JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 78 of 2009

CLAIM NO. HCV 01719 OF 2008

BETWEEN	SHARON BENNETT	1ST APPELLANT/CLAIMANT
AND	CHARLENE THOMAS	2ND APPELLANT/CLAIMANT
AND	VIVIAN DONALDSON	1ST RESPONDENT/DEFENDANT
AND	ENA DONALDSON	2ND RESPONDENT/DEFENDANT

PROCEDURAL APPEAL

Mrs Ingrid Lee Clarke-Bennett, instructed by Pollard, Lee Clarke & Associates for the appellants
Gavin Goffe and Mrs Elise Wright-Goffe instructed by E.R. Wright-Goffe & Company for the respondents

18 September and 6 October 2009

MORRISON, J.A.

Introduction

1. By permission of the judge in the court below (Beswick J), the appellants in this procedural appeal challenge two orders made on 17 June 2009, firstly, refusing their application for summary judgment on their claim against the respondents and, secondly, extending the time for the respondents to file their defence to the claim by a period of 7 days from the date of the order.

2. On 6 October 2009, I made an order dismissing the appeal, with costs to the respondents to be agreed or taxed. These are my reasons for that decision (with apologies to the parties for the delay in preparing them).

The background to the proceedings

3. By an agreement for the sale of land made between the parties and dated 9 March 2007 ("the agreement"), the appellants agreed to purchase and the respondents agreed to sell all that parcel of land, part of Congreve Park Pen, part of Trenham Park, being the land comprised in the Certificate of Title registered at Volume 1129 Folio 533 of the Register Book of Titles ("the property"). The purchase price was $2,600,000.00. In accordance with the agreement, the appellants paid the required deposits (a total of $390,000.00) and applied for a mortgage loan for the balance of the purchase price ($2,210,000.00) from the National Housing Trust ("the NHT"). Completion was set by the agreement to take place within 120 days of signing and time was stated to be of the essence of the agreement in respect of all payments due from the appellants. By letter dated 5 June 2007, the respondents' attorneys-at-law, at the request of the NHT, extended the agreement for a period of 30 days (to 31 August 2007), and by letter dated 19 June 2007, the NHT issued a letter of undertaking to the respondents' attorneys-at-law in the sum of $2,294,985.00, being the mortgage amount, plus $84,985.00, towards the appellants' half costs of the transaction. This letter of undertaking was

sent in exchange for the usual completion documents from the respondents' attorneys-at-law, that is, the Duplicate Certificate of Title, a registrable Instrument of Transfer (along with the registration fee), Discharge of Mortgage and Withdrawal of Caveat (if any), the original transfer tax certificate and an up to date certificate of payment of taxes. An executed transfer was duly delivered by the appellants to the respondents' attorneys-at-law on 30 August 2007, thereby completing all that was required of them under the agreement.

4. On the face of it, the stage appeared at this point to be set for an uneventful and successful completion of the transaction. However, it appears that in or about the third week of May 2007, in circumstances which are hotly contested between the parties, the appellants, according to the respondents, moved onto and took possession of the property. The appellants say that they were put in possession "orally" to "secure" the property and that, while they have not been living on the property, they have been doing "necessary repairs as the said premises [were] uninhabitable". The respondents, on the other hand, insist that the appellants entered the premises without their permission, authority or consent and that they illegally connected electricity and water thereto and began to carry out construction work thereon. At all events, it is common ground that by letter dated 5 June 2007, the respondents' attorneys-at-law wrote to the appellants' then attorney-at-law protesting

the fact that they had taken possession without permission and demanding rent or interest on the unpaid balance of the purchase money payable under the agreement. The respondents, the letter concluded, "will not be proceeding any further with this transaction until payment for the use and occupation of our Clients' property has been settled".

5. Matters went swiftly downhill after this, with the appellants "waiting on" the respondents to take steps to complete the agreement and the respondents, on 7 February 2008, bringing matters to a head by serving a notice of that date on the appellants making time of the essence of the agreement and demanding completion within 14 days. By a subsequent letter dated 28 February 2008, the appellants not having completed in accordance with the notice, the respondents' attorneys-at-law wrote to the appellants' attorneys-at-law cancelling the agreement. In so doing, the respondents maintain "that at all material times they were ready, willing and able to complete the said contract and would have completed...if the [appellants] had remedied their breach of the Agreement for Sale" (see respondents' defence, filed 2 March 2009). However it also appears that the respondents' title to the property had been lost in 2007 and that instructions had had to be given by them to the Registrar of Titles to prepare and issue a new title directly in the names of the appellants. The new title was not issued until 14 April 2008, which the

appellants say is an indication that the respondents were not in a position to complete the agreement within the period specified in their notice to complete.

The proceedings

6. By a claim form filed on 8 April 2008, the appellants issued proceedings against the respondents claiming specific performance of the agreement. The respondents were not actually served (after several missteps) until 23 December 2008, when, pursuant to the order of the Master made on 22 October 2008, they were served in Port St Lucie in the state of Florida in the United States of America. In accordance with the Master's order, the periods within which the respondents were required to file acknowledgment of service and defence were 28 days (20 January 2009) and 56 days (17 February 2009) respectively after the date of service. The acknowledgment of service was in fact filed on 28 January 2009 and on 10 February 2009 the appellants filed an application for judgment in default of acknowledgment of service (which, although it was filed on 28 January 2009, does not appear to have been served on the appellants' attorneys-at-law until 11 February 2009). On 26 February 2009 the respondents filed an application for extension of time within which to file their defence and on 4 March 2009 the appellants filed an application for summary judgment. However, on 11 March 2009, the respondents went ahead and filed their defence. Beswick J heard both

the appellants' application for summary judgment and the respondents' application for extension of time together on 17 June 2009, when she made the orders set out in para. 1 above.

The grounds of appeal and the submissions

7. By notice of procedural appeal filed on 18 June 2009, the appellants challenged Beswick J's orders on several grounds. I intend no disrespect by summarising them as follows. Firstly, that the learned judge erred in failing to have regard to the fact that the delay by the respondents in filing their defence caused prejudice to the appellants and was "an outright abuse of process". Secondly, that the judge failed to exercise the extensive powers given to the court by rule 15 of the Civil Procedure Rules 2002 ("the CPR") and by the overriding objective of the said rules, aimed at saving time, conserving the court's resources and litigation expenses of both parties, particularly when a claim or defence is bound to fail. In particular in this regard, the judge erred in finding that there were too many factual issues in dispute and that the respondents had more than a fanciful case as a basis for refusing the application for summary judgment. And finally, the appellants contend that the learned judge's order for costs on the applications before her were in breach of rules 26.8(4) and 65.8(3) of the CPR.

8. Mrs Lee-Clarke Bennett supplemented her admirably detailed written submissions with further oral submissions when the parties appeared before me on 18 September 2009. She referred me to a number of authorities, including ***Swain v Hillman*** [2001] 1 All ER 91 and ***ED&F Man Liquid Products Ltd. v Patel & ANR*** [2003] C.P. Rep. 51, on the circumstances in which the exercise by the court of its powers under the rules is appropriate. She also referred me to a decision of Sykes J in the Supreme Court in ***Carr & Carr v Burgess*** (Claim No. CL 1997 C130, judgment delivered 19 April 2006), on the application of rule 26.8 of the CPR.

9. With regard to the extension of time application, Mr Goffe in his written submissions referred to rule 15.4(2), which provides that, where a claimant applies for summary judgment before the defendant has filed a defence, the time for filing the defence is thereby extended. Mr Goffe submitted that as a result there had in fact been no necessity to obtain an extension of time. As far as the summary judgment application was concerned, Mr Goffe emphasised that what the court was being asked to do on this appeal was to review Beswick J's exercise of her discretion and that in these circumstances it had to be shown that the discretion had been improperly exercised or was plainly wrong. He also relied on ***Swain v Hillman***, making the point that where on a summary judgment application there are disputed facts and the defence cannot be said to be fanciful,

then the matter ought to be allowed to go trial. By taking possession of the property before completion and without permission, the appellants were in breach of the contract and were therefore guilty of trespass. As a result, the respondents had a separate ground for terminating the contract, independent of the appellants' failure to complete in accordance with the notice to complete. And finally, on the question of costs, Mr Goffe pointed out that the judge had heard two applications, and that it was difficult to separate the order for costs as being applicable to one rather than the other of them.

The application to extend time

10. With regard to the application to extend the time for filing the defence, rule 15.4(2) of the CPR provides as follows:

> "If a claimant applies for summary judgment before a defendant against whom the application has been made has filed a defence, that defendant's time for filing a defence is extended until 14 days after the hearing of the application."

11. It will be recalled that the appellants' application for summary judgment in this case was in fact filed on 4 March 2009, that is, before the respondents' defence was filed (on 11 March 2009). It follows from this that the time for filing the defence was by the operation of rule 15.4(2) automatically extended to 14 days after the hearing of the summary judgment application, that is, to 1 July 2009. As it turned out, therefore,

the order for extension of time sought and obtained from Beswick J was strictly speaking unnecessary and the respondents are as a result entitled to rely on their defence filed on 11 March 2009.

The summary judgment application

12. As to the power to grant summary judgment, rule 15.2 of the CPR provides as follows:

> "The court may give summary judgment on the claim or on a particular issue if it considers that-
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue.
>
> (Rule 26.3 gives the court power to strike out the whole or part of statement of case if it discloses no reasonable ground for bringing or defending the claim.)"

13. In ***Swain v Hillman***, Lord Woolf MR (as he then was) described the court's power under the English rule 24.2, which is in terms identical to rule 15.2, as "a very salutary power" and considered that the words 'no real prospect of succeeding' are apt to distinguish "a 'realistic' as opposed to a 'fanciful' prospect of success" (page 92). Lord Woolf went on to say this (at page 94):

> "Although I consider that the judge therefore adopted the wrong approach for that reason, I

> am quite satisfied that he came to the right decision. It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon a possible."

14. And in the same case, Judge LJ (as he then was), considered (at page 96) that an order for summary judgment "against a litigant on papers without permitting him to advance his case before the hearing is a serious step", but that "The interests of justice overall will sometimes so require".

15. The meaning and spirit of rule 15.2, as elucidated by these dicta, have been routinely applied since the CPR came into force at the beginning of 2003, both by judges of the Supreme Court and in this court (see, for instance, ***Lewis v Blake & Huslin***, suit no. CL HCV 0550/2005, judgment delivered 3 April 2006, per Sinclair-Haynes J at page 24, and ***Capital Solutions Ltd v Rosh Marketing Co. Ltd***, SCCA 63/2008, judgment delivered 30 July 2009, per Morrison JA at paras. 12 and 27). They mandate the court on an application for summary judgment to have regard to the overriding objective of the CPR of dealing with cases justly,

by forestalling excursions in litigation that are essentially wasteful of the court's, as well as the litigants' time and resources, in cases where the claim or defence is fanciful, while at the same time guarding against shutting the door on a claim or defence that has a realistic prospect of success, at what is invariably a very preliminary stage of the litigation. The power is not meant to be exercised in cases where there are issues which should be investigated at trial and the judge hearing the application is not required to conduct a mini-trial (***Swain v Hillman***, per Lord Woolf at page 95).

16. In the instant case, although I did not have the advantage of a written judgment from Beswick J, it appears to me that there was an ample basis for her to decide as she did that this was not a suitable case for an order for summary judgment against the respondents. In the first place, the defence gives rise to a factual issue as to whether the appellants took possession of the property before completion with the oral permission of the respondents or whether they did so unilaterally and without permission. Secondly, on whatever account is ultimately accepted by the court, the defence also gives rise to the legal issue of what are the obligations of purchasers of land who go into possession before completion: are they obliged to compensate the respondents for their occupation of the property, either by way of the payment of interest on the unpaid balance of the purchase price or mesne profits? (See ***Sale***

v Allen (1987) 36 WIR 294.) And further, are the vendors in such circumstances entitled to insist on some understanding or agreement being arrived at on this score as a precondition to the completion of the sale? And further still, were the respondents ready, willing and able to complete at the time they gave the notice to complete to the appellants, given the fact of the lost title and the date on which its replacement was obtained?

17. These are all, it seems to me, issues that require investigation at trial and taking into account, as Mr Goffe correctly invited me to do, that I am asked on this appeal to review the learned judge's exercise of her discretion, I cannot therefore say that she acted on any wrong principle or took into account any irrelevant factor in arriving at her decision not to order summary judgment against the respondents in this case.

Costs

18. On the question of costs, the appellants rely on rules 26.8(4) and 65.8 (3)(b) of the CPR. The former provides that on any application for relief from sanctions imposed by the CPR for non-compliance with any rule, order or direction, the court "may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown", while the latter provides that on an application to extend time for doing any act under the rules or an order or

direction of the court, "the court must order the applicant to pay the costs of the respondent unless there are special circumstances". These rules, as a corollary of the wide discretion given to the court to grant relief from sanctions where permitted by the rules, seek to ensure that the party seeking such relief will ordinarily be the one to pay the costs of such applications. Or, put the other way, that the party not in breach is not penalised in costs save in exceptional circumstances.

19. In the instant case, given that I have determined that the respondents did not in fact need the extension of time which they sought, in the light of the appellants' application for summary judgment, I do not think that either of these rules is applicable. However, in relation to the unsuccessful summary judgment application, it seems to me that the order made by Beswick J, which was that the appellants should pay the respondents' costs, was entirely in keeping with what is stated to be "the general rule" in rule 64.6(1), which is that the unsuccessful party is to pay the costs of the successful party in any proceedings. It follows from this that this ground of appeal must also fail as well.

Conclusion

20. These are my reasons for the order made on 6 October 2009 dismissing this procedural appeal, with costs to the respondents to be agreed or taxed.