

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 121 OF 2007

**BEFORE: THE HON. MR. JUSTICE PANTON, P
 THE HON. MR. JUSTICE COOKE, J.A.
 THE HON. MISS JUSTICE G. SMITH, J.A. (Ag.)**

**BETWEEN: JAMAICA REDEVELOPMENT APPELLANT
 FOUNDATION, INC.**

AND ROYLAND WILLIAMS RESPONDENT

Mr. Gavin Goffe, instructed by Myers Fletcher & Gordon for the Appellant.

Mrs. Charmaine Patterson, instructed by Charmaine Patterson & Associates, for the Respondent.

14th July, 2008 and 1st May, 2009.

PANTON, P.

I have read the judgment of Cooke, J.A. I agree with his reasoning and conclusion. There is nothing further that I wish to add.

COOKE, J.A.

1. This appeal is being dealt with solely on written representations submitted by the parties.
2. The respondent's matrimonial home is at Lot 51 Queen Hill, registered at Volume 1182 Folio 406 of the Register Book of Titles. On this title are endorsed

two mortgages. The first dated 27th June 1994 is to Island Victoria Bank Limited to cover a loan of US\$24,000.00. This is mortgage No. 818639. The second, No. 891725, was to secure a loan of J\$3,000,000.00. This dated 4th October 1995, was also to Island Victoria. Subsequently, the appellant became the mortgagee in respect of these two mortgages.

3. The respondent, in his Affidavit of Urgency dated 26th September 2007 stated that in August 2007 he was informed that his home at Lot 51, Cleopatra Avenue, Queen Hill was being sold. He secured one of the advertisements, proceeded to his attorney and requested that she make an application for an injunction to stop the sale of his home. Thus there was the initiation of these proceedings.

4. On the 28th September 2007, the respondent filed a Claim Form which is now reproduced hereunder:

"The Claimant **ROYLAND WILLIAMS of** 26 Cleopatra Avenue, Kingston 19 in the parish of Saint Andrew claims against the Defendant, **JAMAICA REDEVELOPMENT LIMITED**, a company registered under the laws of Jamaica, and having its place of business situated at 6 St. Lucia Avenue, Kingston 5 in the Parish of Saint Andrew for redemption of property under a mortgage and for an order that:-

1. That the Defendants, its servants and or agents be restrained from exercising any power of sale and/or foreclosure pursuant to Mortgage numbered 818639 registered on the 27th day of June 1994 and Mortgage numbered 891725 registered on the 4th day of October 1995 in relation to property being property

known as lot number 51 on the plan of Marverly called Queen Hill and registered at Volume 1182 Folio 406 of the register Book of Titles.

2. That the Defendants provide proof of the Claimant's indebtedness to them and a statement of account outlining the Claimant's indebtedness to the Defendant.
3. That the Defendant be prevented from selling the Claimants said property situated at Queen Hill until such proof has been provided."

That the grounds on which the Claimant is seeking the orders are as follows:-

- "1. The Claimant is prepared to pay to the Defendant whatever is owed to them, however the Defendant company has failed to provide the information on the current status of the account.
2. That the sale of this property would be detrimental to the Claimant as his family would be left homeless."

5. The Particulars of Claim was also filed on the 28th September 2007. These particulars do not advert to mortgages nos. 818639 and 891725 (above).

Paragraph 6 of the Particulars of Claim is significant. It reads:-

"That the Claimant has indicated to the Defendant company his willing (sic) to pay off the outstanding loan and has requested a meeting with the Defendant Company in order to determine how much is outstanding however, the Defendant has refused to meet with the Claimant and has not to date provided the Claimant with the information requested."

6. On the same 28th September 2007, the respondent filed a "Without Notice of Application for Court Orders". This application sought an injunction in the same terms as that in the Claim Form. In addition, the respondent sought a caveat to prohibit "any dealing with the title to the said premises until the substantive matter herein had been addressed by the Court".

The grounds on which the respondent sought the orders were:

- "1. The Claimant is prepared to pay to the Claimant whatever is owed to them, however the Defendant company has failed to provide the information of the Claimant's indebtedness to them.
2. That the sale of this property would be detrimental to the Claimant and his family would be left homeless."

7. The affidavit filed by the respondent dated 26th September 2007, conveys the picture that he was in a state of bewilderment. Paragraph 4 of this affidavit states as follows:

"That I have requested of the Jamaica Redevelopment Foundation information as to the true principal and this information has not been forthcoming. If there is no indication as to what these figures are I cannot be expected to know the true status of my indebtedness to this organization. I would like to pay off this loan but the lack of details is causing a delay in this activity."

Paragraph 18 is in these terms –

"That all I need is an opportunity to pay off the outstanding balance but it appears that I am being denied this opportunity."

As in the Claim Form and the Particulars of Claim, so too in this affidavit, there is no specific reference to the mortgages previously mentioned.

8. At the hearing of the Without Notice of Application on the 4th October 2007, the court below made the following order:

- "1. The Defendants, its servants and/or agents be restrained from exercising any power under a power of sale and/or foreclosure pursuant to Mortgage numbered 818639 registered on the 27th day of June 1994 and Mortgage numbered 891725 registered on the 4th day of October 1995 in relation to property being property known as lot 51 on the plan of Marverly called Queen Hill and registered at Volume 1182 Folio 406 of the Register Book of Titles for a period of 14 days hereof.
2. The Defendant is to forthwith supply the Claimant with the details of the outstanding balance on the loans due to the Defendant and details of how that balance is arrived at.
3. The matter is set for interpartes hearing on Friday 19th October 2007 at 9:a.m."

9. In the interval between the Without Notice and the inter-partes hearing, the respondent filed on the 9th October 2007 another affidavit dated 4th October 2007, (the same date as the hearing of the Without Notice Application). I will set out paragraphs 2 – 4 of that affidavit.

- "2 That I have made attempts to make payments to the Jamaica Redevelopment Foundation on two separate occasions and the cheques were

returned. In the first instance my attorney was advised that the name of the payee endorsed on the cheque was incorrectly stated.

3. That finally on October 1, 2007 the second cheque was returned to my attorney with a letter in which the amount of the outstanding mortgage was finally provided. In addition this letter advised that the Defendant Company has taken steps to sell the said property. A copy of that letter is hereby exhibited marked 'RWX' for identification.
4. That I am disputing the amounts stated in that letter and need the opportunity to present my arguments before the court. That as stated in my affidavit of September 26, 2007 most of the money's owed was paid up. That I filed suit against the Jamaica Redevelopment Foundation and I fear if I am not afforded that opportunity to pursue this claim the company which has its head office overseas could cease to operate and I would be unable to seek redress."

It is important to set out the letter mentioned in paragraph 3 in extensor.

This letter has endorsed on it in writing "received October 1, 2007". This endorsement is unsigned. The letter reads thus:-

"September 21, 2007

Charmine Patterson & Associates
Attorneys-at-Law
47C Old Hope Road
Kingston 5

Attention: Ms. Charmaine A.N. Patterson

Dear Ms. Patterson;

Re: Royland Williams, Joyst Travel Services et. al.

We are in receipt of your letter dated September 11, 2007 and your letter dated September 20, 2007.

As requested the obligations your client owes to Jamaican Redevelopment Foundation, Inc. as at September 21, 2007 are **THREE HUNDRED FIFTY THREE THOUSAND, TWO HUNDRED EIGHTY THREE UNITED STATES DOLLARS AND EIGHTEEN CENTS (US\$353,283.18)** and **TWENTY ONE MILLION, THREE HUNDRED SIXTY THOUSAND, EIGHT HUNDRED AND FIVE JAMAICA DOLLARS AND FORTY THREE CENTS (J\$21,360,805.43)**. Interest continues to accrue at a rate of **Fifteen Per Cent (15%)** per annum on the United States Dollar amount and at a rate of **Thirty Per Cent (30%)** per annum on the Jamaican Dollar amount until paid.

There is no settlement agreement in place with your client, therefore we are returning the check in the sum of **Fifty Thousand Jamaican Dollars (J\$50,000.00)**, which was enclosed with your letter dated September 11, 2007.

Please be advised that Jamaican Redevelopment Foundation, Inc. has entered into a Sales Agreement for your client's property located at 26 Cleopatra, Avenue, Queen Hill, St. Andrew, pursuant to its rights as mortgagee.

Any offer made by your client to settle his obligations is subject to approval of the head office of Jamaican Redevelopment Foundation, Inc.

Yours Truly,
Jamaican Redevelopment Foundation, Inc.

Randall Crenshaw
Asset Manager-Jamaican Branch

10. In paragraph 4 of this affidavit the respondent executed a volte-face. He completely changed his stance as evidenced by the Claim Form, the Particulars of Claim and the first supporting affidavit. The initial position of the respondent was that he wished to pay but he was being denied the opportunity because the appellant was refusing to supply the requisite information as to his indebtedness. Now that he has that information he contends that he "was disputing the amounts stated in that letter". He further stated in paragraph 4 that he had filed suit against the appellant. I am at a loss to determine whether this suit is the instant action or subject of another action. Obviously, if it is that it was another suit, then the injunction then sought could not be entertained. There is a striking aspect of the evidence which I find disturbing. At least by the 1st October 2007 the respondent had information as to the amount which the appellant claimed was owed to it. Yet, the burden of the stance at the Without Notice Hearing was that the appellant had failed to provide information on the current status of the account. The respondent should have, at the initial hearing on the 4th October 2007, placed before the court the letter of the appellant dated 21st September 2007. This letter was in its possession. Of course, the production of this letter would doubtless have served to undermine the thrust of the application. Further the respondent should have exhibited the letters dated September 11 and 20, 2007 which is adverted to in the appellant's letter of September 21, 2007 (above).

11. The interim order of the 4th October 2007 directed that the appellant should "forthwith supply the Claimant (respondent) the details of the outstanding balance on the loans due to the defendant (appellant) and the details of how that balance was arrived at". In the written representation on behalf of the appellant it was stated that

"the account statement was faxed to the Respondent's attorneys-at-Law the day before the interpartes hearing and formally served on the morning of the interpartes hearing."

In answer to this assertion, the respondent in the written representation submitted on his behalf contended as follows:-

"At the time of the hearing of the Application for Court Orders, the account was not served, not filed into court, neither was a copy presented to the Learned Judge for his examination. The only discussion that ensued regarding the Account was the fact that in defiance of the Order, the Appellant failed to provide same. An unsuccessful attempt to serve the accounts was made by the Appellants via facsimile. This was done on the evening before the hearing, on the 18th day of October, 2007 at approximately 4:30pm. The appellant was advised immediately that it was not legible."

There appears to be some issues as to fact pertaining to performance of the court's directive as to the provision of an account statement.

12. At the conclusion of the inter-partes hearing the court granted on the 23rd October 2007, an order in similar terms to that granted on the Without Notice

Application. Regrettably, the learned judge has not recorded his reasons for the exercise of his discretion. If he gave oral reasons, there is no agreed note from counsel as to what he said. This is quite unacceptable and this court has so said on a number of occasions.

13. At the interpartes hearing, the only evidential material before the court was the Claim Form and affidavits from the respondent. This brings me to the Grounds of Appeal 2(a) and (b), which were in these terms:-

- "2. (a) The Learned Judge in Chambers erred in hearing the application and granting the orders sought as no Notice of Application for an interlocutory injunction was filed or served by the Respondent.
- (b) The Learned Judge in Chambers erred in granting the application as the Notice of Application for interim injunction and the documents in support were not served on the appellants' Attorneys-at-Law at least seven (7) days prior to the hearing as required by **Rule 17.4(6)** of the Civil Procedure Rules;

14. Rule 17.4 (6) of the Civil Procedure Rules 2002 mandates as follows: -

"When an order is made under paragraph (4), the applicant must serve the respondent personally with –

- (a) the application for an interim order;
- (b) the evidence on affidavit in support of the application;

(c) any interim order made without notice;
and

(d) notice of the date, time and place on
which the court will further consider the
application,

Not less than 7 days before the date fixed for
further consideration of the application.”

[An order made under paragraph (4) is an order granting an interim order]

15. On the 8th October 2007, the respondent served on the appellant the interim order granted by the court on the 4th October, 2007. The contents of this order satisfied Rule 17.4 (6) (c) and (d). The respondent failed to comply with 17.4(6) (a) and (b). The purpose of the requirement imposed by 17.4(6) is to alert the party against whom a Without Notice interim order has been made, to be aware of the case to be met and to put before the court evidential material. Thus the court would be in a position to properly adjudicate. In this case, at the time of the interpartes hearing, the respondent had not made known to the appellant the basis upon which the injunction was being sought. This perhaps explains why the appellant did not file any affidavit(s). It would not know what it was to which it should respond. In the written representation, the respondent contended that the appellant could have obtained the information to be supplied under 17.4(6) (a) and (b) from the court file. This is an untenable position. The imposition which was placed on the respondent by 17.4 (6) is clear and imperative. At this stage I feel compelled to say that by not serving on the appellant the application for an interim order and the evidence on affidavit in

support of the application further illustrates the want of candour that permeates the approach of the respondent in these proceedings. I find that there is merit in grounds of appeal 2(a) and (b) and I would allow the appeal.

16. There was a third ground of appeal 2(c) which was couched in these terms:

“(c) The Learned Judge in Chambers erred in restraining the mortgagee’s exercise of the power of sale until the trial of the claim without making the Order on terms that the Respondent ought to pay into Court the amount claimed by the Appellant under the mortgages.”

In view of the decision to which I have already indicated, I find it unnecessary to deal with this ground. In any event there is now an insufficiency of evidence that would allow adequate judicial scrutiny in this regard.

17. Finally, I would make the following orders: -

- (i) The appeal is allowed.
- (ii) The order of the court below made on the 23rd day of October 2007 is set aside, and
- (iii) The appellant is to have the costs of the appeal.

SMITH, J.A. (AG.)

I agree.

PANTON, P.

ORDER

- (i) The appeal is allowed.
- (ii) The order of the court below made on the 23rd day of October 2007 is set aside, and
- (iii) Costs of the appeal to the appellant to be taxed if not agreed.