THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2017/0016

BETWEEN:

[1] SUZANNE P. GRYSPEERDT
[2] BRUCE L. CUTRIGHT
[3] CLAIRE FRASER
[4] DCG PROPERTIES LIMITED

Appellants

and

[1] CLICO INVESTEMENT BANK LIMITED (In Compulsory Liquidation) Represented by the Deposit Insurance Corporation
[2] JEFFREY C. COYNE

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise E. Blenman — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

On Written Submissions:

On written submissions filed on behalf of the Appellants by Mr. Colin J.K. Foster and on behalf of the First Respondent by Mr. Deale Lee of McNamara & Co.

2017: September 8.

Interlocutory appeal – Interim remedy – Interlocutory injunction – Whether there was a serious issue to be tried – Whether Deed of Settlement superseded all prior agreements between parties – Whether appointment of receiver and manager under Mortgage Debenture executed prior to Deed of Settlement null and void

This is an appeal against the learned judge's refusal to grant the appellants an interlocutory injunction prohibiting the second respondent, Mr. Jeffery Coyne, from acting as the appointed receiver and manager of the fourth appellant, DCG Properties Limited ("DCG"). Mr. Coyne was appointed pursuant to a Deed of Appointment made under a Hypothecary Obligation Mortgage Debenture and Floating Charge ("the Mortgage Debenture"). The Mortgage Debenture was executed by DCG in favour of the first respondent, Clico Investment Bank Limited ("Clico"), now in compulsory liquidation. Various assets of DCG were charged to secure advances made by Clico to DCG in the

sum of US$100 million, pursuant to a loan agreement between them. Clico went into receivership four months after entering into the loan agreement and Mortgage Debenture, and the advances therefore ceased. Disputes arose between the parties and a compromise agreement ("the Deed of Settlement") was made. By the Deed of Settlement, DCG agreed to pay Clico the sum of US$30 million within 74 days ("the DCG Debt") and upon receipt of this sum, Clico agreed to execute a Deed of Radiation of the Mortgage Debenture. The DCG Debt was not paid in accordance with the Deed of Settlement or at all. Clico commenced legal proceedings against DCG in respect of the DCG Debt and also appointed Mr. Coyne under the Mortgage Debenture as receiver and manager of the company. DCG subsequently applied for the interim injunction to prevent Mr. Coyne from acting as the appointed receiver and manager. The appellants stated that they wished to prevent the sale of DCG's assets by a receiver 'unlawfully appointed and without notice to the company'.

The learned judge, in refusing to grant the injunction, ruled that there was no serious issue to be tried and further opined that if he was wrong on this finding, damages would be an adequate remedy. The basis of the appellants' challenge to having the receiver enjoined was that the Deed of Settlement had superseded all prior agreements between the parties, including the Mortgage Debenture and therefore, Mr. Coyne's appointment under the Mortgage Debenture was, in essence, null and void.

Held: dismissing the appeal; ordering that the appellants bear the costs of the first respondent fixed in the sum of $1,000.00; and making no order as to costs in respect of the second respondent, that:

1. The notion that only the Deed of Settlement should be considered as encapsulating the parties' rights and obligations in respect of each other is misconceived. There is no ambiguity in the Deed of Settlement and neither is there any language therein to suggest that on its execution the Mortgage Debenture had ceased to have legal effect. To the contrary, clause 2.2 of the Deed of Settlement, on a plain reading, as found by the trial judge, expressly incorporates the Mortgage Debenture into the Deed of Settlement and makes plain that upon receipt by Clico of the US$30 million, Clico will then discharge the hypothec and thereby release all parties from all of their respective obligations under it. The judge was entitled to conclude that there was no serious issue to be tried and accordingly, that the appellants had no real prospect of succeeding in their claim for a permanent injunction at trial.

   American Cyanamid Co. v Ethicon Ltd. [1975] All ER 504 cited.

JUDGMENT

[1] **PEREIRA, CJ:** The appellants have appealed the decision of the learned judge (Smith J) made on 23rd May 2017, refusing to grant an interlocutory injunction prohibiting the second respondent, Mr. Jeffrey Coyne, from acting as the appointed receiver and manager of the fourth appellant, DCG Properties Limited ("DCG") pursuant to a Deed of Appointment dated 8th July 2016 ("the Appointment"). The Appointment was made under a Hypothecary Obligation Mortgage Debenture and Floating Charge ("the Mortgage Debenture") executed on 23rd September 2008 by DCG in favour of the first respondent, Clico Investment Bank Limited ("Clico"), now in compulsory liquidation.

Background summary

[2] (a) DCG and Clico entered into the Mortgage Debenture by which various assets of DCG were charged to secure advances made by Clico to DCG in the sum of one hundred million United States Dollars (US$100,000,000.00 – "the Loan"). This was pursuant to a loan agreement between them dated 22nd September 2008.

(b) It appears that four months after entering into the loan agreement and Mortgage Debenture as security for the advances, Clico went into receivership and thus the funding for the Le Paradis hotel development project at Praslin, Dennery, Saint Lucia, which was seemingly the primary purpose of the loan agreement and the advances to be made thereunder, was no longer forthcoming.

(c) Disputes arose between DCG and Clico in respect of the loan agreement. These conflicting claims became the subject of a compromise agreement. This was memorialised in a Deed of Transaction, Settlement Agreement and Mutual Release dated 15th October 2009 ("the Deed of Settlement").

(d) The Deed of Settlement recorded at clauses 2.1 and 2.2 respectively as follows:

> "2.1 DCG will pay CIB [Clico] US$30 million within seventy four (74) days from the making of this Deed.
>
> "2.2 On receiving this US$30 million, CIB will execute a Deed of Radiation (discharge) of the September 2008 Hypothec, thereby releasing all parties from all of their respective obligations under the Hypothec, and each and every obligation arising under the documents referred to at 1.3."

The US$30 Million shall be referred to as the "DCG Debt."

(e) Clico was eventually placed into compulsory liquidation and Deposit Insurance Corporation who had been earlier appointed as its receiver and Manager was appointed by the High Court of Trinidad and Tobago as liquidator by order dated 17th October 2011.

(f) It is common ground that the DCG Debt has not been paid in accordance with the terms of the Deed of Settlement or at all.

(g) Clico commenced legal proceedings against DCG in respect of the DCG Debt in reliance upon a Promissory Note dated 25th January 2010 in respect of the debt by claim no. SLUHCM2016/0008. That action is still pending. Clico also made the appointment under the Mortgage Debenture in July 2016.

(h) There followed other legal proceedings between some or all of the parties to these current proceedings between 2015 and 2016 relating to locus standi in respect of DCG which are not directly relevant to this appeal save that the appellants allege that now that it has been determined that they are proper directors of DCG, they were now making this 'fresh application … seeking the court's intervention to scrutinize the acts of the

Respondents and prevent the sale of the Company's [DCG's] assets by a receiver unlawfully appointed and without notice to the Company'.[1]

The judge's Ruling

[3] The learned judge having considered the application and the affidavit evidence filed in support of and against the grant of an injunction as well as the submissions and arguments made on behalf of the parties, concluded that there was no serious issue to be tried. He further opined that if he was wrong on this finding, damages would be an adequate remedy and accordingly refused the appellants injunctive relief by which they sought to restrain the receiver from acting pursuant to the Appointment.

The Appeal

[4] The appellants in their notice of appeal have put forward some seven main grounds of appeal with a number of sub-grounds. However, I agree with counsel Mr. Lee on behalf of the first respondent[2] that they can all be reduced to a consideration of a single main issue, namely, whether the learned judge erred in concluding that there was no serious issue to be tried. It is only if he was wrong about that, that the issues as to where the balance of convenience would lie and in that regard, considering the adequacy of an award of damages if they were to succeed in establishing their right to a permanent injunction. There is also the additional complaint made by the appellants that the learned judge proceeded on the interim application to try the substantive claim and that he was wrong to do so. This complaint and the judge's finding that there was no serious issue to be tried are intertwined and may be best dealt with together.

The principles

[5] The English decision of **American Cyanamid Co. v Ethicon Ltd.**[3] has been followed and restated in our courts in so many decisions as to be taken as the

[1] See para. 32 of affidavit of Wendell Skeete in support of Interlocutory Injunction filed 23rd March 2017.
[2] No written submissions were filed on behalf of the second respondent.
[3] [1975] 1 All ER 504.

locus classics and the approach to be taken by the court in treating with an application for the grant of an interim injunction may now be considered as well established. The first principle to be considered is that the court must be satisfied that there is a serious issue to be tried. In this regard Lord Diplock stated at page 510:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> "It is no part of a court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to 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. … So **unless** the material available to the court at the hearing of the application … fails to disclose that the plaintiff [claimant] 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." (Emphasis mine)

This clearly suggests that the claimant must be able to demonstrate that his case discloses a serious issue to be tried or put another way, that he has a real prospect of succeeding in his claim for a permanent injunction at the trial as a threshold issue as it is only where that threshold is met that the court is then required to consider where the balance of convenience lies.

Discussion

[6] There was no conflict on the evidence in relation to the relevant facts. It was common ground that the DCG Debt had not been paid. The trial judge referred to this in his findings set out in the preamble to his order. Further, it was agreed that the Deed of Settlement had the effect as between the parties of a judgment and that the matters contained therein were res-judicata. Indeed the only point of difference was not as to the interpretation of the Deed of Settlement or the Mortgage Debenture but rather, the effect of the former. The appellants contended that the Deed of Settlement had superseded all prior agreements between the parties including the Mortgage Debenture and therefore the appointment under the Mortgage Debenture was, in essence, null and void. This

in reality is the crux of the appellants' case and the basis on which they challenge the Appointment and seek to have the receiver enjoined.

[7] The trial judge found at paragraph (1) as follows:

> "There is no serious issue to be tried since, on a plain and straightforward reading of the Deed of Transaction Settlement Agreement, the Applicants are only released from their obligations under the Hypothec when the debt is paid. … The parties are bound by what is contained therein and cannot seek to re-litigate or resurrect matters laid to rest by that Transaction, such matters being *res judicata*. The Deed … stated that the debt must be paid within 74 days and if it was paid then all the parties would be released from their obligations under the Hypothec and certain other documents. The debt was never paid so that the Respondent's appointment of a Receiver is not an act or issue that is *res judicata*."

[8] The appellants say that the judge misconstrued the Deed of Settlement because he failed to appreciate that the parties' obligations to each other were under the Deed and not the Hypothec and misguidedly focused only on clauses 2.1 and 2.2 and that the parties' rights under the Hypothec had been superseded by the Deed. Counsel for the appellants seeks to suggest that the meaning of clauses 2.1 and 2.2 contain some ambiguity although he has not sought to explain it save to reiterate that the Mortgage Debenture (the Hypothec) has been superseded by the Deed of Settlement.

[9] I am totally unpersuaded by the appellant's argument. It appears to rest on a misconceived notion that one must look only to the Deed of Settlement as encapsulating the parties' rights and obligations in respect of each other. But even in so doing they fail to recognise the clear language of the Deed itself which expressly provides for when DCG will be released from the Mortgage Debenture, the trigger for release being the payment in 74 days of the DCG Debt by DCG to Clico. I can find no ambiguity in the Deed of Settlement, neither have I found any language therein to suggest that on the execution of the Deed of Settlement the Mortgage Debenture had ceased to have legal effect. To the contrary, clause 2.2 of the Deed of Settlement on a plain reading, as found by the trial judge, expressly incorporates the Mortgage Debenture into the Deed of Settlement and makes plain

that upon Clico receiving the DCG Debt (US$30 million) Clico will then 'execute a Deed of Radiation (discharge) of the September 2008 Hypothec, thereby releasing all parties from all of their respective obligations under the Hypothec, and each and every obligation arising under the documents referred to at 1.3.'

[10] Clause 1.3 of the Deed of Settlement expressly lists the Mortgage Debenture (Hypothec) as one of the security documents securing DCG's debt obligations to Clico acknowledged therein to be US$30 million. This involved neither a difficult exercise of construction nor a difficult question of law and clearly no disputed facts. It was one where a judge, on scrutinising the documents which were not disputed and which were plain and unambiguous and on the undisputed facts, was entitled to conclude that the appellants had no 'real prospect of succeeding in [their] claim for a permanent injunction at the trial'. In short, the appellants had failed to meet the threshold requirement of disclosing that their case disclosed a serious issue to be tried. Their case is not that the process of appointment of the receiver was flawed or that a basis for such an appointment had not arisen but rather, that the appointment is of no effect because the Mortgage Debenture ceased to be of any effect upon the coming into effect of the Deed of Settlement, which Deed clearly shows on its the plain reading not to be the case unless DCG had paid up to Clico the DCG Debt. Further, it was not disputed that the DCG Debt had not been satisfied.

[11] Merely because a claimant puts forward an interpretation or legal effect of a document or other agreement which runs counter to that put forward by another party does not automatically give rise to a serious issue to be tried. The case put forward must give rise to a genuine dispute or serious issue to be tried – in essence not one that is fanciful or frivolous. A trial judge, while refraining from conducting a mini trial, is entitled to carry out a critical assessment of the material placed before him or her in determining whether the case discloses a serious issue to be tried. In **Angel Wise Limited v Stark Moly Limited**[4] the Court opined

[4] BVIHCVAP2010/0030 (delivered 13th February 2012, unreported).

that a trial judge was not required to accept facts uncritically and that an examination of whether there was substance to the allegations of facts alleged was appropriate. This is all the more applicable where, as here, there are no relevant disputed facts or ambiguous language in the documents requiring a more in depth or a more complex approach to the construction of the documents or which requires detailed legal argument or mature considerations because of complexity and the like. Both sides amply put forward their view of the purport and effect of the Deed of Settlement. The language of the Deed of Settlement is refreshingly plain. I can find no fault with the findings of the trial judge and accordingly no reason for departing from them. It would have been no doubt obvious to him as it is to me that the appellants had no realistic prospect of succeeding in establishing an entitlement to a permanent injunction of the nature and on the basis sought at trial. On this basis alone the appellants' appeal, in my view, fails.

Other considerations

[12] The conclusion reached above is sufficient to dispose of this appeal. For completeness however, on the assumption that the appellants' case disclosed a serious issue to tried, the basis on which an appellate court would disturb the exercise of a trial judge's discretion is well trodden ground. In **Dufour and Others v Helenair Corporation Ltd and Others**, Sir Vincent Floissac CJ stated the principle thus:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.
>
> "The first condition was explained by Viscount Simon LC in *Charles Osenton & Co v Johnston* [1941] 2 All ER 245 at page 250. There, the Lord Chancellor said:

> 'The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.'

"The second condition was explained by Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 in language which was approved and adopted by the House of Lords in *G v G* [1985] 2 All ER 225 and which I have gratefully adopted in this judgment. Asquith LJ said ([1948] 1 All ER at page 345):

> '… We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'"[5]

[13] More specifically, with regard to an appellate court reviewing a judge's discretion in respect of an interim injunction, Lord Diplock in **Hadmor Productions Ltd. and Others v Hamilton and Another**[6] at page 220 put it this way:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated

[5] At pp. 190-191.
[6] [1983] 1 AC 191.

> to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own".[7]

[14] A review of the trial judge's findings and his approach to the question of the balance of convenience and the adequacy of damages shows that he was alive to these considerations and had proper regard to them in the context of the facts and circumstances of this case. It cannot be said that he exceeded the generous ambit within which reasonable disagreement is possible or that he is plainly wrong or that his decision to refuse the injunction was so aberrant that no reasonable judge regardful of his duty to act judicially could have so decided. There is simply no basis, for the reasons he gave, which would have warranted this Court interfering, had the discretion exercise evolved to that stage.

Determining the substantive action

[15] I return to the complaint of the appellants that the judge tried the substantive matter. It may, on occasion, occur that the decision to grant or refuse an interim injunction has the effect of determining the substantive action particularly in circumstances where the final and substantive relief prayed for, mirrors the interim relief sought. There is no rule of law or principle which requires that where such an effect is the outcome that a judge ought to accede to grant or refuse an injunction as the case may be so as to avoid this result. Normally, where the case discloses a serious issue to be tried and the interim relief and final relief are the same it may be that a judge may refrain from granting an

[7] At p. 220.

injunction and instead take steps to expedite an early trial of the issue(s) raised. The relief is an equitable one and normally one predicated on there being or being able to proceed on a viable cause of action. It is no doubt for this reason that the first consideration for the grant of such relief is to show that the case put forward raises a serious issue to be tried. Where none is disclosed on the evidence or the applicant for such relief fails to show that he has a real prospect of succeeding in being granted such a permanent injunction at the trial then that must be a most weighty factor in refusing to exercise the discretion in favour of granting such relief. The fact that the practical effect may be that the applicant's claim can go no further would clearly be one which must be taken to have been in the contemplation of the applicant in moving the court to grant such relief by way of an interim measure. In the circumstances of this case this factor is not one which lends any weight in the exercise of the discretion by tilting the balance in favour of granting the relief sought by the appellants. The complaint is without merit.

Conclusion

[16] For the reasons given I would dismiss the appeal and order that the appellants bear the costs of the first respondent fixed in the sum of $1,000.00. No costs are ordered in respect of the second respondent who, apart from noting his objection to the appeal, did not actively participate in the appeal.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar