

NMLP

**JAMAICA**

**IN THE COURT OF APPEAL**

**CIVIL APPEAL NO: 15/2001**

**BEFORE:           THE HON MR. JUSTICE BINGHAM, J.A.  
                      THE HON MR. JUSTICE HARRISON, J.A.  
                      THE HON MR. JUSTICE SMITH, J.A. (Ag.)**

**BETWEEN:       ESSEX EXPORT INC.                   PLAINTIFF/  
                                                                                          APPELLANT**

**AND               FLAMSTEAD RESORTS LTD.   DEFENDANT/  
                                                                                          RESPONDENT**

Maurice Manning and Miss Camille Wignall for appellant  
instructed by Nunes, Scholefield, DeLeon & Co.

Abe Dabdoub for respondent instructed by Clough, Long & Co.

**April 16, 17, 18, and May 16, 2002**

**HARRISON, J.A:**

This is an appeal from the order of Mrs Justice Norma McIntosh on  
February 5, 2001, granting in favour of the defendant/respondent:

"An injunction enjoining the plaintiff by itself; its  
servants and/or agents, howsoever, from taking  
steps to enforce its mortgage No. 1047067  
endorsed on the Certificate of Title registered at  
Volume 1170 Follo 451 ... and known as 13 Mark  
Way, Manor Upper Mark Way ... in the parish of St.  
Andrew until the final determination of this action  
..."

The appellant had filed in the Supreme Court, on 10<sup>th</sup> June 1999 an Originating Summons, Suit No. E234/99 against the respondent and the Registrar of Titles seeking:

- "1. A declaration that the plaintiff is entitled to be registered as a second legal mortgagee under instrument of mortgage dated January 8, 1999 between the plaintiff and ... defendant of the land ... at Volume 1170 Folio 451 in the amount of US\$500,000
2. An order that the Registrar of Titles do register (the said Mortgage) ... on payment of the required registration fee under the Registration of Titles Act on presentation ... for registration".

The respondent entered an appearance to the said originating summons on 28<sup>th</sup> July 1999.

The relevant facts are that Pacific Motors Ltd. requested the appellant to grant it trade financing, in the sum of US\$500,000.00 to Import motor cars into Jamaica. As security for such financing the respondent Flamstead Resorts Ltd. and Douglas Sinclair executed a guarantee and indemnity agreements with and in favour of the appellant to cover any monies due and owing to the appellant. The guarantee and indemnity agreements were signed on 8<sup>th</sup> January 1999. On the said date the respondent also executed a mortgage in favour of the appellant, "... Supplemental to a guarantee and indemnity of even date herewith ..." to cover the said financing to be granted to Pacific Motors Ltd. The premises mortgaged were both owned by the respondent, namely (1) Lot 13 part of Cherry Gardens, St Andrew registered at Volume 1170 Folio 451 and (2) Lot 3 part of Dry Harbour Wharf lands, Discovery Bay, St Ann, registered at Volume 495 Folio 41, both under the

Registration of Titles Act. On the said 8<sup>th</sup> January 1999, Pacific Motors Ltd executed a promissory note in favour of the appellant payable "... on demand ..., in the sum of US\$106,084.18 together with interest". The Registrar of Titles refused the request of the appellant to register the mortgage to include land registered at Volume 495 Folio 4, because the first mortgagee thereon had refused to lend the Certificate of Title thereto for that purpose. The power of sale was subsequently exercised by the said first mortgagee and the surplus on sale of land at Volume 495 Folio 4, was paid over to the appellant. The said guarantee and indemnity and the mortgage documents had been executed by Flamstead Ltd and were all signed by Douglas Sinclair as "director". The promissory note was executed by Pacific Motors and signed by Douglas Sinclair as "chairman".

Subsequently, the said mortgage was registered on Title to land at Volume 1170 Folio 451 by the Registrar of Titles on 7<sup>th</sup> September 1999, as No. 1047867. The mortgage on land at Volume 451 Folio 4, was no longer relevant. Consequently the appellant's originating summons No. E234/99 was not proceeded with.

On 5th May 2000, the appellant notified the respondent mortgagor by registered post of its intention to exercise its power of sale as mortgagee, in accordance with section 105 of the Registration of Titles Act, in the event of non-payment of the mortgage monies due. The mortgagor had been in default in payment.

As a consequence, the respondent mortgagor, in order to attempt to prevent the said sale, filed on 14th December 2000, an ordinary summons

seeking an interlocutory injunction against the appellant, the mortgagee, to restrain it:

“... from taking steps to enforce its mortgage No. 1047067 ...”

As stated above, the injunction was granted on 5th February 2001. The latter summons numbered “E234A/99”, was presumably consequential on the appellant’s originating summons No. E234/99.

The originating summons, under the provisions of the Judicature (Civil Procedure Code) Law, may be used where a declaratory judgment is sought.

Section 531A reads:

“531A. Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a Law or an instrument made under a Law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed”.

The respondent, in an affidavit of Douglas Sinclair, one of its directors, dated October 3, 2000, agreed that it granted the said mortgage to the appellant to secure financing of US\$500,000 by the appellant to Pacific Motors, a company in which the said Douglas Sinclair was also a director. The respondent admitted executing a guarantee and indemnity in further support of financing, but disputed any disbursement of funds, and contended that the said mortgage was incomplete and that no monies were due and owing thereunder.

There would therefore be a substantial dispute on the facts and issues arising thereunder.

Mrs Justice N. McIntosh in the court below recognized the existence of such issues where she stated in her reasons, inter alia:

"The validity of the notice needs to be taken into consideration ... The issues are arguable. Serious questions of interpretation and construction fall to be determined at the hearing of the substantive matter ..." (Emphasis added)

The Judicial Committee of the Privy Council in **Eldemire v Eldemire** (1990) 38 WIR 234 advised ( per Lord Templeman), at page 238:

"As a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts ... Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim".

The originating summons filed by the appellant was not treated "... as if ... begun by writ". Clearly, this could not have been so treated because there was in fact no originating summons then for hearing before the learned judge below, and such an order could not properly be made on the basis of a mere ordinary summons seeking the issue of an injunction.

Furthermore, an injunction is granted by a court to a plaintiff who can show some proprietary right or interest in any subject matter sought to be protected by some action or similar process. In **American Cyanamid Co. v Ethicon Ltd.** [1975] 1 All ER 504 the principles governing the grant of an injunction were firmly established by the words of Lord Diplock. He said, at page 509:

"... when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or

not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action". (Emphasis added)

and on page 510:

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial".

His Lordship had observed at page 508, that:

"The grant of an interlocutory injunction is a remedy that is both temporary and discretionary".

Consequently by referring to "... final judgment ... in the action" and "damages recoverable ... in the action ..." and also "... uncertainty resolved ... at the trial", his Lordship was demonstrating the temporary nature of the interlocutory injunction and the anticipated trial of the action in order to resolve the issues. An injunction cannot be granted "in isolation". In the instant case there was no question to be tried. Technically, a defendant in a suit may successfully obtain an injunction against a plaintiff, but the former must also first show a corresponding right to be protected. Ironically, the finding by the judge below that;

"First Defendant/Applicant's assertions are not to be regarded as counter claims but are made to show why the Plaintiff is not entitled to register its mortgage". (emphasis added)

reveals a basic procedural deficiency in the respondent's use of a summons other than an originating process to ground an application for an injunction.

No proprietary right or interest or any cause of action arising in favour of the respondent has been shown by the respondent to exist, by the use of its said summons. In those circumstances, it is our view that no court could properly even order that the appellant proceed with the originating summons or that it do so, as if begun by writ. The appellant would have had no interest in proceeding any further with its originating summons. It had already obtained all that it was seeking, namely, the registration of its mortgage No. 1047867. There was clearly at that time no writ or other originating process before the judge below, or any cause of action in protection of any right, upon which the issuance of an injunction could have been grounded.

We agree with the submission of Mr. Manning for the appellant on his first ground argued that:

"The learned trial judge erred in granting an interlocutory injunction on the application contained in the plaintiff's originating summons when the first defendant had no established cause of action".

However, we do not quite agree that the injunction was granted "in the plaintiff's originating summons". In our view, in all the circumstances, we find it unnecessary to deal with the other grounds argued.

The appeal is therefore allowed. The order of the judge below is set aside. There shall be costs to the appellant in respect of the appeal and also in the court below.

BINGHAM, J.A.

I agree

SMITH, J.A. (Ag.)

I agree