

MMJ

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM No. HCV 540/2004

BETWEEN	LITTLE BAY LIMITED	CLAIMANT
AND	CAPITAL AND CREDIT	
	MERCHANT BANK	DEFENDANT

Mr. H Charles Johnson for instructed by H. Charles Johnson and Co. for claimant

Mr. Audel Cunningham and Mr. Courtney Bailey instructed by Dunn Cox for defendant

MAY 5, 2004

SYKES J (AG)

APPLICATION FOR INJUNCTION

The claimant by way of fixed date claim form dated March 15, 2004 is seeking two remedies:

- a. that the mortgagee be prevented from negotiating the sale of the said property of the mortgagor within 14 day of the order;
- b. that the interest charged on the loan by the mortgagee be rectified allowing for certainty and clarity;

The date for the hearing of this matter is September 28, 2004.

The defendant is apparently taking steps to foreclose and sell the property. The claimant now comes to this court seeking to restrain the defendants from exercising their power of sale under a mortgage between the claimant and the defendant.

The defendant responded by filing on May 4, 2004 their application for court orders in which they are seeking to have the claimant's fixed date claim form struck out under rule 26.3(b) and (c) of the Civil Procedure Rules (CPR). The grounds are that the claim is an abuse of the process of the court and that it discloses no reasonable ground for bringing such a claim.

It seemed that although the claimant's application for an injunction was first in time logically the defendant's application should be heard first. If they are right then clearly there would be no basis for an injunction and needless to say no basis for the claim.

The parties were asked to obtain a date during this term for the hearing of the defendant's application. No dates were available for this term. The earliest dates were in the Michaelmas term, the same term during which the fixed date claim form is to be heard.

The defendant's were not prepared to countenance even the suggestion that they wait until September 28, 2004 when the claimant's case was to be heard.

The real issue therefore is what is the best way to deal with this case in light of all the circumstances.

When Lord Diplock was laying down his now famous formulation in **American Cyanamid v Ethicon Ltd** [1975] A.C.356 at pages 407H-409D he was not purporting to be exhaustive. He said expressly at page 409D that:

I would reiterate that, in addition to those to which I have referred, there may be other special factors to be taken into consideration in the particular circumstances of individual case.

In **American Cyanamid** itself Lord Diplock approved of the trial judge taking into account issues such as (i) the sutures of the defendant were not yet marketed; (ii) no factories would be closed; (iii) no persons would be put out of work and (iv) no businesses would have been brought to a stop by the injunction. These were part of the particular circumstances of the case.

His Lordship spoke again in **N. W. L. Ltd v Nelson and Laughton, Same v Woods (The Nawala)** [1980] 1 at page 10:

My Lords, when properly understood, there is in my view nothing in the decision of this House in American Cyanamid Co.v Ethicon Ltd. [1975] A.C. 396 to suggest that in considering whether or not

to grant an interlocutory injunction the Judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply.

What all this means is that the court takes a look at all the circumstances of the particular case when deciding whether or not to grant an injunction.

In this particular case what are the circumstances?

- a. The claimant operates a business that is an ongoing enterprise;
- b. He is indebted to the mortgages;
- c. It is alleged by the defendant that the claimant has not serviced any of the mortgages since April 2002 in one instance and August 2002 in another;
- d. The claimant is alleging that the defendant's behaviour is oppressive and unconscionable;
- e. The defendant alleges that his conduct is not oppressive as would require the intervention of the court;
- f. The claimant's business is an ongoing one in which there are person's employed;
- g. Person's may be put out of work;

The defendant accepted in principle that in appropriate instances the court and intervene but that this case was not one of them. This then is the serious issue to be tried. So the first threshold has been met.

As I indicated the defendant wished to have the claim thrown out but regrettably no time was available before me or indeed any other judge to hear the defendant's submissions. I was assured by both parties that the hearing would be quite lengthy with authorities to be cited.

The defendant's were unable to point to any prejudice they might suffer if the hearing was adjourned to September 28, 2004. The reply of counsel was that the claimant was in arrears and their client wanted to exercise his power of sale.

In this context I do not think that damages would be an adequate compensation if it happened that the claimant succeeded. To deprive a man of his business with the possibility of unemployment is not a trivial thing.

On the other hand if the defendant succeeds they will undoubtedly have the property to sell and the claimant would still be liable for any balance outstanding, if any, after the sale.

In the circumstances of this case the injunction ought to be granted until September 28, 2004. The court so orders. The application by the defendant is adjourned to September 28, 2004. Defendant granted leave to appeal. Costs to be costs in the claim.