



[2015] JMSC Civ 60

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV05470

BETWEEN	THE PEAR TREE BOTTOM LAND OWNERS ASSOCIATION LIMITED	CLAIMANT
AND	GRAND BAHIA PRINCIPE HOTEL	1ST DEFENDANT
AND	HOJAPI LIMITED	2ND DEFENDANT
AND	TANKWELD DEVELOPMENT LIMITED	3RD DEFENDANT
AND	THE BANK OF NOVA SCOTIA JAMAICA LIMITED	4TH DEFENDANT
AND	THE BANK OF JAMAICA	5TH DEFENDANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	6TH DEFENDANT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	7TH DEFENDANT

IN CHAMBERS

Mr. Humphrey McPherson instructed by Humphrey L. McPherson & Co appeared for the Claimant

Hon. Mr. B. St. Michael Hylton O.J., Q.C. and Mr. Sundiata Gibbs instructed by Hylton Powell appeared for the 3rd Defendant

Mr. Hasani Haughton instructed by Hart Muirhead Fatta appeared for the 4th Defendant

Mr. Kevin Powell and Ms. Shanique Scott instructed by Hylton Powell appeared for the 5th Defendant

Ms. Marlene Chisolm and Ms. Vanessa Blair instructed by the Director of State Proceedings appeared for the 6th Defendant

Heard: 2nd and 27th March and 15th April 2015

Summary Judgment – Defendant’s Application to Strike Out Claim – Whether the Bank of Jamaica has a duty to intervene in private banking contracts – Whether

**commercial banks have a duty to investigate fraud before issuing mortgages –
Banking Act s. 39 and s. 41 – Registration of Titles Act s. 71 and s. 263**

PUSEY J

BACKGROUND

- [1] The Pear Tree Bottom Land Owners Association, the Claimant in this matter, purportedly represents 55 families who are alleging that they have an interest in 196 acres of land situated at Pear Tree Bottom, Runaway Bay in the parish of Saint Ann, the site of the Grand Bahia Principe Hotel. While the particulars of this interest are entirely unclear, certain allegations have, nonetheless, been made.
- [2] The crux of these allegations are that the 4th Defendant, Tank Weld Development Limited, hereinafter called “Tank Weld” acquired certain lands at Pear Tree Bottom in Runaway Bay in the parish of Saint Ann (a part of the 196 acres) fraudulently, and thereafter maliciously bulldozed these lands. It is further alleged that Tank Weld fraudulently sold these lands to the 1st and/or 2nd Defendants, Grand Bahia Principe and Hojapi Limited respectively, hereinafter called “the hotel” and “Hojapi” respectively, for the sum of US\$600,0000.00. The Claimant has not outlined the details of this fraud.
- [3] There is also an allegation that the 3rd Defendant, The Bank of Nova Scotia Jamaica Limited, hereinafter called “Scotiabank,” acted improper in accepting these lands as security for a mortgage loan of US\$14,000,0000.00 given to the hotel and/or Hojapi, being the funds acquired to construct the hotel. Additionally, that the 5th Defendants, The Bank of Jamaica, hereinafter called “BOJ” acted improper when they did not intervene or take steps to revoke the fraudulent mortgage.
- [4] It is further alleged by the Claimant that the 6th Defendant, The Attorney General for Jamaica, knows of the fraudulent actions of the first 4 Defendants and have taken steps to intentionally and negligently defend these actions. The Claimant has since

announced their intention to discontinue the case against the 7th Defendant, The Director of Public Prosecutions.

APPLICATIONS

- [5] The BOJ by Notice of Application filed January 14th 2015 has sought the following orders:
- (i) that the automatic referral to mediation in accordance with rule 74.4(1) of the Civil Procedure Rules 2002 “CPR” be dispensed with;
 - (ii) that the claim against the BOJ be struck out; or in the alternative
 - (iii) that the issue of whether the BOJ owed and breach statutory duties to the Claimant as alleged will be determined as a preliminary issue in favour of the BOJ; and
 - (iv) that judgment be granted in favour of the BOJ.
- [6] In addition, Scotiabank by Notice of Application also filed on January 14th 2015 has sought the following orders:
- (i) that they be granted summary judgment against the Claimant; or
 - (ii) that in the alternative, the claim against them be struck out.

BOJ’s APPLICATION

The Claim Against BOJ

- [7] The Claimant through Claim Form filed on November 11th 2014 has claimed for a declaration by the Court that the BOJ is in breach of section 39 and/or 41 of the Banking Act. They are reflected as thus –

Section 39

The Minister may, after consultation with the Bank of Jamaica and the organisations referred to in section 38 (2), by order require every bank in lending money on the security of land to comply with such conditions as may be specified in the order:

Provided that no such order shall apply to or affect any transaction entered into by the bank prior to the making of the order.

Section 41

Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making (dishonestly or otherwise) or any statement, promise, forecast or projection which is misleading, false or deceptive induces or attempts to induce another person –

a) to invest money on deposit with him or any other person; or

b) to enter or offer to enter into any agreement for that purpose.

Shall be guilty of an offence

Law

[8] Where the matter of dispensing with mediation is concerned, rule 74.4(1) of the CPR provides that mediation may be dispensed with where for some good or sufficient reason, it would not be appropriate.

[9] The CPR also speaks to striking out claims. At rule 26.3(1)(c) it provides that, *“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 the claim.”*

[10] The BOJ also relied on a number of authorities that the court finds instructive and are outlined below. Where the striking out of a claim is concerned the following are instructive:

In **Sebol Limited and Others v Ken Tomlinson and Others** (unreported) Claim No 2004 HCV 02526, Supreme Court, Jamaica, delivered 9 October 2007, Sykes J spoke about Rule 26.3(1)(c):

Let us look at what rule 26.3 (1) (c) actually says. The rule does not speak of a reasonable claim. It speaks of reasonable grounds for bringing the claim. It would seem to me that simply as a matter of syntax, the instances in which a claim can be struck out against a defendant are wider than the old rules. The rule contemplates that the claim itself may be reasonable, that is to say, it is not frivolous, unknown to law or vexatious, but the grounds for bringing it may not be reasonable. Clearly the greater includes the lesser. This if the claim pleaded is unknown to law then obviously there can be no reasonable grounds for bringing the claim. It does not necessarily follow, however, that merely because the claim is

known to law the grounds for bringing it are reasonable. The rule focuses on the grounds for bringing and not on just whether the pleadings disclose a reasonable cause of action.

In **Blackstone's Civil Practice (2003 edition)** it was explained this at page 372:

Under the old rules, a cause of action with some prospects of success would not be struck out. Provided that the statement of case raised some question fit to be tried, it did not matter that the case was weak or unlikely to succeed. It is likely that under the CPR very weak claims or defences should be struck out under r. 3.4(2)(a). A cause of action that is unknown to the law will be struck out; as will, subject to the court giving permission to amend, a statement of case that omits some material element of the claim or defence. A statement of case ought also to be struck out if the facts set out do not constitute the cause of action or defence alleged, or if the relief sought could not be ordered by the court.

[11] Where the alleged acts and/or omissions of the BOJ are concerned the following authorities are instructive:

In **Rayon Electric v The Bank of Jamaica** (unreported), Claim No. 2008 HCV 02951, Supreme Court, Jamaica, delivered 19 March 2009, the claimant complained about extremely penal and damaging clauses that the bank had imposed. The Court found in conclusion:

Having found that the BOJ could not be expected to intervene in what is exclusively a private matter between the parties, I therefore conclude that there is no reasonable ground for bringing the action.

In **Justin O'Gilvie v Bank of Jamaica and Others** [2013] JMSC Civ 143 delivered 4 October 2013, the Court also held that there is nothing in the Banking Act that gave the BOJ power to intervene with individual contracts between the bank and its customers.

Discussion

[12] The Claimant has asserted through Mr. McPherson that the BOJ refused to monitor these contracts for political reasons. He references the Banking Services Act which he contends would give the power to regulate these activities. He laments that this Act has not yet had the regulations passed.

- [13] This response is unhelpful for two main reasons. Firstly, a cause of action cannot accrue in relation to legislation that was not in effect at the time of the action complained. Secondly, regulations which are still unknown at this time cannot be justiciable.
- [14] The BOJ contends at page 2 paragraph 6 of their submissions that *“the issue as to whether the Bank of Jamaica breached its statutory duty is of a legal nature and therefore cannot be properly solved at mediation”* and further that *“[a] private settlement at mediation in relation to those public functions would be inimical to the public interest.”* The Court agrees with this assessment and finds that in the circumstances it is proper that mediation be dispensed with.
- [15] Where the striking out of the claim is concerned the BOJ, relying on the authorities provided and that have been outlined above, submit the following. At page 3 paragraph 10 of their submissions *“that the court will exercise this power of the statement of case fails on its face to disclose a cause of action or a defence which is sustainable as a matter of law.”* It is contended that the particular sections of the Banking Act, outlined above and subject to the alleged breach, impose no statutory duty on the BOJ to intervene or interfere into contractual arrangements between banks and their customers. In this case, s. 39 of the Banking Act imposes a responsibility on the Minister not on the BOJ while s. 41 of the Banking Act creates an offence against persons acting fraudulently where they induce another to invest money and does not impose duty on the BOJ to act in anyway. The BOJ also submits that similar to the authorities *“the mortgage transaction involving the 1st and/or 2nd Defendants and the 3rd Defendant is of a purely private contractual nature.”*
- [16] The Court agrees with the submissions of the BOJ and in accordance with the authorities provided, finds that for these reasons the Claim against the BOJ should be struck out.

Conclusion

[17] The Court finds that where the claim against BOJ is concerned, mediation is dispensed with and the claim struck out for the reasons already provided.

SCOTIABANK'S APPLICATION

The Claim Against Scotia Bank

[18] The Claim against Scotiabank herein is as follows:

- i. A declaration that the US\$14,000,000.00 mortgage between the Hotel and/or Hojapi and Scotiabank is fraudulent, illegal, null and void and is set aside;
- ii. A mandatory injunction ordering Scotiabank to rescind the fraudulent mortgage within 14 days of the order or until trial;
- iii. A declaration that Scotiabank (along with the Hotel, Hojapi and Tank Weld) is/are in breach of relevant provisions of the Proceeds of Crime Act and the Money Laundering Act and has/have committed bank fraud, judicial fraud, land fraud, transfer/conveyance fraud, money laundering, obstruction of justice, malicious destruction of property and/other criminality, wrongdoing and illegality.

Law

[19] Rule 15.2(b) of the CPR provides that the court may give summary judgment on the claim or on a particular issue if it considers that the defendant has no real prospect of successfully defending the claim or the issue.

[20] Rule 26.3(1)(c) of the CPR provides that in addition to any other powers under the 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 disclose no reasonable grounds for bringing or defending a claim.

[21] Section 71 of the Registration of Titles Act provides that except in the instances of fraud, a mortgagee has no duty to 'look behind the title.' It is reflected as thus –

Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application any purchase or consideration money, or shall be

affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

- [22] Section 163 of the said Act provides protection to a bona fide purchaser(s) of registered and against actions. It is reflected as thus –

Nothing in this Act contained shall be so interpreted as to leave subject to an action for the recovery of the land, or to an action for recover of damages as aforesaid, or for deprivation of the estate or interest in respect to which he is a registered proprietor, any purchaser bona fide for valuable consideration of land under the operation of this Act, on the ground that the proprietor through or under whom he claims may have been registered as a proprietor through fraud or error, or may have derived from or through a person registered as proprietor through fraud or error and this whether such fraud or error shall consist in wrong description of the boundaries or of parcels of any land, or otherwise howsoever.

- [23] Where the matter of fraud is concerned, Scotiabank relied on the judgment in the British Virgin Islands case of **Ecedro Thomas and Alphonso Thomas v Augustine Stoutt and Grethel Stoutt-Richardson** (unreported), Civil Appeal No 1 of 1993, Court of Appeal, British Virgin Islands, delivered 12 May 1997 where the reasoning in **Wallingford v Mutual Society** [1880] 5 App. Cas was upheld. At page 7, Byron CJ highlighted the need for the particulars of fraud to be pleaded. He opined –

The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest.

- [24] In **Commercial Fraud in Civil Practice (second edition)** the text writer Paul McGrath QC tackled conversion of real property at page 90 paragraph 4.22. He stated –

The tort of conversion is limited to dealings in respect of corporeal personal property i.e. tangible movable assets and is not capable of being the subject of an action in conversion.

Discussion

- [25] The Claimant has asserted that Scotiabank issued mortgages on property that Hojapi did not own. Mr. McPherson says that he knows that Hojapi has, in his own words, “indisputable title” to the land at Bell Air. He suggests that this is different for the land which was built on.

- [26] Mr. McPherson has admitted that there are not particulars of fraud. He has asked for time to file such particulars. He has failed to set out by way of affidavit and draft amended pleadings or verbally what those particulars would be.
- [27] In the adjudication of civil claims, and as outlined above at CPR 15.2(b) that the Court may give summary judgment if it considers that the Defendant has no real prospect of successfully defending the claim. Additionally, that a claim or statement of case may be struck out if no reasonable grounds for bringing the claim have been disclosed. The question is: does the Claimant herein have a real prospect of defending the claim or any reasonable grounds for bringing the claim?
- [28] A good place to begin is with the allegations of fraud. The Claimant's Particulars of Claim has been outlined in paragraph 18 above. It is immediately apparent that though many allegations of fraud have been made, the details and particulars of this fraud are missing, and as such has hamstrung the Claimant's claim (see: **Ecedro Thomas** and **Wallingford**). The best that can be garnered of the allegations levelled is that Tank Weld in the original claim came to title of the subject property fraudulently and therefore in selling these premises the passage of title to Hojapi is therefore tainted. The claim then, is that Scotiabank acted improperly to use these properties being held by Hojapi as security for the mortgage issued.
- [29] The only issue for determination by the Court then, notwithstanding the aforementioned lacuna in the Claimant's case, is whether Scotiabank acted improperly in effecting the mortgage contract as they did. As s.71 of the Registration of Titles Act provides, a mortgagee has no duty to look behind a registered title unless there is evidence of fraud. In the instant case there is no evidence of fraud where the registered titles exhibited are concerned. In other words, Scotiabank did their due diligence and they have no onus to rely on anything else but the registered title.
- [30] If we look to the root of the alleged fraud, the Claimant suggests that the fraud arises from Tank Weld. Even if this were the case, and there is no evidence whatsoever before the court that this is the case, the alleged fraud would not affect a bona fide

purchaser for value of the real property. As outlined in s. 163 of the Registration of Titles Act, even if there was previous fraud, a bona fide purchaser for value is protected against actions. That action, of course, would properly lie against the party that committed the fraud. This is bolstered by the fact that land is not capable of being the subject of an action for conversion.

[31] The Court assesses that the allegations of fraud have not been particularized and therefore fraud cannot be found. Furthermore, Scotiabank did not act improper in issuing a mortgage to Hojapi. It is clear that, with the facts that have been placed before the court, the Claimant herein has no reasonable grounds in bringing a claim against the Scotiabank. The Claimant having failed to itemize or indicate the particulars he would provide, despite having been served with these applications, will not be given additional time in these circumstances.

Conclusion

[32] The Court therefore awards summary judgment in favour of Scotiabank against the Claimant.

ORDERS

[33] In final disposition of this matter, the following orders are made:

1. That where the claim against the 5th Defendant is concerned, mediation is dispensed with.
2. The claim against the 5th Defendant is struck out.
3. Summary Judgment is awarded in favour of the 4th Defendant against the Claimant.
4. The Claimant's application for permission to amend their statement of case is refused.
5. Costs to the 4th and 5th Defendant to be taxed if not agreed.

**Sgd. The Hon. Mr. Justice L. Pusey
Puisne Judge**

ADDENDUM

- [34] This is an addendum to the judgment given in this court on the 27th day of March 2015, to address an issue raised by Mr. Humphrey McPherson, Counsel for the Claimant, in argument and not expressly dealt with before.
- [35] The Court did not have the file when this matter was dealt with, and took the opportunity to electronically view the file to assist it in considering this matter.
- [36] Mr. McPherson raised a preliminary issue to the application of the 3rd Defendant, Bank of Nova Scotia Jamaica Limited. Counsel argued that the bank could not be heard because there was an application for default judgment, because the bank failed to serve its Acknowledgement of Service on the Claimant's attorneys within the time required by the Civil Procedure Rules ("CPR").
- [37] Mr. Sundiata Gibbs, Counsel for the 3rd Defendant, admitted that the Acknowledgement of Service was served out of time but pointed out that it was filed within the time stipulated. He also argued that although Part 9 of the CPR indicates that the Acknowledgement of Service ought to be served on the other parties, it is the failure to file that has consequences in law.
- [38] In the instant case, a perusal of the Court file indicates that the Acknowledgement of Service of the 3rd Defendant was filed on the 1st day of December 2014. This was within the allowed fourteen days for filing as set out in CPR 9.3(1). Mr. Gibbs' contention is bolstered by CPR 9.2(2) which indicates that an Acknowledgement of Service is of no effect until it is filed.
- [39] It was also mentioned that the Defence of the 3rd Defendant was filed out of time. The Court's file indicates that the 3rd Defendant's Defence was filed on 31st day of December 2014. This was forty days after the service of the Claim Form and therefore within the 42 days prescribed by CPR 10.2(1).

[40] It is clear that there was no basis to indicate that the 3rd Defendant was in default and could be stopped from being heard in this matter. In any case, although there was a Request for Default Judgment to be entered no judgment in default had been entered in this matter.

[41] Subsequently, the Court found no merit in the preliminary application and went on to consider the substantive application of the 3rd Defendant as set out in the Judgment delivered on the 27th day of March 2015.

**Sgd. The Hon. Mr. Justice L. Pusey
Puisne Judge**