[2018] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 28/2018

APPLICATION NO 70/2018

BETWEEN	**LASHMONT FINANCIAL SERVICES LIMITED**	**1st APPLICANT**
		2nd APPLICANT
	MYLES McCLYMONT	
AND	**MORGAN'S HARBOUR LIMITED (IN RECEIVERSHIP)**	**RESPONDENT**

Hadrian Christie and Ms Tashauna Grannum instructed by Hart, Muirhead, Fatta for the applicants

Michael Hylton QC and Sundiata Gibbs instructed by Debbie-Ann Gordon and Associates for the respondents

Mark Williams instructed by Williams McKoy and Palmer for the interested party

19 June and 16 July 2018

IN CHAMBERS

PUSEY JA (AG)

[1] Morgan's Harbour Limited (MHL) is the lessee of land in Port Royal from the Government of Jamaica. The land houses a hotel, marina and other facilities. MHL had sub-leased to Lashmont Financial Services (the 1st applicant). The 1st applicant made two unsuccessful attempts to purchase the leasehold rights of the property from MHL. The 2nd applicant is the principal of the 1st applicant.

[2] The National Investment Bank of Jamaica, now the Development Bank of Jamaica (DBJ), held a debenture over the assets of MHL for debts in excess of $263,000,000.00. In 2014 the 1st applicant settled that debt with DBJ and was assigned the MHL's debt by agreement.

[3] The 1st applicant as debenture holder called on the debt. MHL had not been servicing the debt. The assets of MHL were already on the market for sale at this time. The 1st applicant appointed Messrs Caydion Campbell and Wilfred Baghaloo as joint receiver managers (the receivers) over MHL's assets.

[4] Subsequently, the receivers advertised the sale of the company's assets and initiated a bidding process. Among the bidders was an affiliate company of the 1st applicant and the 2nd applicant was its principal. An overseas investor was selected as the preferred bidder while the entity affiliated to the applicants was the second ranked bidder. The applicants instructed the receivers to suspend the sale as a separate private sale agreement with shareholders of MHL was reached.

[5] The receivers refused and the applicants responded by terminating their services. The receivers also refused to accept their termination. As a result, a claim was commenced in the Supreme Court by Morgan's Harbour Limited (In Receivership) (the respondent) against the applicants pursuant to section 79 of the Insolvency Act, which states:

> "(1) A receiver or other interested party, may apply to the court for directions in relation to any provision of this Part.

(2) The Court shall in relation to an application for directions under subsection (1) give such directions, it considers proper in the circumstances including an order -

(a) appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;

(b) determining the notice to be given to any person, or dispensing with notice to any person;

(c) declaring the rights of persons before the Court or otherwise; or directing any person to do, or abstain from doing, anything in relation to the receivership;

(d) fixing the remuneration of the receiver or receiver manager;

(e) requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed

(i) to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the company;

(ii) to relieve any such person from any default on such terms as the court thinks fit; and

(iii) to confirm any act of the receiver or receiver manager; and

(f) giving directions on any matter relating to the duties of the receiver or receiver-manager."

[6] The claim was one of some novelty. As the learned trial judge Edwards J indicated, there was no precedent to guide her. The applicants resisted the claim but did not seek alternate remedies from the court below. They have however sought declarations in their notice and grounds of appeal.

[7] The respondent contended that the receivers are to be allowed to continue the sale and to fulfil their duties pursuant to the convertible debenture. On the other hand, the applicants argued that the receivers had acted in bad faith in continuing the sale after termination of their services.

Edwards J's judgment

[8] Edwards J, after considering the law in relation to receivers and their relationship to the company, noted that a debenture holder had a duty to the mortgagor to use reasonable care to obtain a fair market value. She inferred from the evidence that the applicants intended to own the assets of the company and acted with bad faith and for an improper purpose. She went further to conclude that the power of sale had been partially executed at the time of the purported termination of the receivers and doubted whether the debenture holder could terminate at this stage. In summarising the case she stated in paragraph [127] of her judgment:

" I have therefore, concluded on the issues in this case that:

i) The debenture holder has the right to terminate a receiver appointed by him but in doing so he must act bona fide in good faith and for proper purposes. The right to terminate must not be exercised, for example, for the purpose of wilfully sacrificing the interest of the company in receivership for the interest of a third part purchaser of the company's assets.

ii) A receiver acting honestly and in good faith is duty bound to seek the direction of the Court, if he is terminated in such circumstances.

iii) Where the Court has found that the debenture holder was acting in bad faith and for improper purposes in terminating a receiver who was exercising his power of sale in carrying out his duty to the debenture holder, the court will hold, on equitable grounds that such a termination is invalid and a court of equity will set it aside.

iv) There is also authority on which I am inclined to rely, to the effect that the authority given to an agent (of which a receiver is one such) cannot be withdrawn at the point where the power of sale was being executed or had been executed. Therefore any withdrawal by termination of such authority was at least improper and at most invalid."

[9] The court found that the conduct of the applicants, prior to the appointment of the receivers, showed a clear intention to acquire the respondent's assets. Furthermore, the subsequent conduct of the applicants, in terminating the receivers' services when the receivers were exercising a power of sale, after a structured bidding process, was found to be executed in bad faith and for improper purposes thus contrary to equitable principles.

[10] Edwards J also held that the receivers acted in accordance with the debenture. Reasonable care was taken to realize the respondent's charged assets despite the complaint of a lengthy delay. As such, they have not breached their duty to either of the parties. In contrast, had they followed the instructions of the applicants, it would have been a breach of duty as at that time, the sale was partially executed.

[11] Consequently, the termination of the receivers was found to be invalid on the basis of bad faith, improper purpose and that the power of sale given to a diligent receiver could not justly be withdrawn where it is or has been executed. The court below therefore found in favour of the declarations sought in paragraphs 1 – 6 of the respondent's fixed date claim form (see paragraphs [10] and [128] of the judgment of Edwards J).

Application for a stay of execution

[12] The applicants now seek an order for the stay of execution of the orders made by Edwards J on 12 February 2018. They also seek an injunction restraining the respondent from disposing of its leasehold interest or other property in relation to MHL. The stay and injunction are sought pending the determination of the appeal against the judgment.

[13] The applicants contend that they have a real prospect of success on appeal as the termination clause in the debenture was not qualified and therefore they can terminate the appointment of the receivers without notice. Thus, termination could be invoked with 30 days' notice or where the applicants and the shareholders of the

Respondent made an agreement to settle debt. In their view, the learned judge wrongly ruled that termination of the receivers was limited to acting in bad faith.

[14] There is an alleged urgency in this application as without a stay of execution or an injunction, the respondent is likely to complete the transfer of the leasehold despite the appeal challenging the receivers' authority to so do. Thirdly, if the stay is refused, the applicants' appeal would be moot. It is argued that the applicants, by agreement, have undertaken to indemnify the receivers. Therefore, they will suffer less hardship in comparison to the applicants.

[15] In oral submissions in chambers, Mr Christie for the applicants indicated that the receivers had in fact accepted the termination by letters seeking compensation from the appellants for the work done by them. He also asserted that the applicants were permitted to convert the debenture into shares and, he implied, that the applicants would be able to realise control of MHL and ownership of its assets.

[16] The applicants reiterated the assertions set out in argument before Edwards J that the receivers failed to comply with the applicants' instructions , failed to effect the sale , refused to allow the applicant to see the Deed of Assignment Agreement with the preferred bidder and were not acting honestly and in good faith. Mr Christie argued that for these reasons the applicants had a duty to terminate the receivers by exercising their contractual right under the Deed of Agreement between the first applicant and the receivers. The learned judge has fully dealt with these assertions in her judgement (see paragraphs 105 to 112 of the judgment of Edwards J) . The applicants appear to have taken the view that they could supervise the receivers having appointed them.

[17] The respondent opposes the applicants' application. In addition to relying on his written submissions, Mr Hylton QC pointed out that some of the assertions made by Mr Christie in his oral arguments were not supported and were new to the applicants' case.

Analysis

[18] The principles involving a stay of proceedings are well settled and thoroughly articulated by both counsel. They have been set out in **Hammon Suddard Solicitors v Agrichem International Holdings Ltd** [2001] All ER 258 and followed by this court in cases such as **Green v Wynlee Trading and another** [2010] JMCA App 3 and **Caribbean Cement Company Limited v Freight Management Limited and Others** [2013] JMCA App 29**.**

[19] The process of deciding whether to grant a stay has two steps. The applicants will have to establish (i) that there is a real prospect of success on appeal and (ii) that a greater risk of injustice would be the effect of the refusal of the application.

[20] The principles for obtaining an injunction pending appeal are similar. They are set out in **Novartis AG v Hospira UK Ltd** [2014] 1 WLR 1264 at paragraph 41:

> "I would summarise the principles which apply to the grant of an interim injunction pending appeal where the claimant has lost at first instance as follows:-
>
> (i) The court must be satisfied that the appeal has a real prospect of success.
>
> (ii) If the court is satisfied that there is a real prospect of success on appeal, it will not usually be useful to attempt to form a view as to how much stronger the

prospects of appeal are, or to attempt to give weight to that view in assessing the balance of convenience.

(iii) It does not follow automatically from the fact that an interim injunction has or would have been granted pre-trial that an injunction pending appeal should be granted. The court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted.

(iv) The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. such a case merely represents the extreme end of a spectrum of possible factual situation in which the injustice to one side is balanced against the injustice to the other."

Real prospect of success

[21] The first step is to determine whether there is a real prospect of success. The applicants seek in their appeal declarations from this court that were never sought from the learned trial judge. These orders sought include:

2 A Declaration that Joint Receivers breached their duty of good faith to the debenture holder.

3 A Declaration that the Notice of Termination tendered by the Appellants' Attorneys-at-Law be found to be valid.

4 A Declaration that, by virtue of the Notice tendered by the appellants' Attorneys-at-Law, the joint Receivership has been validly terminated.

5 A declaration that the New Receiver appointed by the Debenture Holder has been validly appointed.

6 That the Deed of Assignment between Preferred Bidder and Receiver be determined null and void.

[22] The appellate court is only able to make orders that the trial judge could have made. Since the declarations set out above were not requested of Edwards J it would be outside of the remit of this court to make such orders.

[23] Mr Hylton summarised the judgment of Edwards J into three main points. The first is a declaration that the 1st applicant does not have an automatic right to ownership of the assets under the debenture. Secondly, a declaration that the receivers were validly appointed and therefore permitted to assign MHL's leasehold interest to the preferred Bidder. Thirdly, the trial judge ordered the 1st applicant to vacate the premises.

[24] The first point is not expressly challenged by the applicants. The notice of appeal seeks to set aside all orders made by the trial judge but the findings of law which support this principle were unchallenged. It is inferred that the applicants accept that their interest as debenture holder is in the repayment of monies. In any event, declaratory relief is not amenable to stay as this court has indicated in several cases including **Norman Washington Manley Bowen v Shahine Robinson and Neville Williams** [2010] JMCA App27, and **Fernah Brown V Marjorie McClure** [2015] JMCA App 19.

[25] The applicants do not challenge the validity of the appointment of the receivers. They contend that the termination was valid. As Mr Hylton argued even if the applicants are correct that the termination is valid, the deed of assignment was signed by the receivers during the course of their appointment and therefore could not be voided.

[26] The order to vacate the premises is not substantively challenged by the applicants. The 1st applicant is the tenant of MHL and its fixed term lease has expired. No legal basis for the continued occupation has been advanced in the appeal.

[27] Therefore despite this being an unusual area of the law and one that has no precedent, I am of the view that there is no reasonable prospect of success of the appeal.

[28] Having failed on the threshold question (as Morrison JA, as he then was, referred to it in **Green v Wynlee**), it is not necessary to consider the balance of convenience for the injunction or the interests of justice in the stay of proceedings.

[29] However, I am of the view that the balance of convenience or the similarly worded interests of justice, could not lie with the applicants. The applicants' interest as debenture holder, which is their capacity in this matter, is limited to the repayment of monies owed. This interest would be enhanced by the successful sale of the leasehold interest. Therefore as debenture holder it must be in the applicants' interest that the long outstanding sale be completed, and consequently the balance of convenience for the applicants and the respondents, is for the sale to proceed.

[30] In the circumstances, I would refuse the orders sought by the applicants. Notice of application dated 29 March 2018 is refused.

[31] Costs of this application to the respondent to be taxed if not agreed.