JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL COA2019CV00066

APPLICATION NO COA2019APP00170

BETWEEN	**SAGICOR BANK JAMAICA LIMITED**	**APPLICANT**
AND	**HARLEY CORPORATION GUARANTEE TRUST COMPANY LIMITED**	**RESPONDENT**

Christopher Kelman and Litrow Hickson instructed by Myers, Fletcher & Gordon for the applicant

Lijyasu M Kandekore for the respondent

29 October and 14 November 2019

IN CHAMBERS

SIMMONS JA (AG)

[1] This is an application for a stay of execution of the costs order of Wolfe-Reece J, made 24 June 2019, pending the determination of the applicant's appeal. This application was made pursuant section 10 of the Judicature (Appellate Jurisdiction) Act and rule 2.11(1)(b) of the Court of Appeal Rules.

Background

[2] On 16 May 2018, the respondent ("Harley Corporation") filed a claim against the applicant ("Sagicor Bank") for damages for breach of contract dated 25 February 1995. The essence of the claim is that over two decades ago, Citizens Bank Limited, as

mortgagee, pursuant to its powers of sale, entered into a contract with Harley Corporation for the sale of land. It is also asserted that one of the terms of the agreement was that Harley Corporation would be given vacant possession.

[3] For present purposes, all that needs to be said is that Harley Corporation did not receive vacant possession of the land. This resulted in a claim being commenced on 15 May 1996[1], against Ital Walters, who was a tenant of the previous owner. That claim was consolidated with three other claims.[2]

[4] On 2 February 2007 Sykes J, as he then was, set aside the sale and Ital Walters was declared to be the legal and beneficial owner of the land. Harley Corporation appealed and was successful. Ital Walters' application for permission to appeal to the Privy Council was refused on the basis that it did not raise an arguable point of law. Harley Corporation was eventually granted possession by way of a court order dated 10 February 2017.

[5] One might ask how then does Sagicor Bank come to be sued by Harley Corporation nearly two decades later? The answer is that by successive name changes, Citizens Bank Limited became Union Bank of Jamaica Limited, then RBTT Bank Jamaica Limited, then RBC Royal Bank (Jamaica) Limited, which was acquired by Sagicor Group Jamaica in June 2014 and eventually merged with the existing banking operations of Sagicor Bank Jamaica Limited.

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[1] C.L. 1994/H 094

[2] C.L. 1995/D 162 – Rudolph Daley v RBTT Bank Jamaica Limited, C.L. 1996/W 055 – Ital Walters v Rudolph Daley and C.L. 1997/W 369 – Ital Walters v Rudolph Daley and RBTT Bank Jamaica Limited

[6] In its particulars of claim, Harley Corporation contends that Sagicor Bank is liable in damages for its predecessor's breach. Sagicor Bank has taken a contrary view. In its defence, filed 28 August 2018, the claim is disputed on two grounds.

[7] Firstly, it has raised a limitation defence. The defence states that "[t]he cause of action alleged to constitute a breach of contract is statute barred for having arisen more than 6 years prior to the commencement of this action against the Defendant".

[8] Secondly and alternatively, it was stated that "the statements of case disclose no reasonable ground for bringing the claim against the Defendant and constitute an abuse of process of the Court".

[9] It is further stated that the agreement for sale dated 25 February 1995 did not include a clause, express or implied, that Harley Corporation would have been given vacant possession. In addition, reference was made to special condition 8 which states that the land was being sold "as the same shall stand at the time of signing hereof without reference to extent or condition respectively and the Purchasers shall take the property in the state and condition in which the same may be actually found".

The application for summary judgment

[10] So confident in its defence, Sagicor Bank made an application for summary judgment which was essentially based on the aforementioned arguments. Namely, that Harley Corporation had no real prospect of succeeding on the claim, it having been brought outside of the relevant limitation period; and in the alternative for striking out the claim, as the statement of case disclosed no reasonable grounds for bringing the

claim and constituted an abuse of the court's process. This application together with supporting affidavit was filed 28 August 2018 and heard on 10 May and 24 June 2019 by Wolfe-Reece J.

[11] The said application was made on the grounds that:

> "a. there was no breach of contract by Sagicor's predecessor;
>
> b. even if there was, the alleged cause of action for breach of contract arose in 1995 and is, accordingly, statute barred; and
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> c. the claim is *res judicata*."

[12] The learned judge refused both applications but did not provide her written reasons for so doing. She also awarded costs of the application to Harley Corporation to be taxed if not agreed. As mentioned at the outset, Sagicor Bank is seeking a stay of execution of the learned judge's order as to costs pending its appeal against her decision to refuse summary judgment or in the alternative, strike out the claim.

The application for stay of execution and the substantive appeal

[13] The application is based on the following grounds:

> "a. Harley Corporation has commenced taxation proceedings in the court below by filing and serving its Bill of Costs dated July 17, 2019;
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> b. The costs order of the Hon. Mrs. Justice Wolfe-Reece is an order subject of Sagicor's appeal to this court;
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> c. Sagicor has a real chance of succeeding on its appeal; and

> d. There is no evidence that Sagicor will be able to recover the costs paid to Harley Corporation should there be no stay and Sagicor succeeds on its appeal."

[14] The first two of these grounds (a and b, above) are matters of fact and do not require the making any findings. The latter two (c and d) are essentially the issues that must be determined.

[15] The grounds of appeal in the substantive appeal are relevant insofar that I must consider them in determining whether Sagicor Bank has a real prospect of succeeding on its appeal. They are as follows:

> "a) The learned judge erred in making findings of fact for which there was insufficient evidence. The court, having excluded the Affidavit of Lijyasu Kandekore filed on May 3, 2019, had no evidential basis for a finding that the Respondent was hindered from commencing its claim against the Appellant for breach of contract or of adding it to any of the previously subsisting claims.
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> b) Having correctly accepted that the cause of action arose in February 1995, the learned judge erred in law in failing to appreciate that there are very limited circumstances in which the limitation period is deemed to be postponed or extended. None of those exceptions arise on the facts of this case.
>
> c) In finding that this was a case requiring full investigation at trial, the learned judge failed to appropriately apply the summary judgment test of whether the Respondent has a real prospect of succeeding on its claim for breach of contract, the sole legal issues being whether the Appellant had a contractual obligation to give vacant possession to the Respondent and, if so, whether there was a breach.
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> d) The learned judge erred by disregarding the evidence that there was no obligation on the Appellant to deliver vacant possession of the property to the Respondent.

> e) In considering the Appellant's application to strike out, the learned judge erred in applying a test of 'unjust harassment' as opposed to the ***Henderson v Henderson*** rule of whether the issues confronting the court on this new claim ought properly to have been raised in the previous proceedings."

Submissions on behalf of the applicant

[16] Mr Kelman's submissions were two-fold, firstly that Sagicor Bank has a real chance of succeeding on its appeal and secondly that the justice of the case lies in granting the stay of execution. Counsel placed reliance on the case of **Kingsley Thomas v Collin Innis** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 99/2005, judgment delivered 14 February 2006, wherein K Harrison JA opined at paragraph 11:

> "In exercising one's discretion to grant a stay of execution, it will depend upon all the circumstances of the case. The essential factor is the risk of injustice. See the un-reported English case of ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA Civ 1915."

[17] In support of his first contention that the appeal has a real chance of success, Mr Kelman referred to the agreement for sale which Harley Corporation relied on in support of its claim. He submitted that there was neither an express nor implied covenant for Sagicor Bank to give to Harley Corporation vacant possession of the property. This, he argued, is clear from an analysis of the literal meaning of the words used in the agreement, which include the following terms:

> i. "the property shall be sold as the same shall stand at the time of signing hereof without reference to extent or condition respectively and the Purchaser shall take the

property in the state and condition in which the same may be actually found"

ii. "Possession upon payment of the full purchase price."

[18] Further, he submitted that there was no contention by Harley Corporation that the obligation to give vacant possession was an implied term of the agreement for sale and, in the absence of such a provision, there could have been no breach by Sagicor Bank. However, he went on to submit that even if Harley Corporation's assertions are true, that it was entitled to vacant possession, a cause of action for breach of contract would have arisen on the date of the breach, which would have been in 1995. As such, the claim which was filed in 2018 was statute-barred. In the circumstances, it was submitted that there is no reasonable basis for bringing the claim and it therefore amounts to an abuse of the court's process.

[19] Mr Kelman pointed out that Harley Corporation made no assertion, in its pleadings or otherwise, that any of the exceptions under the Limitations Act 1623 applies to its claim. Accordingly, he argued that the learned judge erred when she ruled that despite the cause of action having arisen in 1995, there were circumstances precluding Harley Corporation from prosecuting its claim against Sagicor Bank.

[20] It was also argued that the claim is an abuse of process because it is *res judicata*. Counsel contended that Harley Corporation had several opportunities in the past to bring forward its whole case but has failed to do so. As such, its attempt to prosecute a claim against Sagicor Bank for an alleged breach which it could have sued for in its other claims should not be countenanced by the court. Harley Corporation

ought to have included Sagicor Bank in the 1996 proceedings brought against the third party for recovery of possession.

[21] The principle from the case **Henderson v Henderson** (1843) 3 Hare 100, was commended as applicable, namely "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case".

[22] By way of application of this principle, it was submitted that Harley Corporation's failure to claim against Sagicor Bank, through its negligence, inadvertence or accident, precludes it from now bringing a claim against Sagicor Bank, over two decades later.

[23] Additionally, Mr Kelman argued that the interests of justice lie in favour of the court granting the application for stay pending the outcome of Sagicor Bank's appeal. This is so primarily because it is likely that Harley Corporation will be unable to repay costs in the event that Sagicor Bank's appeal is successful. Reliance was placed on the case of **Boxing Brands Limited v Sports Direct International Plc & Ors** [2015] EWCA Civ 185 where the English Court of Appeal had to consider whether to grant an application for stay of execution of certain costs orders. In granting the application, the court considered the likelihood of Boxing Brands being able to repay costs in the event

Sports Direct succeeded on the appeal. The court ruled that since Boxing Brands was a "worthless" company, the justice of the case required an order staying the costs order.

[24] Reference was made to the records obtained from the Companies Office of Jamaica, which indicated that in 2017 inquiries were being made by the Registrar to ascertain whether Harley Corporation was carrying on business or in operation. Further, the filings of Harley Corporation in 2018 indicated that the last annual return was filed on 3 April 1986 and that filings were being updated to 3 April 1987. According to counsel, this anecdotal evidence indicated that it is unlikely that Harley Corporation is trading and, as such, any sum paid by Sagicor Bank may not be recoverable in the event that the appeal is successful.

[25] It was conceded that Harley Corporation should not be lightly deprived of the fruits of its judgment, however, it was submitted that the right should be tempered in this case in the court's effort to do justice pending the outcome of the appeal. Particularly since Harley Corporation has not demonstrated that it would suffer any injustice by the grant of an order staying execution.

The response

[26] Counsel for Harley Corporation, Mr Kandekore, did not file any submissions in response. Instead, he made oral submissions and relied on two authorities.

[27] The essence of Mr Kandekore's submissions may be summarised as follows:

i) The only time that Harley Corporation could have brought an action against Sagicor Bank was after the Judicial Committee of the Privy Council dismissed Ital Walters' application for permission to appeal (which took place on 27 May 2014). Further, there was a finding by Sykes J that the title was obtained by fraud which precluded Harley Corporation from claiming against Sagicor Bank, its only recourse was to appeal to this court;

ii) The learned judge was correct in refusing the application for summary judgment as she would have been required to make findings of fact which would have been impermissible. He referred to the case of **McDonald's Corp and another v Steel and another** [1995] 3 All ER 615, wherein it was opined as follows:

> "It is to be remembered, however, that the evidence on which a defendant may be entitled to rely at trial may take a number of different forms. It may include: (a) his own evidence and the evidence of witnesses called on his behalf, (b) evidence contained in Civil Evidence Act statements, (c) evidence contained in his own documents or in documents produced by third parties on subpoena, (d) evidence elicited from the plaintiff or the plaintiff's witnesses in the course of cross-examination, (e) answers to interrogatories and (f) evidence contained in documents disclosed by the plaintiff on discovery."

Reliance was also placed on the case of **Wenlock v Moloney and others** [1965] 1 WLR 1238, in particular the dictum of Sellers LJ:

> "There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the court but not, as far as we have been informed, or as I know, where it has involved the trial of the whole action when facts and issues had been raised and were in dispute. To try the issues in this way is to usurp the function of the trial judge."

iii) Sagicor Bank's prospect of succeeding on its appeal was "zero"; and

iv) A principle relevant to the grant of a stay is that the court must be satisfied that the applicant will be ruined if it is not granted. He characterised Sagicor Bank as "a big rich bank" which he submitted would not be ruined without a stay.

Discussion and analysis

[28] The court's jurisdiction to grant stays of execution arises under the Judicature (Appellate Jurisdiction) Act and the Court of Appeal Rules, 2002.

[29] Section 10 of the Act states:

> "Subject to the provisions of this Act and to rules of Appeals court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to

> the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

Rule 2.11(1)(b) of the Rules states:

> "A single judge may make orders –
>
> ….
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal."

[30] I adopt the statement of the relevant principles as concisely formulated by Morrison JA (as he then was) in **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16, at paragraph [10]:

> "[10] The jurisdiction of a single judge of appeal to grant a stay of execution is, as Phillips JA observed in **Reliant Enterprise Communications Ltd v Twomey Group and Another** (SCCA 99/2009, App 144 and 181/2009, judgment delivered 2 December 2003, para [43]) 'absolute and unfettered'. The starting point is, in my view, the well established principle that there must be a good reason for depriving a claimant from obtaining the points of a judgment. In deciding whether or not to grant a stay, this court has in recent times consistently applied the test formulated in **Hammond Suddard** and it is now well established that the applicant must show that he has an appeal with some prospect of success, and that he is likely to be exposed to ruin if called upon to pay the judgment. It is, in my view, essentially a balancing exercise, in which the courts seek to recognise the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay."

[31] In considering Sagicor Bank's prospects of success, I did not find the authorities cited by Mr Kandekore to be helpful in my determination of this issue. Even in the absence of learned judge's reasons, I am prepared to state that Sagicor Bank's appeal cannot reasonably be considered to be "wholly unmeritorious or wholly unlikely to succeed" (per McGaw LJ in **Sewing Machine Rentals Ltd v Wilson & Another** [1976] 1 WLR 37) or, as Mr Kandekore put it, have "zero" prospect of success.

[32] As I understand it, it is common ground that an agreement for sale of land was entered into on or about 25 February 1995. Possession, according to paragraph 4 of the statement of claim in Suit No CL 1996/H 094[3] was given to Harley Corporation on 6 January 1995 although the sale was not completed until 6 March 1995. Sagicor Bank has raised a limitation defence as it is entitled to do pursuant to the Limitation of Actions Act, which expressly recognises the reception of the United Kingdom Statute 21 James I Cap 16. It is obvious that a claim which is statute barred will have no prospect of success at trial and is therefore an abuse of process, making it liable to be struck out pursuant to rule 26.3 of the Civil Procedure Rules (see dicta of Dukharan JA in **International Asset Services Limited v Edgar Watson** [2014] JMCA Civ 42, at paragraphs [15] and [25]). Counsel for Harley Corporation did not make any submissions in relation to the limitation period nor did he state what exceptions the learned judge found to be applicable. He merely submitted that the claim could not

[3] Harley Corporation Trust Company Limited v Ital Walters

have been brought prior and that the learned judge was correct, insofar that she could not make findings of fact.

[33] It is not readily apparent what factual dispute would have caused the learned judge to find that Sagicor Bank could not rely on "the protection of the Act" (per Zacca JA (as he then was) in **Lloyd v The Jamaica Defence Board et al** (1981) 18 JLR 223, 226) particularly since there is a challenge to the evidential basis on which the learned judge made her findings.

[34] It is also not readily apparent why Harley Corporation did not institute proceedings against Sagicor Bank at the time when it filed the claim against Ital Walters. In this regard, the principle in **Henderson v Henderson** is applicable.

[35] In respect of the alternative defence, that there was no express or implied covenant for vacant possession, it is equally unclear why a full investigation at trial would be necessary. Again, this court did not have the benefit of the learned judge's reasons but in my respectful view a consideration of this sort of defence appears to warrant a mere construction of the agreement for sale, which can be done on an application for summary judgment.

[36] In light of the above, it is my view that the appeal has a reasonable prospect of success.

[37] Having found that Sagicor Bank's appeal demonstrates some prospect of success, I will now turn to the other consideration - whether Sagicor Bank is likely to be

exposed to ruin if called upon to pay the judgment. This issue can be resolved quite simply, particularly since Mr Kelman did not even attempt to pursue this argument. From all appearances, Sagicor Bank would not be exposed to financial ruin if it were called upon to pay the judgment. In carrying out the balancing exercise Morrison JA spoke of, I am minded to agree with Mr Kelman's submission that while Harley Corporation should not be lightly deprived of the fruits of its judgment, its right should be tempered particularly since it has not demonstrated that it would suffer any injustice by the grant of an order staying execution.

[38] By contrast, I accept that Sagicor Bank would be prejudiced if Harley Corporation is unable to repay the costs, having regard to its uncertain trading status which has not been addressed. While I would hesitate to apply the term "worthless" to Harley Corporation, I find the reasoning in **Boxing Brands Limited v Sports Direct International** to be apt to the case at bar. In that case Sir Colin Rimer said:

> "30…But in a case of the present nature, where BBL apparently has no assets with which to settle any liabilities it may incur to the defendants other than a costs liability owed to it by those defendants, I can see no good reason why the court should not exercise its discretion to stay that costs liability until after the outcome of the appeals is known.
>
> 31. I recognise that that may in substance amount to the giving of security to the appellants for their costs and damages claim. But that is simply a consequence of the exercise by the court of its jurisdiction to stay the £100,000 order. In the present case, not only can I see no reason why in principle the court should not make such an order, I consider that for the court to do so would be a fair and just course for it to adopt. There is no suggestion by anyone that BBL will not recover the £100,000 if the defendants' appeals subsequently fail. In the meantime, BBL will be earning 8

> per cent interest on the £100,000, which is probably a better rate than it would get anywhere else."

[39] Similarly, in the case at bar there has been no suggestion that Harley Corporation will be unable to recover the funds if a stay of execution is granted and Sagicor Bank's appeal fails. I would also adopt the reasoning of K Harrison JA from **Kingsley Thomas v Collin Innis**, at paragraph 13:

> "…The risk of the Appellant being unable to recover what has been paid to the Respondent if the judgment is enforced in the meantime, is a material factor one ought to bear in mind. I do not believe and I so hold that, it is fatal to one's application if he does not say, that without a stay of execution he will be ruined…the Appellant has stated that he has an appeal which has some prospect of success. These factors to my mind, are, legitimate reasons for granting a stay of execution."

[40] Having regard to all the circumstances, the justice of the case lies in granting the stay of execution. Accordingly, I would exercise my discretion and order as follows:

1. There be a stay of execution of the costs order made on 24 June 2019 pending the determination of the appeal.

2. There is no order as to costs of this application.