Hilary Term
[2017] UKPC 8
Privy Council Appeal No 0052 of 2016

JUDGMENT

Junkanoo Estate Ltd and others (Appellants) *v* UBS Bahamas Ltd (In Voluntary Liquidation) (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Mance
Lord Kerr
Lord Sumption
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

3 April 2017

Heard on 24 February 2017

Appellants
Joel Bennathan QC
Phillip Lundy
(Instructed by Junkanoo Estate Ltd and Yuri Starostenko)

Respondent
Marco Turnquest
Chizelle Cargill
(Instructed by Lennox Paton)

Third Appellant
Irina Tsareva Starostenko
Phillip Lundy
(pro se)

LORD SUMPTION:

1. This is an application for special leave to appeal to the Judicial Committee. Unusually, the application was listed for an oral hearing, and a formal judgment is being given in open court. This is because it arises out of procedural difficulties which have arisen in an ongoing action, and for reasons which will become clear it is important that the basis of the Board's decision should be understood both by the parties and by the courts who may have to deal with further applications.

2. The application arises out of a mortgagee's action for possession of a residential property at Lyford Cay in the western district of New Providence in the Commonwealth of the Bahamas belonging to the First Defendant, Junkanoo Estates Ltd. The mortgage was granted by Junkanoo to secure its indebtedness under an agreement with UBS (Bahamas) Ltd contained in a Commitment Letter dated 23 August 2011. The Second and Third Defendants, Mr and Mrs Starostenko, control Junkanoo and guaranteed Junkanoo's indebtedness. They also occupy the property, together with their family. Under the Commitment Letter, UBS provided a credit facility of $1.4m to the company on terms that at least half of the facility would be available for investment in securities through trading facilities to be made available by UBS. On 28 February 2014, UBS declared the loan in default and demanded repayment of the whole outstanding balance. The alleged defaults were the failure of Junkanoo to maintain the minimum sum under management or to pay periodical interest as it accrued. On 10 March 2014, UBS declared its intention to seek orders for the sale, possession or foreclosure of the property.

3. The defendants say that they have a defence. This is that the alleged defaults were due to UBS's own breaches of their obligations in relation to the management of the invested funds, in particular in failing to provide an electronic trading platform for the investment of the funds under management and failing to carry out certain trades. It is also said that there is a cross-claim for damages flowing from the same breaches. It is unnecessary to examine these points in greater detail. As a result of the procedural mishaps described below, they have never been examined by the courts below. The Board think it right to approach the present application on the assumption that they are arguable, without deciding whether or not they are.

4. The action was begun in the Supreme Court on 3 October 2014, and a month later, on 5 November, UBS applied for summary judgment. The application came before Evans J on 23 March 2015. It is apparent from the transcript of the hearing, which has been put before the Board, that no real attempt was made to present the defendants' case at this hearing. Counsel for the defendants had by mistake put the hearing into his diary for 25 March, as a result of which Mr and Mrs Starostenko were not present and Counsel

was not properly prepared. An affidavit had been sworn on behalf of the defendants which, when read with the voluminous correspondence exhibited, could be said to support the defence to which the Board has referred. However, it was still in the process of being filed and was not before the court. Counsel for the defendants observed that "to that extent" the application for summary judgment was opposed. But he added that Counsel for the Bank had drawn his attention to certain authorities to which, he said, he had no answer. This appears to have been a reference to authorities such as *National Westminster Bank Plc v Skelton* [1993] 1 All ER 242, 246 (per Slade LJ) to the effect that a counterclaim was not normally a sufficient basis for resisting a mortgagee's summary application for possession. It appears not to have been appreciated that the defence which the defendants wished to raise was not just that the debt was abated by the cross-claim, which might in some circumstances have amounted to an equitable set-off, but that the event of default which was said to have made the debt payable was brought about by UBS's breaches of duty. This may or may not have been a good point, but Counsel's concession meant that that was never decided. Evans J gave judgment for the debt claimed and for possession in default of payment, without prejudice to the defendants' right to pursue their counterclaim.

5. Under section 11(f) of the Court of Appeal Act, an appeal to the Court of Appeal from an interlocutory order lies only with the leave of the Supreme Court or that of the Court of Appeal. Rule 27(5) of the Court of Appeal Rules provides:

> "Wherever under the provisions of the Act or of these Rules an application may be made either to the court below or to the court, it shall be made in the first instance to the court below."

It is common ground that for this purpose an order giving summary judgment is an interlocutory order. The English rule to this effect was stated in *White v Brunton* [1984] QB 570 and has been applied for many years in the Bahamas.

6. On 20 April 2015, the defendants filed a notice of appeal against the order of Evans J, together with an application for a stay of execution of the judgment. They had not, however, sought leave to appeal from Evans J. Because of Rule 27(5), they were not therefore in a position to seek it from the Court of Appeal, unless the Court exercised its general power to dispense with compliance, which they had no reason to do. The matter was heard in the Court of Appeal over four days, on 20 May, 29 July, 14 September and 2 November 2015. Junkanoo and Mr Starostenko were each represented by Counsel. Mrs Starostenko appeared in person. UBS took the preliminary point that no leave had been sought or obtained, and in a judgment delivered on 2 November, the applications were dismissed and the Notice of Appeal struck out on that ground.

7. There followed a period of some months in which the defendants, and in particular Mrs Starostenko, attempted to make further applications in the Supreme Court, including an application for a stay of execution of the possession order. According to Mrs Starostenko, the Supreme Court registry refused to accept any applications from her on the ground that the Supreme Court was *functus* and the matter had gone to the Court of Appeal. The Board is unable to determine exactly what happened between Mrs Starostenko and the court administration. She was apparently acting in person and seems to have made personal approaches to the court office rather than lodging applications in proper form. What seems, however, to be the position on the presently available evidence, including Mrs Starostenko's affidavit sworn 8 August 2016, is that the applications which she wished to make in the Supreme Court did not include an application for leave to appeal from Evans J's judgment of March 2015. Mrs Starostenko told the Board that this was because she had been given to understand that until an extension of time had been obtained, she would not be in a position to seek leave to appeal.

8. If so, this was an error. The proper course would have been to apply first to Evans J, on notice to the plaintiff bank, for leave to appeal. If that application for leave had been made in the ordinary way by notice of motion, the registry would have been bound to receive it and list it for hearing before the judge. If leave had been given, the next step would have been to apply to the Court of Appeal for an extension of time for the appeal. If leave to appeal had been refused, application could then have been made to the Court of Appeal for leave to appeal and an extension of time. An application for a stay of execution could have been made at the same time as these applications.

9. As it was, having got nowhere in the Supreme Court, the defendants filed a fresh notice of motion in the Court of Appeal on 2 June 2016 for an extension of the time for appeal and a stay of execution. This came before the Court of Appeal on 6 June. They dismissed the applications on the ground that the matter had been dealt with and the Court of Appeal was *functus*. Although some of the observations made by the court during the hearing suggested it could do nothing for the defendants, who would have to apply for leave to appeal to the Privy Council if they wished to take matters further, the Board is satisfied that the Court of Appeal was not purporting to dismiss a substantive appeal. It is tolerably clear that what the Court of Appeal meant was that they were *functus* in relation to the point that they had dealt with on 2 November 2015, namely that they could not make orders on an appeal which was not before them because leave to appeal had been neither sought nor obtained. That remained the position. The Court of Appeal was not of course *functus* in relation to the substantive appeal from Evans J's possession order, because no such appeal had been heard. Were leave to be sought from Evans J or, in the event of its being refused by him, from the Court of Appeal, neither court would be *functus* in relation to that application, and if leave were granted the appeal would be competent.

10. The present application seeks leave to appeal to Her Majesty in Council from the decisions of the Court of Appeal of 2 November 2015 and 6 June 2016. The Board is grateful to Mr Bennathan QC and Mr Lundy who have appeared *pro bono* for the defendants and who have been able to present the history in a coherent manner. But it declines to grant leave to appeal from those decisions. The Board would not normally entertain an appeal from an interlocutory order of this nature, and this particular application raises no issue of general legal importance. In any event, in the absence of any application to Evans J for leave to appeal, those decisions were plainly correct.

11. However, it appears to the Board to be right to draw attention to the limited basis on which those decisions were made, and on which the present application is being refused. The defendants are in their present position for one reason only, namely that they have not obtained leave to appeal. They have not exhausted their rights in the courts below because it remains open to them to apply for leave in the manner that the Board has indicated. Mr Turnquest, who appeared for UBS, fairly conceded this. On such an application, a number of matters will have to be considered. They will include (i) whether the appeal would be arguable, (ii) what explanation is proffered in the defendants' evidence for the delay in seeking leave, including what has occurred and what the defendants have been doing in the meanwhile, and (iii) what if any prejudice that delay may have caused to UBS. The Board expresses no opinion of its own on any of these matters nor on the appropriate outcome of the application.

12. UBS has undertaken not to proceed with the enforcement of Evans J's possession order until the determination of the present application for leave to appeal to Her Majesty in Council. It will have been determined when the Board's order on the present application is formally made by Her Majesty in Council. There will therefore be time for the defendants to make their applications to Evans J (and if necessary to the Court of Appeal) for leave to appeal and a stay of execution.