



[2013] JMSC Civ 45

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV02704

BETWEEN	TOUSHANE GREEN	CLAIMANT
AND	NATIONAL COMMERCIAL BANK JA. LTD	1 ST DEFENDANT
AND	OWEN CAMPBELL	2 ND DEFENDANT

Mrs. A. Cousins-Robinson instructed by Robinson & Clarke for the Claimant

Mr. K. Powel instructed by Michael Hylton & Associates for the Defendants

Sale of Goods Act - Ownership of Chattel –
Bona fide Purchaser without Notice

Heard: March 14 and 21, 2013

Straw J

The Parties

- [1] The first defendant, National Commercial Bank Ja., Ltd. (NCB) recorded a Bill of Sale at the Island Record Office on July 25, 2007 in relation to a customer, Steven Scott. Mr. Scott granted the bank this Bill of Sale over his 2007 BMW motor vehicle as security for a loan of \$5,000,000.00.
- [2] Mr. Scott deferred on the repayment of his loan and as a result, NCB authorized the second defendant, Mr. Owen Campbell on July 20, 2009 to recover possession of the vehicle.

- [3] On December 14, 2011, Mr. Campbell recovered possession of the 2007 BMW motor vehicle from the claimant, Touseh Green.
- [4] Mr. Green has brought a claim against both defendants for damages and recovery of possession of the vehicle. The Particulars of Claim state that he bought the said motor vehicle on or about October 25, 2011 from a car mart. At the time, he was shown the title which had the registered owner as Beverley Belnavis. The title had a signature at the back signing as transferor which appeared to be that of Beverley Belnavis.
- [5] The Particulars of Claim also aver that the title was already stamped at the Tax Office with a stamp dated July 26, 2011 and that there was no lien or mortgage endorsed on the title. The court has examined the title annexed and there is no dispute between the parties concerning this issue.
- [6] It is stated further that Mr. Green carried out due diligence by checking with the Tax Office and also CarFax in order to ensure that he was not purchasing a stolen vehicle. Having been so satisfied, he paid the full purchase price of \$3.2 million (as agreed) to Ricardo Barker and Curtis Watson, the agents of Beverley Belnavis. There is no dispute in relation to these facts also.

The Application

- [7] NCB has now filed an application for summary judgment pursuant to Rule 15.2(a) of the Civil Procedure Rules (CPR) against the claimant on the ground that the claimant has no real prospect of succeeding on this claim.
- [8] The relevant section of the CPR provides as follows:
- 15.2 The court may give summary judgment on the claim or on a particular issue if it considers that-
 - a. The claimant has no real prospect of succeeding on the claim or the issue.

Summary Judgment

[9] The court can therefore grant summary judgment once it is satisfied that the claimant has 'no real prospect of succeeding.'

In discussing the equivalent provisions on summary judgment under part 24 of the English rules, Lord Woolf MR in **Swain v Hillman** (2001, 1 All ER 91, at 92) observed that the word 'real' distinguishes fanciful prospects of success.

[10] In **Gordon Stewart v Merrick Samuels**, SCCA No. 2/2005, (delivered November 18, 2005, pg. 6). The President, Harrison JA stated that the prime test of 'no real prospect' requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure:

The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party.

Submissions of the Defendants

[11] It is important to note that in this case, the ultimate result of this action turns on the application of and interpretation of the law. However, there are relevant facts that will assist the court in the application of the law.

The application for summary judgment is based on the law dealing with the rights of parties in a Bill of Sale to possession a chattel.

[12] Counsel for the defendants, Mr. Powell has submitted that the bank is the proper owner of the motor vehicle and is entitled to possession as the effect of a Bill of Sale is to transfer the ownership in the chattel from the grantor to the grantee.

[13] Counsel relied on **Johnson v Diprose** (1893) 1 QB 512 and **Small Business Loan Board v Reid** (1964) 7 WIR 287.

In **Small Business**, the Court of Appeal affirmed the above principle. It was held as follows:

The security given was an absolute assignment of the respondents' chattels and, subject to a provision for redemption on repayment, the appellant became the

owner of the chattels. As owner, the appellant had the right to the immediate possession of the chattels, but the respondent was permitted to remain in possession as a mere bailee for and on behalf of the appellant who could terminate the bailment at its pleasure. As legal owner, the appellant at all times had the right to immediate possession of the chattels

....

- [14] In the Bill of Sale, signed by Mr. Scott, he assigned and transferred the motor vehicle to the bank, "To hold the same unto the Bank - - - and assigns absolutely subject to the provision for entry of satisfaction - - -" as outlined in the agreement.
- [15] There is no doubt therefore that the bank has been assigned ownership of the chattel and is entitled to possession as Mr. Scott has breached the terms of the agreement (i.e., repayment of funds to the bank and selling or otherwise disposing of the motor car (per Clauses 2 and 3c of the said Bill of Sale).

Submissions of the Claimant

- [16] Counsel for the claimant, Mrs. Angella Cousins-Robinson has submitted that Mr. Green is a bona fide purchaser for value without notice of any other claim to the motor vehicle. She is relying on Sections 22, 23 and 25[1] of the Sales of Goods Act.
- [17] Before examining these sections of the Act, it is important to note that the Notice of Lien stamped by the Island Record Office on 12th June 2007 in relation to the BMW, was never registered on the title. Mrs. Cousins-Robinson pointed to an error in recording of the chassis number. The error is in relation to one letter which reads 'o' instead of 'p'. The defendants do not allege that this was ever corrected and in fact the Amended Defence filed 13th March 2013 avers at paragraph 9 as follows:

The first defendant avers that despite attempts by it to secure custody of the certificate of title for the Motor Vehicle Mr. Scott collected same from the Inland

Revenue Department and despite demand refused to provide it to the Bank. He has also refused and/or failed to satisfy his obligation under his loan agreement with the Bank.

[18] I also note that the terms of the Bill of Sale required Mr. Scott to register or permit the registration of the interests of the bank on the title [par 26]. The relevant sections of the Act that the claimant is relying on are as follows:

Section 22 (1) - Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Section 23 – When the seller of goods has a voidable title thereto but this title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Section 25 (1) – Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by his duly appointed agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

[19] In relation to Section 22, Mrs. Cousins-Robinson submits it is relevant as the bank ought to have requested the certificate of title and ensured that its name was registered as the lien holder. The failure to do amounted to conduct by the bank allowing the borrower to have the title at his disposal where it could be transferred to an unsuspecting bona fide purchaser. She further submits that, there being no connection between Mr. Scott and Beverly Belnavis, even if Mr.

Green had made checks with the Island Record Office, the Bill of Sale would have been in Mr. Scott's name so he would not have been fixed with notice of the bank's interest.

[20] Counsel for the defendants, Mr. Powell, asserts that there is no evidence of any conduct of the bank that would preclude it from denying Mr. Scott's authority to sell.

[21] It is certainly not clear to this court whether the failure to register the lien on the title would be sufficient conduct. In **Halsbury's Laws of England**, 3rd edition, vol 34, par 123 - 126, an example is given where the owner has clothed the seller with an ostensible authority to sell and the buyer has acted on the faith of it, or estoppel founded on duty. In **Heap v Motorists Advisory Agency**, 1923, 1 KB, 577, the court considered the facts of that case under two limbs. Firstly, Section 21[1] of the Sales of Goods Act, 1893, which is similar to our Section 22. Secondly, the Factors Act which is irrelevant to the present circumstances.

[22] In relation to the Sales of Goods Act, the court held that, in order to prove that the owner is precluded by his conduct from denying the seller's authority to sell, the negligence shown must be more than mere carelessness in the conduct of his affairs and must amount to disregard of his obligations towards the person who is setting up the defence.

[23] It would appear that a material issue for determination is whether the omission of NCB is more than mere carelessness. The claimant's attorney has stated that it is their intention to present evidence at a trial of the effect of lack of registration from the appropriate authority. It is therefore a live issue and cannot be resolved in this application.

[24] Mrs. Cousins-Robinson has also asked this court to consider the observations of Lord Halsbury in **Henderson & Co. v Williams** [1895] 1QB 521. In considering similar issues, Lord Halsbury [page 529], quoted with approval remarks made in **Root v French** from the Supreme Court of New York:

.... Savage CJ makes observations which seem to me to be well worthy of consideration. Speaking of a bona fide purchaser who has purchased property from a fraudulent vendee and given value for it, he says, 'He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer, who, by his indiscretion, has enabled such third person to commit the fraud.

A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the usual course of trade materially rests.

- [25] I note, however, that the facts in **Henderson** are different as the owner of the goods had been induced by the fraud of one F to instruct a warehouseman to transfer the goods to the order of F who sold them to an innocent bystander.

Section 23

- [26] I am of the opinion that Section 23 has no relevance to the facts of this case, as it is hardly feasible that Mr. Scott could be described as having a voidable title. However, based on the decision of **Robin and Rambler Coaches Ltd v Turner**, 1947, 2 ALL ER, 284, a trial court must consider the implications as it appears to contradict remarks made by Graham Perkins J in **Lydon Allen v Olds Discount Co. of Jamaica Ltd and Others** [1966] 9 WIR 452. Both cases dealt with a hire purchase agreement. In **Robin**, the agreement was to purchase a motor car which was sold fraudulently. In **Lydon**, the hire purchase agreement included an option to purchase. Graham Perkins [page 456] expressed that Section 23 was irrelevant:

I find it impossible to discover any principle of law by which he could be held to have a voidable title-- which wasn't avoided at the time of the sale. It would be a novel jurisprudential principle that would recognize the co-existence of an absolute title in one person and a voidable title in another in respect of the same subject matter.

The distinction, however, may well lie in the option to purchase as it is clear that the title does not pass in a hirer purchase agreement with an option to purchase.

Section 25 [1]

- [27] In relation to Section 25 [1] and indeed all the other sections being relied upon, Mr. Powell, has submitted that they are irrelevant. The simple fact is that the bank has the legal title and Mr. Green could not have acquired a better title otherwise than acquiring from the bank which he did not. He is relying on **Lydon** in support of his contention.
- [28] The facts of that case are important. In August 1960, the defendant let a motor car to **RS** on a hire purchase agreement which contained an option to purchase as well as a clause restraining the hirer from "selling... or otherwise disposing" of the car. In January 1961, a transfer of the car was registered from **RS** to **VG**. In April 1961, **SG Ltd** acquired the car from **VG** and sold it to **TD** who eventually sold it to the plaintiff. The car was subsequently repossessed by the defendant in September 1961 as there was a balance owing by **RS**. The plaintiff sued the defendant to recover damages and for wrongful seizure of the car and added **TD** as a defendant who brought in **SG** as a third party.
- [29] Graham Perkins J (Ag.) held that in January 1961, **RS** was still bound by the provisions of the hire purchase agreement and had purported to do something which he was precluded from doing. The result of this is that there was no title that he could pass to **VG** and the defect in title followed every subsequent transaction. The defendant therefore had the right to repossess the car.
- [30] I do agree that the circumstances are similar to the present case except for one material distinction. Although the plaintiff in **Lydon** relied on similar sections of the Sale of Goods Act, the title was never transferred to the hirer as he only had an option to purchase. Graham Perkins referred to various authorities [pg 455-56] and reiterated the legal principle that a hirer under an option to purchase in certain circumstances or to return it to the owner is not a person who has 'agreed

to buy' within the meaning of Section 25[2] of the Act. Section 25[2] is the equivalent of Section 25[1] except that it deals with the buyer in comparison with subsection [2] that deals with the seller.

[31] In the present case, Mr. Scott had clearly transferred the ownership of the car to the bank. Section 2 of the Act defines Contract of Sale as follows:

2(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

[32] When that definition is read in the context of Section 25[1], it could be argued that Mr. Scott sold the car to the bank and continued in possession of it. The words 'continues in possession' has been held by the Privy Council in **Pacific Motor Auctions Pty v Motor Credits [Hire Finance] Ltd** [1965] 2 ALL ER, 105 [deliberating Section 28[1] of the New South Wales Sale of Goods Act, which is similar in wording to Section 25 of the Jamaican Act] to be intended to refer to the continuity of physical possession regardless of any private transaction between the seller and purchaser which might alter the legal title under which possession was held. If Mr. Scott fits into what is described in the above section, then it is possible that protection is offered to Mr. Green under that section.

[33] What is clear from the authorities is that, between Mr. Scott and the bank, the bank is the owner of the vehicle. However, the Act does provide some protection

for a bona fide purchaser without notice of the defective title. The issues raised by the claimant are cogent and it is my opinion that the defendants have not met the standard necessary to succeed in an application for summary judgment as I am not clear as to what the ultimate result of a trial would be.

The Application is therefore refused.

Leave to Appeal granted.

Costs to the claimant to be agreed or taxed.