In The Supreme Court of Bermuda

CIVIL JURISDICTION

Civ. 2007 No. 334

IN THE MATTER OF a mortgage dated the 15th day of March 2000 made between LEYONI JUNOS (as Mortgagor) and FLORENCE MYRTLE A. JONES (as Guarantor) of the one part and THE BANK OF BERMUDA LIMITED, formerly BERMUDA HOME LIMITED, (as Mortgagee) of the other part;

BETWEEN:

THE BANK OF BERMUDA LIMITED

Plaintiff

- and -

LEYONI JUNOS

1st Defendant

and

FLORENCE MYRTLE A. JONES

2nd Defendant

Date of Hearing: 8th October 2010

Kevin Taylor for the plaintiff; and
The first defendant in person.

RULING

INTRODUCTION

1. This ruling is given on two applications by the first defendant ('Ms. Junos') arising out of an order I made in this action on 2nd August 2010. On that occasion I summarily struck out Ms. Junos's Notice of Motion seeking that an order of Greaves J made on 10th May 2010, "be declared a nullity and be set aside *ex debito justitiae* . . . in the exercise of the inherent jurisdiction of the Court". The applications now before me call for a

determination of whether my order of 2nd August 2010 was interlocutory or final[1], and they also seek a stay of it pending appeal. They came before me on 8th October 2010, and at the conclusion of the hearing I re-iterated my view that my previous order was interlocutory in nature. I also granted a stay of execution of 14 days on the order of 10th May to allow Ms. Junos time to make the appropriate applications for leave to appeal and/or an extension of time. I promised to give written reasons for my decision, which I now do.

2. In order to put the present applications in context, it is necessary to give a short history of the matter. The action itself is brought to enforce a mortgage of 15th March 2000, which secured a loan to Ms. Junos of $260,000. The second defendant, who is Ms. Junos's mother, was a guarantor of the loan, and appears to have no other interest in these proceedings. Ms. Junos fell into arrears on the payments due under the mortgage, and by an Originating Summons of 29th November 2007 the Bank sought payment of the whole amount then said to be due; an order for sale; and delivery up of possession. The evidence in support was that no payments had been received during the twelve months preceding the 23rd November 2007, and that as at that date $361,521.48 was due. There is a dispute about those figures, and particularly the accrued interest, which at that time was said to be $111,077.21 in arrears, but I need not go into that for the purposes of this judgment.

3. The Originating Summons came before Bell J on 24th January 2008, when he adjourned it for 21 days. There was no appearance by anyone on the return date, but on 14th February 2008 a consent order was entered adjourning the matter generally with a liberty to restore. Ten months then passed, during which it appears that the parties agreed a revised payment schedule. However, that was not met, and in December the plaintiff applied to resurrect the proceedings, and a hearing was then set for 18th December 2008. That was then rescheduled by agreement for 22nd January, when Ms. Junos did not appear, and the matter was adjourned to 5th February. On that date the matter came before Greaves J. On the morning of the hearing Ms. Junos filed an affidavit, essentially asking

[1] The question is important because it determines (i) the time limit for appealing (7 days if interlocutory, but 6 weeks if final); and (ii) whether advance permission ('leave') is required for the appeal.

for time to get her affairs in order and deposing to her prospects of a substantial settlement from some pending litigation against government in respect of an employment matter. She offered payment of $23,400, although in the event that was not made, the parties being at odds on the terms on which it was offered. It appears that Greaves J had some sympathy with Ms. Junos's position, and he adjourned the matter to 1st April for her to sort things out. On the 1st April the matter came back before Simmons J, who gave judgment on the Bank's claim for the sum due, for sale and for possession.

4. Ms. Junos appealed that on the grounds that Greaves J was seized of the matter, and that Simmons J should not have taken over. That came before the Court of Appeal on 19th November 2009, when it was ordered:

> "1. Appeal allowed.
>
> 2. Order of Simmons J vacated.
>
> 3. Matter remitted to Greaves J for him to complete the hearing of the Bank's application for an order of possession. An early hearing is recommended.
>
> 4. Ms. Junos informs the Court that she is prepared to settle the mortgage payment 18 months up to November 2009 out of the proceeds of her Judicial Review judgments. She is also prepared at the request of the Bank, to assign the proceeds of the Judicial Review judgment to the extent of the mortgage payment due up to November 2009."

That last has not happened. That may turn in part on the terms on which it was offered, but it is not in issue before me, and I do not need to get drawn into that.

5. The matter then went back before Greaves J. It was first put for 13th January 2010, but the defendants were not given notice, and it was relisted for 27th January. At that time the Judge had before him the third affidavit of Teresa Camara for the plaintiff Bank, which

updated the amount due and dealt with certain points as to the rate of interest. It included a schedule of payments actually made, as required by RSC Ord. 88, r. 6(3)(b). On the morning of 27th January 2010 Ms. Junos also filed what she described as a Counterclaim, although this was done by way of a summons, challenging the accounting records and alleging undue influence, misrepresentation and breach of fiduciary duty, and asking for time to file evidence. At the hearing on 27th January Greaves J gave directions, including an order for disclosure of certain bank statements and for an exchange of affidavits, and specifically for an affidavit from Ms. Junos "with supporting documentation in relation to this issue of the amount owed under the subject mortgage". The matter was then put for 1st April, which was when the Counterclaim summons was made returnable for, but Ms. Junos was not available for that date, and it was relisted for 10th May. On that date there was no affidavit from Ms. Junos. Indeed, as far as I can tell from the file, at no point did Ms. Junos file an affidavit contesting the amounts due, or stating her version of what was due. She says that that was due to the Bank's failure to disclose statements. Be that as it may, on 10th May Greaves J proceeded to make an order for possession.

6. The order of Greaves J of 10th May provided –

> "1. That the Mortgage be enforced by sale;
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> 2. That the defendants deliver to the Plaintiff possession of the Property, failing which the Plaintiff shall be at liberty to obtain a writ of possession;
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> 3. The First Defendant's counterclaim be and is hereby struck out, with liberty for the First Defendant to proceed with the counterclaim as a separate action; and
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> 4. That the costs of the application be paid to the Plaintiff by the First Defendant."

7. To the extent that order provides that the mortgage could be enforced by sale, it may be that it is otiose. That form of order is not strictly necessary, if the deed provides an

adequate power of sale or one has arisen under sections 30 and 31 of the Conveyancing Act 1983. Nor in Bermuda is it necessary to obtain the Court's permission for a sale, and there are no statutory provisions in Bermuda allowing the court to defer possession or sale on terms that the mortgagor pay the arrears and thereafter keep up to date with payments. The position here is, therefore, as it was at common law in the United Kingdom before that was altered by statute, and is governed by Birmingham Citizens Permanent Building Society v Caunt [1962] 1 Ch. 883 at 890[2].

8. The order of 10th May did not include a judgment for the money said to be due and owing under the advance secured by the mortgage. There is nothing wrong with that: the plaintiff has the right to exercise its security without a money judgment, and only needs one if there is a shortfall on the proceeds of sale of the security[3].

9. Ms. Junos did not then appeal the order of 10th May. On the assumption that it was a final order she had six weeks in which to do so. Once that six weeks had expired, on 30th June 2010 she issued a Notice of Motion in the Supreme Court to set aside the order of Greaves J. It lists ten essentially procedural points, including systemic bias, and prejudgment. That then came before me on 2nd August 2010. When it came before me I considered it wholly misconceived, and I struck it out summarily and of my own motion. I did this because I took the view that I could not set aside the final order[4] of another judge of commensurate jurisdiction unless it was made –

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[2] For an application of that, see the final paragraph of my decision in BDC Ltd. v Arnold Brown & Ors. (Civ. 1993:356) (15th February 1994)

[3] I accept, of course, that that does not absolve the court from determining, on an application for possession, that the arrears are such that the power of sale has indeed become exercisable.

[4] I have regarded Greaves J's order for possession as final, although it did not entirely dispose of the action, on the basis that it disposed of a discrete issue in the action, namely possession, applying the approach in Holmes v Bangladesh Biman Corp. [1988] 2 Lloyd's Rep 120, at 124:

> ". . . a broad commonsense test should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial. Judged by that test this judgment was plainly final, even though it did not give the plaintiff a money judgment and would not, even if in the airline's favour, have ended the action."

However, even if I were wrong on that, and it was an interlocutory order, I could no more have interfered with it than I could with a final one in the absence of some "fresh material not before the court when the original interlocutory order was made": See Columbia Pictures Inc. & Ors. v Robinson & Ors. [1987] 1 Ch. 38 at 86.

(i) ex parte (see RSC 1985, Ord. 32, r. 6);

(ii) on the non-attendance of the party against whom it was made (see Ord. 32, r. 5(3) and (4), and see also Ord. 14, r. 11; Ord. 28, r. 1; and Ord. 86, r. 7); or

(iii) under Ord. 113, r. 8 (which this was not).[5]

10. However, none of that applied. The order of Greaves J was not made in default, and the record shows that Ms. Junos was present in person at the hearing before Greaves J. To the extent that Ms. Junos says that a judgment can be set aside by another judge of commensurate jurisdiction when it is a nullity, this is a difficult and doubtful area of the law which was considered by the Privy Council in Leymon Strachan v the Gleaner Co. Ltd. & Anor. [2005] UKPC 33 (25 July 2005). That identified certain cases, which were such a complete nullity that the originating process "had no more effect to commence proceedings that a dog licence". This has nothing to do with the phrase 'ex debito justitiae' which Ms. Junos waives around like a magic wand, and to the extent that that has entered into the jurisprudence in the context of nullity, its use is mistaken: see Ibid. at [25] and [26]. But in any event this was not a case where the proceedings were a nullity at all. To the extent that Ms. Junos relies upon non-compliance with the evidential provisions of RSC Ord. 88, that cannot be said to *nullify* the proceedings, particularly in light of RSC Ord. 2, r. 1[6]. They were plainly evidential matters capable of being waived or corrected, and in any event, by the 10th May 2010 the matter had already been up to the Court of Appeal and had been expressly remitted to Greaves J, so by that time if there had been any irregularity at the outset it had long been superseded. In my judgment,

[5] The Supreme Court can also set aside its own judgments if made in default (see Ord. 13, r. 9 and Ord. 19, r. 9), but in such a case it is not strictly a question of setting aside the order or judgment of another Judge.

[6] **2/1 Non-compliance with rules**
1 (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

therefore, Ms. Junos was bound by the order of Greaves J unless and until it was set aside or varied on a properly constituted appeal to the Court of Appeal.

11. I considered the issue to be an important one, and a matter of fundamental principle. The effect of Ms. Junos's attempts to relitigate at first instance, rather than appeal, is to protract the proceedings, and run up the expense and trouble to the plaintiff[7]. Whether or not that is intentional I cannot say, nor do I have to. It is enough that the effect of doing so is to complicate the proceedings unnecessarily, and thereby to deter enforcement of the Bank's security. That is why it is the policy of the law not to allow relitigation at the same level, but to require an aggrieved party to move upwards to the appellate level. Against that background I considered that Ms. Junos's attempt to relitigate the order of 10th May before another Judge was vexatious and an abuse of process, and I therefore struck it out summarily and of my own motion at the hearing on 2nd August 2010.

12. At the hearing on 2nd August Ms. Junos asked for my opinion on whether my decision was interlocutory or final, and I told her that in my opinion it was interlocutory, applying the 'application' test in White v Brunton [1984] 2 All ER 606, which I explained to her.

13. Ms. Junos then sought to file a Notice of Appeal against my order of 2nd August. This was dated and filed on 3rd September 2010. At the same time she also issued an *ex parte* application for a stay pending appeal. The Registrar refused to accept the Notice of Appeal, on the grounds that my order was interlocutory and that therefore (i) leave to appeal was required; and (ii) it was out of time. This was notified to Ms. Junos by letter of 8th September, which was on Court of Appeal notepaper, and signed by the Registrar as Registrar of the Court of Appeal.

14. Ms. Junos did not accept that ruling of the Registrar of the Court of Appeal, and issued an "Originating Summons" of 9th September in which she sought to challenge it.

[7] An example of the chaos which can result is provided by the Strachan case cited above, which the Privy Council described as a ". . . welter of applications, cross-applications, appeals, orders setting aside earlier orders and orders refusing to set aside earlier orders in proceedings which have got complete out of hand."

She also sought a stay of the writ of possession that had by then been issued to enforce Greaves's J's order. That Originating Summons was issued in the Supreme Court and assigned a different case number (2010:304), although it was kept on the same file (as I understand it for reasons of administrative convenience). I think that it was an error to issue the Originating Summons in the Supreme Court, as the decision Ms. Junos was seeking to challenge was that of the Registrar of the Court of Appeal, and I do not think that the Registrar of that Court is amenable to review by the Supreme Court. Nor was it properly a matter for an Originating Summons, or any other form of originating process.

15. On 10th September 2010 the *ex parte* application for a stay pending appeal and the Originating Summons challenging the Registrar's decision both came before Kawaley J. He ordered:

> "1. That there is a Stay of Execution of the Order of Possession of 10th May 2010, pending the *Ex Parte* Notice of Motion (Stay Application) being fully heard before such Judge as the Registrar or the Chief Justice may direct.
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> 2. That the Originating Summons (2010:304) of 9th September 2010 is adjourned to a date to be fixed before the Chief Justice to determine, *inter alia*, whether his order of the 2nd August 2010 was a final or interlocutory order."

16. The matter then came back before me on 8th October 2010 on that referral, and, by agreement, proceeded on the basis that all matters raised by Ms. Junos's applications of 3rd and 9th September were before me.

17. At the start of the hearing on 8th October, Ms. Junos took two preliminary points on the form of my order of 2nd August – (i) that it omitted some of the headings from her Notice of Motion of 30th June 2010, being references to the Constitution, to "Procedural and Natural Justice", and to the inherent jurisdiction; and (ii) that it referred to her application being 'struck out' when I had in fact dismissed it. She referred me to the

transcript of the hearing of the 2nd August, which the court had made available to her[8], to substantiate the latter. As the order had been perfected I did not consider that it was open to further challenge or argument. In any event, in my judgment the form of the order as drawn up is correct. The headings of the action are properly those on the originating process, and the later insertions were not strictly permissible. As to what I did in respect of the Notice of Motion, I consider that on a correct analysis I struck out her application as vexatious and an abuse of process. I therefore take the view that the order as perfected was and is correct. For the record, it would make no difference to my view of the interlocutory nature of that order if I had dismissed the Notice of Motion rather than striking it out.

18. As to the nature of that order, to the extent that the Judge making an order has any jurisdiction to declare whether it is interlocutory or not, I consider that I am *functus officio*, having expressed a view at Ms. Junos's request at the conclusion of the hearing on 2nd August. At that time, according to transcript, there was the following exchange:

> "MS. JUNOS: My understanding from case law that I've researched is that an application such as mine that is dismissed can be appealed, as a final order.
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> THE COURT: Well, you'll have to take a stand on that. My personal view, for the reasons I've tried to explain and perhaps not explained very well, I understand that, but my personal view is that it's interlocutory. I have stated throughout this hearing that it was interlocutory. I have never intended to say that it was final."

19. If I were wrong in my view that I was *functus*, and if it were open to me to reconsider it, I nevertheless consider that my view was correct, and that it is interlocutory, applying the 'application' test from White v Brunton [1984] 2 All ER 606. The application of that test in Bermuda has recently been re-affirmed by the Court of Appeal in Consolidated Contractors International Company SAL v Munib Masri (Civil Appeal 2009: No. 7B,

[8] The Court made the transcript available free of charge and in order to assist Ms. Junos understand the issues. She took objection to this, as she had asked for a copy of the recording itself, and implied she did not trust the transcript. If she wishes to persist with that, she may have the actual recording on payment of the standard fee of $50.

decision of 19th June 2009); [2009] CA (Bda) 11 Civ.[9], where Auld JA stated it succinctly at paragraph [7] as follows:

> "The *application test* is that if an application or claim before the court is of such a nature that, irrespective of which side succeeds, the order made in the proceedings will dispose of the case, subject only to the possibility of appeal, the order will be final."

20. The corollary is that if there is a way that the application can be decided which will not dispose of the proceedings, then the application is interlocutory, and any order made on it will be interlocutory. This will be so whatever the order in fact is, and even if the order made in fact finally disposes of the proceedings. The approach which looks at the order actually made, and whether it in fact disposes of the proceedings or not, was the heresy rejected in White v Brunton:

> "Thus the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order *and not on the order itself*." [my emphasis]

21. Applying that test to the present case, my decision was made on Ms. Junos's application to set aside the order of Greaves J. An application to set aside a judgment is, in my view, interlocutory[10]. This is because, if decided in the applicant's favour, the judgment will be set aside and the original proceedings will continue. I accept that if the application to set aside is dismissed (or struck out) then the outcome is final, in that the judgment will endure. However, for the reasons set out above, it is not the actual outcome which is determinative of the nature of the order.

22. Ms. Junos argues that the actual outcome in Consolidated Contractors International Company SAL v Munib Masri (*Supra*) is to the contrary. As noted above, that decision is binding authority for the application of White v Brunton in Bermuda. It concerned an

[9] Ms. Junos put the decision before me in the form of a summary from a Law Firm's newsletter. I have referred to the full text, which can, like all decisions since 2007, be found on the Judiciary's website at www.judiciary.gov.bm under 'judgments and legal reference'.

[10] It would also have been interlocutory in the UK prior to the introduction of the CPR: see RSC Ord. 59, r. 1A(6)(bb). However, I appreciate that that rule has no direct application in Bermuda for the reasons explained in [2009] CA (Bda) 11, and is not determinative of the issue.

application to set aside the registration of a number of foreign judgments on the grounds *inter alia* of fraud, and held that a refusal to do so was final. That is a very different sort of proceeding from this one, not least because it was not an application to set aside the foreign judgments themselves. The Bermuda courts would have no jurisdiction to do that. It was an application to set aside *the registration* of those judgments for the purposes of enforcement here. The distinction is crucial, because in such a case whichever way the application was decided it would finally dispose of the litigation in Bermuda: if the application was dismissed the foreign judgments remained registered and enforceable; if the application was allowed, the foreign judgments would not be enforceable. Either way, the question of that foreign judgment's registration in Bermuda would be at an end and there could then be no further litigation in Bermuda on that issue. I do not think that it has any direct bearing on the nature of Ms. Junos's application before me on 2nd August. My view therefore remains unchanged.

23. At this point I have to consider in what capacity I am dealing with this. The issue of whether my decision of 2nd August 2010 is final or interlocutory was put squarely before me by Ms. Junos's Originating Summons (2010:304), but, as noted above, I do not consider that the Supreme Court has any power to review decisions of the Registrar of the Court of Appeal. I also consider that the question of "final" or "interlocutory" is really a question for that Court and not for the Supreme Court. On that basis I would simply have dismissed Ms. Junos's summons *in limine*. As it was, I took the view that I could consider it pursuant to section 3(3) of the Court of Appeal Act 1964, which provides that "A judge of the Supreme Court may exercise any of the powers of single Justice of Appeal." I also thought it necessary to determine the issue to prevent further argument and put an end to what was becoming an entirely circular process. I therefore went on to consider her application to review the decision of the Registrar on its merits, and dismissed it for the reasons given above. I now understand her to object to my having taken that course. All I can say to that is that my decision was made on her application, and in an attempt to impose some order on these proceedings. It does not entirely shut Ms. Junos out, because, as I explained to her, the matter remains one for the full Court of

Appeal, and she can seek their determination on it pursuant to Ord. 2, r. 38 of the Court of Appeal Rules[11].

24. A consequence of my decision is that there is, at the moment, no properly constituted appeal on which to hang an application for a stay pending appeal. Nevertheless, because Ms. Junos appears in person, and in a desire to avoid any unfairness to her, I granted a stay of execution of the order of possession until 4.30 p.m. on Friday 22nd October 2010, that being 14 days from the hearing. I did that to allow her time to consider her position and make any application for leave or for an extension of time that she considered appropriate. The matter of a stay could then be considered further in the light of the outcome of any such application.

25. As to what is the appropriate application, that is ultimately a matter for her. I did nevertheless express the view that (i) there was little practical point in pursuing an appeal against my order of 2nd August because, even if such an appeal was successful that would only result in the matter being remitted to the Supreme Court to consider her application to set aside Greaves J's order, without achieving a decision on the merits of that application; and (ii) that on the material she had currently placed before me, I was likely to refuse leave as I thought her position on it hopeless. I also explained to her that if she did apply for leave and was refused by me, that did not debar her from getting before the Court of Appeal, as she could apply to the full Court for leave pursuant to Ord. 2, r. 3(1)(b)[12].

26. I also expressed the view that, as it was the order of Greaves J which was the real subject of her complaint, the preferable course would be for her to make an application for an enlargement of time within which to appeal pursuant to Ord. 2, r. 4(2), which I could then hear and deal with exercising the powers of a single Judge, pursuant to Ord. 2,

[11] **2/38 Interlocutory applications. Power of single Judge**
38 (1) In any cause or matter pending before the Court, a single Judge may hear, determine and make orders on any interlocutory application.
(2) Any order made by a single Judge in pursuance of this rule may be discharged or varied by the Court on the application of any person aggrieved by such order.

[12] All references are to the Rules of the Court of Appeal for Bermuda

r. 4(3) when read with section 3(3) of the Act (see above)[13]. If I granted an enlargement of time the matter could then proceed upwards in good order. If I refused it, she could still renew that application to the full court as provided by r. 4(3). Either way that would allow the Court of Appeal to focus on the merits of the possession order rather than having to deal with the endless procedural distractions attendant upon a review of my order of 2nd August.

27. I awarded the plaintiff its costs of Ms. Junos's two applications. I saw no reason why they should not follow the event. Although Ms. Junos appears in person it is plain from her arguments and her reference to authority that she very clearly understands the issues. She was present at the hearing of 2nd August 2010, and must have understood the view I had expressed on the interlocutory nature of the application. I do not think that Kawaley J would have remitted the matter to me as he did if she had told him what I had said, and I think that this was just another example of her attempting to relitigate decided issues.

28. In summary, on the issue of the nature of my order of 2nd August 2010, I hold and declare that it was a decision in respect of an interlocutory matter within the meaning of section 12(2)(a) of the Court of Appeal Act 1964, and that any appeal against it requires leave.

Dated this 8th day of October 2010

Richard Ground
Chief Justice

[13] I have taken and expressed the view throughout that Greaves J's order was final in nature, and so an appeal from it did not require leave. However, even regarded as a final order, the time for appealing it had already expired when the Notice of Motion of 30th June was issued.