

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 126/2010**

**BEFORE: THE HON MR JUSTICE PANTON P  
THE HON MR JUSTICE DUKHARAN JA  
THE HON MR JUSTICE HIBBERT JA (AG)**

<b>BETWEEN</b>	<b>DIV DEEP LIMITED</b>	<b>1<sup>ST</sup> APPELLANT</b>
<b>AND</b>	<b>MAHESH MAHTANI</b>	<b>2<sup>ND</sup> APPELLANT</b>
<b>AND</b>	<b>HARESH MAHTANI</b>	<b>3<sup>RD</sup> APPELLANT</b>
<b>AND</b>	<b>TEWANI LIMITED</b>	<b>RESPONDENT</b>

**Christopher Dunkley and Miss Janene Laing instructed by Gregory Lopez of Lopez and Lopez for the appellants**

**Miss Carol Davis for the respondent**

**6, 9 June and 28 July 2011**

**PANTON P**

[1] This appeal is from a judgment of Mrs Justice Lawrence-Beswick delivered on 20 October 2010 granting to the respondent possession of land registered at Volume 1391 Folio 496 of the Register Book of Titles, and striking out the ancillary claim brought by the appellants against the respondent.

[2] On 6 March 2007, the respondent filed a fixed date claim form seeking the following:

- i. an order for possession in respect of 81B King Street, Kingston registered at Volume 1391 Folio 496 of the Register Book of Titles;
- ii. mesne profits for the appellants' use and occupation of the property from 8 December 2006; and
- iii. interest at a commercial rate.

[3] The appellants brought an ancillary claim against the respondent and others. In the record, the respondent is referred to as the 5<sup>th</sup> ancillary defendant. In that claim, the appellants sought rescission of the transfer of the land referred to above which has been registered in favour of the respondent. The appellants alleged that there had been a fraudulent circumvention of a caveat that had been recorded against the said property, and that the respondent had falsely represented itself as a disinterested 3<sup>rd</sup> party bona fide purchaser for value without notice when at all material times it was not, given the subsequent passing of its interest in the property to another.

[4] On 22 April 2010, the respondent filed an application for court order seeking to have the fixed date claim determined summarily, and for judgment to be entered in its favour against the appellants. The respondent asked that the mesne profits be awarded in accordance with the rental values set out in the expert report supplied by D C Tavares Finson Realty Limited. Interest was also sought at the rate of 15% per annum.

[5] There were other orders that were sought but they are irrelevant for the purpose of the determination of this appeal.

[6] The main ground on which the application was made was that the respondent had purchased the property at a public auction, and so there was no defence to the claim for possession. The respondent relied on affidavits dated 6 March 2010 and 7 April 2010 filed by its managing director as also on the expert report of D C Tavares Finson Realty Limited.

[7] The evidence presented was to the effect that the respondent's managing director, Mr Gordon Tewani, attended an auction held in August 2006 at the instance of National Commercial Bank Jamaica Limited in respect of the property described in the fixed date claim form. There were several bidders at the auction. Mr Tewani's bid was the highest and he emerged as the successful bidder. Consequently, the property was registered in the name of the respondent on 7 December 2006. At the time of the registration, the appellants were in possession and up to the time of the hearing of this appeal were still in possession notwithstanding requests that have been made of them to deliver up possession to the respondent.

[8] The response of the appellants came in the form of affidavits filed by Mr Tariq Malik, a used car dealer, and Mr Mahesh Mahtani, the 2<sup>nd</sup> appellant. Mr Malik spoke of having a conversation with Mr Tewani on the morning of the auction wherein he advised Mr Tewani that the Mahtanis' company had purchased the part of the building occupied by them from Topaz Jewellers, who were then the registered proprietor. The

property had been mortgaged by Topaz Jewellers to the National Commercial Bank. The fact of the purchase by the appellants had been advertised, according to Mr Malik, and the aim was to warn prospective bidders at the auction of the danger in entering into any transaction for the purchase of same. The auctioneer, according to Mr Malik, advised the bidders that there were two titles involved, and inquired whether they wished to bid separately. All bidders, including Mr Tewani, decided to bid for both properties together. As indicated earlier, Mr Tewani was the successful bidder. He paid a total of \$37,000,000.00 for the properties.

[9] It is appropriate at this stage to make clear the fact that the properties purchased at the auction have been referred to in the record of appeal and the submissions as lots 81A and 81B. The former lot has since been sold and transferred to another, whereas lot 81B was transferred to the respondent. As stated above, the total sum paid for both lots was \$37,000,000.00. At the material time, these properties were mortgaged to the National Commercial Bank. The matter before us is in relation to lot 81B. The appellants claim to have purchased lot 81B from Topaz Jewellers Ltd. However, this sale never reached completion.

[10] For his part, Mr Tewani said he was not aware of any advertisement warning him against purchasing the property as he had been on a trip to India and had returned just in time for the auction. He was of the view that if there was any impediment to purchasing the property, the interested party would have sought an injunction from the court. It should be noted that Mr Tewani attended the auction with his attorney, Mrs Jennifer Messado.

[11] The record of appeal includes the advertisement referred to by Mr Malik. At page 37, there is a document headed "PAID ADVERTISEMENT BY TOPAZ JEWELLERS LIMITED REGARDING THE PROPOSED AUCTION OF 81B KING STREET". Below this headline is a narration that it had come to the attention of Topaz Jewellers that the bank was about to exercise its power of sale at an auction scheduled for 17 August 2006. The public was being notified by the advertisement that the mortgage is void and unenforceable for several reasons including that it was obtained by undue influence. It refers to an existing suit between the bank and Topaz Jewellers which was "proceeding to trial in the normal way". At page 39 of the record, there is confirmation that on 16 January 1996, a transfer of the property had been registered in favour of Topaz Jewellers, the consideration being \$4,500,000.00.

[12] The 2<sup>nd</sup> appellant, Mr Mahtani, disputed Mr Tewani's claim of ignorance of the advertisement. He said that Mr Malik had informed Mr Tewani in his (Mahtani's) presence that the appellants had purchased the property from Topaz Jewellers but the latter had mortgaged it to National Commercial Bank. It seems that the appellants were unable at that time to provide proof of payment for the property considering Mr Mahtani's statement that Mr Tewani had told Mr Malik that he was sorry for the situation in which the appellants had found themselves as they "should have known better than to do business in that manner in not taking receipts for monies paid for purchasing the building"(p. 111 of the record para. 7). However, the record of appeal at pages 200 and 204 show receipts of \$5,151,040.00 and \$9,648,960.00 respectively as being for payments towards the purchase price.

## **The judge's findings**

[13] The learned judge found that there was no defence to the claim. She expressed herself thus:

"The law as I understand it, is quite clear as it concerns the effect of registered proprietorship of land. It does not brook credible argument. The registered title can only be defeated by fraud. As there is no proof of fraud here, it cannot be defeated even if the purchaser were aware of another interest being claimed. In the circumstances therefore the claim can be dealt with summarily."

The learned judge found that Mr Tewani attended a public auction and purchased the property as permitted by law. The property, she said, was being sold under the unfettered mortgagee's powers of sale.

## **The grounds of appeal**

[14] The following grounds of appeal were filed with a view to having the judge's order set aside:

- "1 The Learned Judge in Chambers erred in arrogating to herself the role of trial judge in circumstances where sufficient evidence was before the Court which ought properly to be considered at a trial of the Ancillary Claim against the 5<sup>th</sup> Ancillary Defendant;
2. The Learned Judge in Chambers erred in failing to consider or at all that the issue of the circumvention of the Ancillary Claimants' caveat lodged at the Office of the 6<sup>th</sup> Ancillary Defendant was a material piece of evidence which required examination, before a trial court before summarily dismissing the Ancillary Claimants' case;

3. The Learned Judge in Chambers erred in failing to give any sufficient regard or at all to the evidence before the Court as to the conduct of the 5<sup>th</sup> Ancillary Defendant which led to the partition of the lots at issue after its purported purchase but before registration of the respective interests for the purposes of:
  - a. on-selling one of the lots at issue to a previously undisclosed purchaser, Royale Jewellers owned by Shashi and Renuka Khemlani and,
  - b. of making a material misrepresentation of their values to the 6<sup>th</sup> Ancillary Defendant, for the express purpose of fraudulently defeating the Ancillary Claim; of which both issues ought properly to be the subject of a trial.
4. Determining the matter without any mention or at all in the Judgment of the Learned Judge in Chambers of the cogent evidence of the material misrepresentation of the values of the lots at issue which resulted in a determination in the 5<sup>th</sup> Ancillary Defendant's favour.
5. The Learned Judge in Chambers erred in failing to give any sufficient regard or at all to the Ancillary Claimants' rights to have the 5<sup>th</sup> Ancillary Defendant cross-examined at trial in circumstances where evidence of fraud was before the Court, thereby shutting out a significant aspect of their claim.
6. The Ancillary Claim to proceed against the other Ancillary Defendants, separate from the original claim The Learned Judge in Chambers erred in that having permitted any subsequent disclosure through the trial process to further implicate the 5<sup>th</sup> Ancillary Defendant of fraud was rendered nugatory by her Judgment ordering its summary release.

7. The Learned Judge erred in failing to recognize that her duty to consider whether the case at bar had sufficient prospects so as to be permitted to proceed to trial was independent of any obiter comments of the Court of Appeal which may have been misconstrued as pre-judging the case before her.”

### **Unresolved issues**

[15] It has to be noted that there are unresolved issues between the appellants on the one hand and Topaz Jewellers and the National Commercial Bank on the other, in that:

- a) Topaz Jewellers, having allegedly received a substantial portion of the sale price, have defaulted in giving a good title to the appellants;

and

- b) National Commercial Bank, being aware of the arrangement between the appellants and Topaz Jewellers in respect of the property, lent money to Topaz and then exercised its power of sale to the detriment of the appellants.

These are not issues for determination before us. That being so, it will be appreciated that comments made at the hearing and in the written submissions on those aspects will not be addressed in this judgment. It should be mentioned, however, that the property having been purchased at the auction, it was transferred into the name of Royale Jewellers which the appellants allege is owned and controlled by persons who are related to the previous owners of the property.



## **The submissions**

[16] In their written submissions, the appellants stress that the participation of the respondent's representative in the auction was at the behest of Topaz Jewellers for the specific purpose of facilitating the reacquisition of the property at the expense of the appellants. Further, the appellants are contending that the respondent and the National Commercial Bank made fraudulent representations to the Registrar of Titles to effect the transfer for a consideration that was contrary to the pertinent and ascertainable value of the property. The total sum of \$37,000,000.00 paid by the respondent for the property is far below the commercial value, the appellants contend. Consequently, they say that the transaction was fraudulent. According to the appellants, the respondent gave the impression that it was a bona fide purchaser for value, but its action was merely aimed at defeating the appellants' equitable claim.

[17] The appellants said that they intended, if the court below had refused the respondent's application, to seek discovery of the process by which Royale Jewellers came to be registered as proprietor of the interest bought by the respondent at the auction. The result they had hoped for was expressed thus in their written submissions:

"Discovery on this issue would be important as on its face, Royale Jewellers Limited purchased Lot 81A directly from [National Commercial Bank]. If that purchase was for value ..., then any deposit paid by the Respondent would be the extent of its interest, or more likely refunded; in either case it would not have paid any proper consideration or at all, and so may not be recognized as a bona fide purchaser for value of Lot 81B."

[18] The main complaint against the judgment of Lawrence-Beswick J is her failure to find that there had been a fraudulent misrepresentation by and involving the respondent as regards the consideration for the two lots. This failure resulted in the consequential determination of summary judgment being flawed, said the appellants. In the opinion of the appellants, there was sufficient material that warranted "further examination and explanation to be elicited at the trial".

[19] In the oral submissions before us, Mr Christopher Dunkley for the appellants acknowledged that the learned judge wrote a clear judgment. He stressed that Royale Jewellers ended up owning lot 81A although that entity was not at the auction. He said that there was evidence of fraud for the learned judge to consider. When pressed to specify the evidence of fraud, he referred to the two affidavits filed by Mr Gordon Tewani, and the affidavits of Miss Carol Davis and Mrs Jennifer Messado, attorneys who have acted for the respondent. To these he added the certificate of title, the valuation and the recorded consideration. He said that disclosure of the true consideration paid by Royale Jewellers will determine the issue. There was, he said, a prima facie case of fraud due to a complete disconnect between the value of the property and the consideration. He conceded, however, that he could not say whether there was fraud on the part of the respondent at the time of the determination of the matter by Lawrence-Beswick J.

[20] In response, Miss Carol Davis for the respondent submitted that a registered title may only be defeated by fraud, and that the only defence raised was the respondent's alleged notice of fraud. In her view, there was nothing in the transaction to suggest

fraud. As regards the caveat, where it is claimed that there was a circumvention of the caveat, Miss Davis submitted that a caveat protects an equitable interest but its existence would not prevent the exercise of a power of sale by the mortgagee. She referred in this regard to section 106 of the Registration of Titles Act.

[21] Miss Davis responded to the following grounds of appeal and the appellants' submissions thereon as follows:

**Ground 3:** It is incorrect to say that the lots had been partitioned before the sale. There had always been two lots.

**Ground 4:** There is no evidence of misrepresentation of the values.

**Ground 5:** There is no principle that you can have a person as a defendant give evidence so that you can cross-examine.

**Ground 6:** There was no request for further disclosure. This ground accepts that there is no evidence of fraud. It shows that the appellants are trying to go on a fishing expedition.

### **Determination of the appeal**

[22] Section 71 of the Registration of Titles Act provides:

"Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such

trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

When applied to the instant case, it means that the respondent, barring fraud, by purchasing lot 81B, is not required to enquire or ascertain the circumstances under which the previous proprietor was registered. Nor is the respondent affected by notice of any trust or unregistered interest, notwithstanding any rule of law or equity to the contrary. In addition, knowledge of any such interest is not of itself to be imputed as fraud.

[23] In the circumstances of this case, there is additional statutory protection for the respondent, it having purchased the property as a result of the exercise of a power of sale under a mortgage. Section 105 of the Registration of Titles Act reads:

“A mortgage ... under this Act shall, when registered ... have effect as a security ...; and in case default be made in payment of the principal sum, interest or annuity secured, or any part thereof respectively, ... the mortgagee ... may give to the mortgagor ... notice in writing to pay the money owing ... .”

Section 106 provides for the possible consequence of failing to comply with the notice.

It reads thus:

“If such default in payment, ... shall continue for one month after the service of such notice, ... the mortgagee ... may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, ... and resell in manner aforesaid, without being liable to the mortgagor ... for any loss occasioned thereby, ... and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, ... or whether such

notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale;... .”

[24] The statutory picture for the present purposes is completed by section 108 which provides that upon registration of any transfer signed by a mortgagee, the estate and interest of the mortgagor shall pass to and vest in the purchaser, freed and discharged from all liability on account of such mortgage. The purchaser is then entitled to be registered as proprietor and to receive a certificate of title to the property.

[25] Given the statutory provisions outlined above, the position of the respondent is untouchable – barring fraud.

[26] The thrust of Mr Dunkley’s arguments has been that the acquisition by the respondent was fraudulent. His line of reasoning was puzzling. There is no doubt that there was a mortgage over the property in favour of National Commercial Bank, and that the loan payments were in arrears causing the bank to exercise its power of sale. The borrowers Topaz Jewellers were supposed to have contracted to sell the property to the appellants who say that they have paid to Topaz Jewellers a substantial portion of the selling price. The appellants though aware of the public auction took no steps through the courts to halt the same auction. Indeed, Mr Malik who seemed to have been an agent of theirs is supposed to have participated in the bidding process at the auction. He participated while urging the respondent’s managing director Mr Tewani not to participate. The urging of Mr Dunkley has been that Mr Tewani, having been advised of the appellants’ dealings with Topaz Jewellers, should have refrained from

participating in the auction; he, having ignored the advice, has somehow provided the fraudulent ingredient that is necessary to set aside the transaction!

[27] With the greatest of respect to Mr Dunkley, his arguments are without substance. His suggestion that the learned judge should have allowed the case to be tried in order for there to be cross-examination to explore the allegations of fraud shows clearly that there is no evidence of fraud. As Miss Davis has said, the appellants are seeking to go on a fishing expedition.

[28] The respondent's acquisition of lot 81B was in keeping with the law. It was completely above board. The learned judge was correct in her assessment of the evidence and the application of the law. In the circumstances, the appeal is without merit and must fail.

#### **DUKHARAN JA**

[29] I have read in draft the judgment of my brother Panton P and I agree entirely with his reasons and conclusions. I have nothing further to add.

#### **HIBBERT JA (Ag.)**

[30] I too agree with the reasoning and conclusions of Panton P.

**PANTON P**

**ORDER**

Appeal dismissed. Order of Lawrence-Beswick J made on 20 October 2010 affirmed.

Costs of the appeal to the respondent to be agreed or taxed.