[2012] JMCA App 5

JAMAICA

SUPREME COURT CIVIL APPEAL NO 6/2011

APPLICATION NO 208/2011

BETWEEN	**WILFRED EMMANUEL FORBES**	**1ST APPLICANT**
	COWELL ANTHONY FORBES	**2ND APPLICANT**
AND	**MILLER'S LIQUOUR STORE (DIST.) LIMITED**	**RESPONDENT**

Christopher Dunkley instructed by Phillipson Partners for the applicants

Mrs Marvalyn Taylor-Wright instructed by Taylor-Wright & Co for the respondent

28 November, 9 December 2011 and 21 March 2012

IN CHAMBERS

MORRISON JA

[1] On 9 December 2011, after hearing submissions on behalf of the applicants and the respondent on 28 November 2011, I refused this application for an interim injunction pending the hearing of an appeal to this court in this matter, with costs to the respondent, to be agreed or taxed. These are the promised reasons for that decision.

[2] The appeal which is currently pending before this court is from a judgment of Smith J given on 17 December 2010, after a hearing which took place on 13, 14 and 15 December 2005. In order to gain even the barest appreciation of the nature of the application that was before me, it is necessary to say something about the background to the claim which was before the learned judge, which I am happily able to take from her detailed written judgment.

[3] The claim arose out of an agreement for sale entered into on 14 September 1993, between the applicants as purchasers and the respondent as vendor, in relation to property located at Brumalia in the parish of Manchester and contained in certificates of title registered at Volume 1035 Folio 462 and Volume 1053 Folio 757 of the Register Book of Titles. The agreed purchase price was $5,500,000.00, payable by an initial deposit of $550,000.00, with the bulk of the balance of the purchase price to be secured on a vendor's mortgage to be given by the applicants to the respondent on the security of the property. On 15 September 1993, the parties duly executed a mortgage agreement, which was stated to be for a period of 10 years, to secure a principal sum of $4,000,000.00, at a rate of interest of 15% *per annum.* However, neither the transfer to the applicants nor the mortgage was ever registered on the certificates of title.

[4] In 2001, the applicants defaulted in their mortgage payments and the respondent served them with a notice (dated 22 June 2001), purportedly pursuant to section 105 of the Registration of Titles Act ('the RTA'). The notice stated that, should their default not be cured within 30 days of the date of the notice, the property would be sold "in

accordance with the Powers of Sale contained in the mortgage dated 15 September 1993". On 30 August 2001, the respondent entered into a contract with Duncarl Ltd for the sale of the property to it at a price of $8,000,000.00 and on 20 September 2001 the applicants filed action against the respondent in the Supreme Court claiming, among other reliefs, (i) a declaration that they were entitled to redeem the mortgaged property upon payment of whatever sums were found to be due to the respondent on the taking of an account; (ii) a declaration that the purported contract for sale of the property to Duncarl Ltd was for a "gross undervalue"; (iii) an injunction to restrain the respondent from taking any further steps to complete the contract of sale to Duncarl Ltd and seeking registration of any instrument of transfer of the property until trial of the action; and (iv) damages for negligence, breach of contract and "wrongful exercise of the powers of sale thereof" .

[5] By a reserved judgment given on 18 October 2002, Anderson J granted an interlocutory injunction against the respondent in the terms sought, on the applicants' undertaking as to damages in the usual terms and on condition that the applicants "pay into an interest bearing account at a commercial bank in Kingston, in the joint names of the Attorneys at law on the record, the sum allegedly due to the [respondent] as set out in the [respondent's] managing director's affidavit, to abide the outcome of the trial…within ten (10) days".

[6] Smith J considered that the determination of the case gave rise to three issues, that is, (a) what are the rights of a mortgagee of registered land under an unregistered mortgage agreement ('the first issue'); (b) was the applicants' equity of redemption

extinguished ('the second issue'); and (c) did the respondent discharge its duty of care towards the applicants ('the third issue').

[7] In respect of the first issue, the learned judge took the view, after careful consideration of the provisions of the RTA, in particular sections 63 and 105, that a mortgagee of registered land whose mortgage was not registered on the title "has no status under the Act…" and that the power to of sale given by section 106 does not apply to such a mortgagee (para. 12 of the judgment). However, the judge found, although such a mortgage could not take effect at law, because of its non-registration, it could and did take effect as an equitable mortgage. The rights of a mortgagee under an equitable mortgage accordingly derived from the general law, under which the matter was governed by the contract between the parties. In the instant case, the mortgage agreement did contain an explicit power of sale which, although obviously drafted on the assumption that the RTA would apply, had "an existence of its own outside the Act" (para. 15). On this issue, the learned judge accordingly concluded that the respondent, albeit an equitable mortgagee of the property, did have the right to sell upon the applicants' default. (See also the very similar analysis on the identical point in the New South Wales case of ***King Investment Solutions Property Ltd v Hussain*** NSWSC 1076, para. 54, which Smith J expressly adopted at para. 14 of her judgment.)

[8] On the second issue, the applicants' contention at trial was that their equity of redemption was not extinguished by the contract of sale entered into by the respondent with Duncarl Ltd. The basis of this contention was two-fold. Firstly, that the applicants had, after having made arrangements with the respondent to settle their outstanding

debt under the mortgage, tendered to the respondent a cheque for the full amount owing under the mortgage on 31 August 2001 and that the respondent, having accepted the cheque, was estopped from returning it or had waived its rights to do so. The second limb of the contention was that the respondent was guilty of bad faith in its dealings with the applicants. The learned judge found against the applicants on both limbs, primarily on factual grounds. Thus she specifically found that the sum tendered by the applicants was insufficient to satisfy the mortgage debt, that the sum sent by cheque to the respondent could not be regarded as a tender and that the respondent "did not agree to the settlement of the mortgage debt with the [applicants] and did not accept the cheque as full and final settlement of the debt" (para. 21). Further, there was no bad faith on the part of the respondent, the equity of redemption was accordingly extinguished and there was no basis on which the respondent could be restrained from completing the sale of the property to Duncarl Ltd. On this last point, Smith J referred to and relied on ***Waring v London and Manchester Assurance Co. Ltd*** [1934] 1 Ch 311 and ***Shackleford v Mount Atlas Estate Ltd*** (SCCA No 148/2000, judgment delivered 20 December 2001).

[9] And finally, on the third issue, the learned judge found that the respondent had breached its duty of care to the respondents in the exercise of its powers of sale under the mortgage, primarily on the ground that it failed to advertise the property properly before selling to Duncarl Ltd. This failure therefore "significantly affects the [respondent's] ability to show that it had obtained the best price possible" (para. 27). The judge founded her analysis on this issue on the well known decision of the Court of

Appeal of England in ***Cuckmere Brick Co. Ltd v Mutual Finance Ltd*** [1971] 2 All ER 633 and the subsequent decisions of this court in ***Dreckett v Rapid Vulcanising Company Ltd*** (1988) 25 JLR 130 and ***International Trust and Merchant Bank v Gardener*** (SCCA No 111/2000, judgment delivered 30 March 2004).

[10] The learned judge then went on to the issue of damages. The applicants' claim for damages for breach of contract was based on the failure of the respondent, in breach of the agreement for sale, to procure the registration of a transfer of the property in favour of the applicants and the executed mortgage. The respondent did not deny this breach, but submitted to the judge that the loss occasioned to the applicants by this breach was so minimal as to entitle the applicants to no more than nominal damages. Smith J agreed with the respondent on this point, holding that, in the absence of proof of any loss flowing from the failure to register the transfer and the mortgage, the applicants were entitled to nominal damages only for the breach.

[11] The respondent for its part contended that the applicants should be required to make good the undertaking as to damages which they had given as a condition of the grant of the interlocutory injunction, and accordingly asked for an order for an inquiry as to damages. The judge agreed and she also gave some general indication of the nature of the damages to which she considered that the respondent would be entitled (para. 31).

[12] In the result, the learned judge ordered that there should be (a) "[j]udgment for the [respondent] in the sum of the amount owing under the mortgage ($1,221,317.40)

plus interest @ the rate of 18% per annum (commercial rate from September 21, 2001 to the date hereof"; and (b) costs to the respondent to be taxed, if not agreed. This judgment was subsequently amended by an order made by Anderson J on 24 October 2011, on the respondent's application, firstly, "to reflect the amount owing under the mortgage as $3,637,984.26 instead of $1,221,317.40", and secondly, to order payment of "The sum of $2,416,666.85 together with interest (accruing thereon) paid into the joint names of [the attorneys-at-law for the parties] pursuant to the order of this court made on October 18, 2002" to the respondent or his attorney-at-law.

[13] By notice of appeal filed on 27 January 2011, the applicants appealed against Smith J's decision on the following grounds:

> "1. The Learned Trial Judge erred in failing to give any sufficient regard or at all to the Respondent's responsibility under the Agreement(s) for Sale, transfer and mortgage to stamp and register same in the face of the Appellant's financial discharge of its duties under all three at the material time;
>
> 2. The Learned Judge erred in failing to give any sufficient regard or at all to the fact that a mortgagee has to account to a mortgagor for surplus proceeds of sale;
>
> 3. The Learned Judge erred in that having found that the mortgagee did not obtain the best price possible for the property since $8,000,000.00 was not a current valuation and that the property was only advertised in a limited and insufficient way, she later found that the Appellants were not entitled to damages for the mortgagee's breach of its duty of care by virtue of the Court's prior injunction;
>
> 4. The Learned Judge erred in failing to award even the nominal damages to which she held that the Appellants were entitled for the breach of contract by the Respondent;

> 5. The Learned Judge erred in awarding judgment to the Respondent at a commercial rate of interest of 18% against the Appellants notwithstanding that the said mortgage proceeds were held in escrow pending determination of the matter contrary to the principles governing court-ordered escrows;
>
> 6. The Learned Judge erred in withholding judgment to some five years after the taking of the evidence at trial."

[14] Based on these grounds, the applicants sought orders that the judgment of Smith J be set aside, the contract between the respondent and Duncarl Ltd be cancelled, and that the agreement for sale between the applicants and the respondent be carried into effect. In the alternative, the applicants asked for an order for payment to them "in the sum of $12,000,000.00 (less monies held in escrow) from 30th August 2001 or such other sum and/or date as the Court may deem appropriate".

[15] By a notice of application for court orders filed on 21 September 2011, the applicants sought an order for stay of execution of the Smith J's judgment, pending the hearing of the appeal. In the grounds stated in the notice of application, the applicants complained that Smith J's judgment was "inconsistent on its face" and stated that "as there is no stay of execution in place the sale of the property may be imminent". The application was supported by the affidavit of Mr Christopher Dunkley, the applicants' attorney-at-law, sworn to on 21 September 2011. In paragraph 5 of that affidavit, Mr Dunkley stated as follows:

> "That on a reading of the judgment of Smith J handed down on December 17, 2010 the Court made findings in favour of both the parties to this Appeal. However, having written to the Attorneys-at-law for the Respondent/Defendant, they have advised that they are not of the similar view, and as

> such the Appellants are very concerned that the Respondent will proceed with the sale of the property before the hearing of the Appeal itself."

[16] Mr Dunkley's affidavit was met by an affidavit in opposition to the application sworn to on 26 October 2011 by Mr Sydney Miller, the respondent's managing director. Mr Miller said a number of things in that affidavit: that, to his "certain knowledge", the 1st applicant was dead prior to the filing of the appeal (para. 2); that he had instructed his attorneys-at-law "to convey the property to the [applicants] and proceed with the sale to Duncarl Ltd so as to allow satisfaction of the judgment debt and fulfillment of the Respondent's obligation to Duncarl Ltd under the said agreement for sale" (para. 4); that the judgment debt, "which reflects the amount owing under the mortgages lands at $10,234,779.64" and the respondent had already executed the judgment by realisation of the sum of $4,681,568.60, that is, the money paid in by the applicants as a condition of the grant of the interlocutory injunction (para. 5); the respondent was still owed "$5,553,211.04 under the mortgage", with interest continuing to accrue at 6% (para. 6); Duncarl Ltd had now paid the full purchase price for the property and the respondent was "well advanced in the process of transfer of the property to the [applicants], registration of the mortgage, discharge of same and completion of the sale to Duncarl Ltd" (para.7); once the sale was complete, a full accounting would be done between the respondent as mortgagee and the applicants as mortgagors, "hence the [applicants] are exposed to no prejudice" (para. 8); and the respondent had been trying to realise its security for 10 years and would be severely prejudiced by a stay of execution (para. 9).

[17] On 1 November 2011, I refused this application, on the ground that, Smith J having made no order for sale of the property, a stay of execution of her judgment in order to prevent such a sale could have no purpose. The applicants were ordered to pay the respondent's costs of that application.

[18] It is against this background that, by notice of application filed on 3 November 2011, the applicants sought orders for interim injunctions against the respondent, to restrain it from taking any further steps to complete the contract with, or transferring or otherwise disposing of the property to, Duncarl Ltd or any other party; or, alternatively, to restrain the Registrar of Titles from effecting a transfer of the property to Duncarl Ltd or any other party.

[19] This application was also supported by an affidavit sworn to by Mr Dunkley, on 3 November 2011. In that affidavit, Mr Dunkley referred to Mr Miller's affidavit of 26 October 2011, to make the point that the respondent "is therefore proceeding with the sale of the property, the subject of this appeal, in circumstances where the learned trial judge found the Respondent to be in breach of its duty to the Appellants" (para. 4). Mr Dunkley went on to observe that, the judge having made "no consequential Order as to the effect of the Respondent's breach of duty, or any final entitlement to the property, as a result, the Respondent has now taken the above steps to proceed under the very contract of sale for which the learned judge found it was in breach" (para. 8). The respondent's current actions would, Mr Dunkley's affidavit continued (at para. 9),

"defeat any possible reversal of the lower Court's finding that the equity of redemption was extinguished, for which damages would not be an adequate remedy". Mr Dunkley accordingly concluded (at para. 10) that, if an injunction pending appeal was not granted, the appeal "would be rendered nugatory"), and prayed for the grant of the injunction on this basis.

[20] When this application came on for hearing before me on 28 November 2011, Mr Dunkley referred me to the affidavit evidence that had been filed and to Smith J's judgment. Describing the latter as "confusing", Mr Dunkley submitted that damages would not be an adequate remedy for the respondent in the circumstances and asked for the grant on of an injunction pending the hearing of the appeal.

[21] In her submissions opposing the grant of an interim injunction, Mrs Marvalyn Taylor-Wright for the respondent supplemented the detailed skeleton arguments filed by her on 25 November 2011 by making a number of points. Among other things, she pointed out that, the 1st applicant, Wilfred Forbes, having died prior to the filing of the appeal and no steps having been taken to secure representation of his estate, the attorneys for the applicants must have acted solely on the instructions of the 2nd applicant in filing the appeal and submitted that, in these circumstances, "the proceedings can proceed no further and in fact [are] not properly before the court".

[22] Mrs Taylor-Wright also referred me to the decision of the Privy Council on appeal from this court in ***National Commercial Bank Jamaica Limited v Olint Corp. Limited*** [2009] UKPC 16, to make the point that an injunction pending appeal will only

be granted if (a) the appellants have provided material to the court to suggest that the appeal has some prospect of success and (b) it is in the interest of justice to do so. In the instant case, she observed, no material was placed before the court by Mr Dunkley's affidavit to enable it to make such a judgment. In particular, it was submitted, the grounds of appeal disclosed no complaint about either the judge's finding that the applicants' equity of redemption had been defeated or her award of damages to the respondent. Those grounds were in fact referable only to the applicants' complaints that damages had not been awarded to them in consequence of the judge's finding that the respondent had breached its duty of care in the exercise of its power of sale and as regards the award of interest at the rate of 18% *per annum*. In any event, it was further submitted, none of the grounds filed revealed any prospect of success and no basis had therefore been shown for the grant of an interim injunction in this case.

[23] I accept Mrs Taylor-Wright's submission that the threshold criterion for the grant an injunction pending appeal is that the applicant must show that he has an arguable appeal or one that has some prospect of success. In ***NCB v Olint Corp.***, the application for an interim injunction ultimately failed on the explicit basis that the material before the court at the interlocutory stage did not disclose a triable issue and that in those circumstances no injunction should be granted (see the judgment of Lord Hoffmann, at para. [12]). This threshold not having been crossed, it was therefore unnecessary for the court to go on to consider, as a discretionary matter, what course of action, that is, the grant or refusal of an interim injunction, was "likely to cause the

least irremediable prejudice to one party or the other" (per Lord Hoffmann, at para. [19]).

[24] Approaching the application for an injunction pending appeal in this case on the same basis, I came to the view that no injunction ought to be granted, for a similar reason. Mr Dunkley provided me with absolutely no material to suggest that Smith J's careful analysis of and conclusions on the issues involved in the case, in particular her finding that the applicants' equity of redemption had been lost in all the circumstances, was flawed in any way. Indeed, as Mrs Taylor-Wright correctly observed, there was in fact no ground of appeal challenging this finding, which it would be critically important for the applicants to seek to reverse on appeal in order to entitle them to any order preventing the completion the sale to Duncarl Ltd.

[25] But even if the applicants had succeeded in showing that there was an arguable appeal from Smith J's judgment, I also considered that there was merit in Mrs Taylor-Wright's additional submissions that no injunction should be granted in this case, because (i) no steps appear to have been taken (indeed the applicants did not appear to have a position or a plan of action on this aspect of the matter) to address the question of representation of the deceased 1st applicant's estate and by that means to regularise the appeal itself; (ii) the applicants offered no undertaking as to damages as a condition of the grant of the interim injunction (a particularly relevant factor, it seems to me, in the light of the existence of a binding contract of sale between the respondent and Duncarl Ltd); and (iii) the grant of an injunction in the circumstances of this case

would cause irreparable harm to Duncarl Ltd, the third party to whom the property was sold over 10 years ago and who is not a party to the action in this case.

[26] In her skeleton argument, Mrs Taylor-Wright had also made the point that the contention by the applicants that the respondent ought not to be permitted to proceed to completion of a contract in respect of which the judge had found it to be in breach was misconceived, since the only breach of contract by the respondent that the judge had found to be established was that of having failed to register the transfer after the execution of the mortgage agreement (para. 28), in respect of which nominal damages were awarded. It seems to me that this submission is entirely correct and that in these circumstances, in the light of the grounds of appeal filed, the only question which can possibly arise on appeal is whether the judge's award of nominal damages was a correct assessment of the applicants' loss as a result of this breach. This then is yet a further reason for the refusal of an injunction pending appeal.

[27] These are my reasons for the order which I made on 9 December 2011 (see para. [1] above). On that date, after I had announced my decision, Mr Dunkley told me that amended grounds of appeal had been filed on the applicants' behalf on 29 November 2011, drawing my attention in particular to the late addition to the grounds of a new paragraph 3, which complained that the trial judge erred in concluding that the applicants' equity of redemption had been extinguished. While it could well be that when the parties were before me on 28 November 2011 it was intimated to me by Mr Dunkley that he intended to file amended grounds of appeal, I was not aware that they

had in fact been filed until Mr Dunkley so advised me on 9 December 2011 and the argument before me on both sides was certainly conducted on the basis of the original grounds. In any event, I had already given my decision by then and considered that no further material could at that stage be taken into account, for whatever it might have been worth.