



The Court of Appeal for Bermuda

CIVIL APPEAL No. 14 of 2012

Between:

LEYONI JUNOS

Appellant

-v-

THE BANK OF BERMUDA (HSBC)

Respondent

**Before: Auld, J.A.
Forte, J.A.
Dangor, J.A.**

Appearances:

Appellant in person
Mr Timothy Marshall, Marshall Diel & Myers Limited, for the Respondents

Date of Hearing and Order 11 June 2013

Reasons for Decision 7 July 2013

REASONS FOR DECISION

AULD, JA:

Introduction and Summary History of the Litigation

1. These are the Court's reasons for its refusal on 11th June 2013 of leave to Ms LeYoni Junos to appeal part of a Ruling of Kawaley CJ on a Preliminary Issue and consequential Orders on 29th June 2012, striking-out her challenges of an order of Greaves J of 10th May 2010, in which he:
 - 1) Granted the HSBC (Bank of Bermuda) Limited ("the Bank"), as mortgagee, possession of property held by her as a mortgagor in default ("the Possession Order"); and
 - 2) Struck out, in the exercise of his discretion, her counterclaim making a number of allegations, including fraud and duress going to the validity of the mortgage itself, but left her to pursue them in a separate action if she wished – which she has not done.
2. The Preliminary Issue in June 2012 before Kawaley CJ followed a two year period of unsuccessful attempts by Ms Junos to unseat and/or obstruct the enforcement of the Possession Order by a series of complaints, including fraud, and procedural and other challenges to its validity and as to the Bank's right and/or steps to enforce it.
3. Kawaley CJ helpfully summarised, in paragraph 4 of his Ruling, the forensic history of the matter during the intervening two years. This included a challenge by Ms Junos of the Possession Order on appeal to the Court of Appeal in June 2011. In that appeal she alleged wilful and fraudulent evasion by the Bank of legal requirements as to its enforcement in RSC O.42, Rule 2(1) and (2), when read with O 45, Rule 6(2) and (3). She also attacked the validity of the mortgage itself. She garnished those challenges with allegations of fraud, undue influence, bias and other misconduct, so-called "errors of law and fact" of Greaves J and of the Registrar and/or her staff, and of general oppression by all of them in violation of her constitutional rights.

4. The Court of Appeal, on 17th June 2011, dismissed all those complaints, upholding the validity of the Possession Order, lifting an interim stay on its execution and dismissing her challenge to Greaves J's strike-out of her counterclaim for fraud and undue duress.
5. The Bank, in early July 2011, on Ms Junos's case, then attempted to enforce the Possession Order. She responded with a battery of claims in the Supreme Court seeking a declaration that the Possession Order was invalid because it had not expressly provided for its enforcement; and she challenged the legality of the alleged enforcement action.
6. Ms Junos's complaint before Kawaley CJ was that Greaves J had not specified in the Possession Order the date within which she was to deliver up possession to the Bank – required, so she maintained, by RSC O 42, Rule 2(2), when read with O.45, Rules 6(2) and (3). She sought on that basis interim injunctive relief to restrain the Bank from enforcing the Possession Order and damages for violation of her human rights. She included in her complaints a rich mix of allegations of fraud, oppression and abuse of process on the part of the Bank and Kevin Taylor, its attorney in the matter, in relation, in particular, to the drawing up of the Possession Order.
7. The Bank sought to strike out her various claims as *res judicata* and/or as an abuse of process, having regard particularly to the Court of Appeal's Judgment and Order of 17th June 2011.
8. As indicated, Kawaley CJ, directed hearing of a Preliminary Issue as to the validity and enforceability of the Possession Order. This included whether Ms Junos's challenges on those matters were barred by the doctrine of *res judicata* in the light of the Court of Appeal's June 2011 Ruling.

Kawaley CJ's Rulings and Order of 29th June 2012 on the Preliminary Issue and Order

9. The Preliminary Issue directed by Kawaley CJ was for resolution of Ms Junos's contention that failure by the Bank to comply with the procedural requirements of RSC O 42, Rule 2(2), when read with O 45, Rule 6(2), rendered the Possession Order unenforceable and, therefore, invalid, also whether, in any event, that issue was *res judicata*. Those Rules provide that:

- 1) As to court orders generally, a court need not specify a date within which to enforce an order, although it may do so (O 42, Rule 2(2)); and
- 2) As to orders for possession of land, where an order does not so specify, a court may subsequently do so, thus displacing other and more general different provisions in O 45, Rule 6(2).

The rationale for such provisions is to enable a mortgagor in default to stave off the need for enforcement, either by remedying the default or by agreeing with the mortgagee terms for doing so or as to delivery of possession. It is only after it becomes apparent that a mortgagor is unable or unwilling to take such remedial steps that it may become necessary for the mortgagee to move to enforcement under the above Rules.

10. Here, the Bank had sought to enforce the Possession Order after 18 months or more of unfounded procedural and other attacks by her to frustrate enforcement. As indicated, she had sought to fortify all these delaying devices with various allegations against the Bank, its legal representative, several members of the Judiciary and Court Staff. Throughout, she had continued to occupy the property at the expense of the Bank, and had made no attempt to cooperate with it by agreeing to or making payments in elimination or reduction of her mounting default.

11. In Kawaley CJ's Ruling and Order under challenge, he resolved the Preliminary Issue in favour of the Bank:

- 1) Holding that the matter was *res judicata* in the broader sense of the term so as to render it an abuse of process for Ms Junos to seek to impugn the Possession Order when she could and should have done so - and had not - in the foreclosure proceedings;
- 2) Stating that, in any event, he would have found as a matter of construction of the Possession Order and the RSC Rules governing it, that the Order was not invalid for want of specification of a date for enforcement;
- 3) Barring her from pursuing any fresh claims seeking to impugn the Possession Order; and
- 4) Dismissing her claim for interim injunctive relief to restrain the Bank from enforcing it.

12. As to *res judicata* and abuse of process, Kawaley CJ held on the forensic history of the matter before him that, although the procedural issue raised by Ms Junos as to enforcement of the Possession Order was new, she could and should have raised long before. He cited a 1971 Privy Council authority,¹ one of many applications of what is known in England & Wales as the *Henderson v. Henderson* principle.²

23. “These pleas constitute a renewed attack on the validity of the Possession Order based on additional legal grounds which were not advanced before the Court of Appeal when the Plaintiff initially sought to set that Order aside for, *inter alia*, non-compliance with other provisions in the Rules of the Supreme Court. The pleas also seek to deprive the Bank of the right to enforce the Possession Order, a right that was affirmed by the Court of Appeal in proceedings when it lifted the stay on execution granted prior to the appeal.

24. The legal argument is, in no sense, based on fresh evidence that only became available after the appeal hearing. It is plainly an argument that she could have advanced in the context of the appeal in

¹ *Yat Tung Investment Co. Ltd v. Dao Hens Bank Ltd* [1971] AC 581.

² *Henderson v Henderson* (1843) 3 Hare 100; see also the more recent authority of *Bradford & Bingley Society v Seddon* [1999] EWCA Civ 944.

proceedings between the same parties and in relation to the same commercial dispute.

25. It is clear beyond serious argument that ... [Ms Junos's] attempts to re-litigate the issue of the validity of the Possession Order, an issue which was resolved against her by the Court of Appeal in the Foreclosure Proceedings, is an abuse of process. There are no special circumstances which would support a finding that the doctrine of *res judicata* should not operate so as to shut out the advancement for a second time of a claim which essentially asserts that the Bank is not entitled on technical procedural grounds to enforce the Possession Order.”

13. As to construction of the above-mentioned Rules with regard to possession orders against a mortgagor in default, Kawaley CJ held, in paragraphs 31 and 40 of his Ruling, that the Possession Order took effect from its date, and did not *require* any further act to give it legal effect. He also considered and rejected, in paragraphs 30 – 39 of his Ruling, arguments of Ms Junos based on other statutory provisions and rules on which she had relied unsuccessfully before the Court of Appeal in June 2011, in support of her contention that the Possession Order was invalid because it failed to specify a time for delivery of possession.

14. In short, Kawaley CJ ruled that:

- 1) The Possession Order was not invalid by reason of its non-specification of a date within which possession had to be delivered;
- 2) Barred her from pursuing on any fresh grounds claims that seek to impugn the validity of the Possession Order;
- 3) Dismissed her application for an injunction to restrain the Bank from enforcing the Possession Order by sale; and
- 4) Struck out her claim against Kevin Taylor, the Second Defendant in its entirety.³

³ Not the subject of challenge by Ms Junos in this appeal

The Issues on the Appeal

15. As Mr Timothy Marshall, for the Bank, noted in argument, the focus of this application of Ms Junos for leave to appeal to the Court is yet again on alleged procedural shortcomings of the Possession Order in failing to specify a date for its enforcement.
16. In opening her motion for leave to appeal, Ms Junos accepted that, in the light of the Court of Appeal's Orders in June 2011 and Kawaley CJ's like Rulings and Orders in June 2-12, she cannot challenge the lawfulness of the Possession Order. However, she maintained that it is still open to her to rely on RSC O 45, Rule 6(2) and (3), to challenge the lawfulness of the Order's enforceability and the Bank's attempt to enforce it after the Court of Appeal ruling (See paragraph 5 above). That narrower issue of enforceability, she maintained, is not covered by the ruling of the Court of Appeal either as part of its *ratio* or binding on her as *res judicata and/or* abuse of process.
17. Ms Junos also maintained that she does not challenge - and had never challenged - the Possession Order as such, only its enforceability and, by that route, the Bank's right, *post* the Court of Appeal's ruling, to enforce it. But her further challenge is in substance the same as that in her unsuccessful appeal to this Court in June 2011, despite her attempts to *nuance* it in that way. It is a claim of unlawfulness, based on want of specification in the Possession Order of a date for its enforcement, seeking a declaration that "there is currently no enforceable order for possession in existence and that, therefore, she is still lawfully on the premises." On that basis, she submitted to this Court that Kawaley CJ's Rulings on *res judicata* and/or abuse of process cannot avail the Bank as to its early July 2011 attempt at enforcement - or in any further enforcement action it may undertake.

18. Ms Junos also advanced what Mr Marshall has described as a tortured - or tortuous – argument, suggesting that the mortgagor/mortgagee relationship is also governed by the *Landlord & Tenant* Act 1974 and RSC Order 88. The combined effect of those provisions, she submitted, is that there is only one template in Bermuda for all possession orders, save as against trespassers, namely one that specifies a date within which it is to be enforced.

19. Mr Marshall’s response to these arguments was short and to the point. They were, he submitted, an attempt to distinguish between the validity of the Possession Order and whether it was properly enforced by the Bank *post* the June 2011 Court of Appeal Ruling. He said that, as the Bank’s attempt at enforcement of which she complained occurred after the Ruling, she could not in any event argue that the Possession Order was unlawful and/or unenforceable on that account. The Order has remained in the same form and enforceable since May 2010, as also has the basis for possible challenge, including, under RSC O 88, before the Court of Appeal in 2011. It is, therefore, immaterial, submitted Mr Marshall, that enforcement or attempt at enforcement had not taken place before that Ruling; Ms Junos could and should have relied before then on this or any other alleged deficiencies. He added that any other matters of complaint not covered by *res judicata* or as abuse of process she can still pursue in separate proceedings.

Reasons

20. We have ruled that Ms Junos’s latest challenge to the Possession Order cannot succeed. It is, as Mr Marshall put it, a classic case of attempted re-litigation. First, it is an attempt by her to re-open by a side-wind her challenge to Kawaley CJ’s construction of RSC 42, Rule 2(2) and O. 45, Rule 6 (2) and (3) - ostensibly not to challenge its validity, but its enforceability for want of specification of a date for delivery of possession. If she were to

succeed in that challenge, it would render the Possession Order permanently invalid for want of enforceability.

21. In this purported change of tack she has wrongly seized upon Kawaley CJ's words in paragraph 31 of the Ruling that the Possession Order was not "an order requir[ing] an act to be done," to suggest some impairment of its validity, instead of it being a simple and necessary precursor to its enforcement following permissible later specification of date for delivery of possession.
22. Her second point was that Kawaley CJ wrongly applied the doctrine of *res judicata* in its wider sense and/or as an abuse of power to this procedural point going to the legality of enforcement; when the Court of Appeal had ruled on the matter in June 2011, the Bank had not yet attempted to enforce it. It was not until after the Court of Appeal's Order - including its lift of the stay of execution of the Possession Order - that it would become open to her, for the first time, to challenge its enforcement.
23. Ms Junos's reasoning has no logical basis, whether as a challenge to the validity of the Possession Order itself or to what was, at the time of the Court of Appeal's June 2011 Ruling, simply the potential for later enforcement. Her argument confuses the validity of the Possession Order, upheld by that Ruling to have been legally in force without valid challenge on this or any other point since 10th May 2010, with the absence of any factual basis for a challenge to its enforcement until after the Ruling. In any event, she cannot overcome the fact that the Possession Order, on its terms, remains valid in the light of the Court of Appeal's June 2011 Ruling, as held by Kawaley CJ. Any challenge to it, direct or indirect, arising out of the same or closely related issues is and would be *res judicata* and/or an abuse of process.

24. Finally, as to Ms Junos’s reliance on RSC O. 88, we have we have no hesitation in upholding Kawaley CJ’s reasoning in rejecting her further recourse to it and the 1974 Act in these proceedings. It too is covered by *res judicata* and/or abuse of process.

25. For the above reasons the Court has:

1) Refused Ms Junos leave to appeal Kawaley CJ’s Rulings and Orders on the Preliminary Issue before him, namely as to the enforceability of the Possession Order on its terms and whether that Issue is, in any event *res judicata* in its wider sense and/or unchallengeable as an abuse of process;

2) Barred her from pursuing on fresh grounds any other claim seeking to impugn its validity;

3) Dismissed her application for an injunction to restrain the Bank from enforcing the Possession Order; and

4) Ordered her to pay the costs of the Application, to be taxed, if not agreed, and to be paid forthwith.

Signed

Auld, JA

I agree,

Signed

Forte, JA

I agree

Signed

Dangor, JA