



[2012] JMSC Civ 122

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 04380 OF 2008

BETWEEN	HAROLD MORRISON	1st CLAIMANT
AND	ROBERT WOODSTOCK (T/A HAROLD MORRISON & ASSOCIATES)	2nd CLAIMANT
AND	HATFIELD DEVELOPERS LIMITED	DEFENDANT

Mr. Ransford Braham, Q.C, Mrs. Daniella Gentles-Silvera & Mr. Miguel Palmer, instructed by Livingston, Alexander & Levy for the Claimant/Respondent.

Mr. Stewart Stimpson, instructed by Hart, Muirhead, Fatta for the Defendant/Applicant.

Application by Interested Person – Application to Set aside Provisional Charging Order – Application to Set aside Injunction- Application for Final Charging Order – Priority of Interests – Section 134 of the Registration of Titles Act – Effect of Lodging Court Order with Registrar.

IN CHAMBERS

Heard: April 5 & September 17, 2012.

Coram: F. Williams, J.

The Issues in the Case

[1] The issues that fall for determination in this matter may be shortly stated to be as follows:-

- (i) Whether an agent can act for a principal which is not in existence when the agent performs the act(s) in question?
- (ii) What is the interest of a judgment creditor who obtains a provisional charging order over land?
- (iii) What is the interest of a bona fide purchaser of land under an Agreement for Sale, which interest has not been transferred and in respect of which a caveat has not been lodged?
- (iv) How do these two interests rank *vis-à-vis* each other?

[2] It may be useful at this stage to give the factual background to this application.

Background

[3] This application was originally brought as part of a Notice of Application filed on June 28, 2011.

[4] By that Notice of Application (as it was first framed), the applicant, who originally was one Mr. Desmond Richards, sought this court's leave to intervene in the suit. Leave was sought in order for him to apply to set aside the order for sale and the provisional charging order that had been granted in this matter on October 6, 2008 by Thompson-James, J; and to apply to discharge the injunction that also was granted on that date and to attempt to prevent the provisional charging order being made final.

[5] At the hearing of this Notice of Application before Beswick, J on August 2, 2011, leave to intervene was granted to Mussawair Construction Limited (and not Desmond Richards). Leave to intervene was granted to Mussawair on the application of the applicant's attorney-at-law and based on the contents of paragraphs 3, 4 and 12 of the affidavit of Desmond Richards sworn to and filed on January 31, 2008 in support of the application. In these paragraphs, Mr. Richards deponed as follows:-

"3. At all material times, I was an authorized representative of Mussawair Construction Limited, a company duly registered

under the laws of Jamaica with registered offices at 1 McCatty Street, Montego Bay in the parish of Saint James, (hereafter referred to as “MCL”).

4. In or about June 2008, I commenced negotiations on behalf of MCL for the purchase of land registered in Register Book of Titles at Volume 1324 Folio 29 (“The Property”) from its registered proprietor, Hatfield Developers Limited of Shop 13, Parkway Village Plaza, Post Office Box 989, Ironshore, Montego Bay in the parish of Saint James...

12. Having regard to the fact that I was acting on behalf of MCL, and as the aforementioned Sale Agreement permitted it, MCL was nominated as the transferee and accordingly the Instrument of Transfer executed on the 11th February, 2009, reflected The Property being transferred from Hatfield to MCL...”

The Origins of the Suit

[6] The origins of the suit are to be found in an arbitration award made by Langrin, JA (then retired, and now of blessed memory), on September 4, 2008. The defendant, by that award, was required to pay to these claimants within 21 days the sum of \$2,000,000 as damages; and, within the said period, the sum of \$26,426,250 as net profit and interest, as well as costs to be agreed or taxed. It was sought by this suit to enforce that award.

[7] As previously indicated, it was sought by this suit to enforce that award; and the main means employed to do so was the application for and the obtaining of the order for sale and provisional charging order and the injunction over two lots of land: - one registered at volume 1324, folio 29 and the other at volume 1324, folio 33 of the Register Book of Titles. It is the dealings with the former lot (that registered at volume 1324, folio 29) that form the bone of contention in this application.

[8] This lot (hereinafter referred to as “the said lot”), was the subject of an agreement for sale dated the 14th August, 2008. By that agreement, the said lot was said to have been sold to Mussawair through Mr. Richards for the sum of US\$200,000 (the then equivalent of J\$14,000,000). The purchase price was paid in three instalments, with the first paid on July 29, 2008; the second on September 4, 2008; and the third on November 28, 2008. The instrument of transfer in respect of the sale was executed on February 11, 2009; and sent to the Office of Titles to be registered. It is the intervenor’s case that based on these considerations, the said lot could and should not have been the subject of a charging order, order for sale or injunction. By virtue of the said considerations, the defendants held the said lot on trust for the intervenor once the agreement for sale was executed.

[9] As it turns out, Mussawair was not incorporated until December 15, 2008 (see the affidavit of Miguel Palmer, attorney-at-law, sworn to and filed on March 12, 2012). This fact is not in dispute.

[10] The Deputy Registrar of Titles, Ms. Shalise Porteous swore an affidavit on March 5, 2012 in which she seeks to establish the timeline over which various acts were done in relation to the certificate of title for the said lot. To similar effect is another affidavit of Miguel Palmer, sworn to on February 6, 2012. Their most important contents show that on October 21, 2008 the court order dated October 6, 2008 was registered by way of miscellaneous entry number 1563106. On May 4, 2009 (that is, after the registration of the court order), the transfer of the said lot to Mussawair was endorsed on the title as transfer number 1594902; but was rejected on May 20, 2009 and struck out on June 2, 2009 and was never re-lodged. Although endorsed on the title, the transfer was in fact never registered and, indeed, not signed by a duly authorized officer of the Registrar of Titles.

[11] As regards miscellaneous entry number 1563106 (the entry in respect of the court order), on October 13, 2009 the Registrar of Titles formed the view that the wording of

that endorsement did not accurately reflect the court order and so struck it out, writing across it the words “entered in error” across it. The order was re-lodged and the entry re-worded with the same entry number entered on the said October 13, 2009. A further entry, (under entry number 1620208) was also made, recording the grant of the provisional charging order and injunction. (When first entered, entry number 1020208 only reflected that an injunction had been granted; however, when corrected in October of 2009, it was corrected to reflect the grant of the order for sale and the charging order).

[12] Ms. Porteous ends her affidavit by making the following significant statement:

“6. That the Formal Order dated 6th October 2008 remained on the title from the 21st October 2008 to 13th October, 2009 when the endorsement was amended to accurately reflect what was stated in the Court Order. The original order was entered in the Register Book on the 21st of October, 2008”.

[13] That background ought to be a sufficient basis for us now to proceed to an examination of the several issues in this case.

Examination of Issues

Issue 1: Whether an agent can act for a principal which is not in existence when the agent performs the act(s) in question?

[14] As paragraph [9] of this judgment indicates, no objection is being taken (nor, respectfully, could there reasonably be), to the assertion that Mussawair was incorporated on December 15, 2009. When this formidable point was made by Mr. Braham, Q.C for the claimants at the hearing of this matter, counsel for the intervenor applied to have Mr. Richards substituted for Mussawair. However, in the face of paragraphs 3, 4 and 12 of Mr. Richards’ aforesaid affidavit, and what could only be

regarded as the vacillation of Mr. Richards Mussawair on this issue, the application was, of necessity, refused.

[15] To put the fact of the ex post facto formation of the company in its proper perspective, it might be noted that the company was formed about one year and four months after the date of the agreement for sale; or more than one year and a month after the final payment; or some ten months after the date of the transfer; or about one year and two months after the making of the provisional charging order and the grant of the injunction; or approximately one year and two months after the endorsement of the certificate of title with the claimant's interest.

[16] The legal effect of all of this is that when Mr. Richards purported to have entered into a contract or agreement for sale of the said lot on behalf of Mussawair, there was no principal on whose behalf he could have acted as agent.

[17] How the law views such a situation is conveniently and succinctly set out in Volume 1 of **Halsbury's Laws of England**, Fourth Edition at paragraph 759. That paragraph, so far as is relevant, reads as follows:-

"759....the agent must not be acting for himself, but must profess to be acting for a named or ascertainable principal, and one who is actually in existence at the time when the act... is done." [emphasis added].

*(Citing such cases as **Marsh v Joseph** [1897] 1 Ch 213, CA).*

Additionally, as paragraph 760 of Halsbury's states, neither is the procedure of ratification open to the interested party:

"In order that the intended principal may be able to effectively ratify a contract, he must be in existence and ascertainable at the time of the act of the agent

to be ratified..." (emphasis added).

To similar effect is the case of **Kelner v Baxter & Ors.** (1866) LR 2 CP, 174. In that case Erle, CJ observed, at page 183, that:

"When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before..."

[18] It is clear, therefore, that this intervenor does not, as it were, have a leg to stand on, as there is legally no agreement on which it can itself rely to intervene in this application or suit and claim the reliefs that it is claiming. On this ground alone, its claim is doomed to failure; as this point is sufficient to dispose of this matter. However, because other points have been and arguments presented thereon, they will be given consideration. We may, therefore, proceed to look at the second issue.

Issue 2

(ii) What is the interest of a judgment creditor who obtains a provisional charging order over land?

[19] Part 48 of the Civil Procedure Rules (CPR), sets out the procedure for obtaining a charging order, whether provisional or final. The order is seen as an adjunct or companion piece to the order for sale, one of which was also granted in this case in relation to the said lot. This view of the charging order was taken in the case of **Beverley Levy v Ken Sales & Marketing Limited**, Privy Council Appeal No. 87 of 2006 (a case, incidentally, that was decided at a time – now past- when there was no clear statutory basis for the grant of a charging order).

[20] The main focus of the discussion of that case was the effect of section 134 of the Registration of Titles Act, which reads as follows:-

“...the Registrar, on being served with a copy of any writ or order of sale issued out of any court of competent jurisdiction, or of any judgment, decree or order of such court, accompanied by a statement signed by any party interested, or his attorney, solicitor or agent, specifying the land, lease, mortgage or charge, sought to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the Register Book; and after any land, lease, mortgage or charge, so specified shall have been sold under any such writ, judgment, decree or order, the Registrar shall, on receiving a certificate of the sale thereof in such one of the Forms A, B, or C in the Twelfth Schedule hereto as the case requires, (which certificate shall have the same effect as a transfer made by the proprietor), enter such certificate in the Register Book; and on such entry being made the purchaser shall become the transferee, and be deemed the proprietor of such land, lease, mortgage or charge:

Provided always that until such service as aforesaid no sale or transfer under any such writ or order shall be valid as against a purchaser for valuable consideration, notwithstanding such writ or order had been actually issued at the time of the purchase, and notwithstanding the purchaser had actual or constructive notice of the issuing of such writ or order....”

[21] The effect of this section was conveniently summarized in the **Beverley Levy** case, where it was observed at paragraph 17 thereof that:-

“...An interest in land is acquired when the Registrar, having been served with a copy of the order of sale, enters the order in the Register Book. The interest acquired by the judgment creditor at this point is an equitable interest subject to other interests already on the Register.”

[22] That paragraph also discusses the requirement for the order to be lodged within three months, indicating its purpose as being:-

“... to prevent title to land being burdened by orders for sale that are not acted upon. A creditor who wants execution against land of the debtor must pursue his remedy with diligence. If the creditor does not do so the order of sale will cease to bind the land and the creditor will lose his priority. He will become simply an unsecured creditor.”

[23] Inasmuch as the submissions of Mr. Braham, Q.C, for the claimant are based on and in step the dicta in the **Beverley Levy** case, and in accordance with the court's own assessment of the of this issue; and the intervenor's submissions are not, the court must again rule for the claimants on this issue.

[24] In short, the court finds that the judgment creditor who obtains a provisional charging order and has same registered with the Registrar of Titles (as the claimants did in the instant case); obtains an equitable interest in the property in question. That was the nature of the claimants' interest in the instant case. We may now proceed to a consideration of the third and fourth issues, which are closely connected.

Issues 3 and 4

(iii) What is the interest of a bona fide purchaser of land under an Agreement for Sale, which interest has not been transferred and in respect of which a caveat has not been lodged?

(iv) How do these two interests rank *vis-à-vis* each other?

[25] A discussion of these two issues is also closely connected with the earlier discussion of issue 2, in respect of which the thrust and purport of section 134 of the Registration of Titles Act and the effect of the registration of a charging order and an order for sale were discussed.

[26] In this specific discussion, what was discussed at paragraph 10 of this judgment is of considerable significance. The essence of this, it will be remembered, is that there is no record or notation on the certification of title of the interest being claimed by the intervenor. An attempt at doing so was rejected by the Registrar of Titles and the application was never re-lodged. From the cases of **Barclays Bank D.C.O v The Administrator General for Jamaica (Administrator of the estate of Gifford Reid, deceased) and Ransford Hamilton** (1973) 20 WIR, 344; and the case on which it is based on **Abigail v Lapin** (1934) A.C, 491, (cited by Mr. Braham, Q.C for the claimants), the main principle to be extracted is this: “the person whose equity attaches to the property first, will be entitled to priority over the other...”.

It is also noteworthy that there is no caveat in existence that was lodged by the intervenor. The only interest, therefore, that is noted on the certificate of title is that of the claimants: the order for sale, the provisional charging order and the injunction that was granted in support thereof. So that, as matters stand, there is no encumbrance on the certificate of title that ranks prior to the claimants’ or that should be given priority to that or those of the claimants’. The answer to issue number four, therefore, must be that the claimants’ interests rank in priority to those of Mussawair, the intervenor, such as it may be.

[27] Relying on such cases as **Riverton City v Haddad** (1986) 40 WIR, 236, Mr. Stimpson, counsel for the intervenor, put forward the proposition that the signing of the Agreement for Sale of the said lot, the vendor (Hatfield) became a trustee of the said lot and that that was the extent of what remained of its interest in the said lot: it held the said lot as trustee for the purchaser. Counsel for the claimants (Mr. Braham, Q.C), agreed with this argument in principle but sought to distinguish it on the basis that the

proposition (that is, that execution of an agreement for sale renders the vendor a trustee for the purchaser), presumes the payment of the purchase price in full, as, until that has been done and a transfer is executed, the agreement stands to be rescinded or cancelled at any time. The other limb of the claimant's attempt to persuade the court to their point of view is the contention (correct, in the court's view), that at the time the court order was granted and later when it was endorsed on the title, Mussawair did not have any interest in the said lot and Mussawair still does not have an interest.

[28] This argument by counsel for the claimants is, of course, sound and must be accepted – especially with the court's resolution on issue one in the claimants' favour. With that earlier finding and ruling, Mussawair does not have an interest to protect in this matter and, in fact, has no *locus standi* to make the application for the orders that it is seeking.

[29] There is one further point to be dealt with before finally disposing of this matter. That point has to do with an order that was made in claim number HCV 2of 2005. That order was made on October 30, 2008 in that suit, which was brought by the defendant (Hatfield) in an effort to have the arbitration award set aside. The terms of that order (so far as is material) are as follows:

“Stay of Execution of Arbitration Award granted
for a period of three (3) months as of September
4, 2008 or further order of the Court”.

[30] The court regrets that it is unable to place upon this order the interpretation urged upon it on behalf of the intervenor – that is, that it is open-ended and that possible the stay is still in effect. To the court's mind, the words “...or further order of the Court” could only be referable to and have effect within the period of three months referred to earlier in the order. That is, unless a further order is made in the matter, then the stay should have effect for the period of three months and expire at the end of that time.

Otherwise, the order would simply grant the stay until further order. That order (in the court's view) can therefore be no hindrance to this matter proceeding.

[31] For all these reasons, therefore, the applications contained in the notice of application filed on June 28, 2011, will be refused, with costs to the claimants to be agreed or taxed. the provisional charging order will also be made final.

[32] It is therefore ordered as follows:-

- (i). Application dismissed.
- (ii). Provisional charging order made final.
- (iii). Costs to the claimants to be agreed or taxed.