

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 115/2007

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)**

BETWEEN:	SEBOL LIMITED	1ST CLAIMANT/ APPELLANT
AND	SELECTIVE HOMES & PROPERTIES LIMITED	2ND CLAIMANT/ APPELLANT
AND	KEN TOMLINSON (As the Receiver of Western Cement Company Limited	1ST DEFENDANT
AND	NATIONAL INVESTMENT BANK OF JAMAICA LIMITED	2ND DEFENDANT
AND	THE REGISTRAR OF TITLES	3RD DEFENDANT/ (Nominal)
AND	PAN CARIBBEAN FINANCIAL FINANCIAL SERVICES LIMITED (Formerly Trafalgar Development Bank Limited)	4TH DEFENDANT/ RESPONDENT

John Vassell, Q.C. and Courtney Bailey instructed by DunnCox for the Claimants/Appellants.

Gordon Robinson instructed by Miss Linda Mair of Patterson, Mair and Hamilton for the 4th Defendant/Respondent.

10th December, 2007 and 12th December, 2008

PANTON, P.

1. The facts are set out in the judgment of my learned brother Dukharan, J.A. I agree with him and my learned brother Harrison, J.A. that this appeal ought to be dismissed. Sykes, J., in my opinion, demonstrated a full appreciation of the matter that was before him for determination. He summed up the position well, when in paragraph 15 of his judgment he said:

"I do not see why Pan Caribbean should be saddled with the burden of defending a claim in which they have no legal or equitable interest. They have sold the debt and have moved on."

Consequently, I am of the view that it was unnecessary for the learned judge to have entered into a discussion on the distinction between "reasonable claim," "reasonable cause of action" and "reasonable grounds for bringing the action."

2. The reality is that Pan Caribbean has no further interest in the mortgage. As far as the cause is concerned, the reality is that Pan Caribbean does not exist. There is a new entity standing in its stead. That being the case, how can Pan Caribbean be involved in any process of rectification of the mortgage? In my view, such involvement would be only to serve the whim and fancy of Sebol and Selective. Such a situation cannot be countenanced.

HARRISON, J.A.

I too agree with the reasoning and conclusion of Dukharan, J.A. There is nothing further I wish to add.

DUKHARAN, J.A.

1. This is an appeal from a decision of Sykes, J. in which he struck out the statement of case against the 4th Defendant/Respondent on the ground that it failed to disclose any cause of action against it, pursuant to Rule 26.3 (1) (c) of the Civil Procedure Rules.

Background to this Appeal

2. The 1st Claimant/Appellant, Sebol Limited (Sebol) is a company incorporated in the Cayman Islands. The 2nd Claimant/Appellant Selective Homes and Properties Limited (Selective) is a company incorporated in Jamaica. The 1st Defendant Ken Tomlinson is the receiver of Western Cement Company Limited (WCC) which was placed in receivership. The 2nd Defendant National Investment Bank of Jamaica Limited (NIBJ), is the assignee of the 4th Defendant/Respondent Pan Caribbean Financial Services Limited (formerly Trafalgar Development Bank Limited) (Pan Caribbean). The 3rd Defendant, The Registrar of Titles is a nominal Defendant.

3. Mr. Robert Cartade is a director of Sebol and WCC. WCC is a company incorporated in Jamaica to manufacture cement in the parish of St. Elizabeth. The company needed funding to pursue this enterprise. A group of lenders came together to provide funding with the Respondent Pan Caribbean being the main lender.

4. It was agreed between WCC and Robert Cartade that Selective would use three properties to secure part of the loan made to WCC by Pan Caribbean. The mortgage instrument is dated the 20th October, 1995 but was not registered. This mortgage has now been assigned to NIBJ. WCC defaulted on the loans and a receiver (1st Defendant) appointed by NIBJ to realize the security. The receiver has attempted to register the mortgage which is one of the equitable interests in a priority dispute.

5. NIBJ invested the sum of US\$1,191,392 in the WCC project by way of equity and was given preference shares. When WCC defaulted on the loans NIBJ purchased the debt of the lenders. By deed of assignment dated 1st May, 2003 Pan Caribbean assigned to NIBJ all rights, titles and interest in the debts and loan documents relating to the financing of the WCC. NIBJ paid Pan Caribbean US\$1,055,429.83 for this assignment.

6. The Appellants are alleging that during negotiations leading up to the execution of the loan agreement and the mortgage, Pan Caribbean had said that the collateral offered by WCC for the loan would not be realized until the commissioning of the lime plant. This led Selective and Pan Caribbean to agree that Selective would offer the three properties as collateral for the loan to WCC until the lime plant was commissioned. Selective's properties which would be offered as security in the interim would be released.

7. The Appellants further allege that when Selective executed the loan documents and the mortgage instrument, it was under the mistaken impression that the mortgage instrument reflected the understanding between Selective and Pan Caribbean. The Appellants contend that the mortgage instrument should be rectified to reflect this agreement between Selective and Pan Caribbean, as Pan Caribbean was aware of the mistake.

8. It is against this background that suit was filed against Pan Caribbean. Sykes, J. ruled that Pan Caribbean having assigned its rights and liabilities to NIBJ the Appellants had no cause of action against it.

GROUND OF APPEAL

The grounds of appeal are as follows:

- "1. The learned trial judge having found that there were reasonable grounds for bringing a claim for the rectification of the aforementioned mortgage, erred in law in finding that there were no proper grounds for bringing the claim against the 4th Defendant because the 4th Defendant had assigned the mortgage to the 2nd Defendant.
2. The learned judge erred in the significance that he attached to the change in the language from "reasonable cause of action" in the old rules to "no reasonable grounds for bringing or defending a claim" under C.P.R 26.3 (1) (C) of the new rules. There is no warrant whatsoever for this conclusion and no authority supports it."

ORDERS SOUGHT

- "(1) That the order of Sykes, J. dated the 9th October, 2007 striking out the claim against

the 4th Defendant/Respondent and awarding costs to the 4th Defendant/Respondent be set aside.

- (2) The costs of the appeal and of the 4th Defendant's/Respondent's application in the Supreme Court be the Claimant's/Appellant's to be taxed if not agreed."

SUBMISSIONS

9. Mr. Vassell, Q.C. for the Appellants submitted in ground 1 that there was no attempt to exercise powers under the mortgage. It is the registration of the mortgage which the first Defendant was attempting to effect. The Appellants' object in bringing the action is not only to stop registration of the mortgage, but to have its rights against all relevant parties, including the Respondent established by binding declarations and other orders of the Court, so that all issues in controversy will be finally settled and multiplicity of proceedings avoided.

10. Learned Queens Counsel further submitted that the claim for rectification depends upon dealings between Selective and Pan Caribbean which took place when the loan to WCC from Pan Caribbean was negotiated in 1995. NIBJ took an assignment of the rights under the loans and mortgages in 2003 and was not privy to the negotiations or the agreement. Learned Queens Counsel contended that if Selective is left to pursue its rectification remedy against NIBJ alone, it might be faced with evidential difficulty in proving against NIBJ the oral agreement and the unilateral mistake on which the rectification claim depends.

NIBJ was not present when the relevant discussions with Pan Caribbean took place and may therefore claim that such evidence is hearsay against it.

11. Learned Queens Counsel further submitted that the issue was not whether Pan Caribbean had the power to assign its rights under the mortgage but whether it remained subject to liabilities and legal and equitable claims affecting the mortgage in its hands notwithstanding the assignment. Counsel submitted that it remained subject to such claims. To support this view he cited a passage from **Cheshire, Fifoot & Furmston's Law of Contract** 14th Edition pp. 580 – 581.

“The question that arises here is whether B can assign the obligation that rests upon him by virtue of his contract with A to a third person, C, so that the contractual liability is effectively transferred from him to C. Can he substitute somebody else for himself as obligee?”

English law has unhesitatingly answered this question in the negative. In the words of Collins MR: (in **Tolhurst Association v. Portland Cement Manufacturers Ltd.** (1900) 1902 KB 660 at 668)

“It is, I think, quite clear that neither of law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to somebody else; this can only be brought about by the consent of all three, and involves the release of the original debtor.

Novation, therefore is the only method by which the original obligator can be effectively replaced by another.”

Counsel referred to the cases of **Wilson v. Wilson** (1969) 3 HER 945, and **Bhullar v. McArdle** [2001] EWCA CV 510.

GROUND 2

12. In ground 2 it was submitted by Learned Queens Counsel that one simply looks at the pleadings to see whether it disclose a cause of action. Under the new rules (CPR 26(3) (1) (c)), no significance properly attaches to the change in the language used. He submitted that the learned judge applied an erroneous test to the application that was before him and came to an erroneous decision. Counsel referred to the cases of **Three Rivers District Council v. Bank of England** (No. 3) [2001] 2 AER 513 and **S & T Distributors Ltd. v. CIBC et al** SCCA 112/2004 delivered the 31st July, 2007.

13. Mr. Robinson for the Respondent submitted in response to ground 1, that neither the case of Sebol or Selective has been struck out. The claim of Sebol and Selective continues against the correct Defendants. On the Appellants own pleadings no obligations arise on Pan Caribbean as the mortgage was duly assigned to NIBJ. Counsel relies on Para. 4 of the Amended Particulars of Claim of the Appellants which reads:

“The 2nd Defendant is the assignee of the 4th Defendant’s rights, title and interest in the debts under a mortgage lodged at the Office of the Registrar of Titles as Mortgage Investment No.

1294239 [sic] and other loan documents, as well as the securities held in connection therewith including the properties which are the subject of these proceedings."

14. Mr. Robinson further submitted that it can be seen from the Appellants pleading that the Respondent has no further right, title or interest in the said mortgage, and that not one single allegation on the facts was made against the Respondent in the pleadings.

15. In response to ground 2 Mr. Robinson expressed support for Sykes, J. analysis of Rules 26.3 (1) (c) of the CPR and is in keeping with the rationale and philosophy behind the passing of the new rules. He submitted that these Rules are not only "new" but are expressed in the body of the legislative instrument, to be a "code". He further submitted that if the rules of the interpretation of codes are strictly applied, not even post CPR decisions are binding, since the "over-riding objective" of the code is to deal with cases justly on a case by case basis. He further submitted that even if Rule 26.3 (1) (c) was to be interpreted in accordance with the ancient cases' way of dealing with the old formulation, or the more modern approach of the learned judge, under either interpretation it would not matter. This was so because as submitted in ground 1 there was no cause of action against the Respondent shown in the pleadings of the Appellants.

THE ISSUES

16. The main issue in this appeal is not whether there can be a rectification of the mortgage but whether the pleadings give rise to a cause of action against

the Respondent. The issue of rectification is still to be determined by the court below.

17. Sykes, J. in striking out the case against Pan Caribbean had this to say:

“... there is no legal necessity for Pan Caribbean to be named as a defendant when the real quarrel is between NIBJ as assignee and Mr. Ken Tomlinson who was appointed receiver by NIBJ. I do not see why Pan Caribbean should be saddled with the burden of defending a claim in which they have no legal or equitable interest. They have sold the debt and have moved on.”

18. To determine whether Sykes, J. was correct it is necessary to examine the pleadings carefully to see whether it gives rise to a cause of action against the Respondent.

19. It is not being challenged by the Appellants that the assignment was defective or ineffective in law to transfer Pan Caribbean rights under the mortgage. This is acknowledged by the Appellants in para. 4 of the Amended Particulars of Claim which is worth repeating:

“The 2nd Defendant is the Assignee of the 4th Defendant’s rights, title and interest in the debts under a mortgage ... as well as the securities held in connection therewith, including the properties which are the subject of these proceeding.” (Emphasis mine)

20. In para. 30 of the Particulars of Claim the Appellants admit to the fact that NIBJ as assignee had notice of the agreement between Selective and Pan Caribbean as early as November 15, 2002.

21. A perusal of the Claim discloses a claim against the 1st and 2nd Defendants while in the prayer the claim is against the 1st, 2nd and 3rd Defendants.

22. A perusal of the Consortium Loan Agreement dated 20th day of October, 1995 between WCC and several banks including Trafalgar Development Bank (now Pan Caribbean) states at Article VIX Section 9.03 headed succession:

"This agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto, provided that the company shall not without the prior written consent of the secured parties, assign or delegate all or any part of its interest of obligation hereunder." (Emphasis mine)

23. The case of **Lorraine Nunn v Hugh Wily** [2001] NSWSC, 317 demonstrates that once a party has transferred or assigned their rights and interest under a mortgage there is no right left in that party. This was a decision of the New South Wales Supreme Court. In this case the Plaintiff Lorraine Nunn loaned money to one Mr. and Mrs. Ewins who in return granted Mrs. Nunn a mortgage over certain property. As a result of the Ewins becoming bankrupt, Mr. Wily the trustee in bankruptcy administered their estate. Mrs. Nunn sought rectification of the mortgage which was resisted by Mr. Wily. The Ewins gave evidence at the trial not as parties to the claim but as witnesses.

24. The Appellants complained in ground 2 that the learned judge erred when he attached significance to the change in the language of the new rules (CPR 26.3 (1) (c)). Under the old rules (CPC) it was "reasonable cause of action" but under the CPR it is "no reasonable grounds" for bringing or defending a claim. Rule 26.3 (1) (c) of the CPR reads as follows:

- "26.3(1) In addition to any other power under these Rules the court may strike out a statement of case or part of a statement of case if it appears to the court —
- (a) ...
 - (b) ...
 - (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim."

25. Sykes, J. in striking out the claim against Pan Caribbean, said:

"The rule focuses on the grounds for bringing the claim and not on just whether the pleadings disclose a reasonable cause of action. In this case the claim for rectification is known to law but the grounds are not reasonable in light of Pan Caribbean's assignment of all its rights to NIBJ."

26. In **S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance** SCCA 112/04 delivered 31st July, 2007, a decision of this court, Harris, J.A. said at page 29:

"The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out

and balance them carefully against the principle As prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obviously cases."

27. Also in **Drummond Jackson v. British Medical Association and**

Others [1970] 1 WLR 688, Lord Pearson observed at page 695 that:

"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases."

It can be seen from those authorities that before a claim can be struck out it must clearly be obvious that no reasonable cause of action is disclosed.

28. The focus on the new rules is to deal with matters expeditiously and to save costs and time. If there are no reasonable grounds for bringing an action then the court ought to strike it out. Under the old rules once the pleadings indicated some known cause of action then it is hardly likely to be struck out.

29. As to whether or not there was a cause of action against the Respondent, it is my view that Sykes, J. was correct when he struck out the case against the Respondent. The pleadings in my view do not disclose a cause of action against the Respondent. In para. 4 of the pleadings it is the Appellants own pleading that the Respondent has no interest in the matter. It has assigned its rights, interest and title in the mortgage to NIBJ. No obligation therefore arises on the

Respondent. No allegations on the facts were made against the Respondent in the pleadings.

30. It is NIBJ as the assignee who appointed Mr. Ken Tomlinson as the receiver. It is Mr. Tomlinson who is seeking to rectify the mortgage. The Respondent Pan Caribbean therefore has no legal or equitable interest in the matter and cannot therefore exercise any power under the mortgage.

31. The Consortium Loan Agreement states in the Articles that the agreement "shall' insure to the benefit of, and be binding upon the successors and assigns of the parties hereto...". The action in my view can be tried without the Respondent being a party to the action.

32. In my view Sykes, J. was correct in his interpretation of the new meaning in Rule 26.3 (1) (c). However, in my judgment, and I do agree with Counsel for the Respondent, that under either interpretation of the Rules there is no cause of action against the Respondent.

33. Accordingly, I would dismiss the appeal with costs to the Respondent to be taxed, if not agreed.

PANTON, P.

The appeal is dismissed with costs to the Respondent to be taxed, if not agreed.