

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 98/2009**

**BEFORE: THE HON MR JUSTICE BROOKS JA  
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)  
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (Ag)**

<b>BETWEEN</b>	<b>KEN'S SALES &amp; MARKETING LIMITED</b>	<b>APPELLANT</b>
<b>AND</b>	<b>CASH PLUS DEVELOPMENT LIMITED (In provisional liquidation)</b>	<b>RESPONDENT</b>

**Roderick Gordon and Ms Kereene Smith instructed by Gordon McGrath for the appellant**

**William Panton and Ms Cindy Lightbourne instructed by DunnCox for the respondent**

**17 February and 13 March 2015**

**BROOKS JA**

[1] The very narrow issue raised by this appeal is whether a vendor of real property, who has a claim for unpaid interest on purchase money, has a proprietary interest in that property, which is capable of being protected by a caveat against the registered title for the property. R Anderson J, on 16 July 2009, ruled that it was not an interest that could be so protected. He ordered that the caveat that Ken's Sales and Marketing

Limited (Ken's Sales) had lodged in such circumstances, against Cash Plus Development Limited's (Cash Plus) certificate of title, should be discharged.

[2] Ken's Sales has appealed against that decision. Before assessing the issue in dispute, some background facts will allow a better understanding of the context.

### **The context of the dispute**

[3] By an agreement for sale dated 25 August 2006, Ken's Sales agreed to sell and Cash Plus agreed to purchase two properties along Slipe Road in the parish of Saint Andrew. The properties were each comprised in registered titles. The total price agreed was \$105,000,000.00. Completion of the sale was stipulated to be on or before the expiry of 45 days of the execution of the agreement for sale. Cash Plus was put into possession upon execution of the document.

[4] Three aspects of the agreement for sale are particularly relevant. The first is a stipulation that Cash Plus would pay interest at the rate of 23% per annum on all monies that were not paid within the stipulated time, which had been made the essence of the contract. The second aspect is that Cash Plus agreed to pay a sum representing 3% of the purchase price to settle the commission that was due to the realtor that had brokered the deal. It is not contested that Ken's Sales was the party that was obliged to settle the realtor's commission. By that provision, Ken's Sales would have been recovering that sum from Cash Plus.

[5] The third aspect is the clause dealing with completion of the agreement. Completion required payment of all monies payable by the purchaser. The provision is quoted below:

“Completion shall be on/or before FORTY-FIVE (45) days after the signing of this Agreement for sale **on payment of all moneys payable by the Purchaser** hereunder in exchange for the duplicate Certificate of Title for the properties duly registered in the name of the purchaser.”  
(Emphasis supplied)

[6] The payment of the sale price required Cash Plus to obtain mortgages, including a vendor’s mortgage for three months. Those aspects were eventually settled, after some delay. The delay meant that interest accrued during that time. The interest that became due on the vendor’s mortgage was paid, and on 27 April 2007, after a delay of several months, the outstanding purchase money was completely paid. Subsequent to the payment, the instruments of transfer in respect of the properties were delivered to Cash Plus’ attorneys-at-law and Cash Plus was eventually registered on both of the certificates of title, as the proprietor thereof. The delivery was not accompanied by any waiver of Ken’s Sales’ right to the interest that had accrued during the delay.

[7] That interest became the first of two outstanding issues between the parties. It amounted, on Ken’s Sales’ calculation, to \$5,976,849.20, being interest at 23% per annum on \$50,000,000.00. The second issue was the fact that Cash Plus had also failed to pay the sum due for the commission. It amounted to \$3,150,000.00.

[8] Payment of those outstanding sums was to prove problematic. Cash Plus fell into financial difficulty and was placed into receivership on 31 March 2008. Ken’s Sales,

in an effort to protect its claim to the sums due to it, lodged a caveat on 18 April 2008, against both certificates of title. The interest that it sought to protect by virtue of the caveat was stated in the document:

“Interest amounting to \$5,976,849.20 is owed on the purchase price by virtue of an Agreement for Sale dated the 25<sup>th</sup> day of August...”

[9] On 27 November 2008, the Supreme Court, as part of Cash Plus’ liquidation process, ordered the properties sold. The provisional liquidator entered into a contract to sell them and the caveat surfaced as an impediment to the sale. The provisional liquidator then filed a fixed date claim asking that the caveats be ordered discharged. It is that claim upon which Anderson J ruled.

[10] After Ken’s Sales filed its appeal, Morrison JA, by and with the consent of the parties, on 11 August 2009, made an order authorising the sale of the properties, and reserving the sum of \$15,000,000.00 from the sale proceeds, pending the resolution of the appeal. If Ken’s Sales succeeds on the appeal it will have access to these funds. If it fails, the monies will become part of the assets to which Cash Plus’ creditors, including Ken’s Sales, will look for compensation. Ken’s Sales will have to prove its debt against Cash Plus in the course of the liquidation process, which is still ongoing for Cash Plus.

## **The grounds of appeal**

[11] Despite the narrow issue identified above, counsel for Ken's Sales filed eight grounds of appeal. They are set out below for completeness but shall not be individually assessed.

- "(1) The Learned Judge erred in finding that interest on unpaid purchase price represented damages arising from a breach of contract rather than part of purchase price.
- (2) The Learned Judge erred in finding that unpaid interest payable under the agreement for sale gives rise to a claim for damages in breach of contract and does not provide the Defendant/Appellant (the Vendor) with an interest within the meaning of Section 139 of the [Registration of Titles] Act.
- (3) The learned Judge erred in finding that interest due and payable under the terms and conditions of an agreement for sale of land did not give rise to a Vendor's lien or create an interest within the meaning of Section 139 of the Registration of Titles Act but only gave rise to a claim for damages for breach of contract.
- (4) The Learned Judge erred in finding that unpaid interest on unpaid purchase price was not a part of the purchase price of land and further erred when he found that there was no Vendor's lien for same or for the realtor's commission.
- (5) The Learned Judge erred when he found that the claimant/respondent (the purchaser) had paid a sum of \$267,000.00 in interest on the claimant/respondent's calculation of that which was owed creating a misunderstanding of the issues as that sum related to a previous period under the Agreement for Sale and not the period out of which these proceedings rise.

- (6) That consequent on the Learned Judge erroneously finding that the sum of \$267,000.00 was paid on the calculation of the claimant/respondent the Learned Judge further compounded his error in finding that what is owed in interest is the proper subject of the determination of the liquidator.
- (7) The Learned Judge erred in finding that the Defendant/Appellant (the Vendor) did not have an equitable interest in the said lands which gave rise to the entitlement to lodge a caveat pursuant to Section 139 of the Registration of Titles Act.
- (8) The Learned Judge erred in ordering that the Defendant be restrained from further proceedings in the action against the Claimant."

### **The submissions**

[12] Mr Gordon, for Ken's Sales, relied heavily on the principle that a vendor's lien arises from operation of law. He contended that any sum payable, under the terms of the agreement for sale, constituted "purchase money" for the purposes of creating a lien. He relied heavily on a number of older cases for the proposition that the interest and the commission, being payable under the contract, were capable of creating a lien and therefore an interest which was capable of being protected by a caveat.

[13] Mr Panton, on behalf of Cash Plus' provisional liquidator, submitted that the claims by Ken's Sales do not amount to an interest in land that is capable of being protected by caveat. Learned counsel argued that the burden was on Ken's Sales to prove that it had an interest of a proprietary nature. He submitted that it had failed to do so and that the learned judge was entitled to conclude, on the evidence, that Ken's

Sales did not have an equitable interest in land. His submissions may be summarised, hopefully without injustice to them, as follows:

- a. The agreement for sale does not state that interest on the purchase price would form part of the purchase price.
- b. A caveatable interest arises out of an equitable interest in land, not out of a relationship with the registered proprietor.
- c. Ken's Sales' caveat does not allege that a part of the purchase price is outstanding; it only speaks to interest and commission.
- d. The interest claimed on the purchase money does not amount to a proprietary interest in land. Ken's Sales only has a remedy in damages for breach of contract and must seek its remedy through the liquidator.
- e. The provision for payment of a collateral sum, such as the amount claimed for the realtor's commission, cannot constitute purchase money for the purpose of creating a lien.

[14] The authorities cited by both counsel were of much assistance in the analysis of the appeal. The court is also grateful for the careful submissions of learned counsel.

## **The law regarding vendor's liens**

[15] It is not completely surprising that learned counsel were not able to unearth any recent case dealing with this particular scenario. Conveyancers acting for vendors rarely part with instruments of transfer unless the purchase money has been paid, or a reliable undertaking is in place for its payment. That this case is unusual does not necessarily mean that negligence was involved. In the absence of directly relevant authorities, the resolution of the issue will have to be achieved by extrapolation from the established principles concerning the sale of land and the role of vendor's liens in such transactions.

[16] The first basic principle in this context is that, generally speaking, upon entering into an agreement for sale and purchase of an interest in real property, the purchaser becomes the beneficial or equitable owner of that interest. The vendor, upon execution of the contract, although remaining the owner at law, and, in the case of registered land, the registered proprietor, becomes a qualified trustee for the purchaser. The relationship between the parties is not, however, precisely that of trustee and beneficiary. The vendor has a right to possession of the property, the right to take rent and profits until the date of completion, and a lien on the property until the purchase money is fully paid. The position of the vendor in the contract of sale was explained by James LJ in **Rayner v Preston** (1881) 18 Ch D 1 at page 13:

"I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in

which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance...then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*."

[17] The vendor's concern, upon execution of the contract, is in obtaining the purchase money. He immediately acquires, upon execution, a lien on the property in order to secure his right to that money. That principle was explained by Sir George Jessel MR in **Lysaght v Edwards** (1876) 2 Ch D 499. He said at page 506:

"...the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, **a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid**, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without a beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, *viz.*, possession of the estate and a charge upon the estate for his purchase-money." (Emphasis supplied)

[18] The principles stated above were accepted by both sides to the present dispute. The principles that Cash Plus disputes, now follow.

[19] There is authority for the principle that a vendor's lien is activated not only by the outstanding principal money, but also the interest that accrues thereon. That has been accepted to be the effect of the decision in **Rose v Watson** (1864) 10 HLC 672;

11 ER 1187. In that case, a purchaser had paid part of the purchase money under a contract for sale. He then, justifiably, declined to complete. It was held that he was entitled, so far as the payments had extended, to claim a lien on the estate for the amounts and to enforce that claim even against assignees of the vendor. Lord Westbury LC, with whom the rest of the House agreed, dismissed the contention that the lien could not include a claim for interest. He said at page 682:

“...But, my Lords, interest is given in respect of principal money when that principal money becomes a lien upon the estate; and, therefore, it is the same question repeated again in a different form. **If the payment of the interest be a payment of money in performance of the contract, in obedience to the terms of the contract, and which the Respondent was not only left at liberty to pay in the manner in which he did pay it, but which in truth he was compelled to pay under the contract, with which the present Appellants did not choose to interfere, then that money so paid in conformity with the terms of the contract was part of the purchase-money under the contract.** It was money advanced upon the faith that the land, the subject of the contract, would become the property of the Respondent; and being so paid as part of the purchase-money under the contract, and being paid in advance, on the faith of the vendor's performance of the contract, **I think that your Lordships will have little difficulty in coming to the conclusion that those sums of money thus paid formed principal sums, in respect of which there became a lien from the time of the payment of them;** in consequence of the subsequent failure of the vendor to perform the contract, and becoming such lien, they bore fruit consequently—that is to say, **they entitled the person who is possessed of that lien to claim interest in respect of them.**” (Emphasis supplied)

The portions of that extract that have been emphasised suggest that any payments required to be made under the contract became “part of the purchase money under the contract”.

[20] Although that was a case of a purchaser claiming a lien, it is beyond doubt, from the learned Law Lord's reasoning, that the principle would also apply to a vendor's lien. The principle was applied in **In re Stucley, Stucley v Kekewich** [1906] 1 Ch 67. In that case an unpaid vendor of personal property was held to have a lien against the property sold. Their Lordships in the Court of Appeal were firmly of the view that a vendor's lien for unpaid purchase money in real property matters extended to personal property. They also endorsed the principle laid down in **Rose v Watson** that the lien incorporated the interest that had accrued on the unpaid purchase price:

"...the case of **Rose v Watson** shews that the lien extends not only to principal money, **but also to interest from the time that the equitable lien comes into existence**; and **Munns v Isle of Wight Ry Co** [(1870) LR 5 Ch 414] shews that **the right which the owner of an express charge possesses to have the charge raised by a sale or mortgage of the property charged extends to a lien arising under general principles of equity, such as a vendor's lien.**" (Emphasis supplied)

[21] The next basic principle applicable to this case is that an unpaid vendor may exercise his lien by way of sale of the subject property. As mentioned in the extract from **In re Stucley** above, **Munns v Isle of Wight Railway Company** is authority for the wide powers that a court may exercise in favour of an unpaid vendor seeking to satisfy his lien.

[22] That a lien is an interest in the affected property, is recognised in **Lysaght v Edwards** where Sir George Jessel MR, in the extract cited above, described the unpaid vendor as having "a charge or lien on the estate for the security of that purchase-

money". The point was also recognised, although in a context which demonstrated the prejudices of the day, in **Mackreth v Symmons** (1808) 15 Ves Jun 329; 33 ER 778.

Eldon LC at page 781 of the latter report said:

"There is also another case...shewing the opinion of Lord Hardwicke, that the lien prevails: **Harrison v Southcote** (2 Ves 389; see 393): the case of a Papist vendor; for whom, Lord Hardwicke says, the lien would not be raised; as that would be giving an interest in land to a Papist: the speciality of that proving, that the lien prevails in general cases."

A hundred years later, Cozens-Hardy LJ, in **In re Stucley**, at page 83, made it clear that the principle was still valid. He said:

"...Now, it is quite settled that a vendor's lien is not a mere personal equity, and that **it really creates a charge upon and an interest in the property sold**, in the same manner as if that charge had been created by writing...." (Emphasis supplied)

[23] The principles set out in the above analysis have been accepted to be applicable to land brought under the Torrens system of land registration. In **Wossildo v Catt and anor** (1934) 52 CLR 301, the High Court of Australia cited the principle with reference to registered land. Rich J, at page 307 of the report, cited, with approval, the reasoning of Issacs J, as he then was, in **Davis v Littlejohn** (1923) 34 CLR 174 at page 185:

"**The prima facie right of an unpaid vendor of land to an equitable lien upon it for the amount of his unpaid purchase money is too well established to be disputed.** The right arises whenever there is a valid contract of sale and the time for completing that contract has arrived and the purchase money is not duly paid.' That is a clear statement of the rule." (Emphasis supplied)

[24] Two further principles, which are relevant to the present case, should also be noted. The first is that the mere fact that a document asserts that payment has been made for the property sold, or even if a receipt is given asserting payment, does not relieve the party, who is entitled to a lien, of his entitlement, if payment has not in fact been made. That was recognised in **In re Stucley**. The second principle is that a person who is entitled to a lien may take some other security in place of the lien. On doing so he is no longer entitled to claim a lien. In **Wossildo v Catt**, Dixon J addressed this principle at page 310:

“The lien of an unpaid vendor arises by operation of law, but its existence is commonly ascribed to the fact that he does not intend to transfer the beneficial ownership of his estate except in exchange for the stipulated price. **Where an owner of land transfers it in exchange for a contractual promise on the part of the transferee to pay a life annuity, and does not secure the annuity over the land or take it in the form of a rent charge, it seems difficult to regard the transaction as one to which the doctrine can apply so as to give rise to a vendor’s lien....**” (Emphasis supplied)

### **Interests which may be protected by caveat**

[25] The next question to be assessed is whether a lien held by an unpaid vendor may be protected by lodging a caveat against the certificate of title for the property the subject of the transaction. In order to answer this question it is necessary to assess section 139 of the Registration of Titles Act. This is the section that allows caveats to be lodged. The relevant portion of the section states who may lodge a caveat and the basis for lodging the caveat:

“139. **Any beneficiary or other person claiming any estate or interest in land under the operation of this**

**Act, or in any lease, mortgage or charge, under any unregistered instruments, or by devolution in law or otherwise, may lodge a caveat with the Registrar** in the Form in the Thirteenth Schedule, or as near thereto as circumstances will permit, forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest, either absolutely or until after notice of the intended registration or dealing be given to the intended caveator, or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat....” (Emphasis supplied)

[26] It should be evident from the analysis done above, and particularly the extract from **Lysaght v Edwards**, that an unpaid vendor’s lien does constitute an interest in land, or at least a charge therein, for the purposes of section 139. Such an interest or charge would entitle him to lodge a caveat to protect his lien.

### **Applying the principles to the instant case**

[27] Ken’s Sales seeks to secure monies arising from two separate clauses in the contract for sale. The first is the interest that accrued from Cash Plus’ delay in paying the balance of the purchase price. The second is the sum due in order to pay the realtor’s commission.

[28] The cases cited above, in the analysis of the law, support Ken’s Sales. The provision that speaks to completion of the agreement requires Cash Plus to pay “all moneys payable by the Purchaser”. As a result, the sums due for interest and the amount representing the commission payable are sums payable under the contract and are capable of supporting a claim for a lien.

[29] The fact that the instruments of transfer recited that Ken's Sales had acknowledged receipt of the sums representing the sale price, was no bar to the claim for the lien. This is because it is not contested that the interest and commission were, in fact, not paid.

[30] Finally, there is no other agreement whereby Ken's Sales waived its right to its lien created by the agreement for sale.

### **Summary and conclusion**

[31] The unpaid interest on the purchase price and the sum representing the realtor's commission were monies payable to Ken's Sales under the terms of the agreement for sale. An analysis of the relevant cases, despite their antiquity, supports Ken's Sales' position that those monies were capable of supporting an unpaid vendor's lien on the property. The lien, based on the authorities, is an interest or charge on the land, which is capable of supporting a caveat which may be lodged in accordance with section 139 of the Registration of Titles Act.

[32] In the circumstances, Mr Panton's submissions cannot find support in the established principles and must fail. The appeal must, therefore, be allowed and Anderson J's order set aside.

[33] As has already been explained, there is no need to re-establish the caveat. This is because the property has already been transferred pursuant to the order of this court made on 11 August 2009. The other provisions of that order would now take effect.

**MCDONALD-BISHOP JA (Ag)**

[34] I have had the pleasure of reading, in draft, the judgment of my learned brother Brooks JA. I agree with his reasoning and conclusion and there is nothing that I could usefully add.

**SINCLAIR-HAYNES JA (Ag)**

[35] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion.

**BROOKS JA**

**ORDER**

- a. The appeal is allowed.
- b. The judgment of Anderson J made on 16 July 2009 is set aside.
- c. The provisions of the order of Morrison JA, made on 11 August 2009, shall take full effect.
- d. Subject to the said order of Morrison JA, costs, both here and below, are awarded to the appellants, such costs to be taxed if not agreed.