[2015] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 16/2015

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**DIGIORDER JAMAICA LIMITED**	**APPELLANT**
AND	**DENNIS ATKINSON**	**RESPONDENT**

Written submissions filed by Golaub and Golaub on behalf of the appellant

Written submissions filed by Joseph Jarrett and Co on behalf of the respondent

3 July 2015

PROCEDURAL APPEAL

(Considered by the court on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

MORRISON JA

[1] I have read in draft the judgment of my sister Sinclair-Haynes JA (Ag). I agree with her reasoning and conclusion and have nothing useful to add.

PHILLIPS JA

[2] I too have read the draft judgment of Sinclair-Haynes JA (Ag) and agree with her reasoning and conclusion. I have nothing to add.

SINCLAIR-HAYNES JA (AG)

[3] This is an appeal against the order of K Anderson J, refusing the application to remove the appellant, as the fourth defendant, from the respondent's amended fixed date claim form filed on 13 February 2014.

The background

[4] The respondent was the owner and general manager of property situate at 14 James Avenue, Ocho Rios, St Ann, known as Ocean Sands Resort (Ocean Sands). In March 1998, the respondent borrowed from the Development Bank of Jamaica Limited (DBJ), the sum of US$308,106.00 for the purpose of expanding and renovating Ocean Sands. The loan was personally secured by the respondent and his guarantor's mortgage of the property.

[5] Consequent on a number of unfortunate business ventures, the debt fell into arrears. On 9 July 2007, by agreement between the respondent and DBJ, Ocean Sands was transferred to Cash Plus Development Limited (Cash Plus) for the sum of US$1,000,000.00, subject to DBJ's mortgage of US$668,116.28. DBJ was a party to the instrument of transfer, which was registered on the Ocean Sand's title in September 2007.

[6] Cash Plus assumed full obligations and liabilities to DBJ in respect of the mortgage and liability for the payment of the sum outstanding to DBJ. Cash Plus however ran afoul of the Financial Services Commission, regulatory authorities and it subsequently collapsed. Consequently, except for one payment of the sum of US$250,000.00 to DBJ on 13 August 2007, Cash Plus has made no further payment. DBJ in an effort to recoup its money has endeavoured to sell the property.

[7] In furtherance of that desire, it engaged the services of Business Recovery Services Limited (BRS) of which Mr Kenneth Tomlinson was the managing director. Mr Tomlinson advertised the property for sale. An offer of US$50,000.00 from the appellant, who was the respondent's tenant, has incurred the ire of the respondent who claimed that the property was worth J$200,000,000.00. Consequently, the respondent has instituted proceedings by way of amended fixed date claim form against the DBJ, BRS, Kenneth Tomlinson and the appellant. He sought the following reliefs, *inter alia*:

> "1. A declaration that the Claimant is a mortgagee in possession of the property known as 14 James Avenue, Ocho Rios, in the parish of St Ann, registered at Volume 1269 Folio 97 of The Registered [sic] Book of Titles, whose mortgage is registered as No. 1486323 on the 4th day of September, 2007 for the sum of Six Hundred and Sixty Eight Thousand One Hundred and Sixteen Dollars and Twenty Eight Cents United States Currency (US$668,116.28).
>
> 2. A declaration that any sale of the property registered at Volume1269 Folio 97 must be at a price which takes into account the claimant's interest as a mortgagee and must be at the market value or not less than the forced sale value.
>
> 3. A declaration that the proposed sale of the property registered at Volume 1269 Folio 97 by the 1st Defendant to the 4th Defendant for a consideration of $50,000,000.00

Jamaican Dollars was below the forced sale value and a breach of the 1st Defendant's obligations as a trustee for the Claimant and the mortgagor/s.

4. A declaration that the proposed sale of the property registered at Volume 1269 Folio 97 by the 1st Defendant to the 4th Defendant for a consideration of $50,000,000.00 Jamaican Dollars was fraudulent.

5. A declaration that the 2nd and 3rd Defendants as the agents of the 1st Defendant are under an obligation to ensure that the property registered at volume 1269 Folio 97 is sold at the market value or not below the forced sale value and that any prospective purchaser/s recommended by them meets the relevant criteria of being able to purchase at the market value or forced sale value.

6. An Order setting aside the sale of 14 James Avenue, Ocho Rios, St. Ann to the 4th Defendant who was at all material times the tenant of the Claimant and was aware that the sale to them was at a gross under value and fraudulent.

7. In the alternative, Damages jointly and severally for negligence and/or breach of fiduciary duty and/or breach of statutory duty that occurred when 14 James Avenue, Ocho Rios, St Ann was sold at a gross undervalue by the 1st, 2nd and 3rd Defendants, acting in concert with each other, to the 4th Defendant for a consideration of $50 million Jamaican dollars.

8. Alternatively, the sum of $157,000,000.00 being the difference between the sale price and the true market value at the time of the sale against the 1st, 2nd and/or 3rd Defendants Jointly and severally, less the amount owing by the Claimant to the 1st Defendant…"

[8] On 8 November 2013, Ms Sheron Henry, general manager, Legal Services of DBJ, in response to the fixed date claim form, deponed that the property was advertised on numerous occasions in the Jamaica's daily newspapers and on DBJ's website but the highest serious offer had been that of the appellant for US$50,000.00 subject to

mortgage financing. It was her evidence that the property was not sold. She however categorically stated that that if the debt remained unpaid DBJ intended to sell.

[9] Mr Kenneth Tomlinson, averred in his affidavit of 9 December 2013, that in spite of the extensive advertisement of the property, the best offer was that of the appellant. There was an offer of US$1,300,000.00 from a purchaser whose identity his attorney was not prepared to reveal. There was also another offer of JA$3,000,000.00. The appellant's initial offer was US$40,000.00 on 13 August 2013 but was revised on 6 September 2013 to US$50,000.00. On 15 August 2013 an offer of $1,500,000.00 subject to contract was received. The proposals were made known to the respondent. It is his evidence that he has neither accepted nor communicated acceptance to any of the offerees.

[10] On 8 July 2014, the appellant applied to the Supreme Court by way of notice of application for court orders to be removed from the amended fixed date claim form as a defendant paramount to rule 19.2(4) of the Civil Procedure Rules (CPR). The grounds on which the order was sought were that:

- it was not a necessary party to the proceedings as there had being no agreement between it and the other defendants for the sale of the property;
- it has neither a legal nor equitable interest in the claim;
- the court has a discretion pursuant to rule 19.2(4) to remove a party if it was desirable to do so.

[11] As aforesaid, the application did not find favour with the learned judge. The appellant consequently filed the following grounds of appeal:

"(i) That in the exercise of his discretion no Judge properly directed as to the law applicable to the facts could have reached the conclusion appealed against.

(ii) That the Learned Judge erred in exercising his discretion in favour of the respondent.

(iii) That the Learned Judge erred in concluding that there was a sale to the Appellant, when in fact there was evidence provided to the contrary.

and

(iv) The learned judge failed to take all relevant factors as stated at the hearing into consideration.

(iv) The learned judge erred in finding that there was a sale to the 4th defendant at a gross undervalue and fraudulent.

(vi) The learned Judge erred in not following the principles laid down in the **Honourable Dorothy Lightbourne v Christopher Coke et al** as to the interpretation of rule 19.2.4.

(vii) The learned Judge failed to give effect to the powers of the court granted under the Civil Procedure Rules 2002 to protect persons from unnecessarily being joined in proceedings.

(viii) The learned judge erred in concluding that in the interest of justice the appellant should remain a party to the claim.

(ix) The learned judge failed to consider that the claimant who has an onus to show a cause of action and some other good reason to validate the 4th defendant/ appellant remaining a party to the proceedings, did not discharge this burden."

The appellant now seeks among others, the following orders:

- That the decision of Kirk Anderson J be set aside.

- Judgment is entered for the appellant on the claim for costs to be taxed if not agreed.

- Costs of the appeal and of the proceedings in the court below to be awarded to the appellant, to be taxed if not agreed.

- Such further order or relief as the court may deem just.

[12] The appellant relies on his affidavit in response to the fixed date claim form in which its managing director, Michael Belnavis, deponed that there was no agreement of sale for the property. The property was advertised in the newspaper on 21 June 2013 for bids to purchase it. Digiorder made an offer but there has been no acceptance or further negotiations.

[13] Counsel on his behalf submits that the appellant has evinced no further interest in purchasing the property at that price and therefore has no interest in the disposition of the case. There is no agreement for sale and negotiations have been discontinued. He submitted that the learned judge, in determining whether it was desirable for the appellant to be a party to the proceedings, ought to have considered whether the appellant has a true interest, legal or equitable in the claim. It is his contention that the appellant has no true interest in the claim as there is no agreement, contract or further negotiations between the parties.

[14] In resisting the application, the respondent deponed that in response to a letter of 9 October 2013, from his attorney requesting DBJ to stop the sale because the property was being sold at an under value and that he was a mortgagee in possession,

DBJ was insistent. He averred that Ms Henry, in her affidavit, had averred that Cash Plus and not he, was the registered owner.

[15] Counsel Mr Jarrett for the respondent, in his submissions also expressed concern at the averments of Ms Henry on behalf of DBJ in her affidavit and her response to his letter to stop the sale to the appellant. He complained that on 11 October 2013, DBJ responded in the following terms inter alia:

- They had no intention of halting the sale.
- They gave them 30 days to settle their debt.
- They had no choice but to accept the offer in order to recoup the debt.
- Their attorneys-at-law were at liberty to take whatever steps necessary to protect their client.

[16] He submitted that the respondent's indebtedness was transferred to Cash Plus with the consent of DBJ. The respondent's indebtedness to DBJ was thereby discharged. The responsibility for the debt became Cash Plus' while the respondent became a mortgagee/creditor with DBJ. He contended that the respondent is therefore a mortgagee in possession and a fellow mortgagee/creditor with DBJ. Both respondent and DBJ, as mortgagees, are to benefit from the proceeds of the sale in order of priority. DBJ cannot, he submitted, sell the property at a price which will only satisfy its mortgage. DBJ, in exercising its right to sell, is thus obliged to obtain the best price. He relied on the work of the authors of Fisher and Lightwood's Law of Mortgage, 11th edition for that proposition.

[17] According to Mr Jarrett, DBJ is aware that the sum of US$50,000.000 is a gross under value and prejudicial to the respondent's interest as mortgagee because they were at the material time in possession of a valuation report from CD Alexander. The report, which was obtained one and a half year before, stated the market value at $149,000,000.00 and the forced sale value at $105,000,000.00.

[18] In demonstrating DBJ's failure to obtain the best price, counsel cited the following as examples:

- the lack of evidence as to the method of advertisement to attract purchasers outside of Jamaica apart from the Gleaner and its website;
- the lack of evidence whether proper public auction governed by the rules of auction sales was held;
- the almost exclusive reliance of Mr Tomlinson and BRS Recovery Services Ltd (RBS) on sale by private treaty;
- the age of the valuation report at the time the respondent was informed of the intention to sell to the appellant;
- the receipt of a bid for US$1,3000,000.00 indicating that if the property had been subject to public auction it would have been sold for a price much higher than the appellant's offer of US$50,000.000.
- the lack of evidence as to whether Mr Tomlinson or BRS engaged real estate agents and brokers;
- the failure of DBJ, BRS and Kenneth Tomlinson, in accepting the appellant's offer to engage real estate agents and brokers; and
- the failure of DBJ to rely on a reserve price or the forced sale value.

[19] He pointed out that CD Alexander's report was obtained in 2012 and that the property would have appreciated. He submitted that the sale to the appellant for US$50,000.00 is suspicious and fraudulent. He said it involved collusion between the parties.

[20] Counsel demonstrated by way of calculation and the application of the exchange rate of US$1 to J$115.50, that upon deducting Mr Tomlinson's, BRS's fees and legal fees, no reasonable balance would remain for the respondent in light of his mortgage of US$1,000.000.00 or JA$115,000,000.00. Counsel ascribed negligence to the appellant and BRS and leveled complaints about the treatment of the respondent as a mortgagor by Mr Tomlinson and BRS.

[21] He said an offer was made to Mrs Minott-Phillips QC, counsel for DBJ, to discontinue the action in return for an undertaking not to sell the property below the forced sale value and requested a valuation of the property. The offer he said was rejected. He submitted that the threat to sell the property to the appellant for US$50,000,000.00 remains real as Mrs Minott-Phillips indicated that she intended to sell the property for that sum. He submitted that the appellant is a necessary party because an order sought is to set aside the sale. Further, he said in the event of a settlement, the appellant would also be a necessary party.

[22] He submitted that although DBJ has prior mortgage to the respondent's vendor's mortgage, the respondent's mortgage was as a result of the tacit consent and approval of DBJ. In the circumstances DBJ ought not to be allowed to disregard the respondent's

interest in the property in a manner which is unfair, inequitable and contrary to the overriding objective.

[23] Counsel for the respondent submitted that unless the judge's exercise of his discretion was "blatantly wrong" this court ought not to interfere. He directed our attention to the Privy Council decision of **G v G** [1985] 2 All ER 225. Lord Fraser of Tullybelton's statement in **G v G**, at page 229 provides guidance. He said:

> "We were told by counsel that practitioners are finding difficulty in ascertaining the correct principles to apply because of the various ways in which judges have expressed themselves in these cases. I do not think it would be useful for me to go through the cases and to analyse the various expressions used by different judges and attempt to reconcile them exactly. Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as "blatant error" used by Sir John Arnold P in the present case, and words such as "clearly wrong", "plainly wrong" or simply "wrong" used by other judges in other cases. All these various expressions were used in order to emphasize the point that the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

Analysis

[24] It should be noted that there is dissention between counsel as to the learned judge's rulings as stated by the appellant in his grounds of appeal. Mr Jarrett said that

the learned judge expressed that it was necessary for the appellant to remain as a party because of the allegation of fraud. The issue however is whether in refusing to accede to the appellant's request to be removed as a defendant, he blatantly erred?

[25] Rule 19.3(1) of the CPR permits the court, whether on application or without, to add, substitute or remove a party after the commencement of proceedings. Rule 19.2(4) confers on the court the discretion "*to order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings*." The authors of the text Zamir and Woolf, The Declaratory Judgment (1993) 2nd edition explained "desirable" in the context of retaining a defendant as a party to a suit. At page 239 paragraphs 6.08, they state:

> "No person should be made a defendant unless "he has a true interest to oppose the declaration sought" or unless there is some other good reason why he should be a party."

[26] The exercise of any discretion under the CPR requires the court to "give effect" to its overriding objective (see rule 1.2). The learned judge, in determining these issues ought therefore to have considered as paramount, the overriding objective of the CPR which is to "enable the court to deal justly with matters". In dealing justly with cases, the court is required to consider "saving expenses" and ensuring that cases are "dealt with expeditiously and fairly".

[27] The issue is resolved in answering whether the issues can be disposed of without the appellant remaining as a party and whether its removal as a party will be prejudicial

to either party. If there is no good reason why the appellant should continue to be a party, allegation of fraud or not, the answer must be in the affirmative.

[28] Ms Henry has made it plain that there will be no demur on DBJ if the debt remains unpaid and Digiorder is willing to purchase. Mr Belnavis has not explicitly said that Digiorder is no longer interested. His evidence is that there has been no acceptance or further negotiations. Counsel Mr Jarrett has deponed that Mrs Minott-Phillips is resolute in the decision to sell the property for $50,000,000.00 and has flatly refused his offer to forbear and to obtain a current valuation.

[29] Those facts notwithstanding, is the appellant as a defendant necessary to the disposal of the matter and does he have a real interest in the dispute between the parties? An examination of the declarations sought in the fixed date claim form is helpful in determining the issue. Of the orders and declarations sought, the third, fourth, sixth and seventh, mentioned the appellant.

[30] The first declaration does not concern the appellant. Proof of whether the respondent is or is not a mortgagee in possession does not require the appellant remaining as a party to the suit. Regarding the second and third declarations, even if the appellant has knowledge that the property is being sold below the market value, that issue is one to be to be determined by evidence adduced by DBJ, Mr Tomlinson and BRS, not the appellant. The appellant therefore cannot be regarded as being involved in the controversy. Further, the claim is that DBJ as trustee, acted in breach.

There is no assertion of impropriety on the part of the appellant in relation to that ground. It made an offer but there is no agreement for sale.

[31] The declaration sought at four, that the proposed sale by DBJ to the appellant for the consideration of US$50,000.00 was fraudulent, again does not necessitate the appellant remaining as a defendant. Whereas the respondent's attorney has enumerated a litany of complaints against DBJ, BRS Recovery and Mr Tomlinson concerning the acceptance of the appellant's offer of US$50,000.00 as being substantially below the forced value; the failure to advertise; the failure to subject the property to public auction and real estate agents; and the reliance on sale by private treaty, there are no particulars of fraud or wrongdoing against the appellant. In the absence of particulars of fraud, the mere fact that the appellant made an offer to purchase the property cannot justify an order compelling it to remain as a party to the proceedings. All complaints and allegations of wrong doing relate to DBJ, Mr Tomlinson and BRS.

[32] The declaration sought at five concerns Mr Tomlinson and BRS. The issue whether the property was being sold below the forced sale does not require the appellant being a party to the action. Regarding the orders sought at six and seven, there is no agreement for sale hence no sale to be set aside. The remedy sought at seven, concerns the DBJ, Mr Tomlinson, and BRS for having acted in concert to sell the property at a gross undervalue to the appellant. The allegations of negligence and/or breach of fiduciary duty and/or breach of statutory duty all relate to DBJ, Mr Tomlinson

and BRS not to the appellant. The orders sought at eight, nine and ten are entirely unrelated to the appellant.

[33] The crux of the respondent's complaint in his fixed date claim form is that the property is being sold at an under value and that the proper procedures were not adhered to. Whether there is an intention to sell or not to sell to the appellant, the issue is whether the appellant remaining as a defendant is necessary to the outcome of the trial. In the absence of an agreement, the appellant has no real interest, legal or equitable in the matter. It has no interest in opposing the declarations and cannot be prejudiced by any order of the court. Further, its exit from suit cannot prejudice the respondent as the dispute does not concern it. Its presence is, in my view unnecessary. If the respondent wishes to prevent the property being sold pending the outcome of the trial, an injunction would be the appropriate remedy.

[34] To compel it to remain as defendant will cause the appellant to incur unnecessary cost which is contrary to the overriding objective to deal justly with matters which includes saving expense. Accordingly, the appeal should be allowed with costs to the appellant to be agreed or taxed.

MORRISON JA

ORDER

Appeal allowed. Costs to the appellant to be agreed or taxed.