

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. NO. 2389 OF 1991

BETWEEN  
ALFRAS INVESTMENTS LIMITED PLAINTIFF  
AND  
NATIONAL COMMERCIAL BANK  
OF  
TRINIDAD AND TOBAGO LIMITED DEFENDANT

BEFORE THE HON. MR. JUSTICE WILLS.

Appearances:

Mrs. Roberts for the Plaintiff.

Mr. F. Singh for the Defendant.

October 16 & 19, 1992.

J U D G M E N T

By Summons dated and filed on the 15th July 1991 the Plaintiff Alfras Investments Limited, hereinafter referred to as, the Mortgagor, applied to the Court for the following Order that:-

- "(1) Upon payment by the Plaintiff to the Defendant of the sum of \$45,000 due and payable under and by virtue of an agreement in writing dated the 25th day of March, 1991, and made between the Plaintiff of the One Part and one Manzoer Ali of the Other for the sale by the Plaintiff to the said Manzoer Ali of the parcel of land which forms the subject matter of Memorandum of Mortgage dated the 24th day of January 1990, and made between the Plaintiff of the One Part and the Defendant of the Other Part that the Plaintiff may be at liberty to redeem the said mortgaged.
- (ii) That the Plaintiff may be able to sell the said mortgaged property for the purpose of discharging the said mortgage thereby secured or that the said mortgaged property be sold on the approval of this Honourable Court.

HON. MR. JUSTICE WILLS  
ALFRAS INVESTMENTS LTD. v. N.C.B.

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(iii) Such further or other relief."

On the 29th July 1991 the Summons was amended to include, two other reliefs in the alternative, as follows:-

"(iii) Further or alternatively that in pursuance of (i) and (ii) above the Plaintiff be granted an extension of time for redeeming the said mortgage up to the date of payment of the balance of the purchase price due and payable under the said agreement.

(iv) Further or alternatively an account of the balance of principal interest properly due under the said mortgage.

(v) Such further or other relief."

In support of the Summons three affidavits were sworn to by Carlos Waldron and relied upon on behalf of the Defendant and two were sworn to by Allison Eustace Luther Roberts and relied upon by the Plaintiff.

The Court made the following findings of facts:-

(a) The Mortgagor Company (hereinafter referred to as the "Surety") registered under the Companies Ordinance Chapter 31 No.1 was the registered proprietor of 0.364 hectares of lands which is described in a Certificate of Title in Volume 2015 Folio 21 delineated on a plan and coloured pink which is annexed to a Memorandum of Mortgage registered in Volume 3373 Folio 159 in the Real Property Register, the boundaries of which have been described (hereinafter referred to as "the Mortgaged Property").

(b) The Memorandum of Mortgage by its recital established that the Mortgagor Company utilized the Mortgaged Property as security for money lent and or to be advanced to a Company known as The Coach Shell Limited, incorporated under the Companies Ordinance Chapter 31 No.1 (hereinafter referred to as "the Borrower Company") by the Defendant Bank, that is to say, the National Commercial Bank of Trinidad and

Tobago (hereinafter referred to as "The Lender Bank").

By the operative part of the Memorandum of Mortgage, it is therein provided that: "In pursuance and in consideration of the premises." The Borrower and the Surety.....jointly and severally covenant with the Lender -

- (a) "On demand in writing made to the Borrower to pay to the Lender the balance which on the account of the Borrower with the Lender shall for the time being (and whether on or at any time after such demand) be due or owing to the Lender in respect of all moneys now or from time to time hereinafter owing by the Borrower or for which the Borrower may be liable either solely or jointly with any other persons, firms or companies and whether as principal or surety for..... in respect of bills or notes discounted or paid or other loans payments credits or advances on banking account or otherwise made or on account of or for the accommodation or at the request of the Borrower or for interest, discount, commission or other lawful charges and expenses which the Lender may in the course of its business charge in respect of any of the matters aforesaid or for keeping the Borrower's account and will thereupon also retire all bills or notes which may be for the time being be under discount with the Lender and to which the Borrower is a party either as drawer, acceptor, maker or endorser without any deduction whatsoever."

In the Memorandum of Agreement the following terms were also agreed and declared:-

- (1) As between the Borrower and the Mortgaged Lands on the one hand and the Surety of the Other hand the Borrower and the Mortgaged Lands shall be primarily liable for the payment of the moneys hereby secured.

/(ii) The proviso

- (ii) The proviso last hereinbefore contained with respect to the primary liability to the payment of moneys hereby secured shall not affect the Lender or in any wise preclude it from enforcing or having recourse to all or any remedies or means which may be available to it by 1..... for recovering payment of such moneys as aforesaid.
- (iii) The giving of time to the Borrower or the neglect or forbearance of the Lender in requiring or enforcing payment of the principal money and interest hereby secured or any other variation of the provisions of these presents or other dealing between the Borrower and the Lender shall not in any way prejudice or affect this security or the joint and several covenant of the Borrower and the Surety hereinbefore contained or the continuing liability of the covenantors and each of them by virtue thereof and although as between the Borrower and the Surety the Surety is only a surety for the Borrower yet as between the Surety and the Lender the Surety is to be considered a principal debtor for all moneys and interest intended to be hereby secured sub to sub-clause (i) hereof.
- (iv) A demand for payment or any other notice under this security may be made by any Manager or Officer or Attorney-at-law of the lender by letter sent by post addressed to or in care of the Borrower and the Surety the address hereinbefore set out or at their last known place of abode or business in the Republic of Trinidad and every demand or notice so made shall be deemed to have been made or given on the day after the letter was posted.
- (v) This security shall not be considered as satisfied or discharge by any intermediate payment of the whole part of the moneys owing as aforesaid but shall constitute and be a continuing security to the Lender notwithstanding any settlement of account or other matter or thing whatsoever and shall be  
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in addition to and shall not operate so as in any way to prejudice or affect the security created by any deposit which may have already been made with the lender of the title deeds and writing relating to the said property or any other security which the Lender may now or at any time hereafter hold for or in respect of the moneys hereby secured or any part thereof.

- (vi) The lender shall be at liberty at any time and from time to time to upstamp this security above the amount for which it is then stamped at the expense of the Borrower without any reference to any owner of the premises hereby mortgaged to cover the total indebtedness and liability of the Borrower hereunder if the said security is insufficiently stamped for such purpose and all legal costs charges and expenses incurred by the lender in connection therewith shall be deemed to be properly incurred by the lender provided that no limit has otherwise been expressly stated in these presents.
- (viii) The Lender shall be at liberty from time to time to give time for payment of any bills of exchange promissory notes or other securities which may have been discounted for or received on account from the Borrower or on which the Borrower shall or may be liable as drawer, acceptor, maker or endorser or otherwise to any party liable thereon or thereto as the lender in its absolute discretion shall think fit without releasing the Borrower or affecting any liability under these presents.
- (xi) The statutory power of sale conferred upon mortgagee the Ordinance shall apply to this security but with the restrictions therein contained as to giving otherwise and so that for the purpose of exercise said power of sale the mortgage moneys hereby secured .. shall be deemed to have become due and payable immediately upon the  
/execution

execution on these presents between the Lender and the Borrower the Lender shall exercise the said power of sale until payment of moneys hereby secured has been demanded and default has been made in paying the same but this proviso in protection only of the Borrower and shall not affect purchaser or put him upon enquiry whether such ..... has been made.

(xvii) Although the total liability of the Borrower hereunder shall not exceed the amount which the security for the time being is intended to cover the aforesaid limit should not in any way prejudice or affect any right of the lender independently however to recover the total sum from the Borrower but if the total liability of the Borrower exceeds the said limit the Lender may conclusively determine what part of such total liability not exceeding the limit aforesaid shall be deemed to be secured by these presents and what part or parts thereof shall be deemed not so secured."

It is clear from the expressed terms of the memorandum of Mortgage that the security provided by it was intended to be continuous. Any termination thereof ought to be preceded by a demand for payment made to the Borrower by the Lender Bank. There was no evidence before the Court of any such demand made by the Mortgagee. In my judgment termination of the facilities would require adequate notice and reasonable consideration to be given to the Mortgagor in relation to its entitlement to redeem. I come to this conclusion, not being unmindful of the provision of clause (xi) of the memorandum of Mortgage quoted supra in that, once a mortgage always a mortgage and any clog or fetter on the equity of redemption is void; see Hoekes & Co. Limited v Rice [1902] A.C.24 per Lord Mac Naghten at page 30 where it is said:-

"Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money is secured by a mortgage of land is paid off, the land itself "and the owner of the land in the use" and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security."

Mr. Singh for the Defendant, opposing the summons, submitted that since what was before the Court was a redemption action and the Plaintiff did not make a full tender of the amount due and owing on the mortgage, the Plaintiff would not be entitled to any of the reliefs sought. I find that submission unacceptable having regard to all the circumstances. Even assuming that was so, there were other considerations of law which made his contention untenable and which will be apparent from this judgment.

Mrs. Roberts for the Plaintiff submitted that at the time of the execution of the mortgage memorandum the sum of money secured thereby was \$55,000. And, that a further sum of \$35,000 was secured by a Fixed Deposit by one Carlos Dillon. This fact was common ground between the parties. And while the total indebtedness to the Lender Bank was \$75,000 there was then security in its possession to the extent of \$80,000; at which time the request was made to redeem and sell the mortgaged property subject to the purchase price being deposited with the Defendant.

The Defendant did not agree to the Plaintiff's proposition and/or request in the manner suggested. In the result the Plaintiff filed the summons now before the Court on July 15, 1991 seeking the reliefs therein stated.

Whilst the summons was pending before the Court with the Defendant's Attorney attending and the matter being adjourned from time to time, the Defendant proceeded to exercise its power of sale and sold the property with no account or statement of what sum of money was owing by the Plaintiff.

In order to sell the property the Defendant obtained a valuation of its own and proceeded to upstamp the mortgage memorandum to cover an amount in excess of \$55,000 for which the mortgage was the security at the time of its execution. The upstamping was effected after several appearances were made to the summons before the Court. Having due regard to the express terms of the Mortgage Memorandum and to section 57(2) of the Stamp Duty Act I do not regard the act of upstamping per se during the pendency of Action unlawful as was contended by Attorney; but doing so and the disposal of the property during the pendency of these proceedings seems to me a demonstration of bad faith.

/The Law

The law

Now what is the law relating to mortgages as applied to circumstances as are stated in this case?

A mortgage is said to be a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. The security is redeemable on the payment or discharge of the debt or obligation notwithstanding any provision to the contrary in the mortgage document.

Any provision inserted or attached which has the effect of preventing redemption on payment or performance of the debt or obligation for which the security was given will be regarded as "clog or fetter" on the equity of redemption and would in law be void. Hence it is said, "once a mortgage always a mortgage".

The right to redeem is not a personal one but an equitable estate or interest in the property which can be assigned or disposed of as is necessary or desired, subject to priorities or certain consent wherever necessary.

Civil behaviour and equitable conduct would require that when a request is made to redeem mortgaged property, the mortgagee would be expected to provide the mortgagor with a statement of the amount outstanding of the money owed to the mortgagee at the date of the proposed redemption.

In the instant case one would have expected when the request was made to sell and redeem by the mortgagor that the mortgagee's main interest should relate only to the receipt of the sum of money outstanding, how, and when it would be paid rather than proceed to have its own valuation, upstamp the mortgage memorandum while this summons was pending and proceeded to sell the mortgaged property with total disregard for the Courts of Justice and thereby deprived the mortgagor of its equity of redemption.

A mortgagee is not entitled to consolidate debt owed outside of the mortgage security when called upon by the mortgagor to have the mortgaged property redeemed. To do so, tantamounts to a clog or fetter on the equity in law is void: Santley v Wilde [1899] 2 Ch. 474; Noakes & Co. Limited v Rice [1902] A.C.24.

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If the mortgage was solely for the security of the sum of \$55,000 at the time of the execution thereof and I so find, any condition by way of upstamping to increase the sum secured subsequent to the execution, would in my judgment be void since the effect of so doing would be a fetter on the equity of redemption. And, while a collateral advantage may be stipulated for by a mortgagee, the law require him not to act unfairly and or oppressively; Kreglinger v New Patagonia Meat and Cold Storage Co. Limited [1914] A.C.25.

In the mortgage instrument, there appeared to be no fixed date for redemption of the property, since the right of the mortgagor to redeem is an equitable one, it follows therefore, that it must be governed by principles of equity.

As I understood it, the mortgaged property was still in the possession of the Plaintiff as the Mortgagor surety. It would seem to me that it was necessary for the mortgagee bank to obtain possession before the exercise of its power of sale. Concomitant with a power of sale, there must be a right of entry. A right of entry can only arise or be exercised in default of payment of the mortgage debt on demand. And in the event of a demand a reasonable time must be allowed for compliance before the mortgagee enters: Toms v Wilson [1863] 4B&S 435.

There had been no evidence before me of any demand and or noncompliance.

In my judgment, a mortgagee who intends to exercise his powers of entry and sale must do so in good faith. And while he is in general entitled to exercise such powers in a way conducive to his best interest, subject to any express conditions contained in the mortgage instrument, he must act in good faith and not capriciously. Furthermore, while to him it may be commercially necessary for him to sell the mortgaged property primarily for his own benefit to recover the money lent; he is not entitled to ignore the interests of the mortgagor with impunity. At law, the mortgagee is not a trustee of the power of sale for the mortgagor. And while he has a right to look after his own interest, he is not at liberty to act either recklessly or with wilful disregard or indifference sacrificing the interest of the mortgagor: See e.g. Farrer v Farrars Limited [1888] 40 Ch. 395; Kennedy v De Trafford [1897] A.C.180 and Reliance Permanent Building Society v Marwood Stamper [1944] 1 Ch.362.

The circumstances of this case seem to follow a trend which is prevalent at times like these when there appears to be economic recession during which the principles of Equity seem to be ignored by financial institutions. I find that the property in this case has been sold in questionable circumstances but I am constrained by the remedy sought in the summons from granting the kind of remedy which in my view might have been available to the Plaintiff.

In the circumstances of this case I find the Defendant's conduct in proceeding to exercise its power of sale was, to say the least, draconian and its effect was such as to make the Memorandum of Mortgage a Deed of Defeasance. The Defendant bank in acting as it did, clearly demonstrated a reckless and or conscious indifference as to whether or not its act of selling the mortgage property could or could not interfere with the proper dispensation of justice.

Not only has the Defendant proceeded to sell the property in the face of the pending proceedings but they failed to provide the Plaintiff with an account when it should be obvious to the lender bank and or their advisers that in law, on a sale being completed they become trustees of any surplus in their hands - see Banner v Berridge [1081] 18 Ch. 254 at 269. They ought also to be aware that on the completion of the sale interest ceases to run against the mortgagor - West v Diprose [1900] 1 Ch.337 at 340.

In the light of the foregoing it is ordered that the Defendant render an account of the balance of principal and interest properly due as at the date of the filing of the summons herein. And that any sum found due to be paid to the Plaintiff upon the rendering of such account.

The Defendant to pay the Plaintiff's cost of the summons taxed fit for Advocate Attorney, in default of Agreement. Liberty to apply.

Dated this 25th day of November, 1992.

A. E. Wills,  
JUDGE.