

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2023/0006

BETWEEN:

EFICER COMERCIO DE GENEROS ALIMENTICIOS LTDA.

Claimant/Applicant

And

**[1] CLEVELAND SEAFORTH
BRIAN GLASGOW
(AS JOINT LIQUIDATORS OF ANTIGUA OVERSEAS BANK LIMITED
(In Liquidation))**

1st Defendant/Respondent

[2] GALLEON BEACH LIMITED

2nd Defendant

[3] PAUL DEETH

3rd Defendant

[4] ASTRID DEETH

4th Defendant

[5] PETER STEHLIN

5th Defendant

[6] MIDDLE BAY LIMITED

6th Defendant

Appearances:

Jan Peltier of counsel for the Applicant

Loy Weste and Lisa John Weste of counsel for the Respondent

2023: February 23rd

February 27th

RULING

1. **Drysdale J:** Before the Court are several applications between the Applicant/Claimant and the Respondent/First Defendant for determination. The Respondent being a company in liquidation, the first application is for the lifting of stay of proceedings and for leave to commence proceedings. This is followed by an application for interim relief in the form of an injunction against the Respondent. The basis of all these applications is a claim for breach of contract and fraud.
2. Briefly the Applicant contends that the by virtue of a Subordination Agreement executed on 10th December 2010, the Respondent's interest in the Second Defendant was subordinated to it. That notwithstanding the same, the Respondent on or about 28th July 2022 exercised a power of sale over the property of the Second Defendant and sold the same to the 3-6 Defendants¹ but to date has refused to remit any proceeds of sale to it.
3. The Respondent opposed the applications claiming inter alia that there has been material non-disclosure by the Applicant and that in any event this being a claim for financial compensation, damages are a suitable relief.
4. There is no statutory test to guide the Court in determining when a stay should be lifted. However, the case law suggests that a stay should be lifted where there has been demonstration that there is a good and proper cause, where continuance of the stay could cause or produce injustice or prejudice or where there has been a change of law.²
5. The court of appeal in the more recent case of **National Bank of Anguilla (Private Banking and Trust) Limited (In Administration) and Others v National Bank of Anguilla Limited (In Receivership) and Others**³ articulated a non-exhaustive list of factors for the determination of the lifting of a stay. Those matters included the purpose of the receivership, whether the claim could be dealt with in the receivership process, the effect the lifting of the stay would have on the parties and the public interest.
6. Having heard the parties, read the submissions, and considered the law I hereby refuse the applications to lift a stay and to commence legal proceedings.

¹ A Notice of Discontinuance has been filed with respect to the Claim against the 3-6 Defendants but the issue of costs has not yet been resolved

² Janin Caribbean Contractors v Consolidated Contractors Company (Kuwait) Wll Civil Appeal No 18 of 2004

³ [2018] ECSJC No. 197

APPLICATION TO LIFT THE STAY

- i. The purpose of liquidation is to wind up the affairs of the company in an orderly manner that minimizes any risk to financial stability, minimizes disruption to depositors, and, maximizes the value of the assets of the licensed financial institution or licensed financial holding company. Hence it is designed to protect the assets of the financial institution and to ensure fair and equitable distribution to affected creditors. Hence the powers and duties of a receiver along with the corresponding duties of any creditors provide for the determination of issues outside the remit of the Court.
- ii. On the commencement of winding up proceedings the principle of collectivity takes effect. Simply put this means that there is a moratorium on hostile actions and the restraining of uncompleted executions. To lift the stay the Applicant must provide a good and proper cause sufficient to justify the same. The Applicant's case is premised on a subrogation agreement which subordinated the priority of legal interest in the 2nd Defendant's property. The clear intent of the subordination agreement was to provide security for the repayment of the commercial paper. The recitals states that:

‘By a Commercial Paper ('the Commercial Paper') issued on May 28th, 2009 and entered into by the Investor as investor and Freemans Bay Investment Limited (Issuer) and ABI Bank Ltd. (Arranger), the Investor did invest the sum of US\$26,573,696.07 on the terms and subject to the conditions contained in the Commercial Paper. The Company has guaranteed the repayment of the Commercial Paper to the Investor and has agreed to provide the Investor with tangible real estate collateral security to secure such repayment.’

- iii. A commercial paper is an unsecured promissory note which has a fixed maturity date. According to the exhibits this is a period of two years. Subsequently a charge was executed which also confirmed the same and set the maturity date for repayment to 28th May 2011. The maturity date being the final date on which the loan is due, would mean that if there was a breach that at the latest a cause of action would have arisen is at that time. According to section 7 the Limitation Act, a cause of action for breach of contract

must be commenced before the expiration of 6 years. Although section 12 of the said act which deals with the recovery of any principal sum of money secured by a mortgage, sets that limitation period to 12 years, this would in effect be against the 2nd Defendant and not the Respondent who was not a party to that agreement. Thus, this claim now being presented at least 11 years later, is well outside the limitation period of 6 years. Moreover, there is no order which pursuant to CPR allowed for the Claimant to avoid the limitation period in these proceedings.

- iv. There is no live charge against the property. The subject property all parties agree, was sold on 17th November 2022. Section 75(4) of the Registered Land Act clearly stipulates that '[u]pon registration of such transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge, or on account of any other incumbrance to which the charge has priority.' The effect of this is that the charge executed by the Applicant in 2013 is of no effect against the property as the property has been transferred free and clear. Thus, I agree with counsel for the Respondent that this means that at the date of the commencement of these proceedings, that the Applicant could not have commenced the same subject to the charge. Thus, the Applicant cannot rely on a limitation period relevant to a charge where all charges had been removed.
- v. The claim of fraud by the Applicant against the Respondent is briefly expressed in the following manner: that the Respondent failed to provide an accounting of the value of the charge in its favour against the property; that the Respondent with actual or constructive notice of the subordination agreement failed to remit the proceeds of the sale of the property to the Applicant; and that the Respondent colluded or conspired with the second defendant to prevent the Applicant from receiving the proceeds of sale. Save for the failing to account claim, the particulars of fraud pleaded against the Respondent is markedly similar in substance to the breach of contract cause of action pleaded. That is not to say that a breach of contract claim could not found a cause of action in fraud. However, there should be some additional or distinguishing feature to tilt the balance in favour of a fraud and take it out of the realm of a breach of contract claim simpliciter. In

the case of Three Rivers District Council and others v Bank of England (No 3)⁴ the House of Lords at paragraph 184 expressed that:

'It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see *Kerr on the Law of Fraud and Mistake* (7th edn, 1952) p 644, *Davy v Garrett* (1878) 7 Ch D 473 at 489, *Bullivant v A-G for Victoria* [1901] AC 196, [1900–3] All ER Rep 812, *Armitage v Nurse* [1997] 2 All ER 705 at 715, [1998] Ch 241 at 256. **This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.**' (emphasis mine)

- vi. Thus, the more serious the allegation the 'greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud.' See paragraph 51 Three Rivers District Council and others v Bank of England (No 3)⁵.
- vii. Having examined the scant pleadings I find that they do not meet the threshold for a claim of fraud. The subordination agreement was executed more than a decade ago and was based on a commercial paper which had a fixed maturity date of two years. There is no pleading that there was an acknowledgment of the debt or some factor which would take this out of the limitation period for commencing such actions. Further the bald assertion that the Respondent and the Second Defendant colluded to deprive it for the proceeds of sale without more as well is insufficient. The pleadings at best suggest a claim for breach of contract only. In any event whether a claim for breach of contract or fraud, both of these causes of action are subject to a limitation of 6 years. Claims which

⁴ [2001] 2 All ER 513

⁵ [2001] 2 All ER 513

are statute barred are incapable of being pursued in the court without leave. None has been obtained. Thus, having looked at the matter in the round there appears to be no live cause of action against the Respondent upon which the Applicant can rely to justify a lifting of the stay of proceedings.

- viii. The Applicant has not demonstrated any prejudice that would result from failing to lift the stay. Although the Applicant has attempted to couch its claim in fraud when looked at in the round it is a claim for damages. A monetary claim is one which can be handled as part of the liquidation process. The Applicant has not demonstrated that the liquidation process is not suitable to address its concerns or that a claim having been made has been allowed to languish without any appreciable action which in turn could defeat any legal claim that it has. In fact, it appears that the Applicant attempted to make a claim through this process but when asked to address certain concerns instead resorted to filing these proceedings in the High Court. The Applicant has not provided any cogent evidence why this claim could not satisfactorily be handled during the liquidation process. Further the issue of the priority of an alleged debt only arises if there is established to be a valid debt. Once the issue of the debt is resolved any issue of priority can in any event be easily dealt with during the liquidation process. In the circumstances it appears that the Applicant is seeking to circumvent the liquidation process as provided which is inappropriate and contrary to the purport and intent of the grant of a stay of proceedings.
- ix. To grant the application would likely open the floodgates to other such claims thereby putting strain on the limited resources of the company in liquidation. Public policy should not allow for the Applicant to attempt to resolve this matter in this manner, especially in circumstances where the Applicant has not provided any reasonable rationale why the statutory process is not suitable to resolve the matter.

APPLICATION FOR INTERIM RELIEF

- 7. Filed also by the Applicant is an application for interim relief seeking inter alia the following reliefs:

- a. An interim injunction prohibiting the Respondent, its servants or agents from parting with any part of the proceeds of sale of received following the sale of the chargee sale of the property described as Registration Section: English Harbour, Block No: 35 2479A Parcel: 237
 - b. An interim injunction restraining the Respondent from continuing to deny and or frustrate the interest of the Applicant in the property, the proceeds of sale of the property or from doing anything to adversely affect those interests.
- 8. Having heard the parties, considered the submissions and the law I also refuse the application for interim relief for the following reasons:
 - i. Having found that there is no basis for lifting a stay, the application for leave to commence proceedings and for injunctive relief which is contingent on the aforesaid automatically fails. In any event concerning the application for interim relief in the event regarding the refusal to lift a stay and commence legal proceedings, the application for interim relief would still be unsuccessful as the Applicant has failed to overcome two important challenges being whether there is a serious issue to be tried and whether there has been full and frank disclosure.
 - ii. The Court's power to make an injunction is dependent on the existence of an extant cause of action, which the court has jurisdiction to decide. Lord Diplock in the well-established authority of The Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA⁶, advocates this and states:

"right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action."

⁶ [1979] AC 210

- iii. As indicated previously the various causes of action which form the basis of the application for interim relief are statute barred. The effect of this is that there is no cause of action that can be enforced against the Respondent. There is therefore no serious issue to be tried.
- iv. It is the duty of the Applicant to present full and frank disclosure to the court on any matter which may be material of the case. The Applicant failed to disclose that an application was made to the Respondent (Receiver) to recover the moneys which are subject to this matter. The Respondent expressed concern about the ability of the Applicant to prove its claim and asked for clarification on certain issues and documentation. No response was forthcoming from the Applicant. The Applicant omitted this information from its various applications and only dealt with it as a result of being confronted by the Respondent with the same. At the hearing counsel attempted to provide an explanation but the same amounted to evidence from the bar table. This is not permitted and as such is totally disregarded. What is clear is that there was not full and frank disclosure by the Applicant.
- v. However not every non-disclosure has the resultant effect of precluding the grant of an injunction. The case of **JIPFA Investments Ltd v Brewley**⁷ supports this position. There the court set out certain principles for consideration and stated:

‘The court will have regard to all the circumstances of each case and will assess the gravity of the alleged breach, the degree and extent of culpability with regard to the non-disclosure, the importance and significance of the facts not disclosed to the outcome of the application, any excuse or explanation offered, the severity and duration of any prejudice caused to the respondent and whether the non-disclosure can be and, if so, has been, remedied.’

- vi. Considering that there is an established process for such claims to be made and the Applicant is seeking to avoid it, this was information that should have been disclosed from the outset and any potential reasoning for approaching the court in this manner. It

⁷ SBVIHCV2011/0038

must be remembered that where a company is in liquidation or experiencing any form of insolvency, the liquidity of the company is at stake. The purpose of imposing a stay is to prevent the company from using its already limited resources to defend matters which can be determined without the need to incur such costs. Further there is no prejudice to the Applicant in undergoing the statutory process for making a claim. However, the prejudice to the Respondent is significant having regard to the further financial distress that it may face in resolving this issue. Having considered the matter in the round and in accordance with the above principle, I find that this was information necessary to fairly and justly dispose of the application for interim relief. I find also that the prejudice to the Respondent to be greater than the Applicant. The failure to satisfy these requirements is fatal to the application for interim relief.

ORDER:-

1. The applications to lift a stay and for interim relief are hereby refused.
2. The Applicant shall pay the Respondent costs in the sum of \$2,000.00

Jan Drysdale

High Court Judge

By The Court

Registrar