

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION

CLAIM NO. HCV 2526/2004

IN THE MATTER of all those parcels of land
part of Harmony Hall in the parish of St. Mary
being the land comprised in Certificates of
Title registered at volume 1200 folio 122, 126
and 154 of the Register Book of Titles

AND

IN THE MATTER of an application for
registration of an instrument of mortgage in
respect of the land comprised in volume 1200
folios 122, 126 and 154 of the Register Book
of Titles

AND

IN THE MATTER of agreements for sale
between Selective Homes & Properties Limited
and Robert Cartade dated the 15th day of
April 1987 with respect to all those parcels of
land registered at volume 591 folio 83 and 84

AND

IN THE MATTER of instruments of transfer
dated 20th day of July 1999 with respect of all
those parcels of land registered at volume
1200 folios 122, 126 and 154

AND

IN THE MATTER of caveats numbered
1070277, 1070278 and 1070279 recorded
against certificates of title registered at
volume 1200 folios 154, 122, and 126
respectively (sic)

BETWEEN SEBOL LIMITED

FIRST CLAIMANT

AND SELECTIVE HOMES & PROPERTIES
LIMITED

SECOND CLAIMANT

AND KEN TOMLINSON
(As the Receiver of Western Cement
Company Limited)

FIRST DEFENDANT

AND	NATIONAL INVESTMENT BANK OF JAMAICA LIMITED	SECOND DEFENDANT
AND	THE REGISTRAR OF TITLES	THIRD DEFENDANT
AND	PAN CARIBBEAN FINANCIAL SERVICES LIMITED (Formerly TRAFALGAR DEVELOPMENT BANK LIMITED)	FOURTH DEFENDANT

IN CHAMBERS

John Vassell Q.C., Courtney Bailey and Kerry Ann Ebanks instructed by DunnCox for the claimants

Charles Piper and Kameka Tomlinson for first and second defendants

Kevin Powell instructed by the Director of State Proceedings for the third defendant

Gordon Robinson instructed by Lynda Mair of Patterson Mair and Hamilton for the fourth defendant

February 19, September 27, October 9, 2007

**APPLICATION TO STRIKE OUT CASE, RULE 26.3 (1) (C) OF THE CIVIL
PROCEDURE RULES**

SYKES J.

Issue

1. The sole issue on this application is whether the claimants' statement of case against Pan Caribbean Financial Services Limited ("Pan Caribbean") as pleaded discloses no reasonable ground for bringing the claim. This is an application under rule 26.3 (1) (c) of the Civil Procedure Rules. Mr. Gordon Robinson on behalf of Pan Caribbean makes two basic points. The first is that in Jamaica a mortgage involving property under the Registration of Titles Act cannot be rectified and if he is wrong in this, there is no case for rectification here because the claimants' real complaint is that the loan agreement as distinct from the mortgage did not capture what was agreed. Second, Pan Caribbean is no longer the mortgagee and as such cannot exercise any power under the mortgage and therefore ought not to be a party to the claim. The consequence is that no wrong doing can be alleged against Pan Caribbean because it is no longer in a position to utilise any power under the mortgage.
2. I should point out that when Mr. Robinson made these submissions on February 19, 2007, they were made in respect of the particulars of claim dated February 17, 2006. At the end of those submissions Mr. John Vassell Q.C. applied to amend the particulars of claim. The application was not opposed by Mr. Robinson since he formed the view that no amendment can save the claimants' case against Pan Caribbean. The application was granted. Thus when Mr. Vassell replied on September 27, 2007, he referred to the amended particulars of claim.

The leading personalities

3. Sebol Limited is a company incorporated in the Cayman Islands ("Sebol"). Selective Homes and Properties is a company incorporated in Jamaica ("Selective"). Western Cement Company Limited ("WCC") is a company incorporated in Jamaica to manufacture cement in the parish of St. Elizabeth. Mr. Robert Cartade is a director Selective and WCC. The project failed which led to WCC being placed in receivership. Mr. Ken Tomlinson is the receiver of WCC ("the receiver"). National Investment Bank of Jamaica Limited ("NIBJ") is the assignee of Pan Caribbean's mortgage granted by Selective over three properties. Pan Caribbean was formerly known as Trafalgar Development Bank ("TDB"). The Registrar of Titles is a nominal defendant who was asked by the receiver to register the mortgage. I shall use the name Pan Caribbean to refer to mortgagee when it was known as TDB.

The dispute

4. This case is ultimately about whether a mortgage instrument can be rectified and if it can, should it be rectified. If the claimants are successful, then the further question of which of two equitable interests in the mortgaged properties should have priority may be resolved.
5. Let me relate the allegations showing how the claim arose. As stated already, WCC was incorporated to manufacture cement. The factory was to be located in the parish of St. Elizabeth. WCC needed money to borrow money to fund this enterprise. A number of lenders formed themselves into a consortium to fund this enterprise. Pan Caribbean was the leading lender.
6. Needless to say, security was needed for these loans. After some discussion between WCC and Mr. Cartade, it was agreed that Selective would use three properties to secure part of the loan made to WCC by Pan Caribbean. The three properties are registered at volume 1200 folios 122, 126 and 154 of the Register Book of Titles. Selective granted the mortgage granted over the properties. The mortgage instrument is dated October 20, 1995. The mortgage was not and is not registered. This mortgage has now been assigned to NIBJ. WCC defaulted on the loans. The receiver was appointed by NIBJ to realise the security. The receiver attempted to register the mortgage and it is this registration attempt that has sparked this claim. This mortgage is one of the equitable interests involved in the priority dispute.
7. This is how the other equitable interest arose. Selective was and is the registered proprietor of the three properties at material times up to and including October 20, 1995, when the mortgage was executed. On April 15, 1987, Selective and Mr. Cartade had a sale agreement to the effect that the three properties would be purchased by Mr. Cartade or his nominee. It is said that the sale agreements were signed and stamped with the appropriate stamp duty. It appears that Mr. Cartade nominated Sebol to become the transferee of the three properties. It is further alleged that on July 20, 1999, transfers were signed by Selective as transferor and Sebol as transferee. This transaction it is said gives Sebol an equitable interest in the three properties. These transfers were not registered. Sebol alleges that in order to protect its equitable interest, it lodged caveats against all three properties.

8. Mr. Cartade alleges that when the loan from Pan Caribbean was being discussed, he told Pan Caribbean that Sebol was the transferee of the properties and that he would need to get Sebol's permission to allow Selective to grant the mortgage. Of course, this conversation is denied by the receiver, NIBJ and Pan Caribbean.
9. The claimants allege that during the negotiations leading up to the execution of the loan agreement and the mortgage, Pan Caribbean "expressed the opinion that the collateral offered by WCC for the loan (being the declared assets of the equipment to be used in the lime plant and owned by WCC) would not be realised until the commissioning of the lime plant, when much of the said equipment would be used in the new lime plant". This led Selective and Pan Caribbean to agree that Selective would offer the three properties as collateral for the loan to WCC until the lime plant was commissioned. After the commissioning of the plant, Selective's properties which would be offered as security in the interim would be released.
10. The claimants say that when Selective executed the loan documents and the mortgage instrument, it was under the mistaken impression that the mortgage instrument reflected the understanding between Selective and Pan Caribbean. The claimants say that the mortgage instrument should be rectified to reflect this agreement between Selective and Pan Caribbean.
11. How does NIBJ feature in this dispute? NIBJ invested in the WCC cement company project by way of equity and not debt. The sum allegedly invested was US\$1,1091,392. WCC gave NIBJ preference shares in exchange for the sum invested. When WCC defaulted, NIBJ bought the debt of the lending consortium. On January 31, 2003, Pan Caribbean assigned to NIBJ all rights, title and interest under the loan as well as collateral securities. Then by deed of assignment dated May 1, 2003, Pan Caribbean, for US\$1,055,429.83, assigned to NIBJ "absolutely, all of ... rights, title and interest in the debts and loan documents relating to the financing of Western for the said project" (see para. 23 of amended defence of the receiver and NIBJ dated April 25, 2006).

The submissions

12. Mr. Gordon Robinson submitted that a mortgage is security for a loan and not the loan itself and therefore when the mortgage is granted over property by the mortgagor, regardless of the terms of the loan, the mortgage is just that - a security interest in property. He contended that the terms of the loan may indicate the duration of the security and the terms of the loan may regulate how, if and when the security is enforced. This led to his ultimate submission on this point which was that the claimants' case, as stated, is seeking to establish a conditional mortgage which he submitted was a legal impossibility. Consequently, in this case there is no case for rectification. One either has a mortgage or one does not.
13. Mr. Vassell resists this submission by Mr. Robinson. He submitted that there is no authority for the view that equity will not rectify a mortgage. He referred to a number of cases in which courts in Canada and Australia have entertained claims for modification of mortgage instruments (see *Bank of Montreal v Pender* 205 Nfld & P. E.I.R. 353; *MSW Properties Pty v Law Mortgages Queensland Pty Ltd.* [2003] QCA 257; *Lorraine Nunn v Hugh Wily* [2001] NSWSC 317). Other cases were

cited. In some of the cases, the claim was successful and in others it was not. The cases do not have any discussion on whether a mortgage can be rectified. They proceed on the assumption that rectification of a mortgage instrument is possible. These cases make it possible for Selective to argue that a power in the courts to rectify a mortgage exists. I do not ignore Mr. Robinson's comments on these cases but in light of the cases cited above and others, the claim is not without some legal foundation. I therefore would not strike out the claim against Pan Caribbean on this basis.

14. The other critical submission made by Mr. Robinson is that the claimants accept that the mortgage has been assigned and therefore Pan Caribbean is no longer the mortgagee. The fourth paragraph of the amended particulars of claim reads:

The 2nd Defendant is the Assignee of the 4th Defendant's rights, title and interest in the debts under a Mortgage lodged at the Office of the Registrar of Titles as Mortgage Instrument No.1294239 (sic) and other loan documents, as well as the securities held in connection therewith, including the properties which are the subject of these proceedings.

15. According to Mr. Robinson if this pleading is correct, then it follows that there is no issue between the claimants and Pan Caribbean. Pan Caribbean is not purporting to exercise any power or right conferred by the mortgage instrument. In short, there is no legal necessity for Pan Caribbean to be named as a defendant when the real quarrel is between NIBJ as assignee and Mr. Ken Tomlinson who was appointed receiver by NIBJ. I do not see why Pan Caribbean should be saddled with the burden of defending a claim in which they have no legal or equitable interest. They have sold the debt and have moved on.

The legal test

16. This application being under rule 26.3(1) (c) of the CPR no evidence is admissible. Mr. Vassell Q.C. relied on *Three Rivers D.C. v Bank of England* [2001] 2 All E.R. to say that one simply looks at the pleadings to see whether the pleadings disclose a cause of action. He relied on the judgment of Lord Hutton and in particular, paragraphs 116 and 117.

17. For ease of reference and to facilitate understanding of my analysis, I set out the rule. It reads:

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-

(a) ...

(b) ...

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending the claim

18. Mr. Vassell relies on the Court of Appeal of Jamaica's decision in *S & T Distributors Limited and S & T Limited v CIBC Jamaica Limited and Royal* (delivered July 31, 2007). Harris J.A. at pages 29 - 30 said:

The striking out of a claim is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implications of striking out and balance them carefully against the principles as prescribed by the particular cause of action which is sought to be struck out.

...
In light of the foregoing, it is clear that a claim will be only be struck out as disclosing no reasonable cause of action if it is obvious that the claimant has no real prospect of successfully prosecuting the claim. Real prospect of success contemplates the existence of a claim which carries with it realistic prospect successfully prosecuting the claim as opposed to a "fanciful" prospect.

19. In the Court of Appeal of New Foundland Greene J.A. explained, at paragraph 13 in *Seadane International Inc. v. Morgan International Marketing Co.* 180 Nfld & P.E.I.R. 97, the reason for the striking power as well as the reason for caution in exercising that power:

This rule has, as one of its purposes, the control of access to the court system by allowing for a preemptive strike to be made against claims that are apparent on their face to be without any basis in law and hence do not justify subjecting the person having to respond to the claim to the time, inconvenience and expense of being drawn into full-scale litigation. As such, it works against the general principle of universal access to the courts and, hence, is given a limited sphere of operation. Where it applies, however, the rule provides an efficient, though drastic, remedy for fundamentally defective pleading.

20. Learned Queen's Counsel also relied on *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, a decision cited by Harris J.A. in *S & T Distributors Limited*. The *Drummond-Jackson* case is to the same effect as *S & T Distributors Limited* case. The case of *Wenlock v Moloney* [1965] 2 All ER 871 was also cited by Mr. Vassell. It is to the same effect as the others cited.

21. Mr. Vassell further submitted that in a claim for rectification it is necessary to bring all the parties to the document to be rectified unless the provision to be rectified has no effect whatever on the party. If Mr. Vassell is correct in this then it is difficult to resist Mr. Robinson's submission because Mr. Robinson is saying that Pan Caribbean is no longer a party to the mortgage. The mortgage and loan were assigned and Pan Caribbean has not and cannot exercise any power under the mortgage.

22. In the case of *Wilson v Wilson* [1969] 3 All E.R. 945, the vendor who was a party to the agreement was not a party to the claim between the two purchasers because the vendor was in no way affected or concerned with that part of the deed which was sought to be rectified. By parity of reasoning, I do not see how a person who has sold assigned his mortgage can be said to be a necessary party to this

rectification action. How will Pan Caribbean be affected? The very pleading cited above concedes the point. It is the person to whom the mortgage was assigned who was purporting to exercise the power under the mortgage. None of the claimants has said that the assignment was defective or ineffective in law to transfer Pan Caribbean's rights under the mortgage.

23. The position I have taken is supported by the case of *Lorraine Nunn v Hugh Wily* [2001] NSWSC 317, a decision of Austin J. of the New South Wales Supreme Court. In that case the claimant, Mrs. Lorraine Nunn loaned money to Mr. and Mrs. Ewins who in turn granted Mrs. Nunn a mortgage over certain property. Mr. and Mrs. Ewins became bankrupt and their estate was being administered by Mr. Wiley, the trustee in bankruptcy. Mrs. Nunn sought rectification of the mortgage. The trustee resisted. Mr. and Mrs. Ewins gave evidence at the trial. They were not parties to the claim; only witnesses. What this case shows is that once one party to the mortgage has lost or transferred his rights under the mortgage and there is no right remaining in that party then it follows that such a person is not a necessary party to any action for rectification. That person, at best, is a witness for whomever needs his evidence.

24. 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 under 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. Thus 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 the claim and not on just whether the pleadings disclose a reasonable cause of action. In this case the claim for rectification is known to law but the grounds are not reasonable in light of Pan Caribbean's assignment of all its rights to NIBJ.

25. The CPR is a new procedural code. We must not keep resurrecting cases decided on the old rules that had a particular wording. The wording in the CPR was deliberately changed. It is for this reason that I do not find the old cases cited by Queen's Counsel of much help. They all dealt with the old rules. If Lord Hutton is saying that rule 3.4 (2) (a) of the English rules (Jamaican equivalent is rule 26.3 (1) (c)) means the same as the old rules dealing with a reasonable cause action as opposed to reasonable grounds for bringing the action then there is a difficulty. Mr. Vassell seems to think that that is what Lord Hutton meant (see 549b - 550j). However, I do not think so. At paragraph 118 (page 550b) his Lordship said: *The applications before Clarke J and the Court of Appeal were governed by the RSC but those rules have now been replaced by the Civil Procedure Rules 1998... I think that r 3.4 (2) (a) of the new rules corresponds in a broad way to RSC Ord. 18, r 19 (1) (a)* (My emphasis). I agree with his Lordship on this - in a broad way and the broad way is, I believe, as I have indicated, which is that it covers claims that are unknown to law, vague, incoherent and ill founded. It is not necessary to say how much more it covers but what I can say is that it covers the case before me.

26. Under the old rules the focus was on word perfection. If one looked at the pleadings and the pleadings were word perfect and indicated some known cause of action then it would not be struck out. The wording of the new rule is in keeping with the new focus on efficiency and speed as well as dealing with the cases justly. No litigant should have unnecessary costs imposed on them.

27. The claimants' pleaded case may be word perfect but it does not necessitate Pan Caribbean being a defendant. There is no dispute between Pan Caribbean and Selective or Sebol. Pan Caribbean has sold the mortgage and it is the purchaser of the mortgage who is acting under the powers it believes it has under the mortgage. It is the purchaser which has activated the receiver. I cannot see how a claim to have the loan or mortgage rectified can necessarily require that the original mortgagee be an actual party to the action. There is nothing to say that the action cannot be tried without Pan Caribbean being a party to the claim. It follows then that Selective and Sebol have no reasonable grounds for bringing a claim against Pan Caribbean. The error I believe arose because there is too much looking back to the old, looking at the new CPR and deciding which procedure in the new rules is similar to that in the old and seek to transpose the case law from the old law into the new rules. This technique has serious pitfalls which have been demonstrated in this case. It may be that the underlying thought processes of the old cases may have relevance under the regime but at the end of the day we must give effect to what the rules actually say and not encrust them with old cases.

Conclusion

28. Pan Caribbean succeeds. The claim against them is struck out in its entirety. Costs to Pan Caribbean to be agreed or taxed. Leave to appeal granted.