ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.2 OF 2007

BETWEEN:

[1] BEACH PROPERTIES BARBUDA LIMITED
[2] CCI GROUP INC.
[3] ALL AMERICAN PLAZAS INC

Appellants

and

LAURUS MASTER FUND LTD

First Respondent

LAURUS CAPITAL MANAGEMENT LLC

Second Respondent

Before:

The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mr. Hugh Rawlins — Justice of Appeal
The Hon. Ms. Ola Mae Edwards — Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan, SC with Mr. John Fuller for the Appellants
Mr. Dane Hamilton, QC with Miss Sherriann Bradshaw for the Respondents

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2007: July 18;
September 17.

JUDGMENT

[1] BARROW, J.A.: On an application that the three appellants made to the High Court without notice to the respondents, Thomas J granted an injunction restraining the respondents from enforcing the remedies given to them in loan security documents. On the return date the respondents persuaded Blenman J to discharge the injunction on the grounds that the case the appellants asserted in their statement of case disclosed no cause of action; that the injunction was obtained as a result of the non-disclosure of material facts; and, that the appellants should not be granted an injunction because damages would be an adequate

remedy to compensate them for the loss, if any, they suffered. It is against the decision to discharge the injunction that the appellants appeal.

The claim that the appellants filed

[2] Only the broad outline of the case brought by the appellants, who were the claimants in the court below, is necessary for the purposes of this appeal. The Amended Statement of Claim states that Beach Properties Barbuda Limited (hereafter Beach) was at all material times a wholly owned subsidiary of CCI Group Inc. (hereafter CCI). Laurus Capital Management LLC (hereafter Laurus Capital) acted as manager of Laurus Master Fund (hereafter Laurus Master), which was in the business of lending and investing.

[3] On or about 29th July 2004 Laurus Master entered into an agreement with CCI and Beach pursuant to which Laurus Master provided CCI with a credit facility of US$10,500,000.00. As part of the consideration for the credit facility Beach granted Laurus Master a lien on its leasehold interest in the property known as The Beach House- Barbuda (the Beach House). CCI drew down a total of $5,049,500.00 from the credit facility.

[4] On or about 30th December 2005 the credit facility was restructured. At that time CCI owed the amount drawn down as principal plus $354,210.00 as interest and $90,599.00 as fees. These last two amounts were past due. This constituted an event of default under the original agreement. I will hereafter refer to the agreements of 29th July 2004 and 30th December 2005 as "the earlier agreements".

[5] Pursuant to the restructuring Laurus Master agreed to (a) forbear asserting a default under the original agreement, (b) allow Beach to assume the liability for the debt owed by CCI, (c) lend a further sum of $550,000.00 to Beach and, (d) defer payments on all indebtedness until 1st December 2006. Further, the original

promissory note made by CCI was cancelled and replaced by a new note from Beach to Laurus Master. The Amended Statement of Claim states that to secure payment of this new note Beach granted a first lien on the Beach House and CCI and another of its subsidiaries, Caribbean Clubs International, Inc. (CCI Inc), guaranteed payment of the note.

[6] Thereafter, in February 2006, the appellants pleaded, the appellants' representative, CCI's Chief Executive Officer Fred Jackson, (Jackson) met with the respondents' representative, Eugene Grin (Grin) a principal and co-founder of Laurus Capital, and the latter informed that if a certain official, Mark Casolo, were replaced by a new management team the respondents would provide all the financing CCI needed for the operation and expansion of the Beach House facilities.

[7] On or about 9th March 2006, the appellants pleaded, a meeting was held at the respondents' offices in New York to discuss the possible investment by All American Plazas Inc. (AAP), which had recently been introduced by a third party to the idea of investing in the Beach House, with a view to AAP or one of its affiliates gaining a controlling interest in CCI, and by extension, in Beach. Senior representatives of the respondents and AAP were present at that meeting.

[8] At that meeting, the appellants pleaded, Grin stated on behalf of the respondents that if AAP made certain financial investments and removed Casolo from management of Beach and CCI, the respondents would commit to funding repairs and renovations as well as expansions of the Beach House. One of the fundamental premises of the meeting, agreed to by all the parties, according to the appellants, was that if AAP was to make the investment it required financial support from Laurus Master for certain critical activities.

[9] In subsequent discussions, that the meeting had agreed would be held, CCI and AAP agreed in principle on a share exchange whereby shares of AAP's affiliate,

Able Energy Inc. (Able), would be exchanged for shares of CCI resulting in either Able or AAP acquiring seventy percent of CCI's shares (the Share Exchange Agreement).

[10] Another meeting was held on 27 March 2006 between the same parties to the earlier meeting, which Jackson also attended, convened for AAP to receive assurances from the respondents that Laurus Master would commit to providing financing to Beach and CCI to fund renovations, expansion and some debt liquidation for the Beach House. The appellants pleaded that Grin, speaking for the respondents, gave AAP the assurances it sought that the respondents would provide the financing and funds would be available to Beach and CCI as and when they were needed. I will hereafter refer to the meetings on 9th and 27th March as the March Meetings, and the agreement allegedly concluded at these meetings as the March Agreement.

[11] Based on these representations and commitments, the appellants pleaded, on 7 June 2006 AAP entered into the Share Exchange Agreement with CCI which resulted in AAP having control of CCI. AAP was required to exchange shares of Able that it owned, which had a value of approximately US$3,200,000.00. Also on the basis of the representations and warranties, the appellants pleaded, AAP paid US$53,376.00 directly to Laurus Master on behalf of CCI and lent an additional US$1,250,000.00 to CCI to enable it and Beach to continue their operations. Out of this sum AAP placed US$525,000.00 in escrow with Laurus Master to pre-pay future interest due from Beach.

[12] It is the appellants' pleaded case that at the time AAP entered into the Share Exchange Agreement CCI was in terrible financial condition, the Beach House needed substantial repairs and renovations and, even if CCI's financial problems could be resolved and the repairs and renovations were done, the Beach House would still not be profitable unless expanded. AAP would not have entered into the Share Exchange Agreement and paid such a substantial price for an interest in

CCI, the appellants pleaded, if the respondents had not made the representations and commitments to AAP.

[13] The respondents did not provide financing. This drove Beach and CCI into default. In the affidavit of Eugene Grin, filed on behalf of the respondents, he denied the respondents had concluded any agreement to provide financing. Among other things, he asserted that under no circumstances would the respondents make any investment without memorialising the terms in writing, clearly defining the covenants and representations that would protect Laurus' investments, and specifying the consideration and collateral to Laurus for making the investment.

[14] By letter dated 7th November 2006 the respondents advised Beach and CCI that the entire principal and interest under the promissory note were currently due and owing. The letter advised of other events of default. In exercise of its rights under the various loan documents, Laurus Master stated, it was appointing its own management company to manage the Beach House and to prevent further damage to the assets. The letter also advised of the right to exercise other remedies including, in summary, to enforce its securities and sell the Beach House.

[15] On 20th December 2006 the appellants filed a claim against the respondents. The relief claimed in the Amended Statement of Claim included an injunction to restrain the respondents from enforcing the remedies available to them under the earlier agreements and an order for specific performance of the March Agreement. These reliefs are apparently sought in favour of all appellants. The relief sought specifically in favour of AAP is compensatory damages of not less than US$5,000,000.00 together with exemplary damages in the amount of US$20,000,000.00. The relief sought specifically in favour of Beach and CCI is compensatory damages of not less than US$5,000,000.00. On the same day, the appellants filed a notice of application for an injunction.

The Injunction

[16] The injunction that the appellants obtained on 21st December 2006 restrained the respondents from "enforcing or seeking to enforce the remedies available to them under the Agreements made on or about the 29th July 2004 and/or the 30th December 2005" (the earlier agreements) and went on to particularize them. The respondents were enjoined from, among other things, appointing their own managers of the Beach House, accelerating the payment obligations, charging default interest, taking title to 100% of the shares of Beach, enforcing the mortgage on the Beach House property and enforcing the guarantees given to them. All of the aforesaid conduct was identified as having been threatened in the letter issued by the respondents to Beach and CCI dated 7th November 2006.

The Judge's Reasons for Discharging the Injunction

[17] As summarized in the submissions for the respondent, the judge discharged the injunction for the following reasons[1]:

(i) That based on the pleadings and evidence in the case the applicant has failed to disclose a cause of action and this is fatal to the continuation of the injunction.

(ii) That the appellants had failed to provide full and frank disclosure to the Court of all of the material facts and matters. They failed to disclose to the Court:

(a) That an associate corporation Able Energy Inc was being investigated by the SEC for fraudulent trading since funds were loaned by the respondent to Able by way of provision of separate security and applied by Able to liquidate the debt of the appellants.

[1] Respondents' Submissions, page 1

(b) That the appellants failed to disclose that they had proposed to sell villas as condominiums in the business plan they had submitted to the respondents and the respondents rejected this plan because it would diminish the value of the security given to the respondents.

(c) That the appellants ought to have disclosed their knowledge that Laurus Investment Committee had to consider the application for loan financing before Laurus Master could commit to providing the desired financing

(iii) In applying the balance of convenience test there was a greater risk of injustice being done to the respondent should they be forced to await a final determination of the matter after a full trial. The least risk of injustice would be to discharge the injunction. The judge did not accept that the appellants would suffer irreparable harm.

(iv) Further, damages would be an adequate remedy if the appellants were successful.

The grounds of the application for the injunction

[18] The application for the injunction followed the unfortunate practice[2] of failing to state the grounds of the application. The prescribed form for making applications expressly requires the grounds to be stated in the form by providing a section beginning[3], "The grounds of the application are - ". The lawyers for the appellants thought it satisfactory to complete this section by inserting: "As set forth in the Affidavits [filed in support]."

[2] The lawyers who represented the appellants on this appeal did not represent the appellants in the court below and, hence, bear no responsibility for the drafting of the application for the injunction.
[3] Form 6: Application, in the appendix to Civil Procedure Rules 2000

[19] This is a completely unacceptable practice. It is an abuse of the process of the court that should attract condign consequences. One objective of requiring that the application must state its grounds is to focus the thinking of lawyers. By being required to identify the grounds for making an application, before making it, lawyers are required to consider the merits of the application. A lawyer who has difficulty in formulating grounds for making an application has reason for thinking that perhaps it is because there are no grounds. The requirement of stating grounds also serves to clarify for the judge and the opposing party the basis on which the applicant claims to be entitled to the order sought. When an application states no grounds, it raises the suspicion that the application may be groundless, not just in form, but also in substance. That suspicion is heightened in a case such as this in which the failure to state grounds was deliberate: the section of the form requiring grounds to be stated was not simply overlooked. By telling the court to find the grounds in the affidavits the drafter revealed a clear advertence to the requirement of stating the grounds of the application and a conscious decision not to comply with the requirement. But even if it had been a case of laziness and not obfuscation that would have been a difference only of degrees. Failure to state the grounds of an application because it is too much trouble for the lawyer to do so is still very much an abuse of process.

[20] On this application, I am still not clear on what grounds the appellants thought they were entitled to an injunction. It is easy enough to gather what the appellants wanted to restrain and why they wanted the restraining order. But one is left to divine the grounds they thought entitled them to an injunction. In this case there were three claimants and it is plain from the Amended Statement of Claim that each of them had a different relationship with the respondents and they claimed different reliefs. What grounds did any of them have for applying for an injunction?

The Respective Claims

[21] Mr. Astaphan SC, counsel for the appellants, sought to defend the omnibus application and the assumptive entitlement of the appellants to an injunction by urging the court to look at the interests of the appellants holistically. That cannot avail. A common interest in obtaining an injunction does not transform into a common ground to justify granting one.

[22] On the pleadings, the March Agreement the respondents are alleged to have made was allegedly made with AAP and not with any of the other two appellants. In a number of paragraphs in the Amended Statement of Claim[4] references are made that sail pretty close to asserting that the respondents made separate promises to CCI to provide it with financing. Having examined these closely I am satisfied that what the appellants were asserting was what the appellants ultimately expressed in paragraph 47 of the Amended Statement of Claim; that the respondents "misrepresented to the Third Claimant [AAP] that it would provide financing to the First and Second Claimant (sic) …" (Emphasis added). The appellants do not contend anywhere that Beach and CCI were parties to the March Agreement or can have any claim to enforce it. The affidavits in support of the application for the injunction make no such assertion. It seems to me, therefore, that any injunction that could be granted based on any promise contained in the March Agreements could be granted only to AAP because only it could enforce the agreement.

[23] In fact the affidavits in support of the application for the injunction, in particular the affidavit of Frank Nocito, a vice-president of AAP, make it clear that the ground for seeking the injunction was that it would be unfair to allow Laurus Master to get away with deceiving AAP into injecting money into Beach and CCI while all along Laurus intended to take the Beach House for itself and had no intention of lending the money, as it had promised to do. The peroration of Mr. Nocito's affidavit is that

[4] See especially paragraphs 33 to 36, 38 and 39

"Laurus' scheme must be stopped to prevent Laurus from wrongfully benefiting from its illegal acts."[5]

[24] To similar and fuller effect are the assertions of Jackson (the Chief Executive Officer of CCI) in his affidavit. After expressing[6] the precise thoughts that Mr. Nocito expressed, that Laurus must not be allowed to benefit from its illegal act, Jackson goes on: "Accordingly, Plaintiffs are requesting that the Court enter an order restraining the Laurus Defendants … from taking any action pending the determination of this application and the trial of this proceeding in furtherance of their fraudulent scheme set forth in this complaint …"[7]

[25] It is notable that the assertion is made by Jackson (of CCI) but not by Mr. Nocito (of AAP) that an injunction is needed to protect the property because damages would not be an adequate remedy. At paragraph 40 of his affidavit Jackson states:

> "40. Clearly, a restraining order maintaining the status quo of the parties pending the outcome of this action is warranted. In the first place, Plaintiff will sustain irreparable injury if Laurus is permitted to take any action which would affect title to the Beach House and the underlying leasehold interest of the property on which the Beach House is situated. As the Court is aware, it is well-established that all real property is unique and any action which may affect title to real property can not simply be compensated by money damages. It is difficult to imagine property which could be more unique than the property at issue given its location and its pristine beachfront. In sum, if the Laurus Defendants were permitted at this stage of the proceedings to take steps which would affect title to the Beach House or the underlying leasehold interest and Plaintiffs later prevailed on their claims against Laurus, Plaintiffs would be left without an adequate remedy at law for their loss of their property."

Damages an adequate remedy

[26] It seems fairly apparent that the reason why Mr. Nocito did not extend himself to asserting that damages would be an inadequate remedy for AAP is because AAP does not own the Beach House. It is the first appellant, Beach, which owns the

[5] Paragraph 22, Record of Appeal, page 83
[6] Paragraph 38, Record of Appeal, page 73
[7] Paragraph 39, Record of Appeal, page 73

leasehold interest in the 90 acres of land on which the Beach House is situated. As earlier indicated, AAP does not even own Beach; that company is owned by CCI. The truth, therefore, is contrary to the assertion in the skeleton argument for the appellants[8] that "The property is held by the Appellants on leasehold and is operated as a going concern." The appellants do not hold the property; Beach holds it. Therefore, AAP is no fond property owner seeking to hold on to its unique piece of earth. AAP's only object in seeking an injunction, as gathered from the contents of Mr. Nocito's affidavit[9], is to prevent Laurus Master from taking the Beach House for itself.

[27] Mr. Astaphan complained that the judge gave no explanation for her decision that damages would be an adequate remedy. This is true. But, in light of the immediately foregoing analysis of AAP's position flowing from the fact that AAP does not own the property, there is no need to look far for reasons. AAP's interest and involvement were purely as an investor in two companies that owned a pre-existing business. AAP's object, so far as the available material discloses, was pure profit[10], to be measured in monetary terms. There is no hint anywhere in the material that damages would not be an adequate remedy for AAP. I see no indication, from the facts of this case, that there would be any difficulty in quantifying damages. If Laurus Master were not stopped from taking the Beach House for itself, which the appellants contended was the respondents' fraudulent purpose, the only effect upon AAP would be that it would be deprived (possibly) of the money it has already invested and the opportunity to invest further in the Beach House, and to earn profits. In short, the only loss AAP would suffer would be money.

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[8] At paragraph 2 of page 2 of the Revised Submissions on Behalf of the Appellants

[9] At paragraph 22

[10] Thus, in paragraphs 4 and 15 of Mr. Nocito's affidavit he stated AAP became interested in the Beach House because of its potential even though it was operating at a loss and AAP decided the Beach House needed to be significantly expanded to become profitable.

[28] "The very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy", Lindley L.J. stated in London & Blackwall Railway Co v Cross.[11] In this case it seems to me AAP can be fully compensated by an award of damages and is not entitled to the grant of an injunction. David Bean writes in his book, "Injunctions",[12]

> "It is comparatively unusual for the defendant to be able to say that damages are the only available remedy in the case and that the court does not even have a discretion to grant an injunction. The more common defence is that although the claimant has made out a prima facie case for an injunction, nevertheless the court, weighing all the circumstances in the balance, should exercise its discretion against granting one."

That statement was made in a treatment of permanent injunctions. In view of the appellants' claim for specific performance of the alleged agreement to lend, it would be premature at this interlocutory stage of the proceedings to decide that damages are the only properly available remedy to AAP. However, it can be said at this stage that AAP has made out no ground to entitle it to an injunction.

Injunction for the other appellants

[29] There can be no doubt that if Laurus Master sold the Beach House in exercise of its presumed power of sale under the security documents this would cause irreparable harm to Beach, as the owner of the property. That property, one presumes, is the sole or dominant reason for that company's existence. I am therefore prepared to presume also, for present purposes, that Beach would cease to exist, functionally, if that were to happen and that would be the ultimate irreparable harm. I am also prepared to assume, for present purposes only, that in the premised event, even though CCI has only an indirect interest in the property by virtue of its shareholding in Beach, that CCI would suffer irreparable harm. However, the consequence of irreparable harm does not, by itself, ground the grant of an injunction. When these two appellants put up the property as security

[11] (1886) 31 Ch. D. 354 at 369
[12] At 2.08, 9th edition, Sweet and Maxwell

for the loan from Laurus Master they voluntarily undertook the risk of irreparable harm by the sale of the property and its loss to them. In the world of business the loss to the owner of property that it puts up as security for a loan is a consequence that happens everyday. It is only if that consequence flows from an arguably wrongful action by a defendant that it may be restrained. The question, therefore, is what wrongful action do Beach and CCI allege against the respondents?

[30] All that Beach and CCI do is join with AAP in alleging breach of the March Agreement. I am aware that in paragraphs 51 to 53 of the Amended Statement of Claim the claimants, jointly, claim damages for Laurus Master's failure to act honestly in its dealings with the claimants. This seems a reference to the respondents' conduct in relation to the March Agreement. In paragraphs 54 to 57 the claimants, again jointly, claim prospective damages that would be caused by their detrimental reliance on the improper lending practices of Laurus Master if the latter were permitted to enforce its security. The improper lending practice seems again a reference to the alleged promise to lend pursuant to the March Agreement and the failure to do so after inducing reliance on the promise. Also, in paragraphs 58 and 59 Beach and/or CCI allege the respondents breached their agreement to provide further financing of at least US$4,000,000.00 and claimed damages of a proximate amount. It is not entirely clear but this seems again a reference to the March Agreement. In any event, none of these averments was relied on to ground the application for the injunction. The affidavits, at which the Notice of Application for the injunction stated the court must look to find the grounds, were quite clear that it was to stop the respondents from getting away with their breach of the March Agreement (that the respondents made with AAP, alone,) and their fraudulent lending practices (asserted only in relation to the March Agreement) that the appellants sought the injunction. That was the actionable wrong complained of.

[31] Therefore, it is only that actionable wrong that could be restrained by injunction. And that is the fundamental difficulty Beach and CCI face. By no stretch of argument can restraining the respondents from acting in breach of the March Agreement they made with AAP extend to restraining the respondents from enforcing their rights under the earlier agreements that the respondents made with Beach and CCI long before AAP came on the scene. The appreciation that if the March Agreement had been performed Beach and CCI would (presumably) be compliant with their obligations under the earlier agreements (because AAP would have used the loan funds to finance Beach and CCI) does not alter the reality that Beach and CCI have no enforceable rights under the March Agreement.

[32] What Beach and CCI wanted, and what they got on the without notice hearing before Thomas J was an injunction to stop Laurus Master from acting pursuant to the earlier agreements. That was the express statement in the order for the injunction. These appellants simply elided the difference between the two agreements. They alleged no breach of the earlier agreements or no actionable wrong in relation to those agreements. Instead they made an application, based on an alleged breach of the March Agreement to which they were not parties, to restrain Laurus Master from exercising its rights under the earlier agreements. They had no proper ground for seeking such an order. That, one must conclude, is the reason why the notice of application for the injunction stated no grounds for the application. There was none.

[33] I would dismiss the appeal and order the appellants to pay the costs of this appeal. Because we have not heard counsel on the matter of costs I would make a provisional order quantifying costs on the basis that the value of this appeal concerning the grant or discharge of an injunction be fixed at EC$50,000.00, pursuant to rule 65.5 (2) (b) (iii). Prescribed costs would amount to $14,000.00, which must be reduced on appeal to two thirds, pursuant to rule 65.13 (b). Costs would therefore amount to $9,333.00. I would order that if either side wishes to be heard on costs it must, within 21 days of the date of this judgment, file an

application (unsupported by affidavit) requesting directions for making representations on costs, failing which this order for costs will stand as a final order.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]