[2020] JMSC Civ. 161

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV07867

BETWEEN	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**CLAIMANT**
AND	**GLOBAL ARCHITECTURE DRAUGHTING LIMITED**	**1ST DEFENDANT**
AND	**GREGORY DUNCAN**	**2ND DEFENDANT**

IN CHAMBERS

Kathryn Williams instructed by Livingston Alexander & Levy for the Claimant/Judgment Creditor.

Annette J. Henry for 2nd Defendant/Judgment Debtor.

Heard June 22, July 2, 10 and 24, 2020.

Civil procedure – Enforcement of Money Judgment – Application for Provisional Charing Order to be made final – Whether judgment debtor has demonstrated that there are good grounds for not making a Final Charging Order – Rule 48.8 of the Civil Procedure Rules, 2002, as amended.

N. HART-HINES, J (Ag.)

Background

[1] In 2009, the 1st defendant/judgment debtor was involved in the business of property development and the 2nd defendant/judgment debtor was the Managing

Director of the 1st defendant company. A commitment letter dated March 23, 2010, indicates that the property being developed was located at Lot 68 Woodpecker Avenue, St. Georges, Hellshire, St. Catherine. The 2nd defendant approached the claimant for a loan in 2009 and 2010. As a result, the claimant authorised two credit facilities to the 1st defendant, which was named as "the borrower" in the "Terms and Conditions of Credit Facility" of the commitment letter dated March 23, 2010. Pursuant to the credit facility called "A", and pursuant to the credit facility called "B", the sums of $5,000,000.00 and $2,900,000.00 respectively, were made available to the 1st defendant. It was agreed between the parties that the interest rate payable was 3% per annum over and above the basic lending rate at the time of the execution of the Promissory Notes, which were 19.125% per annum and 19.875% per annum respectively. The sums were to be repaid in full by June 30, 2010 from proceeds of the sale of units 3 and 4 of Lot 68 Woodpecker Avenue, St. Georges, Hellshire, St. Catherine. The security to be provided was indicated as follows:

> *"Guarantee of Gregory Duncan supported by:*
>
> - *Undertaking from the Borrower's Attorney-At-Law, Patrick Bailey & Co, to forward proceeds from sale of property to BNS Spanish Town in the amount of $7,900,000 plus any interest*
> - *Legal Mortgage documents and Letter of Direction over residential property located at Apartment #5, Lot 68 Woodpecker Avenue, St. Georges, St. Catherine registered at Vol 1144 Fol 828 in the name of Gregory Duncan, held in registrable form."*

[2] The claimant relied on the fact that the 2nd defendant executed several documents, as the basis for its claim against the 2nd defendant. The 2nd defendant executed (1) two Promissory Notes in respect of the sums of $5,000,000.00 and $2,900,000.00 on January 12, 2009 and January 27, 2010 respectively, (2) the Terms and Conditions of Credit Facility on March 25, 2010, and (3) an Instrument of Guarantee to the claimant on March 3, 2010. It is not clear whether the 2nd defendant ever executed a Memorandum of Mortgage under the Registration of Titles Act in relation to the $7,900,000.00 borrowed in 2009 and 2010. However, it is clear that in executing the Instrument of Guarantee, the 2nd defendant, guaranteed payment to the claimant of all debts and liabilities owing by the 1st defendant to the claimant, limited to the sum of $5,000,000.00 with interest.

[3] It is alleged that the 1st defendant failed to repay the loan amount in breach of the said agreement with the claimant, and thus demand letters dated July 14, 2011 were issued to both defendants and when the defendants failed, neglected or refused to pay the sums outstanding, the claim form and particulars of claim were filed and served. Upon the defendants failing to file an Acknowledgment of Service, the claimant obtained judgment in default against the defendants on May 15, 2013.

[4] Since 2013 the claimant/judgment creditor has taken several steps to enforce the judgment, and although previous orders for payment were made by other judges, neither defendant made any payment. On January 16, 2019 a Provisional Charging Order was granted by the Honourable Miss Justice C. McDonald over a parcel of land formerly known as part of Hellshire, now known as St. Georges in the parish of Saint Catherine being Strata Lot numbered Three on the Strata Plan numbered Two Thousand Four Hundred and Twenty Six and Eight undivided 1/71 share in the common property therein and being part of the land comprised in Certificate of Title registered at Volume 1144 Folio 828, now registered at Volume 1432 Folio 79 of the Register Book of Titles. The claimant now seeks to have the Provisional Charging Order made final.

[5] At the hearing on June 22, 2020, the court enquired whether the 1st defendant was represented and was informed that the 1st defendant has been wound up and dissolved. The hearing of the application for the Final Charging Order proceeded on the basis that the claimant is seeking to enforce the judgment against the 2nd defendant, since the 1st defendant had been dissolved. No evidence was presented to me to support the assertion that the 1st defendant was dissolved, but it was not challenged by the claimant. Paragraph 7 of Miss Williams' submissions suggests that the 1st defendant was discovered to have ceased operations from about 2014, when the bailiff was unable to execute the Order for Seizure and Sale of goods.

[6] On June 8, 2020 the 2nd defendant filed an objection pursuant to rule 48.8(2) of the Civil Procedure Rules ("CPR"). This document also purported to be an application to set aside the default judgment entered on May 15, 2013, in that it was headed "Objection and Application" and the content referred to an application pursuant to rule 13.2(1)(c) of the CPR. The basis of the objection to the making of a Final Charging Order is that 2nd defendant did not owe money the claimant. The 2nd defendant sought

to set aside the default judgment on the basis that the default judgment was wrongly entered because the whole of the claim was satisfied before judgment was entered in default on May 15, 2013.

[7] The claimant/judgment creditor maintains that the debt has not been satisfied and the total due to it as at July 2, 2020 is $26,292,881.94 inclusive of interest. The issue for the consideration of this court is whether it is appropriate in all the circumstances to make the Final Charging Order.

The Hearing and Submissions

[8] The hearing of the application for the Provisional Charing Order to be made final was fixed for June 22, 2020. The 2nd defendant filed his objection 14 days before the hearing and has complied with rule 48.8(3) of the CPR. In his objection the 2nd defendant urged the Court to discharge the Provisional Charging Order on the basis that the sums owed to the bank were repaid in full on or before December 31, 2010. It was further alleged that the claimant's mortgage numbered 1788424 was discharged on July 29, 2019.

[9] Further, the 2nd defendant alleges that pursuant to the loan agreement, a bank account was opened at the claimant's Spanish Town branch to facilitate the repayment of the loan, and that the account number is 600505. The 2nd defendant alleges that the loan was repaid by the defendants through direct deposits to the account as well as payments made by cheques by his Attorney-at-Law. He relied on letters dated June 27, 2009, June 25, 2010 and August 31, 2010 from his lawyer which made reference to three cheques totalling approximately $1,215,000.00 in payments. The 2nd defendant further alleges that several payments were made between the period 2009-2012 and he relies on a certified statement obtained on January 23 2019 showing payments and showing a closing balance of $2,028.12 for the period October to November 2012.

[10] During the hearing on June 22, 2020, the court observed that in addition to the Promissory Notes, the 2nd defendant executed an Instrument of Guarantee which was limited to the sum of $5,000,000.00 with interest. The Promissory Notes said "we promise to pay" the claimant, and the 2nd defendant affixed his signature as well as

the name of the 1st defendant company. Ostensibly, the Promissory Notes were executed by the 2nd defendant in his capacity as Managing Director of the 1st defendant, to whom the commitment letter stated was "the borrower". However, the Instrument of Guarantee which was executed in the 2nd defendant's personal capacity. The court therefore invited further submissions from counsel in respect of the Instrument of Guarantee and the hearing was adjourned to July 2, 2020.

[11] On June 26, 2020, the 2nd defendant filed an affidavit, without the leave of the court. Therein, the 2nd defendant stated that the Instrument of Guarantee which he signed in 2010 was secured by a Letter of Undertaking issued by his former Attorneys-at-Law, Patrick Bailey & Co dated December 19, 2008. He stated that the claimant has presented no evidence of demand on this Letter of Undertaking, and submitted that the claimant should pursue his former Attorney-at-Law to honour the undertaking given.

[12] It was only in his affidavit filed on June 26, 2020 that the 2nd defendant sought, for the first time, to introduce evidence of his personal circumstances and the hardship or prejudice he would suffer if the Final Charging Order was made. He said that it would be unjust to make the final order since his first born child, who attends UTECH, resides at the address with his mother.

[13] At the adjourned hearing on July 2, 2020, counsel Miss Williams applied for permission to file an affidavit in response to the 2nd defendant's affidavit. The court was permitted the 2nd defendant's affidavit filed without leave on June 26, 2020 to stand and the claimant was permitted to file an affidavit in response by July 8, 2020.

[14] In response to the 2nd defendant's affidavit, Mr. Anthony Boyd on behalf of the claimant said that account number 600505 was not the account from which the two loans were to be serviced, and the lodgement of cheques and payments made through that account related to another loan facility. The relevant loan accounts from which the two loans were to be serviced are account number 8000411 and 8000461. Further, he stated that mortgage numbered 1788424 which was discharged on July 29, 2019 related to another loan facility. As such, the loans which are the subject of this claim have not been repaid. Further, Mr. Boyd stated that the Letter of Undertaking given by Attorneys-at-Law, Patrick Bailey & Co in respect of the loans in this case, was given

on March 3, 2010 and the earlier Letter of Undertaking dated December 19, 2008 related to another loan facility.

[15] On July 10, 2020, the court heard fulsome submissions and had regard to the written submissions filed previously. I will not repeat the submissions in detail here, but counsel should rest assured that I have given consideration to all the submissions. In essence, the thrust of Miss Henry's submission was that the Provisional Charging Order should be discharged on the basis that there were no sums owed to the claimant by the 2nd defendant. Miss Henry also submitted that the claimant had not complied with rule 48.3(2)(b) of the CPR to produce a certified statement of sums owing.

[16] Counsel Miss Williams submitted that the claimant had complied with rule 48.3(2)(b) of the CPR as Mr. Anthony Boyd was the claimant's Manager for the Loan Recoveries Unit and was duly authorised to check records and swear an affidavit in relation to the total sums which remain due and owing to the claimant, and he had certified that the said sums were still outstanding. It was submitted that more than one loan facility had been extended to the defendants and the 2nd defendant was mistaken when he averred that he had repaid the $7,900,000.00. The total sum due to the claimant is $26,292,881.94 inclusive of interest, as at July 2, 2020.

[17] The court also heard submissions in relation to the Instrument of Guarantee and the two Letters of Undertaking issued by his former Attorneys-at-Law, Patrick Bailey & Co dated December 19, 2008 and dated March 3, 2010.

The issues

[18] The issues for the consideration of this court therefore are:

1. Whether the 2nd defendant/judgment debtor has properly applied to set aside the default judgment; and
2. Whether the 2nd defendant/judgment debtor has discharged the burden of showing that there are good grounds for not making the Provisional Charging Order final.

The Law

[19] Pursuant to rule 48.8(4) of the CPR, the Court may make a Final Charging Order, discharge the provisional charging order, or give directions for the resolution of any objections that cannot be fairly resolved summarily. The CPR does not indicate the factors which a court should consider in deciding whether or not to make a Final Charging Order. However, in exercising its powers pursuant to the rules, the court is always bound to give consideration to the overriding objective of the CPR of dealing with cases expeditiously and fairly, and this requires that the court consider all the relevant circumstances of the case.

[20] The burden of showing that there are good grounds for not making the Final Charging Order rests on the judgment debtor. In England, the courts have regard to two matters set out in section 1(5) of the Charging Orders Act 1979, which are (1) the personal circumstances of the debtor and (2) whether any of his creditors would likely be unduly prejudiced. There is no similar provision in this jurisdiction, but in my opinion principles of justice and proportionality require the court to hear the judgment debtor on matters of law and fact, within reason.

[21] In ***Jennifer Messado & Co. v North America Holdings Company Limited*** Claim No. 2011HCV 04943 and Claim No. 2011HCV 04669 (unreported) judgment delivered June 20, 2014 His Lordship Mr. Justice Brown at paragraph 61 said this:

> *"[61] What, then, may be some of the matters meet for the court's consideration in the exercise of its discretion whether to make a charging order? Under the* ***UK's Charging Orders Act 1979 (COA 1979)*** *the court is required to consider matters such as the personal circumstances of the debtor and whether any of his other creditors would likely be unduly prejudiced. Although these requirements have not been the subject of a statutory command to a Jamaican court, any court which is anxious to do justice would take them into consideration as a matter of course. In any event,* ***the court has at least to consider all the circumstances before deciding to grant the charging order****." (my emphasis)*

[22] Counsel for the claimant Miss Williams, agreed with His Lordship's view the view that the court ought to take into account all the circumstances of the case when making a charging order, and in particular any evidence before it as to the personal circumstances of the debtor and whether the judgment creditor would be unduly prejudiced if the order was not made.

[23] The wording of rule 48.8(4)(c) of the CPR that directions should be given where objections cannot be "fairly resolved summarily", suggests that the hearing of an application to grant a Final Charging Order is not to be too involved. However, it seems permissible to examine, perhaps cursorily, whether the judgment creditor has established its right to execute the judgment.

[24] In ***Gifford Morrell and Fiona Morrell v Workers Savings and Loan Bank*** (unreported), Supreme Court, Jamaica, Suit No CL 1996/M105 judgment delivered June 5, 2009, Campbell J considered an application for a Final Charging Order. In that case, the learned judge heard submissions on the issue of whether the Jamaica Redevelopment Foundation (JRF), as the legal and equitable assignee of the judgment debts, was required to provide evidence of a sale agreement in relation to its purchase of debts from the judgment creditor. The JRF had also been given a Power of Attorney by the judgment creditor, allowing the JRF to demand and receive the judgment debt in the name of the judgment creditor. Justice Campbell examined the sale agreement and other relevant documents which the creditors had argued were highly confidential, as they contained names of other parties and other debts. The learned judge was satisfied on the documents before him that the judgment debtors had adequate notification that the debt is in the hands of the JRF, that the Power of Attorney was exhibited, and that the JRF was entitled to enforce the judgment against the judgment debtors.

[25] I rely on the ***Morrell*** case as it suggests that the court is empowered to consider matters other than the judgment debtor's personal circumstances, when considering whether to make a Final Charging Order. Indeed, consideration was given to whether or not the person applying for the Final Charging Order was entitled to same.

[26] In the instant case, the 2nd defendant/judgment debtor alleges that the judgment creditor is not entitled to enforce the judgment because the sums had been repaid before the default judgment was entered against the defendants. I believe that it is permissible for the court to examine the documents relied on by judgment debtor in support of his assertion, as well as the documents relied on by the claimant/judgment creditor in relation to the agreement for the loans. In so doing, the court will be able to decide whether it is appropriate and just to grant the Final Charging Order.

[27] Further, the 2nd defendant has briefly referred to hardship to his child who resides at the property in question. However, it has been observed that the 2nd defendant is the sole owner of the property.

[28] Insofar as the 2nd defendant seemed to seek to set aside the default judgment, this court cannot set aside the default judgment, since no formal application was filed. Further, at this stage of the proceedings, no such application could seriously be made in light of the fact that an oral examination was conducted previously and the 2nd defendant attended hearings as far back as March 9, 2016 and filed affidavits in relation to his means to pay the debt. At some point between 2016 and the hearing in June 2020, the 2nd defendant had the benefit of legal representation.

[29] For the sake of completeness, it must be noted that no application was filed to set aside the default judgment. Rules 11.7, 11.8 and 11.9 of the CPR indicate what an application must include, the need for notice of the application and the need for evidence in support of an application. The relevant portions of these rules state as follows:

> *"**11.7 (1)** An application must state -*
> *(a) what order the applicant is seeking;*
> *(b) briefly, the grounds on which the applicant is seeking the order; and*
> *(c) the applicant's estimate of the likely length of hearing….*
>
> ***11.8 (1)** The general rule is that the applicant must give notice of the application to each respondent.*
> ***(2)** An applicant may make an application without giving notice if this is permitted by -*
> *(a) a rule; or*
> *(b) a practice direction.*
> ***(3)** Notice of the application must be included in the form used to make the application (form 7).*
>
> ***11.9 (1)** The applicant need not give evidence in support of an application unless it is required by -*
> *(a) a rule;*
> *(b) a practice direction; or*
> *(c) a court order…."*

[30] Having regard to the need for notice, affidavit evidence and the need to file an application in the Civil Registry indicating the likely length of the hearing, the 2nd defendant had not filed an application in compliance with the rules 11.7, 11.8 and 11.9

of the CPR. However, the court permitted the 2nd defendant to be heard in relation to his allegation that there were good grounds for not making a Final Charging Order. I will now indicate my analysis in respect of the substance of the objection, and indicate whether the 2nd defendant has discharged his burden.

Analysis

[31] The 2nd defendant has alleged that mortgage numbered 1788424 which was discharged on July 29, 2019 was the mortgage registered in relation to the 2009 and 2010 loans made by the claimant to the defendants. In response to that allegation, the claimant, through Mr. Boyd, has said that the 2nd defendant is mistaken and that mortgage numbered 1788424 related to a later loan, which was given to the 2nd defendant personally.

[32] The court has observed that although the certificate of title registered at Volume 1432 Folio 79 of the Register Book of Titles (in respect of the relevant property) was issued on July 24, 2009, the earliest date on which a mortgage was registered was on October 25, 2012. Mortgage number 1788242 to the claimant was registered on the certificate of title on October 25, 2012. This mortgage to the claimant was to secure the sum of $5,900,000.00 with interest.

[33] It is noted that the figure secured by mortgage number 1788242 does not match the principal sums borrowed in 2009 and 2010 as indicated in the promissory notes or the commitment letter and the Terms and Conditions of Credit Facility dated March 23, 2010.

[34] It is also noted that by October 25, 2012, the defendants had defaulted on their obligation to repay the $7,900,000.00 as agreed in 2010. Two demand letters had been issued on July 14, 2011 and indicated that the total indebtedness to the claimant was $8,567,098.33 inclusive of interest. The defendants having failed to make payments to satisfy the debt after July 14, 2011, the claimant instituted these proceedings on December 15, 2011.

[35] While it seems unusual that the claimant would not have registered a mortgage against the certificate of title around the time of the commitment letter dated March 23,

2010, or the time the 2nd defendant is said to have executed the Instrument of Guarantee on March 3, 2010, it would be even more unusual for the claimant to register a mortgage for this debt on October 25, 2012, after proceedings were instituted in this matter.

[36] Having regard to all the circumstances discussed above, I am satisfied that mortgage number 1788242 registered on October 25, 2012 relates to another loan.

[37] The 2nd defendant also relied on the certified statement in relation to bank account numbered 600505, which demonstrates that there were several payments made and sums were deducted by the bank. The 2nd defendant alleged that this was the account which serviced the two loans. While he was able to show that approximately $1,215,000.00 in cheques were deposited around June 27, 2009, June 25, 2010 and August 31, 2010, the 2nd defendant has not demonstrated that account numbered 600505 is the account which serviced the two loans totalling $7,900,000.00 plus interest. Further, he has not demonstrated that more than approximately $1,215,000.00 was paid to the claimant from that account.

[38] Having regard to the documentary evidence supplied up to July 10, 2020 by the 2nd defendant and Mr. Anthony Body on behalf of the claimant, I am satisfied that the sums borrowed in respect of the loans which are the subject of this claim have not been repaid. The sums were not paid before the default judgment was entered and remain unpaid to date. There is no good factual or legal basis to discharge the Provisional Charging Order.

[39] As regards the Instrument of Guarantee, Ms. Henry submitted that the judgment debtor should be limited to the extent of his personal guarantee. Counsel relied on the decisions of ***Barclays Bank Plc v Landgraf*** [2014] EWHC 503 (Comm), ***Khemlani v Topaz Jewellers Ltd*** [2018] JMSC Comm 47 and ***First Active Plc v Cunningham*** [2018] IESC 11.

[40] Finally, as regards the Letter of Undertaking, Ms. Henry submitted a party who accepts a professional undertaking must take steps to ensure that it is satisfied. She relied on the decision of ***Henlin Gibson Henlin v Calvin Green*** [2010] JMSC 73.

[41] In response to Ms. Henry's submissions, counsel Ms. Williams, stated that the claimant could seek to enforce the undertaking, to enforce the guarantee or to sue on the loan and debt itself. In this case, the claimant elected to file suit in respect of the Promissory Notes and the Instrument of Guarantee and obtained judgment in default in respect of same. As such, the undertaking was now irrelevant.

[42] Ms. Williams drew the court's attention to paragraphs 13 and 14 of Mr. Boyd's affidavit. Counsel pointed out that at paragraph 13 of the affidavit filed on July 8, 2020, Mr. Boyd on behalf of the claimant/judgment creditor indicated that the sums due by the 2nd defendant pursuant to the Instrument of Guarantee would now be $13,411,815.07 inclusive of interest. However, at paragraph 14 of his affidavit, Mr. Boyd indicated that the claimant/judgment creditor seeks the Final Charging Order to secure the judgment obtained which is now $26,292,881.94 inclusive of interest, as at July 1, 2020, or the lesser sum of $13,411,815.07 in respect of the Instrument of Guarantee, whichever sum the court deems appropriate.

[43] I have noted that the Particulars of Claim filed on December 15, 2011 indicates that the claimant indeed relied on the Promissory Notes (at paragraph 3) and the Instrument of Guarantee (at paragraph 6) and these documents were annexed. At paragraph 8 of the Particulars of Claim the claimant asserted that both the 1st and 2nd defendants were jointly and/or severally liable for the sums loaned with interest. It is not clear why the claimant caused the 2nd defendant to sign an Instrument of Guarantee limiting his liability to only a portion of the sums loaned. However, in the absence of evidence indicating the capacity in which the 2nd defendant signed the Promissory Notes, in my opinion, the 2nd defendant's liability for the debt would be limited to the sums stated in the Instrument of Guarantee.

[44] I have considered the 2nd defendant's objection and heard and considered all the affidavits and submissions filed up to July 10, 2020. I have considered his account that hardship would be caused to his child who is now at university (and presumably over 18), but who resides at the property in question. However, the law seems to require me to consider the hardship to the 2nd defendant directly, and not the hardship to his adult child who is not a co-owner of the property.

[45] The burden on the 2nd defendant to persuade this court that the Final Charging Order should not be made has not been discharged. The debt has been unsatisfied since May 15, 2013 and despite previous orders that the 2nd defendant make payments, he has failed and seemingly refused to do so. I am satisfied that absolutely no hardship would be caused to the 2nd defendant, who is a land developer and who does not live at the address in question. However, it is clear that the claimant/judgment creditor would be unduly prejudiced if the order was not made final, as significant sums remain unpaid since 2010.

[46] It should be noted that shortly before delivering this judgment on July 24, 2020, an email was sent to the Civil Registry by the 2nd defendant with two attachments. A Court Administrator in turn forwarded the email to me. At the hearing, this matter was brought to the attention of counsel for the parties and the court was informed that the 2nd defendant filed two affidavits, which he is asking the court to consider.

[47] As the time for filing affidavits has long passed, this court will neither have regard to the email, its attachments, nor the affidavits filed. However, it is noted that the 2nd defendant indicated at the signature section of the email that he is the Managing Director of Global Designs & Builders Ltd. It seems therefore that the 2nd defendant remains in business, while the debt to the claimant remains unsatisfied.

Disposition

[48] I now make the following orders:

1. The Final Charging Order is granted in respect of the 2nd defendant, limited to the sum of $5,000,000.00 plus interest at the rate of 18.75% from July 14, 2011 until payment in full, over a parcel of land formerly known as part of Hellshire, now known as St. Georges in the parish of Saint Catherine being Strata Lot numbered Three on the Strata Plan numbered Two Thousand Four Hundred and Twenty Six and Eight undivided 1/71 share in the common property therein and being part of the land comprised in Certificate of Title registered at Volume 1144 Folio 828, now registered at Volume 1432 Folio 79 of the Register Book of Titles.

2. The 2nd defendant is restrained until July 31, 2020 whether by himself or through his servant and/or agent from mortgaging, assigning, transferring, selling, or otherwise disposing of his interest in all that parcel of land formerly known as part of Hellshire, now known as St. Georges in the parish of Saint Catherine being Strata Lot numbered Three on the Strata Plan numbered Two Thousand Four Hundred and Twenty Six and Eight undivided 1/71 share in the common property therein and being part of the land comprised in Certificate of Title registered at Volume 1144 Folio 828, now registered at Volume 1432 Folio 79 of the Register Book of Titles.
3. Costs to the claimant to be agreed or taxed.
4. Attorney for claimant to prepare, file and serve this order.