Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. N 156 of 1993

BETWEEN	N M & M HOLDINGS LIMITED	PLAINTIFF
A N D	VICTORIA MUTUAL BUILDING SOCIETY	DEFENDANT

Janet Morgan for the Plaintiff

Allan Wood and Ransford Braham for the defendant

HEARD IN CHAMBERS: 4th, 5th and 11th August 1993

COURTENAY ORR J.

This is an application by the plaintiff for an interlocutory injunction to restrain the defendant from selling, transferring or disposing or taking any further steps whatsoever prepartory to selling transferring or disposing of premises known as Apartment 336 Dunrobin Acres, 68 Red Hills Road in the parish of Saint Andrew registered at Volume 1215 Folio 468 of the Register Book of Titles at public auction or private treaty until after the trial of this action, or until further order.

On 5th July 1993, the plaintiff obtained an exparte interim injunction in the terms just recited, and now seeks to have a similar injunction in force till the completion of trial.

In the endorsement to its writ dated 1st July 1993, the plaintiff claims for an interim injunction and further and in the alternative for damages for breach of the terms and conditions of a mortgage deed between the parties and dated 19th April 1991.

FACTS NOT IN DISPUTE

The following facts are common ground between the parties:

(1) On 19th April, 1991 the plaintiff granted a first legal mortgage on the premises known as Apt. 336 Dunrobin Acres, 68 Red Hills Road, St. Andrew to the defendant to secure a loan to it of $209,000 with interest; and the mortgage was duly registered under the Registration of Titles Act.

(2) By the terms of the mortgage there was vested in the Defendant a right of power of Sale of the mortgaged premises at public auction without notice to the plaintiff in the event of default by the plaintiff to perform and observe all the several covenants and undertakings contained in the mortgage deed.

(3) The plaintiff after making two payments fell into arrears and remained in arrears for approximately 7½ months.

(4) The plaintiff failed to reply to monthly reminders sent by the defendant.

(5) By letter dated 24th March 1993 the defendant advised the plaintiff of its default and that, if default continued for a further month the premises would be sold by public auction on 26th May 1993, and that the first advertisement would appear in the daily newspaper on May 2, 1993.

(6) Attached to the said letter of 24th March 1993 was another letter notifying the plaintiff that all arrangements for mortgage arrears and the additional charges incurred must be entered into directly with the Arrears Section of the defendant's Mortgage Department. It also advised that all payments must be made by certified cheque or cash. The notice closed with the warning "if payment is not made in the above prescribed manner, the society will not be responsible for any loss or inconvenience caused thereby."

(7) The address of the plaintiff and it guarantors set out in the mortgage deed was Lot 22A Swain Spring, Red Hills, St. Andrew.

(8) Ralph Michael Parkes, Senior Vice President of Mutual Life Insurance Company is one of the guarantors of the mortgage loan.

(9) The notices about the arrears were sent to the address for notices in the mortgage deed, 22A Swain Spring, Saint Andrew and also to the mortgaged premises.

(10) On 17th May 1993 the premises were valued by a firm of valuators Langford and Brown. They gave a market value of $750,000 and a forced sale value of $600,000.00.

(11) There were three (3) separate advertisements of the auction in the press by d. C. Tavares Finson auctioneers.

(12) The amount owed by the Defendants at the time of the auction was $209,000.

(13) Rosemarie McCalla an employee of the defendants, made efforts to contact the plaintiff and its guarantors in May 1993.

(14) On 21st May 1993 Rosemarie McCalla telephoned the office of Ralph Michael Parkes and spoke to his Secretary Janet Biggs.

(15) Sometime subsequent to that conversation Mr. Parkes drew a personal cheque dated 25/5/93 for the sum of $27,238.81 and it was sent to the office of the defendant in an envelope addressed to Rosemarie McCalla. The signature on the cheque was "Jim Parkes".

(16) In a conversation, the date of which is a matter of controversy Rosemarie McCalla told Janet Biggs of the amount necessary to clear off the arrears.

(17) The premises were sold at public auction by D.C. Tavares Finson on 26th May 1993 for $822,000.00. The successful bidder was Donovan Ellis.

(18) The cheque was returned to Mr. Ralph Michael Parkes by letter dated 31st May, 1993.

(19) The plaintiff obtained a valuation of the mortgaged premises from C.D. Alexander Company Realty Limited in which the market value of the mortgaged premises was given as $1,250,000-; and the opinion was expressed that should the premises be put up for 'forced sale' within a 60-day period, a price of $1,100,000 should be obtained.

Thereafter the parties' stories diverge.

THE PLAINTIFF'S CASE

In paragraph 9 of the statement of claim the gravamen of the plaintiff's case is set out thus:

> "The plaintiff contends that the Defendant has thereby clogged the Plaintiff's equity to redeem the aforesaid mortgage".

The plaintiff then sets out the following particulars

> "(a) Receiving the plaintiff's payment of $27,238.81 on 21st May 1993 and proceeding nonetheless on 26th May, 1993 to dispose of the premises at Public auction;
>
> (b) Alternately, receiving the Plaintiff's payment of $27,238.81 on the 25th May, 1993 and proceeding on the 26th May 1993 to dispose of the premises at public auction;
>
> (c) Failing to take such reasonable steps to alert the director of the Plaintiff, Ralph Michael Parkes that the premises were up for sale at public auction on 26th May 1993;
>
> (d) Returning the aforesaid payment of the $27,238.81 to the said Ralph Michael Parkes on the 31st May 1993 after it had exercised the powers of sale.
>
> (e) Failing to advise the said Ralph Michael Parkes and/or his secretary on the 26th day of May, 1993 that the payment of $27,238.81 was not acceptable in the form of a personal cheque drawn by the said Ralph Michael Parkes;
>
> (f) Failing to advise the Plaintiff on the 21st May 1993 or before the public auction on the 26th May, 1993 that the said Rosemarie McCalla had no authority to accept a personal cheque and that the same would not constitute a good and proper tender of arrears;
>
> (g) In the circumstances causing the said Rosemarie McCalla to act under the ostensible authority of the Defendant upon which the Plaintiff relied to its detriment."

A second contention is given in paragraph 10 which reads:

> "The Plaintiff further contends that the Defendant having sold the premises at $822,000 has disposed of the premises below the forced sale market value which value the plaintiff claims is no less than $1,100,000.00

Although it was not explicitly pleaded Mrs. Morgan submitted that:

(a) The defendant through Rosemarie McCalla had represented to the plaintiff that if he paid $27,238.81 the premises would be withdrawn from the auction;

(b) that it was reasonable for the plaintiff to tender a personal cheque in circumstances where there were no stipulations at the time.

(c) Having received the cheque on 21st May 1993 (the plaintiff's assertion) or 25th May 1993 (the defendant's contention) the defendant ought to have alerted the plaintiff that a personal cheque was not an acceptable method of payment, and that it ought to have sent a manager's cheque or cash.

IS THERE A SERIOUS ISSUE TO BE TRIED?

Mrs. Morgan submitted there is a serious issue and identified the following issues, namely; the plaintiff's equity to redeem, the question as to whether the defendant can now assert that there was no proper tender of payment and whether the premises were sold at an undervalue.

The first two issues can be dealt with together. The plaintiff's deponents state that Rosemarie CmCalla made one call on 21st May 1993 a Friday, and at that time informed Mr. Parke's secretary of the amount needed to clear off the arrears. That a cheque post-dated, 25/5/93, the next working day, was then sent by bearer who delivered it at the defendant's office. On the other hand one of the defendant's deponents says that two calls were made on the 21st and on each occasion she was told that Mr. Parkes was not in office and that she did not then disclose the amount needed to pay the arrears: This was not done till the morning of 25th May when she again telephoned and was told Mr. Parkes was unavailable.

On the plaintiff's own case it did not make a payment according to the notice sent by the defendant, and it cannot plead its own carelessness in not indicating a change of address as a factor which should impose any duty on the defendant to seek out another address for the plaintiff.

It is significant that Mrs. Morgan submitted only that the defendant's servant Rosemarie McCalla represented that if the plaintiff paid $27,238.81 before the auction date the premises would be withdrawn from the auction.

I accept that the affidavits on both sides indicate such a representation was made and that the plaintiff relied on it.

But as regards the method of payment Mr. Morgan could not go so far as saying that there was a representation that a personal cheque was acceptable - contrary to the notice given by the defendant. Instead her statement of claim suggests that in the absence of a clear statement by Rosemarie McCalla in the telephone conversation that a personal cheque would not be a proper method of payment the defendant cannot now say so.

To succeed on this point the plaintiff would have had to show that the defendant's servant had represented that a personal cheque would be acceptable.

In the absence of such a representation the plaintiff's assertion has no real or substantial prospect of success at the trial, for two reasons. It is contrary to the express notice given to the plaintiff, which if it did not receive was due to its own fault; (and Mrs. Morgan indicated in argument that the plaintiff accepted the full consequences of not notifying its change of address).

Secondly, it is contrary to the principle laid down in many cases that a personal cheque is not legal tender, and a creditor is not bound to accept it. See JOHNSTON vs BOYES [1899] 2 CH 73 BLUMBERG v LIFE INTERESTS [1896] 1 CH 171.
In RE STEAM STOKER CO. LR. XIX EQUITY 417.

On the issue of sale at an undervalue I again hold there is no likelihood of success at the trial. There is no suggestion of collusion or fraud. The sale was properly advertised and the plaintiff was sent notices informing it of the auction. The defendant obtained a valuation; and the auction realized a price in excess of that valuation but below the valuation obtained by

the plaintiff. In this regard I am guided by the decision of the Court of Appeal in SCCA 35/83 Moses Dreckett vs Rapid Vulcanizing Company Limited (unreported). The affidavits in support of the plaintiff's case do not assist the proposition that the defendant did not act in good faith and did not take reasonable care to obtain the true market value of the mortgaged premises at the time it was sold.

This application is therefore refused. Defendants costs in the cause.

Before parting with this matter I wish to say a few words on the contents of some of the affidavits filed on behalf of each party. The affidavits were defective in two respects:

Firstly, affidavits on both sides were in breach of the rules regarding hearsay in affidavits in interlocutory proceedings. Secondly, both plaintiff and defendant, but moreso the plaintiff, have included arguments in the affidavits filed.

IMPROPER USE OF HEARSAY

Rule 408 of the Civil Procedure Code reads as follows:

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under Section 272 A or Section 367 of this Law, an affidavit may contain statements of information and belief, with the sources and grounds thereof.
>
> The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents shall be paid by the party filing the same." (emphasis supplied)

Three affidavits filed on behalf of the plaintiff contain statements of information and belief without stating the sources and grounds thereof. Similarly two affidavits filed on the defendants behalf bear the same defect.

The reason for allowing hearsay in interlocutory proceedings was explained by Peter Gibson J. in Savings and Investment Bank Ltd. vs Gasco Investments (Netherlands) BV [1984] 1 WLR 271 at 282 F - G; where speaking of the English equivalent of Rule

408 he said:

> "To my mind the purpose of rule 5 (2) is to enable a deponent to put before the Court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief. When the sub-rule allows the deponent to state that he has obtained from another must, in my judgment, be limited to what is admissible in evidence" (emphasis mine)

The learned judge then went on at pages 282 - 3 to point out that such hearsay must be first hand hearsay.

In Re Young J. L. Manufacturing Co. Ltd. [1902] CL 753 Rigbsy LJ berated the practice of filing affidavits which breach the rule and Vaughan Williams L. J. at page 757 pointed to a very real problem which arises in seeking to ensure compliance through an award of costs. He said:

> "With regard to affidavits of the sort before us, it is not quite a sufficient or satisfactory remedy to throw upon the party upon whose behalf such affidavits are put forward the liability of paying the costs of those affidavits. The only more satisfactory remedy is one which I am aware is difficult, if not impossible to apply the law as it stands: namely, that no one shall pay for these affidavits at all, and that the solicitor who has drawn these affidavits and made copies of them and so forth, should be left out of pocket thereby."

In principle such affidavits should not merely be ignored; but in a clear and obvious case, the improper hearsay should be struck out on the grounds of irrelevance [per Peter Gibson J in Savings and Investment Bank Ltd vs Gasco Investments (Netherlands) B.V. (supra)]. That case illustrates that it is useful for an application to strike out the offending affidavits or passages in affidavits, to be made before a different judge from the one who will hear the interlocutory application in which the affidavits are filed. Firstly it would enable the other side to know whether they would need to go to the expense and trouble of filing affidavits to counter what is said in those portions

portions which are thought to offend against the rules. Secondly, such a decision may assist the offending party who may wish, if the passages are struck out to file a proper affidavit. Thirdly, striking out the passages would avoid the judge hearing the main application having to perform the mental gymnastics of putting out his mind inadmissible passages.

Peter Gibson J in Savings and Investment Bank Ltd vs Gasco Investments Netherlands B.B. (supra) summed it up thus at page 278 G.

> "It is of course true that judges are accustomed to put out of mind matters which they have seen or heard and judged to be inadmissible, but the greater the amount of such material the more desirable it seems to me to have the question of striking out determined in advance."

The affidavits sworn to by Patricia Fisher of behalf of the defendants contained statements of information and belief on matters on which the person actually involved, Miss McCalla, had already deponed in her affidavit. At other times Miss Fisher's affidavit merely stated as a fact what Rosemarie McCalla had done without even stating how she came by this knowledge. I regard these instances as unnecessary hearsay.

ARGUMENTS IN AFFIDAVITS

As noted above the rule prohibits arguments being included in affidavits. Such matters should be struck out as being irrelevant. Here again both sides offended. For example in his affidavit of 28th July 1993 Ralph Michael Parkes on behalf of the plaintiff says at paragraph 4.

> "That the issue I submit that is before this Honourable Court is whether having received a payment by way of cheque from the plaintiff before the auction date that the defendant failed to apply the payment to the arrears and withdraw the premises from auction as agreed....."

Again in paragraph 12 of the same affidavit, he expresses an opinion on the conduct of the servant of the defendant. He says:

> "Further I beg ... to state that Miss Rosemarie McCalla held herself out to be acting on the defendant's behalf on 21st May 1993 when the communication took place between my secretary Mrs. Janet Biggs and herself and that the plaintiff relied on that ostensible authority ....."

He makes bold to give this opinion when on his own affidavit he was not present when the conversation took place between the ladies. So it is an opinion based on hearsay.

In another affidavit another deponent refers to two affidavits filed by the other side as being contradictory. Later the same deponent expresses an opinion as to what someone ought to have done, and remarks that a fact "is immaterial to this procedure."

The dictum of Roshill L.J in Alfred Dunhill Ltd vs Sunoptics S.A. [1979] F.S.R. 337 at 352 is particularly apt in this case. He said:

> "I hope it is not out of place to say at this stage that the affidavits filed on both sides are in at least two cases very much too long. Affidavits are designed to place facts, whether disputed or otherwise, before the tribunal for whose help they are prepared. They are not designed as a receptacle for or as a vehicle for legal arguments. Draftsmen of affidavits should not as a general rule, put into the mouths of the intended deponents legal arguments of which those deponents are unlikely ever to have heard. Legal arguments especially in interlocutory proceedings, should come from the mouths of those best qualified to advance them and not be put into the mouths of the deponents. There has been much unnecessary paper in this case brought about by the inclusion of legal arguments in affidavits."

Browne L. J agreeing with the sentiments of Roskill L. J put forward an interesting suggestion as to how this problem may be dealt with. He said at page 373:

> "Some of the affidavits, .. have been made the vehicle for numerous submissions of law and for forensic argument, wholly out of place evidence of the witness. If such a document were, to be admitted at all, there might be much to be said for giving the Court power to treat the affidavit as though it were

> a party's brief to the Court in United States procedure: with the consequence that Counsel's time for oral argument would be drastically restricted."

I think it is appropriate for a restatement to be made upon the question of responsibility for the ultimate use of affidavits in application in chambers. It is the duty of counsel who appears in chambers to present arguments on behalf of his or her client to ensure that the affidavits to which reference will be made are not prolix, and do not contain irrelevant matter, but rather that they do conform to the rules in every respect. This responsibility rests on counsel whether or not he or she is the draftsmen of the affidavits.

Finally I think that where a party's affidavits offend in the manner I have mentioned above counsel on the other side should apply to have the offending portions struck out, preferably by a different judge from the one who will hear the main application. Counsel should not allow the defective affidavits to remain intact and then ask the Judge to perform the necessary mental gymnastics to exclude the offending portions from his mind.

As I have said the application is dismissed.