

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. H-131 OF 2001

BETWEEN	LANCASTER HENRY	1 ST CLAIMANT
AND	LEONARD CONDELL	2 ND CLAIMANT
AND	KEN ANN MANAGEMENT COMPANY LIMITED	1 ST DEFENDANT
AND	KENNETH LEWIS	2 ND DEFENDANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	3 RD DEFENDANT

Dr. Bernard Marshall for the Claimants.

Mr. John Graham & Mr. Stewart Stephenson instructed by John Graham & Company for the 1st & 2nd Defendants

Miss Camaleta Brown instructed by Vacciana & Whittingham for the 3rd Defendant

Heard on the 11th May 2004

Sinclair-Haynes, J (Ag.)

On 11th May 2004, I agreed with National Commercial Bank (NCB) that the Claimants' claim against it should be struck out. I now set my reasons for so doing in writing.

Lancaster Henry and Leonard Condell, the claimants in this matter and Kenneth Lewis, the 2nd defendant, were partners in the firm of Mair, Russell and Partners, Chartered Accountants.

Ken Ann Management Company Limited was incorporated by the parties. One of the main purposes of the corporation was the purchase of property known as Lot 3 Haughton Avenue, Kingston 10.

Messrs. Lancaster and Condell were allotted a 20% share each in the company, whilst Mr. Kenneth Lewis was allotted 60%. The partnership dissolved subsequently. Mr. Henry left the firm in 1989 and Mr. Condell in 1993.

In 1993, the title to the property was cancelled and a new title Volume 1257 Folio 43 issued. A mortgage No. 1189859 and dated September 11, 2001 was obtained from National Commercial Bank and registered on the title to secure a loan in the sum of Four Million and Twenty Dollars (\$4,000,020.00) with interest thereon. The claimants are alleging that the cancellation and issue of the new title were fraudulently and unilaterally obtained by Mr. Lewis.

The claimants Messrs. Condell and Henry have instituted proceedings against Ken Ann Management Company Limited, Kenneth Lewis and National Commercial Bank.

The Claimant's Claim Against National Commercial Bank

National Commercial Bank, they contend, in their particulars of claim, acted negligently and in breach of its duty in that:

- a) it failed to ascertain that Mr. Lewis had no authority to procure such mortgage;
- b) it failed to verify whether Mr. Lewis had authority to act;
- c) it failed to make inquires of the claimants in and about the said mortgage;
- d) it failed to carry out the necessary investigations and searches;

- e) it failed to ascertain whether documents and other things relative to the said mortgage were genuine and bona fide;
- f) it granted the said mortgage recklessly, carelessly totally oblivious to any loss, damage or harm it might cause.

National Commercial Bank has applied to the court to have the claim against it struck out on the following grounds:

1. it discloses no reasonable ground for bringing the claim;
2. that the claim has no merit on a matter of law or fact and is without reasonable prospect of success.

Glen Shields, manager of the Duke & Barry Street branch of National Commercial Bank averred in his affidavit in support of NCB's application that the Articles of Association of Ken Ann named Mr. Lewis as a director and by virtue of the Memorandum of Association he was empowered to borrow upon security of the said property. National Commercial Bank was presented with a resolution of the Board of Directors which authorized the said mortgage.

Claimants' Answer

In answer to this, the claimants, in their joint affidavit have alleged that the averments contained in Mr. Shields' affidavit are contradictory and false. According to them, he averred that the title could not be found and so the mortgage was not executed until a later date. Yet, he stated that he was provided with proof of Lewis' authority to execute the mortgage. At the time the mortgage was executed, they had both left the

company. They were unaware of the passing of any resolution and in any event the resolution was irregular for the following reasons:

- a) Patricia Newman was not the company's secretary;
- b) A special meeting of the company was not convened.

It is also their contention that paragraph 78 of the Articles of Association empowers the directors and not a single director to borrow. National Commercial Bank ought to have conducted proper searches and investigations of Mr. Lewis and themselves before granting the mortgage. In failing to do so, it was grossly negligent. Being a constructive trustee, it acted as an accessory and breached the trust.

Submissions

Miss Camaleta Brown on behalf of NCB submits that NCB did all it was required in law to do to satisfy itself that the application was regular and in the absence of a caveat to alert them they had no way of knowing that the title was unilaterally cancelled by Mr. Lewis and the resolution irregularly obtained.

It is Dr. Marshall's submissions that had Mr. Shields perused the Telephone Directory he would have discovered that the claimants were no longer with the firm.

First issue: Has the claimants any real prospect of succeeding on their claim against NCB?

Rule 15.2a of the Civil Procedure Rules 2002 states as follows:

The court may give summary judgment on the claim or on a particular issue if it considers that:

- a) the claimants have no real prospect of succeeding on the claim or the issue.

Paragraph 3 of the Memorandum of Association of Ken Ann states as follows:

To borrow or raise money in such manner as the company shall think fit in particular by the issue of debentures or debenture stock perpetual or redeemable and to secure the repayment of any monies borrowed or raised or owing by the company by mortgage charged lien upon the whole or any part of the company's property or assets (whether present or future) including its uncalled capital and also by a similar mortgage charge or lien to secure and guarantee the performance by the company of any obligation or liability it may undertake.

Paragraph 78 of the Articles of Association states as follows:

The directors may exercise all the powers of the company to borrow money, and to mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and to issue debentures, debenture stock, and other securities whether outright or as security for any debt, for any assets, liability or obligation of the company or of any third party.

The directors were therefore clearly empowered by virtue of the Memorandum and Articles of Associations to mortgage the property.

National Commercial Bank was presented with a resolution of the company which permitted the bank to grant a mortgage and allowed the title of the property to be used as security.

The resolution on the face of it was duly signed and certified by Mr. Kenneth Lewis, the Chairman of the board of Directors and Patricia Newman, the secretary. It bore the seal of the company.

Assuming without admitting that the defendant irregularly obtained the resolution, there was nothing to alert NCB that it was irregularly obtained. Ostensibly, Mr. Lewis on behalf of Ken Ann had the authority to obtain the mortgage. NCB acted quite cautiously and prudently by delaying the execution of the mortgage until the title was found.

Did NCB act negligently or in breach of trust by accepting the resolution?

Should NCB have conducted investigations as the claimants contend?

The claimants in their joint affidavit in support of their Notice of Motion for judgment aver that they conducted a search at the Registrar of Companies in 1997 and discovered that Mr. Lewis had improperly and unilaterally allotted additional shares to himself in 1990 which were registered in 1996. If this is true, they would have been alerted that Mr. Lewis was dishonest and therefore had the propensity to further act to their detriment. In the circumstances, it was their duty to protect their interests. To the contrary, they imprudently waited until October 2001 to cause a search to be conducted at the Titles Office. This search revealed that the original title was cancelled in 1993 and a new title was issued. They allege that this was illegal and without their knowledge and approval. It was then, they allege, that they discovered the mortgage on the title in favour of NCB. The cancellation of the original title occurred in 1993. Mr. Lancaster Henry was still at the firm in 1993. It is remarkable that the cancellation and issue of a new title eluded him. It was in their interest to discover the fact that the title was cancelled and to protect themselves.

In light of their indifference to the alleged acts of dishonesty committed by Mr. Lewis against them, it is unreasonable to saddle NCB with the burden of protecting them from the alleged acts of fraud perpetrated by Mr. Lewis. It is unreasonable to expect that NCB should have known that the claimants were not properly notified about the meeting and that Miss Newman was not the company 's secretary.

In the face of a resolution which appeared to be regular, NCB could not be expected without more to question its validity. In those circumstances, I am of the view that the submission that NCB should have conducted further inquiries and checks is untenable.

It is quite evident that the claimants' claim against NCB is bound to fail and therefore ought to be summarily disposed of as having no reasonable prospect of success. In light of the overriding objective of the CPR, it is in the claimants' interest to know as soon as possible that their claim against NCB cannot succeed. The court has a duty to stop hopeless cases from dragging on as Lord Woolfe in Swain & Hillman (2001) 1 All ER 91 opined:

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In so doing he or she gives effect to the overriding objectives contained in Part 1. It saves expenses; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and I would add, generally that it is in the interest of justice."

Accordingly, the Claimants' Claim against National Commercial Bank is struck out. Leave to appeal granted.