

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 13/2011

**BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)**

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| BETWEEN | JAMAICA REDEVELOPMENT FOUNDATION INC | APPELLANT |
| AND | PREMIUM INVESTMENTS LIMITED | RESPONDENT |

Charles Piper and Miss Marsha Locke for the appellant

**Abraham Dabdoub and Paul Beswick instructed by Raymond Clough of
Clough Long and Co for the respondent**

10 May and 8 July 2011

MORRISON JA

[1] I have read in draft the judgment of my brother Hibbert JA (Ag). I agree with his reasoning and conclusions and have nothing further to add.

DUKHARAN JA

[2] I agree with the reasoning and conclusion of Hibbert JA (Ag).

HIBBERT JA (Ag)

[3] The financial crisis of the 1990s and the subsequent acquisition of debt portfolios triggered many suits in our courts. One such suit was brought by Premium Investments Limited (in liquidation), hereinafter called Premium Investments, against Jamaica Redevelopment Foundation Inc. (J.R.F.). This suit was brought by way of a fixed date claim form, filed on 13 September 2007 and supported by an affidavit of Douglas Chambers, the then liquidator of Premium Investments. In that claim the following orders were sought:

- “1. That the Defendant do give to the Claimant a full account of all monies alleged by the Defendant to be owing by the Claimant to the Defendant such account(s) to commence from the 1st day of December 1993 up to the present time.
2. That such account(s) be given by the Defendant to the Claimant in respect of each and every loan or advance made to the claimant in respect of which the Defendant alleges that the claimant is indebted to it including the following particulars:
 - (a) The date on which each and every loan or advance was made to the Claimant, the amount of the principal of each and every such loan or advance, the rate per centum per annum of interest charged in respect of each and every such loan or advance;
 - (b) The amount of each and every payment already paid by the Claimant and/or anyone else on behalf of the Claimant in respect of each and every such loan and the date on which each such payment was made and the manner in which

each and every such payment was appropriated or applied.

- (c) The amount of each and every sum claimed to be due to the Defendant by the Claimant but unpaid, the date upon which it became due, and the amount of interest due and unpaid in respect of every such sum.
 - (d) The amount of every such sum not yet due which remains outstanding, and the date on which it will become due;
 - (e) The manner in which interest is computed (simple or compound) in respect of each and every such loan or advance and the rests [sic] at which it is applied or computed.
3. An injunction to restrain the Defendant whether by itself or by its directors, officers, servants or agents or otherwise howsoever from dealing with or disposing of the lands owned by the Claimant comprised in Certificates of Title registered at Volume 1127, Folio 995, Volume 1206 Folio 261 and Volume 1218 Folio 285 of the Register [sic] of Titles (which are subject to a Registered Mortgage which the Defendant claims to own) until the final determination of this action.
 4. Costs.
 5. Such other relief as this Court deems just."

[4] A further affidavit of Douglas Chambers was filed on 17 September 2007. In response to the affidavits of Douglas Chambers, an affidavit of Miss Janet Farrow, the then chief executive officer of the Jamaican branch of J.R.F., was filed on 28 September 2007. A supplemental affidavit of Miss Farrow was filed on 16 November 2007.

[5] On 7 August 2008, Sykes J delivered his judgment after hearing, in chambers, an application for summary judgment made on behalf of Premium Investments, and applications made on behalf of J.R.F. to discharge an injunction and for an extension of time for filing the defence to the date of the filing of Miss Farrow's affidavit of 2B September 2007. Among the orders made by Sykes J was:

"4. The Affidavits of Janet Farrow filed on September 28, 2007 and November 18, 2007 is [sic] to stand as the defence."

[6] Douglas Chambers died tragically on 21 June 2008 and on 22 July 2008 Miss Sophia Beckford was appointed the liquidator of Premium Investments. In furtherance of the claim filed by Premium Investments, two affidavits, sworn to by her, were filed on 26 and 28 October 2010.

[7] The case came up for trial in chambers before Jones J on 2 November 2010 and, in granting a further adjournment to 25 January 2011, he ordered that "Janet Farrow and Sophia Beckford should be present for cross examination".

[8] On 11 January 2011, by notice of application for court orders, J.R.F. sought a variation of Jones J's order of 2 November 2010, to permit Joseph Gibson IV, J.R.F.'s president, to be substituted in place of Miss Farrow as the witness for J.R.F. for the purposes of cross-examination. This application was supported by an affidavit of Mr Gibson which was sworn to and filed on that same day. The orders sought and the grounds submitted were as follows:

- “1. Joseph W. Gibson IV be substituted as the witness for the Defendant in place of Janet Farrow;
2. The Order of the Honourable Mr. Justice Jones dated November 2, 2010 requiring Ms. Janet Farrow to be present for cross examination be varied to allow Joseph W. Gibson IV to be cross examined at the trial in substitution for Ms. Janet Farrow;
3. The time for service of this application be abridged; and
4. There be such further or other relief as to the Court may seem just.

The grounds on which the Defendant/Applicant seeks the order are as follows:

- “a) Ms. Janet Farrow is no longer employed to the Defendant, she has left the jurisdiction and the Defendant has not been able to make contact with her.
- b) It is believed that Ms Farrow is unaware of the Order that she attend for cross examination.
- c) The Claimant will not be prejudiced by an order that Mr. Joseph Gibson IV, President of the Defendant be cross examined on the contents of Ms. Farrow’s Affidavits.
- d) The Defendant will be prejudiced if the order being sought is refused.
- e) The overriding objective of the Rules favours the grant of the application as opposed to its refusal.”

[9] The application was heard by King J who refused it. No written judgment was produced by King J but the following extract from his notes, which was provided to the

court, is of assistance in the determination of whether or not King J exercised his discretion correctly. It states:

“He explained that Ms. Farrow resigned as CEO of the Defendant with effect from the 29th October 2010, and that since she left the island on that date, neither the Defendant nor its Attorney has been able to contact her. No information is supplied as to what efforts have been made to contact her.

Rule 30.1 of the Civil Procedure Rules (CPR) 2002 in dealing with affidavits, provides that where a deponent does not attend to be cross-examined when ordered by a Court to do so, the affidavit of that deponent may not be used as evidence unless the Court permits. This provision is, no doubt, the reason for this application.

I have carefully considered the submissions of Counsel for each side. It is noted that no application was filed seeking to adduce the affidavits of Ms. Farrow as hearsay evidence by virtue of the provisions of section 31E of the Evidence Act. Much of the contents of these affidavits were exhibits comprising computer generated documents and/or conclusions drawn from such documents.

Since those documents have not been made admissible under the provision of section 31(G) of the Evidence Act, neither the documents nor any conclusions drawn from them would be admissible.

Mr. Gibson ended his affidavit by saying that he is not seeking to add to, vary or contradict any of the facts set out in Ms. Farrow [sic] affidavit. In effect the Defendant seeks to meet the provisions of section 30.1(5) by having Mr. Gibson put in the evidence [sic] Ms. Farrow's affidavits and offer himself to be cross-examined on her evidence-in-chief.

How would such an exercise afford the Court the opportunity of assessing the credibility of Ms. Farrow or the reliability of what would really be her evidence? To vary the Order of JONES, J in the manner sought would, in my judgment,

defeat the purpose of that Order and severely prejudice the Claimant in the conduct of its case.”

[10] It is from this refusal that J.R.F. has appealed relying on the following grounds of appeal:

- “(1) The Learned Judge erred in his assessment of the facts and, in particular, by categorizing the evidence set out in Ms. Farrow's Affidavits as being based upon "computer generated documents", a term which he did not define.
- (2) The Learned Judge erred in his assessment of the evidence contained in Ms. Farrow's Affidavits and wrongfully exercised his discretion on the application to vary the order of the Honourable Mr. Justice Jones seeking the substitution of Mr. Joseph Gibson IV in place of Ms. Janet Farrow as the deponent for cross examination.
- (3) The Learned Judge erred by having failed to have any or any sufficient regard to the consequences of Mr. Joseph Gibson IV having adopted as true and correct the contents of Ms. Farrow's Affidavits, which are based upon the records in the Defendant's possession regarding the Claimant's transactions, the subject of the proceedings.
- (4) The Learned Judge erred in law, misdirected himself and/or incorrectly exercised his discretion in taking into consideration matters relevant to the admissibility of evidence under the Evidence Act or otherwise, when the issue was whether it was procedurally appropriate and just that the Order of Mr. Justice Jones be varied to permit another person who is in custody of the documents revealing the facts that are relevant to the case, to be cross examined thereon.
- (5) The Learned Judge erred in law and in fact in failing to appreciate that once filed, the affidavits on behalf of the parties stands [sic] as their evidence

notwithstanding that, where ordered by the Court, they may be cross examined thereon.

- (6) In all the circumstances, the Learned Judge misdirected himself as to the overriding objective of dealing with cases justly and has, accordingly, effectively deprived the Defendant of the ability to advance its defence without there being any basis in fact or in law to support his having done so.”

[11] Before this court, Mr Piper submitted that, Mr Gibson, having stated that he was familiar with the facts as they appear from the correspondence and documentation on J.R.F.’s files, and that he adopted the facts set out in the affidavits of Miss Farrow as true and correct, became eligible to be cross-examined on Miss Farrow’s affidavit. This, he also submitted, would cause no prejudice to Premium Investments.

[12] Mr Piper also submitted that, as Sykes J had already ordered that the affidavits of Miss Farrow filed on 28 September 2007 and 16 November 2007 should stand as the defence, a new affidavit could not be substituted. Consequently, the refusal by King J to grant the order sought was tantamount to striking out the defence of J.R.F. in circumstances where no injustice would be done to Premium Investments.

[13] Mr Beswick, in responding to submissions made by Mr Piper, challenged the procedural correctness of the application to have Mr Gibson substituted for Miss Farrow for the purpose of being cross-examined on her affidavit. He submitted that, in order for the affidavit of Miss Farrow to be used in her absence, an application would have to be made to the court under the provisions of section 31E of the Evidence Act and rule 31.1(5) of the Civil Procedure Rules (CPR). Mr Beswick further submitted that as Miss

Farrow also prepared the statement of account spoken of in her affidavit, Mr Gibson could not speak to the accuracy of this statement.

Analysis

[14] The use of affidavit evidence in civil proceedings in the Supreme Court is governed by part 30 of the CPR. Rules 30.1(1), 30.1(3) and 30.1(5) are pertinent to this case and are as follows:

- 30.1(1) "The court may require or permit evidence to be given by affidavit instead of, or in addition to, oral evidence."
- 30.1(3) "Whenever an affidavit is to be used in evidence, any party may apply to the court for an order requiring the deponent to attend to be cross examined."
- 30.1(5) "Where the deponent does not attend as required by the court order, the affidavit may not be used as evidence unless the court permits."

[15] Jones J, having made the order that Miss Farrow should attend at the trial for the purpose of being cross examined on her affidavit, by virtue of rule 30.1(5) of the CPR, her affidavit could not be used as evidence in her absence without leave of the court. Provision is therefore made under this rule for an application to be made for the affidavit of Miss Farrow to be used as evidence in her absence. No doubt, before granting this application, the court would have to be satisfied that there is a good explanation for her absence. No such application was, however, made and it could not

be seriously argued that this was what was intended by the notice of application for court orders which was filed on 11 January 2011 on behalf of J.R.F.

[16] One question which arises is this: can a person be substituted as a witness in place of an affiant for the purpose of being cross-examined on the affiant's affidavit? No statutory provision or rule in the CPR permitting such a course has been brought to our attention, neither have I been able to find any.

[17] Section 31E of the Evidence Act also makes provisions for statements to be admitted in evidence in the absence of the maker of the statement. Section 31E states:

- "(1) Subject to section 31G, in any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.
- (2) ...
- (3) ...
- (4) The party intending to tender the statement in evidence shall not be obliged to call, as a witness, the person who made the statement if it is proved to the satisfaction of the court that such person -
 - (a) is dead;
 - (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

- (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
- (d) cannot be found after all reasonable steps have been taken to find him; or
- (e) is kept away from the proceedings by threats of bodily harm.”

[18] Section 31E of the Evidence Act, like rule 30.1(5) of the CPR provides for the use of a statement as evidence in the absence of the maker of the statement. Significantly, none of the provisions in rule 31.1 of the CPR or section 31E of the Evidence Act sanctions or even addresses the substitution of a witness for the purpose of being cross-examined relative to the contents of the statement of another.

[19] Mr Piper has argued that the affidavits of Miss Farrow, having been used as evidence in interlocutory proceedings, are not subject to the provisions of section 31E of the Evidence Act. I cannot agree with this submission, but instead, agree with the submission of Mr Beswick that for the purposes of the trial, the affidavit of Miss Farrow does not become evidence unless Miss Farrow attends court or, in her absence, (the court so permits). This position is clearly borne out by the provisions of rule 30.1(5) of the CPR.

[20] Even if the court could allow a person to be substituted for the purpose of being cross-examined on the affidavit of another, could the court in this case, properly exercise its discretion in that way, bearing in mind that the purpose of cross-examination is to test the credibility and reliability of the affiant? To answer this

question, one must examine the affidavits of Miss Farrow. Her affidavit which was filed on 28 September 2007 was in response to the affidavits of Mr Chambers and spoke of matters within her personal knowledge, her examination of documents numbering in excess of 50 and the conclusions drawn and opinion formed as a result of these examinations. Most importantly, she exhibited what she described as a detailed statement of Premium Investments' account with J.R.F. She did not, however, state who prepared this account or how it was prepared. Serious questions may therefore arise as to the admissibility and reliability of this account which, in light of what is sought in the claim, would be crucial to the outcome of the case. In my view, based on the contents of Miss Farrow's affidavit, she, and she alone, would be able to give any explanation which would be requested during cross-examination.

[21] During arguments before this court, the following cases were referred to:

- (1) **Infields Ltd v Rosen** [1939] 1 All ER 121
- (2) **Ozzard-Low v Ozzard-Low and Wonham** [1953] 2 All ER 550
- (3) **Rover International Ltd and Others v Cannon Films Sales Ltd** [1987] 1 WLR 1597
- (4) **In re Konigsberg (A Bankrupt) Ex parte Trustee of the Property of the Bankrupt v Konigsberg and Others** [1989] 1WLR 1257

I do not find any of these authorities very helpful as they dealt with the admissibility of statements.

[22] Mr Piper, in asserting that the decision of King J went against the overriding objective of the CPR relied on a statement of Cooke JA in **RBTT Bank Jamaica Ltd v YP Seaton, Earthcrane Haulage Limited and YP Seaton & Associates Company Limited**, SCCA No 107/2007. At page 26, paragraph 20 of his judgment, Cooke JA stated:

“Before I depart from this case, I wish to say, that there were submissions as to the overriding objective of the C.P.R and various rules calculated to achieve the aim of dealing justly with cases. The learned trial judge also dealt with this. However, in the instant case the central issue was whether or not the learned trial judge properly exercised his discretion. If he did not, it is impossible to say that the case was dealt with justly.”

In that case what was in issue was an application to replace the stipulation for a witness statement by a witness summary. What was requested in the instant case was far more contentious and for which neither statute nor the CPR provided.

[23] I cannot agree with the submission by Mr Piper that, Jones J by virtue of his order requiring Miss Beckford to attend at the trial for the purpose of cross-examination was in essence allowing her to be cross-examined on the affidavit of Mr Chambers. Although in her first affidavit, Miss Beckford stated that she adopted what was said in the affidavits of Mr Chambers, she spoke to what she had done and the order of Jones J could only mean that she should be cross-examined on the contents of her affidavits.

[24] The other complaint made by Mr Piper was that the decision of King J was tantamount to striking out the defence of J.R.F. I cannot agree with this submission as there were other avenues which could have been pursued in having the defence

presented. An application could have been made to amend the order of Sykes J to substitute an affidavit of Mr Gibson as the defence and the order of Jones J to require him to be present for cross-examination on his own affidavit. Additionally, an application could have been made under rule 30.1 (5) of the CPR for the affidavit of Miss Farrow to be used as evidence in her absence.

[25] I am of the view that King J acted correctly in the exercise of his discretion in refusing the application for Mr Gibson to be substituted for Miss Farrow for the purpose of being cross-examined on her affidavit. Accordingly, I would dismiss this appeal and award costs of this appeal to the respondent to be taxed if not agreed.

MORRISON JA

ORDER

Appeal dismissed. Costs to the respondent to be taxed if not agreed.