



[2015] JMCC Comm 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO 2013CD000146

(NO 2)

BETWEEN JMMB MERCHANT BANK LIMITED

CLAIMANT

AND WINSTON FINZI

FIRST DEFENDANT

AND MAHOE BAY COMPANY LIMITED

SECOND DEFENDANT

IN CHAMBERS

Michael Hylton QC, Shanique Scott and Melissa McLeod instructed by Hylton Powell for the claimant

Hugh Wildman, Dr Christopher Malcolm and Ernest Davis instructed by Malcolm Gordon for both defendants

July 14 and 16, 2015

MORTGAGOR/MORTGAGEE DISPUTE – APPLICATION FOR INJUNCTION – WHETHER INJUNCTION SHOULD CONTINUE – AGREEMENT FOR SALE BY MORTGAGOR BEFORE MORTGAGEE CONCLUDING CONTRACT WITH PURCHASER UNDER EXERCISE OF POWER OF SALE – WHETHER FIRST AGREEMENT SHOULD GO THROUGH OR WHETHER MORTGAGEE’S SALE SHOULD STAND

SYKES J

[1] There is no doubt that Mr Winston Finzi borrowed money from Capital and Credit Merchant Bank ('CCMB'). There is no doubt that he has defaulted. There is no doubt the loan was supported by a mortgage over two parcels of land registered at volume 936 folio 167 and volume 936 folio 168 of the Register Book of Titles. Equally, there is no doubt that CCMB has a power of sale. There is no doubt that that power of sale is now held by JMMB Merchant Bank Limited ('JMMB'). It is equally clear that JMMB wishes to and has exercised that power of sale. There is no doubt that on April 21, 2015 JMMB has entered into a contract for the sale of the lands used as security for the debt with Asset Securitisation Trust Limited ('ASL') ('the ASL agreement'). It is undeniable that Mr Finzi entered into an agreement for sale with Miss Marcella James on April 18, 2015, three days before JMMB signed its agreement with the purchaser ('the James agreement'). On July 9, 2015, the process of registering JMMB's transfer was stopped by the Supreme Court on a without notice application, that is to say, without notice to either JMMB or Asset Securitisation Limited. The question here is whether the injunction should continue. On Tuesday, July 14, 2015 the court decided not to extend the injunction and the written reasons are now being given.

[2] Neither purchaser has been served. The court should point out that Mr Hylton QC made no submissions on behalf of JMMB because an application has been filed by the defendants to have the court remove Mr Hylton and his firm from acting for the defendants. This application is set for July 28, 2015.

[3] Mr Finzi in his affidavits stated that when he contracted to sell the property to Miss James there was no impediment in his path (see paragraph 2 of affidavit dated July 9, 2015). The court is not so sure about this because there is a clause in the mortgage document that expressly states that the mortgagor shall not 'lease or demise or sell or part with the possession of the mortgaged lands ... during the continuance of this security without the express consent in writing of the mortgagee first had and obtained' (see clause 1 (e)). There is no evidence that the mortgagee waived this provision or agreed not to rely on it and neither is there any evidence in the affidavits that Mr Finzi obtained the written consent of the mortgagee. If this is correct then it would seem that there was indeed a lawful impediment in the path of this disposition, namely, the contractual provision in the mortgage.

[4] From an examination of the material before the court and affidavits the following seems reasonably clear:

- a)** the parcels of land that were used as security are registered volume 936 folio 167 and volume 936 folio 168 of the Register Book of Titles;
- b)** Mr Finzi is the registered proprietor;
- c)** the mortgage in question is number 1612988 that was endorsed on both titles on 25th day of August 2009 to secure JA\$50m;
- d)** the mortgage was upstamped to cover a further JA\$18,537,075.84 cents 25th November 2009;
- e)** Mr Finzi has not paid off the debt;
- f)** the James agreement was entered into on April 18, 2015;
- g)** the purchase price has been paid and the relevant duties and taxes paid. The transfer for this sale is not yet registered;

- h) the ASL agreement was entered into on April 21, 2015;
- i) JMMB's position is that it was exercising its power of sale;
- j) a caveat was lodged by Miss James on 26th May 2015 on the basis that she was a purchaser under the James agreement.

[5] From this Mr Wildman and Dr Malcolm submitted that the sale to Miss James was first in time; it was in fact completed save for the registration of the transfer and all necessary taxes and fees have been paid. It was also submitted that there is no affirmative evidence that JMMB has in fact sold the properties (as in received payment, stamped the agreement for sale etc) and therefore the contract with Miss James is first in time and thus should have pride of place.

[6] There are, also, these additional facts:

- a) there is no evidence that ASL knew of the James agreement;
- b) there is no evidence that JMMB knew of the James agreement;

The applicable legal principle

[7] The court refers to the case of **Lloyd Sheckleford v Mount Atlas Estate Ltd** SCCA No 148/2000 (unreported) (delivered December 20, 2001). In that case the issue was whether the court could prevent the transfer from being registered in circumstances where the mortgagee had exercised his power sale and the purchaser was a bona fide purchaser for value who had paid in full. Forte P accepted the following submission from Mr Vassell QC: the effect of the amendment of section 106 of the Registration of Titles Act is that an injunction will not lie to restrain the completion of a sale of the mortgaged property to a bona fide purchaser for value on the basis of a complaint by the mortgagor as to the regularity or propriety of the sale. In so doing, the learned President rejected

the submission of eminent counsel Dr Lloyd Barnett to the effect that a purchaser from mortgagee only secures the full protection of section 106 on registration of the transfer.

[8] His Lordship observed at page 7 that section 106 not only gives the mortgagee the power to sell but is specific in protecting a bona fide purchaser from the consequences that may flow if the mortgagee exercised the power improperly or irregularly. Forte JA further observed on the same page that the purchaser from the mortgagee need not make any enquiries into whether the mortgagor had in fact defaulted or enquire whether there was any irregularity or impropriety in the exercise of the power of sale.

[9] Importantly, his Lordship, in referring to the amendment to section 106 noted, at page 14, that the only remedy against the mortgagee is damages but not an injunction. Before the amendment it was possible to argue that injunctive relief was possible in the circumstances that arose in **Mount Alas** but such an argument is difficult to make in light of the amendment to the section.

[10] Dr Malcolm directed the court's attention to the first of two quotations found on page 14 which was to the effect that where the mortgagee sells the property and the bona fide purchaser makes the first payment called for by the terms of the agreement then it is too late for the mortgagor to intervene. The submission was that in this case in the absence of affirmative evidence that the purchaser paid the money in accordance with sale agreement then such a purchaser does not have the protection afforded by the decision in **Mount Atlas**.

[11] The court does not agree with this interpretation of Forte P's judgment. His Lordship was endeavouring to explain the logic behind section 106. His Lordship observed that the 1922 amendment introduced these words:

and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this law or by the mortgage or charge shall not be concerned or required to make any enquiries aforesaid; and any persons damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.

[12] Forte P observed that the amendment did two things: (a) relieve the Registrar of Titles from making enquiries about the propriety of the sale and (b) provided that damages was the only remedy.

[13] On this premise, it followed, according to the learned President, that a bona fide purchaser who entered into a contract for sale with mortgagee who exercised his power of sale was protected. When did the protection arise? The answer must be when the contract was executed by both parties. The payment of money is not a necessary precondition for there to be a valid contract between the mortgagee and the purchaser unless the contract specifically says that unless a certain sum is paid on execution then the contract is not valid. In the absence of a clause of this nature, non-payment of money does not put the contract at an end or prevent it coming into being. Non-payment or late payment, at best, is a breach of contract which gives rights to the mortgagee to terminate or sue for damages depending, of course, on the terms of the contract. The mortgagee may ignore the breach and press ahead with sale. Therefore when Forte JA said at page 7 that the mortgagee had exercised the power of sale and thereafter completed the sale by executing the transfer, his Lordship was not laying down a principle of law regarding when the protection arose. It was not being said that the law required payment in full along with execution of transfer

before the protection arose. What was said was simply a narration of the facts of the case.

[14] This must be so because at page 10 Forte P stated:

A bona fide purchaser for value in the Jamaican jurisdiction, if the respondent's contentions are correct, would always be in danger of reversal of his contractual agreement with the mortgagee, and would never be certain as to whether there would be a completion of the sale.

[15] This dictum can only make sense if the protection of the purchaser arises on execution of the contract and not on completion unless the contract provides otherwise.

[16] At page 14 Forte P stated:

In any event, in my judgment, on a simple reading of section 106, it is clear and unambiguous that the legislature intended to give the purchaser the protection as soon as the mortgagee, in the exercise of his power of sale, enters into a contract with a bona fide purchaser for the sale of mortgaged property.

[17] Thus it is clear that payment of the deposit or even payment of the complete purchase price is not a condition precedent for contract formation unless the

terms of the contract make it so. The purpose of a deposit is to indicate that the purchaser intends to complete the bargain struck (**Howe v Smith** (1884) 27 Ch D 89). It is 'an earnest for the performance of the contract' (**Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd** [1993] AC 573; **United Eagle Ltd v Golden Achievement Ltd** [1997] AC 514). Thus a deposit has nothing to do with whether a contract exists unless a term makes it so but it was something (not necessarily money) given by the purchaser to show to the vendor that he is serious about performing his obligations under the contract. Therefore the passages cited by Forte P and relied on by Dr Malcolm have to be understood in this light and not that under a sale by a mortgagee exercising the power of sale the payment of a deposit was an indispensable necessity for the agreement to be binding. The authors were merely stating what was the usual practice regarding sale of land and advancing a deposit but as always, parties are free to create their own private subject to any legal restrictions. All this has been confirmed by T Cyprian Williams, *Treatise on the Law of Vendor and Purchaser: Real Estate and Chattels Real*, (4th) (Sweet and Maxwell) (1936) Vol1. Pp 29 – 30 where the learned author recommends that the matter of a deposit be considered before contract formation. The learned author then goes on to refer to various types of sales and noted that some provided for the deposit to be paid on entering the contract. In this actual case, the ASL contract provided for the deposit being paid before the signing of the agreement and a further sum to be paid when the agreement was signed.

[18] To put the matter beyond doubt one only needs to refer to the way in which Forte P formulated the question for determination. His Lordship stated that the question for determination at page 4 was:

Is the court precluded from granting an injunction where a mortgagee in the exercise of his power of sale under the mortgage has entered into an agreement for sale of the

mortgaged property with a bona fide purchaser, but the transfer of the property has not yet been registered?

[19] The question could not be phrased any other way because payment of the deposit is a matter of contract not statute law. There may well be a delay between the execution of the agreement and the payment of the deposit. That delay does not mean that there was not a valid contract. The non-payment of the deposit, subject to the terms of the contract, may give certain rights to the vendor but that is all it does. It has nothing to do with contract formation which is what we are concerned with.

Disposition

[20] As noted earlier, JMMB was not told of this contract with Miss James. There is no evidence that the purchaser knew of this agreement between Mr Finzi and Miss James. The purchaser's bona fides in this case, at this stage, is not up for question. The defendants in this case are not without a remedy. If JMMB went about this the wrong way then it is liable to the mortgagor in damages. Indeed, this is not a case where the defendants do not want to sell the property. The issue seems to be who should sell the property. In the view of this court, the facts are such that the mortgagee's sale to the purchaser should stand and the injunction discharged.

Order

[21] Injunction discharged. Order stayed until July 23, 2015 pending application for injunction to the Court of Appeal. Leave to appeal granted. Costs to be costs in the claim.