NMCS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 146/01

COR: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE CLARKE, J.A. (Ag.)

BETWEEN	**VEHICLES & SUPPLIES LTD**	**1ST DEFENDANT/ APPELLANT**
AND	**VEHICLES & SUPPLIES (Industrial Division) Ltd**	**2ND DEFENDANT/ APPELLANT**
AND	**FINANCIAL INSTITUTIONS SERVICES LTD**	**PLAINTIFF/ RESPONDENT**

Raphael Codlin and Miss Simone Morris for the Appellants

Michael Hylton, Q.C., Miss Debbie Fraser and Annaliesa Lindsay for the Respondent

July 15, 16 & December 20, 2002

FORTE, P:

This appeal has as its origin, an action which was commenced by the respondent in September 1996. In that action the respondent claimed against the appellants inter alia, recovery of possession of certain Lots, described as Lots 1, 2 and 5 at Blaise Industrial Park, part of a commercial complex and which were constructed in 1991. These lots are registered at Volume 1239 Folios 499,500 and 513 respectively. At the time of construction the registered owner

of the Lots was Consolidated Holdings Ltd, which along with the entities Blaise Merchant Bank and Trust Co., and Blaise Building Society (the "Blaise Financial Entities)" comprised a group.

In 1994 and 1995 the Minister of Finance assumed temporary management of each of the Blaise Financial Entities comprising the above named entities. A Scheme of Arrangement was entered into between each entity and its depositors and "general creditors". The Scheme was sanctioned by the Supreme Court on the 26th October 1995 in the following order:

> "The Scheme of Arrangement set out in the Schedule to the Petition filed herein be sanctioned by this Honourable Court so as to be binding upon the Company and its Creditors/Depositors."

The following paragraphs of the "Scheme" are relevant:

> "3. The General Creditors shall transfer and assign to FIS and/or its nominees their deposits upon the effective date and the Company in consideration of the assumption by FIS of its deposit liabilities transfers to FIS all its assets real and personal. Upon this scheme being approved by the Court this transfer and assignment shall be deemed to have taken place. A transfer of all the assets and liabilities of any subsidiary of the company shall upon this Scheme being approved be deemed to have taken place. FIS shall have the power to appoint and revoke the appointment of any director or other officer of such subsidiary.
>
> 4. The Preferential Creditors of the Company in so far as not already paid shall be paid by FIS in full.
>
> 5. Subject to paragraph 7 hereunder each General Creditor of the Company shall accept

> from FIS in full discharge and satisfaction of his deposit as admitted or established or to be established a payout equal to 90 cents in the dollar of such deposit as the same would have been provable had the Company been placed in an insolvent winding-up commencing on the Fixed Date."

"Preferential Creditors" is defined in the Scheme as –

> "Creditors of the Company whose claims as at the Fixed Date would have been preferential under Section 294 of the Companies Act had an order for Winding up of the Company been made on the Fixed Date to the extent to which such debts would have been so preferential or whose claims are for amounts accrued or accruing due by the Company in respect of rent supply of water, electrical energy or telephone service.

"The General Creditors" is defined as –

> "all Depositors and other trade Creditors of the company as at the Fixed Date other than Preferential Creditors with the trade Creditors being persons who supply goods and services to the Company in the normal course of business."

Pursuant to the Scheme sanctioned by the Court the Lots were duly transferred from Consolidated Holdings Ltd to the respondent in June 1996. At the time of the transfer the appellants were in possession of the Lots. The appellants are controlled by Donald and Janet Panton, who also controlled the Blaise Financial Entities before the assumption of temporary management. It should be noted that the respondent is a Government Company formed specifically for the purpose of paying depositors and certain creditors of the

Blaise Financial Entities, and in exchange to acquire their assets, as provided for in the Scheme of Arrangement.

The respondent in whom the Lots became vested, demanded, on the 22nd July 1996 possession of the Lots from the appellants, who did not comply, but remained in possession until June 2000.

In the meantime in September 1996 the respondent filed this action for recovery of the Lots and for mesne profits and/or damages. The first appellant filed a Defence and Counterclaim, in which it claimed reimbursement of monies allegedly expended by the first appellant between 1989 and 1991 on the Lots pursuant to oral agreements allegedly made between the first appellant and Consolidated Holdings Ltd. This claim appears in paragraph 17 of the Counterclaim and is set out hereunder:

> "17. Pursuant to the oral Consolidated Agreement the First Defendant took possession of the said lands, completed the buildings thereon and outfitted them, and discharged Consolidated of its indebtedness to Dojap and in completing the buildings and outfitting same and expended monies as follows:
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> | | | |
> |---|---|---|
> | (i) | Sum required to discharge Consolidated from its indebtedness to Dojap Investments Limited | $3,500,000.00 |
> | (ii) | Construction of Mezzanine Floors | $2,500,000.00 |
> | (iii) | Purchase and installation of three Hydraulic Lifts | $ 480,000.00 |
> | (iv) | Purchase and installation of Four Roller Shutters for Garage | $ 260,000.00 |
> | (v) | Construction of Walls, electrical outlets, installing doors, air- | |

conditioning equipment	$5,000,000.00
Total Expenditure	$11,740,000.00"

On the 23rd June 2000, summary judgment was entered against the appellants on the respondent's claim. The Court then ordered as follows:

> "1. The Defendants have no interest legal or equitable in the commercial premises known as lots 1, 2 and 5, Blaise Industrial Park, 69-75 Constant Spring Road, Kingston 10, registered respectively at Volume 1239 Folio 499, Volume 1239 Folio 500, Volume 1239 Folio 513 of the Register Book of Titles.
>
> 2. The Defendants do forthwith deliver possession of the said premises to the Plaintiff.
>
> 3. The Defendants pay to the Plaintiff mesne profits to be assessed.
>
> 4. The Defendants pay the costs of this application and order."

The appellants appealed this Order and on the 16th March 2001 this Court dismissed the appeal and affirmed the order made in the court below. In doing so Downer, J.A. in an oral judgment offered the following opinion:

> "It may be that the appellants have a good case based on the counter-claim which they may wish to pursue. It would be a claim in money terms but such claim does not run with the land. If such a claim is vindicated in the Supreme Court it could be conveniently heard together with the order for assessment of the mesne profits."

On the 25th October 2001 the assessment of mesne profits and the counterclaim were heard together by Cooke, J. He assessed mesne profits in the amount of $7,341,000.00 to be paid to the respondent and gave judgment for

the respondent on the counter claim. It is against those orders that the appellants now appeal.

The issues on appeal were confined to the complaints made in the following grounds of appeal:

> "3. The Plaintiff/Respondent, through one of its witnesses, admitted that one of the Defendants/Respondents was treated as a tenant at the time when the Plaintiff/Respondent gave notice to the Defendants/Appellants. If, therefore, either or both of the parties were tenants, they would enjoy the protection of the Rent Restriction Act to hold over as tenant and could not, therefore be regarded as trespassers but would be statutory tenants.
>
> 4. That the Defendants/Appellants, being statutory tenants, were entitled to enjoy all the rights and privileges of a statutory tenant, pursuant to the Rent Restriction Act and could not, under any circumstances, be treated as trespassers until the tenancy was terminated pursuant to sections 25, 28 and 31 of the Rent Restriction Act.
>
> 5. That the learned judge, having recognized that the claim of the Defendants/Appellants were based on the rule in ***Ramsden v. Dyson,*** misdirected himself in dismissing the Defendants/Appellants' counterclaim and not allowing the said Defendants/Appellants to pursue their claims under the said rule and be afforded the opportunity of proving that their claim fell within the ambit of that rule."

Grounds 3 and 4

These grounds were based on evidence given at the assessment by Mr. Patrick Hylton, Managing Director of the respondent company, in cross-

examination by counsel for the appellants. The dialogue as recorded in the transcript (page 50) went as follows:

"Q. Indeed, at the time when you gave this notice you were aware of the capacity in which Vehicles and Supplies were occupying the premises? If you weren't say so.

HIS LORDSHIP: I don't understand this question.

MR. CODLIN: I am asking the witness, M'Lord, if he is aware of the capacity in which they were occupying the Premises.

HIS LORDSHIP: I don't think it is 'capacity' you mean, sir.

MR. CODLIN: I am sorry, sir.

HIS LORDSHIP: I don't think it's capacity, I think I know: How come they were occupying the premises.

MR. CODLIN: My understanding is that they were tenants.

A. Yes, sir.

MR. CODLIN: That's it.

HIS LORDSHIP: That's the Second Defendant

MR. CODLIN: Vehicles and Supplies (Industrial Division Limited).

Q. They were the tenants, you understand that they were the tenants?

A. That is correct."

Q. And this notice was given in July, 1996?

A. That is correct."

The testimony of the Managing Director led the appellants through its counsel, to contend both at the assessment and before us that the second appellant, was a tenant of the respondent and consequently is protected by the provisions of the Rent Restriction Act.

Mr. Hylton, Q.C., however pointed out that the second appellant, had never, and particularly not in its pleadings contended that it was a tenant of the respondent but instead maintained that it was the tenant of the first appellant which was the equitable owner of the said lands. He referred us to paragraphs 6, 7 and 9 of the appellants' Defence and Counterclaim in which they pleaded as follows:

> "6. ... The Defendants aver and say that the Second Defendant, Vehicles and Supplies (Industrial Division) Limited, a Limited Liability Company and separate legal entity to First Defendant, is in lawful possession of the said lands as tenant with the full knowledge of the Plaintiff and agreement of First Defendant, as is evidenced by correspondence to this effect which is in Plaintiff's possession.
>
> 7. Paragraph 3 of the Statement of Claim is denied and the First Defendant avers and says that it has the full equitable interest in the said land and avers and says that as equitable owner of the said lands it is entitled to undisturbed possession of the said lands. The Second Defendant avers and says that it is the lawful tenant of the First Defendant.

> ...
> 9. The Defendants deny that the said letter of July 22, 1996 amounts in law to any or any proper and/or valid Notice to Quit as the First Defendant was neither a tenant nor a squatter or trespasser on the said lands."

Mr. Hylton, Q.C. maintained that without an amendment to its pleadings which was never applied for, the first appellant cannot now contend contrary to its pleadings that the second appellant was a tenant of the respondent. In any event the mere statement by the Managing Director that he considered the second appellant to be a tenant would not in my opinion, without more be sufficient to establish that as a fact. I would agree with counsel for the respondent that the appellants cannot by virtue of that evidence change the whole nature and content of its pleaded case. In those pleadings the appellants maintained that the first appellant had the full equitable interest in the lands. This Court has decided, in affirming the Order of the Supreme Court that, the first appellant has no such interest. If it had no equitable interest in the land, then it could not grant a valid tenancy to the second appellant.

In the circumstances, in my view the appellants' contention that the provisions of the Rent Restriction Act, would be applicable is of no merit. The matter was sent for assessment of mesne profits on the basis that the respondent is the registered owner of the land to the exclusion of the first appellant and consequently no question of tenancy between the second appellant and the respondent could properly arise in those proceedings.

It should be noted that the learned trial judge was not persuaded by the contentions of Mr. Codlin, that the statement of the Managing Director of the Respondent Company brought the matter within the purview of the Rent Restriction Act. He thereafter correctly decided:

> "... in view of this Court, the critical factor is the directions given by the Court of Appeal to me, and in obedience to their Lordships, I now proceed to carry out my task:." [i.e. the Assessment of Mesne Profits]

We can find no reason to fault the learned judge's conclusions in this regard and for the above stated reasons hold that there is no merit in these grounds of appeal.

Ground 5 – The Counterclaim

In its counterclaim the first appellant pleaded that between 1989 and 1991 it entered into some oral agreements with Consolidated Holdings Ltd, as a result of which it expended certain amounts of money on the Lots totalling $11,740,000.00. The claim reads at paragraph 31:

> "By way of Counterclaim, the First Defendant avers and says that the First Defendant has expended considerable sums of money in constructing, completing and outfitting the buildings, and discharged Consolidated of its indebtedness to Dojap and in completing the buildings and outfitting same ...".

It thereafter, asked for the following orders at paragraph 32:

> "1. A declaration that the various written agreements are valid and enforceable in law.
>
> 2. A Declaration that the Defendant is the Equitable Owner of the said land.

3. A Declaration that the Plaintiff is a Trustee of the said land for the Defendant.

4. An Order for specific performance of the various oral and written agreements or in the alternative an order that the Plaintiff do re-imburse the Defendant the sum of 11,740.00.00 (sic)

5. An Injunction restraining the Plaintiff whether by itself, its servants and/or agents or otherwise howsoever from selling and/or transferring the said land to any person other than the Defendant and/or its nominee.

6. Damages."

At trial, as recorded by the learned trial judge the respondent took a preliminary point contending that as a matter of law even if all the facts alleged in the counterclaim are proved the counterclaim is bound to fail because the respondent would not be liable on the counterclaim.

Having cited paragraph 32 of the Counterclaim, the learned trial judge concluded at page 105, that in respect of the order asked for in paragraph 32(1)(2)(3) and (5):

> "... there having been a judicial determination in respect of those matters, those reliefs are no more. In respect of 4, the first part, an Order for specific performance is also no more because of prior judicial determination – if I may add – at the highest level in this country. So we are left with the latter part of 4, which is the alternative: an order that the plaintiff do reimburse the defendant the sum of $11,740,000.00. This sum is a computation of sums spent in respect of, I suppose lots 1, 2 and 5."

In my view the learned judge was correct in coming to his conclusion in respect of the orders asked for in paragraph 32 (1)(2)(3) and (5) and part of (4), that those matters were already decided by the Court of Appeal, and could therefore not be the subject of the declarations prayed for. These declarations would be based on the finding of the Court that the appellants had an equitable interest in the Lots, a determination to the contrary having been made by this Court in affirming the judgment of the Court below. As this Court said in that judgment in referring to the Counterclaim:

> "It would be a claim in money terms but such claim does not run with the land."

This statement effectively took care of the declarations which the appellant sought in the above stated sub-paragraphs of Paragraph 32 of the Defence and Counterclaim including of course the first part of sub-paragraph (4) which asked for specific performance.

All that remained was the prayer for an order requiring that the respondent pay to the appellants the sum of $11,740,000.00 in re-imbursement of the amount allegedly spent on the Lots. This of course is the same as damages asked for in sub-paragraph (6) of paragraph 32, as there is no allegation of any other damage apart from the sum claimed for re-imbursement.

Mr. Hylton for the respondent maintained that even if the facts alleged in the first appellant's counterclaim are accepted as true, in order to establish the counterclaim, the first appellant would have to establish either that:

(a) at the time it allegedly expended the monies, it did so at the request or with the consent or acquiescence of the Respondent; or that

(b) when the Respondent became the registered owner of the Lots, it assumed the alleged liability of Consolidated Holdings Ltd to the First Appellant.

In respect of (a) there has been no allegation that the monies were expended either with the consent or acquiescence of the respondent. However, the respondent was incorporated pursuant to the Scheme of Arrangement approved by the Supreme Court on the 25th October 1995. At the time the expenditure was incurred therefore, the respondent had not yet come into existence. The claim made by the first appellant relates to purported oral argreements between itself and Consolidated Holdings Ltd under which the monies were expended on the development of the Lots which was completed in "late 1991". There was no claim that the respondent was a party to these agreements, which would of course be impossible since the respondent was not in existence at the time.

The rule in ***Ramsden v. Dyson*** (1866) L.R. 1 H.L. 729 cannot therefore apply to the circumstances of this case.

In respect to (b) Mr. Hylton, Q.C. submits that the first appellant has failed to prove that the registered owner, the respondent, assumed the alleged liability of Consolidated Holdings Ltd. In order to determine this, it is necessary to go back to the Scheme of Arrangement.

By that Scheme, which was approved by the Supreme Court, the respondent assumed the liabilities of Consolidated Holdings Ltd as set out in paragraphs 3 and 4 which are set out earlier in this judgment.

It will be seen that the liabilities taken over by the respondent relates to deposit liabilities (paragraph 3) and preferential creditors (paragraph 4).

In respect of paragraph 3, the General Creditors transferred and assigned to the respondent and or its nominees their deposits upon the effective date and the company in consideration of the assumption by the respondent of its deposit liabilities transferred to the respondent all its assets, real and personal. The respondent, thereafter became liable to the general creditors for all outstanding liabilities to them, by Consolidated. The Scheme defines "General Creditors" as (repeated here for convenience) -

> "All depositors and other trade creditors of the Company as at the Fixed Date other than Preferential Creditors with the trade Creditors being persons who supply goods and services to the Company in the normal course of business."

There is no allegation or claim in the Defence and Counterclaim that the First Appellant was a general creditor as defined in the Scheme. It follows therefore that the respondent could not be liable under the provisions of paragraph 3, for the claimed amount, the respondent being liable only for depositors liabilities and debts owed to trade creditors.

In paragraph 4, the respondent undertook to pay in full, all preferential creditors. However, again the first appellant, would not come within the

definition of preferential creditor in the Scheme, and consequently, nor would the debt allegedly owed to it by Consolidated.

Given the nature of the liabilities undertaken by the respondent in the Scheme, the claim made by the first appellant in its Counterclaim could never get started and was certainly doomed to failure.

In the event, no meritorious reason has been advanced why we should interfere with the order of the Court below. As a result we dismissed the appeal and affirmed the order of the Court below. We also ordered that the appellants pay the costs which should be taxed if not agreed.

PANTON, J.A.

I agree.

CLARKE, J. A. (AG.)

I agree.