

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Civil Division)

CLAIM NO. CV 777 of 2016

BETWEEN:

**JESSICA SAMANTHA EDOUARD-
MCDONALD**

FIRST CLAIMANT

EMELDA HAYNES

SECOND CLAIMANT

AND

**RBC ROYAL BANK (BARBADOS)
LIMITED**

DEFENDANT

Before the Honourable Mr. Justice Cecil N. McCarthy, Judge of the High Court

Dates of Hearing: 2021 February 17th; March 8th

Date of Decision: 2021 May 13th

Appearances:

Mr. John C. Collymore for the Claimants

Ms. Karis Bynoe of Hanschell & Company for the First Defendant

DECISION

Introduction and Factual Background

- [1] The first claimant, Jessica Edouard-McDonald is the devisee of a half-share in 81,210 square feet of land at Long Bay in the parish of Saint Philip. Cordella Oneta Lorde-Smith is the devisee of the other half-share.
- [2] The second claimant, Emelda Haynes is the devisee of 10,890 square feet of land, also located at Long Bay in the parish of Saint Philip.
- [3] Both pieces of land together comprise a larger area of land that was owned by Sylvia Cordella Lorde (“the deceased”), who died on 29 May 2000, having made the devises in her will dated 12 February 1991.
- [4] Ms. Cordella Oneta Lorde-Smith, also known as Cordella Onita Lorde-Edouard (“Ms. Lorde-Smith”) is also the administratrix (with the will annexed) of the estate of the deceased. In her capacity as administratrix and personal representative of the deceased, she assented to the vesting of the 92,100 square feet of land, comprising both pieces of land at Long Bay together with the dwellinghouse thereon (The Long Bay property”) in herself in her capacity as personal representative.
- [5] The backing sheet to the assent relating to the Long Bay property, which was dated 16 February 2001, did not reflect what was in the body of the document. The operative part of the said assent reads:

*“NOW THIS DEED WITNESSETH that in consideration of the premises the said **CORDELLA ONITA LORDE-EDOUARD** as the sole Qualified Administratrix and as such the Personal Representative of the said **SYLVIA CORDELLA LORDE** also known as Slyvia Lorde doth hereby ASSENT to the vesting in the said **CORDELLA ONITA LORDE-EDOUARD** as Personal Representative for the estate or interest stipulated or contained in the said Last Will and Testament of the Deceased dated the 12th day of February 1991 (without any charge for payment of any moneys which the said **CORDELLA ONITA LORDE-EDOUARD** as the Qualified Administratrix and Personal Representative as aforesaid is liable to pay).”*

[6] The backing sheet reads:

Cordella Onita Lorde-Edouard

To

Cordella Onita Lorde-Edouard

[7] Ms. Lorde-Smith then mortgaged the Long Bay property to the Royal Bank of Canada (Barbados) Limited to secure the principal sum of \$321,000.00 and further principal sums of \$90,000.00 and \$32,000.00 respectively.

[8] Ms. Lorde-Smith took out the loans ostensibly in her personal capacity, and the mortgage deeds did not reflect that she was a personal representative. She has subsequently defaulted on the loans and the bank has obtained an order for possession and a writ of possession to enforce the order.

[9] The claimants now seek an interim injunction to restrain the bank from selling or in any way disposing of the mortgaged property. They also request the Court to stay execution of the writ of possession until they obtain their respective benefits. The Court granted a stay of execution of the writ of possession for the purpose of hearing these proceedings.

The Evidence

[10] Both claimants reside overseas. The application for injunctive relief is supported by an affidavit signed by their legal counsel. That affidavit was sworn and filed on 13 November 2020. Paragraphs 7 to 15 of the affidavit set out the basis for the claimants' application. They provide as follows:

- “7. *Cordella Lorde-Smith, as mortgagor, and Wayne Smith as surety, secured the mortgage and further charges dated February 2, 2005, December 16, 2005 and August 2, 2006 respectively without the claimants' knowledge and/ or consent.*
8. *The mortgage deeds erroneously recited the mortgagor as the estate owner of the fee simple absolute in possession of the property.*
9. *At all material times the claimants held legal interest in the mortgaged property.*
10. *Cordella Lorde-Smith et al defaulted on the mortgage. By HCA – CV777/2016 – RBC Royal Bank Barbados Limited, brought an action against Cordella Lorde-Smith et al for possession of the property.*

11. *On 5th day of December 2018 pursuant to HCA # 777 of 2016, the High Court of Barbados granted the Respondents an Order for Possession. The Claimants herein were not parties to the High Court action and were not represented.*
12. *When the Claimants became aware that their legal interest in the property was being challenged, they sought legal advice. They were resident out of the jurisdiction and being unaware of the proceedings were absent and unrepresented.*
13. *The mortgagee failed or neglected to investigate title it accepted as security for the mortgage and their negligence contributed to the state of affairs.*
14. *The parties have been in discussion trying to reach a solution; but the Respondents indicated their intention to proceed to have the Writ of Possession executed.*
16. *The claimants stand to be disinherited if the Order of Possession is not stayed until the Claimants receive their respective benefits.”*

[11] The defendant did not file an affidavit in response, but argued that the injunction should not be granted.

The Claimants' Submissions

[12] Both parties filed written submissions. I do not think it necessary to recount the full extent of those submissions, but I will very briefly seek to capture the essence of the parties' positions.

[13] In support of his application, counsel for the claimant, Mr. John Collymore cited **section 30** of the **Supreme Court of Judicature Act Cap 117A** which deals with the power of the Court where a mortgagee claims possession of the mortgaged property which includes a dwellinghouse.

Section 30(2) provides:

“30(2) The Court may,

(a) adjourn the proceedings, or

(b) on giving judgment, or making an order for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order,

(i) stay or suspend execution of the judgment or order, or

(ii) postpone the date for delivery of possession,

for such periods as the Court thinks reasonable.”

[14] Counsel contends that there is a serious issue to be tried. He submits that the mortgagor of the Long Bay property had no authority to mortgage the property and this fact is borne out by the documents in the case. He argues that if documents underpinning the loan are called into question, there must be a trial.

[15] Counsel submits that the balance of justice favours the granting of an injunction. He also contends that damages are not an adequate remedy.

The Defendant's Submissions

[16] Ms. Karis Bynoe, on the other hand, submits that the application for the injunction should be refused. Ms. Bynoe argues, among other things, that the court is *functus officio* and only applications under **section 30** of the **Supreme Court of Judicature Act** should be allowed; and the application for an injunction should not be entertained.

[17] Ms. Bynoe contends that there is no serious issue to be tried.

[18] She submits that taken at its highest the claimants' case is that the bank was negligent because it should have had the will of the deceased checked to see the legal interests of the claimants.

[19] Counsel argues that the personal representative was vested with title to the property and could seek a loan using it as security.

[20] Counsel also submits that damages are an adequate remedy. She also says that the monies owed to the bank exceeds \$750,000.00 based on the last statement relating to the mortgage debt. Ms. Bynoe says that the bank is in a better position to pay damages and that the bank will be prejudiced if there is a further stay of proceedings because its debt will be increasing.

[21] Ms. Bynoe submits that the claimants have no cause of action against the bank. She argues that the relationship of the beneficiaries under the will of the deceased is with the trustee of the trust created by the will, the personal

representative. Counsel submits that it is not the responsibility of the bank to look after the rights of the beneficiaries under the will.

The Issues

[22] There are two broad issues that the Court must consider, namely:

- (1) Whether the Court has power to suspend the execution of the writ of possession.
- (2) Whether on the facts the claimants have established a claim for the injunctive relief that they seek.

LAW AND ANALYSIS

Issue I - Whether the Court has power to suspend the execution of the writ of possession.

[23] Counsel for the bank submitted that the claimants' application seeks to reopen proceedings long adjudicated on the claimants' right to possession given the fact that there was an order of the court still in effect which granted the defendant an order for possession. She submitted that the court is *functus officio* and only applications under **section 30** of the **Supreme Court of Judicature Act Cap. 117A** or applications to clarify the mode of carrying out the order should be allowed. The court, she contends, has an interest in ensuring that there should be an end to proceedings.

[24] This is not the first occasion in this jurisdiction in which injunctive relief has been sought to prevent a mortgagee from taking possession. One such case is **RBTT Bank Barbados Ltd. v Olympiad Inc. and Jeffrey Chandler CV 817 of 2008, date of decision June 7th 2016 Barbados High Court.**

[25] In that case the applicant filed an urgent application requesting the Court to order that the plaintiff bank be restrained from taking possession of certain property until such time as the Court makes a determination with respect to its suit against the said bank.

[26] Counsel for the respondent, in that case, argued that the Court was “*functus officio*” and that the Court had considered the issues and made an order for possession. In rejecting counsel’s submissions, Reifer J. (as she then was) said at paragraph 10 to 12 of her judgment:

“[10] The view of this Court is that it has an unfettered decision to grant a stay of execution be it pending appeal or, as in this case pending, the hearing of related proceedings (in this case suit no. 1679 of 2011). See sections 37-46 of the Supreme Court of Judicature Act, Cap. 117A, as it relates to the exercise of the equitable jurisdiction of the High Court and Court of Appeal and specifically Section 40 which provides that the rules of equity shall prevail over the rules of the common law where they are in conflict or at variance.

[11] This Court finds this to be an application for a Stay of Execution, thereby invoking this Court’s equitable jurisdiction.

[12] *The applicable law to be applied is that outlined by Awich CJ (Ag) in BCB Holdings Limited, Belize Bank Limited v The Attorney General of Belize Claim No. 743 of 2009 as follows:*

“6. When considering an application for a stay of execution, the court must keep in mind that the primary rule is that a judgment creditor is entitled to enjoy immediately the fruits of his success in a litigation, unless the court orders otherwise:

***BMW v Commissioners of HM Revenue and Customs [2008] EWCA CIV 1028,** is the current authority (see paragraphs 14 and 15)... It follows that a judgment creditor should be allowed to enforce his judgment, unless and usually on an application for a stay of execution, the court considers it is in the interest of justice to order a stay of execution. Put another way, the court will grant a stay of execution if there will be risk of injustice in the circumstances, if a stay is not granted – see **Gater Assets Ltd v Nak Naftogaz Ukrainy [2008] EWCA Civ 1915.**”*

[27] I agree with the above statements and therefore hold that the Court is not *functus officio* and therefore can exercise its equitable jurisdiction to grant injunctive relief.

[28] The Court held it was not *functus officio* and it therefore rejected the submission by the bank’s counsel that it could not hear the matter.

[29] Similarly, in the instant case, I hold the view that the Court is not *functus officio* and it can therefore hear the matter. The submission to the contrary by counsel for the bank is rejected.

ISSUE II

Have the claimants established that they are entitled to the grant of an interim injunction?

[30] The Court is empowered by **section 44(b)** of the **Supreme Court of Judicature Act Chapter 117** to grant mandatory and other injunctions.

[31] For the claimant to obtain an interim injunction he must establish that:

1. there is a serious issue to be tried, and
2. the balance of justice favours the grant of an injunction.

[32] These guiding principles have been enunciated in **Toojays Limited v Westhaven Limited [2012] 2 LRC 65**, in which the Court of Appeal gave its interpretation of Lord Diplock's seminal judgment in **American Cyanamid v Ethicon [1975] 1 ALL ER 504**.

[33] Counsel for the bank submitted that the claimants have no cause of action against the bank and, therefore, are not entitled to the injunctive relief which they seek.

[34] When this matter first came on for hearing, the Court concluded erroneously that the claimants were seeking to be joined as a party to the proceedings

that the defendant had commenced against Ms. Lorde-Smith, the defendant in these proceedings.

[35] Counsel for the claimants informed the Court that they were not seeking to be joined in the proceedings, but merely wanted an injunction to prevent the bank from assuming possession of the property.

[36] However, the claimants have not filed any substantive action and neither in their affidavit nor their submissions have they identified their cause of action against the bank.

[37] It is a basic principle of the law with respect to injunctions, that in order to obtain an interim injunction against a party the applicant must have a cause of action against that party. see: **American Cyanamid above, and Fourie v Le Roux and Others [2007 UKHL 1]**. There are exceptions to this principle but none of them apply in the circumstances of this case. (See discussion of the subject in **Chapter I of the 12th Edition of Injunctions by David Bean et al.**)

[38] This legal principle is expressed by **Lord Diplock in The Siskina [1979] A.C. 210 at 254**, in these words:

“A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him of a

legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an injunction is merely ancillary and incidental to the pre-existing cause of action.”

- [39] Other than suggesting that the bank had acted carelessly with respect to examining the title, the claimants have made no attempt to assert what cause of action they have against the bank.
- [40] No action has been filed before the court other than that which the bank has brought for possession of the mortgage property.
- [41] It is my opinion that the failure of the claimants to identify a cause of action and to file a substantive claim against the defendant is fatal to their application for injunctive relief.

The Assent – The Conveyancing Point

- [42] Before I render my decision in this matter, I wish to make a brief comment with respect to two separate matters.
- [43] First, having regard to the facts set out at paragraphs 5 and 6, this matter demonstrates the vulnerability of Conveyancers. Conveyancers have a responsibility to translate the agreements with respect to land into documents that accord with the wishes of the parties and the requirements of the law.

[44] In the assent referred to at paragraphs 5 and 6 hereof the body of the document clearly purports to vest the Long Bay property in the personal representative of the estate of Sylvia Cordella Lorde as personal representative. The backing sheet, however, suggests that the property is being vested in the personal representative in her personal capacity.

[45] The meaning conveyed by the backing sheet would have been reinforced when one considers that **section 3** of the **Succession Act Cap. 249** makes it unnecessary for the personal representative to assent the property to himself as personal representative.

[46] That section provides:

“3(1) The real and personal estate of a deceased person shall on his death, notwithstanding any testamentary disposition, devolve and become vested in his personal representatives.”

[47] It is, therefore, not necessary for a personal representative to assent to the vesting of the property of the estate in himself or herself as personal representative.

[48] The assent in this case, therefore only achieves the purpose of giving the impression that the property was in fact vested in Ms. Lorde-Smith in her personal capacity when in fact, in accordance with the provisions of the will,

she is only entitled to the half-share in the property mentioned at paragraph 1 hereof.

[49] **The purport of Section 30 of Cap. 117A.**

This is the second matter on which I wish to comment. Section 30 provides:

“30(1) Where the mortgagee under a mortgage of land that consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action of fore-closure in which a claim for possession of the mortgaged property is also made, the High Court may exercise any of the powers conferred on it by subsection (2) if it appears to the court that if it exercises that power the mortgagor is likely to be able within reasonable period to pay any sums due under the mortgage, or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.”

[50] Section 30 does not assist the claimant in this case. That section applies to the facts and circumstances specifically prescribed in the section.

[51] The High Court is only empowered to exercise its powers under that section *“if it appears to the court that if it exercises that power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage, or to remedy a default consisting of a breach of any other obligation under or by virtue of the mortgage.”*

[52] The above section is intended to facilitate the grant to the mortgagor of some indulgence where the above conditions are met.

[53] The section cannot assist a third party seeking injunctive relief. The discretion of the Court is therefore circumscribed by those provisions and are not at large.

[54] On the facts of this case those provisions cannot assist the claimants; nor on the special facts, do they apply to circumscribe the options available to the claimants for relief.

DISPOSAL

[55] For the foregoing reasons the Court makes the following orders:

- (i) The stay of the execution of the writ of possession is lifted.
- (ii) The claimants' application for an interim injunction is refused.
- (iii) The parties will be heard with respect to costs.

Cecil N. McCarthy
Judge of the High Court