[2012] JMCA App 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 140/2012

APPLICATION NO 237/12

BETWEEN	**DINO MICHELLE LIMITED**	**1ST APPLICANT**
AND	**WINSTON ZIADIE**	**2ND APPLICANT**
AND	**CAROL ZIADIE**	**3RD APPLICANT**
AND	**SHELLY CORPORATION LIMITED**	**4TH APPLICANT**
AND	**WINCARL LIMITED**	**5TH APPLICANT**
AND	**NATIONAL COMMERCIAL BANK LTD**	**1ST RESPONDENT**
AND	**NATIONAL DEVELOPMENT BANK LTD**	**2ND RESPONDENT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**3RD RESPONDENT**

Abraham Dabdoub and Miss Jacqueline Cummings for the applicants

Miss Natasha Richards instructed by Myers, Fletcher & Gordon for the 1st respondent

Mrs Daniella Gentles-Silvera instructed by Livingston, Alexander & Levy for the 2nd respondent

Mrs Sandra Minott-Phillips QC and Mrs Alexis Robinson instructed by Myers, Fletcher & Gordon for the 3rd respondent

17 and 20 December 2012

IN CHAMBERS

MORRISON JA

[1] By notice of application for court orders filed on 14 November 2012, the applicants seek an injunction pending an appeal to this court from the judgment of King J given in the Supreme Court on 11 May 2012, some six years after he had completed the hearing of the evidence and reserved his judgment. The order sought is to restrain the 3rd respondent ('JRF') from auctioning, selling, transferring or exercising its powers of sale over or in any way dealing with the following properties held by it by way of security, until the determination of this appeal:

> "i) **ALL THAT** parcel of land situate at No. 17 Glenalmond Drive, Kingston 6 in the parish of Saint Andrew comprised in Volume 1061 Folio 64 of the Register Book of Titles
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> ii) **ALL THAT** parcel of land situate at Lot no. 103¼ Luke Lane in the parish of Kingston and comprised in Volume 244 Folio 100 of the Registrar [sic] Book of Titles
>
> iii) **ALL THAT** parcel of land situate at Newport West and formerly comprised in Volume 1029 Folio 71 and now Volume 1327 Folio 875 of the Register Book of Titles
>
> iv) **ALL THAT** parcel of land situate at Newport West and formerly comprised in Volume 1029 Folio 72 and volume 1327 Folio 876 of the Register Book of Titles"

[2] The 1st applicant ('the company') is a limited liability company engaged in the business of garment manufacturing for the local and export markets. The 2nd applicant ('Mr Zaidie') and the 3rd applicant ('Mrs Zaidie') are directors, shareholders and guarantors of the indebtedness of the company. The 4th applicant is also a limited

liability company, the shares of which are owned by Mr and Mrs Zaidie, which has also guaranteed the indebtedness of the company.

[3] The 1st respondent ('NCB') is a commercial bank, of which the company has been a customer for a number of years, and the 2nd respondent ('NDB') is a development bank. The 3rd respondent is NCB's successor in title to certain mortgages taken by NCB as security for moneys advanced to the company.

[4] The application is supported by first and supplemental affidavits of Mr Zaidie, sworn to on 14 November 2012 and 17 December 2012 respectively, and it is opposed by an affidavit sworn to on 12 December 2012 by Ms Merline Patterson, a loans recovery manager employed to JRF. At paragraph 11 of her affidavit, Ms Patterson avers that the properties comprised in Certificates of Title registered at Volume 1327 Folio 875 and Volume 1327 Folio 876 of the Register Book of Titles are already the subject of signed agreements for sale with third parties, pursuant to powers of sale contained in the mortgages registered on those titles in favour of JRF. At paragraph 5 of his supplemental affidavit, Mr Zaidie does not dispute this assertion, and Miss Cummings for the applicants confirmed to me at the outset of the hearing that the intention was that the application for an order preventing a sale of the mortgaged properties should proceed in respect of the properties registered at Volume 1061 Folio 611 and Volume 244 Folio 100 only. However, Miss Cummings submitted, it nevertheless remained open to the court to make an order that the proceeds of the sale of those properties should not be disbursed or dissipated and should be held in an interest bearing account pending the determination of the appeal.

[5] At the conclusion of the hearing of the application on 17 December 2012, Miss Cummings applied to amend the notice of application for court orders to add a third property registered at Volume 1144 Folio 947, on the basis that it was a part of the applicants' claim in the court below and had in fact been specifically referred to in the statement of claim (at paragraph 30). Mrs Robinson for JRF told me that she was taken by surprise and would need to take instructions as to the status of this property. It was therefore agreed at the end of the hearing that she would communicate her client's position on Miss Cummings' application to me by electronic mail ('email') as soon as she was able to do so. In an email sent to me (and copied to all other parties) on 18 December 2012, Mrs Robinson advised that this property, although available for sale, was not yet subject to an agreement. However, Mrs Robinson went on to point out that this property had in fact been mortgaged to NCB before the transaction which is the subject matter of the dispute in the instant case and that there was therefore no basis for including it in the current application. Accordingly, in the absence of any further input from Miss Cummings on this, I propose to proceed on the basis that the application to amend the notice to include this property has not been made out.

[6] The application for an injunction pending appeal is made on the following grounds:

> "1. The 3rd Respondent/Defendant is the registered mortgagee of the 4th and 5th Appellant/Claimants' properties aforementioned and the 2nd and 3rd Appellants/Claimants are the sole owners of the 4th and 5th Appellant/Claimants.

2. That the matter herein was tried in the Supreme Court before His Lordship Mr. Justice King from the 3rd to the 6th day of April 2006 and submissions were submitted in July 2006.

3. That His Lordship Mr. Justice King gave his judgement approximately 6 years later on the 11th day of May 2012.

4. That the findings of His Lordship Mr. Justice King herein were ambiguous and inconsistent with the evidence adduced at the hearing and resultantly the Appellants filed its Notice and Grounds of Appeal in this Honourable Court.

5. That the legitimacy of the 3rd Respondent/Defendant's claim as mortgagees of the abovementioned properties, inter alia, forms the gravamen of appeal herein.

6. That following the judgment of His Lordship Mr. Justice King, the 3rd Respondent/Defendant sold by way of private treaty/or auction the property located at 71 Luke Lane in the parish of Kingston and comprised formally in Volume 1327 Folio 873 of the Registrar [sic] Book of Titles advertised for sale by public auction and has taken positive efforts to sell the other four premises hereinbefore mentioned which the 4th and 5th Claimant currently hold as registered proprietors.

7. That in addition to the 4th and 5th Appellant/Claimant [sic] being the registered owners of the properties, the 2nd and 3rd Appellant/Claimants have equitable interests in each and every property as listed, in particular the property as itemized in no. 1 (i) herein as it is the matrimonial home of the 2nd and 3rd Appellants/Claimants herein.

8. That as a result of the sale of the property stated in paragraph 6 herein by the 3rd Respondent/Defendant, the 2nd and [sic] Appellant/Claimant were forced to close their family business which is their sole means of livelihood and are now before the Resident Magistrate's Court for manse profits by the registered owner thereof.

9. That no justice is foreseeable to the detriment of the 3rd Respondent/Defendant if the injunction is granted. Conversely, any resulting damage to be incurred by the 3rd Defendant may be properly remedied by monetary damages.

10. Should an injunction be refused and the 3rd Respondent/Defendant proceed with the auction sale of any of the properties named herein, the resulting damages to the

Claimants would be such that monetary damages or otherwise would not be an adequate remedy for the Applicants should judgment be handed down in their favour.

11. There are serious issued to be determined in the appeal herein.

12. The balance of convenience favours the Appellants/Claimants."

[7] In his first affidavit in support of the application, Mr Zaidie speaks to the history of the company and its dealings with NCB and NDB, as well as the nature and progress of the litigation from which the appeal arises. He identifies the property registered at Volume 1061 Folio 611 of the Register Book of Titles as the matrimonial home of himself and Mrs Zaidie. He points out that King J heard the matter on 3-6 April 2006, that closing arguments were submitted by the parties in or about July 2006 and that the learned judge's judgment was not given until 11 May 2012. Since delivery of the judgment, active steps have been taken by JRF to sell the company's property under the powers of sale in the mortgages and the justice of the case supports the grant of an injunction pending the hearing of the appeal.

[8] In her affidavit, Ms Patterson confirms that the company's debt to NCB, now held by JRF, is still outstanding and that, as at 24 September 2000, the amount due from the company to NCB under the debt was $67,781,125.05.

[9] The applicants' claim in the court below was to the following general effect. NCB had been the company's banker for a number of years and had at all material times been its main creditor, through loans secured by mortgages over its property and guaranteed by the other applicants. There was relationship of trust and confidence between the applicants and NCB and the company relied at all material times on the

advice of NCB. In or about December 1996, the company presented a proposal to NCB, which acted as agent for NDB, whereby the company would obtain financing from NDB on preferential terms, for the purpose of injecting new capital into the operations of the company, to allow for its expansion to meet "the growing number of orders for garments both locally and overseas". On 3 April 1997 NDB approved a loan to the company of US$600,000.00 and the applicants provided all security required for the loan and incurred expenditure of $3,000,000.00 in reliance on the loan, on the basis that that sum would be reimbursed in due course by NDB. Further, in anticipation of the disbursement of the loan, NCB loaned the company $5,000,000.00 at a rate of interest 46% per annum and allowed the company to draw down this amount, which was used to make purchases contemplated by the loan agreement with NDB "and it was agreed that this sum would have been repaid from the loan by NDB". In breach of contract, and negligently, NCB and NDB failed to reimburse the company the sums expended in anticipation of receipt of the NDB loan and NCB acted negligently in inducing the company, which relied on it, to expend $3,000,000.00 in anticipation of the loan. As part of the consideration for the anticipated NDB loan, the company gave certain security to NCB, including various mortgages (two of which are now the subject of this application), and the NDB loan never having been granted, the consideration for the giving of the security failed and NCB negligently and in breach of an implied term of the contract between the parties failed to return the security granted by the company. NCB having purported to assign the company's debt to JRF, which assignment was void, JRF had threatened to exercise its powers of sale under the mortgages.

[10] On this basis, the applicants claimed damages against NCB and NDB, jointly and severally, for (i) breach of contract and/or negligence and/or breach of duty and/or breach of trust; (ii) declarations (a) that such portions of the contract between NCB and the company that the applicants provide security for the loan were void (b) that NCB should discharge all liens currently stamped on the collateral pledged by the applicants and return such collateral free from all encumbrances and (c) that the applicants should be released from the unlimited guarantees given in contemplation of the loan; and (iii) injunctions restraining the respondents from entering upon the applicants' properties pledged in contemplation of the loan from NDB and from selling and/or dealing with the properties pledged as collateral for the loan from NDB.

[11] In their joint amended defence, NCB and JRF denied that NCB was the agent of NDB and stated that the arrangement between the two institutions was that NCB would from time to time borrow funds from NDB, which it then loaned to members of the public. In the instant case, the arrangement between the parties was that NDB would make a loan of US$600,000.00 to NCB, for on-lending to the company. The proposed loan from NDB was mainly for the purpose of liquidating loans already made by NCB to the company and most of the securities referred to in the statement of claim were in fact provided by the company prior to the approval of the NDB loan, as the company was already heavily indebted to NCB. NDB was not obliged under the terms agreed to disburse any of the loan amount until and unless NCB provided it with certain specified documentation, which the company was in turn obliged to provide to NCB. NCB did make a loan to the company of $5,000,000.00 at the company's request and repayment

of this loan was to be made in fixed monthly instalments. There was no agreement that this loan was to be repaid out of funds expected from the NDB loan. Ultimately, the NDB loan did not materialise because of the company's failure to present to NDB documentation satisfactory to it as required by the agreement for the US$600,000.00 loan. NCB did not act negligently or in breach of duty to the company and the assignment of the company's debt to JRF was lawfully made.

[12] As I have already indicated, the matter was tried before King J on 3, 4, 5, and 6 April 2006, when judgment was reserved, and the learned judge's decision was not forthcoming until 11 May 2012, six years and a month later. A written judgment is still awaited, but I have had the benefit of Mrs Robinson's very helpful note of what the judge actually said in giving his decision. This note was handed up at my request at the end of the hearing of this application and, as I understand the position, it was shared with Mr Dabdoub and Miss Cummings at the same time. Although it cannot in these circumstances be regarded as an agreed note, I propose, in the absence of any contrary indication from the applicants, to treat it as substantially accurate.

[13] It appears from counsel's note that, on the basis of the evidence, King J did not accept that NCB acted as agent for NDB; that there was a special relationship between NCB and Mr Zaidie; that the company entered into the transaction as a result of any inducement offered by NCB; and that there was a contractual relationship between NDB and the company or that NDB acted negligently. However, he accepted that the arrangement between NDB and NCB was as described by NCB; that prior to the application for the NDB loan the company was indebted to NCB in the sum of

$19,000,000.00 and that the debt was not being serviced; and that much, if not all, of the security for the NDB debt was already held by NCB in relation to the company's prior indebtedness. He therefore formed the view that the intention of both the company and NCB was to deceive and obtain from NDB the proceeds of the loan and use it for a purpose other than that intended. As between the company and NCB, the doctrine of *ex turpi causa non oritur actio* therefore applied to bar either party from claiming any right or remedy under the agreement and the claim was an abuse of the process of the court. And finally, JRF was non-suited on its counterclaim, on the ground that it had not presented any acceptable evidence in support of it.

[14] The judge accordingly gave judgment in the following terms:

> "1. There be judgment for the 2nd Defendant on the Claimants' claim with costs to be agreed or taxed.
>
> 2. The Claimants' claim is struck out as an abuse of the process of the court with no order as to costs.
>
> 3. The 3rd Defendant is non-suited on its counterclaim with no order as to costs.
>
> 4. The interim injunction ordered on March 27, 2012 is hereby discharged."

[15] With the understandable exception of NDB, for whom judgment was given by the judge, King J's judgment has left the parties dissatisfied. By notice and grounds of appeal filed on 12 November 2012, the applicants challenge the judgment on a number of grounds, mainly centred on the contention in ground one that the findings of the judge "were manifestly unsound and against the weight of the evidence produced at the trial". The finding of abuse of process is challenged on the ground that there was

no evidence to support it and, as regards the non-suiting of JRF, the applicants say that the judge ought as a result to have gone on to order the release of the mortgages held by it. By counter-notice of appeal filed on 6 December 2012, JRF challenges the judge's finding that there was no evidence to support the counterclaim and, as regards the judge's application of the *ex turpi* doctrine, complains that the judge failed to take into account the absence of any pleading of illegality in the case. And NCB, for its part, also challenges the judge's finding of illegality, on the basis of an absence of any pleading to that effect as well as the lack of evidence of an intention on its part to deceive NDB or that NDB actually deceived.

[16] Miss Cummings referred me to the decision of this court in ***Amauto Ltd v JRF*** (SCCA Nos 27 & 28/2007, judgment delivered 21 November 2008), as authority for the submission that this court had the power to restrain the disbursement of the proceeds of sale of the two properties registered at Volume 1327 Folio 875 and Volume 1327 Folio 876 which, the applicants now accept, are already under contract for sale to third parties. She also referred me to the decision of the court in ***Rupert Brady v JRF*** (SCCA No 29/2007, delivered 21 November 2008), for the proposition that the court will grant an injunction to restrain a mortgagee's exercise of its powers of sale in cases in which there are triable issues as to the validity of the mortgage document in which the power of sale is given. And lastly, Miss Cummings directed my attention to the judgment of Panton P (in dissent) in ***Global Trust Jamaica Ltd v JRF*** (SCCA No 41/2004, delivered 27 July 2004), in which that very learned judge expressed the view

that, once there was a serious question to be tried, an injunction could be granted to preserve the rights of the mortgagor.

[17] Following on from Miss Cummings, Mr Dabdoub put the applicants' case on the basis that the mortgages to NCB were given in expectation of the receipt of the proceeds of the loan from NDB and that, this expectation not having been fulfilled, JRF could not now rely on the powers of sale in those mortgages. Any advances made by NCB to the company in that same unfulfilled expectation were now in the nature of unsecured loans. The judge's reasons, given after an inordinate six year delay (as to which I was referred to the decision of the Caribbean Court of Justice ('CCJ') in ***Delys O'Leen Colby v Felix Enterprises Ltd and another*** [2011] CCJ 10 (AJ)), were unintelligible and confusing and it is clear that he had come to the wrong conclusion because of the delay. The appeal therefore has a good prospect of success and a stay should in the circumstances be granted. Mr Dabdoub sought special consideration for the property registered at Volume 1061 Folio 611, on the basis that this was Mr and Mrs Zaidie's matrimonial home.

[18] Mrs Robinson submitted that the appropriate threshold test on an application for an injunction pending appeal, is whether the applicants have a reasonable ground of appeal. If that test is met, then the court must go on to assess whether the grant or refusal of an injunction is more likely to produce a just result at the end of the day. If damages would in fact be an adequate remedy no injunction ought ordinarily to be granted. Against that background, Mrs Robinson resisted the application in three ways. Firstly, that there was no reasonable ground of appeal, in light of the fact that the

judge based his material findings of fact against the applicants on the Mr Zaidie's evidence and/or the plain meaning of the documents in the case. Secondly, damages would in any event be an adequate remedy, since the applicants' potential loss, if any, should be easily quantifiable. And thirdly, if an injunction is to be granted restraining JRF as mortgagee from exercising its powers of sale, it should only be granted on condition that the mortgagor (the company) pay the amount claimed as due under the mortgage into court.

[19] The authority of a single judge of the Court of Appeal to grant an injunction pending appeal derives from rule 2.11(i)(c) of the Court of Appeal Rules 2002 and I accept, as Mrs Robinson submitted, that the proper test to be applied at this stage is whether the applicants have shown that they have reasonable grounds of appeal. In the event that that test is satisfied, then the court must go on to "assess whether granting or withholding an injunction is more likely to produce a just result at the end of the day" (***Auburn Court Ltd v Perrier and JRF*** [2010] JMCA App 5, para. [18]).

[20] The delay in delivering the judgment in this case is on the face of it inordinate and it has remained unexplained. In the ***Delys O'Leen Colby*** case, the CCJ reiterated its previously given guidance that, in general, no judgment should be outstanding for more than six months and, unless the case is one of unusual difficulty or complexity, judgment should normally be delivered within three months. In ***Cobham v Frett*** [2001] 1 WLR 1775, a decision of the Privy Council on appeal from the Court of Appeal of the British Virgin Islands, in which the trial judge had given his reserved judgment a

year and three weeks after the trial ended, Lord Scott of Foscote (speaking for the Board, which included the Rt Hon. Edward Zacca), said this (at para. 35):

> "In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant."

[21] In the result, the judgment of the trial judge, which had been set aside by the Court of Appeal on the ground of the delay, was reinstated by the Board, on the basis that there was no indication that the judge had misremembered or misapplied any of the evidence given at trial. ***Cobham v Frett*** has been followed in a number of cases, both in the Privy Council and in England, the most recent to have come to my attention being ***Jervis and another v Skinner*** [2011] UKPC 2, an appeal from the Court of Appeal of The Bahamas, in which the trial judge's judgment had been delayed for a year and five months. However, the Board did accept in that case (at para. 45) that "where there is excessive delay the appeal court must consider the findings of fact of the judge with particular care".

[22] So in the instant case, it seems to me, it will be necessary for the applicants to demonstrate when the appeal comes on for hearing that King J's delay in delivering his judgment, albeit inexcusable, had an impact on the judgment which he did give, whether as a result of an imperfect recollection or a misapplication of the evidence. In

this regard, there is, it also seems to me from the note of his judgment which I have seen, some indication that King J was, despite the delay, alive to and did make intelligible findings on some of the crucial issues in the case. For instance, what was the nature of the relationship as between the company and NCB, between NCB and NDB, and as between the applicants and NDB; what was the nature of the arrangements by which it was intended that the company should access the benefit of the NDB loan; whether there was any breach of contract by either NCB or NDB; and whether much of the security held by NCB had in fact been given prior to the NDB involvement.

[23] On the other hand, I must bear in mind, I think, that the judge's findings of illegality and abuse of process (which appear to be the true basis of the applicants' claim being struck out), in the absence of any pleading or, it appears, evidence to ground them, have attracted the unanimous disapproval of the applicants, NCB and JRF. One explanation for this, assuming that the challenge to this aspect of the judgment is made good on appeal, could well be that, because of the delay in delivering the judgment, the judge misapprehended the nature of the parties' pleaded cases and the evidence that had been placed before him in 2006. So, on balance, I am not prepared to say at this still preliminary stage that there is no reasonable ground of appeal on the issue of delay.

[24] But it nevertheless remains necessary to consider the status of JRF as a mortgagee seeking to exercise its powers of sale under the mortgages. Mr Dabdoub

contended strongly that, in the light of JRF having been non-suited, the judge erred in not making an order that the mortgages held by it should be released and returned to the applicants. In my view, this submission fails to take into account the special features of a mortgage, which consists of "a personal contract for the payment of a debt and a disposition or charge of an estate or interest of the mortgagor as security for the repayment of the debt" (Halsbury's Laws of England, 3rd edn, vol. 27, para. 237). Mortgages of land falling under the Registration of Titles Act are governed by the provisions of the Act as regards both their creation and their discharge (sections 103-125) and the form of mortgage prescribed by section 103 and set out in the Eighth Schedule to the Act demonstrates the dual nature of the instrument. Thus, the fact that JRF counterclaimed for the sums due from the company under the contract for repayment constituted by the mortgages cannot, in my view, affect its position as mortgagee of the properties comprised in those mortgages.

[25] It therefore seems to me that Mr Dabdoub's submission on this point is untenable and does not provide a reasonable ground of appeal. Accordingly, if the mortgages remain unaffected by King J's judgment non-suiting JRF, it must follow that it is open to JRF to enforce the obligations of the mortgages in the ways contemplated by the mortgage documents and the Act itself. It follows further that the applicants' case for an interim injunction must necessarily fall away by the operation of what Harris JA described in ***Leicester Green v JRF*** [2010] JMCA 21, para. [38], as the "settled rule [that] no restriction will be placed on a mortgagee in the proper exercise of his powers of sale". In coming to this conclusion, I have not lost sight of the applicants'

appeal for special consideration in respect of the matrimonial home, but this point is in my view also completely covered by the authority of ***Leicester Green v JRF***, in which Harris JA said this (at para. [39]):

> "It was also contended by the appellant that the sale of the property would result in his family and himself being deprived of their home. At the time of the execution of the mortgage deed, the appellant would have been aware that if Gold Star defaulted on the loan, the property would become subject to being sold by the mortgagee. This is a risk which he had taken. He therefore cannot now justifiably complain about the prospects of the loss of his home."

[26] As regards ***Amauto Ltd v JRF***, in which the court made an order preventing dissipation of the proceeds of sale of property subject to a mortgage pending appeal, it is clear that, by reason of what was described in the judgment of Dukaharan JA as "irregularities", the court was of the view that it was a proper case for the grant of an injunction to restrain the mortgagee from exercising its powers of sale. In the instant case, which as I have indicated I do not consider to be such a case, the question of restraining the mortgagee from dissipating the proceeds of sale of the properties already subject to sale contracts simply does not arise.

[27] For completeness, I would add that, had I considered that this was a proper case for the grant of an injunction pending the hearing of the appeal, the grant of the injunction would have had to be on condition, in accordance to well settled principle, that the applicants bring into court the full amount claimed by JRF as due under the mortgages (see ***SSI (Cayman) Ltd v International Marbella Club SA***, SCCA No

57/1986, judgment delivered 6 February 1987, ***Leicester Green v JRF***, ***Auburn Court v JRF*** and ***Mosquito Cove Ltd v Mutual Security Bank Ltd et al*** [2010] JMCA Civ 32). It is clear from a reading of ***Rupert Brady v JRF***, upon which Miss Cummings relied, that the exceptional circumstance accepted by this court as a basis for departing from the general rule in that case was the mortgagor's challenge to the validity of the mortgage document itself, a feature which is missing from the instant case.

[28] The application for an injunction pending the hearing of the appeal must therefore be dismissed, with costs to JRF to be agreed, if not sooner taxed.