

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 64/2013

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE BROOKS JA**

**BETWEEN NATIONAL COMMERCIAL BANK
JAMAICA LIMITED APPLICANT**

AND GAREY WHITTAKER RESPONDENT

Kevin Powell instructed by Michael Hylton & Associates for the applicant

**Miss Nicole Allen instructed by Gifford, Thompson & Bright for the
respondent**

14 and 16 October 2013

PANTON P

[1] On 11 June 2013, Simmons J refused an application by National Commercial Bank Jamaica Limited (NCB) for summary judgment against the respondent herein, and ordered that the matter should proceed to mediation. She refused leave to appeal and so NCB has applied to this court for permission to appeal.

[2] The learned judge heard the application on 18 March 2013 and 11 June 2013. However, we have not had the benefit of the reasons she may have given for her decision.

[3] The respondent, a businessman of Sandy Bay, Hanover, claims that at all material times he was the registered legal owner of a 2008 Honda Ridgeline motor vehicle. A certificate of title for the vehicle was issued in his name on 14 December 2009, he having purchased the vehicle from one Joshua Thomas on or about 8 August 2009. The purchase price was \$4,000,000.00 There was nothing on the title to indicate that it was encumbered. However, on or about 18 May 2011, agents or servants of NCB seized the said motor vehicle from the respondent's premises.

[4] The filing of this suit resulted. The respondent is seeking, against Joshua Thomas and NCB, "damages in breach of contract, negligence, breach of common law, breach of statutory duty and in the alternative the return of the motor vehicle ..."

[5] On 31 October 2012, NCB filed a notice of application to dispense with mediation and for summary judgment. According to NCB, the respondent has no real prospect of succeeding on his claim against it. The application was supported by an affidavit of Ilyn Thompson, manager of the Oxford Place branch of NCB. The affidavit speaks of the granting of a loan of \$4,500,000 in February 2008 by NCB to one Devon Evans for the purchase of the motor vehicle mentioned above. On 18 February 2008, NCB registered a lien against the motor vehicle with the Inland Revenue Department. A bill of sale was executed on 29 February 2008 by Mr Evans in favour of NCB. A certificate of title for

the vehicle, issued on 26 May 2008 reflected that Mr Evans was the registered owner of the vehicle and that NCB held a lien in respect of it in the sum of \$4,500,000.00.

[6] Mr Evans fell into arrears with the repayment to NCB. There is no indication of the sum that Mr Evans has outstanding for NCB. Acting in keeping with the terms of the bill of sale, NCB authorized the seizure of the vehicle.

[7] The respondent filed an affidavit in response to NCB's application. In the affidavit, he stated that the vehicle was advertised for sale in the Sunday Gleaner in or about August 2009. He said that he travelled to Kingston to view and test drive the motor vehicle. He was shown the vehicle and documents by Joshua Thomas' son, named Nicholas Manley. The documents shown to him were :

- (i) original motor vehicle certificate of title;
- (ii) a valuation report on the motor vehicle;
- (iii) the motor vehicle registration document; and
- (iv) the certificate of fitness for the motor vehicle.

Having found the documents to be in good order, and being satisfied with the performance of the vehicle on the test run, the respondent returned to Kingston a week later and paid \$4,000,000.00 to Nicholas Manley in the presence of Joshua Thomas. Thereupon, he was given the keys and documents for the motor vehicle.

[8] The transfer of the motor vehicle into the respondent's name was done seamlessly according to him, on 14 December 2009. He had possession of the vehicle for almost two years before it was seized by NCB. The respondent exhibited before Simmons J a motor vehicle certificate of title in his name showing no lien. In addition,

he exhibited a document that had apparently been lodged on 20 June 2008 with the collector of taxes, St Andrew, indicating that there had been a discharge of the lien that had been in favour of NCB. This document was addressed to the Commissioner, Inland Revenue, and purported to have come from NCB Oxford Place. There is a signature in the space reserved for the lien holder's signature. It purports to be the signature of a person authorized by NCB to effect that discharge of lien. NCB has provided no response to the production of that document.

[9] It is against this background that Simmons J made the order which the applicant now seeks to challenge.

[10] Mr Kevin Powell for NCB submitted that the bill of sale transferred ownership of the vehicle to the bank. In view of that, NCB should have been recognized by Simmons J as the owner of the vehicle and so she ought to have granted summary judgment. Mr Evans, he submitted, had failed to fulfill his obligation to repay the loan that he had received from NCB, and had parted with the vehicle without proper authorization. In the circumstances, he said, NCB had the authority to take possession of the vehicle without the necessity of filing an action in court for the recovery of possession. This course of action, he said, is in keeping with the provisions of the bill of sale as well as the Hire Purchase Act. Mr Powell made reference to several authorities, with special emphasis on ***Lydon Allen v Olds Discount Co of Jamaica Ltd and Others*** (1966) 9 WIR 452, a case which involved multiple sales of a motor car subsequent to it having been let on a hire purchase agreement.

[11] Miss Nicole Allen, on behalf of the respondent, submitted that there are issues to be tried. She asked: how did the respondent end up with a good title, the bank having a lien? She submitted that the bill of sale and the rights conferred by it are not to be considered "in isolation of the intervening facts, which is the change of ownership by way of a bona fide purchase for value". Miss Allen is also of the view that section 23 of the Sale of Goods Act points to the prospect of success being in the respondent's favour.

[12] Rule 15.2 of the Civil Procedure Rules provides that the court may give summary judgment on a claim if the claimant has no real prospect of succeeding on it. By denying the application, Simmons J must have concluded that she was unable to agree with NCB's contention that the respondent Whittaker had no real prospect of succeeding. The question now is whether there is reason to disagree with the position seemingly adopted by the learned judge. In looking at the circumstances, there is room to argue – as Mr Powell did – that the bill of sale is a powerful tool in NCB's armoury. The case *Allen v Olds Discount Co* is also helpful in NCB's cause. On the other hand, there are questions relating to the purported discharge of the lien and the effect, if any, on the respondent Whittaker's claim that he was a purchaser in good faith and without notice. Section 23 of the Sale of Goods Act, referred to by Miss Allen, reads thus:

"When the seller of goods has a voidable title thereto but this title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect in title."

[13] We are not in a position to say that this matter is as clear cut as Mr Powell has advanced it in the cause of NCB. It seems most appropriate that there should be room for the facts to be determined, particularly as regards the purported discharge of the lien. In the circumstances, the learned judge was correct to have refused the application for summary judgment, and to have directed that the matter proceed to mediation. The application for permission to appeal is therefore refused and the costs of the application are awarded to the respondent.

[14] We trust that the mediation process will be successful. A matter of this nature ought to be brought to an end speedily.