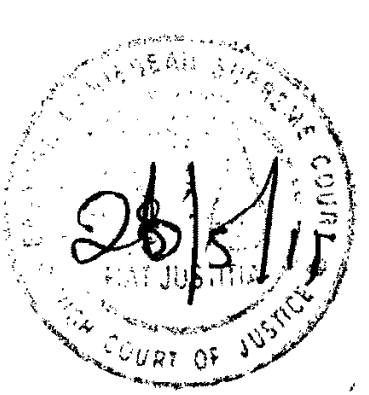

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL SUIT NO. 396 OF 2010

IN THE MATTER OF A PARCEL OF LAND AT FRIENDSHIP BEQUIA SHOWN ON PLAN GR 20

AND

IN THE MATTER OF THE FRIENDSHIP BAY HOTEL LIMITED

AND

IN THE MATTER OF SECTION 250 OF THE COMPANIES ACT 1994

AND

IN THE MATTER OF SECTIONS 294-297 OF THE COMPANIES ACT 1994

BETWEEN:

FRIENDSHIP BAY HOTEL LIMITED

Claimant

V

BRAGANZA AB (formerly BRZ SVERIGE AB)

First Defendant

ROY BAILEY (A Receiver appointed pursuant to the Provisions of Mortgage 4340/2005)

Second Defendant

APPEARANCES:

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

2011: May 26

DECISION

INTRODUCTION

[1] **JOSEPH, MONICA J**: This is the hearing of an application filed on 23rd November 2010, one, for an interim injunction restraining the Defendants and their agents from selling the property at Bequia, at a reserve price less than EC$25,205,998.00 for the reality, plus EC$1,750,000.00 for the hotel as a going concern.

[2] Two, an interim order that the First Defendant, its agents and representatives, be restrained from purchasing the property at less than the reserve price of EC$25,205,998 for the realty plus EC$1,750,000.00 for the hotel as a going concern. Three, an interim order that the Defendants be restrained from selling the property to themselves, their agents, partners or related companies.

WRITTEN SUBMISSIONS; 3rd May 2011

BACKGROUND

[3] The Claimant is a company registered under the Companies Act (Ch. 219) and Act No. 8 of 1994. The First Defendant is a company incorporated in Stockholm, Sweden and registered under the Companies Act as an external company.

[4] The First Defendant made a loan to the Claimant secured by a November 2005 mortgage of its 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 provisions of the mortgage. An application by the Defendants for security of costs was not granted by judgment delivered on 24th March 2011.

CLAIM

[5] 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 (un)enforceable as a charge security or mortgage on the 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 of 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.

ISSUES IDENTIFIED BY THE DEFENDANTS

[6] 1. Whether the court should restrain the Defendants from selling the property in the face of a Sale Agreement between the Second Defendant and a company Cakotil, in which the First Defendant has an interest.

2. The application in the Notice of Application relates to an anticipatory breach.

3. That the Claimant has not amended its notice and what it is now seeking is different from the course of the case and should not be entertained by the court.

NOTICE OF APPLICATION

[7] The Defendants urged that the Claimant's application be kept within the four corners of the filed Notice of Application and that some of the Claimant's submissions to the court range beyond that application. For the Second Defendant it was submitted that there has been no amendment of the Notice of Application

[8] The Claimant's grounds for the application for interim relief supported by the affidavit of Lars Abrahamsson, Director and Shareholder, and submissions related thereto are: Grounds 9, 10,11 and 12 of the Notice of Application, which are:

"9. The Claimant and the First-named Defendant, as long ago as November 28th 2008, had agreed that the minimum sale price should be US$9,000,000.00.

10. Notwithstanding the ... valuations of Christopher Browne and TVA Consultants, the First-named Defendant is intent on purchasing the said hereditaments from the Second-named Defendant and at a price it claims is the sum due under the mortgage and deed of further charge, namely US$5,000,000.00.

(i) After the filing and service of the fixed date claim form, Mr. Geir Stormorken, a Managing Director and Representative of the First-named Defendant visited Bequia and met with Mr. Abrahamson. He expressly stated the said Defendant intended to buy the said hereitaments at US$5,000,000.00.

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(ii) The Second-named Defendant has been, in writing, inviting bids starting at a reserve price of US$5,000,000.00.

11. In these circumstances, the Claimant is very reasonably afraid that the Second-named Defendant will sell to the First Defendant and at a price than is far less than the best price reasonably obtainable in breach of their duty to him, as mortgagor. In that eventuality the loss to the Claimant will be immense.

[9] The issues identified by the Defendant have been dealt with, insofar as they can be at this stage of the proceedings. I do not think that an amendment of the Notice of Application is necessary, for reasons which will appear.

LEGAL PRINCIPLES:

[10] The legal principles enunciated in ***American Cyanamid Co. v Ethicon Limited*** (1975) 1AER 504 at p 510:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious.....that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. ..."the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages.....if damages ....would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted.."

IS THERE A SERIOUS ISSUE?

[11] By the parties there were claims and counterclaims; allegations and counter allegations; submissions and counter submissions. Several affidavits were filed by the parties over an extended trial period, with the utmost latitude given to the parties to ensure that the parties had the fullest opportunity to put forward their case, orally and written.

[12] The Defendants submitted that the Claimant has acknowledged that it defaulted in repayment of the loan and the Court should follow ***Antigua Aggregates Limited v The Attorney General of Antigua & Barbuda and Antigua Commercial Bank*** ANUHCV 2008/0558 and hold that there is no serious issue to be tried. Damages would be an adequate remedy.

[13] On behalf of the Claimant it was submitted that, in this case, the acknowledgment of default in repayment of the loan was just one of the issues, unlike the main default in

repayment issue in the Antigua Aggregates case. Counsel for the Claimant urged that the claim is not frivolous and that there are serious issues to be tried. I find that the filed affidavits relate to:

1. Whether Abrahasson's (for Claimant) only objective is to delay as long as possible the First Defendant's possibility of effecting sale of the property: whether the First Defendant's failure to exercise its option to purchase the property affected the sale of the property.

2. Whether it was after an extensive marketing process of the property by the Second Defendant, when no buyers came forward with an acceptable price, that the First Defendant decided to nominate a subsidiary company to offer to purchase the property from the Receiver for a price that largely equals the Claimant's outstanding secured mortgage debt.

3. Whether the First Defendant had indicated a keen desire to own the property, conducting itself so as to drive away potential buyers of the property and to secure it for itself.

4. Whether the Second Defendant failed to maintain and preserve the property and prevent its deterioration and diminution in value: or whether it was the Claimant who had failed to maintain the property, which resulted in a Government Electrical Inspector concluding that part of the property should be shut down, pending the completion of electrical repairs:

5. Whether there was bad faith by the Second Defendant in executing his duties as receiver: whether the description of the property on the market was accurate; whether the length of time the property was advertised was adequate: whether the Second Defendant acted with honesty and dealt with the property in a commercially reasonable manner.

6. Whether Carikoll (the company launched by the First Defendant) was a bona fide purchaser for value without notice, inasmuch as Geir Stormorken as Carikoll's

principal, had signed the alleged contract for sale and an affidavit for the First Defendant: whether the First Defendant should be restrained from selling the property to itself or to a related company:

7. Whether the hotel part of the property ought to have remained open to generate revenue which would have been available to reduce the Claimant's debt, as asserted by the Claimant.

[14] On behalf of the Claimant it was submitted that the Second Defendant considered that the Receiver had an unrestricted right to sell at any time and that the Claimant has no right to restrict that right until they redeem the mortgage or at least made a valid tender of the redemption price. The law is that the Receiver's right to sell is not unrestricted. It is constrained by the common law duties to act in good faith, to get the best price reasonably obtainable, Counsel cited Section 294 of the Companies Act and paragraph 30.36 of Fisher and Lightwood's Law of Mortgage 12th Edition. Counsel submitted that there is no authority for the proposition that the Claimant must first tender the redemption price.

[15] The Defendants claim that there is a valid contract for sale .of the property and the Court ought not, in that circumstance, to grant an injunction. The Claimant claims that there is not a sale but an agreement for sale, and rights and interests of the vendor and the purchaser differ.

[16] A further point relates to the valuation of the property. Some US$ 5 million put forward by the Second Defendant, or EC$25 million put forward by the Claimant. Whether there was an agreed minimum sale price of US$9,000,000.00 at some point in time: whether the property was sold at an undervalue (the expression used by the Defendants) or a price less than the stated reserve price, (the expression used by the Claimant).

[17] In the Antigua case the learned judge found that there was no serious issue to be tried and did not grant an injunction. The ***American Cyanamid*** case shows that it is not for the Court at this stage of the proceedings to try to resolve the conflicting information – and conflicting information there is - I find that there are serious issues to be tried.

WILL DAMAGES BE AN ADEQUATE REMEDY?

[18] The thread that runs through the affidavits is the sale of the property. The main relief sought by the Claimant is that the Defendants be restrained from selling the property at less than a stated reserve price.

[19] What the Claimant seems to be saying is that it really has no objection to the sale of the property, provided the property is sold at what it considers a reasonable price. Confirmation that there is no objection to a sale of the property appears in a letter dated 3rd June 2008, from Lars and Margit Abrahamsson to Geir Stormorken, Managing Director of First Defendant:

> "During our meeting in Ft. Lauderdale, we discussed a potential sale of the property in order to pay back the loan and a sale to be completed within a reasonable time.
>
> We explained that we would prefer not to sell the property, but at the same we have no problem to face the reality of our poor finances and our possibility to develop the site without a strong financial JV partner.
>
> If we cannot locate such a JV partner on or before November 1st the official sale program for the resort will officially be launched."

[20] I find that damages will be an adequate remedy. The application for the grant of an injunction is not acceded to.

[21] IT IS ORDERED:

1. The application of the Claimant for an injunction is dismissed
2. Costs relative to this application will be considered on the hearing of the substantive matter.

Monica Joseph
High Court Judge (Acting)
18th May, 2011.