Morgan J. Negligence — Mortgage Debenture — Receivership.
Interlocutory Injunction — Defendant seeking to sell premises on which it has debenture as mortgagee — Ltd running business / receivership by allegations of negligence by Def. whether ① defendant/mortgagee can be sued ② P's can sue ③ triable issue ④ balance of convenience. Ans. Interlocutory injunction dismissed.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. A080/81

Arawak Woodworking Establishment Ltd. - Plaintiff
Applicant

vs.

Jamaica Development Bank - Defendant
Respondent

Carl Rattray, Q.C. - Clark Cousins instructed by
Rattray, Patterson & Rattray for Plaintiff.

John Vassell & Michael Marsh instructed by
Dunn, Cox & Orrett for Respondent.

Heard: 12th 13th, 14th & 21st January, 1987.

MORGAN, J:

This is an application for an interlocutory injunction brought by the plaintiff Arawak Woodworking Establishment Ltd. against the Jamaica Development Bank. The gist of the matter is that the defendant is seeking to sell lands and buildings belonging to the plaintiff on which it holds a debenture as mortgagee. The plaintiff seeks an injunction to restrain the defendant from selling.

The circumstances of the matter shortly put are these: The plaintiff obtained a loan from First National Citibank which loan it failed to re-pay. As a result it was put into Receivership in 1976. The defendant, a financial institution, agreed to lend the plaintiff a sum equal to an amount required to re-pay Citibank and to continue to run the Company. The Receivership was taken over by the defendant and a loan of $567,404.00 made. This loan was secured by a mortgage of the land and building of the plaintiff company to the defendant. A Board of Directors was put in place and subsequently a Receiver but the plaintiff was dissatisfied with the handling of the affairs of the company and complained to the defendant of the Receiver's mis-management and misuse of the funds of the company. A flood severely damaged the fixtures and building but the sum in which these were insured was not sufficient to

cover the loss. The company then fell into shambles and since the year 1980 it has been unable to carry on any business. The plaintiff holds that the loss incurred was as a result of mis-management by the Board and the Receiver, both of whom acted as agents of the defendant and have sued the defendant in negligence.

The defendant in the meantime has been advancing moneys to the Receiver for his purposes and that of securing the business. It now wishes to exercise its right as a mortgagee and is selling the lands and buildings. The plaintiff though having no doubt thought that it was in its best interest to sell the land and buildings - having itself - previously unsuccessfully advertised it for sale, seeks an injunction to restrain the defendant from now doing so until the hearing of the action for negligence. This request is made on the basis that if the plaintiff succeeds in that action, such damages as it could recover would be sufficient to liquidate the indebtedness to the defendant a debt which the defendant says is approximately $1,200,000.00 with interest at the rate of $500.00 per day.

The first point is: can the plaintiff through its directors initiate suit? Mr. Vassell quoted from the text book Kerr on Receivers 14th Ed. (1972) p. 301 and submitted that after the appointment of a Receiver the powers of the Company or its directors are paralysed. They cannot distrain even if the Receiver refuses to do so.

That very paragraph was quoted and criticised in the case of -

Newhart Development vs. Co-operative Commercial Bank (1978) 2 All E.R. at p.901 C.A.

as being too wide and unsupported by any authority (Judgment of Shaw L.J.).

The general principle as enunciated in Newhart's case is that the Directors of a Company have the power and were under a duty to institute proceedings on behalf of a company provided they do not imperil the assets and provided also that the action is in the company's interest and the suit is for/and on behalf of the benefit of the creditors. This can be done without the Receiver's consent and concurrence. What they cannot do is to file an action which by itself will threaten or imperil

the assets which are subject to the charge. This principle, however, is alterable. There were special circumstances in this case to which his Lordship referred but which were not then material. They were - (a) that a director Mr. Hartley along with others had provided an indemnity for the plaintiff company, (b) the company was not financing the action out of its own resources, (c) the company would not have to meet any claim for cost, (d) the directors of the company at the time they started the action were a duly constituted Board, and (e) nothing in the course of the proceedings threatened the interest of the debenture holders.

None of these circumstances were raised in the course of argument in the instant case. The general principle must then be applied. In my view that point fails. I hold that the plaintiff can sue.

2. The next point is - can the defendant/mortgagee be sued?

It was argued by the defendant that the Receiver was the agent of the plaintiff. In the case of any wrong therefore a mortgagee is not responsible for the acts of the Receiver and cannot be sued.

Mr. Rattray cited the case of American Express Intl. Banking Corp. v. Hurley (1985) 3 All E.R. p. 564.

In that case it was held that the mortgagee indeed was not responsible for what the Receiver did, but if the mortgagee directed or interfered with the Receiver's activities, in a manner to be regarded as such, the latter would become the agent of the mortgagee. In such event the mortgagee would be responsible for what the Receiver did. The plaintiff in this matter is prepared to prove that the Receiver took instructions from the defendant and acted as his agent. In those circumstances, I would hold that the defendant mortgagee can be sued.

3. Is there a triable issue?

The claim is in negligence and the two heads are:

(1) mis-management and depletion of funds causing loss;

(2) under-insuring fixtures causing severe financial loss on a subsequent claim.

On the facts as adverted, the claim for damages in negligence is not frivolous neither is it vexatious and whether or not the Receiver and the Director acted in a manner to be regarded as agents of the defendant and mis-managed the company and depleted the assets - if indeed, there was a depletion, I hold that these are serious matters to be tried.

So where does the balance of convenience lie?

There is no issue that the mortgagee has a legal right to sell when he likes, to whom he likes, provided that he acts in good faith, uses reasonable care and gets the right price. The present situation, is that the Receiver from all the accounts of the plaintiff, is an inefficient one, is in place and no business is being carried on, on the plaintiff's premises. The defendant continues to advance moneys for the Receiver's fees and the security of the assets. In the ensuing period the advances and interest are added to the loan and the indebtedness of the plaintiff to the defendant keeps increasing. The defendant cannot desist from these acts as he has to protect his mortgage. It cannot be a wonder then, that the sum on account of the loan has increased from $772,000.00 odd to $1,200,000.00.

On the other hand the plaintiff has filed an action, the success of which cannot be predicted, the amount of damages if successful is unascertainable as well as the time within which the case will come up for trial and the issues determined. The ultimate object of this application is to pay off the debt owed. If there is undue delay the debt may yet rise to a figure which no damages however substantial can satisfy. All these uncertainties must remain until final judgment.

The plaintiff says that the defendant may well sell the land at an undervalue. There is no proof of this although all things are possible. At best it is now a mere speculation as there is a total absence of any evidence to show that there is any danger of the property being sold below value. The exercise of the defendant's right as mortgagee to sell, if indefinitely postponed, will undoubtedly cause the defendant great injury and I venture to say injury to the plaintiff also, because the debt

would rise to such an astronomical figure that any undertaking which the plaintiff could give, in my view, could not adequately compensate the defendant if the uncertainties were resolved in its favour at the trial.

I cannot say that there is not here a very unfortunate set of circumstances which, with a little more care need not have arisen. In view of the fact that the substantive case is yet to be heard, I say no more.

I find the balance of convenience is heavily weighted on the side of the defendants and the application for an Interlocutory Injunction is therefore dismissed with cost to the defendant.

Senior Puisne Judge.