THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 396 OF 2010

BETWEEN:

FRIENDSHIP BAY HOTEL

Claimant

V

BRANGANZA AB

First Defendant

ROY BAILEY

Second Defendant

APPEARANCES:

Mr. Joseph Delves for the Claimant.
Mr. Stanley John for the First Defendant
Ms. Nicole Sylvester for the Second Defendant

2011: February 10
March 24

DECISION

[1] **JOSEPH, Monica J. (Ag.)**: There are two applications for security for costs, supported by affidavits. An application by the First Defendant filed on 14th January 2011. An application by the Second Defendant filed on 9th December 2010.

CONSOLIDATION OF APPLICATIONS

[2] Mr. John's submission was that the applications were consolidated. Mr. Delves submitted that the applications were not consolidated, that they are separate and distinct, each notice of application being supported by its particular affidavit.

[3] The request on behalf of the First Defendant to the Court Office was for the applications for security for costs to be heard by the court on 15th and 16th February 2011,

contemporaneously with the Claimant's application for interlocutory restraining orders against the Defendants. The Court Office responded to that request and listed both applications to be heard together. The two applications were not consolidated. The effect is almost the same. This is not two different suits but applications in the same suit.

BACKGROUND

[4] The Claimant is a company registered under the Companies Act (Ch. 219) and Act No. 8 of 1994 (the Companies Act). The First Defendant is a company incorporated in Stockholm, Sweden and registered under the Companies Act. The Second Defendant is the Receiver appointed by the First Defendant under the provisions of a November 2005 mortgage arrangement between the Claimant and the First Defendant.

[5] The First Defendant made a loan to the Claimant secured by that mortgage of its Bequia property (property). The Claimant has not made any repayments and repayment of that loan with interest, was due on 15th May 2008. The Claimant went into receivership on 22nd April 2010 and the Second Defendant was appointed receiver under the mortgage.

[6] The Claimant filed a statement of claim on 28th October 2010 claiming against the Defendants:

1. A declaration that the option to purchase was at all material times a clog on the equity of redemption and void and unenforceable.

2. A declaration that the sum owed by the claimant to the First Named Defendant is US$2,600,000 being principal plus interest at the rate of 5 per centum per annum.

3. A declaration that the deed of further charge is oppressive, unconscionable, void and unenforceable.

4. An order that the sum contained in the Deed of Further Charge is a penalty and/or a premium and is unenforceable.

5. A declaration that the said Deed of Further Charge fails to comply with section 250 of the Companies (Act) 1994 and is void and unenforceable as a charge security or mortgage on the said hereditaments.

6. A declaration that the Second Defendant breached his fiduciary duty to the clamant.

7. A declaration that the Second Defendant failed to exercise his powers as Receiver in good faith.

8. A declaration that the Second Defendant failed to deal fairly and equitably with the Claimant.

9. A declaration that the Second Defendant failed to do everything to obtain the best price reasonably obtainable or to properly expose the property to the market.

10. A declaration that the Second Defendant breached his statutory duty to the claimant.

11. An order revoking the appointment of the Second Defendant.

12. An order that the Second Named Defendant forthwith account for all fees and expenses incurred during his tenure and administration up to the date of the cancellation of his appointment.

13. An order that the Claimant be deemed not liable for any act or fee or expense incurred by the Second Defendant whilst in breach of his duty to the Claimant.

14. An interim order restraining the Defendants, their servants, agent or howsoever otherwise stated from selling the said hereditaments until the loan sum due and payable by the Claimant is determined by the court.

15. An interim order that the reserve price be not less than EC$25.205,998.50 for the said hereditaments plus EC$1,750,000.00 for the hotel as a going concern.

16. An order that any advertisement placed by the Defendants contain accurate information and that prospective purchasers be given sufficient time to inspect the premises and conduct all necessary inquiries.

JURISDICTION

[7] Mr. John submitted that the court has jurisdiction to hear the applications by virtue of section 548 of the Companies Act, whether or not the First Defendant falls squarely under any of the categories in CPR Pt 24.3. Counsel urged upon the court that the issue of the insolvency of the company grounds the court's jurisdiction. He cited ***Surfside Trading Ltd. v Landsome Group Inc. et al*** AXAHCV/2005/0016 where the court considered a comparable provision to section 548 of the Companies Act.

[8] Ms. Sylvester, in adopting the submissions made on behalf of the First Defendant, submitted that the ground of the Second Defendant's application is that the Claimant is a limited liability company and is insolvent. If successful in the litigation, the Claimant would be unable to pay costs of the Second Defendant who was appointed Receiver, acting as agent on behalf of the Claimant.

[9] Security for costs ought not to negatively impact the Claimant who is seeking an interim order mentioning a reserve price of not less than 25 million E.C. dollars and 1.7 million for the hotel as a going concern. With that claim value, the Claimant ought to appreciate the cost implication, stated counsel.

[10] Counsel submitted that, procedurally the Court has been moved under Part 24 of CPR 2000, but the Second Defendant's application is on the basis of insolvency, which is grounded in Section 548 of the Companies Act.

[11] Mr. Delves' submission was that the application for security for costs was made under Pt. 24.3, that the Claimant does not fall under any of the categories mentioned in that part and that the court has no jurisdiction to entertain the applications under that part. Counsel mentioned that Section 548 of the Companies Act provides for applications where a company is insolvent.

[12] Pt 24.3: "The court may make an order for security for costs ...only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that –

(a) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover;

(b) the claimant -

(i) failed to give his or her address in the claim form;

(ii) gave an incorrect address in the claim form; or

(iii) has changed his or her address since the claim was commenced, with a view to evading the consequences of the litigation;

(c) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court;

(d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;

(e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;

(f) the claimant is an external company; or

(g) the claimant is ordinarily resident out of the jurisdiction."

[13] I agree that the Claimant does not fall within the categories of 24.3. Part 24.1 reads:-

"This Part deals with the power of the court to require a claimant to give security for the costs of the defendant".

(Against a bullet mark) it continues:

"Additional provision is made in relevant enactments relating to limited companies for security to be ordered against an insolvent claimant company."

[14] I think that part does two things: It states that that Part of the Rules sets out the powers for the granting of security for costs generally and provides, in a case of limited company that is insolvent, that the relevant legislation (section 548) applies. That section enacts:

> "Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

The Court has jurisdiction to entertain the matter under Section 548 of the Companies Act.

[15] George-Creque, J. (as she then was) in ***Surfside Trading Ltd. v Landsome Group Inc. et al*** AXAHCV/2005/0016 dealt with that point in this way:

> "Most of the authorities cited in the course of argument concern the applications brought under mirror provision to section 276 in other jurisdiction. It is clear however, given the claimant's admitted impecuniosity that it would have been open to the applicants to apply solely on this ground. I am further of the view given the clear wording of section 276 that notwithstanding an application being made under CPR 2000 Part 24, that where a claimant company admittedly is impecunious I am not precluded from a consideration of requiring security of such claimant company under this section even though such company may not fall within any of the categories set out under CPR 2000 Part 24.3 (a) to (g)."

The difference between this case and ***Surfside*** case is that the company in that case fell within one of the categories of Part 24.3, in addition to coming under a similar provision to Section 548, whereas this case does not fall within categories (a) to (g).

GROUNDS

[16] Five grounds are put forward by the first defendant to support its application for security for costs:

(1) The Claimant is insolvent and there is reason to believe that it will be unable to pay the First Defendant's costs if so ordered.

(2) The Claimant's claim against the First Defendant is not bona fides but is a sham, in that the Claimant admits that it has executed the mortgage under which the Receiver was appointed, that it has defaulted on the loan of 2.6 million dollars

secured under the mortgage, yet it purports to impugn the appointment of the receiver under the said mortgage. Thus, the Claimant does not have a reasonably good prospect of succeeding against the First Defendant.

(3) The application for security is not being used oppressively so as to stifle a genuine claim and that the Claimant's want of means have been brought about by its own conduct and not by the First Defendant's conduct.

(4) The application for security is made early in the proceedings.

(5) To deny making an order for security for costs against the Claimant would, in all the circumstances, prejudice the First Defendant unfairly as, if successful, the prospect is he would not recover costs from the Claimant.

The Second Defendant's ground is that the Claimant is insolvent.

THE LAW - CIRCUMSTANCES

[17] Blackstone's Civil Practice 2004 para 65.12:

> "The defendant has the burden of proving that a claimant will be unable to pay any costs that ultimately may be awarded in the defendant's favour. Proof that the company is in liquidation is prima facie evidence that it will be unable to pay any costs order. The section requires credible testimony of the company's inability to pay. This usually requires a comparison between the company's assets and the likely costs. It was held wrong in principle to order security against the company inv view of its substantial assets."

[18] Lord Denning M.R. in ***Sir Lindsay Parkinson v Triplan*** (1973) 2 WLR 632 at p. 645 para. D

> "If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case."

[19] The Master of the Rolls mentioned some of the circumstances that the court might take into account: whether the company's claim is bona fide and not a sham; whether the company has a reasonably good prospect of success (even in part); whether there has been an admission on the pleadings that money is due; whether the application for security for costs was being used oppressively so as to try to stifle a genuine claim; whether the

company's want of means has been brought about by any conduct of the defendants, such as delay in payment or delay in doing their part of the work.

[20] Mr. Delves invited the court, in exercising its discretion to order security for costs, to look at the timing of the application which, he stated, was critical. I turn to look at the circumstances, including the timing of the applications for security for costs. The Claimant's claim was filed on 23rd October 2010 and an *inter partes* hearing for the granting of an injunction against the defendants was fixed for 10th December 2010.

[21] Applications for adjournment of that hearing were filed, by the Second Defendant on 6th December 2010 and by the First Defendant on 7th December 2010, on grounds that included that the clients were overseas and time was required to file responses to the issues raised. Notice of application for security for costs by the Second Defendant was filed on 9th December 2010, and a similar application was filed by the First Defendant on 14th January 2011.

[22] The Court was informed that the Defendants have advised that the hotel had been sold and the Defendants required time to enable documents to be filed. The Court stood down the matter to facilitate the filing of an affidavit. An affidavit was sworn by the Senior Law Clerk in the firm of solicitors for the Second Defendant that the relevant documentation evidencing the sale was being "couriered" to that firm. Subsequently, the court was informed that there was an agreement for sale between unnamed persons. Later still, the Court was informed that the agreement for sale was between the First Defendant, another entity, a nominee of the First Defendant and the Second Defendant.

[23] The applications for security for costs came on for hearing. It may well be when the substantive matter is heard that the party who does not succeed at this point may succeed then. All that is required of the court at this point in time, without going into details which will be for a trial, is to assess the situation to determine the chance of success or partial success by the parties.

INSOLVENCY

[24] Where a company is in liquidation there is a rebuttable presumption of insolvency. I have not seen an authority that there is a rebuttable presumption of insolvency where a company is in receivership. However, I will follow a similar route in arriving at whether a security for costs order should be made.

[25] The Claimant has admitted that it has not made any repayments to the First Defendant on the mortgage loan (principal and interest) from November 2005 to the due date 15th May 2008. Hermie Miller's affidavit in support of the First Defendant's application for security for costs, is based on information received from Geir Stormorken, a Director of the First Defendant.

[26] She deposed that Stormorken informed her that the Claimant admits in its statement of claim that it has defaulted on payment of the loan made to it by the First Defendant. As a result of this default the First Defendant addressed default notices to the Claimant informing of the amounts due which, at the institution of the claim was in excess of US$5,000,000, inclusive of the principal, interests and legal costs incurred and any enforcement costs would be added.

[27] The Claimant attempted unsuccessfully to sell or refinance the hotel and the Claimant has not been able to make arrangements to repay the amounts owed. In exercise of its security under the principal mortgage, the First Defendant appointed the Second Defendant by instrument dated 22nd April 2010 to be Receiver.

[28] The issues Ms. Sylvester submitted are threefold: whether or not security for costs should be ordered; in what amount and by whom should it be provided. Upon the receipt of credible testimony as enacted in Section 548, the Court may exercise its discretion and grant the order for security of costs.

[29] It was Ms. Sylvester's submission that the credible evidence of insolvency is that the Claimant is unable to pay its debts as they fall due and the cumulative effect of all the

amounts creates the insolvency. The Claimant owes 3.9 million principal and interest including default interest to 30th November 2010.

[30] Roy Bailey's affidavit for the Second Defendant alleges insolvency of the Claimant from both a cash flow and balance sheet perspective: that the Claimant has a loss making business, his belief being that it will not be able to generate sufficient funds to secure the Second Defendant's costs.

[31] Details of the cash flow insolvency given: the Claimant has not made any repayment of the debt secured by the mortgage. There are unsecured creditors: SVG Air – $70,688.23 – invoices for transactions from 2008 to 2009; Gideon's Taxi-$7012.00; Fantasea Tours $5,902.00-2010; KDLT Accountants US$25,755.00 for audit of financial years ending 30th September 2008 and 2009; 2009 Judgment of US$19,040.00 plus interest and costs obtained by Gourmet Foods. There is also an unsecured debt of some 1.2 million dollars.

[32] With respect to the debt owed to Gourmet Foods there is a letter from Equity Chambers dated 11th December 2009, on behalf of Gourmet Foods:

> "In 2002 we obtained a two fold judgment against Friendship Bay Hotel Ltd for a total sum of $50,837.32 plus interest and costs; execution proceedings in the matter are ongoing, in fact we have also instituted bankruptcy proceedings against Friendship Bay Hotel. It has been extremely difficult recovering the money owed to our client and the judgment remains unsatisfied. More importantly our client's judgment is first in time to your client's mortgage. In the premises this letter also serves to inform you that our client intends to exercise its right to be paid out of the proceeds of sale."

[33] Bailey deposed that Grenadines Holdings Limited addressed a letter dated 14th June 2010 to the Second Defendant advising him of an agreement dated 28th July 2005 by which that company loaned Lars Abrahamsson US$2,650,000 of which US$2,492,746 is outstanding. That company holds a share charge over the entire authorized and issued share capital of the Claimant as security for the loan.

[34] In that letter the company made enquiries, including: the sum the Claimant owes the First Defendant; the value of the immovable property; whether it is anticipated that there will be any residue after the sale of the immovable property.

[35] Bailey's affidavit refers to Outstanding BDO auditors fees (sum not stated): VAT charged to customers but not paid to Government (sum not stated): no taxes paid for four to five years (sum not stated): Arrears of employee's salary for April 2010 and severance pay of up to three months in some cases (sum not stated). In the absence of figures, I note this information.

[36] Details of Balance sheet insolvency from Roy Bailey's affidavit: the property that is mortgaged is the most significant asset. The other significant asset is a net debt US$2,798,381, due from directors Margit and Lars Abrahamsson. The Second Defendant deposed that the indication is that the Abrahamsson would be unable to pay especially in light of the fact that under a loan agreement dated 28th July 2005, the Abrhamssons borrowed US$2,650,000.00 from Grenadines Holdings Limited. Of that debt US$2,492,746.00 is outstanding.

[37] The estimated balance sheet deficit that the Second Defendant has calculated is EC$3,509,786. From those factors the Second Defendant deposed that the Claimant has negative net assets and he concluded from a balance sheet perspective that the Claimant is insolvent.

[38] Lars Abrahamsson for the Claimant deposed that the company is not insolvent. If the company had become insolvent that is entirely the fault of the Second Defendant who closed the resort despite a positive cash flow and an agreement from Cayman Island to sell part of the land behind the resort for eight million EC dollars. He had given to Ernst and Young (with which the Second Defendant is associated) the budget for the income of the company which showed a positive cash flow.

[39] Further, Abrahamsson deposed that the closing of the resort caused temporary cash flow problems. Not all funds of its income related to the main business i.e., the hotel. The Second Defendant secured the buildings with chains on the gate and the Claimant was not

able to operate business on the site. Part of other business that the Claimant ran was the operation of a restaurant and two other restaurants located at Tradewinds Marina and Princess Margaret Beach in Bequia. Additionally, Abrahamsson deposed that he operated a wholesale company in one of the warehouses with facilities including newly installed portable cold and freezer facility to store products for the operation of the business.

[40] Abrahamsson deposed that from 1st December 2010 the Claimant invested in a new building the operation of that business is back to normal and there is a good cash flow. A new restaurant called Papas Bar in the same building has been opened. The Defendants have placed a low value on the company's assets. The company's assets exceed the debt service as shown by the two valuations of the property the Claimant has received: (one valuation is some 25 E.C. million dollars, the other some 32 E.C. million dollars.

[41] Further, he averred if the property is sold at undervalue and the court allows the Second Defendant to be paid in excess of E.C. $300,000.00 per month (questionable) for his work the assets would be diminished tremendously.

[42] Abrahamsson gave explanations for the debts owed to the other creditors: that once there is an outcome of the claim against the Defendants, certain debts will be paid. He is therefore assuming that the Claimant would be successful in its claim – not a good explanation. Neither is it a good explanation that the Claimant has filed a claim against Gourmet Foods as the fact is Gourmet Foods obtained a judgment against the claimant that has not been paid.

[43] The only explanation that seems reasonable is that, following the closure of the hotel, alternative accommodation had to be arranged for a group and that that cost is to be met by the tour company that had arranged a tour to Mustique.

[44] Abrahamsson also deposed that the Claimant had other assets related to land and buildings with equipment and vehicles for a value in excess of 1.75 million EC. It is not clear to the Court where exactly these additional assets are and I do not take them into consideration in exercising my discretion at this point in time.

[45] Mr. Delves submitted that it is indisputable that the Claimant did not pay the mortgage debt. The question is whether or not the asset can pay those debts. The claimant needs to establish a fifty per cent chance of success.

[46] I agree that the property is the most significant asset. Is the asset of sufficient value to meet all its debts? The creditors are certainly interested in an answer to that question, from the enquiries they have made. If the asset cannot meet the debts then the Claimant is insolvent. If the asset can meet the debts then the Claimant is not insolvent.

[47] The Claimant claims that it has received valuations of the property, from Christopher Brown value of 9.4 million US, and TVA value of 12 million US. That is for the trial of the substantive matter. The Claimant may be insolvent if the value of the property is some five million dollars as urged on behalf of the Defendants. If the property value is 25 million dollars the Claimant is not insolvent as the assets would be adequate to meet its debts, as urged on behalf of the Claimant.

[48] I am required to ensure that the First Defendant's interest is protected. I think that that interest is protected as the First Defendant holds an agreement for sale of the property for some five million dollars. I weigh that against the Claimant's claim that the value of the property is some 25 million EC$. I weigh in favour of the Claimant. I hold that the Claimant is not insolvent. The application for security for costs based on the ground of insolvency, fails.

IS THE CLAIMANT'S CLAIM A SHAM?

[49] On this second ground, Mr. John urged the Court to find that the Claimant's claim is a sham. I do not hold that the claim is a sham because the Claimant acknowledges that he defaulted on repayment of the mortgage. The Claimant has put forward a case. Whether the Claimant can establish its case would be for the trial of the matter.

GENUINE CLAIM

[50] The third ground is that the application for security is not being used oppressively so as to stifle a genuine claim and that the claimant's want of means have been brought about by its own conduct and not by the First Defendant's conduct.

[51] In her affidavit, Hermie Miller deposed that she believes, having been so advised by Geir Stormorken, that the application for security for costs is not intended to stifle a genuine claim; that the Claimant's want of means has been brought about by its own conduct and not by the conduct by the First Defendant.

[52] It is the First Defendant, Mr. John submitted, who is being put through a most oppressive situation. It may be that from the record it appears that the First Defendant's pockets are deeper than the Claimant's, but that in itself does not justify that this court should act in a manner that perpetrates an injustice to the First Defendant.

[53] Counsel argued that the application for security for costs is not oppressive and is not being used to stifle a genuine claim by the Claimant. The Claimant's claim is not genuine. The First Defendant has done nothing from 2005 (date of mortgage) to the present to prevent the Claimant from servicing the loan. It cannot be said that the Claimant's impecuniosity has been brought about by the First Defendant, submitted Mr. John.

[54] There is no doubt that the Claimant's debts predated the appointment of the Receiver. However, that point is not to be considered in isolation of another point i.e., whether any subsequent action or non-action on the part of the Receiver contributed to weakening the financial position of the Claimant.

[55] The effect of granting an order in certain circumstances may result in the stifling of a genuine claim. What I am to decide at this juncture is whether there is a fifty per cent chance that the grant of a security for costs order might have the effect of stifling a genuine claim. I think that that threshold has been reached.

[56] Para. 65.19 of ***Blackstone's Civil Practice*** under the heading "Stifling a Genuine Claim":

"The essential policy is that the need to protect the defendant has to yield to the claimant's right of access to the courts to litigate the dispute if it is a genuine claim"

[57] I take into account that the Defendants are protected to a certain extent as there is an agreement to sell the property to the First Defendant or the First Defendant's nominee – a property which the Claimant considers is valued at some 25 million dollars as against value of five million dollars by the Defendants. The Claimant, having rebutted the presumption of insolvency, is to be given the opportunity to litigate his claim.

[58] Relative to ground four, Mr. John submitted that the application was filed at an early stage as is reasonable in the circumstances. The First Defendant was confronted with an application for interim injunction and priority was given to the preparation of documents in relation to that application. I do not think that there is any argument that the application was filed at an early stage. In fact, what I understand Mr. Delves to be advocating is that the Defendants were concerned with filing documents to support a Security for Costs Application when the Claimant would have wished them to deal with the Interlocutory Injunction Application.

[59] With respect to ground five, Mr. John urged that to deny the making of an order for security for costs against the Claimant would prejudice the First Defendant unfairly since, if successful, the First Defendant will be faced with the prospect of recovering nothing. As I have already held that the Defendants have not established that the Claimant is insolvent, I do not think that there is a prospect of the First Defendant recovering nothing.

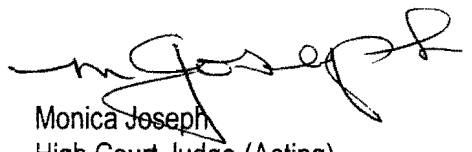
[60] I find that there is a fifty per cent chance of success, weighted in favour of the Claimant. The Defendants' applications for security fail.

ORDER

[61] The order therefore is as follows:

1. The applications of the Defendants for security for costs are dismissed.

2. I make no order as to costs at this stage of the proceedings. Costs relative to these two applications for security for costs will be considered on the hearing of the substantive matter.



Monica Joseph
High Court Judge (Acting)
22nd March 2011.