Neutral Citation Number: [2022] CA (Bda) 10 Civ

Case No: Civ/2021/16

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2018: No. 074

Sessions House
Hamilton, Bermuda HM 12

Date: 14/06/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

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Between:

TROTT & DUNCAN LIMITED

Appellant

- and -

FIDELITY NATIONAL TITLE INSURANCE COMPANY

Respondent

Mr. Mark Diel and Ms. Katie Tornari of MDM Limited for the Appellant
Mr. Keith Robinson and Mr. Kyle Masters of Carey Olson (Bermuda) Limited for the Respondent

Hearing date: 3 June 2022

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APPROVED JUDGMENT

CLARKE P:

1. This is the judgment of the court. We have before us an appeal from the refusal of Subair Williams J to order a stay of the present proceedings. In order to explain the order which we propose to make it is necessary to set out the somewhat complicated history.

2. Par-La-Ville Hotel & Residences Ltd ("PLV") sought to build and develop a 5* hotel complex on the site of the PLV car park in Hamilton. The site was intended to be leased by the Corporation of Hamilton ("COH") to PLV and COH would receive revenue from the use of a new underground car park. On **11 April 2021** PLV entered into a lease and a development agreement with COH.

The loan and the guarantee

3. On **10 May 2013** COH was advised by Charles Flint QC that it did not have power to provide security for a loan to PLV and that section 23 (1) of the *Municipalities Act* did not confer on it any general power to provide financial assistance to a commercial developer. Subsequent to that COH instructed Terra Law Limited ("Terra Law"), a Bermuda law firm, which provided a draft written opinion that COH had the power to mortgage its property pursuant to section 20 (1) (b) of the *Municipalities Act* if Ministerial approval was obtained; but that there was the possibility of a challenge to that, which could be protected against by obtaining title insurance.

4. On **9 July 2014** Mexico Infrastructure Finance LLC ("MIF") agreed to lend $ 18 million to PLV. On the same date COH issued a guarantee of that loan; and on **4 August 2014** COH executed a mortgage in favour of MIF over its freehold interest in the Car Park as security for the loan. It was a condition precedent of the loan that the mortgage should be covered by a title insurance policy.

The insurance

5. Fidelity National Insurance Ltd ("Fidelity") avers that MIF originally approached Stewart Title Guarantee Corporation Ltd ("Stewart Title") for title insurance. Fidelity contends that MIF did not proceed with Stewart Title because Stewart Title sought to include within the policy a clause which excluded liability arising from any claim or loss by reason of any lack of legal or constitutional authority by the COH to act as guarantor/mortgagor. MIF was not prepared to accept the proposed exclusion clause and approached Fidelity.

6. On **18 August 2014** Fidelity issued to MIF a policy covering MIF against, *inter alia*, the invalidity or unenforceability of "*the Lien of the Covered Mortgage*" i.e. the mortgage of 4 August 2014.

7. On **19 August 2014** Trott & Duncan delivered an opinion in writing to Fidelity which said that COH had all requisite corporate power and authority to enter into the guarantee and to grant the mortgage. It is Fidelity's case that Trott & Duncan had been instructed that, if their advice was that COH did not have that power, or if there was any doubt on the matter, Fidelity would either decline to issue a title insurance at all or would issue one with the sort of exclusion clause to which we have referred.

8. The loan was provided in stages. There was an initial drawdown; but part of the loan was paid into an escrow account at the Bank of New York Mellon, which was only to be released subject

to certain conditions. In the event $ 13,749,858, which was in the escrow account, was released to PLV. MIF claims that that sum was released contrary to the conditions of the escrow.

9. On **30 December 2014** the loan of $ 18 million became due. It was not repaid. MIF sought repayment of the entire outstanding balance plus interest from COH under the guarantee,

The guarantee action

10. In **February 2015** MIF brought proceedings in the Supreme Court against COH to enforce the guarantee. On **27 May 2015** COH, having taken legal advice, consented to an order against them for the enforcement of the guarantee. On **23 June 2016** COH, having received different advice from Marshall Diel & Myers, issued an originating summons to set aside the consent order on the ground that the guarantee was null and void because COH had no power to provide it.

11. On **18 November 2016** Hellman J held the guarantee to be *ultra vires* COH and set aside the consent order. That decision was upheld by this court on **12 May 2017** and by the Privy Council (by a majority) on **21 January 2019**.

12. On **6 December 2016** MIF notified Fidelity of a claim under the insurance for the entire policy amount on the basis that, if the mortgage was not enforceable in accordance with its terms, MIF would suffer loss in excess of the policy amount.

The New York action

13. In **July 2017** MIF issued proceedings in New York against COH and the Bank of New York, claiming that the then Mayor and the Chief Operating Officer of COH had breached the terms of the escrow agreement by authorising the release of the $ 13,749,858 to PLV when the terms of that agreement had not been complied with.

The mortgage action

14. On **17 August 2017** MIF brought proceedings in Bermuda against COH claiming that, notwithstanding what had been decided in the guarantee action, COH was bound by the mortgage. These proceedings were later amended to claim that COH was liable for the negligence of Terra Law because Terra Law were COH's agents. COH's defence to these proceedings is that the ruling of the Privy Council necessitates the conclusion that the Mortgage is also *ultra vires*.

The Terra Law action

15. On **13 February 2020** MIF began proceedings against Terra Law in relation to the advice given by Terra Law as to the capacity of COH to enter into the guarantee/mortgage, which advice was, we are told, amended by Conyers and eventually stated that COH did have the capacity to enter into the arrangements.

16. An order has now been made that the mortgage action and the Terra Law action shall be heard together.

The negligence action

17. On **13 March 2018** Fidelity brought the present proceedings against Trott & Duncan alleging breach of contract and/or negligence in giving the opinion of 19 August 2014, which advised Fidelity, without reservation, that the guarantee and mortgage were *intra vires* COH, and failed to advise that there was a significant risk that a court might find that they were not. The Statement of Claim has been amended and re-amended and a Defence has been served as has a Reply.

18. By a summons issued in **May 2019,** Trott & Duncan sought an order that the negligence action be stayed pending the determination by the Supreme Court, and any appeal court, of the mortgage action. In **August 2019** that summons was amended to ask that the negligence action be stayed pending the New York proceedings.

19. By a ruling dated **17 January 2020,** Subair Williams J declined to order the stay sought. She did so on the following basis. The mortgage action would not decide the question of liability in the negligence action. At best it might "*forcibly*" reduce the claim for the quantum of loss. That was not a good reason to prevent the Plaintiff from prosecuting its claim. The potential for an inordinate period of time to pass between the date of her ruling and the final tier of the litigation in the mortgage action was high; and it would be unfair to hold the negligence action hostage because of another claim which would raise significantly different issues of fact and law in terms of liability. The same analysis applied in respect of the New York action. The judge was not persuaded that the progress of the proceedings would result in wasted time or costs that might have been avoided had the mortgage action or the New York action been fully disposed of first.

20. The judge added that should the time come for the negligence action to be set down for trial prior to the final determination of the mortgage action (i.e. before any final appeal), she would be open to hearing Counsel on the possible need for a split trial on liability and quantum.

21. By their Notice of Appeal Trott & Duncan sought an order that the negligence action be stayed pending the determination by the Supreme Court and any appeal court of the mortgage action; or such further or other order as we might think fit.

22. In the course of the focused oral argument before us it became apparent, in the light of the considerations that we raised, that Mr Mark Diel for Trott & Duncan saw the force of the suggestion that an appropriate case management order could be one which ordered that the trial of the mortgage action at first instance, should precede the hearing of the negligence action; and that Mr Keith Robinson, for Fidelity, whilst observing that case management decisions were for the trial judge, did so as well. Mr Diel sought, at least, a stay of the negligence action until the judgment at first instance in the mortgage action. Mr Robinson submitted that there should be no such stay: any further disclosure and the preparation of witness statements in the negligence action should continue.

23. In our view the position is as follows. The hearing of the mortgage action at first instance should precede the hearing in the negligence action, for two principal reasons.

24. First, the validity of the mortgage is a matter which has to be determined in both actions and it is obviously more appropriate that it should be determined first in an action between the parties to the instrument. MIF, which currently asserts that the mortgage is enforceable, could scarcely

have a claim established against Fidelity until it transpired that the mortgage was unenforceable. That being so, it would be inappropriate to determine Fidelity's claim against Trott & Duncan before any determination in the mortgage action[1].

25. The current plan is that Subair Williams J will hear both the mortgage and the negligence actions, in which case she will obviously reach the same decision about the validity of the mortgage in each. Even if it were to transpire that the judges in both trials were different, the likelihood is that the judge in the negligence action would follow the judgment in the mortgage action.

26. Secondly, if, as COH contends, the mortgage is valid, that will have a significant effect on the negligence action in that it will much reduce any claim. If the mortgage is held to be valid, Fidelity will contend that it is entitled to recover the costs it has incurred in defending the guarantee action, i.e. the claim by COH that the guarantee was ultra vires. On that hypothesis Fidelity's case is that, if Trott & Duncan had qualified their advice, Fidelity would either not have insured MIF at all or would have only done so with an exemption clause; and, in either event, it would not have had to finance the defence of the guarantee action, and would claim to recover those costs. The costs of the guarantee proceedings up until 13 March 2018, the date of the writ in the negligence action, were US $ 933,632.80, but further costs have been incurred since then, so that the costs in question are now some $ 3,000,000. Even so, the damages would be about one sixth of the total lent and presently claimed by Fidelity. Trott & Duncan contend that Fidelity was not, on a proper construction of the terms of the policy, obliged to finance the defence of the guarantee proceedings anyway, its only obligation being to finance a defence to a challenge to the validity of the mortgage. Fidelity disputes that and would, we apprehend, claim that, if it were wrong on construction, it could nonetheless recover the costs as expenditure by way of mitigation of damages. It is, however, possible that, if Trott & Duncan are right, the damages would be nil.

27. The fact that the outcome of the mortgage action may greatly reduce what is in issue in the negligence action is a good ground for deciding the mortgage action first.

28. We would not, however, regard it as necessary to stay the negligence action pending the determination of the mortgage action at first instance. It does not seem to us that a failure to order such a stay is going to have the effect that substantial costs in the negligence action will be incurred, which would not have had to be incurred if the hearing of the mortgage action had to take place before any further progress was made in the negligence action.

29. In the negligence action general discovery has taken place and any applications for specific discovery have been ordered to be made by 8 August 2022. It is in any event difficult to see that there is much more to be disclosed in the negligence action, whichever way the mortgage action is decided. Whether the mortgage is valid is a question of law. The advice given is a matter of record. Whether it was negligent is a question of judgment. There are no doubt documents relating to the production of the advice for, and to, Fidelity but they must or should have been disclosed already. Witness statements will no doubt have to be prepared but that does not seem to us to be anything like a massive task; and much of what they are going to say is apparent already.

[1] Fidelity's statement of claim itself pleads that MIF has demanded an indemnity for any loss which it sustains in the event that the mortgage is not enforceable (35); and that, in accordance with the terms of the Policy Fidelity "*may be*" required to compensate MIF (36) and "*may b*e "liable for $ 18,000,000 (37).

30. Mr Diel said that Trott & Duncan might seek disclosure of documents in Fidelity's possession relating to what MIF told Fidelity about its prior attempts to obtain insurance because they might reveal that MIF's insurance with Fidelity was avoidable. This seems to us to be highly speculative and, in the absence of any pleading, of a piscatorial nature. And, in any event, it would be appropriate for any such issue to be ventilated now in order that, if necessary, Fidelity can consider whether it should in fact be avoiding the policy.

31. Lastly we are not convinced that such costs as are incurred in the progress of the negligence action are likely to be wasted. On the contrary it would seem to be advantageous for the negligence proceedings to be close to readiness for a hearing not long after the first judgment in the mortgage action.

32. Accordingly, the orders that we make are as follows:

    a) the appeal is allowed;

    b) the trial before the Supreme Court in this action i.e. *Fidelity National Title Insurance Company v Trott & Duncan Limited* Cecil Jurisdiction 2018 No 74 shall not take place until after the determination by the Supreme Court in the case of *Mexico Infrastructure Finance LLC v The Corporation of Hamilton* Civil Jurisdiction 2017 No 295;

    c) nothing in this order shall prevent any interlocutory proceedings in Action 2018 No 74, nor preclude a trial thereof in the event that Action 2017 No 295 terminates before a determination of that case by the Supreme Court.

33. These orders leave open the position that the Court might take once a determination had been reached by the Supreme Court in the mortgage action. It is possible that the Court might stay the negligence action at that stage. But whether it should do so is much better addressed when the result of the mortgage action is known.

34. This Court is clearly entitled to take this course for the following reasons.

35. First, the learned judge did not, as it seems to us, take account of: (i) the clear need for the question of the validity of the mortgage to be decided before anything else; (ii) the manifest appropriateness of that question being decided in proceedings between the parties to the mortgage; and (iii) the manifest inappropriateness of it being decided before any decision had been reached as between the parties to the mortgage.

36. Second, she was distracted from making the case management orders which we think appropriate by the nature of the application made to her, namely an application to stay the current action until the conclusion of any appeal proceedings. A stay of that nature had the potential to be very long and be unacceptably prejudicial to Fidelity. But what needed to be considered was whether something less than that would be the appropriate case management decision.

37. Third, it became apparent during the course of argument before us that our orders are in fact broadly acceptable to the parties.

Costs

38. Although we are allowing this appeal Trott & Duncan has not secured any stay of these proceedings, either in the form that it sought in its original summons or in the form sought in the notice of appeal, or even as suggested in argument (viz that, if the mortgage action is to be tried first, there should be a stay of any further progress in the negligence action until that happened). The proceedings before the judge were conducted on the basis that the choice was between stay or no stay. A direction such as the one we propose to make was not canvassed. At the same time Fidelity had sought, at a time when an order such as the one we purpose to make was not under discussion, to uphold the decision of the learned judge which, if it remained, would have enabled the negligence action to go ahead before the mortgage action was ever tried.

39. In those circumstances, and subject to any submissions that may be made to us before noon on 16 June 2022, we order that:

    (i) in respect of the hearing before the judge the appellants shall bear their own costs and pay the respondents their costs, to be taxed on the standard scale; and

    (ii) in respect of the proceedings before this court the costs shall be costs in the cause.

40. Such an order seems to us adequately to reflect the fact that the appellants have failed to secure the stay orders that they sought and that the order that we make is a case management order suggested by us which was not the proposal of either side.