

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 18 of 2014

BETWEEN

BATTALEYS (BARBADOS) LIMITED

**APPELLANT/CLAIMANT
(In Receivership)**

AND

**KAUPHUNG SINGER &
FRIEDLANDER LIMITED**

FIRST RESPONDENT/DEFENDANT

CHRISTOPER SAMBRANO

SECOND RESPONDENT/DEFENDANT

CRAIGWATERMAN

THIRD RESPONDENT/DEFENDANT

BM HOLDCO LIMITED

FOURTH RESPONDENT/DEFENDANT

(BM HOLDCO LIMITED added as a fourth defendant pursuant to the Order of the Court, The Honourable Jacqueline Cornelius Judge of the High Court)

Before: The Hon. Sherman R. Moore, CHB, The Hon. Andrew D. Burgess and the Hon. Kaye C. Goodridge, Justices of Appeal

2014: December 10, 16

Mr. Alair P. Shepherd, Q.C. and Mr. Andrew Clarke for the Appellant/Claimant

Mr. Garth St.E.W. Patterson, Q.C., Ms. Tammi Pilgrim and Mr. Bartlett Morgan for the First, Second and Third Respondents

DECISION

Introduction

- [1] **BURGESS JA:** We have before us a notice of application to this Court filed on 7 July 2014 by Battaleys (Barbados) Limited (Battaleys), the applicant, which reached us by a rather circuitous route. The application is for the following order:

“That an injunction be granted restraining the defendants whether by themselves their servants or agents in any way whatsoever from selling mortgaging or alienating in anyway any of the assets of the claimant”.

The application and its route to us, is best understood against its background.

Factual Background

- [2] The appellant Battaleys, is a limited liability company incorporated under the provisions of the **Companies Act Cap 308 (Cap. 308)** of the Laws of Barbados. The first respondent Kaupthung Singer & Friedlander Ltd (Singer Friedlander), is a company incorporated under the Companies Act 1948 of the Laws of England and registered as an external company under the provisions of **Cap 308** and having its principal office situate at Blades & Williams, Tweedside Road in the parish of Saint Michael. The second respondent, Mr Christopher Sambrano, and the third respondent, Mr Craig Waterman, were receivers of Battaleys appointed by the first respondent.

[3] From January 2006 to January 2008, Singer Friedlander carried on business in Barbados of, inter alia, offering loans and mortgages to a number of entities. Singer Friedlander granted loans to Battaleys in the sum of \$11,868,000.00 and \$2,800,000.00 both in the currency of the United States of America. The loans were secured by a deed of charge by way of legal mortgage dated 16 January 2006 over lands owned by Battaleys and a further charge by way of up-stamping dated 20 November 2007.

[4] On 4 December 2009, Singer Friedlander acting under powers contained in the mortgage/debenture appointed Mr Christopher Sambrano and Mr Craig Waterman joint receivers of Battaleys. By way of a claim form and statement of claim filed in the High Court on 17 January 2014, Battaleys commenced proceedings against Singer Friedlander seeking, inter alia, the following relief:

- “a. A declaration that the loans of \$11,868,000.00 in the currency of the United States of America and \$2,800,000.00 in the currency of the United States of America were null and void and unenforceable;
- b. A further declaration that the said Deeds of Charge by way of a legal mortgage over the lands to secure the repayment to Singer Friedlander of the said sum of \$11,868,000.00 in the currency of the United States of America and the upstamping of that Deed was and is null and void and unenforceable;
- c. A further declaration that the appointment of Christopher Sambrano and Craig Waterman was of no effect;
- d. All such orders to give effect to the declarations; and

- e. An interim and permanent injunction restraining the defendant and its Receivers Christopher Sambrano and Craig and Waterman from proceeding further in any way on the appointment of Receivership and acting in any way on the appointment of Receivership and acting in any way as receivers of the claimant.”

- [5] On 29 January 2014, Singer Friedlander filed an application seeking orders for summary judgment and/or to strike-out Battaleys’ claim. On the following day, 30 January 2014, Singer Friedlander filed an amendment to its application to include a request for a declaration that the court had no jurisdiction to hear the claim. Battaleys’ statement of claim was also amended and filed on January 30, 2014 but the relief in the statement of claim remained unchanged.
- [6] On June 19, 2014, **Cornelius J** gave an oral decision dismissing Singer Friedlander’s application for summary judgment on and/or to strike out the claim. Dissatisfied with **Cornelius J’s** decision, Singer Friedlander, on 4 July 2014, filed an application for leave to appeal to the Court of Appeal against that decision. Leave was granted by **Cornelius J** that same day.
- [7] On 4 July 2014 also, **Cornelius J** gave an oral ruling declining to grant the injunction being sought by Battaleys, since Battaleys would be adequately compensated by an award of damages. Upon the refusal of its application for an interim injunction by **Cornelius J**, Battaleys immediately made an oral application to the judge for an injunction for a brief period of time, in order

to give the Appellant time in which to decide to and/or prepare any Notice of Appeal to the Court of Appeal.

[8] Battaleys' oral application was made without notice to Singer Friedlander, which vigorously opposed the application. Nevertheless, Singer Friedlander ultimately gave an undertaking that they would not sell or dispose of the property until 18 July 2014.

[9] On 7 July 2014, Battaleys filed an application in this Court pursuant to **Rule 62.16(1) (c)** of the **Supreme Court, (Civil Procedure) Rules 2008** seeking an order that *“an injunction be granted restraining the defendants whether by themselves their servants or agents in any way whatsoever from selling mortgaging or alienating in anyway any of the assets of the claimant”*.

[10] Thereafter, on 10 July 2014, an order was granted by **Sir Marston Gibson CJ** sitting as a single judge, in the following terms:

“That an injunction be granted restraining the defendants whether by themselves their servants or agents in any way whatsoever from selling mortgaging or alienating in anyway any of the assets of the claimant”.

Apparently, no notice in respect of any hearing leading up to this order was given to Singer Friedlander and, accordingly, Singer Friedlander was not heard prior to the order being made.

[11] On 15 July 2014, an application was filed by Singer Friedlander pursuant to **section 53 (3)** of the **Supreme Court of Judicature Act Cap 117A (Cap**

117A) seeking to discharge or set aside the injunction granted by **Sir Marston Gibson CJ**. This application was amended on 17 July 2014 to reflect their discovery that **Sir Marston Gibson CJ** had granted the injunction based solely on the documents before him comprising Battaleys' application for injunctive relief.

- [12] The grounds of Singer Friedlander's amended application were stated to be both procedural and substantive. The procedural grounds were in summary that (i) the injunction was not expressed to be limited in duration and amounted to a permanent injunction; (ii) that **Sir Marston Gibson CJ** did not have jurisdiction as a single judge of this Court to grant a permanent injunction; (iii) that neither the Court of Appeal nor a single judge thereof had jurisdiction to grant the substantive relief sought in the action in the High Court below, namely, a permanent injunction, before the trial of the substantive matter before that court; (iv) that alternatively, a single judge of the Court of Appeal has no jurisdiction under **section 53 (2) (b)** of **Cap 117A** to grant interim injunctions except during the period of vacation prescribed by the rules of court; and that further and in the alternative, even if a single judge of the Court of Appeal has jurisdiction to grant an interim injunction outside of the period of vacation prescribed by the rules of court, he has no power to grant such an injunction on paper without a hearing.

[13] It is not necessary to recite the substantive grounds in Singer Friedlander’s amended application, as at the hearing of that application before us, Mr Shepherd QC conceded that for the procedural grounds stated in Singer Friedlander’s amended application, the order made by **Sir Marston Gibson CJ** was a nullity. Accordingly, we made an order discharging the order made by **Sir Marston Gibson CJ**.

[14] It is in the foregoing circumstances that the notice of application to this Court filed on 7 July 2014 by Battaleys now arises for our determination.

Discussion

(i) Nature of the Injunction Sought

[15] As noted at para [1] of this judgment, the order sought by Battaleys is that “an injunction be granted restraining the defendants whether by themselves their servants or agents in any way whatsoever from selling mortgaging or alienating in anyway any of the assets of the claimant”. Framed like this, and not limited by duration, the injunction sought by Battaley amounts to a permanent injunction. This is the relief sought by Battaleys in its substantive claim which is still before the High Court. For this Court to grant an injunction in the terms sought by Battaleys would be tantamount to this Court making a final determination of a matter still pending before the High Court.

[16] This Court has no jurisdiction to do that. Our jurisdiction is conferred by **section 52(1) of Cap 117A**. That section provides that: “Except as otherwise provided in this or any other enactment, the Court of Appeal has jurisdiction to hear and determine, in accordance with the rules of court, appeals from any judgment or order of the High Court or a judge thereof.” It is clear from this subsection that the jurisdiction of this Court is to hear appeals from “any judgment or order of the High Court”. This Court cannot therefore pre-empt the judgment or order in this case by ordering an injunction in the terms sought by Battaleys, in effect a permanent injunction.

(ii) An Injunction where the Applicant’s Substantive Action is based on Illegal Contract

[17] It is evident from the statement of claim filed in the High court by Battaleys that the relief sought in that claim is predicated on the contract between Battaleys and Singer Friedlander being declared illegal. In its statement of claim, Battaleys state that Singer Friedlander “at all material times were carrying on the business of banking...and were not licenced under the **Financial Institutions Act Cap 324A**” and that Singer Friedlander entered into the loans with Battaleys “while not licensed to do so in breach of **Section 4 and/or 24** of the **Financial Institutions Act Cap 324A** of the Laws of Barbados”.

[18] If Battaleys is right and the loan and mortgage transactions are tainted with illegality, then both parties, Battaleys and Singer Friedlander are equally involved. This being so, Battaleys is caught by the principle in **Muckleston v. Brown (1801) 6 Ves. 53**, in which Lord Eldon L.C. said in a much-quoted passage, at **pp. 68-69**:

" . . . the plaintiff stating, he had been guilty of a fraud upon the law, to evade, to disappoint, the provision of the legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the court would not act; but would say, 'Let the estate lie, where it falls'."

As Lord Goff opined in **Tinsley v Milligan [1993] 3 All ER 65** the principle stated by Lord Eldon is another way of saying that the claimant must fail because he has not come to the court with clean hands.

[19] In the context of this case, the principle in **Muckleston v Brown** compels the conclusion that even if Battaleys can satisfy the requirements for an interim injunction stated in **American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 50** and **Toojays Ltd v Westhaven Ltd [2012] 2 LRC 65** its claim must still fail as Battaleys is precluded from asserting that those requirements have been satisfied. Further, in our view, this Court should follow the time honoured statement of Lord Mansfield in **Holman v Johnson (1775) 1 Cowp 341 at 343**:

“No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff’s

own stating or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of his country, then the Court says he has no right to be assisted.”

[20] Mr Shepherd QC has rather cleverly turned this principle on its head. He argues that because a court will never award damages in an illegal contract, the principle that an injunction may be refused where damages are adequate is not applicable in this case as Battaleys is not entitled to damages should it succeed on its claim that the mortgage is invalid. In our view, this argument is as subversive of principle as it is intellectually elegant. As we have already pointed out, the principle in **Muckleston v Brown** prevents Battaleys from crossing equity’s door to seek any equitable relief.

Disposal

[21] For all of the foregoing reasons, the application for an injunction is denied.
Costs in the appeal.

Justice of Appeal

Justice of Appeal

Justice of Appeal