

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 05396/2009

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|---------|---------------------------------|---------------------------|
| BETWEEN | KEN'S SALES & MARKETING LTD | CLAIMANT |
| AND | RELIANCE GROUP OF COMPANIES | 1 ST DEFENDANT |
| AND | DAVID DELISSER | 2 ND DEFENDANT |
| AND | DAVID DELISSER & ASSOCIATES LTD | 3 RD DEFENDANT |
| AND | CHRISTOPHER GRAHAM | 4 TH DEFENDANT |

J. Dabdoub instructed by Dabdoub Dabdoub & Company for the Claimant

M. Manning and T. Dunn instructed by Nunes Scholefield Deleon & Company for the 1st Defendant

Second and Third Defendants absent and unrepresented

M. Hylton Q.C., S. Gibbs and T. Long instructed by Hylton & Associates for the 4th Defendant

Heard: January 26 and 28, 2010

Interlocutory Injunction - Registration of Titles Act

Lawrence-Beswick J

1. The claimant, Ken's Sales & Marketing Limited (Ken's Sales), seeks in this application to restrain the first defendant, Reliance Group of Companies Limited

(Reliance) from the transfer of property at 84 Constant Spring Road and the selling or transferring of property at 113 and 113a Constant Spring Road.

Ken's Sales also seeks to restrain the 4th defendant Christopher Graham from selling, transferring, and mortgaging of the property at 84 Constant Spring Road.

2. Ken's Sales are the owners of 84, 113 and 113a Constant Spring Road. They used the properties as security for loans made to Ken's Sales by Reliance.

Reliance sought to sell the property at 84 Constant Spring Road under its power of sale as a mortgagee, and served a Notice to that effect on Ken's Sales.

Ken's Sales entered into negotiations with Reliance to repay the outstanding loan.

The negotiations bore no fruit and Reliance put the property up for auction.

3. The third defendant, David DeLisser & Associates, assessed the market value of the property and Mr. David DeLisser, the second defendant, conducted the auction on November 5, 2009. He accepted the bid of Mr. Graham. Mr. Graham paid the deposit and is ready to proceed to register a transfer of the land.

4. Meanwhile Ken's Sales filed suit on October 16, 2009 and seeking to prevent the completion of the sale to Reliance by obtaining an interlocutory injunction against Reliance and Mr. Graham and lodged a caveat on November 20, 2009 against the Certificate of Title for the property.

5. In determining the circumstances in which an interlocutory injunction is granted, our courts have been guided by the principles delineated in **American Cyanamid Co. v Ethicon.**¹

There Lord Diplock stated that the court must be:

¹ [1975] 1 ALL ER 504

“satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried ... It is no part of the court’s function at this stage ... to try to decide difficult questions of law which call for detailed argument and mature consideration.”²

Serious Triable Issues

6 The **first question** therefore is whether the claim in this matter concerns serious triable issues. Here the claim is for inter alia, a permanent injunction to restrain the sale of the properties.

It is undisputed that several issues are involved in the claim. However, Counsel for the defendants argues that they are without merit and not triable.

Mr. Dabdoub, Counsel for Ken’s Sales argues that the first serious triable issue is whether or not the mortgage deed is voidable.

7. The mortgage deed reflects the terms of the agreement between Ken’s Sales and Reliance. It is argued that Ken’s Sales failed to pay to Reliance monies due under the deed and this ultimately resulted in Reliance’s effort to sell the property.

8. However, Mr. Dabdoub submits for Ken’s Sales, that Reliance cannot legally recover the debt because the mortgage deed is in breach of Section 22(A) (2) and Section 22(A) (3) of the Bank of Jamaica Act and is therefore voidable.

Section 22 (A) (2) of the Bank of Jamaica Act states:

“No person shall carry on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorized dealer.”

9. The mortgage deed exhibited reflects a loan of United States dollars. Reliance is not an authorized dealer. That is not disputed. Mr. Manning, however, argues

² At p. 510

that the evidence is that Reliance gave two foreign currency loans and that does not amount to a business.

10. Section 22 (A) (3) of the Bank of Jamaica Act provides that it is unlawful to borrow or lend foreign currency in a transaction involving the payment of Jamaican currency unless the payment is made by an authorized dealer. Mr. Dabdoub, in his written submissions, for the first time raised the argument that since Ken's Sales repaid some of the U.S. dollar loan in Jamaican dollars, this was in contravention of Section 22(A)(3) of the Bank of Jamaica Act.

11. Additionally, Mr. Dabdoub supports his submission that the mortgage is unenforceable because of its illegality, on several authorities.³ That submission does not find favour with Defence Counsel who responds that the mortgage deed is lawful and enforceable, and who urges that if the law had been broken, it would have been broken not only by Reliance as the lender, but also by Ken's Sales, as the borrower. Ken's Sales itself being tainted in such circumstances would therefore not be able to rely on any such contravention of the law.

12. The **next issue** that Mr. Dabdoub submits needs to be tried is whether Reliance improperly exercised its Power of Sale and should be restrained from completing the sale by virtue of declaring the auction void. He argues firstly that Reliance sold the property at an undervalue. It is undisputed that the bid accepted was \$180 million when the property had been valued in April 2009 by the same auctioneer as having a forced sale value of \$207.375 million and a market value

³ *Cornelius v Phillips* (1918); *AC 199 Bianco v Ruggerio* (1997) FJHC 132; *Yango Pastoral Company Pty Ltd v First Chicago Ltd* (1978) 139 CLR 410

of \$276.5 million. The price at which it was auctioned is approximately \$27 million less than that forced sale value and \$97.5 million less than that market value.

13 It is also unchallenged that another valuation had been done by D.C. Tavares-Finson Realty Co. Ltd., in July 2009 which gave a forced sale value of \$180 million and market value of \$280 million. This valuation was based on an inspection from 2002 when the building on the property was being constructed, on an external viewing only and on a report "prepared by others." The building had therefore not been fully examined by D.C. Tavares-Finson Realty Co. Ltd., for valuation purposes.

14 Mr. Dabdoub submits that the auction should be declared void because the auctioneer negligently failed to accept higher bids as evidenced by the exhibited bid sheet.

15 Mr. Claude Brown made a bid of US\$4.3 million on behalf of Mr. Aubrey Chin but it is disputed as to whether he was so authorized and whether the auctioneer refused to accept the bid despite being advised that Mr. Chin was on his way. The auctioneer also refused to accept the bid of US\$5 million made by Mr. Biersay but the reason for that refusal is disputed.

16. Mr. Dabdoub argued additionally that Reliance improperly exercised its power of sale by failing to give Ken's Sales notice of its intention to sell the property. Reliance had initially notified Ken's Sales of its intention. However, Mr. Dabdoub urges that the notice lapsed when the parties were negotiating after that notice had been served. There is disputed evidence that after the notice Ken's

Sales had advised Reliance of potential purchasers of the property for amounts between US\$5 and \$10 million such that Ken's Sales would therefore have been unaware of Reliance's continuing intention to sell without the knowledge of Ken's Sales.

Minutes before the auction, the auctioneer, Mr. DeLisser, and Mr. Gordon were in a room together with one or two others. Mr. Dabdoub uses this to argue that there was collusion to improperly exercise the power of sale.

17. The argument further was that the successful bidder, Mr. Graham, was aware that the property was the subject of litigation impinging on its availability for sale. Mr. Biersay, Managing Director of Ken's Sales, handed to Mr. Graham a copy of an advertisement published in the newspaper stating that there is a suit pending in the Supreme Court alleging that the mortgage document is illegal and unenforceable and applying for an injunction restraining the sale of the property.

18. Another point being disputed is the advertisement of the auction. The auction of the property was advertised but Mr. Dabdoub argues that the description of the property fell far short of being accurate, thereby not generating interest by purchasers and reducing the ability to obtain the best sale price. Further, he argues, the property was advertised only once for each auction date.

19. It is my view that the issues outlined above are serious and triable and disclose that the claimant has a real prospect of succeeding in its claim for a permanent injunction. Difficult questions of law arise which may well require detailed argument and mature considerations as to the legality of the mortgage document, the circumstances of the auction and the purported sale of 84 Constant Spring

Road all of which may impact on the legality of the transfer and sale of the premises.

Balance of Convenience

20. The **next consideration** in deciding whether an interlocutory injunction is to be granted is whether the balance of convenience lies in favour of granting or refusing the interlocutory relief.

In the **American Cyanamid** case (supra) Lord Diplock in describing the various stages of consideration said that the court should at this stage:

*"So, unless the material ... fails to disclose that the [claimant] has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief ... the court should first consider whether if the [claimant] were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of trial."*⁴

21. Mr. Hylton Q.C. submitted on behalf of Mr. Graham that it is clear that damages would be an adequate remedy because Ken's Sales had itself been trying to sell that property, therefore if it had been wronged, then damages would compensate adequately. He relied, in addition, on Section 106 of the Registration of Titles Act which stipulates that the mortgagor's remedy for any wrongful exercise of the Power of Sale shall be a remedy in damages only.

22. Section 106 of the Registration of Titles Act states, *inter alia*, that:

⁴ American Cyanamid supra. Lord Diplock at p. 510

"... any person damnified by an unauthorized or improper or irregular exercise of the power [of sale] shall have his remedy only in damages against the person exercising the power."

However, in this case, registration of a purported sale is pending. If the circumstances of the case are such as to require detailed argument and mature consideration on the issue of the legality of the sale, it means that there must be the possibility of a finding that the purported sale was unlawful.

23. Does Section 106 of the Registration of Titles Act require a court to sit idly by to await the registration of a potentially unlawful sale, and then award damages? I think not. It is my view that this section applies where the sale of the land is *fait accompli*, i.e. registration of the sale of the land has occurred. This would allow for certainty in the validity of titles already registered. Damages would be the only remedy where the wrongful exercise of the power of sale resulted in such a registration of sale.
24. I am fortified in my interpretation of that section by the fact that Section 140 of the Registration of Titles Act permits the court to "direct the Registrar [of Titles] to delay registering any dealing with the land...." or the Court may "make such other order as may be just ..."
25. Indeed the Notice to caveator signed on behalf of the Registrar of Titles gives notice that:

"I shall proceed to register the said transfer in accordance with the provisions of the Registration of Titles Act unless you sooner obtain and serve on me an Order from a Judge forbidding me so to do." (Emphasis supplied)

To my mind, this demonstrates that although damages are the remedy where registration is wrong, the law recognizes that there can be relief in the form of a Judge's Order delaying registration until a particular time.

26. Here the claimant is the caveator and in accordance with Section 140 of the Registration of Titles Act has appeared before a Judge who is therefore entitled to make Orders under that section until a particular time, effectively amounting to an interlocutory injunction.

27 Lord Diplock stated:

*"If damages ... would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted...."*⁵

28. Reliance is a company incorporated in the Cayman Islands outside of this jurisdiction. There is no evidence of its ability to pay any damages which may be awarded. Neither is there evidence of the ability of Mr. Graham to pay any such damages. An award of damages would thus not be adequate in these circumstances.

29. I continue therefore, in accordance with the law as enunciated in the **American Cyanamid** case and:

*"consider whether ... [if] the defendant were to succeed at the trial ... he would be adequately compensated under the plaintiff's undertaking as to damages for [his] loss ... and the plaintiff would be in a financial position to pay them . [If so], there would be no reason ... to refuse an interlocutory injunction."*⁶

⁵ American Cyanamid supra at p. 510

⁶ American Cyanamid (supra) at p. 511

There is also no evidence of Ken's Sales ability to pay in accordance with its undertaking.

30. In the face of the "doubt as to the adequacy of the respective remedies in damages available to either party or to both, the question of balance of convenience arises."⁷

The evidence is that the pertinent papers concerning the sale of 84 Constant Spring Road to Mr. Graham have been lodged with the Registrar of Titles.

The granting of the interlocutory injunction would delay the registration of the title to 84 Constant Spring Road in the name of Mr. Graham until the hearing of a permanent injunction. If such a grant is determined to have been wrong or if the permanent injunction is not granted, then the loss to Reliance and Mr. Graham is that described above.

31. On the other hand, the refusal of the interlocutory injunction would result in the ability of Reliance and Mr. Graham to register their sale transaction, removing legal ownership of the land from Ken's Sales. Mr. Graham's interest would be registered on the Certificate of Title. If such a refusal is determined to have been wrong, after the registration of the new owner proceeded, the ownership could not be restored to Ken's Sales.

32. In my view, the inconvenience to be suffered by Ken's Sales if the interlocutory injunction is refused is greater than the inconvenience to be suffered by Reliance and Mr. Graham if the injunction were granted. I therefore grant the interlocutory injunction as it concerns 84 Constant Spring Road.

⁷ American Cyanamid (supra) at p. 511

33 This application is also for an injunction based on the same principles of law as it concerns 113 and 113A Constant Spring Road.

I must first consider whether there are serious triable issues concerning a permanent injunction restraining selling, transferring those properties.

There has been no evidence concerning any such issues, that application must therefore fail.

34. I therefore grant an injunction against Reliance Group of Companies Limited and/or the Registrar of Titles or any person whomsoever restraining the transfer of the property situate at 84 Constant Spring Road, registered at Volume 1136 Folio 392 of the Register Book of Titles until determination of this Honourable Court of the validity of the sale by public auction on the 5th November 2009 and an injunction restraining Christopher Graham and/or his nominees, their agents and/or their servants from selling, transferring, mortgaging or otherwise disposing of, dealing in any manner whatsoever, with the property situate at 84 Constant Spring Road registered at Volume 1136 Folio 392 of the Register Book of Titles until determination by this Honourable Court of the validity of the sale of the said property by public auction on the 5th November 2009.

Usual undertaking as to damages.

Costs to be costs in the claim.