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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 00132

BETWEEN	ARTS CENTRE LIMITED	CLAIMANT
AND	RONALD RUPERT BROWN	FIRST DEFENDANT
AND	LESMA EUGENIE BROWN	SECOND DEFENDANT
AND	L W LAMBOURN & CO. LTD	THIRD DEFENDANT

Mr. Alexander Williams for Claimant

Mr. Kipcho West for 3rd Defendant

Heard on 20th March and 12th & 13th April 2006

Sinclair-Haynes J

On the 29th day of June 1992 William Alexander Thwaites and his wife Enid Isabel entered into an agreement with Ronald Brown and his wife Lesma (hereinafter referred to as the vendors) for the sale of two parcels of land part of Barbican Heights which comprised 7 lots numbered one and two as shown on the subdivision plan approved by K.S.A.C registered at Volume 1057 Folio 249 of the Register Book of titles.

The sum of \$135,000 was deposited pursuant to the agreement of sale.

William Alexander Thwaites died subsequent to the agreement.

The vendor obtained subdivision of approval from K.S.A.C but they failed to complete certain roadways, which would allow the Registrar of Titles to release the certificate of title. Consequently the completion of the sale was delayed.

In September 1998 Mrs. Enid Thwaites, the surviving purchaser, caused a letter to be sent to the said defendant which stated that she was then in a position to complete the sale. The vendors responded by letter dated 11th November, 1998, in which they stated that they lacked the necessary funds to complete the roadway. They sought to cancel the agreement by returning the deposit to the purchaser with interest. The cancellation was not accepted by Mrs. Thwaites.

Arts Centre, the claimant in this matter was nominated as purchaser by Mrs. Thwaites.

On the 1st December 1998 the claimant lodged a caveat against the property. On the 29th March 1998 a notice to complete was served on the vendors' attorneys-at-law.

By letter dated 29th April 1999, the claimant's attorneys were informed that the vendors had obtained a mortgage from L W Lambourn & Co. Ltd. The mortgage was registered subject to the caveat.

By letter dated 8th February, 2001 the claimant became aware that the vendors complied with the conditions of subdivision, obtained the requisite approval and were in a position to complete the sale. The claimant and the vendors engaged in discussions to resolve the matter.

The claimant was advised by letter dated 23rd November 2005, that L W Lambourn was seeking to sell the property. On the 13th December 2005 the caveat was warned by L.W Lambourn. Both the purchaser and L W Lambourn were represented by the same attorney. Consequently on the 2nd December 2005 the purchasers retained other attorney to avoid the conflict of interest.

Claimant's Case

On the 16th January 2006 the claimant instituted proceedings against the vendors for specific performance and sought an injunction to restrain the defendants from selling the property. On 16th January 2006 the claimant by way of Notice of Application for Court Orders also applied to the court for an interlocutory injunction to restrain the defendants from disposing of the property.

On the 16th January 2006 Mr. Justice Reid granted an Exparte Interim Injunction, which restrained the defendants from disposing of the property until the 6th February 2006. The said injunction was extended on the 6th February 2006 by Mr. Justice Reid, until the 27th February 2006. It was further extended by Mr. Justice Reid to the 20th March 2006 and on the 20th March 2006 by this court. The inter partes application is now for determination by this Court.

The Mr. Alexander Williams on behalf of the claimant contends that the 3rd defendant was at all material times aware of the claimant's interest as the mortgage over the title was subject to the caveat lodged by the purchaser. Further the 3rd defendant had knowledge of the claimant's interest in the property because both purchasers and the 3rd defendant at one time were represented by the same attorney.

Submission by Kipcho West

Mr. Kipcho West, however strenuously contends that the Interim Injunction ought to be discharged and the orders sought should be refused. He argues that L W Lambourn & Co. had obtained the rights as mortgagees to exercise its power of sale. Further, he argues that Section 106 of the Registration of Title Act makes it clear that if a mortgagee exercises its power in an unauthorized, improper or irregular manner any person who

suffers as a consequence has his remedy in damages against the person exercising the power.

He submits that there is no basis in law on which the claimant can properly maintain the injunction against the 3rd defendant in the exercise of its power of sale conferred on it by virtue of the mortgage and the Registration of Titles Act.

He contends that a mortgagee can only be restrained if the mortgagor pays the amount claimed into court. He relies on **Halsbury's Law of England** Volume 32 page 332 paragraph 725.

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive, but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim. The mortgagee will also be restrained if, upon a subsequent incumbrancer offering to pay off the first mortgage, the mortgagee denies his title to redeem.

He also relies on the very curt statement of Beswick C J in the Australian case of **Inglis and Another v. Common Wealth Trading Bank of Australia** (1971) – (1972) Volume 126 CLR 161

“Failing payment into court of the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of The respondent, mortgagees under the mortgage.”

He submits that the principle is now settled and has been adopted by the Jamaican Court

of Appeal in the celebrated case of **SSI (Cayman) Limited, Steve Laufer and FSI Financial Services US Ink v. International Marabella Club SA. – SCCA 57/86 (unrepresented) delivered on February 8th 1987.**

Ruling

The claimant has an equitable interest in the property for the vendor to transfer the legal title to him on payment of the balance of the purchase price provided the contract subsists and is enforceable against the vendor. There is however no privity between the purchaser and the mortgagee. The question is whether his equitable interest transcends the rights of the mortgagee and affects the right of the mortgagee to exercise its power of sale. The caveat was lodged prior to the registration of the mortgage, which had been made subject to the Caveat. However the caveat was warned on the 13th December 2005. I must now determine whether an interlocutory injunction ought to be granted or whether if the claimant were to suffer damage as a result of any sale of the property by the mortgagee, damages would in the circumstances be an adequate remedy.

In **Attorney General v. Sheffield Gas Consumers** 43 E. R 119 Turner L. J. formulated the test applicable with regard to appropriateness of damages. At Page 126 he said

“whether this is a case in which the remedy at law is so inadequate that the court ought to interfere, having regard to the legal remedy, the rights and interests of the parties, and the consequences of the court’s interference.”

Lord Diplock in **American Cyanamid Co. v. Ethicon Limited** (1970) 1 All ER 504 enunciated as follows:

“.....the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in

establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them. No interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that time."

There is no evidence that the claimant will suffer irreparable loss upon the sale of the property, which would justify the court's intervention to prevent the 3rd defendant exercising its power of sale.

I am fortified in my view that damages can be an adequate remedy by virtue of Section 106 of the Registration of Titles Act, which states as follows:

"If such default in payment, or in performance or observance of covenants shall continue for 1 month after the service of such notice, or for such other period as may in such mortgagee or charge be for that purpose fixed, the mortgagee or annulment his transferees may sell the land mortgaged or charged, any part thereof, either altogether or in lots, by public auction or by private contract and any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

It is not disputed that the vendor defaulted in their payment obligation to the 3rd defendant.

The question is whether the vendors' failure to pay the sum due owing to L W Lambourn & Co. Ltd. prevents the claimants obtaining an injunction.

Ratray P in **Flowers, Foliage and Plants of Jamaica Limited and Jennifer Wright and Douglas Wright v. Jamaica Citizens Bank Limited** (1997) 34 JLR page 447 has stated that the rule is a general rule. At page 452 he said:

“Courts of equity do not shackle themselves with unbreakable fetters if the justice of the particular case demands a flexible approach.”

He distinguished the fact of the **Flowers Foliage** case from that of **Marabella** on the basis that the applicant in the **Flower Foliage** case was not a primary borrower but a guarantor and the mortgage was collateral security in support of the guarantee, which the guarantor maintained was invalid and unenforceable thus rendering the mortgage unenforceable. In that case the applicant contended that if judgment was not stayed and her house was sold she would be financially ruined. Ratray P preferred the principle as adumbrated by Straughton L. J in **Linotype Hell-Finance Ltd. V. Barker** (1992) 4 All E R 887 as he felt it was:

“more in accord with an acceptable concept of equity and justice, a relevant ingredient for the exercise of judicial discretion once it is established that there are these triable issues which would be denied the judicial scrutiny in a summary judgment.”

The head notes of the case of **Linotype-Hell Finance Ltd. V. Barker** succinctly states the modern approach adopted by the courts in determining whether to stay proceeding. It reads as follows:

“Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. The old rule that a stay of execution would only be granted where the

appellant satisfied the court that if the damages and costs were paid there would be no reasonable prospect of recovering them if the appeal succeeded is now far too stringent a test and does not reflect the court's current practice."

The principle that a mortgagee cannot be restrained if the sum owned under the mortgage is not paid is therefore not cast in stone. However this court is of the view that nothing has been advanced by the claimant, which would convince the court to exercise its discretion in favour of the claimant.

Also, the claimant was clearly forewarned of the first defendant's inability to complete the sale. Since 1998 it had the opportunity to withdraw from the agreement. It must have appreciated that the vendors would have had to incur a mortgage in order to complete the sub division which would expose the vendors to financial risk. There is no evidence that if the injunction is refused it would result in disproportionate hardship to the defendant in the circumstances.

Consequently, the application for an interlocutory injunction is refused.

Leave is granted to the applicant to appeal.