[2011] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE HIBBERT JA (Ag)

SUPREME COURT CIVIL APPEAL NO 13/2010

BETWEEN	**RELIANCE GROUP OF COMPANIES LIMITED**	**APPELLANT**
AND	**KEN'S SALES AND MARKETING LIMITED**	**1ST RESPONDENT**
AND	**CHRISTOPHER GRAHAM**	**2ND RESPONDENT**

SUPREME COURT CIVIL APPEAL NO 16/2010

BETWEEN	**CHRISTOPHER GRAHAM**	**APPELLANT**
AND	**KEN'S SALES AND MARKETING LIMITED**	**1ST RESPONDENT**
AND	**RELIANCE GROUP OF COMPANIES LIMITED**	**2ND RESPONDENT**

Patrick Foster QC, Maurice Manning and Miss Tavia Dunn instructed by Nunes, Scholefield, DeLeon & Co for Reliance Group of Companies Limited

Michael Hylton QC and Sundiata Gibbs instructed by Michael Hylton & Associates for Christopher Graham

Jalil Dabdoub and Miss Karen Dabdoub instructed by Dabdoub Dabdoub and Co for Ken's Sales and Marketing Limited

22, 23 February, 1 and 15 April 2011

PANTON P

[1] I agree with the reasons for judgment written by my learned brother, Hibbert JA (Ag) and have nothing to add.

McINTOSH JA

[2] I too agree with the reasoning of my brother Hibbert JA (Ag) and have nothing further to add.

HIBBERT JA (Ag)

[3] On the 1 April 2011, we allowed the appeals, set aside the orders of Beswick J made on 28 January 2010 granting the injunctions against the appellants. We also ordered that Ken's Sales and Marketing Limited pay the costs of the appeal and of the application in the court below; such costs to be agreed or taxed. We now put our reasons in writing.

[4] Ken's Sales and Marketing Limited (Ken's Sales) is the registered proprietor of three properties situated at 113, 113A and 84 Constant Spring Road in the parish of Saint Andrew. The registrations appear in the Register Book of Titles at Volume 1122 Folio 402, Volume 963 Folio 527 and Volume 1136 Folio 392, respectively.

[5] Ken's Sales obtained from Reliance Group of Companies Limited (Reliance), two loans in the currency of the United States of America. The first was for US$1,250,000.00 and the second for US$250,000.00. These loans were secured by mortgages which were endorsed on each of the certificates of title.

[6] Upon Ken's Sales' default in the repayment of the loans, Reliance decided to exercise its powers of sale under the mortgage and advertised the properties for sale. The first advertisement appeared in a daily newspaper on 1 October 2009.

[7] On 16 October 2009, Ken's Sales filed a fixed date claim form in the Supreme Court naming Reliance as the defendant seeking -

> "1. An injunction restraining the Defendant and its servants and/or agents from selling, transferring or otherwise disposing of or dealing with the Claimant's properties being all those parcels of land located at 113 and 113A Constant Spring Road, Kingston 10 in the parish of Saint Andrew and comprised in the Certificates of Title registered at Volume 1122 Folio 402, Volume 963 Folio 527 and Volume 1399 Folio 502 of the Register Book of Titles and all that parcel of land located at 84 Constant Spring Road, Kingston 10 in the parish of Saint Andrew and comprised in the Certificate of Title registered at Volume 1136 Folio 392 of the Register Book of Titles."

[8] Additionally, Ken's Sales sought declarations and orders touching on the validity of the mortgages.

[9] Ken's Sales also on 16 October 2009, filed a notice of application for court orders seeking an interim injunction to bar Reliance from selling, transferring or otherwise

disposing of or dealing with the three mortgaged properties. This application was not pursued.

[10] Mr Christopher Graham carried on a business in relatively close proximity to 84 Constant Spring Road and had been interested in purchasing that property for the purposes of his business. In furtherance of that desire, he, prior to November 2009, had discussions with Mr Kenneth Biersay, the managing director of Ken's Sales. No agreement was however reached pertaining to the sale price.

[11] On 5 November 2009, Mr Graham, in response to an advertisement in a newspaper stating that the property situated at 84 Constant Spring Road was to be sold by public auction, attended the auction at the offices of David DeLisser & Associates.

[12] At the auction, which was conducted by Mr David DeLisser, Mr Graham was the successful bidder on the property. He paid the deposit and secured an undertaking from a financial institution for the balance of the purchase price.

[13] On 20 November 2009, Ken's Sales lodged a caveat against the certificate of title for the property. A transfer to Mr Graham was lodged with the Registrar of Titles on 28 December 2009, and the Registrar warned the caveat lodged by Ken's Sales.

[14] On 6 January 2010, Ken's Sales filed an amended fixed date claim form, adding David DeLisser, David DeLisser and Associates Limited and Christopher Graham as the 2nd, 3rd and 4th defendants, respectively.

[15] On the same day Ken's Sales filed an amended notice of application for court orders seeking the following injunctive reliefs:

> "1. An injunction against the 1st Defendant and/or the Registrar of Titles or any person whomsoever restraining the transfer of the property situate at 84 Constant Spring Road registered at Volume 1136 Folio 392 of the Register Book of Titles until determination of this Honourable Court of the validity of the sale by Public Auction on the 5th November 2009.
>
> 2. An injunction restraining the 4th Defendant and/or his nominees, their agents and/or their servants from selling, transferring, mortgaging or otherwise disposing of, or dealing in any manner whatsoever, with the property situate at 84 Constant Spring Road registered at volume 1136 Folio 392 of the Register Book of Titles until determination by this Honourable Court of the validity of the sale of the said property by Public Auction on the 5th November 2009.
>
> 3. An injunction restraining the 1st Defendant and its servants and/or agents from selling, transferring or otherwise disposing of or dealing with the Claimant's properties being all those parcels of land located at 113 and 113A Constant Spring Road, Kingston 10, in the parish of Saint Andrew and comprised in the Certificates of Title registered at Volume 1122 Folio 402 and Volume 963 Folio 527 of the Register Book of Titles pending the determination of this claim or until further order of the Court."

[16] After an inter partes hearing, Beswick J on 28 January 2010 granted the orders in the terms prayed in paragraphs [1] and [2] of the amended notice of application for court orders. It is from these orders that Reliance and Christopher Graham appeal.

[17] The following are the grounds of appeal filed on behalf of Reliance:

"1. The Learned Judge erred, in law, in ordering that the Appellant/First Defendant be restrained from transferring property in circumstances where the Second Respondent/Fourth Defendant was undeniably the successful bidder at a public auction and to whom the Appellant/First Defendant was contractually bound to and did effect a transfer of the property situated at 84 Constant Spring Road being the property registered at Volume 1136 Folio 392 of the Register Book of Titles.

2. The Learned Judge erred, in law, in seeking to restrain the Appellant/First Defendant in circumstances where the First Respondent/Claimant as Mortgagee (sic) was admittedly indebted to the Appellant/First Defendant and had acted in a manner calculated to impair and or interfere with the Mortgagee's exercise of its powers of sale by public auction and then to subsequently seek equitable reliefs it desired.

3. The Learned Judge erred in failing to at the very minimum consider and in fact require that the First Respondent/Claimant pay into court the sum that was outstanding to the Mortgagee as a condition of its securing injunctive reliefs against the Mortgagee that was otherwise entitled to realize its security in the face of the continuing chronic indebtedness of the first Respondent/Claimant.

4. The Learned Judge erred, in law and/or fact, in finding that the First Respondent/Claimant had a real prospect of succeeding in its claims for a permanent injunction.

5. The Learned Judge erred, in law, in finding that there were serious issues, to be tried.

6. The Learned Judge erred, in law, in finding that damages would not be an adequate remedy for the First Respondent/Claimant."

[18] On behalf of Christopher Graham, the following grounds were relied on:

"(a) The learned judge erred in finding that the evidence available at the time of the hearing disclosed that the 1st Respondent had real prospects for succeeding in its claim for a permanent injunction at the trial.

(b) The learned judge erred in finding that there was a serious issue to be tried.

(c) The learned judge erred in finding that Section 106 of the Registration of Titles Act only protects a purchaser where the transfer has been registered and does not protect a purchaser where the registration of a sale is pending.

(d) The learned judge erred in failing to find that damages would be an adequate remedy for the 1st respondent."

[19] Mr Hylton QC, relying on the judgment of the House of Lords in **American Cyanamid Co. v Ethicon Limited** [1975] 1 All ER 504 submitted that in order for an applicant to obtain an interlocutory injunction, he must first satisfy the court that there is a serious question to be tried. If he succeeds in doing so he needs to further satisfy the court that damages would not be an adequate remedy. For this submission, he also relied on the decision of the Privy Council in **National Commercial Bank Jamaica Limited v Olint Corporation Limited** [2009] UKPC 16; [2009] 1 WLR 1405.

[20] In addressing the issue of whether or not there is a serious issue to be tried, Mr Hylton QC submitted that for the applicant to satisfy this requirement there must be evidence available to the court at the hearing that discloses that the applicant had a real prospect of succeeding in his claim for a permanent injunction. For this, he relied on the judgments in **Re Lord Cable (deceased), Garratt & Ors v Waters & Ors**

[1976] 3 All ER 417 and **Commissioner of Police & Anor v Bermuda Broadcasting Company Limited** et al Privy Council Appeal No 48/2007, delivered on 23 January 2008.

[21] Finally on this point, Mr Hylton QC relied on section 106 of the Registration of Titles Act which was thoroughly examined and interpreted in the judgment of Forte P in **Sheckleford v Mount Atlas Estate Limited** Supreme Court Civil Appeal No 148/2000 delivered 20 December 2001. Based on this decision, he submitted that the transfer to Mr Graham could only be barred from registration, if it can be shown that he was not a bona fide purchaser. This, he submitted, would be the issue for the learned judge to consider. He further submitted that the affidavits of Mr Claude Brown and Mr Kenneth Biersay which speak to the conduct of Mr Graham could not constitute sufficiently precise factual evidence that Mr Graham committed acts which would cause him to lose his status as a bona fide purchaser.

[22] Consequently, Mr Hylton QC submitted, there was no serious issue to be tried hence the learned judge erred in granting the interlocutory injunction.

[23] Relative to the question, whether or not damages would be an adequate remedy, Mr Hylton QC again prayed in aid section 106 of the Registration of Titles Act. He submitted that on the basis of that provision the only remedy that would be available to Ken's Sales would be in damages.

[24] He further submitted that since Ken's Sales was itself seeking to sell the property that would be further indication that damages would be an adequate remedy. If Ken's Sales had been wronged, its loss could only be a deficiency in the purchase price for which it could be compensated by an order for damages.

[25] Consequently, he submitted that even if it was found that Ken's Sales had a serious question to be tried, the application for an interim injunction should have been refused as damages would be an adequate remedy.

[26] Mr Foster QC, on behalf of Reliance, adopted Mr Hylton's position with regard to the legal principles enunciated in **American Cyanamid**. He submitted that in relation to Reliance, Ken's Sales raised two issues stating that those raised serious questions to be tried. The first was the allegation that the mortgage deed was void as Reliance breached sections 22A (2) and 22A (3) of the Bank of Jamaica Act. The second issue concerned the conduct of the auction at which the property was sold.

[27] Citing **Griffin Ex parte Board of Trade** (1890) 60 LJQB 235**,** Mr Foster QC submitted that the extending of the loans to Ken's Sales did not mean that Reliance was carrying on the business of lending foreign currency. Hence, no licence would have been required from the Bank of Jamaica authorizing it to make the loans.

[28] He further submitted that if Reliance was in breach of section 22A (2) of the Bank of Jamaica Act, then Ken's Sales would also be in breach as the section also

restricts the borrowing of foreign currency. Ken's Sales, he submitted, could not properly seek an equitable remedy when it was also tainted.

[29] Mr Foster QC then addressed the complaints by Ken's Sales concerning the non issue of a statutory notice, the refusal of the auctioneer to accept its bid and that of Mr Brown, the inadequacy of the description of the property in the advertisement of the auction and the sale of the property at an undervalue. These allegations and complaints, he submitted, were tenuous and unsupported by the evidence.

[30] Mr Foster QC also, like Mr Hylton QC, submitted that even if there were serious questions to be tried, damages would be an adequate remedy. He also based those submissions on section 106 of the Registration of Titles Act, the decision in **Sheckleford v Mount Atlas Estate** and the fact that Ken's Sales was seeking to sell the property before the auction took place.

[31] Mr Dabdoub in reply, adopting the principles set out in the **American Cyanamid** case, submitted that Ken's Sales had a real prospect of obtaining a permanent injunction because the mortgages on the properties were void.

[32] This submission he based on the assertion that Reliance, in making the loans to Ken's Sales breached the provisions of the Bank of Jamaica Act, thereby making the mortgages void and unenforceable.

[33] Mr Dabdoub next submitted that Reliance improperly exercised its purported power of sale by virtue of the inadequacy in the description of the property, the

absence of a notice to Ken's Sales, the refusal of the auctioneer to accept the bids of Mr Biersay and Mr Brown, and the sale at an undervalue.

[34] Mr Dabdoub further submitted that, based on the decision in **American Cyanamid**, for there to be a determination that there was a serious question to be tried, all that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious.

[35] A mortgagor is entitled to an injunction to restrain a mortgagee from improperly exercising a power of sale he submitted, and for this he relied on the following passage from Fisher and Lightwood's Law of Mortgage, 2nd Australian Edition, paragraph 20.37:

> "…Nevertheless, after contract and before completion, the mortgagor will be able to obtain an injunction to restrain the sale if he can show an arguable case that the power of sale has not been properly exercised, either because the conditions for its exercise (for example notice…) have not been satisfied or because the price is an undervalue or because in some other way the sale is improper."

He also cited the case of **Selwyn v Garfit** (1888) 38 Ch D 273 in support.

[36] Mr Dabdoub next addressed the question of whether or not damages would be an adequate remedy. He submitted that if the transfer of the premises at 84 Constant Spring Road is completed, this would prevent Ken's Sales from meeting its financial obligations in relation to the other properties and this would have serious implications for Mr Biersay's family's welfare which could not be remedied by an award of damages.

[37] He further submitted that section 106 of the Registration of Titles Act can only offer protection to a purchaser if there is a valid and enforceable mortgage, if the purchaser is a bona fide purchaser and if the transfer had already been registered.

Analysis

[38] The Privy Council, in **National Commercial Bank Jamaica Limited v Olint Corporation Limited,** in keeping with the decision in **American Cyanamid** reiterated that before an interlocutory injunction is granted, the court must first be satisfied that there is a serious question to be tried and thereafter be satisfied that damages would not be an adequate remedy. In **American Cyanamid**, Lord Diplock in examining the first basis stated:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."

[39] In **Re Lord Cable (deceased) Garratt v Waters**, Slade J at page 431 stated:

> **"American Cyanamid Co. v Ethicon Limited** may have led prospective plaintiffs to the belief, perhaps partially justified, that it is not necessary for them to adduce affidavit evidence in support of a motion for an interlocutory injunction of such a precise and compelling nature as might have been required before that decision. Nevertheless, in my judgment it is still necessary for any plaintiff who is seeking interlocutory relief to adduce sufficiently precise

> factual evidence to satisfy the court that he has a real prospect of succeeding in his claim for a permanent injunction at the trial. If the facts adduced by him in support of his motion do not by themselves suffice to satisfy the court as to this, he cannot in my judgment expect it to assist him by inventing hypotheses of fact on which he might have a real prospect of success."

Their Lordships, in **National Commercial Bank Jamaica Limited v Olint Corporation Limited** adopted a similar approach.

[40] Ken's Sales' case is based on the perceived invalidity of the mortgages registered on the certificates of title as security for the loans made to it by Reliance. This challenge to the validity of the mortgages is based on the assertion by Ken's Sales that, in making the loans, Reliance breached section 22A (2) of the Bank of Jamaica Act which states:

> "No person shall carry on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorized dealer."

[41] On the basis of the evidence before the learned judge, could it be said that Reliance was carrying on the business of lending foreign currency? In re **Griffin; Exparte Board of Trade**, Lord Esher MR stated at page 237:

> "I think that whether one or two transactions make a business depends upon the circumstances of each case. I take the test to be this: if an isolated transaction, which if repeated would be a transaction in a business, is proved to have been undertaken with the intention that it would be the first of several transactions, that is, with the intent of carrying on a business, then it is the first transaction in the

> existing business. The business exists from the time of the commencement of that transaction with the intent that it should be one of a series …"

[42] In this case there is evidence that two loans were made to Ken's Sales, one in October 1999 and the other in December 1999. There is no evidence of any other loans or even offers of loans to anyone else. It does not require a court to resolve conflicts of evidence as to facts, or to decide difficult questions of law to conclude that on the evidence available to the court, it could not be held that Reliance was carrying on the business of lending foreign currency. This could not, therefore, be deemed to be a serious question to be tried in determining whether or not a permanent injunction should be granted.

[43] The learned judge seemed to be of the same view as she refused to grant an injunction restraining Reliance from selling or transferring the properties situated at 113 and 113A Constant Spring Road after finding that there were no serious triable issues in relation to those properties.

[44] Even if, as the learned judge found, there were other serious triable issues relating to 84 Constant Spring Road, other hurdles had to be cleared before an interim injunction could be properly granted.

[45] Section 106 of the Registration of Titles Act was one such hurdle. It reads:

> "106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such

> other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

[46] The learned judge, in considering the implications of this section, in her judgment stated as follows:

> "It is my view that this section applies where the sale of the land is fait accompli, i.e. registration of the sale of the land has occurred."

This was the view adopted by Mr Dabdoub in his submissions to this court.

Although our Act was patterned from the legislation in Australia which uses the same Torrens system of land registration, several amendments have been made both in

Australia and in Jamaica which now result in a difference between section 106 of our Act and the comparative section in the Australian legislation. Consequently, the quote from Fisher and Lightwood's Law of Mortgage and the decision in **Selwyn and Garfit** which were relied on by Mr. Dabdoub are not applicable in Jamaica.

[47] The question whether or not a purchaser is protected even before the transfer is registered arose in the case of **Lloyd Sheckleford v Mount Atlas Estate Limited**. Forte P, in delivering one of the judgments of the court, traced extensively the development of the legislation which resulted in the present section 106. In interpreting that section he stated at page 7:

> "It is clear from the provisions of section 106, that it not only gives the mortgage the power to sell, but is specific in protecting a bona fide purchaser for value from the consequences that may flow, if the exercise of the power by the mortgagee was the result of impropriety or irregularity. The real question then, is whether a bona fide purchaser, who had no obligation to enquire into whether there was any default, impropriety, or irregularity in the sale should be deprived of the benefits of his contract already executed, for the reason that he had not yet registered the transfer."

Forte P continued at page 8:

> "Where then, the purchaser is a bona fide purchaser without any knowledge of an impropriety or irregularity in the sale, and where he has no obligation to make enquiries into such matters, the statute bestows upon him the guarantee that the registration cannot thereafter be restrained."

Later in his judgment at page 14 Forte P stated:

> "In any event in my judgment, on a simple reading of section 106, it is clear and unambiguous that the legislature intended to give the purchaser the protection as soon as the

> mortgagee, in the exercise of his power of sale, enters into a contract with a bona fide purchaser for the sale of the mortgaged property."

[48] Clearly, therefore, the learned judge erred in concluding that section 106 of the Registration of Titles Act did not apply before the registration of the transfer had occurred. Based on the provisions of section 106, and its interpretation in the case of **Sheckleford v Mount Atlas Estate Limited**, the registration of the transfer to Mr Graham could only be restrained if it can be shown that he was not a bona fide purchaser.

[49] In his affidavit sworn to on 4 January 2010, Mr Kenneth Biersay stated that he attended the auction and handed to Mr Graham, a copy of a notice he had caused to be published in a daily newspaper stating that there was a suit pending in the Supreme Court alleging that the mortgage document was illegal and unenforceable.

[50] Mr Graham admitted receipt of the notice but paid little attention to it as it was neither from an attorney-at-law or a court and he thought this was just the owner of the property trying to discourage prospective purchasers. He also admitted having social discussions with the auctioneer and other persons in the auctioneer's office prior to the commencement of the auction.

[51] In my view, none of these could remove from Mr Graham the status of a bona fide purchaser, who is afforded protection under section 106 of the Registration of

Titles Act. Ken's Sales only recourse would be to seek an award of damages against Reliance, if Reliance had acted improperly or irregularly.

[52] Since by virtue of section 106 of the Registration of Titles Act, damages is the only remedy available to an aggrieved mortgagor, then, in keeping with the decision in the **American Cyanamid** case, an interlocutory injunction should not have been granted.

[53] Furthermore, Ken's Sales was actively engaged in trying to sell the property at 84 Constant Spring Road. It is my view that the only detriment it could suffer would be the sale of the property at a value below what could have been obtained. For this, no doubt, an award of damages would be adequate remedy if it is shown that the sale was improper or irregular.

[54] For the above reasons I agreed with my learned colleagues to allow these appeals and make the order mentioned in paragraph [3].