JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 55/05

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)

BETWEEN	**SHADES LIMITED**	**APPELLANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC.**	**RESPONDENT**

Vincent Chen instructed by Chen, Green & Co., for Appellant

Dave Garcia and Jerome Spencer instructed by Myers, Fletcher & Gordon for Respondent

25th, 26th, 27th January & 20th December 2006

HARRISON, P.

This is an appeal from the order of Miss Justice Gloria Smith on 14th April, 2005 refusing the application for an interlocutory injunction to restrain the respondent from exercising its power of sale in respect of two mortgages nos. 941282 and 941283.

We delivered our oral judgment on 27th January 2006. These are our written reasons.

The facts are that Cameron Engineering (Ltd) (Cameron) was indebted to National Commercial Bank ("NCB") in the sum of $8,740,774.00 and exhibited,

by its conduct, an inability to pay. This loan was unsecured. In order to ensure recovery the parties agreed that the appellant, Shades Ltd, would execute a mortgage over its property in Norbrook, St. Andrew, a dwelling house, as security for the indebtedness of Cameron.

Michael Archer was the managing director of both Cameron and the appellant.

It was agreed between the parties that the appellant would assume the debt of Cameron by the process of novation. All parties agreed.

Novation, in law comes into operation, where parties to a contract between debtor and creditor agree that the debt shall remain in existence but a new debtor is substituted. (See Chitty on Contracts, 28th edition, (1999), paragraph 20-084).

In March 1996, the appellant executed certain documents, namely:

(a) mortgage documents;
(b) guarantees;
(c) loan cheque; and
(d) resolutions

which were returned to NCB to be "held in blank", to facilitate the appellant until it had completed negotiations with the Jamaica National Building Society to secure a loan to defray the indebtedess of Cameron.

In a letter dated 6th March 1996 (R 15) NCB expressed its concern inter alia, about Cameron's inability to service the debt and the latter's breaches of "NCB's and Bank of Jamaica's" regulations, and requested that Cameron address this concern "urgently and positively."

There were two sets of mortgage documents. The amounts of $10m and $3m respectively were owing by June 1996.

In March 1996 the outstanding debt had increased to $11,868,115.00, in April 1996, $12,436,360.00, and in June 1996 to an amount in excess of $13m. The monthly interest added was $500,000.00, approximately.

The mortgage documents were deposited with the Registrar of Titles on 15th August, 1996 and registered in October 1996.

In August 1996, the debt outstanding amounted to a sum in excess of $18m (See NCB cheque to Shades Ltd for $18,177,000.00 dated on 27th August 1996, to enable Shades Ltd to assume the loan obligation of Cameron by novation as agreed.)

The respondent sought to exercise its power of sale as a mortgagee by sale of the said mortgaged property in which Michael Archer and his son resided.

Consequently, the appellant sought the said injunction.

Smith, J., following faithfully the principles in the case of ***American Cyanamid Co. v. Ethicon Ltd*** [1975] 1 All ER, found that there was a serious question to be tried but refused the injunction on the ground that damages would be an adequate remedy to the appellant if he succeeded at the trial. Such refusal resulted in this appeal.

The respondent filed a counter-notice of appeal seeking that the decision of Smith, J., be affirmed on the ground that there is no undertaking from the appellant as to damages.

The grounds of appeal were:

"(i) The Learned trial judge failed to consider the implication of the use to which the Claimant/Appellant has put the dwelling house the subject of the action and whether in the circumstances of the instant case the occupation of the managing director of a holding company as his private dwelling house is not a circumstance to be taken into consideration in deciding whether damages would be an adequate remedy.

(ii) That the Learned trial Judge erred in holding that there was a serious issue to be tried as the evidence before her did not contain any material upon which the Defendant/Respondent can base a defence or which raises any factual matter in answer to the Claimant/Appellant's case.

(iii) That the Learned trial Judge erred in the application of the test on the balance of convenience in that having regard to the evidence before the Court the status quo should have been maintained.

(iv) The Learned trial Judge failed to consider all the matters necessary in determining where the balance of convenience lay.

(v) The Learned trial Judge failed to consider the relative strengths of the parties cases on the evidence before her in determining the balance of convenience and that the Appellant/Claimant had put clear and compelling evidence before the Court that the transaction was a sham and /or irregular and the Defendant/Appellant had failed to produce any evidence to contradict this evidence.

(vi) The Learned trial Judge has come to a conclusion that is contrary to the evidence before her and unreasonable.

(vii) The finding by the Learned trial Judge that the Defendant/Respondent would be able to pay damages is not supported by the evidence."

This Court has consistently embraced the principles outlined by Lord Diplock in the ***American Cyanamid Co. v Ethicon Ltd*** (supra).

In our view, the learned judge cannot be faulted in the exercise of her discretion in refusing the application for the interlocutory injunction, although she may have been somewhat generous in finding that there was a serious question to be tried.

1. The appellant by agreement assumed the liability of the debtor Cameron and executed the mortgage document in respect of the security, the dwelling-house in Norbrook, St. Andrew by way of novation. The signed mortgage documents, guarantees, resolutions and cheque for a sum in excess of $18m is evidence of the appellant's agreement.

From March 1996 to October 1996, that period of time may well have provided ample opportunity and a reasonable time for the appellant to finalize negotiations with the Building Society to obtain financing for the payment of the debt.

The agreed condition between the parties, NCB and the appellant, that the documents would remain in blank until the negotiations with the Building Soicety were complete, were on the facts presented, not unsatisfied. The appellant failed to respond with the urgency required and failed to advise the respondent of any outcome of the negotiations.

We do not agree, as argued by counsel for the appellant that the conditions were not satisfied and therefore the mortgages were null and void. Contrary to his argument that the case was overwhelming, we find that it may not even have risen to the level of a serious issue to be tried. The mortgages were, on the face of it, valid and enforceable, having been properly registered in October 1996. Any restriction by a court on the right of the mortgagee to exercise its power of sale, would necessitate that the mortgagor pay into court the amount claimed ***(SSI (Cayman) Ltd v. International Marabella Club S.A.,*** SCCA 57/86 dated 6th February 1987 (unreported).

(2) Assuming that there was a serious issue to be tried, the learned judge was correct to find that damages would have been an adequate remedy if the injunction was refused and the appellant succeeded at the trial.

The appellant was a mere holding company of the security, the dwelling-house, registered at Volume 1275 Folio 191 of the Register Book of Titles, in the name of the appellant. In the event of the sale of the said dwelling-house the proceeds of sale would be all that the appellant would have been entitled to, if successful, at the trial. The said house would be a mere asset of the company.

The submission of counsel for the appellant that the learned judge was in error in not considering that the managing director and his son resided at the premises, is without merit. We agree with counsel for the respondent, that neither person was a party to the proceedings. In our view, neither person was entitled to any right of residence.

3. The appellant did not demonstrate, on the affidavit evidence, any current ability to give an undertaking in damages, as a condition of the grant of the interlocutory injunction.

The affidavit of Dennis Joslin, the respondent, reveals:

(i) On 27th January 2005 the appellant was indebted to the respondent in the sum of $76,024,591.26 inclusive of interest, which would continue to be added on.

(ii) There was a "poor history" of payment by the appellant.

(iii) As the debt increased, the adequacy of the security, the dwelling house would decrease.

The appellant's response, supporting its undertaking to pay damages, if the injunction was granted and it loses at the trial, was that it owned several properties, then held by Century National Bank as equity, and which it expected to recover if successful in anticipated suits. This is dubious to say the least and not elevated beyond a hope.

The appellant was required to show a current ability to be able to pay in April 2005. This it failed to do. No undertaking in damages having been given, the appellant was in addition, rightly refused an injunction in the exercise of the discretion of the learned judge.

4. Counsel for the appellant also argued that the learned judge should, in the exercise of her discretion apply the principle of the overriding objective as mandated in Rule 1.2 of the Civil Procedure Rules 2002 to the consideration of ***American Cynamid*** (supra). He argued that she should have considered all the circumstances, including the relative strengths of each party's case, with a view

to achieving justice in the situation. We do not agree. No such general approach is permissible.

We agree with Mr. Garcia for the respondent, that on the wording of the said rule, the overriding objective is referable to the exercise of a discretion or the interpretation of the rules.

The grant of an injunction is governed by:

(i) Section of 49(h) of the Judicature (Supreme Court) Act; and

(ii) the equitable jurisdiction of the Court.

The discretion of the learned judge was properly exercised. Such exercise was not in conflict with rule 1.2, which reads, inter alia:

> "1.2 The court must seek to give effect to the overriding objective when it –
>
> (a) exercises any discretion given to it by the Rules; or
>
> (b) interprets any rule."

For the above reasons the appeal is dismissed with costs of the appeal to the respondent to be agreed or taxed.

COOKE, J.A.

I agree.

McCALLA, J.A.

I agree.

HARRISON, P.

ORDER

The appeal is dismissed with costs of the appeal to the respondent to be agreed or taxed.