[2024] JMCA App 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA

APPLICATION NO COA2023APP00013

BETWEEN	**GLOBAL ARCHITECTURE DRAUGHTING LIMITED**	**1ST APPLICANT**
AND	**GREGORY DUNCAN**	**2ND APPLICANT**
AND	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**RESPONDENT**

Global Architecture Draughting Limited listed as the 1st applicant is no longer in existence

Gregory Duncan in person and self-represented

Ms Kathryn Williams instructed by Livingston Alexander and Levy for the respondent

15 May 2023 and 24 May 2024

Civil procedure – Permission to file notice and grounds of appeal – Stay of execution of judgment – Rules 1.8(7) and 2.10(1)(b) of the Court of Appeal Rules

BROOKS P

[1] I have read in draft the judgment of my brother D Fraser JA. I agree with his reasoning and conclusion and have nothing to add.

D FRASER JA

Introduction

[2] This is an application by Mr Gregory Duncan for permission to file notice and grounds of appeal and a stay of execution in respect of the order of O Smith J (Ag) ('the

learned judge') made on 11 January 2023. Global Architecture Draughting Limited ('Global Architecture') is no longer in existence having been wound up and dissolved. Permission to appeal is being sought as Mr Duncan wishes to move this court to i) set aside the order of the learned judge and ii) make an order that the certified declaration of loan satisfaction dated 28 June 2021 issued by The Bank of Nova Scotia Jamaica Limited ('the respondent') stands. The order appealed against was made following the hearing of three applications; two were made by Mr Duncan and the other by the respondent.

[3] Mr Duncan's applications before the learned judge were: a) a notice of application to tender fresh evidence and in support of application to set aside judgment and consequential orders filed on 29 June 2021 and b) an amended notice of application for a declaration by court filed on 13 December 2021. The respondent's application was an amended notice of application for an order for the sale of land, filed on 28 October 2022. The learned judge in a judgment intituled, **The Bank of Nova Scotia [sic] Limited v Global Architecture Draughting Limited and Gregory Duncan** [2023] JMSC Civ 87 refused the applications made by Mr Duncan, granted the application of the respondent together with consequential orders to give effect to the order for sale, and awarded the costs of Mr Duncan's applications to the respondent. The learned judge also refused Mr Duncan's application for leave to appeal.

Background

[4] The detailed history of this matter was traversed by Hart-Hines J (Ag) as she then was in her judgment intituled **The Bank of Nova Scotia Jamaica Limited v Global Architecture Draughting Limited and Gregory Duncan** [2020] JMSC Civ 161, and by the learned judge in her subsequent judgment already referenced. It was the orders made by Hart-Hines J (Ag) that Mr Duncan unsuccessfully applied to have set aside before the learned judge.

[5] For the purposes of background, the following brief overview will suffice. Global Architecture was a limited liability company. Mr Duncan, a builder and real estate developer was its Managing Director. On 23 March 2010, Global Architecture entered

into a loan agreement with the respondent through its branch in Spanish Town. The loan totalled $7,900,000.00 at an interest rate of 3% above the base lending rate of 19.875% per annum. This loan was actually a continuing facility that was first granted by the respondent in December 2008. Twenty days prior to the date of the loan agreement, on 3 March 2010, Mr Duncan executed a personal guarantee of payment to the respondent for all debts and liabilities present or future at any time owing by Global Architecture to the respondent, up to $5,000,000.00 together with interest.

[6] Global Architecture defaulted on the loan. The respondent filed claim number 2011 HCV 07867 against both Global Architecture and Mr Duncan to recover the outstanding sums and, on 15 May 2013, was granted judgment in default of acknowledgment of service. This judgment was in the sum of $11,247,467.81 inclusive of interest and costs with interest continuing at a rate of 18.75% per annum from 15 May 2013 until payment. Global Architecture and Mr Duncan never applied to set aside the default judgment. Having not received payment, and unable to secure any goods for sale from Global Architecture, on 16 January 2019, the respondent obtained a provisional charging order over land owned by Mr Duncan. The provisional order was made final against Mr Duncan on 24 July 2020, limited to the sum of $5,000,000.00 plus interest.

[7] Mr Duncan applied to the court below to discharge the final charging order, maintaining that the debt had been paid and its repayment had been acknowledged by the respondent. His application was dismissed on 23 June 2021. He then filed the two applications mentioned in para. [3] from which refusal he seeks permission to appeal.

The findings of the learned judge

[8] The learned judge found, in treating with the application to adduce "fresh evidence", that the information concerning payment was always available to Global Architecture and Mr Duncan and could have been obtained with due diligence: i) even before the order for seizure and sale was made in September 2014, ii) before the provisional charging order was made in 2019 and iii) before the final charging order was made in 2020. However, at no time from the entry of the default judgment on 15 May

2013 until 2018 did Mr Duncan say he had paid sums towards the loan; neither had he presented to the court any personal proof that he or Global Architecture paid off the loan, other than the letter from the respondent dated June 28, [2021]. The learned judge found that Mr Duncan was in agreement that the loans remained un-serviced and remained so until at least May 31, 2017. The learned judge having examined the affidavits and exhibits, accepted the evidence of Mr Anthony Boyd and Ms Nastassia Brown in relation to the classification of the defendants' loan as a bad debt and what obtains after such a classification. She determined that the evidence proved the loans had not been satisfied and that there was no indication that account numbered 600505 was used to satisfy the two loans related to account numbered 8000411 and 8000461.

[9] Regarding the declaration sought for the final charging order to be discharged, she saw no basis to conclude that any court had been misled nor had any fraud been alleged by Global Architecture and Mr Duncan. She was satisfied on the evidence that the debt remained outstanding.

[10] Accordingly, the learned judge determined that the declarations sought by Global Architecture and Mr Duncan could not be granted.

[11] In respect of the application for an order for sale of land, she found that the several affidavits filed by the respondent had satisfied in great detail the requirements of rules 46.2(1) and 55 of the Civil Procedure Rules ('CPR'). Further that Global Architecture and Mr Duncan had not provided any evidence to the contrary. The order was, therefore, granted for the sale of land.

Grounds of the application

[12] The application for permission to appeal is based on the following grounds:

> "1. That an oral application for leave to appeal was made in the Supreme Court, on the 11th of January 2023, but same was refused by the Hon. Justice Ms O. Smith.

2. That the June 28, 2021 Certified Declaration by the respondent that loan A/C# 8000411 & 8000461 were redeemed on July 22, 2014 stands.

3. That the respondent's claim was for debt satisfaction and not "error" which latter claim by affidavit filed October 13th and 14th 2022 is late, and statute barred.

4. That the respondents breached the March 23, 2010 Contract Agreement.

5. That the correct method of repayment of loans on AC# 8000411 & 8000461 was already executed on the 2nd [applicants'] [sic] behalf of such what the respondent is seeking is double compensation.

6. That Anthony Boyd's claim at paragraph 6 of Affidavit filed October 13, 2022, that the appellant's account was classified as a bad debt on July 22, 2014 proves that on December 15, 2011 his department could not have had conduct of the [applicant] account, and in fact proves that BNS Debt Management Unit duplicate bank accounts in breach of BOJ laws.

7. That caveator for caveat 22090033 were [sic] not warned by the respondents [sic]."

The proposed grounds of appeal

[13] The following are the proposed grounds of appeal:

"1. That the Respondent did issue on June 28, 2021, the Certified Statements of Accounts and Certified Letter declaration [sic] that Account 8000411 and 8000461 were paid out and closed out on July 22, 2014.

2. That the respondents Claim, and Particulars of Claim filed December 15, 2011 sought debt satisfaction which was so declared by respondent's June 28, 2021 the Certified Statements of Accounts and Certified Letter.

3. That the respondents breached the March 23, 2010 Loan Agreement attached to its particular [sic] of claim.

4. Section 84 & 85 of the Banking Services Act 2014 & Section 48 & 49 of the Bank of Jamaica Act.

5. The Appellants has good grounds and prospect of appeal if same is allowed.

6. The Respondent failed to warn the caveat# 22090033 on Volume 1432 Folio 79 which disqualify [sic] the application for sale of land. And said valuation report did not value the unit to its true valuation in that, no internal assessment was done."

The affidavit evidence

Mr Duncan

[14] Mr Duncan relied on affidavits sworn by him on 18 January and 7 February 2023. He averred that on 23 March 2010 Global Architecture and the respondent entered into an agreement for a total loan of $7,900,000.00 secured by a letter of undertaking from the law firm of Patrick Bailey & Co. He additionally indicated that by letter dated 1 June 2015, Patrick Bailey & Co disclosed that the sums were repaid in full through Global Architecture's main current account numbered 600505.

[15] He further outlined that the respondent issued to him an acknowledgment, by letter dated 28 June 2021, that the loan facilities had been paid out on 22 July 2014 and loan accounts numbered 8000411 and 8000461 were closed out.

[16] He also stated that the respondent's debt management unit had put forward false and new evidence claiming "error" after six years and that the loan redeemed by Patrick Bailey & Co was not the judgment being pursued. He, however, maintained that the certified statement from the respondent confirmed that on 22 July 2014 the loan facility had been paid out and the relevant accounts closed.

The respondent

[17] The respondent relied on the affidavits of Mr Anthony Boyd, Manager of the respondent's Loan Recoveries Unit filed 6 October 2021, 3 December 2021 and 13 December 2022 along with the affidavit of Ms Nastassia Brown, Relief Service and Support Officer of the respondent's Spanish Town Branch filed 14 October 2022, all of which were before the court below. In his affidavit evidence, Mr Boyd chronicled the history of the matter outlined in the background up to the obtaining of the final charging order.

[18] He also responded to Mr Duncan's reliance on the respondent's letter dated 28 June 2021 that the loan facilities had been paid out and loan account numbers 8000411 and 8000461 were closed out. He explained that the loan account having been classified as bad debt, based on the internal administrative processes of the respondent, the loan account was removed from the respondent's computer system by manually inputting a zero balance. This however did not mean that the loan had been paid or settled. The matter was then transferred from the branch to the head office in Kingston to be manually managed by the Finance Department.

[19] Mr Boyd additionally stated that Mr Duncan was well aware that the loans have not been settled as he had attended court on many occasions where he acknowledged the debt. Further, that he had filed several affidavits of means and given sworn evidence during proceedings to enforce the judgment debt and he had never claimed the debt was satisfied, nor ever made an application to set the default judgment aside.

[20] Ms Brown in her affidavit indicated that Mr Duncan attended the Spanish Town Branch of the respondent on 28 June 2021 and requested that a letter to him be prepared, indicating that he owed no money on loan accounts numbered 8000411 and 8000461. However, he did not reveal that the said loan accounts were the subject of a matter before the court. She further stated that, based on the respondent's computer system reflecting a zero balance and the loan accounts closed, the requested letter to that effect was issued. She additionally explained that issuing the letter was an honest mistake as she was unaware that the accounts had been categorised as bad debts, therefore the request should have been referred to the external Loan Recoveries Unit at the head office of the respondent. She also highlighted that arising out of this incident the respondent made a decision that once a status request was made, whether or not the facility was categorised as a bad debt, the request should be sent to the Loan Recoveries Unit for them to respond to the customer.

[21] Though not specifically relied on by the respondent, two other affidavits filed by Mr Boyd in opposition to Mr Duncan's application to discharge the final charging order

and set aside the default judgment in the court below, are relevant to the disposal of the current application. Firstly, in his affidavit filed on 30 November 2020 he outlined that the mortgage number 1788424 endorsed on the 2nd applicant's property against which the charging order was made, relates to another loan facility and not the loans which were the subject of claim number 2011HCV07867 which concern the debts owed on accounts numbered 8000411 and 8000461. The result being that reliance could not be placed on the discharge of that mortgage facility as proof that the relevant loans had been paid off.

[22] Secondly, in his affidavit filed on 26 February 2021, prior to the respondent's request on 28 June 2021 for a loan status letter from the respondent's Spanish Town Branch, Mr Boyd responded to the 2nd applicant's reliance on the fact that the loan accounts 8000411 and 8000461 showed a nil balance. He gave the same explanation then, as outlined earlier why that did not mean the loan had been paid off. Therefore, at the time of the request, the 2nd applicant was already well aware of that explanation.

Submissions

Mr Duncan

[23] Mr Duncan's argument was essentially that the loan amounts were already repaid. He pointed to the letter dated 28 June 2021, from the Spanish Town Branch of the respondent, certifying that on 22 July 2014 the loan facilities had been paid out and the loan accounts numbered 8000411 and 8000461 closed. He pointed out that was after 24 July 2020 when Hart-Hines J (Ag) granted the final charging order.

[24] It was also argued that while Mr Boyd claimed that his department received accounts numbered 8000411 and 8000461 on 22 July 2014, after they were classified as bad debts, Mr Boyd was the one who signed the claim filed on 15 December 2011. He submitted that disclosed a conflict which points to a lack of credibility.

[25] Mr Duncan also relied on sections 84(4) and 85(1), (2) and (4) of the Bank Services Act of 2014 and advanced that they supported his position that the Certified Statement of Account, which accompanied the letter dated 28 June 2021, is the respondent's audited

and conclusive version. This, he submitted, was conclusive proof of repayment which could not have existed if repayment was not in fact made. He further argued that, even if the letter was released in error, that could not prove that the monies were not in fact fully repaid.

[26] In submissions filed 26 May 2023 after the hearing, which gave no indication whether they were served on the respondent, the 2nd applicant suggested that funds from account numbered 600505 contributed to paying off debt on accounts numbered 8000411 and 8000461.

[27] It is noted that the 2nd applicant made no submissions in relation to the order for the sale of land.

The respondent

[28] Counsel for the respondent, Ms Kathryn Williams, submitted that the application should fail as the proposed appeal had no prospect of success given that the learned judge had not made any error of fact or law in the exercise of her discretion to dismiss the applications of Global Architecture and Mr Duncan and grant the application of the respondent. Counsel relied on rule 1.8(7) of the Court of Appeal Rules ('CAR'), rules 48.10(1) and 55.1 of the CPR and the cases **Humphrey Lee McPherson v Damion Chambers and Smart Technologies Ja** [2010] JMCA App 7 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1.

[29] Counsel highlighted that the court below had, based on the affidavit evidence put forward by the respondent, correctly found that the letter of 28 June 2021, relied on by Mr Duncan, was issued in error, and without knowledge of the bad debt. Consequently, the debt remained unsatisfied and there was no basis to discharge the charging order. Counsel relied on the cases of **Parr v Tiuta International Limited** [2016] EWHC 2 (QB) and **Bardi Limited v McDonald Millingen** [2018] JMCA Civ 33 which outline the factors a court should consider in determining whether to discharge a final charging order.

[30] Counsel also pointed out that the issue of whether the debt was outstanding had been previously considered by Hart-Hines J (Ag) and Mott Tulloch-Reid J (Ag) (as she then was) both of whom had also determined that the debt remained outstanding, which decisions were never appealed. In addition, counsel emphasised that Mr Duncan was well aware that the debt remained outstanding as he had appeared in court on several occasions and admitted owing the debt to the respondent. Therefore, counsel advanced that it was rightly accepted by the learned judge that the contention that the debt had been satisfied was just another attempt by Mr Duncan to frustrate the respondent's efforts to enforce the judgment.

[31] Regarding the respondent's application for the sale of the land belonging to the Mr Duncan it was submitted that the learned judge correctly exercised her discretion to grant the respondent's application for the following reasons:

a) Despite the respondent having obtained judgment against Global Architecture and Mr Duncan in 2013 to date no sum had been paid by them towards the judgment debt;

b) Global Architecture and Mr Duncan never applied to set aside the default judgment; rather for many years acknowledged the debt was owed to the respondent;

c) The respondent sought to enforce its judgment by i) order for seizure and sale of the assets of the 1st applicant, ii) application for oral examination to ascertain means of the 2nd applicant, and iii) obtaining of a charging order over land owned by the 2nd applicant, before the application for the sale of land, given that all three previous proceedings to realise the proceeds of the judgment were unsuccessful.

d) Mr Duncan had not advanced any evidence of his personal hardship or undue prejudice that would affect any third party which should have prevented the making of the order for sale.

[32] Counsel relied on section 28A (1) of the Judicature (Supreme Court) Act, rule 55.1(1)(b) of the CPR and the case of **Girvan Williams v Omotoso Uswale-Neita** (unreported), Supreme Court of Judicature of Jamaica, Suit No CL 1996/W 239, judgment delivered 25 July 2007.

[33] Concerning the application for a stay of execution, counsel advanced that for a stay to be granted the appeal must have some prospect of success and the court must determine in its discretion that there is a real risk of injustice to the 2nd applicant if the stay is not granted. Counsel argued that as the proposed appeal had no prospect of success there was no need to assess the risk of injustice and no basis on which a stay should be granted. Counsel cited in support, the case of **Greg Tinglin et al v Claudette Clarke and the Attorney General of Jamaica** [2020] JMCA App 24.

[34] Counsel asked for the application to be dismissed with costs to the respondent.

Analysis

[35] This court will only grant permission to appeal in civil cases where it considers the appeal will have a real chance of success: rule 1.8(7) of the CAR. This means the appeal must have a "'realistic' as opposed to a 'fanciful' prospect of success.": **Garbage Disposal & Sanitation Systems Limited v Noel Green et al** [2017] JMCA App 2 quoting with approval Lord Woolf MR in **Swain v Hillman and another** [2001] 1 ALL ER 91; **Humphrey Lee McPherson v Damion Chambers and Smart Technologies Ja**.

[36] The decision of whether to grant the declarations sought by Global Architecture and Mr Duncan in the court below involved the exercise of discretion by the learned judge. To demonstrate that the proposed appeal has a realistic prospect of success, Mr Duncan therefore has to show it is arguable that the learned judge made an error of fact or law in the exercise of her discretion: **The Attorney General of Jamaica v John Mackay**.

[37] The cornerstone of Mr Duncan's contention is that the letter of 28 June 2021 from the respondent's Spanish Town Branch and the certified statement of account which accompanied it, provide conclusive proof of the repayment of the loan amounts that were reflected in accounts numbered 8000411 and 8000461. Mr Duncan went further in his submissions, advancing that even if the letter was issued in error, that did not prove that the sums claimed were not repaid.

[38] Mr Duncan has rehashed before this court, the argument that the debt claimed has been repaid. That argument has been advanced, refuted, examined in detail, and dismissed as being wholly devoid of merit, in three separate proceedings in the court below. Firstly, in the application before Hart-Hines J (Ag) for the provisional charging order to be made final, the decision in which was made on 24 July 2020; secondly in the application before Mott Tulloch Reid J (Ag) to discharge the final charging order decided **23 June 2021**; and thirdly in the proceedings before the learned judge to admit fresh evidence in support of application to set aside judgment filed **29 June 2021**, decided 11 January 2023, from which the current application to this court has sprung.

[39] The latter two dates have been highlighted because the letter of 28 June 2021, the so-called "fresh evidence" on which Mr Duncan primarily relies, was obtained five days after the application before Mott Tulloch Reid J (Ag) was dismissed and one day before the application ultimately heard by the learned judge was filed.

[40] Those dates are significant in light of information gleaned from the judge's bundle provided to the court by Mr Duncan. It includes the second affidavit of Mr Anthony Boyd in opposition to Mr Duncan's application to discharge final charging order and to set aside default judgment, filed 26 February 2021. Quotations from three paragraphs of that affidavit will demonstrate that long before Mr Duncan requested the letter of 28 June 2021, he was well aware of the respondent's explanation for the nil balance reflected in accounts numbered 8000411 and 8000461 held at its Spanish Town Branch. Para. 4 and a part of para. 5 of that affidavit read as follows:

> "4. I have read the Affidavit of Gregory Duncan in Support of Amended Application in Objection to Final Charging Order filed on 2nd December 2020 (hereinafter referred to as the "Third Gregory Duncan Affidavit") and I now respond to same as follows.
>
> 5. Paragraph 3 of the Third Gregory Duncan Affidavit is not true. The loan accounts which are the subject of this claim, being accounts numbered 8000411 and 8000461 remain unsatisfied…

[41] After setting out in the remainder of para. 5 the amount owing on each account as at 9 December 2020 and specifying at para. 6 the annual rate and specific dollar figures at which interest was accruing on each loan, Mr Boyd continued in his affidavit by stating at para. 7:

> "7. In addition, on 22nd July, 2014, [the respondent] classified the loan accounts as bad debt which is an internal administrative process to close accounts that are long outstanding and have not been settled. This is why the current balance on the statement dated 3rd October, 2020 from the Spanish Town Branch of the Bank, which is referred to at paragraph 3 of the Third Gregory Duncan Affidavit says "Nil." It is not that the loans were settled or paid off but they were just moved to a new category of [the respondent], that is from the Spanish Town Branch of [the respondent] to the Loan Recoveries Unit of [the respondent], for management purposes. The loan accounts therefore remain unsatisfied as outlined above and it is not true that Mr. Duncan has settled the debt."

[42] The above outline clearly shows that when Mr Duncan attended the Spanish Town Branch of the respondent on 28 June 2021 to request a letter which the following day he advanced as "fresh evidence", it contained information that he knew was inaccurate and anything but fresh. Further, it was procured by the provision of incomplete information, he having failed to indicate that the relevant loan accounts were the subject of current litigation. Despite the learned judge acknowledging that applications to adduce fresh evidence are not for first instance courts, and that the judgment at the centre of the applications was not the result of a hearing on the merits, she nevertheless proceeded to

consider Mr Duncan's applications in the context of the principles in **Ladd v Marshall** [1954] EWCA Civ 1. In future, judges should bear in mind that, while first instance courts may consider "fresh evidence" in an application to set aside a judgment that was not determined on the merits of a matter, the principles in **Ladd v Marshall** are not applicable to such an exercise.

[43] The well-intentioned but misguided indulgence of the learned judge aside, this court takes a very dim view of the conduct of Mr Duncan. The unchallenged evidence is that Mr Duncan had previously attended court on many occasions and admitted the debt. After two court hearings in which the Supreme Court found that the debt remained unsatisfied, he then procured the letter of 28 June 2021, in the circumstances just outlined, in order to foist the discredited information upon the court in a third hearing. Having been again unsuccessful he seeks leave to appeal the order of the learned judge, relying primarily on the letter of 28 June 2021. I can come to no conclusion other than that advanced by counsel for the respondent in her submissions; that the application before this court is just another attempt by Mr Duncan to frustrate the respondent's efforts to enforce the judgment.

[44] Though the learned judge should not have entertained the "fresh evidence" application, she having done so, her decision cannot be impeached. She reviewed all the evidence and submissions advanced including that sums were transferred from account number 600505 to satisfy a part of the outstanding debts. Her findings of fact culminated in her conclusion that the outstanding debts on accounts numbered 8000411 and 8000461 remained unsatisfied. There was, therefore, no basis for the learned judge to disturb the findings and orders made by Hart-Hines J(Ag) which were based on that learned judge's previous similar review and self-same determination. There is nothing that has been advanced before this court to support a finding that there was any error in the conclusion arrived at by the learned judge.

[45] Concerning the order for sale, section 28A (1) of the Judicature (Supreme Court) Act empowers that court at the instance of a person prosecuting a judgment, to make an

order for the sale of land of a judgment debtor. After appropriately analysing rules 46, 48 and 55 of the CPR and the case of **Parr v Tiuta International Ltd** in light of the relevant facts of this matter, the learned judge exercised her discretion to grant the order sought by the respondent. The extant reality that i) the debt has been long outstanding; 2) the debt was admitted before the spurious claim that it was satisfied was advanced; and 3) other previous attempts at enforcing the default judgment proved futile, points to an entirely reasonable and judicious exercise of the learned judge's discretion. No basis exists for this court to interfere.

Conclusion

[46] The material placed before this court has clearly revealed that Mr Duncan remains indebted to the respondent on accounts numbered 8000411 and 8000461; a reality which has been recognised by the Supreme Court from the granting of the default judgment on 15 May 2013. Mr Duncan has no prospect of success in his proposed appeal. There is accordingly no basis for a stay of execution to be considered. The application should be refused.

BROWN JA

[47] I too have read the judgment of my brother D Fraser JA and agree with his reasoning and conclusion.

BROOKS P

ORDER

1. The application for permission to appeal against and a stay of execution of the order of O Smith J (Ag), made on 11 January 2023, is refused.

2. Costs are awarded to the respondent to be agreed or taxed.