



- a) Pursuant to Rules 15.2 and 26.3 (1) of the Civil Procedure Rules 2002.
- b) The Claimant has no real prospect of success.
- c) The registration of the mortgage on the title for the mortgaged property was tainted by fraud and therefore is liable to be set aside under the Registration of Titles Act.
- d) The mortgage was signed by a person who was dead and therefore not in existence when the mortgage was created, therefore the mortgage is a nullity.
- e) The Bank of Nova Scotia Jamaica Limited was not legally entitled to sell the property under its power of sale as a mortgagee as the mortgage over the mortgaged property was procured by fraud.

## **Background**

- [2] Mrs. Faith Edwards entered into an agreement for sale (dated 10<sup>th</sup> day of May 2018) with the Bank of Nova Scotia Jamaica Ltd. to purchase property located in Goshen St. Elizabeth. The agreement was duly signed by the parties and Mrs. Edwards paid all the monies required to fulfill her obligations accordingly. By letter dated 19<sup>th</sup> of June 2018 she was advised by the bank that they were unable to complete the sale of the property and in accordance with special condition 14 of the agreement they were giving her notice of the rescission. Mrs. Edwards sued the bank for breach of contract and damages or in the alternative damages for breach of contract to be assessed by the courts.
- [3] In their defence the Bank admitted to the agreement and the subsequent rescission. However, they contended that they were not in a position to complete the sale.
- [4] To that end, and in support of their application, they filed affidavits from Ms. Maya Wilson indicating that the Bank entered into a loan agreement with a company

whose principals included Mr. Keith Spencer and Mr. Clinton Howard Powell. Both gentlemen signed a guarantee as well as a mortgage with the bank. The loan having not been repaid the Bank proceeded to exercise its rights under the mortgage agreement and put the land up for sale.

- [5] It was subsequently discovered by the bank that Mr. Spencer was deceased at the time that he purportedly signed the mortgage documents, as a result the mortgage was obtained by fraud and therefore a nullity.

## **Submissions**

### **For the Applicant**

- [6] Counsel Mrs. Gentles-Silvera argued that as the mortgage and guarantee were fraudulently obtained the bank could not possibly proceed with the sale as they were not legally in a position to do so. It was also submitted that Mrs. Edwards was repaid the sums she expended on the sale as well as her attorney's costs and as such there is no need for a trial in the matter. Mrs. Gentes-Silvera further submitted that it was the responsibility of Mrs. Edwards to place before the court all evidence she had in support of her claim for damages for loss of opportunity. This should have been stated in her affidavit in response to this application. The failure to do so, should be viewed by the court as confirmation of the fact that the claim has no real prospect of success.
- [7] In support of her submissions Mrs. Gentles-Silvera referred to the affidavits of Ms. Wilson.
- [8] In Ms. Wilson's first Affidavit dated December 2, 2019 at paragraph (5) five it was stated:

"We received a telephone call from a relative of one of the mortgagors (nephew Raymond Powell), who advised that Keith Spencer had died before the mortgage was signed."

[9] It was subsequent to this that the Bank carried out investigations which purported to establish that Mr. Spencer died in 1995 some seven years prior to the execution of the mortgage and guarantee. Ms. Wilson exhibited a burial order in the first affidavit and subsequently in her further affidavit exhibited a receipt for funeral expenses which bore the name of the second guarantor Mr. Clinton Powell.

### **For the Respondent**

[10] Mr. Leroy Equiano on behalf of Mrs. Edwards challenged both documents exhibited by Ms. Wilson. He posited that they were insufficient to substantiate the bank's claim that Mr. Spencer was deceased.

[11] The burial order he argued was a photocopied document and there was no explanation given as to the absence of the original. The receipt for funeral expenses he submitted could have been written by anyone and therefore could not be relied upon to establish the death of Mr. Spencer.

[12] Mr. Equiano suggested that it was the duty of the bank to prove at a trial that the contract was frustrated and that this was a triable issue that should be determined after the review of evidence. As to the issue of information outlining details as to the claim for opportunity lost being included in the affidavit in response, counsel submitted that the application was for summary judgment and striking out of the claim and as such there was no requirement on the part of a respondent to go outside of those narrow issues.

### **Discussion and Analysis**

[13] Rule 15.2 of the Civil Procedure Rules 2002 states:

- (a) "The court may give summary judgment on the claim or on a particular issue if it considers that –  
  
the claimant has no real prospect of succeeding on the claim or the issue;"

Rule 26.3 (1) (c) provides:

“In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court—  
  
that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.”

- [14] Rule 15.5 of the Civil Procedure Rules sets out the evidence for the purpose of summary judgment hearing. The applicant must file an affidavit in support of the application and **if (my emphasis)** the respondent wishes to rely on evidence they must also file an affidavit in response. The affidavit of Mrs. Edwards in response to the affidavit of Ms. Wilson disputed the claim that Mr. Spencer was deceased and she exhibited documents from a court file in support of this. That is the evidence that she is relying on to suggest that the bank has not met its burden of establishing that her claim is not likely to succeed. There is no requirement for the affidavit to set out anything else apart from what the respondent is relying on as evidence for the purpose of the application. I therefore cannot accept counsel's submission that in failing to outline the basis upon which the respondent seeks damages for loss of opportunity, that she has somehow placed herself at a disadvantage in responding to this application.
- [15] The basis on which a court will strike out a claim is somewhat similar to the requirements which must be established to satisfy a court that an applicant is entitled to summary judgment. The Applicant must show that there is no reasonable ground for bringing the claim. In this case the Claimant has averred that there is a breach of contract, this has not been denied by the Defendant in the pleadings. What was put forward in the defence is that there was a good reason for that breach.
- [16] The sole issue therefore is whether or not Mrs. Edwards has a real prospect of succeeding on the claim.

[17] As per the Privy Council decision of **Sagicor Bank Jamaica Limited v. Taylor Wright** [2018] UKPC 12,

“...There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant’s entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.”

[18] Although the court is not to conduct a mini trial, it is necessary to determine from the pleadings filed whether or not a trial of the issues will affect the claimant’s entitlement to relief. In essence, if the allegations in the defence can be established would that result in the claimant having no remedy in law for the breach as set out? If the bank is not in a position to complete the sale, then what is the useful purpose of a trial proceeding?

[19] Mrs. Gentles-Silvera conceded in her submissions that the clause relied on by the bank for the purpose of rescinding the agreement was not applicable to the present circumstances. The sole reason for the bank’s position not to pursue the agreement with the respondent is the invalidity of the mortgage document due to the death of Mr. Spencer.

[20] In looking at the documents presented by the bank the following observations are made:

- a) The information received about the death of Mr. Spencer came from a relative, a court will have to determine whether that evidence is admissible to prove his death.
- b) The burial order refers to a Keith Spencer aged 65 years who died in New Roads Clarendon, the address on the mortgage and guarantee signed by Keith Spencer is Greenvale District Mandeville Manchester.

- c) The mortgage and guarantee were executed in the presence of a witness as well as a Justice of the Peace.
- d) By the bank's own admission, they instituted proceedings against the guarantors in 2007 and the bailiff swore to an affidavit indicating that she had served Keith Spencer. Judgment was obtained and an order for seizure and sale was made.
- e) It is upon the attempt to execute the order for seizure and sale in 2011 that another bailiff was informed by someone that Mr. Spencer had died.

**[21]** On the face of the affidavit and exhibits there is a real dispute as to whether the bank can satisfy a court that Mr. Spencer was in fact deceased at the time of the execution of the document.

**[22]** If the bank is unsuccessful in establishing the invalidity of the mortgage document the claimant would be entitled to a remedy for breach of contract.

**[23]** It is also noted that the claim included a remedy in damages in lieu of specific performance. The repayment of the sums expended in pursuance of the agreement by the respondent is not the only sum of money she may be entitled to receive. At the end of a hearing, in the event that the defendant is unsuccessful, a court would have to assess the damages to be awarded for the breach of contract.

**[24]** In the circumstances therefore the applicant has failed to establish that Mrs. Edwards does not have a real prospect of succeeding on the claim and the application is refused.

Order:

1. Amended Notice of Application for court orders dated the 2<sup>nd</sup> day of December 2019 is refused.

2. Costs to the Claimant / Respondent to be agreed or taxed.