



[2014] JMSC. Civ. 153

IN THE SUPREME COURT OF JUDICATURE

THE CIVIL DIVISION

CLAIM NO. 2014 HCV 02813

BETWEEN	ROYDEN RIETTIE	CLAIMANT/ APPLICANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	1ST DEFENDANT
AND	FITZ JACKSON	2ND DEFENDANT
AND	CEMENT JAMAICA LIMITED	3RD DEFENDANT

IN CHAMBERS

Mr. Vincent Chen instructed by Chen, Green & Co. for the Claimant.

Mr. Ransford Braham Q.C., Mr. Hadrian Christie and Mr. Jerome Spencer instructed by Patterson Mair Hamilton for the 1st Defendant.

Mr. Hugh Wilson instructed by Wilson Franklyn Barnes for the 2nd Defendant and 3rd Defendant.

Heard: 18th September 2014 & 29th September 2014.

Injunction – Application to restrain Mortgagee’s power of sale – Claimant claims Mortgagee acted in bad faith – Selling land at gross undervalue – Misdescription of property – Collusion – Exception to the Marbella principle – Adequacy of damages – Application for injunction refused.

CAMPBELL, J.

[1] On the 1st May 2003, a mortgage was executed on behalf of the Applicant, to secure the repayment of a loan to the 1st Defendant. There had been a prior

mortgage in favour of the National Investment Bank of Jamaica Limited (NIBJ) registered on the 9th July 1999.

- [2] Consequently, both loans fell into arrears. On or around the 26th of February 2010, NIBJ, advertised the property for sale by public auction under the power of sale contained in their mortgage. The Claimant had on-going negotiations with the 2nd Defendant, who represented that himself and his associates were interested in purchasing the mortgaged property from the Applicant to construct a 340 mega watt generation unit and a cement plant.
- [3] That the 1st Defendant was aware of the on-going negotiations and that the various regulatory approvals were being sought, and the reclassification of the land from agricultural to commercial was done. On 20th November 2013, the 1st Defendant advertised the mortgaged property for sale by public auction.
- [4] On the 10th June 2014, the Claimant filed a claim alleging that the Defendants, have acted together and conspired to dispose of the mortgaged lands in a clandestine manner to achieve the improper and unlawful purpose of selling it at a gross undervalue to the 3rd Defendant. A further complaint of the Claimant was that the 1st Defendant has acted in bad faith; in the conduct of the sale of the mortgaged land under the power of sale contained in a mortgage by proceeding to sell the same without exposing the intended sale to the general public in a fair and reasonable way to obtain a fair price and is not acting for the purpose of recovering the debt but for the improper and unlawful purpose of causing the lands to be sold at a gross undervalue to a third party.
- [5] The Claimant sought declarations that he is entitled to redeem the property, and for an accounting. That if the Claimant did not redeem within 60 days the Court should supervise the sale of the property. He claimed that no substantial damage will result to the Defendants if they are restrained until trial and any damage suffered by them can be met by the Claimant.
- [6] On 9th September 2014, the Applicant filed a notice for court orders claiming for an injunction until the hearing of the application dated the 9th June 2014 which is set for hearing on the 24th of October, 2014 to restrain the 1st Defendant whether by itself or by its officers, servants or agents or otherwise howsoever from:
 - (a) Proceeding with an auction sale advertised for the 30th September, 2014 of lands registered at Volume 932 Folio 447 of the Register Book of Titles and known as Lodge, in the parish of St Catherine owned by the Claimant and mortgaged to the 1st Defendant.

- (b) Doing any act or thing or executing any deeds, documents, agreements or instruments in furtherance of any sale of the Mortgaged lands.

The Claimant grounded his claim on his suit filed to stop the sale of the land which was to commence on 21st July 2014. The proposed sale was discontinued. However the 1st Defendant is treating the land as agricultural land, which classification results in a valuation substantially less than its present fair market value of US \$10M. The 1st Defendant has acted precipitously in scheduling an auction sale for the 30th September 2014.

The Claimant's Case

- [7] The Claimant contends that this is not a simple exercise of the power of sale. It is outside the Marbella principle. The Defendants are abusing the process of the court. Therefore the court should make an Order that any sale on behalf of the mortgagee to enforce the rights of the mortgagee, should be under the supervision of the Court. The Court should fix the reserve price and fix the conditions of sale.
- [8] Action was commenced against the Defendants because the Claimant became aware that the 1st Defendant had sold the property at a gross undervalue to Cement Jamaica Limited, the 3rd Defendant. There are allegations of conspiracy, between the three Defendants. The mortgagee insists that the property is agricultural land and the Claimant alleges there is an approval for the construction of a cement plant and a coal-fired power plant on the lands.

The Defendants' Case

- [9] Mr. Braham Q.C., contends that when the suit was filed on behalf of the Claimant, the sale was pending from National Commercial Bank (NCB) to the 3rd Defendant. The Claimant however contended that there is a "cook-up", between NCB and the 3rd Defendant. The sale was cancelled before the matter was tried because the 3rd Defendant was not able to come up with the money. The sale the Claimant came to complain about no longer exists.
- [10] The Bank had to get permission from the Land Development and Utilization Commission, in relation to the question of agricultural land. It was noted that an approval is required for the transfer. The Commission is treating it as land in their jurisdiction. It is being claimed that the Bank misconceived the classification of the property. There is no conspiracy, because the Bank is the registered

mortgagee. There is also no basis in law to refuse to allow the Bank to exercise its power of sale, so that the Court can do it. Section 106 of the **Registration of Titles Act** empowers the mortgagee, to sell the mortgage land and empowers rights to damages if sold at an undervalue or any wrong suffered by the exercise of the power. It is clear the Bank is owed money and the Claimant cannot pay. The statutory remedy in S. 106 of the **Registration of Titles Act** is damages and damages are adequate.

- [11] Morrison JA, in delivering the judgment of the Court Appeal, in the **Mosquito Cove Limited v Mutual Security Bank Limited**, [2010] JMCA Civ. 32, outlined the exceptions to the general principles in **SSI (Cayman) Limited. v International Marbella Club S.A** SCCA No.57/1986, judgment delivered on 6th February 1987. (See paragraphs 57 and 59 – breach of fiduciary and special relationship). (See also paragraph 62.) The exceptions are closed, in that the Court of Appeal has identified them. The Claimant is saying do not sell the property because it is being sold too cheaply. The Affidavit filed 18th July 2014 of Damion Fletcher at paragraph 21, stated there is a debt of \$755,380.19, and there is no dispute as to quantum. (See, the Claimant’s letter of 24th July 2014). We however are saying that the full amount should be paid into court.

Discussion

- [12] The Claimant is contending that the 1st Defendant’s action of exercising its power of sale under the mortgage prior to the adjourned hearing date is an abuse of process of the Court. Further the sale of the mortgaged land is at a gross undervalue, due to the misdescription of the property and the collusion of the Defendants. For those reasons, the Claimant submitted that, this was not “a simple Marbella case.”
- [13] A simple Marbella case or the applicability of ordinary rules was recently rehearsed in this jurisdiction by the Court of Appeal of Jamaica in **Mosquito Cove Limited v Mutual Security Bank Limited**, which has adopted the principles in **SSI (Cayman) Limited. v International Marbella Club S.A**. As Morrison JA, pointed out, the principles espoused in Marbella broke no new ground, save that it is the first known application of the principle in our courts. There are English authorities in which the ordinary rules or general principle has long been maintained. The law is therefore well settled as it relates to a Claimant seeking an injunction to restrain a mortgagee’s power of sale. As it involves the exercise of the judge’s discretion, it is revisited from time to time. At paragraph 55, Morrison JA said;

*"In recent years, this court has been invited on a number of occasions to revisit **Marbella**, but in my judgment in **Michael Levy**, after a brief review of some of the later cases, I concluded (at para. 32) that "the Marbella principle is ... alive and well". Most recently, in **Leicester Green v JRDF** (in a judgment with which Philips JA and McIntosh JA (Ag) agreed), Harris JA reaffirmed the principle (at para. [9]), referring to her own earlier statement in **Paulette Hamilton v Gregory Hamilton and others** (at para.10) in which she had stated, again speaking for the court, that "**mortgagee will not be restrained in the exercise of his powers of sale because the amount due is in dispute... however, [he] ...may be restricted in the exercise of his powers of sale if the mortgagor pays into court the amount claimed by the mortgagee as due and owing**". [Emphasis provided].*

- [14] There was agreement that on an application of the general rule; to restrain the exercise of a mortgagee's right under the orders sought by the Applicant, would be impermissible. Learned Queen's Counsel, Mr. Braham, "wondered much and sorrowed more" as to the stringency of the principle, and expressed some measure of regret that the general rule in **Marbella** has survived, the most recent consideration, in the Court of Appeal decision in **Mosquito Cove**. The **Marbella** decision is unscathed and perhaps fortified. However, he was firmly of the view, that the instant case did not fall within any of the exceptions of that general rule as adumbrated in **Marbella**, as considered and applied by Morrison JA. in **Mosquito Cove**.
- [15] The thrust of the Claimant's claim, is conspiracy by the Defendants to dispose of the land in a clandestine manner in order to achieve the unlawful purpose of selling at an undervalue. Although so couched, the complaint is essentially that the lands were improperly described as being agricultural lands, as against what the Claimant alleges is its proper designation, as "commercial lands."
- [16] The 1st Defendant denies any collusion and asserts, through their affiant, Damion Fletcher that the loan which was granted in October 2002 in the sum of US\$400,000.00 had become delinquent in July 2004. Funds in the bank which were used as collateral were used to reduce the loan, nonetheless the bank restructured the loan, in January 2006, in the face of its continued detritions. In 2008, the loan was classified as non-performing. Demand letters were sent out in October 2008 and February 2009. No payments having been received on the loan account a Notice of Sale was issued to the Applicant.

- [17] Further Notices were sent to the Applicant in January 2013, demanding the immediate repayment of US\$562,125.09. On 16th October 2013, NCB commissioned the preparation of a valuation report, by an approved valuator. The property was listed for public auction to take place on December 12th 2013. The property was advertised in a national daily newspaper on four occasions. Only one bid was received, and the auction was aborted.
- [18] The property was next listed for sale by private treaty. An attorney-at-law, unrelated to the matter, made an offer of \$70 million. A few weeks later, the 2nd Defendant made an offer of \$75 million, this offer was accepted by the Bank. An Agreement for Sale was executed on 23rd April 2014. The 2nd Defendant failed to provide a letter of undertaking within the stipulated 60 days, and NCB canceled the sale.
- [19] It is not contested that NCB had written authorization from the Applicant to release its account information to the 2nd Defendant. The Bank alleges that at all times, the 2nd Defendant acted as agent for the Applicant. NCB has obtained a valuation, which appraised the property with a market value of \$98,400,000.00 - \$108,000,000.00 and a forced sale value of \$86,000,000.00. The bank contend that the valuations relied on by the Claimant are excessive.
- [20] In the Marbella Case, the Defendants had counter-claimed for rescission on the ground of fraud of various agreements given by them to secure the loan. Downer JA, after examining the authorities relied on by counsel for the plaintiff, noted the case of, **Mc Leod v Jones** (1883)24 CH.289, where there was a claim by the plaintiff against the defendant that the mortgage in issue be declared void on the ground of constructive fraud, as a result of the special relationship of the mortgagee, who was also the mortgagor's solicitor. Downer JA, said at page 24;

“The important aspect of the law is that where there is an allegation of fraud equity tends to qualify the right of the mortgagee to enforce his remedy of sale but the terms and conditions which are imposed is that the mortgagor pays the amount claimed or such other amount as the court considers just into court .”

The Court in **MacLeod v Jones** granted an injunction; despite the finding of a special relationship ordered the plaintiff to pay into court such a sum as the court considers would cover the amount actually advanced by the defendant.

- [21] In **Mosquito Cove**, the Court of Appeal, treated **MacLeod v Jones**, as an exception to the ordinary rule, which was partially displaced by “*the payment of*

the amount actually advanced by the defendant.” The ordinary rule would require the “*payment into court the amount claimed to be due.*”

- [22] In another case cited by Counsel for the plaintiff in Marbella, **Inglis v Commonwealth Trading Bank of Australia** (1972) 126 CLR 161 there was a claim by the plaintiff for damages for fraud and conspiracy and an interlocutory injunction was sought to prohibit dealing with the property in issue which was mortgaged to the bank. Rowe J, in rejecting the submission that **Inglis and Anor** was not based on fraud said, at page 12;

“the allegation of fraud did not deter the court from refusing to make a restraining order.”

- [23] Downer JA, adopted the principle enunciated by Russell LJ, in **Samuel Kellier (Holdings) Limited & Anor. v Martin Bank Limited & Anor.** (1970) 3 All E.R 950, at page 953;

“However speaking for myself it seems clear to me where the parties use a system of payment under a contract which involves in fact notional payment in full and a lending on mortgage of a sum it could lead to abuse if the mortgagor was to be kept out of his undoubted rights, expressly provided for, by allegations of some connected cross-claim which might prove without foundation.” [Emphasis provided].

- [24] Downer JA, in approving Russell JA, comments at page 26;

“...if they were not, where there is an allegation for fraud by the mortgagor, then the mortgagee would be deprived of his rights under the mortgage if a restraint is imposed without the appropriate conditions attached.” [Emphasis provided].

- [25] In the instant case there are allegations of collusion, conspiracy and clandestine dealings to undervalue the property. The more aggravated allegation of fraud was not specifically pleaded. On the other hand, there is the expressed right of the mortgagee to enforce his security. The Claimant here seeks a displacement of the rights of the mortgagee as spelled out in Fisher & Lightwood, **Law of Mortgage**, 11th Edition, (paras. 20-34) and approved by the Court of Appeal, in **Mosquito Cove**. (See paragraph 56). It would diminish the value of the security, if those rights could be deferred or set aside on an assertion by the mortgagor of

collusion and sale at an undervalue without causing the amount the mortgagee holds due to be paid in court.

[26] The Claimant has argued that this case is an exception to the ordinary rule. The exceptional cases identified in Mosquito Cove, may be categorized as thus;

1. Where the terms of the mortgage deed is peculiar or unusual;
2. Where the issue of a fiduciary relationship between the mortgagor and the mortgagee arises; or perhaps in the case of forgery;
3. Where questions arise as to the validity of the mortgage document, i.e. a person claiming they did not sign or give authority for the mortgage document to be signed; and
4. Where on the face of the mortgage, the mortgagee's claim is excessive.

[27] Morrison JA, detailed these cases at paragraph 61. He said;

“It seems to me to be clear that, in both **Gill v Newton** and **MacLeod v Jones**, the decisive factors that took the cases out of the general rule were, in the former case, the ***peculiar provisions of the deed under which the mortgagee was in possession of the mortgaged property on certain trusts that were independent of the mortgage itself***, and, in the latter case, ***the fact that the mortgagee had concurrent, but also independent, fiduciary responsibilities to the mortgagor as her solicitor.***”
[Emphasis provided].

[28] A third category was engrafted by the Jamaican courts in ***Rupert Brady v JDRF and others***, SCCA No. 29/2007, judgment delivered 12 June 2008. This was a case in which the mortgagor's position was that he **had not signed the relevant mortgage documents, that he had not given authority to anyone to pledge his property as security and that the alleged mortgage was therefore null and void**. It was stated;

The correct distinction is between cases where the issue is in respect of the amount of money owed under a valid mortgage and cases where the validity of the mortgage is challenged ... In the instant case the appellant is challenging the validity of the mortgage document as it relates to him.

[30] In the Mosquito Cove case, Morrison JA, notes that the only exception to the rule as formulated by Fisher & Lightwood, in **Law of Mortgage** (11th Edn.), **is where, on the face of the mortgage, the mortgagee's claim is excessive.**

[31] The instant case does not fall within any of these identified categories. Mr. Chen did not argue that it did. However, the Court was invited in the exercise of its discretion to provide a remedy outside of the ordinary rule. On the evidence adduced, there are serious issues to be tried. Downer JA, recognized the harshness that the ordinary rule can create. He says at page 25, of the Marbella case;

“It was contended that such an order favors the Goliaths of this world but as Turner L.J puts it in Gill v Nelson (1800) 14 W.R 191 the party who has entered into such contract cannot complain of its consequences. This is particularly so when the consequences are implied by statute see section 105 and 106 of the Registration of Titles Act and sections 22 and 23 of the Conveyancing Act which gives the mortgagee the power of sale apart from any term in the deed.”[Emphasis provided].

[32] On a consideration of the relevant principles in **American Cyanamid v Ethicon Limited** (1975) AC 396. I am of the view that damages are adequate. The application for an injunction is refused.

[33] In light of all these circumstances, and the evidence brought before the court, the court orders:

1. Application for injunction refused.
2. Leave to appeal granted.
3. Costs to the 1st Defendant and a special costs certificate granted.