

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C. L. 1977/J151

BETWEEN JAMAICA DEVELOPMENT BANK PLAINTIFF
AND LEON ROBERTSON, RECEIVER DEFENDANT
WILBROS LIMITED

Heard: November 21, 22, 1977;
December 12, 1978;
November 2, 1979

COR: THE HONOURABLE MR. JUSTICE WHITE

Mr. W. K. Chin-See, Attorney-at-Law, instructed by Messrs. Dunn, Cox & Orrett, for plaintiff.

Mr. David Muirhead and Mrs. G. Saunders, Attorneys-at-Law, instructed by Messrs. Judah, Desnoes, Lake, Nunes, Scholefield & Company, for Defendant.

J U D G M E N T

White, J.:

By summons, the plaintiff, (J.D.B.) applied for an order that:

1. The defendant, its servant and/or agents do forthwith deliver up the equipment set out in the Schedule I of the Bill of Sale bearing date the 25th day of September, 1976, made between the defendant of the one part as Borrower, and the plaintiff of the other part as Lender recorded at Liber New Series 2352 Folio 261 to the plaintiff wheresoever the same may now be situated and in particular without prejudice to the generality of the foregoing all equipment now located on premises known as Balcony Inn Hotel near May Pen in the parish of Clarendon.
2. The defendant whether by itself or by its servant or agents or otherwise howsoever be restrained from interfering, obstructing or hindering the seizure by the plaintiff, its servants and/or agents of the equipment the subject of the aforesaid Bill of Sale and as such

is entitled to the immediate possession of the said equipment or any replacements or additions thereto in accordance with the aforesaid Bill of Sale.

The background of this summons is the default of the defendant to comply with the terms of the Bill of Sale, consequent upon which the plaintiff, a body corporate duly established by the Government of Jamaica, under the Jamaica Development Bank Act, took steps to take possession of the 11 pieces of equipment referred to above. According to the affidavit of Phillip Lewis^{he} and other employees of the Jamaica Development Bank, on the 27th May, 1977, went to the Balcony Inn premises in May Pen, Clarendon, and took one piece of machinery which was among the 11 pieces of machinery identified as mortgaged to the Jamaica Development Bank by Wilbros *Ltd.* by Bill of Sale. They took away the piece of equipment but subsequently on the 30th May, 1977, the removal team was prevented from removing any more of the machinery.

It was asserted that this was because the Ministry of Works claimed that it had acquired a right under an agreement between Wilbros Limited and the Ministry of Works whereby that Ministry should have the right to use the equipment in the event that Wilbros *Ltd.* should make default in performing its contract. The assertion is that this right is superior to the right conferred under the Jamaica Development Bank under its Bill of Sale. Therefore, the Ministry of Works had a superior right to obtain possession of the equipment. It is not shown from any of the affidavits that any documentary evidence to support the Ministry's claim was produced to those who were attempting to complete the seizure in a peaceful manner. However, I should here mention that a Condition of the Bill of Sale is that the defendant should deliver to the plaintiff standing orders through the Bank of Nova Scotia Jamaica Limited for remittance to the plaintiff of proceeds from the Contract Agreement, referred to in Schedule II of the Bill of Sale. This makes it clear that these three contracts each dated the 16th January, 1976, and made between the Government of Jamaica and Wilbros Limited,

were entered into before the Bill of Sale, which itself is dated the 29th day of September, 1976. But this fact does not, by itself, give any priority to the Government to the claim of the Jamaica Development Bank who was rightly and legally attempting to enforce whatever rights it had over property mortgaged to it by the Bill of Sale. The position of the plaintiff under this Bill of Sale is that the particular provision identifies the source from which payments in discharge of the defendant's obligation were to be effected.

In pursuance of the legal rights of the Jamaica Development Bank, Mr. Vincent Chen, Attorney-at-Law, acting on behalf of the Jamaica Development Bank along with others made a further attempt to locate and seize the property charged under the Bill of Sale. It eventuated that in the exercise of those rights, the persons just mentioned were confronted by armed policemen who with contemptuous treatment prevented them from carrying away any of the machinery. Mr. Chen has deponed that during the incident:

" I showed the Bill of Sale to the Inspector (L.L. Robinson) advised him of the claim by the JDB and told him that we were seizing the equipment by virtue of this Bill of Sale. I enquired why he had interfered with the seizure.

14. He informed me that the Ministry of Works had claimed a right to the equipment and I asked him if he had seen any document or other evidence that could support the Ministry's claim. He said no he had not but that he had instructions from his superiors and that consultations had taken place at Ministerial level on the matter; therefore he could not permit me to remove the equipment on the ground that the equipment was now disputed property and he was taking the same into his custody and would release same only upon the production of a Court Order. This conversation took place in the presence of Mr. Miller from the Ministry of Works who confirmed that the Ministry would not permit the removal of any of the equipment and that the Ministry had requested the Police to stop the seizure. "

Because of this uncontroverted, blantly contumelious, actions by the police, acting in the name of the Ministry of Works, I adjourned the matter into open Court. For the account given in the affidavits of Mr. Chen and Mr. Lewis poses a dilemma which would deprive an independent corporation from carrying out the functions conferred on it by Parliament, and with which the Ministry concerned did not see

fit to discuss the problem, so that in due recognition of the situation mutual protection of rights would be secured. For what it is worth, I must say that I regard the action of the Ministry of Works and the police as highhanded and does deprive the Jamaica Development Bank, a lending agency, of any proper safeguards to its rights and interests about which, presumably, an annual report has to be made to Parliament.

This aside, the real problem here is whether an interlocutory injunction can be ordered against the defendant of whose business Leon Robertson was appointed Receiver and Manager under powers of Sale contained in Clause 21 of a debenture between the Bank of Nova Scotia Jamaica Limited and Wilbros Limited dated the 22nd November, 1973. This debenture created a charge over all the assets of Wilbros Limited. The machinery or equipment set out in the Bill of Sale between Jamaica Development Bank and Wilbros Limited was later excluded from the aforesaid debenture by a consent in writing given by the Bank of Nova Scotia Jamaica Limited that the charge created by the foregoing Indenture of Bill of Sale dated the 29th day of September, 1976, issued by the Company to the Jamaica Development Bank shall rank in priority in point of security to the charge created by the Bank of Nova Scotia debenture. So that there is here no question of the Receiver and Manager exercising a prior security against the Jamaica Development Bank.

In paragraph 4 of his affidavit, Mr. Robertson states:

"4. That I understand that certain equipment the subject of a Bill of Sale dated the 29th September 1976 between the Jamaica Development Bank and Wilbros Limited is the property of the Jamaica Development Bank and I have not made any claim to the said equipment. "

Further in paragraph 6:

"6. That at no time before suit was filed herein was I approached by the Jamaica Development Bank with regard to giving them possession of the said equipment and that had I been approached by the Jamaica Development Bank I would not have resisted them in their efforts to obtain possession of the said equipment.

In paragraph 9, he points out:

"9. That I refer to the Affidavit of Vincent Chen filed herein with particular reference to the Jamaica Development

" Bank having exercised their rights under the said Bill of Sale and have to say that the Jamaica Development Bank has reduced the equipment into their sole possession and have ousted any rights I might have had to possession of the said equipment and I have not asserted or sought to assert any rights over the said equipment consequent on the action of the Jamaica Development Bank. "

These paragraphs of Mr. Robertson's affidavit disclose that he, in his capacity of Receiver and Manager, is not making any claim to the equipment in question, nor is he resisting the plaintiff's right to obtain possession of the said equipment. Although he refers to the action of the May Pen Police in frustrating the efforts of the Jamaica Development Bank, he posits that:

" It appears that the Government of Jamaica is claiming an equitable right to use the equipment to complete certain road works which were abandoned by Wilbros Limited in about February 1977. This right is apparently being claimed by the Government of Jamaica under certain contracts it entered into with Wilbros Limited. "

He exhibits an extract of one of the said contracts but I fear that the extract does not help me in any way in this particular matter so far as the rights of the **Government** vis-a-vis the Jamaica Development Bank ^{are} ~~is~~ concerned. If in fact the rights of the Government are equitable it is a moot point whether those rights would have priority over those of the Jamaica Development Bank especially seeing that the Bill of Sale was recorded.

Considering that the Receiver and Manager is not disputing the claim of the Jamaica Development Bank to possession, is it obligatory on him to positively hand over the goods to the Jamaica Development Bank? This arises because he admits the plaintiff's contention that the equipment is on the Balcony Inn Hotel premises which form part of the assets of the defendant. Mr. Chin-See for the plaintiff submitted that if a third party attempts to prevent B from his rightful possession whilst the property is still in the custody of A, A has a duty to hand over the property to B. He cannot sit by idly and say that he is not making a claim, but at the same time he produces a contract which shows that the third person makes a claim thereto, and so he is under no duties to act positively.

The effect of the contract as extracted and exhibited is that when the plant is brought on site it vests in the Government

of Jamaica if it belongs to the contract. Otherwise the only way it can vest is by evidence of title produced to the Government of Jamaica. The Bill of Sale/^{being}evidence to the contrary, there could be no vesting in the Government of Jamaica of chattels whether for the purpose of completing works or not. The Jamaica Development Bank is therefore entitled to this property, and the order should be made against the Receiver and Manager.

I think Mr. Muirhead for the defendant pinpointed the real approach on this summons. He argued that I should direct the injunction to the force of the resistance in order to compel that source to acquiesce in a claim supported by the order of the Court. The plaintiff has identified the 11 pieces of equipment and so reduced them into its possession, and all that is left is for the plaintiff to effect their removal.

It is my view that the interlocutory injunction should not be granted. Apart from the alleged impassivity and inactivity of the Receiver/Manager, which has been satisfactorily explained, no evidence has been given to show that he actively or even covertly prevented the seizure of the equipment. If the Government has any rights whatever in the equipment here involved, it certainly cannot be determined herein and so I am relieved of any necessity to decide what order can properly be made against the Ministry of Works. I would, however, advert to the Crown Proceedings Act s. 16. At the same time, I express the hope that no part of the Executive would do anything which could be interpreted as emasculating the rights and obligations of a body duly authorised by Parliament to carry out functions assigned to it by Parliament.

Except in so far as authorised by Parliament, the Crown is not authorised to interfere with those rights at its own mere will.

" It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law in order to obey it not to disregard it."

These words of Sir George Farwell in the judgment of the Judicial

Committee of the Privy Council in Eastern Trust Co. v. McKenzie
Mann & Co. Ltd. [1915] A.C. 750 at p. 759 are worthwhile repeating
in reference to this case.

I dismiss this application with costs to the defendant.
