[2014] JMCC Comm 9

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2014 CD 00050

BETWEEN	OCEAN CHIMO LIMITED	CLAIMANT
	(In Receivership)	
AND	KENNETH LEWIS	DEFENDANT

Mr. Douglas Leys, Q.C., Mr. G. Anthony Levy, Mr. Roderick Gordon, Ms. Kimone Tennant and Ms. Kereene Smith instructed by G. Anthony Levy & Co. for the Claimant.

Mr. John Givans and Mrs. Janis Williams instructed by Vaccianna Whittingham for the Defendant.

Mr. John Vassell, Q.C., Mr. William Panton, Mrs. Julianne Mais-Cox and Mr. Emile Leiba instructed by DunnCox for the Interveners/Interested Parties, Royal Bank of Canada and RBC Royal Bank (Trinidad and Tobago) Limited.

HEARD: 12TH August 2014

IN CHAMBERS

ORAL JUDGMENT

Edwards J.

[1] In this particular case, the issue is a simple one of debt, a significant debt or to say it another way, a debt of significant proportion which is owed to the creditor (the RBC Royal Bank) and remains unpaid by the debtor (Ocean Chimo Ltd). The said debtor has now come before the Court, a Court of Equity, to seek to have the court

prevent the creditor from exercising its powers to realize its security for a period of time, which in the view of this court, is time for the debtor in fact to go fishing.

[2] The Claim Form filed in this matter presents a Claim for accounting and for damages for breaches of duty of care, fiduciary duties and for an interlocutory injunction to prevent the defendant, who was appointed receiver by the creditor as the debenture holder, from selling the hotel, which is the sole asset of the debtor and which was mortgaged by the debtor as security for the loan.

THE APPLICATION

[3] The Claimant's Ex-Parte Notice of Application for Court Orders is for an Interim Injunction for 28 days and for the provision of records regarding insurance claims made by the receiver as a result of an unfortunate fire at the hotel and for the receiver to produce an account of his fees. The Claimant is also asking for copies of all policies of insurance covering the hotel.

[4] The grounds set out by the Claimant point to the announcement of the pending sale of the hotel (which I already pointed out was the Claimant's sole asset charged under the debenture deed) by auction and the fact that there is a challenge to the appointment of and the subsequent actions of the receiver under the Debenture. The Claimants have also brought collateral proceedings to challenge the lawfulness of the actions of the debenture holders in respect of the asset under the control of the receiver.

[5] They claim that if the collateral proceedings succeed, it will enable them to, amongst other remedies, repossess the hotel as a continuing operation. I make no judgment in that regard. They also claim that if the present claim is decided in their favour, damages would not be an adequate remedy and if the hotel is sold they would lose their primary and unique asset.

[6] In this application they have also asked to be excused from providing any undertaking as to damages but in their later submissions it was suggested that the two directors of the Claimant would give an undertaking as to damages for 28 days, the period of the interim injunction, if granted.

APPLICATION OF THE LEGAL PRINCIPLES

[7] It is agreed that even in an application for an interim injunction, the principles outlined in the **American Cyanamid** case **(American Cyanamid Co. v Ethicon Ltd.** [1975] 1 ALL ER 504) applies. The question the court would have to determine is firstly, whether there is a serious question to be tried; if the answer to that is yes then the court would go on to consider whether damages are an adequate remedy and where does the balance of convenience lie. In this application and in the claim, the matters referred are matters which touch and concern issues arising after the appointment of the receiver. There is no allegation made regarding the validity of the debenture or the validity of the appointment of the receiver who was appointed there under.

[8] Even in the previous collateral claims made and referred to in submissions as background, there is no claim challenging the validity of the security document or the appointment of the receiver. There is nothing to suggest to the Court that the exercise of a power of sale arising under the debenture is not valid or that the creditor is attempting to exercise an invalid power through the receiver. Therefore, the principles applicable to the refusal to restrain the exercise of the power of sale under a security deed apply, unless there is an exception. The cases cited by counsel demonstrate a general principle and what might form a particular exception but this case does not fall within any of the exceptions, as this case involves a question of a pure debt. There is nothing highly exceptional about it contrary to what was claimed by counsel for the Claimant. There is a loan on certain terms and that loan has not been repaid.

[9] There is no contest as regards the principal sum of the loan. However, the Claimant is contesting the interest and the application of the movement of the interest rates, alleging fraudulent manipulation of the rates and conspiracy. The Claimant has

been in default for some time and has made no payments, attempts or arrangements to pay, although they have not disputed the debt owed. Instead, they have filed a plethora of claims and applications on collateral issues. To borrow McDonald-Bishop J's words in **Patvad Holdings Limited et al v Jamaican Redevelopment Foundation Inc. et al** JM 2007 SC 23, they have shown no *"willingness or capability to pay"* the creditor or pay into Court any sums which the Court could consider to be a payment towards the debt.

[10] In the absence of a challenge to the validity of the security documents and the appointment of the receiver, and, as in the present circumstances where the claim is simply one of a pure debt, apart from collateral issues of conspiracy and interest rates manipulation, there would have to be something exceptional present to deprive the creditor of its rights under the security deed or the power of the receiver to sell the asset.

[11] He who comes to equity must come with clean hands. In my view there is no real evidence of the Claimant's bona fides in its attempt to prevent the sale. The evidence is that there was already an earlier attempt by the Claimant to sell majority shares in the property.

[12] The remedy sought in all the claims is for damages and yet the Claimant avers that damages are not an adequate remedy. Even considering the interim period within which restraint is being asked for, there is no evidence or suggestion of what this delay will achieve. Assuming that the insurance records are provided, are we seriously to believe that 28 days, having insurance accounts and records in hand, is enough time to put the debtor in a better position to pay back the debt, fix and manage the hotel or go to another financial institution with hope that something will come of it?

[13] The collateral claims, again using the term used by counsel, relate to separate issues for which the Claimant may or may not get damages but this is entirely different from the rights of the bank to appoint a receiver and to enforce their security to collect the debt owed, a debt which is not in issue or dispute.

DISPOSITION

[14] Taking everything into consideration, in the round I do not see that there are any serious issues to be tried and I also believe in any event, that damages are an adequate remedy. To say that the hotel is a unique piece of real estate is one thing but it is also a deteriorating asset, not a going concern, with no money coming forth from the Claimant. In coming to this conclusion I am in no way to be taken to be departing from the principles espoused by Brooks J (as he then was) on the unique nature of real property, in **Tewani Limited v Kes Development Co. Ltd and Another**, Claim No. 2008 HCV 2729 decided July 9 2008 (unreported). However, in this case if the receiver or the creditor sells the hotel and in doing so is in breach of fiduciary duties in any way relating to the sale, then damages would be an adequate remedy.

[15] In light of my findings, I do not need to go further but even if I were to continue to the third principle in the **American Cyanamid** case, where does the balance of convenience or as sometimes termed, the balance of justice between the parties lie?

[16] The Ocean Chimo case does not fall within any exception to the **Marabella** principles (**SSI (Cayman) Limited v International Marabella Club SA SCCA No. 57/1986**) contemplated in the **Mosquito Cove Case (Mosquito Cove Ltd and others v Mutual Security Bank Ltd and others** [2010] JMCA Civ 32) regardless of whatever criticisms counsel for the Claimant puts forward regarding the application of those principles in the subsequent cases which follow it. Although the categories of exceptions may not be closed, the present case does not present any factors which would justify the court regarding it as an exception to the stated principles. Certainly where there is such a huge sum owed in United States dollars and no payment is being made on principal or interest, (and might I take judicial notice that the Jamaican dollar, relative to its United States counterpart, is in a free-fall and has devalued several times since the loan went into default), there would be great prejudice to the Bank to which the money is owed in not being paid; especially while there is no issue that the money is owed. The debtor has not paid one cent to the creditor but instead continues to file claim after claim

without making any payment, even in good faith, to the banks or into court; and to date has not offered to do so. I find that the balance of convenience lies in any event, in favour of allowing the receiver to do his job.

ORDERS

[17] Taking all that into consideration, the Court therefore orders that:

(1) The Application is denied with costs to be taxed if not agreed.

(2) Leave to Appeal is denied

(3) Application for a temporary injunction pending Appeal is denied.