

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 16/08

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.**

BETWEEN	THE ATTORNEY-GENERAL OF JAMAICA	1ST APPELLANT
AND	THE REGISTRAR OF TITLES	2ND APPELLANT
AND	INTERNATIONAL TRUST LIMITED	RESPONDENT

**Mrs. Michelle Shand-Forbes and Mrs. Trudy-Ann Dixon-Frith, instructed
by the Director of State Proceedings, for the appellants**

Charles Piper and Ms. Yualande Christopher for the respondent

July 28, November 6 and December 18, 2009

PANTON, P.

1. This appeal was heard on July 28, 2009 and on November 6, 2009 we allowed the appeal and set aside the order of Pusey, J. entering judgment for the respondent with damages to be assessed. We promised then to put our reasons in writing, and this we now do.

2. This appeal was in respect of the admitted error of the Registrar of Titles in not endorsing a caveat on a certificate of title at the time of the lodging of the caveat. The issue before the court was in respect of the consequences of that

error, seeing that a mortgage, which was later in time than the caveat, was noted on the title ahead of the caveat before the error was discovered, and the appropriate entry made.

The facts

3. It is necessary to state the relevant facts for there to be a proper appreciation of the order that was appealed. On September 24, 1993, Mr. Jackson Wilmot requested of the Registrar of Titles that a caveat be lodged against land registered in the name of the Jamaica Co-operative Automobile and Limousine Tours Ltd. (JCAL) at Volume 1221 Folio 893 of the Register Book of Titles. Mr. Wilmot declared, in support of his request, that JCAL owed him approximately \$9,500,000.00. One month later, October 25, 1993, the respondent lent \$9,600,000.00 to JCAL and the said property was used to secure the loan. At the time of the mortgage, there was no incumbrance noted on the certificate of title. The mortgage was duly registered and noted, and the certificate of title shows that there was up-stamping thereafter to secure further indebtedness.

4. On August 16, 1994, the respondent was advised of the existence of Mr. Wilmot's caveat. The mortgage fell in arrears and the respondent attempted to sell the property by auction on three occasions between September 1995 and January 1997, but the attempts were unsuccessful. On July 1, 1997, the respondent lodged an application for foreclosure, but the Registrar of Titles

indicated that the caveator's consent was required as the caveat had been lodged before the mortgage was registered. However, on July 13, 1998, the Registrar of Titles made an order for foreclosure in favour of the respondent to which entity the property was transferred and a new title issued on December 16, 1998, with the caveat endorsed. The new title was registered at Volume 1313 Folio 763 of the Register Book of Titles.

5. On July 5, 2001, the caveat documents were returned to the caveator, and on September 14, 2001, the Registrar of Titles advised the respondent that the caveat had been removed. A new and unincumbered certificate of title was issued to the respondent on November 21, 2001. However, on October 31, 2002, in uncontested proceedings brought by Mr. Wilmot against the present appellants, Beckford, J. declared that the caveat had been properly entered against the title in accordance with section 139 of the Registration of Titles Act, and that accordingly, the Registrar of Titles did not have the power to remove the said caveat unless it was being done in accordance with section 140 of the Registration of Titles Act. The learned judge also declared that the said caveat had been improperly removed by the Registrar of Titles. The Minute of Order containing the aforementioned declarations of Beckford, J. states that the summons was adjourned sine die by consent pending settlement.

The fixed date claim

6. Against the background set out above, the respondent filed a claim seeking the following main reliefs:

"A Declaration that:

- i. The Order of Foreclosure made by the Second Defendant on July 13, 1998 under mortgage no. 78657 (sic), vested the lands comprised in Certificate of Title registered at Volume 1221 Folio 893 of the Register Book of Titles, in the Claimant as the registered proprietor, free from any and all competing interest.
- ii. On December 16, 1998, caveat no. 783004 was incorrectly endorsed by the Second Defendant, or other officer or clerk in the Office of Titles, on the new Certificate of Title registered at Volume 1313 Folio 763 of the Register Book of Titles, issued in the Claimant's name in pursuance of the said Order for Foreclosure.
- iii. The Claimant is entitled to bring an action against the Second Defendant to recover damages, for the loss which it sustained as a consequence of the erroneous endorsement of the said caveat on the Certificate of Title registered at Volume 1313 Folio 763 of the Register Book of Titles.

B. An Order that the Claimant is entitled to recover damages against the Second Defendant as Nominal Defendant, in the sum of \$55,939,800.37 with interest calculated in the manner contained in the Instrument of Mortgagee executed on October 20, 1993, between Jamaica Cooperative Automobile and Limousine Tours Limited and the Claimant."

It should be noted that the mortgage number as seen on the certificate of title is 786857, and not 78657 as stated in the pleadings and judgment and elsewhere

in the record. It should also be further noted that the fixed date claim form refers to caveat no. 783004, and not 7830004 as is in the formal order and on pages 4 and 8 of the reasons for judgment.

The Judge's Order

7. On January 4, 2007, Pusey, J. granted two of the declarations that were sought. Firstly, he declared that the order for foreclosure had vested the land registered at Volume 1221 Folio 893 in the respondent, free from all competing interests; and, secondly, that the caveat had been incorrectly endorsed on the new certificate of title registered at Volume 1313 Folio 763. It will be recalled that Beckford, J. had, in October 2002, declared that the caveat had been improperly removed by the Registrar of Titles, and that the parties had adjourned the relevant summons pending discussions as to a settlement. In the instant case, Pusey, J. gave judgment to the respondent with damages to be assessed.

8. Pusey, J. said that there was no contest by the appellants in respect of the declarations made. The issue, he said, was whether the Registrar's action had prevented the respondent from exercising its power of sale in respect of the land. The respondent has maintained that the presence of the caveat and the position of the appellants in respect of the action brought by Mr. Wilmot have combined to adversely affect the respondent's right to sell the property to recover the sums loaned. The appellants, on the other hand, have adopted the

posture that at all times the respondent could have exercised its rights over the property, notwithstanding the errors made by the Registrar.

9. The learned judge considered sections 164 and 165 of the Registration of Titles Act and concluded that the conditions in section 164 had been complied with, and that the respondent should be compensated in damages. He found that there was a loss occasioned by the inability of the respondent to utilize its asset "when it ought to". Paragraph 13 of the respondent's particulars of claim had alleged special damages to the tune of \$55,939,800.37 in that the respondent had been unable to sell the lands to liquidate the mortgagor's outstanding indebtedness as a result of the Registrar's error. The judge was of the view that such an award would have been a windfall to the respondent as there was no evidence to justify it. Notwithstanding the absence of evidence, he ordered an assessment of damages.

The challenge to the judgment – and the response

10. The appellants filed two grounds of appeal:

"(a) The learned Judge erred in concluding that the delay in obtaining title caused loss to the Claimant.

(b) The learned Judge erred in not concluding that the alleged loss suffered by the Claimant cannot be compensated for by an action for recovery of land, estate or interest."

11. Mrs. Michelle Shand-Forbes, for the appellants, submitted that the proper interpretation of section 164 of the Registration of Titles Act formed the crux of the matter. She contended that the interpretation by the learned trial judge was erroneous, in that he failed to appreciate that the conditions precedent to naming the Registrar of Titles as a nominal defendant had not been satisfied. She said that the loss contemplated by section 164 was a deprivation of the land or interest in land. In the circumstances that obtained, there had been no such deprivation, so no loss had been shown.

12. On the other hand, Mr. Charles Piper, for the respondent, submitted that there was evidence of loss, and that the judge was satisfied in that regard. He said that there had been no ability to sell the property. With the caveat in place, it would have been fraudulent to put up the property for sale. The proper course would be first to have the interest discharged before putting up the property for sale, he said.

Sections 164 and 165- Registration of Titles Act

13. Section 164 of the Registration of Titles Act reads:

"Any person sustaining loss through any omission, mistake or misfeasance, of the Registrar, or any other officer or clerk, in the execution of their respective duties under the provisions of this Act or by any error, omission or misdescription in any certificate of title, or any entry or memorandum in the Register Book, or by the registration of any other person as proprietor, and who by the provisions of this Act is barred from bringing an action for **the recovery of the land, estate or interest, may**, in

any case in which the remedy by action for the recovery of damages herein provided is inapplicable, bring an action against the Registrar as nominal defendant for recovery of damages.

Provided that ..."

Section 165 reads:

"Any person sustaining loss or damage in any case in which he is entitled to bring an action to recover damages under the provisions of sections 162 and 164 shall before commencing proceedings make application in writing to the Registrar for compensation, and such application shall be supported by affidavits or statutory declaration. ..."

14. There were two questions for Pusey, J. to consider:

- (i) Was the respondent a person who had suffered loss "through any omission, mistake or misfeasance, of the Registrar...in the execution of ... duties under the provisions of this Act by an error, omission or misdescription in any certificate of title, or any entry or memorandum in the Register Book"?
- (ii) Was the respondent "barred from bringing an action for the recovery of the land, estate or interest"?

15. The learned judge answered the first question in the affirmative. He used as the basis for this answer the affidavit of Allan Thomas, the respondent's credit manager. The judge found that the loss was the respondent's inability to recover the sums loaned. The flaw in this finding is that there is no evidence that showed that the Registrar's error contributed in any way to the inability to recover the

sums loaned. There was nothing to indicate that the erroneous endorsement of the caveat on the title had proved a hindrance to the repayment of the loan, or the sale of the property to recover the loan. Pusey, J. was of the view that an award of damages in the sum put forward by the respondent would have resulted in a "windfall" so he denied the claim. He may well have been thinking of the oft-quoted words of Lord Goddard in ***Bonham-Carter v Hyde Park Hotel Ltd*** (1948) 64 TLR 177 at 178:

"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down particulars and, so to speak, throw them at the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it."

The Allan Thomas affidavit which was sent to the Registrar of Titles with the application for compensation prior to the commencement of the suit purported to give details of the loss sustained. In paragraph 22 of that affidavit, Mr. Thomas stated that he believed that the "... net effect of the Registrar's error... (was) to deprive this bank of its legal rights as Mortgagee ...". However, having filed the suit, no loss has actually been proven. The "loss" remains in the realm of Mr. Thomas' belief. The adjournment for damages to be assessed seems, therefore, to have been aimed, unwittingly of course, at giving the respondent a further opportunity to prove that which it had not succeeded in proving at the first attempt. This cannot be permitted.

16. The second question above was not addressed by the learned judge. An action against the Registrar as nominal defendant for recovery of damages requires that there be proof that the person sustaining the loss is barred from bringing an action for recovery of the land etc. However, in the instant case, the respondent was the registered proprietor of the land, so there was no basis for such an action.

17. The situation is not dissimilar to that which obtained in *The Registrar of Titles v Melfitz Ltd. and Another* (SCCA No. 9 of 2003 delivered on July 29, 2005). In that case, in 1979, the second respondent took adverse possession of a parcel of land in Clarendon which was at that time registered in the name of the first respondent (*Melfitz*). In November 1994, the second respondent applied to the Registrar of Titles for himself to be registered as proprietor. *Melfitz* lodged a caveat on November 14, 1994, but as of November 10, 1994, the certificate of title had been cancelled and a new certificate of title issued to the second respondent. *Melfitz* lodged a caveat against the new certificate of title and then filed suit against the second respondent, the Registrar and the Attorney-General.

18. In the suit, *Melfitz* alleged that the second respondent falsely and fraudulently caused its land to be transferred to himself, and that the Registrar was negligent and in breach of her statutory duty. Having filed a defence denying the allegations, the Registrar then filed a summons to strike out or stay

the action against her. One of her contentions was that the preconditions in section 164 of the Registration of Titles Act for the action to be filed against the Registrar of Titles had not been fulfilled. Campbell, J., heard the summons but dismissed it. This court allowed the appeal against the decision of Campbell, J., and ordered that the suit be struck out.

19. Smith J.A., in delivering the judgment of the court, referred to section 164 of the Registration of Titles Act and said:

“This section permits a person wrongfully deprived of land or any interest therein through the mistake, omission or misfeasance of the Registrar or any other officer, or by the registration of any other person as proprietor, to bring an action against the Registrar as nominal defendant for the recovery of damages in two situations. These are:

- (1) Where the person deprived of land is barred, by the provisions of the Act, from bringing an action for the recovery of land; and
- (2) Where the remedy by action for recovery of damages as provided by the Act is applicable.”

The court then went on to point out that the second respondent was still the registered owner of the land and **Melfitz** was entitled to sue and had in fact sued the second respondent for recovery of the land. In those circumstances, **Melfitz** was not permitted by section 164 of the Act to bring an action for damages against the Registrar.

20. In the circumstances, in the instant case, there being no evidence of loss having been occasioned by the Registrar’s errors, and given the fact that the

land was at all relevant times registered in the name of the respondent, the learned judge was in error so far as he had ordered an assessment of damages to be done at a later date and the appeal was allowed accordingly.