

7/11/08

**JAMAICA**

**IN THE COURT OF APPEAL**

**IN CHAMBERS**

**APPLICATION NO: 82/08**

<b>BETWEEN</b>	<b>DEREK BLACKBURN</b>	<b>APPLICANT</b>
<b>AND</b>	<b>PAUL MARCHALLECK</b>	<b>1<sup>st</sup> RESPONDENT</b>
<b>AND</b>	<b>NATIONAL COMMERCIAL BANK JAMAICA LIMITED</b>	<b>2<sup>nd</sup> RESPONDENT</b>
<b>AND</b>	<b>REFIN TRUST LIMITED</b>	<b>3<sup>rd</sup> RESPONDENT</b>
<b>AND</b>	<b>JAMAICA REDEVELOPMENT FOUNDATION INC.</b>	<b>4<sup>th</sup> RESPONDENT</b>

**BEFORE: THE HON. MR. JUSTICE PANTON, P.**

**Ms Carol Davis instructed by Patrick Bailey & Co., for the applicant**

**Linton Walters for the first respondent**

**Garfield Haisley instructed by Vaccianna & Whittingham for the  
second respondent**

**Ms. Nicola Brown, instructed by the Director of State Proceedings for  
the third respondent**

**Charles Piper and Ms. Kanika Tomlinson for the fourth respondent**

**June 10 and 11, 2008**

**PANTON, P.**

1. The applicant is claimant in a suit against the respondents which has been fixed for trial in January, 2009, in the Supreme Court. In that suit, he is seeking the following:

- (a) a declaration that he is the sole owner of the title to property registered at volume 1082 folio 164;
- (b) specific performance of an agreement between himself and the first respondent;
- (c) damages for negligence against the second respondent for parting with the duplicate certificate of title;
- (d) an order for the third and fourth respondents to deliver up the said title to him; and
- (e) damages for wrongful detention of the said title.

2. The applicant and the first respondent entered into a written agreement for sale on August 21, 1996, in respect of the property. The sale price was stated as \$2,000,000.00. In his defence, the first respondent has alleged that he is being frustrated in his efforts to complete the agreement between himself and the applicant. The other respondents contend that the applicant is not entitled to the reliefs sought, as the property was, at the time of the agreement, mortgaged to the second respondent and the applicant was fully aware of that fact.

3. A public auction sale has been advertised for tomorrow (June 12) in respect of this property as the first respondent has not satisfied his obligations in

respect of his indebtedness. The applicant sought from Mangatal, J., an injunction to prevent the auction sale. Mangatal, J. refused it, and also refused permission to appeal. The applicant, as is his right, has renewed his request before me.

4. In her written submissions, Ms. Carol Davis, for the applicant, submitted that there are serious issues to be argued on appeal as to whether the Court ought to direct the sale of the mortgaged premises to the applicant. She stressed that "the entire subject matter of the claim relates to the issue as to whether in all the circumstances the (applicant) will be permitted to pursue the sale of the said land". If the fourth respondent were to proceed to sell the land, she argued, "the entire subject matter would be alienated, and the purpose of the trial and the appeal herein made otiose". The fourth respondent, it should be pointed out, was on February 1, 2002, assigned all the bad debts and securities which the first respondent had with the second respondent, and which had been acquired by the third respondent on February 1, 1998.

5. Mr. Haisley, for the second respondent, referred to the affidavit of David Barnes, manager of the branch of the bank that disbursed the various loans to the first respondent. In that affidavit [page 74 judge's bundle] it is disclosed that the second respondent did not become aware of the agreement for sale until November, 1997, that is, more than a year after the agreement. Mr. Piper referred to the affidavit of Ms. Janet Farrow [p.79] chief executive officer of the

Jamaican branch of the fourth respondent. That affidavit discloses that the fourth respondent is owed in excess of \$115,000,000.00 in respect of the debts that have been assigned to it.

6. In respect of the application for permission to appeal, the general rule is that permission will only be given if the appeal has a real chance of success [Rule 1.8(9) of the Court of Appeal Rules]. Given the factual situation disclosed in the affidavits as to where the registered title lies, and the clear knowledge of the applicant as to the state of affairs existing at the time he entered into the agreement with the first respondent, it is difficult to see how it can be successfully argued that the applicant has a real chance of success against the fourth respondent. That application must be refused. With that in mind, there is really no basis to prevent the latter from seeking to recover the sums owed through sale of the property.

7. The application for permission to appeal against the order of Ms. Justice Mangatal is refused. The application for an injunction to prevent the sale of the property is also refused. Costs are awarded against the applicant in favour of the second, third and fourth respondents; such costs to be agreed or taxed.