

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 72/2006

**BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE COOKE JA
THE HON. MR JUSTICE DUKHARAN JA**

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| BETWEEN | NEVILLE BALLIN VIRNA BALLIN | APPELLANTS |
| AND | JAMES BROWN | RESPONDENT |
| AND | NATIONAL COMMERCIAL BANK JAMAICA LIMITED | INTERVENING PARTY |

Raphael Codlin and Miss Melissa Cunningham for the appellants

Miss Aisha Mulendwe for the respondent James Brown

Charles Piper for the intervening party National Commercial Bank Jamaica Limited

16, 17 December 2009 and 15 April 2011

PANTON P

[1] This appeal is from a decision of Reid J on 10 August 2006 whereby he dismissed an application by the appellants (hereinafter referred to as the Ballins) seeking to have

National Commercial Bank Jamaica Limited hand over the duplicate certificate of title in respect of certain property in which all parties to the appeal are interested, even if they do not all have a legal or equitable interest therein.

[2] In a suit filed in 1990, the Ballins had sought specific performance of an agreement that they had entered into with the respondent Mr James Brown in respect of land registered at Volume 1063 Folio 926 in the Register Book of Titles in the name of Mr Brown. On 3 October 1996, judgment was entered by Ellis J in favour of the Ballins, not for specific performance but rather for damages in the sum of \$1,736,870.00 plus interest @ 27% per annum from 29 November 1990.

[3] Efforts on the part of the Ballins to receive the fruits of this judgment have failed so far. The first attempt was the issuance of a writ of seizure and sale on 31 October 1996, but that was returned unexecuted on the basis of 'no assets'. Since then, the Ballins have focused their attention on recovering the judgment debt through the execution of process on the said land that was the subject of the agreement. In doing so, they have filed a series of court procedures which culminated in the judgment of Reid J.

[4] The record of appeal indicates that on 3 October 1989, the land in question was transferred to the respondent Brown for a consideration of \$90,000.00. On 22 January 1990, mortgage number 606280 was registered over the property in favour of Mutual Security Bank Limited as security for \$600,000.00. A caveat dated 10 September 1990 was lodged by the Ballins.

[5] On 30 June 1997, a "summons to execute judgment" came on for hearing before Theobalds J. The order made thereon is recorded thus:

"BY CONSENT IT IS HEREBY ORDERED:

That without seeking any Order against the Land at this stage the matter be referred to the Registrar."

The next step was the issuance of a summons dated 16 October 1997 for the Registrar to carry out the inquiries ordered by Theobalds J. There followed an order by Theobalds J on 12 August 1998 for the sale of the land and for the proceeds to be applied in satisfaction of the judgment entered in favour of the Ballins. By then, the judgment debt had soared to \$7,029,460.00.

[6] In keeping with the order for sale, an auction was advertised for 1 April 1999. However, on 31 March 1999, Reid J made an ex parte order postponing same for a period of seven days. The respondent Brown gave the usual undertaking as to damages. The next significant step was the making of an order by Reckord J on 5 July 2000, whereby it was ordered that the land registered at Volume 1063 Folio 926 of the Register Book of Titles be offered for sale by private treaty under the same conditions of sale imposed for the sale at public auction. An appeal was filed to set aside this order of Reckord J but the appeal was dismissed and the order of Reckord J affirmed by this court on 24 October 2001.

[7] On 8 November 2004, Sykes J (Ag) (as he then was) ordered the sale of the property to Peter Grant McMaster and Elaine Veronica McMaster. This order was made after the learned judge had heard submissions on behalf of the Ballins and the

respondent Brown. The learned judge ordered that a binding agreement be prepared and executed within 21 days of the date of the order. The attorney-at-law for Mr Brown was given carriage of sale and the parties were to return to the court within 60 days of the order for any further directions that they thought necessary. If the vendor refused to execute the agreement for sale, the Registrar of the Supreme Court was empowered to execute same.

[8] By a letter dated 11 January 1995, Mutual Security Bank Limited, Spanish Town Branch, through its loans officer, wrote to the manager of National Commercial Bank Limited, Morant Bay, enclosing the certificate of title and discharge of mortgage in respect of the property, and requesting that the said manager sign and return the duplicate of the letter as an acknowledgment of receipt. However, National Commercial Bank Jamaica Limited (successor in title to Mutual Security Bank Limited) filed a claim in 2004 against James Brown alleging that mortgage number 606280 and subsequent mortgages endorsed on the said title were still then outstanding and that Mr Brown had defaulted in respect of his payments. On 28 January 2005, judgment in default was entered in favour of National Commercial Bank Jamaica Limited against Mr Brown and Arizon Inn Limited for the sum of \$12,253,187.24 with interest at the rate of 12% per annum (p. 298 of the record).

[9] In a notice of application for court orders dated 11 July 2005, the Ballins sought the following orders:

- “1. That mortgage number 606280 which was granted to James Brown and registered on

Duplicate Certificate of Title registered at Volume 1063 Folio 926 of the Register Book of Titles was fully paid up and ought to have been discharged by Mutual Security Bank.

2. That National Commercial Bank was notified of the order for sale pronounced herein by His Lordship Mr. Justice Theobalds on the 12th of August 1998.
3. That National Commercial Bank, which is holding the Duplicate Certificate of Title as aforesaid, may be directed to hand over same to the Attorneys at Law acting for James Brown or Neville and Virna Ballin.
4. That this Honourable Court may grant such further and other relief to the application as the Honourable Court deems fit.”

[10] National Commercial Bank Jamaica Limited was notified of this application which was adjudicated on by Reid J and which resulted in these proceedings before us. However, between the filing of the notice of application for court orders and the determination by Reid J there was a consent order made by Dukharan J on 24 August 2005, on yet another notice of application for court order. Dukharan J ordered as follows:

1. the sale that had been earlier ordered by the court should proceed;
2. the net proceeds of the sale should be held in an interest bearing account in the names of the attorneys-at-law on the record;

3. the National Commercial Bank should, without prejudice to its rights, issue full discharge of the mortgages registered on the title to enable completion of the sale; and
4. the National Commercial Bank is at liberty to produce to the Court such evidence as it may possess to substantiate its claim against the net proceeds of sale.

[11] In order to complete the picture, it should be noted that, by letter dated 15 November 1990, the Ballins had written to the manager of the Spanish Town branch of Mutual Security Bank Limited in the following terms:

"As you are aware the proceeds of the above mortgage loan were paid to Ocean Terrace Inn of which Company we are shareholders. As guarantors of the loan we have an interest in the subject matter of the mortgage and therefore request that if at any time you propose to exercise your Powers of Sale under the mortgage, you so advise us and we hereby give our undertaking in such event to settle the arrears owed to you." (p. 239 of the record)

The loan that was being referred to in this letter was that which had been granted in 1989. However, as indicated earlier, subsequent loans were granted to Mr Brown using the said land as security. This is evidenced by the letter of commitment dated 11 October 1996 addressed to, and accepted by, Mr Brown (p. 267 of the record). That letter confirmed the granting of a legal mortgage over the land. Mr Brown acknowledged the existence of two mortgages registered on 22 January 1990 and 26 August 1991 respectively in favour of Mutual Security Bank Limited, and one registered on 7 December 1993 in favour of National Commercial Bank Jamaica Limited.

[12] In his judgment, Reid J noted that National Commercial Bank Jamaica Limited had intervened "to assert an interest in the proceeds of sale of land owned by the judgment debtor J. H. Brown". The learned judge reasoned that although the Ballins were judgment creditors, they had no interest in or charge against the land to secure their debt; so, their entitlement to recover the proceeds of their judgment would be subject to those judgment creditors who had registered their interest. The caveat, he said, "could hardly have rendered the registration of the bank's mortgages nugatory". As a result, there had never been any competing interests in the said land to afford the applicants priority over the bank in the net proceeds of sale. He concluded "that the interest of the National Commercial Bank as mortgagee of the land must first be satisfied from the net proceeds of sale and the surplus if any should be paid to the Plaintiffs/Applicants".

Grounds of Appeal

[13] The following grounds of appeal were filed:

- "1. The Bank having been notified of the order for sale of the property as long ago as January 20, 1999, more than six years before the Bank became involved in the litigation, ought not to have been heard in these presents when it failed to take any action when it was then notified to enforce any right which it may have against the Defendant/Respondent.
2. The Bank's interest, if any, could not accrue after the caveat of the Claimants/Appellants was lodged and certainly such interest could not continue to accrue after judgment was pronounced by Justice Ellis in October 3 1996.

3. The Bank, not having been properly joined and properly deployed its arguments according to the directions of the court which is required by the Civil Procedure Rules, was not entitled to descend upon the proceedings and thereby acquire the status of a legitimate litigant in the proceedings and the Bank certainly did not make any claim nor sought the court's permission to make any claim which it ought to have done when the proceedings commenced in 1990, having been notified by the process of suits and judgments, certainly when it was notified in 1999 on the 20th of January.
4. After Justice Ellis handed down his judgment on the 3rd of October 1996, various interlocutory applications were heard and among those applications were three orders directing that property registered at Volume 1063 Folio 926 of the Register Book of Titles should be sold and the proceeds applied to satisfy the judgment handed down by Justice Ellis as aforesaid and until those judgments were set aside, His Lordship Justice Reid had no jurisdiction to make orders contrary to those orders for sale unless they were all set aside.
5. The learned judge misdirected himself when he assumed jurisdiction to make declaration on behalf of the Bank when there was no request by the Bank for such declaration and there was no opportunity given to the Claimants/Appellants to resist such an application since it was not made and the first time that the Claimants/Appellants became aware that such declaration was in the offing, was when it was requested by the Bank's Counsel in his written submission after the proceedings had been completed, something that he could not properly have done when there were no claims therefor before the court.

6. The learned judge clearly misdirected himself when he held that there was no issue of priority of interest and therefore the claim of the Bank was unassailable when there was really no claim by the Bank except to say that the mortgage had not been paid and that the Claimants/Appellants did not supply any proof that the mortgage had been paid.”

[14] The order sought by the Ballins was as follows:

- “1. That the National Commercial Bank was not properly joined as a party to these proceedings and therefore ought not to have been heard in the circumstances that it was heard.
2. Further or in the alternative, that the order pronounced by Justice Reid on the 10th day of August 2006 be set aside and that the orders pronounced by Justices Ellis, Theobalds, Reckord and Sykes be carried out and that the proceeds of sale of the property aforesaid be paid to the Claimants/Appellants.”

The issues as seen by the Ballins

[15] The Ballins, through their attorney-at-law, Mr Raphael Codlin, identified six issues for determination of the appeal. They are as follows:

- (i) Could Reid J have made the order which he made while the orders of the other judges remain extant?
- (ii) Could Reid J have set aside the order of Theobalds J?

- (iii) Was there a mortgage that the bank could properly enforce?
- (iv) Could the Ballins have properly lodged a caveat against the property?
- (v) What is the effect of non-notification of the bank by the Registrar of the Supreme Court pursuant to undertaking the investigation? and
- (vi) Was the procedure employed by Reid J consonant with the rules?

The submissions on behalf of the Ballins

[16] In respect of issues (i), (ii) and (v), Mr Codlin submitted that a judge of the Supreme Court does not have the power to make an order in the manner done by Reid J without setting aside the order made by the previous judges. The reason for this, he said, was that it had long been established that a court will not entertain conflicting orders as regards the same subject matter in the way Reid J has done because that will be a most potent source for confusion. In his view, the orders of Reid J and Theobalds J are conflicting. That which was done by Reid J, according to Mr Codlin, required the calling of witnesses in order to have the issues "properly deployed". The non-notification of the bank by the Registrar of the Supreme Court as regards the undertaking of the investigation was not fatal to the Ballins' cause seeing that the bank was notified of the judgment in early 1999. There was ample time, he said, between the making of the order by Theobalds J and the orders made by Sykes and Dukharan JJ for the bank to intervene. It had a year in which to apply to set aside the order of

Theobalds J but it had failed to do so. That failure, according to Mr Codlin, was a clear indication that the bank had no interest in pursuing that route.

[17] On issue (iii), Mr Codlin submitted that there was no mortgage in existence in favour of the bank, hence there is nothing to enforce. The evidence, he said, revealed that the only mortgage that was outstanding, the one given to Mutual Security Bank Limited ought to have been discharged as it had been paid. This was signified by the fact that Dr Neville Ballin's security had been returned to him.

[18] As regards issue (iv), the caveat, Mr Codlin submitted that one can lodge a caveat against a property without having an interest in that property. Hence, the fact that Ellis J found that the Ballins did not have an interest in the property did not preclude the lodging of a caveat by them. He cited section 139 of the Registration of Titles Act in support of this proposition. The failure of the bank, he said, to warn the caveat amounted to a surrender of its right to enforce the mortgage.

[19] In looking at the orders that were being sought by the Ballins, Mr Codlin said that the application was filed prior to the sale of the land, but the sale had taken place before the application came on for hearing before Reid J. He expressed the view that the learned judge made orders that had not been asked for, and so the appeal should be allowed. He contended that "the paying off of the mortgage is a factual issue". The title should have been given to the owner unless there was evidence that the mortgagor had given instructions for his title to be sent to National Commercial Bank Jamaica Limited. There was no evidence, he said, that National Commercial Bank

Jamaica Limited had a right to hold the title. Mr Codlin conceded that apart from the mortgage that had been registered in favour of Mutual Security Bank Limited there were two other mortgages endorsed on the title. He submitted that they could not be enforced, as the caveat had been lodged earlier. According to him, these mortgages have no legal effect as a result of the caveat.

The submissions on behalf of the bank

[20] Mr Charles Piper, in response, submitted that the judgment of Ellis J which has not been appealed, determined that the Ballins have no interest in the land. The continued existence of the caveat, he said, does not vest any interest as the caveat itself does not create an interest in land; nor does it defeat an interest in land. He submitted that the Civil Procedure Rules contemplate the very issues that have arisen in this case. He referred specifically to rules 55.4 to 55.6 which deal with the making of an order for the sale of land and for the directions that may be given by the court upon the making of such an order.

[21] The rules referred to by Mr Piper are as follows:

"Order for sale

55.4 On making an order for sale, the court may –

- (a) permit the person having conduct of the sale to sell the land in such manner as that person thinks fit; or
- (b) direct the manner in which the land is to be sold.

Directions

- 55.5 The court may give directions for the purpose of the sale, including –
- (a) fixing any reserve or minimum price for such sale;
 - (b) obtaining further evidence as to the valuation of the land;
 - (c) settling the particulars and conditions of sale;
 - (d) fixing the remuneration of the auctioneer or estate agent dealing with the sale;
 - (e) requiring payment of the net proceeds of sale into court or otherwise;
 - (f) an inquiry into what interests any interested persons may have in the land and the extent of such interests in the net proceeds of sale;
 - (g) how the net proceeds of sale should be applied; and
 - (h) certification of the result of the sale.

Further directions

- 55.6 Any party or the person having the conduct of the sale may apply to the court to vary the directions or to make further directions.”

[22] Mr Piper said that mortgage number 606280 was not discharged at the time the matter was before Reid J and that Mr James Brown did not have the right to call for its

discharge. He referred the court to the judgment in default that had been entered in favour of the bank, and pointed out that the affidavit of Ms Avis Andrews at page 230 of the record had not been challenged. There was, he said, clear evidence of the indebtedness of Mr Brown to the bank and submitted that Reid J was correct in finding that the mortgages remained outstanding in their entirety.

[23] The affidavit of Ms Avis Andrews, to which Mr Piper referred, states that Mutual Security Bank Limited was merged with National Commercial Bank Jamaica Limited with effect from 1 October 1996, resulting in the latter bank assuming the former's assets, liabilities and records relating thereto. The respondent James Brown was a customer of the Young Street, Spanish Town branch of Mutual Security Bank Limited. He obtained a loan from that branch for and on behalf of Ocean Terrace Inn Limited, of which he was a shareholder to the amount of 51%. This loan was secured by, among other things, a mortgage over the property in question. That mortgage was endorsed on the title as mortgage number 606280. The Ballins acknowledged to Mutual Security Bank the existence of this loan, and the fact that the proceeds were paid to Ocean Terrace Inn Limited of which they were shareholders. The Ballins further acknowledged that Mutual Security Bank Limited had the power to sell the property, and gave an undertaking to settle any arrears owed in respect of the mortgage. Subsequently, the respondent Brown obtained a personal loan from the said Spanish Town branch of Mutual Security Bank Limited, which loan was also secured by a mortgage over the said property. Mr Brown also obtained a loan from National Commercial Bank Jamaica Limited, Morant Bay, which loan was endorsed on the title, albeit after the caveat had been lodged.

The mortgages endorsed on the title have not been cleared, and the sums remain outstanding.

Determination of the issues

[24] The Ballins have posed the question of whether Reid J could have made the order while the orders of the other judges were extant. In answering this question, it is necessary to refer to the various orders made over the years by the learned judges. The first relevant order was made by Theobalds J. He had before him a summons to execute the judgment entered in favour of the Ballins by Ellis J. However, by consent of the parties, the matter was referred to the Registrar "without seeking any order against the land at this stage". Later, on 12 August 1998, presumably after the Registrar had made the necessary inquiries, Theobalds J made an order for sale of the land and for the proceeds to be applied in satisfaction of the judgment. There followed the order of Reckord J (affirmed by this court) authorizing a sale at public auction. The next order of significance was that of Sykes J (Ag) (as he then was) specifying to whom the property was to be sold. It was followed by the order of Dukharan J (as he then was), instructing that the sale was to be proceeded with and that the bank should without prejudice to its rights issue full discharge of the mortgages registered on the title subject to the production by the bank of evidence to substantiate any claim it may have against the proceeds of sale.

[25] It is to be noted that all these orders with the exception of that made by Reckord J were made with the consent of the parties. As said earlier, the order of Reckord J

was affirmed by this court. It is clear that the orders were all made with a view to having a resolution of the matter that has been in the courts for two decades. They seem to follow logically in a natural progression, and there is no conflict between them and the proceedings before Reid J. It is rather strange that having consented to these orders, the Ballins should now be objecting to the intervention of the bank and the proceedings before Reid J which followed on the order of Dukharan J that due recognition was to be given to the rights of the mortgagee bank.

[26] The second question posed was whether Reid J could have set aside the order of Theobalds J. This question does not arise as Reid J did not set aside the order of Theobalds J. To think otherwise is to demonstrate a misunderstanding of the various steps in the history of the matter.

[27] The remaining issues as posed by the Ballins may be dealt with together. National Commercial Bank Jamaica Limited was not an intruder as has been portrayed by Mr Codlin in his arguments before us. The bank has a legitimate interest in the property involved, and it has produced evidence to support its claim. The mortgages have been registered, and there has been no evidence to show that the sums borrowed have been completely repaid thereby making it just and right for the mortgages to be discharged, without more. The return of a "security" to a guarantor does not show that a mortgage has been repaid, as has been advanced by Mr Codlin. One would have thought that a receipt or cleared cheque would have been forthcoming in such a situation. An insurance policy or other form of security can be returned to a guarantor

for a variety of reasons. Finally, we have not been pointed to any rule or practice that frowns on the procedure that was adopted before Reid J. It clearly allowed for the parties to deal with the matter by affidavit evidence, and it was utilized to the fullest by all concerned.

Conclusion

[28] In the circumstances, it cannot be said that there is any merit in this appeal. Accordingly, the appeal is dismissed. The order of Reid J is affirmed and the National Commercial Bank Jamaica Limited is to have the agreed or taxed costs of the appeal, such costs to be paid by the Ballins.

COOKE JA

[29] I have read in draft the judgment of my brother Panton P. I agree with his reasoning and conclusions. There is nothing I wish to add.

DUKHARAN JA

[30] I too agree with the reasoning and conclusion of my brother Panton P and have nothing to add.

ORDER

PANTON P

The appeal is dismissed.

The order of Reid J is affirmed.

National Commercial Bank Jamaica Limited is to have its costs agreed or taxed and such costs are to be paid by the Ballins.