[2012] JMCA App 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 69/2012

APPLICATION NO 101/2012

BETWEEN	**LOOKAHEAD INVESTORS LIMITED**	**APPLICANT**
AND	**MID ISLAND FEEDS (2008) LIMITED**	**1ST RESPONDENT**
AND	**JAMAICA LIVESTOCK ASSOCIATION LIMITED**	**2ND RESPONDENT**
AND	**NEWPORT-FERSAN (JAMAICA) LIMITED**	**3RD RESPONDENT**
AND	**THE REGISTRAR OF TITLES**	**4TH RESPONDENT**

Michael Hylton QC and Duwayne Lawrence instructed by Michael Hylton and Associates for the applicant

Ransford Braham QC instructed by Mrs Jacqueline Samuels-Brown QC for the 1st respondent

Jerome Spencer instructed by Patterson Mair Hamilton for the 2nd respondent

Stephen Shelton and Ms Maliaca Wong instructed by Noel Levy of Myers Fletcher and Gordon for the 3rd respondent

4th respondent not appearing or represented

Emile Leiba instructed by DunnCox for the Intervenor

22, 24, 25 and 29 May 2012

IN CHAMBERS

BROOKS JA

[1] This is an application by Lookahead Investors Ltd, for the grant of an injunction pending the completion of an appeal from the decision of Sinclair-Haynes J made on 11 May 2012. In that decision, the learned judge refused an application for an injunction pending the trial of a claim brought by Lookahead, against the respondents herein. On 14 May 2012, Panton P granted a without-notice application for an interim injunction, pending the hearing of this application.

[2] The main issue raised by the appeal is whether Sinclair-Haynes J, in arriving at her decision, erred in her analysis of the application before her. Before considering that issue, it is necessary to outline the events which led to the claim having been filed. Thereafter, I shall outline the relevant law and then consider the application in the context of the issue to be resolved.

The background to the claim

[3] The claim has its genesis in an agreement for sale between Lookahead and the 1st respondent, Mid Island Feeds (2008) Ltd. By that agreement Lookahead was to purchase from Mid Island, a parcel of land situated at Newport East in the parish of Kingston. It is important to note that the land has a wharf thereon, which wharf abuts the Kingston harbour.

[4] The agreement for sale was negotiated between November and December 2011 and was conditional on certain matters which concerned Mid Island alone. The first was stipulated in the document encompassing the sale agreement. It stated, at special condition 8 thereof, that Mid Island had to get the consent to the sale, of certain third

parties, including RBC Royal Bank Jamaica Ltd (RBC) and another entity, Newport Mills Ltd. RBC held a mortgage in respect of the land but Mid Island was otherwise heavily indebted to RBC. Newport Mills is a company affiliated to Lookahead and is a creditor of a company affiliated to Mid Island.

[5] The second condition required Mid Island's attorneys-at-law to certify that the pre-emption rights of a previous prospective purchaser, the 2nd respondent, Jamaica Livestock Association Ltd (JLA), had been waived, had expired or otherwise no longer existed. That second condition was set out in correspondence between the attorneys-at-law for Lookahead and Mid Island respectively. The pre-emption right would, however, have also been contemplated by special condition 8, mentioned above.

[6] The sale agreement with Lookahead was signed in triplicate by both parties but was not dated. Mid Island's attorneys-at-law sent a photocopy of the duly signed document to Lookahead's attorneys-at-law under cover of a letter dated 2 December 2011. In it they stated, in part:

> "We reiterate our undertaking to hold the [sale agreement] and funds [representing the deposit and further payment specified in the sale agreement] in escrow under our direction, and to procure that same are not used in any manner prejudicial to your client's interest unless we first certify to you that any pre-emption rights held by [JLA] over the property has [sic] been waived, has [sic] expired or no longer subsists [sic]." (page 77 of Bundle 2 of the Record of Appeal)

Mid Island's attorneys-at-law retained the three originals of the signed document.

[7] That undertaking was pursuant to and consistent with the basis on which Lookahead's attorneys-at-law had sent the document when it had been signed by

Lookahead. The covering letter sending the document and the cheque representing the deposit and further payment stipulated the undertaking on which they were sent. The undertaking included the following stipulation:

> "(c) to ensure that the documents and funds are held in escrow under your direction, and to procure that same are not used in any manner prejudicial to the Purchaser's interest unless you first certify to us that any pre-emption rights held by [JLA] over the property has [sic] been waived, has [sic] expired or no longer exists [sic]." (pages 74 - 75 of Bundle 2 of the Record of Appeal)

[8] The expected release of the rights held by JLA was never secured. A deadline given to JLA, which was to have expired on 10 December 2011, had to be extended to 9 January 2012. Mid Island's attorneys-at-law kept Lookahead's attorneys-at-law abreast of developments as they occurred.

[9] By letter dated 10 January 2012 Mid Island's attorneys-at-law informed Lookahead's attorneys-at-law that JLA had notified Mid Island of its intention to exercise its pre-emption rights. Attached to the letter were one copy of the signed sale agreement, duly marked as cancelled, and Lookahead's cheque for the deposit and further payment, which cheque had not been negotiated. The other two signed copies of the document were also marked as cancelled and sent, one each, to RBC and to Mid Island.

[10] Lookahead was undaunted. First, its attorneys-at-law offered an increased purchase price, not on behalf of Lookahead but on behalf of a company related to Lookahead. The intention, no doubt, was to achieve a position that dissuaded JLA from exercising its rights of pre-emption. When that increased offer failed to attract Mid

Island's attention, Lookahead lodged a caveat against the title for the land and threatened court action. Correspondence between the respective attorneys-at-law took place thereafter, in which each party justified its particular stance.

[11] Meanwhile Mid Island continued with its transaction with JLA. As a result of that transaction an instrument of transfer of title to the land was lodged with the 4th respondent, the Registrar of Titles. The transfer was in favour of JLA's nominee Newport-Fersan (Jamaica) Ltd (Newport-Fersan). Newport-Fersan is the 3rd respondent to this application. The Registrar issued a notice, warning Lookahead of the application to have the transfer registered. Lookahead, therefore, filed the claim which has been mentioned above and applied for the injunction to prevent the transfer of the title.

[12] It is to be noted that the caveat, lodged on 1 February 2012, asserted that Lookahead had an agreement for sale with Mid Island and had paid it US$750,000.00. A copy of the sale agreement was used to support the request for the caveat to be noted on the title. It bore no sign of the cancellation notation placed by Mid Island's attorneys-at-law.

[13] When the claim came before Sinclair-Haynes J, the learned judge quite correctly refused to consider the agreement for sale until the document had been stamped. The document, when stamped, also bore no indication that the original document had been cancelled by Mid Island's attorneys-at-law. The documents respectively used for lodging the caveat and submission for stamping were photocopies of the sale

agreement which was sent to Lookahead's attorneys-at-law before the cancellation had occurred. It is against that background that the submissions were made.

The applicant's submissions

[14] Mr Hylton QC, on behalf of Lookahead, pointed to a number of factors which, he argued, made it plain that the learned judge erred in coming to her decision. He said firstly, that she used the wrong test in deciding the issue. As a consequence, he said, there was an arguable appeal. Learned Queen's Counsel then submitted that an arguable appeal should not be rendered nugatory by virtue of the refusal to grant an injunction. He pointed out that if the land were hereafter sold to a third party, Lookahead's appeal would be rendered nugatory, if at this stage the application for injunction were refused.

[15] Learned Queen's Counsel argued that at "the heart of the claim is a dispute as to whether JLA has a valid enforceable pre-emption right against Mid Island and if so, [whether] they validly exercised it". A number of points fell within the ambit of that submission, including the question of whether the land was included in the pre-emption rights and secondly whether the contract giving rise to the pre-emption rights was an illegal one.

The respondents' submissions

[16] Messrs Braham QC, Shelton and Spencer, in their respective submissions, each stressed some aspects more than others but all argued that there was no arguable appeal, that the learned judge made no error which would warrant the full court

disturbing her decision and that the circumstances of this case warrant the refusal of the application for an injunction pending appeal.

[17] A principal plank of those submissions was that the escrow agreement was such that it prevented the sale of land agreement from coming into effect until the condition of the escrow had been satisfied. That condition not having been satisfied, counsel argued, there was no agreement for sale on which the claim for specific performance could be hung. They submitted that the claim is without merit as is the current application.

[18] Counsel also pointed out that Lookahead consistently, from the beginning of the negotiations between the parties, through the signing of the agreement, the acceptance of the extension of the time to exercise the pre-emption rights and even receiving the notice of the exercise of the pre-emption rights, accepted that a valid pre-emption right existed. It cannot, they say, after the fact, seek to challenge the validity of those rights. Learned counsel also asserted that there was no foundation for the charge of illegality as advanced by Lookahead's counsel.

The submissions by RBC

[19] RBC, although not a party to the claim or the appeal, has asked to be allowed to be heard in this application. This is, it says, in order to ensure that any order made thereon does not adversely affect its rights under the mortgage; particularly its powers of sale. Mr Leiba, on its behalf, argued that as there is no assertion that RBC has acted improperly or is liable to any of these parties, any injunction granted pending appeal should not prevent it from exercising its powers of sale arising under the mortgage.

The analysis

[20] In determining whether an injunction ought to be granted pending appeal, the question is whether the applicant has a good arguable appeal. This was the opinion of K. Harrison JA, sitting alone, in the case of **Olint Corp Ltd v National Commercial Bank Jamaica Ltd** SCCA No 58/2008 (delivered 30 April 2008). The learned judge of appeal cited established authority on the point and I respectfully agree with his reasoning and conclusion.

[21] Also to be considered is the fact that this court, either at this stage or at the consideration of the appeal, will only disturb the decision of the learned judge below, if it finds that she exercised her discretion on an incorrect basis (see **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042). In that case Lord Diplock gave guidance on the point at page 1046 a – b:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court…is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently."

[22] Morrison JA in this court relied on that dictum in **Hadmor** in the case of **The Attorney General v John Macka**y [2012] JMCA App 2. He said at paragraph 20 of his judgment in that case:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the

> ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[23] Lord Diplock also explained in **Hadmor** that if the reasons given by judges for their decisions are "sketchy", the appellate court could reach the conclusion that the judge's decision must be set aside.

[24] The guiding principle is whether, at this stage, the appellate tribunal finds that it is arguable that the learned judge was in error in any of the ways set out in those quotes. Only if I so find, may I then analyse the considerations outlined in the seminal case of **American Cyanamid Co. v Ethicon Ltd** [1975] 1 All ER 504 and the overall effect on the parties as was emphasised in **National Commercial Bank Jamaica Ltd v Olint Corp. Ltd** PCA No 61 of 2008 (delivered 28 April 2009). This is not to usurp the process which the full court will undertake at the hearing of the appeal but for me to determine whether, despite the possibility that the learned judge may be found to have erred, it is appropriate that an injunction should be imposed, pending the hearing of the appeal.

Is it arguable that the learned judge erred?

[25] As was mentioned above, the first task, at this stage, is to determine whether it is arguable that the learned judge erred in the analysis, which gave rise to her decision. Given the nature of the exercise required by this application, it is unfortunate, though understandable, that the learned judge's reasons for her decision are outlined only by

the incomplete notes of learned counsel who recorded the oral judgment as it was delivered. No issue has, however, been taken as to the accuracy of those notes, as far as they go. In my view, they do not reflect reasons that fall into the category of being "sketchy".

[26] In her reasons for judgment, the learned judge examined arguments advanced by each side in support of their respective positions. Based on her examination of the various issues she decided that each side had an "arguable case". Mr Hylton, in his written submissions accepted that the learned judge "correctly found that there were serious issues to be tried". The notes do not show that she used that formulation but I find that learned Queen's Counsel's inference, drawn in that regard, is a fair one.

[27] The learned judge examined the question of the adequacy of damages and, in my view, her assessment of each of the respective issues raised by the parties, shows that she considered not only the balance of convenience in respect of individual issues, but considered the case as a whole. The concluding sentences of counsel's notes state as follows:

> "The strength of the Claimant's case does not surpass that of the Defendant and it is a matter to be dealt with by the court and damages is [sic] sufficient.
>
> I am satisfied that this is not an appropriate case for an injunction and damages can be an adequate remedy.
>
> I think an urgent trial is required."

[28] I accept that the notes seem to indicate that the learned judge did not follow the order, for considering the various issues, as was recommended by Lord Diplock in

American Cyanamid. In my view, judges at first instance are more likely to do justice if they follow that formulation, without, of course, omitting to consider the principle emphasised by Lord Hoffman in the **Olint** case, namely, the overall justice of either granting or refusing the injunction. Such a methodical approach could not be considered to be a "box-ticking approach", which latter approach Lord Hoffman castigated.

[29] Failure to follow the method set out in **American Cyanamid** is not fatal to the decision; it is merely a method which minimises the risk of omitting consideration of an important element. In the instant case, the learned trial judge did not miss any important element and did precisely what Lord Hoffman recommended at paragraph 18 of his judgment in the **Olint** case: she considered and gave her "opinion of the relative strength of the parties' case".

[30] I, therefore, find that the reasons provided by the learned judge do not fall into the category of cases which "can be shown to be demonstrably wrong, or where the judge's decision is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it". There is no basis, therefore, for me to find that there is a good arguable appeal in respect of the learned judge's decision or her reasons therefor.

[31] I must say, however, that were I to have found that the learned judge made some error in respect of her reasons as were handed down, I would, in going through the process anew, have arrived at the same conclusion to which the learned judge was drawn. I shall briefly state my reasons for that position.

Is there a serious question to be tried?

[32] Firstly, on the issue of whether there is a serious question to be tried, I find that there is, in fact, no serious question to be tried. I so find for two especial reasons. Firstly, it seems to me to be patent, that special condition 8 of the sale agreement was not fulfilled. RBC's release was not obtained and there was no receipt of a consent to the sale from JLA. For completeness, condition 8 is set out in full:

> "The **purchase of the Property the subject of this Agreement is conditional upon the following**:
>
> (a) Receipt of such third party consents as may be required for the transactions(s) as contemplated by the parties hereto, including but not limited to, the receipt of executed consents/discharges/memoranda of satisfaction (as the case may be) related to:
>
> (i) The release of the Vendor's secured indebtedness to RBC Royal Bank Jamaica Limited over the Property; and
>
> (ii) The full and unconditional release by an affiliate of the Purchaser, Newport Mills Limited of its claim in debt also described as the 'NML Debt' (Claim No. 2010/HCV-4304) against the Vendor's Affiliate Mid Island Poultry Limited and including the provision of evidence satisfactory to the Vendor/Mid Island Poultry Limited that the Judgment entered in Judgment Binder No. 752 Folio 37 on the 5th day of May , 2011 in the Supreme Court of Jamaica has been duly discharged." (Emphasis supplied)

There were submissions by counsel as to whether the release by RBC was a condition precedent or a condition subsequent. It seems to me that the words emphasised above show that without the release by RBC having been obtained, there could be no purchase by Lookahead.

[33] Secondly, Lookahead and Mid Island had agreed that their agreement would be held in escrow on a specific basis. An undertaking was required and accepted stipulating that:

> "…the [agreement for sale in triplicate] and funds are held in escrow under [the direction of Mid Island's attorneys-at-law], and to procure that same are not used in any manner prejudicial to the Purchaser's interest unless [Mid Island's attorneys-at-law] **first certify to [Lookahead's attorneys-at-law] that any pre-emption rights held by [JLA] over the property has been waived, has expired or no longer subsists**…" (Emphasis supplied)

It was on these bases that the documents were sent under the cover of the letter dated 30 November 2011 from Lookahead's attorneys-at-law.

[34] I accept the submissions of counsel for the respondents that the basis for the agreement being removed from escrow was the certificate from Mid Island's attorneys-at-law. It was not the validity or otherwise of the pre-emption clause. I therefore, disagree with Mr Hylton's submission in respect of the importance of the validity of the pre-emption right. There is no doubt that JLA issued a letter seeking to exercise its pre-emption right; there is no doubt that RBC did not issue any document signifying its consent to the sale to Lookahead and there is no doubt that no certificate, such as was contemplated in the undertaking, was ever issued. In those circumstances, Mid Island's

attorneys-at-law were entitled, as they did, to cancel the agreement and return Lookahead's cheque to its attorneys-at-law.

[35] The consequence of that finding is that no agreement ever came into effect. That is the result when the condition of an escrow is not fulfilled. In **Beesly v Hallwood Estates Ltd** [1961] 1 All ER 90 Lord Harman, in discussing an escrow, said at page 94 B:

> "In other words, if you do deliver a document as an escrow it is your act and deed and is not recallable by you. **If, of course, the condition be never performed it never becomes binding**…" (Emphasis supplied)

[36] Lookahead's reliance, after the cancellation of the original document, on a photocopy thereof is, in my view, at best, misguided. Its statement, dated 31 January 2012, in the caveat document, that it "has paid to the legal owner on the title the amount of [US$750,000.00]", made some three weeks after it had received the return of its un-negotiated cheque in that sum, can only be described, at its most charitable, as depriving it of an entitlement to equitable relief. I have noted, however, that it re-sent the cheque by letter dated 1 February 2012 to Mid Island's new attorneys-at-law. It is not clear what has happened to the cheque thereafter. No complaint has, however, been made by Mid Island or its attorneys-at-law that it has been negotiated.

[37] If Lookahead falters on the issue of having a serious question to be tried, I need go no further, but out of deference to the extensive, well researched and ably argued submissions of learned counsel for all parties, I shall consider the issue of the balance of convenience starting with whether damages would be an adequate remedy.

Are damages an adequate remedy?

[38] I cannot agree with learned counsel for the respondents that damages would be an adequate remedy in the event that Lookahead is successful at the trial. I am inclined toward the school of thought that contends that, where land is concerned, it is presumed that damages are not an adequate remedy, and no enquiry should ever be made in that regard. The reason behind that thinking is that each parcel of land is said to be "unique" and to have "a peculiar and special value" (see page 32 of Specific Performance 2nd Ed. by Gareth Jones and William Goodhart). That reasoning may be found in the judgement of Hardwicke LC in **Buxton v Lister & Cooper** (1746) 3 Atkyns Reports 383, when he said at page 384:

> "As to the cases of contracts for purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, **it is on a particular liking to the land, and it is quite a different thing from matters in the way of trade**." (Emphasis supplied)

[39] The principle seems to apply even if the transaction in respect of the land is part of a commercial venture. In **Verrall v Great Yarmouth Borough Council** [1981] 1 QB 202 at page 220 B-C Roskill LJ said, in the context of an application for specific performance of a commercial contract to lease a hall:

> "It seems to me that, since the fusion of law and equity, it is the duty of the court to protect, where it is appropriate to do so, any interest, whether it be an estate in land or a licence, by injunction or specific performance as the case may be."

[40] There are two fairly recent cases in which this court has found that, in the context of commercial entities, damages would have been an adequate remedy. They

are **Shades Ltd v Jamaica Redevelopment Foundation Inc.** SCCA No 55/2005 (delivered 20 December 2006) and **Global Trust Ltd and another v Jamaica Re-development Foundation Inc. and another** SCCA No 41/2004 (delivered 27 July 2007). In **Shades**, this court was of the view that such land, was "a mere asset of the company" despite the fact that it comprised a residence of one of the principals. In **Global Trust**, the property was an incomplete hotel and not a going concern. Both those cases, in my view, have different considerations which make them exceptions to the principle that the land and its location are unique. I do not consider the land in the instant case to be an exception to that principle.

[41] The location of the land and the feature it possesses of having a wharf on the Kingston Harbour make this piece of realty unique. The fact that it is in the vicinity of property where other companies, related to Lookahead, conduct business, enhances the value of the property to Lookahead.

[42] I also find that damages would not be an adequate remedy because, even if it were said, as the learned judge did say, that "this is not such a piece of land which ought to be protected until final trial", the next question, allied to this question, is whether, using Lord Diplock's formulation in **American Cyanamid**, Mid Island "would be in a financial position to pay them". The evidence suggests that it is not. Affidavit evidence from Mr Adrian Keys sworn to on behalf of Mid Island on 25 March 2012 and Mr Barrington Watson, on behalf of RBC, sworn to on 9 May 2012, paint a picture of a company, deep in financial trouble. That evidence suggests that Mid Island is depending on the sale of this property to stave off being placed into receivership

because of its indebtedness to RBC. The sale price would not even be sufficient to satisfy the debt owed to RBC.

The other issues affecting the balance of convenience

[43] In considering the balance of convenience, Mid Island asserts that if an injunction is granted it will face financial ruin (see paragraph 35 of Mr Keys' affidavit mentioned above). I am not convinced that that situation does not exist independently of this sale and these proceedings. I have noticed from the correspondence conducted during the negotiation of the contract with Lookahead, that Mid Island does not seem to be considered, by its principals, to be a company with a future. In the early correspondence, when it seemed that a sale of the company itself was being contemplated, its attorney-at-law, Miss Stephanie Gordon, said that "the business of [Mid Island] while dormant is a going concern" (see e-mail dated 4 November 2011). On 17 November 2011, Lookahead's attorneys-at-law wrote to Miss Gordon outlining the fact that Newport Mills Ltd had a judgment against Mid Island and that the court's bailiff may be asked to step in and to do his duty.

[44] The next issue for consideration is the amount of the debt owed to RBC. In March 2012 Mr Keys stated that the debt then stood at J$751,499,510.05 and US$80,000.00. The interest accruing daily on that debt was J$269,257.66. Undoubtedly, RBC is anxious to recover some of the money which is outstanding. That anxiety is revealed in an e-mail, dated 29 November 2011, by its Mr Indar Mahase when he exhorted Mid Island and Lookahead to take a decision "by the end of [that] business day".

[45] Finally, for these purposes, is the fact that third parties have acquired interests in the subject property. There is an agreement for sale between Mid Island and Newport-Fersan. This is an agreement to which RBC has given its blessing and has signified its approval by issuing an instrument of discharge of mortgage to allow the transfer of title to Newport-Fersan to be registered. A delay in completion not only increases Mid Island's debt to RBC but also exposes Mid Island to litigation by Newport-Fersan.

[46] Taking all these factors into account and considering the justice of the case as a whole, I find that even if Lookahead were to succeed at trial, the injunction would be viewed by the court as having been rightly refused.

Conclusion

[47] An appellate tribunal should not lightly overturn a decision of a judge at first instance, if that judge's decision was an exercise of a discretion. The appellate tribunal may set aside the judge's exercise of his discretion on the ground (among others) that it was based on a misunderstanding of the law or of the evidence. Although I have a different opinion from the learned judge in respect of the issue of the quality of the land in the context of the adequacy of damages, I find that her analysis of the evidence and the law is in no way flawed and, accordingly, there is no basis on which to find that it is likely to be set aside on appeal. I would therefore refuse the application for the grant of an injunction pending appeal.

Costs

[48] Costs should, in this case, follow the event and therefore the costs of the application should be borne by the applicant.

Order

(1) The application for an injunction pending appeal is refused;

(2) The injunction granted by Panton P herein on 14 May 2012 is hereby discharged;

(3) Costs to each of the respondents, to be taxed if not agreed, shall be paid by the applicant.