IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO HCV 00945/2004

BETWEEN	**WINSTON BLOOMFIELD**	**FIRST CLAIMANT**
AND	**MARCIA DAVIS**	**SECOND CLAIMANT**
AND	**NATIONAL DEVELOPMENT FOUNDATION OF JAMAICA**	**DEFENDANT**

Mr. Gayle Nelson instructed by Gayle Nelson & Company for the claimants

Mr. Donovan Williams instructed by Chancellor & Company for the defendant

Sykes J (Ag)

August 27, 2004 and September 3, 2004

APPLICATION FOR EXTENSION OF INTERIM INJUNCTION TO PREVENT MORTGAGEE EXERCISING POWER OF SALE

This is an application by the two claimants in which they are seeking an extension of an injunction restraining the defendant from exercising its power

of sale or from foreclosing on property used as security to secure a mortgage until the trial of a claim filed on July 8, 2004. The injunction was first granted, ex parte, by Campbell J on July 9, 2004. At that time only the affidavit of Winston Bloomfield, the first claimant, was before the court.

Campbell J extended the injunction on July 19, 2004 to July 30, 2004. Anderson J, on July 30, 2004, extended the injunction to August 26, 2004 so that an inter partes hearing could take place. The injunction was ancillary to a claim in which both claimants are seeking the following:

(1) statement of account of all sums paid by the claimants to the defendant in respect of the principal and interest in relation to a mortgage made to the claimants by the defendant;
(2) damages for fraud and negligence;
(3) damages for breach of contract;
(4) damages for loss of business;
(5) a declaration that the mortgage is unenforceable; and
(6) an injunction restraining the defendant from exercising any power of sale or foreclosing.

The context

Mr. Winston Bloomfield, the first claimant, is a block maker and businessman. Miss Marcia Davis, the second claimant, is his common law partner. They are co-owners and the registered proprietors of premises known as Lot 430 Clayton Crescent, Willowdene, Spanish Town, St. Catherine. The claimants live at the premises. These premises were mortgaged to the defendant. The money was used to finance the business of the first claimant.

The defendant says the mortgage is in arrears. The first claimant says this is not so because he was told by a Mr. Haye and a Mr. Martin, officers of the defendants, that the defendant institution would lend him money at 17% interest. At that rate of interest, according to the claimant, he has repaid the loan. Unfortunately, the documents signed by both claimants show that the agreed rate of interest was 35%. On this basis the mortgage is still outstanding.

The defendant mortgagee has exercised its power of sale. The defendant and Gusric and Nadine Thompson have signed an agreement for sale dated May 13, 2004. Under this agreement the completion date was August 14, 2004. In other words by the time Campbell J granted the injunction on the ex parte application the mortgagee had in fact already exercised its power of sale and had executed an agreement for sale. This fact was not known to the court at the time the ex parte injunction was granted.

The mortgagee's version

The history of the relationship between the claimants and the defendant is provided by Mr. Waldon Wright. He was the banking services manager for the defendant between January 1991 and June 1997 and operations manager between July 1997 and June 2004. He depones that on July 25, 1994 both claimants borrowed JA$800,000 from the defendants. The loan was repayable over five years at 35% interest. Also on that date both claimants and the defendant executed a mortgage instrument. This mortgage was registered on September 19, 1994. It was agreed, in the contract, that the monthly payments would be JA$28,392.24.

Within three months, the ominous clouds of default began to form. In a letter dated October 28, 1994 to the defendant, Mr. Bloomfield requested a moratorium of three months because he had overspent on the project he had borrowed to finance. The letter also stated that the working capital of the business had been "severely eroded" and also that there was a "significant reduction is (sic) sale". To put it bluntly, the business was experiencing a severe cash flow problem that prevented it from servicing the loan.

After some discussion the defendant advanced a further sum of JA$575,000. This sum was part of the original loan of JA$800,000. The terms of this disbursement were set out in a letter dated April 3, 1995 addressed to both claimants.

The concern of the defendant must have increased when it received another alarming letter, dated June 11, 1996, from the first claimant to the defendant. He was asking the defendant to release either the block making machine or the property in Willowdene. Both were was used to secure the loan.

It appears that at some point in 1997 the claimant asked for a further loan. This application was refused. Mr. Bloomfield was informed of this decision by letter from the defendant dated December 29, 1997. The letter advised that Mr. Bloomfield should dispose of underutilized fixed assets and use the sums so realised as working capital. He was told specifically that as of January 1, 1998 the current loan would be rescheduled and the interest rate would be reduced to 30% on the reducing balance. Significantly he received the good news that the "accrued penalty on arrears [would] be waived."

The dark clouds of default had by June 2000 disgorged their burden. The defendant wrote to both claimants in letters dated June 5, 2000. The letter

was terse and to the point: settle the loan in full within fourteen days of the date of the letter, failing which the Willowdene property used to secure the loan would be sold. Notices of sale dated July 5, 2000 were sent to both claimants. The notices were clear. It had a simple but distressing message: pay up the money or the Willowdene property will be sold. The defendant followed this up with an auction notice dated January 17, 2001 to Miss Davis, the second claimant, informing her that the well known auctioneers D. C. Tavares & Finson would be auctioning the property.

The auctioneers were unsuccessful. This failure to sell the property apparently prompted the defendant to attempt to recover the money from Mr. Bloomfield personally. He was told in a letter dated March 1, 2001 that he would be sued to recover monies due to the defendant. He responded in a letter dated October 10, 2002 in which he optimistically suggested that his total indebtedness be "written off to one million dollars ($1,000,000.00) interest free." Also on October 10, 2002 a meeting, between the Mr. Bloomfield and the defendant, was held to arrive at some acceptable solution. The minutes of the meeting state that although these discussions were being held they were without prejudice to the defendant's right to exercise its power of sale.

This meeting offered a glimmer of hope. A letter dated October 14, 2002 from the defendant to the first claimant reiterated the defendant's stance regarding the power of sale. The letter laid down conditions that would have to be met before the rescheduling proposal could be favourably considered. The flicker of hope was extinguished. The conditions were not met.

The position then is that by October 14, 2002 both claimants knew that:

a. the loan was in arrears; and
b. the defendant intended to sell the Willowdene property unless the loan was repaid.

The affidavit of Miss Melrose Bains, legal officer for the defendant, added the following vital information:

a. the defendant exercised its power of sale evidenced by executing on May 13, 2004 an agreement for sale. The purchasers also signed this agreement for sale;
b. an instrument of transfer was executed on May 13, 2004 by the defendant and the purchasers;
c. the completion date was August 14, 2004;
d. the claimants were asked to vacate the property on June 29, 2004;

The claimants' version

The main thrust of Mr. Bloomfield's affidavit is that two officers of the defendant told him that he would be lent the money at 17% but that the loan had to be executed at the rate of 35% per annum because the defendant did not yet have the funds from they would lend to him from National Development Bank. They told him that as soon as the money arrived the rate of interest would fall to 17%.

In respect of the JA$575,000 at 38% Mr. Bloomfield says that as soon as he received this offer he called the defendant and the same persons who told him of the loan at 17% assured him that the rate of interest would be temporary and it would soon be reduced to 17%.

Two days before this matter came on for hearing on August 27, 2004 Miss Marcia Davis filed an affidavit in which she alleges that she was subject to undue influence when she signed the various loan documents. She alleges that not only was she a reluctant borrower but that Mr. Bloomfield coerced her "because by his attitude it became clear that if [she] did not cooperate he would blame [her] for any collapse of his block making business and that ultimately [her] refusal would lead to a break-up of [their] union which would not only affect me adversely but would be disastrous for [their] four (4) children." She states further that she had no independent legal advice about participating in the mortgage of their home. Her sights were clearly set on taking advantage, if she could, of the case of ***Royal Bank of Scotland plc v Etridge*** (No. 2) [2001] 3 W.L. R. 1021.

The submissions

Mr. Nelson, for Miss Davis, sought to rely on the ***Etridge*** case. According to Mr. Nelson this case established that whenever a wife or a partner is either a guarantor or co-borrower the financial institution is put on enquiry that there may be the possibility of undue influence. This meant that a financial institution should ensure that the partner of the borrower should receive independent legal advice. The financial institution should ensure that the partner appreciated the risks involved in accepting the responsibility of a surety or borrower. This standard was not met in this case. This, according to Mr. Nelson, meant that her claim that there was undue influence is enough to cause this court to extend the injunction until trial because if it is established that there was undue influence then in relation to Miss Davis the mortgagee could not enforce its security.

I respond to the submission in this way. Without deciding one way or the other on the applicability of the case to Jamaica it is readily distinguishable on the basis that in none of the eight appeals that went to the House of Lords was there a situation on which the lender had concluded a sale agreement and executed an instrument of transfer with a bona fide purchaser for value without notice of any impropriety or bad faith on the part of the mortgagee.

Second, the affidavit of Miss Davis does not indicate with any degree of particularity what exactly Mr. Bloomfield did to overwhelm her will to the point where her decision to sign as co-borrower was not free and voluntary. She simply asserts that although she pleaded with him to find alternate means of finance he coerced her into signing as a co-borrower "because by his attitude it became clear that if [she] did not co-operate he would blame [her] for any collapse of his block making business and that [her] ultimate refusal would lead to a break up" of the union.

It is important to note that she is not saying that she was misled. Neither is she saying that he practiced any fraud on her. There is no allegation of any misrepresentation either by her partner or the financial institution. What she is saying is that she interpreted his behaviour in a particular way and she concluded that if she did not sign he would blame her for any business failure. She says further that she was not a willing participant in the mortgage and resisted each time Mr. Bloomfield asked her to join in the mortgage. This does not present the picture of the ignorant partner who reposed such full trust and confidence in the other that she did not follow what was happening. Miss Davis had enough presence of mind to resist signing as co-borrower and only signed because of how she interpreted Mr. Bloomfield's behaviour.

It is not entirely clear from Mr. Nelson's submissions what independent legal advice would have added to Miss Davis. She clearly appreciated the risks. She knew what was involved in a mortgage. One possible explanation for her resistance is that she recognised that her home might be sold of there was default on the loan.

There was evidence that this was the third loan from the defendant in which Miss Davis was a co-borrower along with Mr. Bloomfield. The previous loans were in 1987 and 1992. Those loans were repaid. No doubt this previous experience as a borrower exposed Miss Davis to the risks of borrowing. She was not a neophyte. Miss Davis then was not in the position of the apparently hapless English wives who did not know what their husbands were up to or who had little experience in financial arrangements such as that in the case before me.

As I understand ***Etridge*** access to independent legal advice is not an end in itself but a means to an end which is that the potentially disadvantaged party is fully aware of the risks and pitfalls of the particular transaction. In other words any participation in the transaction should be voluntary with full appreciation of the risks. In the present case the loan transaction was uncomplicated. It had no twists or unusual terms. It was a simple case of default on loan may result in sale of house.

Mr. Nelson next relied on ***Flowers Foliage & Plants and another v Jamaica Citizens Bank Ltd*** SCCA 42/97 (September 29, 1997). He isolated a single sentence on page eight where Rattray P stated that:

> *Courts of equity do not shackle themselves with unbreakable fetters if the justice of the particular case demands a more flexible approach.*

This statement by the learned President was made in the context of a hearing by a three-judge panel of the Court of Appeal in which a challenge was made to an order by Downer J.A. The Justice of Appeal had granted a stay of execution restraining the mortgagee from exercising its power of sale without imposing what may now be described as the usual Marbella conditions (see ***SSI (Cayman Limited) and others v International Marbella Club S. A***. SCCA 57/86 (February 6, 1987)). Rattray P noted that ***Marbella*** laid down a general rule. It was immediately after this that the learned President made his statement that has already been cited. When placed in its proper context the dictum of Rattray P does not have the revolutionary effect being attributed to it by Mr. Nelson.

I hope I have not misunderstood Mr. Nelson but it appeared to me that he was submitting that a court could simply look at a particular case, ignore existing law and act according to the justice of the case. The President had no such heresy in mind. The learned President was simply saying that a judge ought not to straight jacket himself and conclude that in every case in which the mortgagee is restrained from exercising his power of sale there must necessarily be payment of the sum alleged to be owed by the mortgagor. This approach the President was implicitly saying would not be consistent with the exercise of a judicial discretion but rather the application of a fixed unchangeable rule without sufficient consideration of the facts of the particular case. Some cases might warrant the court granting the stay on terms different from the Marbella terms. Isolated from its context this passage might be misunderstood as apparently in Mr. Nelson's submissions. It seems clear to me that the President could not mean that well settled

principles of equity should be jettisoned merely because they may prove to be inconvenient but that they should be used judiciously having regard to the facts of the particular case.

In my view the controlling legal principles are to be found in sections 105 and 106 of the Registration of Titles Act and the cases of ***Lloyd Sheckleford v Mount Atlas Estate Ltd*** SCCA 148/2000 (December 20, 2001) and ***Waring (Lord) v London and Manchester Assurance Co.*** [1935] 1 Ch. 310. I am indebted to Mangatal J for bringing the ***Sheckleford*** case to my attention. I only became aware of it after I had made by decision but before I delivered the written judgment.

Section 105 permits the mortgagee to give notice in writing to the mortgagor to pay the money owing or to perform the covenants where the mortgagor is in default and the default continues for one month or such other period as stipulated in the mortgage. If the default continues for one month after the notice under section 105 then by virtue of section 106 the mortgagee may sell the land.

In my view Crossman J stated the correct principle in ***Waring*** when he indicated that the ultimate logic of the mortgagee's power of sale (in his case under the section 101 of the Law of Property Act, 1925 (UK)) was that the mortgagor was bound by the contract with the necessary consequence that the mortgagor's equity of redemption is extinguished once the agreement for sale is signed. If it were otherwise then any person purchasing from the mortgagee would only acquire a conditional contract that itself would disappear if the mortgagor turned up with the outstanding balance. I accept this analysis as correct in principle and logic even though it was directed at the Law of Property Act, 1925 (UK) (see ***Waring*** pages 317-318).

Crossman J said that if between execution of the agreement for sale and completion the purchaser becomes aware of any facts showing that the power of sale was not exercisable or there was some impropriety in the sale then he could not get a good title (see ***Waring*** (supra) at page 318). This latter principle was designed to prevent any statute conveying a power of sale on a mortgagee being used to defraud the mortgagor or any other person who might have an interest in the mortgaged property (see ***Bailey v Barnes*** [1894] 1 Ch. 25). It seems to me that this principle has does not apply to a sale by a mortgagee under the Registration of Titles Act (see ***Sheckleford).*** This will be dealt with later in the judgment. Even if the principle does apply, there is no evidence that the purchasers in this case had any knowledge of any impropriety on the part of the mortgagees, assuming without deciding that any impropriety in fact occurred. Therefore this principle could not assist any of the claimants.

Crossman J's conclusion that the signing of the sale agreement extinguishes the equity of redemption was implicitly accepted by all members of the Court of Appeal in the ***Sheckleford*** case. This conclusion is supported by the fact that the issue in that case was whether injunctive relief could be provided to the mortgagor between the signing of the agreement for sale and completion where the purchaser was a bona fide purchaser for value. The court gave a resounding no.

The following passages in the judgments of the Court of Appeal are emphatic on the point. Forte P said at page 7

> *It is clear from the provisions of section 106, that it not only gives the mortgagee the power to sell, but is specific in* ***protecting a bona***

fide purchaser for value *from the consequences that may flow, if the exercise of the power by the mortgagee was the result of impropriety or irregularity. The real question then, is whether a bona fide purchaser, who had no obligation to enquire into whether there was any default, impropriety, or irregularity in the sale should be deprived of the benefits of his contract already executed, for the reason that he had not yet registered the transfer.* (my emphasis)

At page 8 the learned President states

Where then the purchaser is a ***bona fide purchaser without any knowledge of an impropriety or irregularity*** *in the sale, and where he has no obligation to make enquiries into such matters, the Statute bestows upon him the guarantee that the registration cannot thereafter be restrained.* (my emphasis)

Harrison J.A. at page 20 said

The mortgagee however is like any other mortgagee who exercises a power of sale under section 106 of the Registration of Titles Act is subject to the scrutiny of a court, to ensure that there is no "...unauthorized or improper or irregular exercise of the power." ***This sanction for any misbehaviour, is for the protection of a wronged mortgagor, although the liability is in damages only.*** (my emphasis)

Walker J.A. at page 21 said

> *The provisions of section 106 of the Registration of Titles Act are clear and unambiguous.* ***They effectively oust the jurisdiction of the Court to grant injunctive relief in a situation such as this.*** (my emphasis)

My understanding then of the decision of the Court of Appeal is this:

(i) the signing of the sale agreement extinguishes the equity of redemption and so tendering of the monies owed after signing is of no assistance to the mortgagor;

(ii) if the purchaser from the mortgagee is a bona fide purchaser for value who has no notice of any impropriety on the part of the mortgagee even if such impropriety exists injunctive relief is not available to the mortgagor. This is supported by the fact that section 106 relieves the purchaser from enquiring whether (a) the mortgagor defaulted; (b) notice was given under section 105 and (c) the sale was proper and regular. In other words section 106 truncates the application of constructive notice in the context of a sale by a mortgagee;

(iii) the only remedy available to the mortgagor in the context of a sale to bona fide purchaser for value without notice of any impropriety on the part of the mortgagee assuming any such impropriety exists is damages;

(iv) a necessary corollary of (i) – (iii) above is that once the agreement for sale is signed the effect of section 106 is that the mortgagee is treated as if he were the registered proprietor and so the mortgagor is eliminated from the equation. The mortgagor has no proprietor interest in the land capable of being protected by law;

(v) because there is an inevitable time lapse between execution of agreement for sale and registration of the transfer to the purchaser there is a period of time when the mortgagor is still the registered proprietor. This fact, it appear, is not of any legal significance. The mortgagor is powerless to exercise any power over the land. In other words the purchaser is assured of an indefeasible title.

(vi) that given this understanding of the Registration of Titles Act I do not see how the ***Etridge*** and ***O'Brien*** cases could avail the claimants at this late stage. The signing of the agreement for sale acts like a guillotine.

The significance of this for the claimants is this. In this case there is no allegation that the purchasers are anything other than bona fide purchasers for value without notice of any alleged impropriety on the part of the mortgagee. Therefore there is no basis upon which the injunction can be extended.

In any event the courts have shown great reluctance to interfere with the exercise of the mortgagee's power of sale that has properly arisen (see ***Marbella***; ***Waring*** and ***Sheckleford***). I am aware that at the interlocutory stage it may be difficult to determine whether the allegations of the claimants

can be established. However it is significant to note that ***Sheckleford*** and the case of ***Inglis and Another v Commonwealth Trading Bank of Australia*** [1972] 126 C.L.R. 161 which was approved in ***Marbella*** (supra) were decided at the interlocutory stage. The decision of the judge in ***Inglis*** was upheld by the High Court of Australia. This suggests that the general rule that the court will not interfere with the mortgagee's power of sale unless the debtor pay either the agreed amount, or the amount said to be owed by the mortgagor or an adequate sum set by the courts is a very very strong general rule. So strong is the rule that not even allegations of fraud or a counter claim in damages that exceeds the debt owed was sufficient to displace the general rule (see ***Inglis***).

Conclusion

For the reasons given at (i) – (vi) above no injunctive relief is available to the claimants. The injunction granted by Campbell J is discharged. Leave to appeal granted.