[2012] JMCA App 41

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 129/2012

APPLICATION NO 211/2012

BETWEEN	**JAMES WYLLIE**	**1ST APPLICANT**
AND	**LORNA WYLLIE**	**2ND APPLICANT**
AND	**RICHARD WINT**	**3RD APPLICANT**
AND	**DAVID WEST**	**1ST RESPONDENT**
AND	**CHRISTOPHER WEST**	**2ND RESPONDENT**
AND	**DOUGLAS WEST**	**3RD RESPONDENT**
AND	**MARSHALEEN FORSYTHE (Nee Henriques)**	**4TH RESPONDENT**
AND	**JEROME SMITH**	**5TH RESPONDENT**
AND	**RICHARD SMITH**	**6TH RESPONDENT**

Owen Crosbie for the applicants

Allan Wood QC and Miguel Palmer instructed by Livingston Alexander and Levy for the respondents

13 and 18 December 2012

IN CHAMBERS

MORRISON JA

[1] This is an application by the first and second applicants ('the Wyllies') for stay of execution pending appeal of a judgment given by Lawrence-Beswick J in the Supreme

Court on 4 October 2012. The judgment, which is in relation to a certain parcel of land at Spitzbergen in the parish of Manchester registered at Volume 1260 Folio 65 of the Register Book of Titles ('the property'), is in the following terms:

> "Judgment for the claimants on the amended claim and the couterclaim. As it concerns land at Spitzbergen, Manchester registered at volume 1260 folio 65:
>
> 1) The defendants are restrained and prohibited from constructing or continuing the construction of any building or structure on the land.
>
> 2) The defendants must deliver up possession of the land to the claimants within fourteen (14) days of today.
>
> 3) Costs to the claimants to be agreed or taxed."

[2] By notice of appeal filed on 11 October 2012, the Wyllies challenge this judgment on a number of grounds, some legal and some factual in nature. In relation to the third appellant ('Mr Wint'), a specific ground challenges the judgment on the basis that there was no evidence that he was in possession of the property so as to justify the making of an order for possession, with costs, against him.

[3] This application is made pursuant to rule 2.11(1)(b) of the Court of Appeal Rules 2002, which empowers a single judge of this court to make an order for a stay of execution of any judgment or order from which an appeal had been made, pending appeal. As regards the criteria for the grant of a stay, both parties have referred me to and rely on the admirable judgment of Harris JA in ***Paymaster (Jamaica) Ltd v Grace Kennedy Remittance Services Ltd*** [2011] JMCA App 1, in which that learned judge said this (at para. [19]):

> "Rule 2.11 (1) (b) of the Court of Appeal Rules 2002 permits a single judge of this court to order a stay of execution of a judgment pending the hearing of an appeal. The power of the court or a judge to order or refuse a stay of execution of a judgment is discretionary. This discretionary right is unfettered. The foregoing proposition is propounded by the learned authors of Halsbury's Laws of England 4th Edition, Volume 17 at paragraph 455 in the following terms:
>
> > 'The court has an absolute and unfettered discretion as to granting or refusing of a stay, and as to the terms upon which it will grant it and will as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.'"

[4] Foremost among the 'special circumstances' required to be shown by an applicant for a stay of execution pending appeal is that he has an appeal that, as Harrison JA put it in ***Watersports Ltd v Jamaica Grande Ltd*** (SCCA No 110/2008, App. No 159/2008, judgment delivered 4 February 2009, at para. 7), "has some prospect of success". Thereafter, as Harris JA put it in the ***Paymaster*** case (at para. [23]), the interests of justice are "an essential element in a decision to grant or refuse a stay".

[5] In order to consider whether this application meets the required threshold, I must provide a brief summary of the facts of the case, which I have largely taken from the judgment of Lawrence-Beswick J. The respondents are the registered proprietors of the property, pursuant to the provisions of the Registration of Titles Act ('the Act'), it having devolved to them by way of a device contained in the will of the late Mr William Arscott ('Mr Arscott'), who died on 6 March 1994. Some years before, on 1 March 1988, Mr

Arscott entered into a lease with an option to purchase of the property with the Wyllies, who have been in possession pursuant thereto.

[6] On 7 March 1994, the day after Mr Arscott's death, the Wyllies went to his home and delivered to an employee of his a cheque for $2,500.00 payable to Mr Arscott. On that same day, the Registrar of Titles ('the Registrar') issued notice of a caveat (dated 3 February 1994) which had been lodged against the title to the property on behalf of the Wyllies. On 5 April 2004, the Wyllies wrote to Mrs Sheila Smith, Mr Arscott's daughter, who was the executrix of his estate, indicating that they had an agreement with Mr Arscott to lease and purchase the property and that they wished to make a payment on the lease. Through her attorneys-at-law, Mrs Smith, by letter dated 15 June 2004, returned the cheque to Mrs Wyllie, stating that she did not know the purpose of the payment and also that she was of the view that the cheque could not be negotiated, it being in Mr Arscott's name. On 27 June 1994, Mr Owen Crosbie, attorney-at-law for the Wyllies, wrote to the respondents' attorneys-at-law stating that the cheque was for rental of the property and that a caveat had been lodged to protect the caveators' interest in the property. That letter also enquired whether the attorneys-at-law would accept all arrears of rent and/or $300,000.00 inclusive of costs for the property. This correspondence ended inconclusively in a letter dated 25 January 1995 from the respondents' attorneys-at-law, indicating that they were applying for probate of Mr Arscott's will. Probate was in due course granted on 23 June 1999.

[7] There matters remained until 16 July 2003, when an application to warn the caveat, pursuant to section 140 of the Act, was lodged with the Registrar. Thereafter, a

notice dated 9 October 2003 was issued, directed to Mr James Wyllie as caveator, in care of Owen S. Crosbie & Co, 64 Duke Street, Kingston (which was one of two addresses provided in the caveat for service of notices), and sent by registered post to that address. On 19 November 2003, the Registrar recorded the 14 day period given by the notice as having lapsed and in January 2004 the letter containing the notice to the caveator was returned to the Registrar as "undelivered, addressee unknown". On 8 September 2005, after a further period of inactivity, a transfer of the property from the executors of Mr Arscott's estate (who had been registered on transmission on 7 October 2003) was registered in favour of the respondents, the beneficiaries of the estate. On 1 June 2007, a notice to quit the property (dated 18 May 2007) within one month was served on the applicants on behalf of the respondents. There was some evidence before the judge (although it is not clear that any specific finding was made on this) that during the intervening period the property had not been in use and was not being maintained.

[8] The amended fixed date claim form for an order for recovery of possession of the property was filed by the respondents on 3 October 2007 and, on 30 June 2010, an amended counterclaim, seeking an order for specific performance of the lease agreement made between the Wyllies and Mr Arscott, was filed. In a careful written judgment, the learned trial judge, after a full analysis of the provisions of the Act relating to caveats (sections 139-143) and a review of the decision of this court in ***George Hylton v Georgia Pinnock (as executrix of the estate of Dorothy McIntosh, deceased) and others*** [2011] JMCA Civ 8, found that service of notice of

the warning of a caveat by registered post was not service in accordance with section 140 of the Act, for the purposes of which "[a]ctual service is what is required" (per Phillips JA, at para. [36]). Lawrence-Beswick J therefore took the view that the court was obliged to resolve "the competing interest of the caveators who were not notified of a warning of the caveat, and the interest of purported beneficiaries of the will of the registered proprietor". Further, that in so doing the court would be "considering issues which would have been determined if the caveators had been properly warned" (para. [36]). In this contest, the learned judge considered that the principle of indefeasibility of title, as encapsulated in section 70 of the Act, was decisive. Accordingly, in the absence of any evidence, direct or inferential, of fraud on the part of the registered proprietors, their title to the property was indefeasible. She also dismissed the counterclaim, finding that the Wyllies had been in arrears of rent before Mr Arscott died and that he therefore been entitled to re-enter the property, that the lease had come to an end, that the option had not been exercised and was in any event uncertain and that the Wyllies accordingly had no interest in the property.

[9] The Wyllies contend that the learned trial judge "fell into vital and grave errors", and that there is a real prospect of the judgment in the court below being set aside on appeal. The application is supported by the affidavit of Lorna Wyllie, sworn to on 9 October and filed on 11 October 2012. In her wide ranging affidavit, more in the nature of written submissions than an affidavit, Mrs Wyllie makes a number of points. First, having found that the notice that the caveat had been warned was not served on the caveators, the learned judge ought, pursuant to the overriding objective of dealing

with cases justly, to have acceded to the request of counsel for the Wyllies that she make an order for the Registrar to act under the section 153 of the Act by recalling the certificate of title. Second, the judge erred in finding that the Wyllies were in arrears of rent, the evidence given in support of the claim before her having shown that they refused to accept money tendered to them on behalf of the Wyllies. Third, contrary to what the judge found, there was evidence that the option to purchase the property in the lease had been exercised. Fourth, that the judge erred in concluding that the option was uncertain, this not having been an issue before her and the applicants not having had an opportunity to respond to it. Fifth, section 70 of the Act could not avail the respondents, as there was "overwhelming evidence of fraud before the court". Sixth, and finally, that the judge erred in making an order giving the applicants 14 days to vacate the property, which consisted of "twenty four acres with farm houses, horned cattle, pig pens, plantations of bananas, yams, sweet potatoes and a multitude of other crops, employees, etcetera, etcetera".

[10] In a supplemental affidavit filed on 9 November 2012, Mrs Wyllie added the following:

> 3. That if a stay of execution is not granted, my husband and I would be ruined, and an order for stay would best accord with the interest of justice as there would not only be the risk of immediate harm, but an immediate harm may be accused to the Applicants/Appellants, but no similar detriment to the Claimants/Respondents if the stay is not ordered. There is merit in the appeal either for judgment in favour of the Appellants in both claim and counter claim or an order for re-trial.

4. That the property is agricultural property comprising yams, sweet potatoes, bananas and a number of pear trees planted by us, pig pens, cow pastures, large water tank built by us and one repaired and maintained by us, caretaker quarters built by us consisting of two bedrooms and outbuildings and a store house. There are also water troughs built by us.

5. That my husband, the first named Defendant/Appellant is upwards of 81 years and I am upwards of 70 years and the farm is our only source of income. We conduct a little shop, but nothing has been going on there for us for years.

6. That if the order is carried out, it is obvious that we would be ruined and it would be unjust, and if we succeed in the appeal, which is [sic] mostly likely we will on the facts before the court, there is no evidence that the Claimants/Respondents who have at all material times residing [sic] out of the country will be in a position to compensate us and to restore the status quo and we would not be able to maintain ourselves and compensate our farm hands.

7. That it is to be reminded that the third Defendant/Appellant, Richard Wint has left [sic] my employment before the case came on for trial and he gave evidence to this effect, and as a servant, he was never in possession.

8. That we humbly pray that the order be granted with costs to us.

[11] These affidavits drew a response from Mrs Smith, acting now as agent for the respondents, who challenged the contention that the Wyllies would be ruined if no stay is granted, on the ground that "they have various forms of income outside the farm" and also own other property. In addition, Mrs Smith exhibited to her affidavit photographic reproductions, which suggest that "there is absolutely no viable farming being done" by the Wyllies on the property.

[12] Before me, Mr Crosbie for the Wyllies relied primarily on Mrs Wyllie's affidavit, which he supplemented by his oral submissions. He submitted that, on an application for a stay, two things need to be established, (i) that there is a likelihood of success on the appeal and (ii) that there will be an injustice to the applicant if a stay is not granted. In making this assessment, the court has to balance the parties' interests. Mr Crosbie pointed out that Mr Wint was at all material times a mere servant or agent of the Wyllies and submitted that as a result his appeal against the order for possession with costs against him was "unanswerable".

[13] In his submissions opposing a stay, Mr Wood QC, who also relied on his skeleton arguments, maintained strongly that there was no real prospect of a successful appeal, in the light of the judge's findings and the provisions of the Act. He emphasised that in the circumstances described by section 70 of the Act, the registered proprietor's title was indefeasible save for cases of actual fraud, in the sense of deceit or some other act of dishonesty. In the instant case, fraud had neither been properly pleaded nor adequately proved. In any event, the learned trial judge was correct in her finding that the option was void for uncertainty, it not being a properly drawn option to purchase, and that the Wyllies had been in arrears of rent at the date of Mr Arscott's death. Finally, Mr Wood submitted, even if the court were to find that there was a real prospect of success in the appeal, there was no evidence in support of the Wyllies' assertion that they would be ruined if execution of the judgment was not stayed.

[14] In his written reply to the respondents' submission opposing a stay, Mr Crosbie referred again to the ***Paymaster*** case and reiterated his reliance on section 153 of the

Act. The judge's finding that there was no fraud was, it was again submitted, inconsistent with the evidence.

[15] I come therefore to consider the first threshold question, which is whether it has been shown at this stage that the applicants have an appeal that has a real prospect of success.

[16] Section 70 of the Act provides as follows:

> 70. "Nothwithstanding the existence in any other person or any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate if title, but absolutely free from all other incumbrances whatsoever, except the estate of interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from our through such a purchaser:
>
> Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon of affecting such land, and to any unpaid rates and assessment, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and

> also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument."

[17] There can be no question, it seems to me, that the judge was correct in saying, based on this section, that "[t]he Act holds sacrosanct the endorsement on a registered title except fraud is found" (para. [40], under the rubric 'Indefeasibility of Title'). Several authorities of long standing support this view (see for example, ***Fraser v Walker*** [1967] 1 AC 569) and, indeed, I do not understand Mr Crosbie to contend otherwise. Any appearance of circularity in the conclusion that, despite the registration of the transfer in the respondents' favour having been effected without the caveat having been effectively warned, as the judge found, the fact of registration nevertheless rendered their title indefeasible, is in my view completely dispelled by a consideration of the judgment of the Privy Council in ***Half Moon Bay Ltd v Crown Eagle Hotels Ltd (Jamaica)*** [2002] UKPC 24 (a case referred to by Phillips JA in delivering the leading judgment in ***Hylton v Pinnock***).

[18] That was a case in which a transfer was registered without reference to caveats forbidding the registration of any transfer which was not expressly made subject to the caveators' interest in the benefit of certain covenants. The reasons for this omission on the part of the Registrar were unclear, but the Board had no difficulty in holding that the transferor took the property free from the burden of the covenants. Delivering the judgment of the Board, Lord Millett said this (at para. 30):

> "Be that as it may, the entry of a caveat merely operates to prevent the registration of a transfer or dealing without the

> consent of the caveator or the removal or withdrawal of the caveat. It does not of itself subject the title of the transferee to the interest or incumbrance which the caveat serves to protect. If, notwithstanding the failure to obtain the consent of the caveator or the withdrawal of the caveat, and in breach of section 142, the Registrar mistakenly registers a transfer without making the appropriate entry or notification of the caveator's interest on the Register Book, then subject to the Registrar's powers under Section 15(b) [the power to correct errors in the Register Book] the transferee takes free from that interest."

[19] It therefore follows that the registration of the transfer of the property in favour of the respondents on 8 September 2005 is beyond reach by way of challenge, in the absence of proof of fraud. In this regard, the authorities amply support the proposition that fraud in this context means actual fraud, in the sense of dishonesty of some sort, and not in the sense of equitable or constructive fraud. In order to raise fraud, it is necessary to "condescend upon particulars", as the old cases say, and general, sweeping allegations of fraud will not suffice (see, for example, but hardly exhaustively, ***Timoll-Uylett v Timoll*** (1980) 17 JLR 257, ***Willocks v Wilson*** (1993) 30 JLR 297 and ***Smith v Steer*** (SCCA No 91/2008, delivered 8 May 2009), all of which were cited by Mr Wood).

[20] Mr Crosbie did not flinch from this challenge, but submitted, through Mrs Wyllie's affidavit (paragraph 23), that the fraud in this case "involves the Registrar of Titles knowingly not warning the Caveat in accordance with the law, giving evidence on behalf of the Claimants and said that it was properly warned only to admit under cross-examination that it was not and has refused to act under section 153 to recall the title

and cancel the tranfer…" It was further submitted, in reliance on ***Lynch & Lynch v Ennevor and Jackson*** (1982) 19 JLR 161 that the learned judge erred in thinking that the fraud necessary to defeat the registered proprietors had to be committed by them personally, since that case demonstrated that the fraud of an agent could in a proper case be equally attributed to the registered proprietor. The agents in the instant case were the lawyers for the registered proprietors, who had refused to accept and advised against the acceptance of payment from the Wyllies, thus giving rise to an "inferential conspiracy", presumably with the Registrar.

[21] In my view, none of these sweeping, general allegations of fraud can possibly suffice to displace the respondents' registered title in this case. In the case of the Registrar, it is clear that her initial conclusion that the caveat had been duly warned in accordance with the relevant provisions of the Act was based on what was, up to the time of the decision of this court in ***Hylton v Pinnock***, the settled practice in the Office of Titles. In that case, in which the notice to the caveator was issued on 23 September 2008, the Registrar confirmed that that practice was duly followed, "by giving a notice to the caveator by posting a registered letter to the caveator's address for service", and allowing seven business days for the "ordinary course of post" (see the judgment of Phillips JA, at paras [10] and [11]). In the instant case, in which notice dated 9 October 2003 was dispatched by registered post to the caveator at the address given for service in the caveat, and due allowance was given by the Registrar for the ordinary course of post before the caveat was recorded (on 19 November 2003) as having lapsed, it is clear that the Registrar acted in accordance with what would at that time

have been the usual practice of the Office of Titles. In these circumstances, it appears to me to be impossible to maintain that fraud of any kind can be discerned in the conduct of the Registrar in having effected the transfer of the property to the respondents on 8 September 2005. Looked at this way, it is clear that nothing at all turns on whether the Registrar, at the time she gave evidence in chief before the judge between 30 May and 2 June 2011 (that is, nearly eight years later), was unaware (as could well have been the case) that this court had decided on 1 April 2011 that the previously settled practice of her office in relation to service of notice to caveators was not in accordance with section 140 of the Act.

[22] Equally unpromising, it appears to me, is the Wyllies reliance on the stance taken by the respondents' attorneys-at-law in declining to accept any payment from them after Mr Arscott's death. Nothing has been shown to me to suggest even remotely that in so doing the attorneys acted other than on a purely professional basis.

[23] But Mr Crosbie also places heavy reliance on section 153 of the Act, which provides as follows:

> 153. In case it shall appear to the satisfaction of the Registrar that in any certificate of title or instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any certificate of title or instrument, or that any certificate, instrument, entry or endorsement, has been fraudulently or wrongfully obtained, or that any certificate or instrument is fraudulently or wrongfully retained, he may by writing require the person to whom such document has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected, or given to the proper party, as the case may require; and in case such person shall

> refuse or neglect to comply with such requisition, the Registrar may apply to a Judge to issue a summons for such person to appear before the Supreme Court or a Judge, and show cause why such certificate or instrument should not be delivered up for the purpose aforesaid, and if such person, when served with such summons, shall refuse or neglect to attend before such Court or a Judge thereof, at the time therein appointed, it shall be lawful for a Judge to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the Supreme Court or a Judge for examination.

[24] This section empowers the Registrar to recall a certificate of title for the purpose of its cancellation, correction or delivery to the proper party, in cases in which it appears to her that the certificate has been issued in error, or contains any misdescription of land or boundaries, or that any certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained or retained. On the evidence accepted by the learned trial judge, the section has absolutely no application to this and cannot therefore avail the Wyllies.

[25] For all the reasons which I have attempted to state, I consider that it has not been shown on this application that the appeal has any prospect of success and the application for a stay of execution of the judgment of Lawrence-Beswick J given on 4 October 2012 accordingly fails at the threshold. The application is therefore refused, with costs to the respondents, to be agreed or taxed.