



[2017] JMSC Civ 154

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. CL1999/T120

BETWEEN	JOYCELYN THOMAS	CLAIMANT
AND	MSB LIMITED	1ST DEFENDANT
AND	FINSAC LIMITED	2ND DEFENDANT
AND	JAMAICAN REDEVELOPMENT FOUNDATION INC	3RD DEFENDANT

IN CHAMBERS

Mr Ransford Braham QC and Mr Jeffrey Foreman instructed by Braham Legal for the Claimant

Ms Shanique Scott instructed by Hylton Powell for the 1st and 2nd Defendants

Mrs Sandra Minott-Phillips QC and Ms Rachel McLarty instructed by Myers, Fletcher & Gordon for the 3rd Defendant

HEARD: July 24, 26 and 31, 2017 and October 27, 2017

Injunction – Application to restrain mortgagee from exercising power of sale under mortgage

LINDO J.

[1] This is an application for an injunction pending the trial. The Claimant, Joycelyn Thomas, is one of two joint tenants of premises registered at Volume 1172 Folio 331 of the Register Book of Titles. She is registered along with her husband

Omer Thomas. MSB Limited (formerly Mutual Security Bank Limited) was a limited liability company with objects including the business of providing loans and other financial services.

- [2] FINSAC Limited is a limited liability company incorporated under the laws of Jamaica and owned by the Government of Jamaica. It managed non-performing loans and credit facilities on behalf of Recon Trust Limited, its wholly owned subsidiary.
- [3] Jamaican Redevelopment Foundation, Inc., (JRF) is a corporation formed in Texas in the United States of America and registered in Jamaica as an overseas company.
- [4] The Claimant and her husband jointly obtained a mortgage loan of \$52,600.00 from Victoria Mutual Building Society (VMBS) and in 1993 they obtained a second loan mortgage in the sum of \$1million from Mutual Security Bank Limited and this second mortgage was registered on the title on October 26, 1993, as No. 786920.
- [5] Mutual Security Bank Limited, by letter dated June 14, 1996 sought to obtain security for a loan in the sum of \$10 million made to the Claimant's husband, by way of a mortgage on the said property and an unlimited guarantee by the Claimant. The Claimant claims that she was "approached by [her] husband' and "requested to sign a mortgage in favour of Mutual Security Bank to secure his independent loan obligations with the said bank...and ...refused to sign any such mortgage ...and did not sign the mortgage document or the guarantee".
- [6] On July 1, 1998, MSB Limited upstamped the mortgage and on September 8, 1999 the property was advertised for sale by public auction.
- [7] On September 14, 1999, the Claimant filed a Writ of Summons against MSB Limited and FINSAC Limited seeking to recover damages for breach of contract under Mortgage numbered 786920 dated the 2^{6th} day of October, 1993 and, *inter*

alia, “an injunction to prevent the defendants from selling her property; an account to determine what is truly due and owing to the Defendants under ...mortgage contract and damages for breach of mortgage...”. A Statement of Claim was filed on October 7, 1999.

- [8] On December 9, 1999, the court granted an interlocutory injunction, after an *inter partes* hearing, by which the then named defendants were restrained from:

“1. Exercising a power of sale under mortgage dated the 26th day of October, 1993 and endorsed on the Plaintiff’s Title registered at Volume 1172 Folio 331 of the Register Book of Titles and that an injunction is granted restraining them from selling the Plaintiff’s property.

2. That the Defendants by themselves or their agents or otherwise be restrained from interfering with the Plaintiff her licensees or invitees quiet enjoyment of the aforesaid premises of which the Plaintiff is in possession until after the trial of this action and or until further order, and that the costs of this Application be costs in the Cause.”

- [9] The matter remained in a state of abeyance until by letter dated December 23, 2003 to the Registrar of the Supreme Court, the former attorneys –at law on record for the Claimant applied for a case management conference to be held in the matter.

- [10] Nothing further appears to have happened in the matter until on October 5, 2016, when the Claimant filed an Amended Claim Form and 1st Amended Particulars of Claim, adding JRF as the 3rd Defendant. On the same date, she filed an application for court orders seeking, *inter alia*, an injunction restraining the added 3rd Defendant as follows:

“1. The 3rd Defendant by itself, its agents/and or servants or howsoever otherwise be restrained and an injunction be granted restraining the 3rd defendant from

(a) Exercising its power of sale under the mortgage dated the 26th day of October 1993 and endorsed on the certificate of Title registered at Volume 1172 Folio 331 of the register Book of Titles;

(b) Selling, transferring and /or disposing of the property registered at Volume 1172 Folio331 of the Register Book of Titles

until the hearing and determination of this claim or until further order..."

~~[11] The grounds on which the application for injunction is sought are stated as follows:~~

"(1) The 3rd Defendant has wrongfully and unlawfully advertised for sale premises registered at Volume 1172 Folio 331 of the Register Book of Titles.

(2) Unless restrained by this Honourable Court the 3rd Defendant will sell or transfer the said premises.

(3) Damages will not be an adequate remedy

(4) The mortgage under which the 3rd Defendant is purporting to advertise and sell the Claimant (sic) property was transferred to the 3rd Defendant on the 3rd February 2015. The original claim was filed in 1999"

[12] The 3rd Defendant, on October 21, 2016, filed an acknowledgement of service of the Amended Claim Form and an application for court orders in which it sought the following orders:

" 1. The court has no jurisdiction to try the claim against the 3rd Defendant or, if it does, should not exercise its jurisdiction to do so.

2. Service of the Amended Claim Form on the 3rd Defendant is set aside.

3. (Pursuant to CPR 20.1(1) the amendments introduced via the:

a. Amended Claim Form; and

b. 1st Amended particulars of Claim;

filed herein on October 5, 2016, are disallowed.

4. The Claimant's statements of case are struck out as against the 3rd Defendant

5. Judgment on the claim issues for the 3rd Defendant against the Claimant for costs to be taxed".

[13] On February 16, 2017 the court granted an interim injunction by which the 3rd Defendant was restrained from exercising its power of sale under the mortgage, pending the *inter partes* hearing and on July 24, 2017, the court determined that JRF was added as a party to the proceedings by virtue of the Amended Claim

form filed on October 5, 2016. The 3rd Defendant's application filed on October 21, 2016 was refused.

- [14] This judgment is in respect of the *inter partes* hearing of the application for injunction against the 3rd Defendant, which was concluded on July 26, 2017 with the Claimant being permitted to file and serve written submissions in reply to the 3rd Defendant's submissions on law, on or before July 31, 2017..
- [15] The evidence in support of the application is contained in the affidavit of Joycelyn Thomas filed on October 5, 2016, in which she sought the leave of the court to refer to affidavits filed previously in the matter on September 14 and 15, 1999.
- [16] She indicates that she did not receive a loan of \$10 million and that she had refused to sign the mortgage in relation to this loan and the guarantee. She states that since the injunction was granted on December 9, 1999, "the mortgage under which the First and Second defendants were purporting to sell the property was transferred and/or assigned to the Third Defendant".
- [17] Her evidence further is that the 3rd Defendant in or about April or May 2016 "advertised online the property for sale" and that she became aware that the mortgage was transferred/assigned on 25th August 2016.
- [18] The Claimant is concerned that unless an interlocutory injunction is granted against the 3rd Defendant, the property may be sold. She denies that she signed the Instrument of Mortgage dated March 11, 1996, or the letter to VMBS dated January 19, 1996 which she claims "purportedly gave VMBS authority to lend Mutual Security Bank Limited the duplicate certificate of title to the property for the purpose of registering a further mortgage in their favour in the amount of \$10 million".
- [19] She has exhibited to her affidavits, copy of instrument bearing No.1023672 dated July 1, 1998 (the upstamped mortgage), copy of application for change of name by MSB Ltd. dated July 23, 1998, Transfer of mortgage from MSB to

National Commercial Bank Jamaica Ltd. (NCB) Transfer of mortgage from NCB to ~~Refin Trust Limited, dated December 10, 2014 and Transfer of Mortgage from Refin Trust Limited to JRF dated December 10, 2014.~~ Her evidence also discloses that the change of name from Mutual Security Bank Ltd to MSB Ltd was noted on the title for the property on August 13, 1998 and that the transfers of the mortgage was registered on the title on February 3, 2015.

- [20] Additionally, by the affidavit of Jeffrey Foreman, the Claimant has exhibited the opinion "concerning the authenticity of the documents...", in the form of a report of Mr George Dixon, a certified forensic document examiner, dated February 15, 2017, in support of her contention that she did not sign the mortgage document or the guarantee.

The Submissions

- [21] The Claimant and the 3rd Defendant through their Queen's Counsel, have provided written submissions, which were supplemented by oral submissions. I have given them careful consideration, but for the sake of brevity, do not propose to recite them in detail in this judgment.
- [22] In their respective submissions, both Queen's Counsel referred to the principles and guidelines in **American Cyanamid v Ethicon Ltd** [1975] AC 396 (American Cyanamid) and **National Commercial Bank v Olint Corp Ltd (Jamaica)** [2009] UKPC 16. (Olint)
- [23] In applying the guidelines, Mr Braham, QC., expressed the view that there is a serious question to be tried as to whether the indebtedness which formed the basis for the attempt, initially by the 1st and 2nd Defendants and now the 3rd Defendant to sell the property was valid and as to whether or not the 3rd defendant as an assignee is covered by the injunction granted in 1999. He cited the cases of **Eckman v Midland Ltd.** (1973) 1 QBD 519 at 527H and **Seward v Paterson** [1897] Ch. 545 in relation to this point.

[24] He indicated that the Claimant could be prejudiced by the acts or omissions of the Defendants pending trial and the undertaking as to damages would be sufficient to compensate the Defendant if the case is not determined in her favour. He also indicated that no order for payment into court of the sum claimed by the 3rd Defendant should be made as there is an injunction in place, there were no conditions imposed, and there is an express challenge to the validity of the mortgage or the upstamped mortgage. In this regard he made reference to the case of **Mosquito Cove Ltd. v Mutual Security Bank Ltd and Others** [2010] JMCA Civ 32 at paragraph 62 where the court said, *inter alia*:

"...In Rupert Brady v JDRF and others,...this court itself engrafted another exception to the Marbella principle. 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. This court allowed an appeal from that part of the decision of Sinclair-Haynes J in which, as a condition of granting an injunction to restrain the mortgagees power of sale, she had ordered payment into court by the mortgagor of the sum of \$14.2million, which was the amount said to be due under the mortgage..."

[25] Mrs Minott-Phillips pointed out that the mortgage contract numbered 786920, underpinning the Claimant's claim, is one in relation to which the Claimant and her husband are joint promisees and her action is not maintainable unless both promisees are before the court.

[26] She submitted that delay is a bar to equitable relief and the Claimant has been aware of the assignment of the debts and its securities to the 3rd Defendant since 2005.

[27] She examined Clause 2(e) of the Instrument of Mortgage numbered 786920 and expressed the view that the power to upstamp the mortgage is one granted by Mr and Mrs Thomas to the mortgagee.

[28] With reference to Section 106 of the **Registration of Titles Act** (RTA), she indicated that damages is an adequate remedy in the event the property is sold by JRF. She expressed the view that withholding the injunction will cause the

least irremediable prejudice to the parties and noted that the Claimant is outside of the jurisdiction of the court "~~and thereby outside of its reach in the event she is~~ called upon to honour her undertaking" . She also indicated that an important feature of this case is that by virtue of Section 71 of the RTA, nothing other than fraud on the part of JRF, can affect its rights as the registered mortgagee and that there is no pleading of fraud on the part of JRF.

- [29] Mrs Minott-Phillips, QC, concluded that "the courts in Jamaica do not ordinarily restrain registered mortgagees from exercising their power of sale and will not usually do so without the usual safeguard being put in place of imposing a condition that the amount claimed by the mortgagee to be due, ...is first paid into court".
- [30] Before proceeding to examine the rival contentions, I need to address the issue of the "expert report" as attached to the affidavit of Jeffrey Foreman which has been filed in these proceedings.
- [31] It is my understanding that expert evidence would generally be adduced at a trial. Rule 32.2 of the **Civil Procedure Rules, 2002 (CPR)** CPR states as follows:"Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly" and, in an application as is presently before the court, the court is not required to embark on a trial of, or to determine the substantive issues, and arrive at a determination and as such there would be no need for expert evidence to be presented at this time. Additionally, Rule 32.6(1) and (2) of the CPR provides that the court's permission is required for an expert witness' report to be "put in" and that the general rule is that the court's permission is to be given at a case management conference.

The Court's Jurisdiction and Law Applicable

- [32] The power to grant an injunction is governed by the court's equitable jurisdiction as well as statute. Section 49(h) of the **Judicature (Supreme Court) Act** provides, *inter alia*, as follows:

"...[A]n injunction may be granted...by an interlocutory order of the court , in all cases in which it appears to the court to be just and convenient that such an order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just..."

[33] Guidelines for the grant of an interlocutory injunction were laid down in the **American Cyanamid** case where, Lord Diplock established that an applicant seeking an interlocutory injunction must demonstrate that:

- i. There are serious issues to be tried and there is a real prospect of succeeding on the claim
- ii. Damages, if able to be paid by the Defendant, are not an adequate remedy; and
- iii. The balance of convenience generally lies in favour of granting the injunction.

[34] These guidelines and principles have been followed in our jurisdiction and were reaffirmed by the Judicial Committee of the Privy Council in **Olint**, in which it was stated that the underlying purpose of an interlocutory injunction is *"to improve the chances of the court being able to do justice after a determination of the merits of the trial"*.

[35] In order to do justice *"the basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."* (See **Olint**)

[36] The starting point for my consideration is to determine whether there is a serious question to be tried in relation to the substantive claim, which would warrant the granting of an injunction. I therefore need to determine if the Claimant is likely to obtain an injunction if the matter proceeds to trial.

Whether there is a serious question to be tried

[37] The issues raised in the submissions of both Queen's Counsel and as set out in the Amended Particulars of Claim and affidavits filed in this matter, are in my view serious. The Claimant has mounted a challenge to the validity of the

mortgage, denying the allegation that she signed a second instrument of mortgage and gave it to Mutual Security Bank and also denying that she signed the letter to VMBS dated January 19, 1996, which indicates that they were requesting VMBS to lend the title to the property to Mutual Security Bank. There is also the issue of the upstamping of the mortgage which the Claimant is alleging was procured and or obtained by fraud. Additionally, the Claimant is denying the receipt of any correspondence from the 3rd Defendant in relation to it having been assigned the mortgage or its intention to exercise its power of sale.

[38] Having considered the authorities and the submissions, and having reviewed the evidence placed before the court, I am satisfied that the claim being made is not frivolous or vexatious. Although there is no allegation of fraud on the part of JRF, JRF is now the assignee of the mortgage, the validity of which has been questioned, and it is pursuant to this mortgage that the 3rd defendant is seeking to exercise its power of sale. The circumstances therefore clearly give rise to serious issues to be tried.

[39] I accept, as Lord Diplock entreated in the **American Cyanamid** case, that:

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial".

[40] The substantive issues, including the issue of the validity of the mortgage are matters for the judge at trial and this court cannot conduct a preliminary trial at this stage to determine liability.

Whether damages would be an adequate remedy

[41] In **American Cyanamid**, Lord Diplock stated at page 408:

"...[T]he 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 have 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 the 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 case appeared to be at that stage."

[42] Put another way, even if it is shown that there is a serious question to be tried, if damages will be an adequate remedy for the Claimant, there would be no grounds for the court to restrain the 3rd Defendant from acting by granting an injunction (See **Olint**).

~~[43] In considering whether this test has been satisfied, I find on the evidence that~~ there is the threat of the Claimant losing her interest in the property, subject of the mortgage. It has been established that in the case of land, it is presumed that damages are not an adequate remedy as each parcel of land is said to be "unique" and have a "peculiar and special value". This presumption was outlined by Brooks J (as he then was) in **Tewani Ltd. v KES Development Co Ltd. and ARC Systems Ltd.** Claim No. 2008HCV02729, unreported, delivered July 9, 2008. At page 3 of his judgment, Justice Brooks stated ,among other things, that:

"The significance of the subject matter being real property, raises a presumption 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 to have "a peculiar" and special value".

[44] In that case, Justice Brooks opined that damages would not be an adequate remedy if the claimant were to lose its interest in the parcel of land. In the instant case, the Claimant is claiming damages for breach of contract, and, if the 3rd Defendant is found liable, damages would be the appropriate remedy to compensate her for any loss she may suffer.

[45] Additionally, I am of the view that the provisions of Section 106 of the RTA apply, and I find that damages would be the only remedy available to the Claimant. Section 106 stipulates that where a mortgagee purports to exercise its power of

sale contained in a mortgage, the mortgagor's remedy for any wrongful exercise of that power shall be a remedy in damages only.

[46] In the circumstances of this case, it is my view that the withholding of the injunction will not result in "*irremediable prejudice*" to the Claimant as an award of damages would provide her with an adequate remedy for any loss caused if she were to succeed in establishing her claim at the trial. There is no evidence that the property enjoys any unique feature, for which damages would not compensate and the evidence is that she is not now residing there, but is temporarily residing in the United Kingdom, and no indication has been given as to when she went to live overseas or when she is likely to return to the home or if anyone is now residing there. I must note also that no issue has been raised that the 3rd Defendant would not be in a position to pay such damages.

The issue of delay

[47] The 3rd Defendant became the assignee of the portfolio of debts by way of a Deed of Assignment dated January 30, 2002. The mortgage was transferred to it on December 10, 2014 and registered on the Certificate of Title on February 3, 2015. The factual situation giving rise to an action being brought against JRF therefore arose on or about January 30, 2002.

[48] The 3rd Defendant is contending that the Claimant knew of the assignment of the mortgage as, by letter dated October 25, 2005, the Claimant and her husband were notified.

[49] The Claimant in her 4th affidavit states, *inter alia*, "The address at 27 Bellevue Drive is not recognised and/or serviced by any post office...Had this notice been sent to the actual street address of the said property it may have served my interest..." I note, however, that she has not specifically denied receiving it although in paragraph 19 of her Fourth Affidavit filed on December 28, 2016 she states: "...This notice and other letters addressed to me at any of these addresses could not have been delivered to me or my husband..."

[50] I note also that Merline Patterson in her affidavit filed on October 21, 2016, provides evidence that the statutory notice dated August 5, 2015, sent by registered mail to the Claimant at "27 Bellevue Drive..." and "3 Ridgeway Road..." were returned by the post office.

[51] In view of the foregoing, I find on a balance of probabilities, that the Claimant was not aware of the assignment or of the 3rd Defendant's intention to exercise its power of sale and that it was the advertisement in or about May 2016 which prompted her to take action. I therefore do not find that there has been inordinate delay on the part of the Claimant to add JRF as a defendant, or to seek the interlocutory injunction against it. I therefore find that the Claimant cannot in the circumstances be said to be guilty of unreasonable delay in pursuing her claim as against the 3rd Defendant. This finding, however, is not sufficient in my view to tip the scale in favour of a grant of the injunction sought.

Whether the balance of convenience lies in favour of granting the interlocutory injunction

[52] According to the guidelines stated by Lord Diplock in **American Cyanamid**, it is where there is doubt as to the adequacy of the respective remedies in damages available to either party, that the question of balance of convenience arises. He said :

"it would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."

[53] In the case of **Olint**, Lord Hoffman said, *inter alia*:

"...At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid..., that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. ..." Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would

provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."

- [54] I have nonetheless considered the likelihood of any prejudice which the Claimant may suffer if no injunction is granted, any prejudice to the defendant if it is, and the extent to which such prejudice may be compensated by an award of damages or the enforcement of a cross-undertaking and the likelihood of the respective parties being able to satisfy such an award, in view of the submissions made by both Queen's Counsel.
- [55] I note that no issue has been raised in relation to the 3rd Defendant's ability to give and honour an undertaking as to damages if it is found that the injunction should have been granted. Further, as stated earlier, the Claimant has given an address outside of the jurisdiction of the court and although, by way of affidavit, she gave to the court an undertaking as to damages in respect of the interim injunction, she is at this point "outside of its reach".

Conclusion

- [56] In view of all the foregoing, the application for interlocutory injunction is refused. The interim injunction granted on February 16, 2017, extended on March 22, 2017, May 26, 2017 and July 26, 2017 .is discharged.

Costs of this application to the 3rd Defendant, to be agreed or taxed.

Leave to appeal is refused, (if requested).

The matter is to proceed to mediation on the filing of the Defence of the 3rd Defendant and a case management conference is to be scheduled on a date to be fixed by the Registrar, if the parties fail to resolve the matter at the mediation.

The 1st and 2nd Defendants' application filed on March 7, 2017 is set for hearing on a date to be fixed by the Registrar.