IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV O5120

IN CHAMBERS

BETWEEN	CABOT PAUL	CLAIMANT/APPLICANT
A N D	VICTORIA MUTUAL BUILDING SOCIETY	DEFENDANT/RESPONDENT

Mr. Charles Piper and Miss Dundeen Ferguson instructed by Ferguson Campbell and Co. for Claimant/Applicant.

Miss Daniella Gentles instructed by Livingston Alexander and Levy for Defendant/Respondent.

Practice and Procedure - Application for injunction – Application to prevent mortgagee from registering transfer of mortgaged property pursuant to an exercise of the power of sale contained in a mortgage – Whether mortgagee may be restrained – Whether damages is an adequate remedy – Section 106 of the Registration of Titles Act

Heard: 22nd and 29th February 2008

BROOKS, J.

Mr. Cabot Paul and his wife Vivienne are the registered proprietors of real estate situated at Reading Pen in the parish of Saint James. In July 1988 the couple mortgaged the property to the Victoria Mutual Building Society, to secure a loan of $150,000.00 made to them by the Society. They defaulted in making re-payment and the Society put the property up for public auction on 23rd October 2007. The bid which was accepted was for $6,000,000.00. The Society and the purchaser have both executed the transfer document to have the property transferred to the purchaser.

Mr. Paul has filed this claim for the sale to be set aside. He says that the Society has not proceeded properly in exercising its power of sale and that it is unfair to sell the property when he owes less than $200,000.00 to the Society. He says that he is ready,

willing and able to repay the debt and has filed this application for this court to restrain the Society from completing the sale pending the outcome of his claim. The Society strongly resists the application on the basis that the contract made at the auction, deprives Mr. Brown of any right to redeem the mortgage or restrain the sale.

Mr. Paul's complaints

Mr. Paul alleges that he previously had a very good relationship with the staff of the Montego Bay branch of the Society, through which his account was serviced. He says that he has done work for them and he knows some members of staff personally. He states that the relationship was such that if his account went into arrears, as it has from time to time, someone from the branch would call and inform him of the situation and he would promptly make the required payment.

He says that during 2007 he was off the island for some time and the account went into arrears but he did not receive any call as was the custom. He says that he did not receive any notice from the Society that the account was in arrears and neither did his wife. His wife lives abroad but the branch staff, he says, know her address.

According to Mr. Paul, it was on his return to the island on 28th October 2007 that he was made aware of the Society's plans to sell his home by way of public auction. He says that he made immediate contact with the Society to prevent the sale and offered to pay the sum of $160,000.00 toward the account. He says that he was told that the payment could not halt the sale of the property. Despite this, the Society thereafter sent him notices of arrears and other communication and as a result he paid to his savings account at the branch the sum of $110,000.00. The amount was taken from the account

by the Society to be directed to the mortgage account but was apparently returned to the savings account on the same day.

Mr. Paul asserts that the property is being sold at a gross under-value and that the society is not acting in good faith in carrying out the sale.

The Society's response

Ms. Opal Clarke on behalf of the Society deposed that Mr. Paul had always failed to properly service his mortgage account. She says that this was not the first time that the property was being put up for sale. She declared that there was no contractual arrangement to contact Mr. Paul by telephone in the event that his account went into arrears. In the event that that was done it only by way of courtesy.

Ms. Clarke, who is apparently based at the chief office of the Society in Kingston, asserted that a notice concerning the arrears was sent out to Mr. Paul in January of 2007. She says that a notice demanding the repayment of the principal and arrears of interest was sent out in July of 2007 and that that notice warned of the Society's intention to put the property up for sale on October 23, 2007. She asserts that the latter notice was sent by registered post to Mr. Paul's address. Although a payment was made by Mr. Paul in August 2007, it did not clear the arrears due.

Ms. Clarke exhibited a valuation which the Society secured in respect of the property. The appraisal had been conducted by licensed real estate dealers who opined that the property is valued $7,500,000.00 and that a forced sale value was $6,000.000.00. That valuation was dated 18th October 2007.

Matters in Issue:

Mr. Piper, on behalf of Mr. Paul, raised a number of issues for the consideration of the court. These included the questions of:

1. whether proper notice was given as required by section 105 of the Registration of Titles Act, or instead, the Society's alternative to that notice requirement, which alternative would be contained in the mortgage document;

2. whether the Society's stated intention of having the property sold was not compromised or waived by it issuing thereafter, notices which were inconsistent with that position;

3. whether the Society's description of the property in the public notice of the auction was so inadequate as to inhibit the quantity and quality of potential bidders;

4. whether the Society, in November, 2007, improperly informed Mr. Paul, that it could not accept a payment in redemption of the mortgage;

5. whether, Mr. Paul who is ready to repay the relatively small sum owed to the Society ought not to be allowed to exercise the equity of redemption which he has, that is to pay the sum due to the Society to settle the debt.

Although a lot of research and thorough submissions were made in respect of these items it is not necessary for me to examine or resolve them all. That will be the task of the judge who will hear the substantive claim. I shall, however, use the guidelines provided by *American Cyanamid Co. v Ethicon* [1975] 1 All E.R. 504 to assist me in resolving the question of whether the injunction which Mr. Paul seeks, ought to be granted.

Is there a serious question to be tried?

The first question to be answered, in following this guide to considering injunctive relief, is whether the applicant for that relief has established that there is a serious issue to be tried. In light of the issues raised by Mr. Paul and the large number of cases cited in argument, I find that Mr. Piper is correct when he submits that there are serious issues to be tried.

Are damages an adequate remedy?

The second question to be analysed is whether damages would provide an adequate remedy for a party who succeeds at trial but was denied an interim injunction. Where damages will provide an adequate remedy then the injunction should not be granted. (*Per* Lord Diplock in *American Cyanamid* at page 510 g)

There is a well established line of reasoning that, where land is concerned, it is presumed that damages are not an adequate remedy, and no enquiry is ever made in that regard. The reason behind that principle is that each parcel of land is said to be "unique" and have "a peculiar and special value". (See p. 32 of *Specific Performance* 2nd Ed. by Gareth Jones and William Goodhart) As a result of that reasoning, a money payment could never secure a parcel with all the attributes of that which was originally lost. Mr. Piper also submitted that because the property is Mr. Paul's family home, damages could not be an adequate remedy.

Despite these usual considerations there is however, a statutory provision to be considered. Such a provision, if applicable would override the usual common law considerations. Section 106 of the Registration of Titles Act stipulates that where a mortgagee purports to exercise its power of sale contained in the mortgage:

a. neither the purchaser from the mortgagee (in this case the Society) nor the Registrar of Titles is bound to enquire whether the power has indeed been properly exercised, and,

b. the mortgagor's (i.e. Mr. Paul) remedy from any wrongful exercise of the power shall be a remedy in damages only.

The section states as follows:

> **106**. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; **and any persons 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**. (Emphasis supplied)

Although accepting that section 106 provided a serious difficulty for Mr. Paul, Mr. Piper submitted that:

> "It is difficult to see where damages could be an adequate remedy where a property for which an amount of less than $200,000.00 is owed, is sold for $6,000,000.00.

The challenge which Mr. Piper's submission faces is that this is not a case where Parliament has established a rebuttable presumption. The provision is absolute in its terms. This protection for mortgagees is consistent with the principle that purchasers

from mortgagees should not be placed in a position of uncertainty between the time of contracting to purchase and the time of registration of the transfer of the legal interest in the property. The principle has been expressly recognized and given effect by the Court of Appeal in *Lloyd Sheckleford v Mount Atlas Estate Ltd.* SCCA 148/2000 (delivered 20/12/2001). In that case, Forte, P. in considering section 106 said at page 15 of the judgment:

> "I am of the view...that in our jurisdiction by virtue of section 106 of the Act, the purchaser is protected when he enters into a contract with the mortgagee and consequently the only remedy available to the mortgagor is in damages.
>
> 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 exercise of his power of sale, enters into a contract with a *bona fide* purchaser for the sale of the mortgaged property."

Mr. Piper sought to distinguish *Sheckleford* on the basis that the appellant Mr. Sheckleford was a purchaser and not the mortgagee. The submission, with respect, is misconceived; a purchaser could not be given the protection of the provision without the mortgagee securing a similar benefit. The subject of the relevant portion of section 106 is the mortgagor, or any other person adversely affected by the exercise of the power of sale. The relief available to the mortgagor does not depend on the capacity of the defendant to his claim. The error in Mr. Piper's submission is demonstrated in the judgment of P. Harrison, J.A. (as he then was) in *Sheckleford.* In supporting the view of the learned president, Harrison, J.A., at page 20 of the judgment, said:

> "The mortgagee however, like any mortgagee who exercises a power of sale under section 106 of the Registration of Titles Act is subject to the scrutiny of a court, to ensure that there is no "...unauthorized or improper or irregular exercise of the power." **This sanction for any misbehaviour found, is for the protection of a wronged mortgagor, although the liability is in damages only**." (Emphasis supplied)

It is only if there is evidence of bad faith on the part of a mortgagee that the court will be inclined to restrain the mortgagee in the exercise of the power of sale. In *Waring (Lord) v London and Manchester Assurance Co. Ltd. and others* [1934] All E.R. Rep. 642, Crossman J. stated at page 644 E that:

> "After a contract has been entered into, it is, ...perfectly clear...that the mortgagee can be restrained from completing the sale only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside."

The learned judge went on to say that a sale at an under-value was not, by itself, evidence of a lack of good faith. In the instant case, despite Mr. Paul's claim that the property was worth more than $6,000,000.00, the evidence is that the Society had secured a valuation which supported a sale at $6,000,000.00. The sale was advertised in a nationally circulated newspaper and it took place at a public auction. The contract was concluded at the fall of the auctioneer's hammer or such similar indication of acceptance of the bid. At this stage, I am not convinced that there is any evidence of fraud.

Miss Gentles, in a thorough and scholarly presentation on behalf of the Society, relied heavily on *Waring*. That decision has been approved in the courts of appeal, both in England and in our jurisdiction (*per* Forte, P. in *Sheckleford*). A major element of the decision in *Waring* is the principle that a mortgagor lost his equity of redemption upon the execution of the contract of sale between the mortgagee and the purchaser. That reasoning is supplemental of the principle contained in section 106, namely, that the mortgagor in those circumstances has his remedy only in damages.

Damages being deemed an adequate remedy; Mr. Paul is not entitled to have the Society restrained from completing the sale to the purchaser. I therefore need not go on

to examine the other aspects of the balance of convenience as set out in *American Cyanamid.* The application must be refused.

Preliminary Objection

Although it may be reversing the natural order of things, I must now mention a preliminary objection which Miss Gentles raised to Mr. Paul's claim. She submitted that it had improperly been commenced by Fixed Date Claim Form and therefore ought to be struck out. Counsel submitted that none of the provisions of rule 8.1 (4) of the Civil Procedure Rules (CPR) permitted the use by Mr. Paul, of a Fixed Date Claim Form. Though rule 8.1 (4) (a) spoke to such use in mortgage claims, Miss Gentles submitted that type of claim as defined in rule 66.1, was, in the main, designed for the benefit of mortgagees and not mortgagors, such as Mr. Paul. Counsel admitted that rule 66.1(e) did allow for actions for redemption of a mortgage, and she did agree that Mr. Paul's claim included a claim for redemption but submitted that there were disputes as to fact which made this mode of approach inappropriate.

At the time of the hearing, I rejected Miss Gentles' submission, but promised to decide whether the claim ought to continue as commenced or be treated henceforth as commenced by a regular claim form, with appropriate orders. Having had an opportunity to consider all the affidavits and the issues, I am of the view that the claim may properly and conveniently continue as it has been commenced. Rule 8.1 (a) is clearly authority for the use of a Fixed Date Claim Form in this type of claim and I am also of the view that there are very few disputes as to fact. These may be conveniently dealt with, I believe, by a judge sitting in chambers. I also am of the view that the interests of both parties

would be best served if the matter were disposed of quickly, rather than await a trial date, years from now.

Conclusion

Unless there is evidence of a lack of good faith on the part of the mortgagee, a mortgagor is not entitled to injunctive relief where the mortgagee has contracted to sell the mortgaged property in a purported exercise of the power of sale contained in the mortgage. In this case the Society has contracted to sell Mr. Paul's property under such a power. The sale was contracted by way of a public auction. The sale price is supported by a valuation by a licensed appraiser. There is no evidence of lack of good faith on the part of the Society. By virtue of section 106 of the Registration of Titles Act, Mr. Paul's remedy, in the event that the power of sale has been wrongly exercised, lies only in damages.

The hearing took more than two hours, but in my view the scale of fees set out in table 2 of Appendix B in part 65 of the CPR is now, after 5 years, outdated and an increase must be applied. An increase of fifty percent increase is not unreasonable.

The orders therefore, are as follows:

1. The application for injunction is refused.
2. The Fixed Date Claim Form shall be set for hearing on a date to be fixed by the Registrar.
3. Costs are awarded to the defendant in the sum of $24,000.00, which costs are to be paid by the Claimant to the Defendant, on or before 29th March, 2008, failing which the Claimant's case shall stand as struck out.
4. Leave to appeal granted.