IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

IN CHAMBERS

CLAIM NO. 2010 HCV 02413

BETWEEN	OCEAN CHIMO LIMITED	CLAIMANT
AND	RBTT BANK JAMAICA LIMITED	1ST DEFENDANT
AND	RBTT BANK LIMITED	2ND DEFENDANT

Mr Roderick Gordon and Ms Natalie Douglas-Charles instructed by Gordon McGrath for the Claimant.

Mr John Vassell Q.C., Mr Emile Leiba and Ms Gillian Pottinger instructed by Topaz Johnson of DunnCox for the Defendants.

Civil Procedure – Consent to file defence out of time – Time allowed expiring within the long vacation – Whether computation of time suspended by long vacation – CPR rr. 2.4, 3.5 and 10.3

Civil Procedure – Injunction – Bank seeking to appoint receiver pursuant to debenture/mortgage – Debtor seeking to sell company's asset – Whether bank should be restrained by injunction

12, 19 and 23 August 2011

BROOKS J

[1] Ocean Chimo Limited, between 2005 and 2008, borrowed over U$30.0M from RBTT Bank Jamaica Limited and RBTT Bank Limited. As part of the security for the loan it granted mortgages over a hotel property which it owns as well as a debenture over its fixed assets. Unfortunately it has not been able to service the debts and has fallen into arrears. The banks have threatened to appoint a receiver in accordance with the terms of the debenture.

[2] Ocean Chimo has accused the banks of unfair tactics and asserts that the appointment of a receiver would prejudice a sale agreement which it has for the sale of the property. It has applied for an injunction to prevent an appointment.

[3] The banks have denied Ocean Chimo's allegations and assert that they are entitled to utilise the rights provided to them by the debenture; that being the agreement between the parties and the security for the loans.

[4] The issues for the court to decide is whether Ocean Chimo has shown that it has a serious issue to be tried and if so whether the principles concerning the exercise of powers contained in security documents should be applied to deny any application to prohibit the banks, unless the monies which they claim are due are paid into court or otherwise paid to protect the banks' security.

A procedural point concerning filing statements of case during the long vacation

[5] Before turning to those issues, however, it is necessary to address a procedural point, raised by the banks. They have applied for an order declaring that their joint defence was properly filed or in the alternative, that the time be extended for them to file the defence out of time and that the defence filed stands as properly filed. Ocean Chimo has resisted the application and filed an application of its own, for judgment in default of appearance.

[6] On 12 August, after hearing submissions from counsel for each side, I ordered that the defence should stand as if properly filed. At that time I promised to put my reasons in writing. This is a fulfilment of that promise.

[7] The issue arose in this way. On 8 July 2010, Ocean Chimo's then attorneys-at-law consented to the banks filing their statement of defence "within

fifty-six days from the date hereof". By normal calculation, the 56 days would have expired on 26 August 2010. That date would have, however, fallen during the court's long vacation; August 1 to September 15. Under the practice which previously governed civil litigation, the use of the term "from", means that the given date is excluded (see Order 3 rule 2 (2) of the Supreme Court Practice 1997 (the White Book) and section 686 of the Judicature (Civil Procedure Code) Law.

[8] The Civil Procedure Rules (the CPR), specifically provides for filing and serving statements of case during the long vacation. Rule 3.5 (1) stipulates that the time prescribed "by these Rules for filing and serving any statement of case does not run". Counsel for the banks, Mr Leiba, submitted that, properly interpreted, the rule would cause the interruption of the calculation of the 56 days and that the count would only recommence on 16 September when the long vacation ended.

[9] On that interpretation, learned counsel submitted, the 56 days would not have expired by 19 October 2010, when the statement of defence was in fact filed. On that calculation, the expiry date would have been 21 October 2010. Mr Leiba pointed to the affidavit evidence of Ms Gillian Pottinger, the attorney-at-law having partial conduct of the filing of the defence. In that affidavit Ms Pottinger deposed that she had proceeded on that understanding of the rule in filing and serving the defence.

[10] Mr Gordon, on behalf of Ocean Chimo, submitted that Mr Leiba's interpretation of rule 3.5 is incorrect. Learned counsel submitted that the rule speaks to the suspension of time prescribed by the CPR. He submitted that the

56 days was not prescribed by the CPR, but by Ocean Chimo's attorneys-at-law and that the 56 days should be calculated without any interruption.

[11] Mr Gordon submitted that it is rule 10.3 (5) of the CPR which is the applicable rule for these purposes. That rule stipulates that the parties may agree to extend the time ordinarily allowed for filing a defence. Rule 10.3 (7) imposes a maximum extension period of 56 days. Learned counsel argued that rule 2.4 which, among other things, stipulates that the "period for filing a defence" as used in the rules "has the meaning given by rule 10.3", applies to require that it is rule 10.3 that holds sway, for these purposes, rather than rule 3.5.

[12] Learned counsel relied, in support of his submissions, on the cases of *O'Connor v Piccott and another* SCCA 33 of 2002 (delivered 7 April 2006), *Lynch v Gonsalves* Civil Appeal No 18 of 2005, St Vincent and Grenadines Court of Appeal (delivered 18 September 2006), and *Williams and another v MZ Holdings* 2007 HCV 4070 (delivered 25 July 2008).

[13] I have considered the issue with much anxiety because it may have far reaching implications for other litigants. In my view, it is necessary to examine the history of the rationale for the hiatus provided by the long vacation.

[14] Section 38 of Part VII of the Supreme Court General Rules and Orders, stipulated that "No pleadings shall be amended or delivered during the Vacation …unless directed by the Court or Judge". That, apparently absolute, bar, was explained by Chambers J, in his informative work, *Essays on the Jamaican Legal System.* He pointed out, at page 129, that business during the long vacation was restricted to urgent matters. This view was also expressed by Michael Davies J in *Esso Petroleum Co Ltd v Dawn Property Co Ltd* [1973] 3 All ER 181.

[15] Chambers J also set out the reasons for the long vacation. He quoted from the judgment of Megarry J in *Re Showerings, Vine Products and Whiteways Ltd* [1968] 3 All ER 276. In that quote, Megarry J emphasised the importance of the long vacation for the efficient performance of the court's registry. Although referring to a different court in a different era, Megarry J's words are still pertinent for this court. He said at page 277:

> "The establishment of the registry is modest, and the standards of competence and reliability required pose problems in the maintenance of that establishment at full strength. The volume of work has increased greatly in recent years, and the long vacation represents the only period when it is possible for a substantial part of the staff to be simultaneously absent from duty, enjoying the leave to which they are entitled. Accordingly, while these conditions continue to obtain it seems to me that the court ought to be slow indeed to assent to a proposal which might impose any substantial additional burden on the skeleton staff which the registry maintains during the long vacation."

[16] The sentiments expressed by Megarry J, were endorsed by Chambers J. He applied them to Jamaica when he said at page 132:

> "The Long Vacation, it would seem should remain, as it would appear to facilitate the preparation by the staff in the Registry of matters to be dealt with in Court. Attorneys-at-Law also plan for holidays for themselves and staff, to be taken at this time."

I respectfully agree with that opinion. I, however, digress briefly to show that Chambers J also pointed out at page 130 that the long vacation is a vacation of the court and not of the judges. He explained, at page 132, the use judges should make of the court's vacation:

> "The Judges using such period to either write reserved judgments, check on Notes of Evidence in Cases of Civil Appeal and last but not least the bringing up-to-date their reading on the latest decisions of the Courts of Appeal in Jamaica, the West Indies, England and the Commonwealth."

[17] The reason behind the prohibition of filing and serving pleadings is, therefore, to provide a respite from the normal business of the court. Although the CPR has replaced the Supreme Court General Rules and Orders, I find that the reason, behind the establishment of the long vacation, remains. In my view, the parties ought not, by agreement or as an enforcement of a condition, to be allowed to breach the spirit of the rule which allows the court, its officers and its staff, time off from the rigours of the court's regular business. I find, therefore, that rule 3.5 applies to suspend the time allowed, by one party to another, for filing statements of case, subject, of course, to the order of the court or a judge. It is to be noted that paragraph (2) of rule 3.5 states that paragraph (1) "does not override any order of the court which specifies a date for service of a statement of case".

[18] In directly answering Mr Gordon's submission concerning rule 10.3 being applicable, rather than rule 3.5, I find, that the time allowed by consent, to file statements of case, as is prescribed in rule 10.3, is time "prescribed by" the rules and, therefore, rule 3.5 applies to such time. I also disagree with Mr Gordon that a consent to file a document out of time, granted by one party to another, amounts to an order of the court for the purposes of rule 3.5 (2).

[19] I did not find the cases cited by Mr Gordon, helpful on the point. For example, in *O'Connor v Piccott*, mentioned above, the Court of Appeal ruled that the judge at first instance had correctly refused to set aside a judgment entered in default of a defence. It found that the defendant in that case had "deliberately ignored the procedural requirements, having taken a decision not to defend the matter" (see paragraph 33). I accept that the reason given in the instant case, for

filing the defence when it was filed (that is a certain interpretation of rule 3.5), makes the consideration wholly different from that which obtained in *O'Connor v Piccott*.

[20] Even if I am wrong in my interpretation of rule 3.5, and consequently the defence should be declared as having been filed out of time, I find that this is a proper case in which to exercise the discretion given to the court to cure the defective filing. Rule 10.3 (9) of the CPR allows a defendant, in breach, to apply to the court for an order extending the time for filing a defence. In *Green v Attorney General and others* 2005 HCV 2156 (delivered 27 November 2006) Straw J, in considering such an application, first considered the reason for the default and thereafter considered whether the defence had a real prospect of success (see pages 10 - 11). I respectfully agree with that approach.

[21] In applying that approach to the instant case, I find that the reason given for the delay in filing the defence does not reveal a disregard for the rules set out in the CPR. Secondly the defence, in my view, has a real prospect of success. In addition to the above, I agree with Mr Leiba that at the present stage of the claim, with no judgment yet having been entered and with an interim injunction still being pursued, the default would not have caused any irreparable prejudice to Ocean Chimo.

[22] It is for those reasons that I had ruled that the defence should stand as properly filed.

The application for the injunction

The relevant law

[23] In turning to the substantive application, it must be observed that in recent years there have been, in this jurisdiction, a number of cases in which the question of the injunctive restraint of a lender, seeking to exercise powers granted by the security documents, has been assessed. In *Mosquito Cove Ltd and others v Mutual Security Bank Ltd and others* [2010] JMCA Civ 32 (delivered 30 July 2010), Morrison JA carried out a comprehensive review of the relevant law and clarified some of the issues arising from the various decisions.

[24] Although the learned judge of appeal identified a number of exceptions to the general principle, he opined that the general principle was still "alive and well". That general principle is that "a mortgagee will not be restrained in the exercise of his powers of sale because the amount due is in dispute…however, [he]…may be restricted in the exercise of his powers of sale if the mortgagor pays into court the amount claimed by the mortgagee as due and owing".

[25] The first judgment in this jurisdiction, which is identified as recognizing that principle, is the well known case of *SSI (Cayman) Limited and others v International Marbella Club S.A.* SCCA 57 of 1986 (delivered 6 February 1987) (*Marbella*). That case and all the subsequent cases on the issue, on my reading, require that if there is a serious question to be tried then the manner of dealing with the balance of convenience is that the issue has its peculiar set of rules. By those rules, the injunction will only be granted, in the normal case, if the mortgagee's interest has been secured. This is done by requiring the mortgagor to pay, into court, the sum which the mortgagee swears to be owed.

[26] The enquiry to determine whether there is a serious question to be tried, is however, to be conducted in accordance with the guidelines provided by Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* [1975] 1 All E.R. 504. It is first necessary, however, to provide some further information about the instant claim.

Background details for the instant claim

[27] It is important to note that Ocean Chimo's claim commenced, in May 2010, on the basis that it alleged that the banks were conspiring with Hilton International Manage LLC (Hilton) to prevent Ocean Chimo from transferring the management franchise for Ocean Chimo's hotel property, from Hilton to Wyndham Hotels. The prevention, Ocean Chimo, asserts caused it significant loss.

[28] It sought, and obtained, at that time, an interim injunction which prevented the banks from appointing a receiver over Ocean Chimo's assets. That injunction lasted until sometime around 17 August 2010. It expired by effluxion of time because Ocean Chimo failed to comply with two of several conditions for its extension. Those conditions were firstly, the payment of US$612,966.00 by 17 August 2010 and secondly, to remain current with all principal and interest payments due from time to time. It is not disputed that Ocean Chimo has made no payment of principal or interest since about July 2010.

[29] It transpired during the course of the year since the claim was filed, that the hotel became a franchise of Wyndham Hotels. The details of what occurred during the year and thereafter, was presented by Ocean Chimo through the affidavit evidence of Mr Delroy Howell, one of its directors. The banks' evidence was mainly presented through the affidavits of Ms Petti-Gay Williams, a

Relationship Manager, Corporate Banking, employed to RBTT Bank Jamaica Ltd.

[30] The significant event which occurred in recent times is that on 25 July 2011, representatives of Ocean Chimo met with representatives of the banks. They arrived at a "tentative accord" to be approved by their respective principals. In that accord, a timetable was established whereby a series of extensions, of the date for final re-payment of the loans, was established. The extensions were to have been predicated on the achievement of various stages of an agreement to sell the hotel property as a going concern.

[31] Unfortunately, there was no confirmation of the accord. A part of the reason for the breakdown of the consensus was a condition which the banks sought to impose as a part of the concession of additional time. That concession was that Ocean Chimo should release the banks from all court actions "then existing or arising in the future other than failure to comply with the terms of [the] accord" (see e-mail dated 26 July 2011 exhibited to the second affidavit of Mr Howell, filed on 29 July 2011). The release would have prejudiced this claim. Ocean Chimo was not prepared to agree to that condition.

[32] As a consequence of the disagreement, the banks again threatened to appoint a receiver. Ocean Chimo, once again, approached this court and sought and obtained an injunction without notice being given to the banks. The injunction prevented the banks from appointing a receiver for a period of seven days. It is the extension of that injunction which is the subject of this judgment.

[33] The basis on which Ocean Chimo has requested the injunction to be extended is that it is best for it to complete the sale of the hotel rather than for the

banks to sell it by virtue of a forced sale. Essentially Ocean Chimo has asked the court to afford it time to allow it to complete the sale.

[34] Ocean Chimo has also made new allegations against the banks. It says that the banks have, by their conduct and correspondence, caused Ocean Chimo to believe, and act on the belief, that the banks were willing to let the sale go through to conclusion. On that basis, Ocean Chimo submits that the banks are estopped from appointing a receiver which appointment would have the effect of scuttling the sale agreement.

[35] In addition to that charge, Ocean Chimo accuses the banks of repeatedly jeopardising Ocean Chimo's attempts to complete the sale. It says that the banks have done so "by negotiating with other parties to sell the property as well as frustrating the negotiation process by demanding that they be present during negotiations between the prospective purchaser and [Ocean Chimo]" (see paragraph 8 of the 'without notice' application for court orders filed 29 July 2011.

[36] It is important, for the purposes of this analysis, to note that, Mr Gordon, appearing for Ocean Chimo, has quite candidly informed the court that the validity of the security documents is not in issue, nor are the rights of the banks to exercise the powers given to them under the debenture. As mentioned before, there is also no dispute that Ocean Chimo is in arrears with its repayment of the loans. Mr Gordon also emphasised that Ocean Chimo is not seeking to keep the hotel property. He submitted that it was Ocean Chimo's position that "it was equitable and just for the court to allow no more interference than that [which is] needed to allow [Ocean Chimo] to complete the sale [of the hotel property].

Is there a serious issue to be tried?

[37] In applying the relevant principles of law to the instant case, I shall first consider whether there is a serious issue to be tried. In this context, Lord Diplock identified as part of the test for determining whether there is a serious question to be tried, whether the claimant is likely to secure a permanent injunction at the end of a trial. He said at page 510 e:

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

[38] It is accepted that an interim injunction may be granted even where there would be no need for a permanent injunction at the end of the trial in which the claimant succeeds. It seems to me, however, that this is not one of those cases. Whereas I make no comment on the likelihood of success of Ocean Chimo's claim, I am convinced that it could not secure a permanent injunction at a trial of the action. The questions of liability, for conspiracy and attempting to sell the property themselves, are separate and apart from the rights which Ocean Chimo has given the banks to appoint a receiver and otherwise enforce its security to collect the debt due to them.

[39] My view is based on the position afforded to the banks by the security documents. By clause 4 of the debenture dated 16 September 2005 Ocean Chimo charged "to each of the banks, as a continuing security for the payment and discharge of the Secured Indebtedness", Ocean Chimo's fixed and floating assets. Clause 19 of the debenture stipulated that repayment of the loan

became immediately enforceable where any of a number of events occurred. First among these was a default in making any payment on the due date in respect of the secured indebtedness. By clause 22 the banks were empowered at any time after the debenture had become enforceable, to appoint a receiver of all the charged property. The debenture dated 28 April 2008 was in very similar, if not identical, terms.

[40] Bearing in mind Mr Gordon's concessions, I find that the banks have the right to appoint a receiver if they wish and the claims that the banks have conspired against Ocean Chimo, raise no basis on which a permanent injunction would be granted to prevent them from making that appointment.

[41] By way of completeness it is to be pointed out that the fact that Ocean Chimo may secure an award for damages if it is successful at a trial, does not entitle it to prevent the banks from exercising, now, the powers which they have under the debenture (see *Inglis and another v Commonwealth Trading Bank of Australia* [1972] 126 CLR 161).

Promissary estoppel

[42] There is another point raised by Mr Gordon which, if valid, would be a basis for imposing an injunction against the banks. It is that if Ocean Chimo were able to establish that the banks were estopped from reneging on an agreement which they had reached with it, and which it had relied upon to its detriment, then that would be a basis for finding that a permanent injunction was likely to be granted at the end of a trial. This option is however not available to Ocean Chimo as it has not produced any evidence of an agreement. The "tentative accord", mentioned above, was never ratified. No other agreement

was made so as to bind the banks. This aspect of Ocean Chimo's case cannot secure for it a permanent injunction.

[43] In the circumstances, I find that there is no serious issue to be tried, insofar as an injunction is concerned. To say "I need more time", as Ocean Chimo has, in effect, said, is not an acceptable answer to the lenders' rights given to them under the debenture. There should, therefore, be no extension or renewal of the interim injunction granted on 29 July 2011.

Are damages an adequate remedy?

[44] In the event that I am wrong on the issue, of whether there is a serious issue to be tried, I must next examine the question of damages being an adequate remedy, as is outlined in Lord Diplock's formulation.

[45] It is said that because real property has its own unique characteristics, damages is not usually an adequate remedy for a party faced with losing that property. In the instant case, however, it is clear that Ocean Chimo's interest at this stage, in the hotel property is, not to keep it, but to secure the best price at a sale. It has categorically said on many occasions, in its counsel's submissions, that it does not seek to keep the hotel property. In the circumstances, damages would be an adequate remedy for Ocean Chimo. It should be noted in this context, that there has been no allegation that the banks would not be able to pay any loss incurred as a result of any improper exercise of the powers granted to them under the debentures.

The remaining aspects of the balance of convenience

[46] Although a finding that damages would be an adequate remedy would also put an end to Ocean Chimo's application, I also consider the rest of the

considerations of the balance of convenience. It is at this point that the main principle laid down by *Marbella,* mentioned above, is applicable. The principle is that a lender is entitled to have the benefit of its security and should only have that right compromised if the borrower pays into court the sum that the lender claims is due to it, provided that that sum is not patently excessive.

[47] That the principle is not restricted to mortgage securities, in the strict sense, is made clear in *Shamji and others v Johnson Matthey Bankers Ltd and others* [1991] BCLC 36. That was a case in which the claimants sought to restrain its bankers from appointing a receiver despite there being a default in the repayment of the loan. It was held that the bankers were "contractually entitled to exercise [their] right to appoint receivers".

[48] Nothing that Ocean Chimo has raised in these proceedings would bring it within any of the exceptions to that principle, identified by Morrison JA in *Mosquito Cove*. Nor do any similar or other types of exceptions arise. The concessions by Mr Gordon make that clear.

[49] In this context it must be considered that Ocean Chimo has made no payments against either the principal or the interest accrued for a period in excess of a year. It is the banks who are being prejudiced by the delay in being able to exercise their powers under the debenture. Even on Ocean Chimo's calculation, the debt stands in excess of US$30.0M.

Conclusion

[50] Ocean Chimo having conceded that it does not contest the validity of the security documents by which the banks seek to act, does not contest the power given to the banks to appoint a receiver as they have threatened to do and does

not contest that it is in arrears, there is no basis for stating that it has a serious question to be tried in respect of preventing the banks from seeking to enforce their security. This is an issue separate and apart from the likelihood of success of its claim on the issue of conspiracy and other related issues.

[51] In the absence of a serious issue to be tried, understood in that way, there is no basis for the grant of an interim injunction.

[52] Even if there were a serious question to be tried, the application of the other tests laid down in *American Cyanamid*, mentioned above, would not avail Ocean Chimo in securing an interim injunction.

The orders, therefore, are as follows:

1. The application for injunctive relief filed on 29 July 2011 is refused;
2. The application for a stay or further extension of the injunction granted on 29 July 2011 is refused;
3. Leave to appeal granted;
4. Costs to the Defendants to be taxed if not agreed.