

Judgment Bosh

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R.021/1994

BETWEEN	RIO BLANCO DEVELOPMENT COMPANY LIMITED (In Receivership)	PLAINTIFF
A N D	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	1ST DEFENDANT
A N D	KARL AIRD	2ND DEFENDANT

Mr. Crafton Miller and Ms. Nancy Anderson
instructed by Crafton Miller & Co. for
Plaintiff

Mr. Charles Piper instructed by Piper & Samuda
for Defendants.

Heard: 12th day of May, 1996
Delivered: the 16th day of September, 1996.

Theobalds J.

By summons dated 23.3.95 the Plaintiff herein sought an Interlocutory Injunction "restricting the Defendants or either of them from disposing of, selling, transferring or in any other way dealing with or encumbering those parcels of land in White River in the Parish of Saint Mary comprised in Certificate of Title at Volume 1222 Folios 849 and 850 and any other assets real and personal of the Plaintiff Company until the trial of this action."

This summons is a follow up to a writ of summons and endorsement dated 3rd February, 1994. Again, for purposes of clarity it is desirable that the Endorsement to the Writ be set out in full.

" The Plaintiff's claim is (i) against the first-named Defendant NATIONAL COMMERCIAL BANK JAMAICA LIMITED, as mortgagee, for damages for breach of its duty to the Plaintiff as mortgagor under the terms of instrument of Mortgage under the Registration of Titles Act dated the 11th day of May, 1992 securing the original amount of \$31,000,000.00; and (ii) against the second-named Defendant KARL AIRD in his capacity as Receiver/Manager of the Plaintiff, for an account of all sales receipts and transactions undertaken by him as such; and for all necessary and consequential reliefs."

Pursuant to the order of the Master made on the 27th day of June, 1994 an Amended Statement of Claim was filed on the 30th June, 1994. These dates may be of some significance as will appear later on in this judgment but the heads of claim remain substantially the same. These are as below:

The Plaintiff claims against the 1st named Defendant:

- i) Damages
- ii) Interest on the basis of a commercial rate of interest
- iii) Costs

and the Plaintiff claims against the 2nd named Defendant:

- i) An account of all sales, receipts, transactions undertaken by him as Receiver/ Manager of the Plaintiff Company.
- ii) payment of all money found to be due to the Plaintiff with interest thereon on the basis of a commercial rate of interest
- iii) damages for breach of duty.

In support of its summons for interlocutory injunction the Plaintiff relied on the affidavit of Arthur C. Paul Marsh a director of the Plaintiff Company. This affidavit is sworn to on the 3rd day of March, 1995 and was filed on the 23rd of the same month. From this affidavit and indeed from the pleadings filed in the main action certain salient facts emerge as being not in issue between the parties. From as far back as the 9th September, 1989 the Plaintiff Company had given a Debenture to the 1st Defendant over its fixed and floating assets including several parcels of land part of White River in the parish of St. Mary. These included a large number of strata lots as identified in the affidavit along with twenty seven and three quarters acres of land part of the same White River and comprised in Certificate of Title registered at Vol. 1229, Folio 161 of the Register Book of Titles. This debenture was given in order to secure substantial sums of money loaned by the 1st Defendant to the Plaintiff. A hotel had been constructed on the Plaintiff's land and these loans were mainly to cover construction costs.

In addition in accordance with a loan agreement made between the Plaintiff Company and the 1st Defendant Company by an Instrument of Mortgage dated the 11th day of May, 1992 the Plaintiff mortgaged its interest in several parcels of land in White River to the 1st Defendant. Again the sums involved were substantial; indeed, tho' oddly enough not admitted, the 1st Defendant was referred to euphemistically as the largest commercial bank in Jamaica. It is quite unnecessary for the purpose of this judgment to state precise figures as to the amount of the total indebtedness of the Plaintiff Company to the Defendant bank. The Plaintiff Company having failed to pay off the loan aforesaid from as far back as the 15th October, 1992 the 1st named Defendant appointed the 2nd Defendant to be Receiver and Manager with immediate effect of the Plaintiff's property charged by the above-mentioned Debenture. This was after and in consequence of the Plaintiff Company's continued default in repayments of its said loans and was in pursuance of the rights conferred upon the Defendants bank by the said Debenture. There follow a series of startling disclosures most of which can only be construed as unfavourable to the Plaintiff Company and a director thereof Dr. A.C.P. Marsh on whose affidavit the Plaintiff Company relies in support of its summons for interlocutory injunction herein. In his affidavit Dr. Marsh by production of certain exhibits depones that he is the principal shareholder in the Rio Blanco Development Company and that he had guaranteed along with his two sisters liabilities of that Company under and by virtue of an instrument of Guarantee. All this is set out in a letter from the Bank's Attorney dated 4th October, 1994 in which formal demand is made upon Dr. Marsh for liquidation of the sums guaranteed by him within thirty (30) days of the said letter. While there is no denial of liability in response to this letter no evidence is produced of any offer or proposal for a settlement by the Guarantor. It is against this factual background that the Plaintiff seeks an interlocutory injunction against the Defendant bank and its duly appointed Manager and Receiver of the Plaintiff property from disposing of, selling, transferring in any other way dealing with the assets real and personal of the Plaintiff Company.

An injunction is an Order of the Court directing a party to the proceedings to do or refrain from doing a specified act. It is granted in cases in which monetary consideration affords an inadequate remedy to an injured party. It is a remedy in equity which the Court always has a discretion as to whether the circumstances of the particular case warrant or justify the grant or refusal of the relief sought. The principles of equity apply always. The leading authority as to the principles applicable is to be found in the case of *American Cyanamid Co. v Ethicon Ltd.* (1975) A.G. 396. The view that appears to be most in accordance with the practise of Courts of equity and with equitable principles is that an interlocutory injunction is never granted if the risk of irreparable damage is insignificant. There should be at least a "real question between the parties" or a substantial question to be determined of the final hearing.

Here again the factual situation needs to be examined. The Plaintiff Company is in receivership under powers unquestionably given to the Defendant bank by a Debenture above referred to. The Bank has appointed a Manager and Receiver to handle the affairs of the Company. That Receiver, the 2nd Defendant and an employee of the 1st Defendant is nevertheless the agent of the Plaintiff Company. An undertaking to reimburse the Defendant bank for any damage which the bank may suffer in the event that the interlocutory injunction is granted is a usual condition which the Court impose in granting the application. So here we have the ludicrous situation in which a Company which cannot pay its debts is seeking to undertake further and yet unknown liabilities. A clear distinction must at all times be drawn and maintained between the Plaintiff (an involvent company), and its principal shareholder Dr. Arthur C. Marsh. This gentleman is also a Director of the Plaintiff Company and the deponent to the sole affidavit filed in support of the Plaintiff's application for an interlocutory injunction. Another one of the guiding principles which a Court should bear in mind is whether or not the Plaintiff would be adequately compensated by an award of damages were he to succeed at the Trial and whether or not the Defendant Bank would be able to pay them.

If this is so then no injunction should be granted however strong the case for the Plaintiff may be. One of the guiding principles since the American Cyanamid case established a series of issues which ought to be considered in deciding whether or not the Court should grant an interlocutory injunction is the question of damages. If the Defendants were to succeed at the Trial would the already involvent Plaintiff be in any position to pay the costs of the suit. There is no evidence put before this Court that either the means are immediately to hand or that there are any reliable assets to cover these costs. One has to bear in mind that the live issue between the parties is whether or not the Plaintiff's property was sold at an under-value. It would not be this Court's function to embark upon anything resembling a trial of the action based upon conflicting affidavits.

There is nothing to suggest that the 1st Defendant, described by the Plaintiff as the largest commercial bank in Jamaica would be unable, if unsuccessful in the action to pay the damages awarded against the Defendants. It is clear from his affidavit and the affidavit of Mr. Chester Giddarie filed in reply that it was long after the appointment of the 2nd Defendant as Manager and Receiver that a valuation of the property was first done at the instigation of the Plaintiff. And this is so after many years to settle its indebtedness to the 1st Defendant.

Another factor for consideration by the Court is the question of delay on the Plaintiff's part in applying for the interlocutory injunction he now seeks. The Plaintiff filed his writ on the 10th day of May, 1995. The application for interlocutory injunction was filed on the 23rd day of March, 1995. It has been said that an applicant for an interlocutory injunction must be especially prompt in approaching the Court and that otherwise he is necessarily refused relief. Where an interlocutory injunction is concerned delay of a relatively short time is generally held to be unreasonable, (See *Societie Francaise v Electronic Concepts Ltd.* (1976) 1 W.L.R. 50.) There has been no explanation as to why this Plaintiff did not seek equitable relief earlier. Indeed a Certificate of Readiness has been filed and the parties may now proceed to a trial of the substantial issue between them.

For these reasons I would refuse the application for an interlocutory injunction and award costs to the 1st Defendant to be taxed if not agreed.

Before parting with this matter I wish to express sincere regret in handing down this decision but the file was mislaid for some time.