**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. HCV 00931/2005**

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| **BETWEEN** | **DR. RUPERT BRADY** | **CLAIMANT** |
| **AND** | **JAMAICAN REDEVELOPMENT FOUNDATION INC.** | **1ST DEFENDANT** |
| **AND** | **DENNIS JOSLIN JAMAICA INC.** | **2ND DEFENDANT** |
| **AND** | **HAROLD BRADY** | **ANCILLARY DEFENDANT** |

Mr. Raphael Codlin for the Claimant

Mr. Charles Piper and Miss K. Tomlinson instructed by Charles Piper for the Defendants

Miss Gillian Mullings instructed by Patrick Bailey & Company for the Ancillary Defendant

Heard: 2nd and 14th February 2007

Sinclair-Haynes, J

Dr. Rupert Brady and his brother Mr. Harold Brady are joint tenants of property known as Sea Palms, Harmony Hall situate in St. Mary and registered at Volume 1200 Folio 161.

On August 5, 1993 a mortgage was registered on the certificate of title in favour of Workers Savings & Loan Bank (WS&LB). Mr. Harold Brady was the mortgagor and Dr. Rupert Brady, the guarantor. This mortgage was applied to liquidate two earlier mortgages on the property. The mortgage was transferred from WS&LB and was registered in favour of Jamaica Redevelopment Foundation.

Jamaica Redevelopment Foundation has employed Dennis Joslin Jamaica Incorporated to recover the indebtedness secured by the mortgage.

Dr. Brady claims he never guaranteed any loan nor was he aware that the said mortgage was executed. In fact, he alleges that he was never within the jurisdiction at the time the said mortgage was executed and the guarantee signed. He has applied to the court for an injunction restraining the defendants from selling the property.

**Submission by Mr. Charles Piper**

Mr. Piper submits on behalf of the defendants that the injunction ought not to be granted because damages are an adequate remedy in the circumstances. He relies on the statements made by the learned authors of **Fisher and Lightwood on Mortgages** 3rd edition at page 310 and at Section 106 of the Registration of Titles Act.

Damages would not flow from the defendants because the applicant has not alleged that the defendants' predecessors were guilty of any wrong. The applicant would have to look elsewhere for the remedy.

Further, he argues that an injunction can only be granted where there are triable issues and the full sum is paid into court. He also further submits that the claimant has raised issues of fraud although he has not pleaded same in his Fixed Date Claim Form (FDCF). Fraud is to be specifically pleaded. He also submits, that the FDCF is not the appropriate process when a claim is based exclusively on an allegation of fraud.

He contends that the claimant has not taken any step to report the alleged fraud to the police. He submits that the allegation of fraud referred to in the affidavit is insufficient since it failed to indicate who, if anyone is responsible for the fraud.

He submits that the claimant has failed to particularize his allegation of fraud because he has failed to indicate who is responsible for the alleged fraud. An inference, he submits, can be raised to put forward a case so as to avoid the consequences of the mortgage. The claimant has not put himself in a position where he can properly satisfy the court that there is a serious issue to be tried.

Mr. Piper argues that the claimant is obliged to pay the sum into court before the court can restrict the mortgagee's right to exercise its power of sale. He relies on **SSI (Cayman) Ltd., Dr. Steve Laufer and FSI Financial Services U.S. Inc. v International Marbella Club S.A.** SCCA No. 57/86 delivered on 6th February 1987 **(Marbella)** and **Shades Ltd v Redevelopment Inc**. SCCA No. 55/05 delivered on the 20th December 2006.

He contends that the rule is an absolute one and under no circumstance can the court depart from the requirement that a safeguard is provided to the mortgagee by means of the plaintiff paying into court a sum sufficient to meet that which is claimed by the mortgagee.

It is also his submission that the statements of Rattray P in **Flowers, Foliage and Plants Ja. Ltd v Jennifer Wright and another** SCCA No. 4297 are not applicable to the instant case. He contends that they were made in relation to a stay of execution of a judgment and are therefore of no relevance to the instant case.

He further submits that the balance of convenience is not in favour of the court granting the injunction. The debt is increasing and there is no evidence that the value of the property is increasing. It is not economical to hold the property while the value on

the security is decreasing because the loan balance is increasing. The mortgage was obtained to benefit the claimant.

**Submissions by Mr. Raphael Codlin**

Mr. Codlin submits that the principle enunciated in **Shades Ltd and Marbella** is not applicable to the instant case because this is not a case of mortgagee and guarantor as the claimant never signed the document. The transaction never existed.

**Ruling**

**Whether the court has the power to restrain a mortgagee from exercising its power of sale**

It is an almost sacrosanct rule that a court should not lightly restrain a mortgagee from exercising its power of sale. However, the very cases relied upon by Mr. Piper make it quite plain that Courts of Equity will intervene to restrain a mortgagee from exercising its right to sell in appropriate cases

I will now examine Mr. Piper's contention that the claimant has failed to particularize his allegations of fraud because he has failed to indicate who is responsible for the alleged fraud.

In his FDCF, the claimant stated that he did not execute the mortgage. In the affidavit of Mr. Huntley Martin, his attorney-at-law filed on 4th April 2005, Mr. Martin averred that Dr. Brady did not receive any money from WS&LB. He did not request WS&LB to lend any money or extend any credit facility to Mr. Harold Brady, nor did he agree to guarantee any indebtedness of Harold Brady to WS&LB. It was further averred that the signature which purported to be that of Dr. Rupert Brady was not his and at the

time the mortgage was executed he was not in Jamaica but was in the United States of America.

On May 25, 2005, Dr. Rupert Brady deponed to an affidavit in which it was revealed that he was not in the jurisdiction at the date the mortgage was executed. He did not know that a mortgage document was signed or a loan was being made or had been made to Harold Brady. He did not guarantee any loan. He also averred that he did not attend before Mr. Arthur McCarthy, the Justice of the Peace and sign the mortgage document. Further, he signs his name by writing out the Christian name 'Rupert' and immediately writing a capital 'C' which represents his middle name 'Constantine' after which he writes his surname 'Brady' in such way that the 'C' encompasses the 'T' in Rupert, then he crosses the 'T.' He avers that the signature on the challenged document does not resemble his signature. According to him, he has been signing his name in that manner for the past 20 years. He exhibits three specimens of his signature to the said affidavit. He also exhibits his passport and driver's licence which bear his signature.

In his defence to the defendants' counterclaim he reiterates that he was never a party to the mortgage nor did he guarantee the loan. Nor did he request the bank to extend to the ancillary defendant any loan or credit facility. He did not pledge the property as security for such loan, credit or financial facility.

On the 26th August 2002, he deponed to an affidavit in which he averred that he was not in the country at the time the mortgage transaction occurred; that is, the execution and stamping of the mortgage. He exhibited the pages of his passport to his affidavit dated 25th January 2006.

The court is of the view that the claimant has sufficiently particularized his claim of fraud. He has failed to state who the perpetrator is. However, he can only present his case according to the facts he is aware of.

I cannot agree with Mr. Piper that there are no triable issues. I am satisfied that the allegation that the claimant was never a party to the transaction and that his signature was forged is a serious question to be tried on its merit. His claim is one of substance. In determining whether to grant an injunction, ordinarily it does not matter if the claimant's chance of winning is 90% or 20%. (See **Mothercare Ltd v Robson Books Ltd** [1979] FSR 466)

It is clear from Lord Diplock's statement in **American Cyanamid Co. v Ethicon Ltd** [1975] AC 396 that generally, the applicant need not establish a prima facie case; rather a court must be satisfied that there is a serious question to be tried on the merits.

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits 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 consideration."

The claimant has filed a number of affidavits with exhibits attached. He has therefore satisfied the court that there is serious question to be tried on the merits. It is arguable that the standard ought to be elevated in cases in which it is sought to restrain a mortgagee from exercising its power of sale because of the nearly inviolable right of the mortgagee to sell. Even if these cases are in a special category, I am satisfied that the case advanced by the claimant is one of substance.

Not only should the court consider in whose favour the scale tips in weighing the convenience. It should endeavour to avoid doing injustice (see **Cayne v Global Natural**

**Resources** PLC 1984 1 All ER). It would be unjust to allow the property to be sold in circumstances where Dr. Brady's claim that he never guaranteed any loan is substantial on its merits.

**Whether Dr. Brady ought to pay a sum in court**

I cannot agree with Mr. Piper's submission that in all circumstances where an allegation of fraud is made, the court is obliged to attach conditions if it imposes a restraint. As a general rule, a mortgagee ought not to be prevented from exercising its rights under the mortgage instrument, unless the amount of the mortgage debt, if not disputed, is paid, or if disputed the amount claimed by the mortgagee is paid into Court. However, as opined by Rattray P in **Flower, Foliage** at page 8:

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

It is the court's view that in circumstances where it is alleged that a guarantor's signature was forged and he was never a party to, nor was he aware of the execution of a mortgage, the justice of that situation would demand a flexible approach. Equity would demand that such a case must be distinguished from the case in which it is not disputed that there was indebtedness under the mortgage. The guarantor in such a case is asserting that no money was advanced which was not repaid.

An examination of the facts of the cases relied upon by Mr. Piper is necessary in light of his submission.

In the case of **Samuel Keller (Holidays) Ltd and another v Martins Bank Ltd and another** (1970) 3 All ER 950, Lawton Company (Lawton) borrowed the sum of £31,000.00 from Keller Company (Keller). The security was a third mortgage on a

factory which belonged to Lawton. The contract provided for repayment in three instalments and a number of conditions and warranties. Lawton failed to pay an instalment and Keller sued. Lawton successfully resisted Keller's application for judgment and was given unconditional leave to defend and counterclaim on the grounds that Keller had breached conditions and warranties and they had a substantial counterclaim for unliquidated damages.

Sometime after that action was instituted, the factory was sold. The first and second mortgagees were paid off. After the second mortgagee was paid off, a sum, in excess of £36,000.00 remained which it intended to pay Keller. As it represented the property charged to Keller, Lawton wrote to the bank and objected to it paying the sum to Keller and requested that the money should be paid into the court. Upon the bank's refusal to pay, Keller sued the bank and claimed that as a subsequent chargee, it was entitled to the charged property from the bank as a subsequent incumbent.

Megarry J. heard this action while the other action was still before another court. Lawton requested a Stay of Proceedings in the action against the bank until the question of whether Lawton's claim for unliquidated damages was decided in the other court.

On appeal, Russell L J said at page 953:

> "However, speaking for myself, it seems clear to me that where the parties use a system of payment under a contract which involves in fact notional payment in full and a lending on mortgage of a sum, it could lead to abuse if the mortgagee was to be kept out of his undoubted rights, expressly provided for, by allegations of some connected cross-claim which may prove to be without foundation. Megarry J, in the course of his judgement below said:
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> > 'Unless and until the mortgage in this case is discharged in the appropriate way on actual payment and acceptance of the sum due, I think that the mortgage remains a mortgage, and that the

> mortgagee is entitled to any surplus proceeds of sale in the hands of the bank up to the amount properly due under the mortgage. A doctrine of the discharge of a mortgage debt by the existence of unilateral appropriation of an unliquidated claim is one to which I gave no countenance; I regard it as neither convenient nor just. Even where there is a claim which is both liquidated and admitted, and it exceeds the mortgage debt in amount, it may be to the interest of one party or the other, or both, that the mortgage and the mortgage debt should continue in existence. The rate of interest may be attractively high or seductively low; there may be fiscal advantages in keeping the mortgage alive; there may be new projects to be financed which make liquid case preferable to the satisfaction of mortgage debts; and so on. Nor have I heard any reason why it should be the mortgagor who is to have a unilateral power to discharge the mortgage debt by appropriation without payment."

In the case of **Inglis and another v Commonwealth Treaty Bank of Australia** 126 CLR 161, the plaintiffs were indebted to the defendant in respect of a debt which was secured by a mortgage and the mortgage was not discharged.

The defendant claimed that the debt was counterbalanced by damages which the plaintiffs claimed to be entitled. There was also a dispute as to the value of the property. It was the plaintiff's contention that there should be an injunction until all the issues in the action had been determined. Walsh J at page 164 stated:

> "A general rule has long been established in relation to applications to restrain, the exercise by a mortgagee of powers given by a mortgage and in particular in the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this be not in dispute be paid or unless, it the amount be disputed, the amount claimed by the mortgagee be paid into court."

In **Marbella** the appellants borrowed a large sum from the respondent. Dr. Laufer guaranteed the loan and Dragon Bay Hotel was the security. Marbella also entered into an agreement with Dr. Laufer to manage the hotel. Upon demand by Marbella for repayment of the loan and interest, the defendant admitted the loan but alleged that Marbella's fraudulent misrepresentation induced them to enter the agreement. The defendants sought *inter alia* a declaration that the mortgage was void on the ground of constructive fraud and a declaration that the agreement was void on the ground of fraudulent misrepresentation.

The Court of Appeal accepted the principles enunciated in **Samuel Keller (Holdings) Ltd and another v Martins Bank Ltd and another** [1970] 3All ER 950 as applicable. At page 25 Downer JA (acting as he then was) stated:

> "The contention was similar to that made on behalf of Dr. Laufer and his co-defendants that because of the allegation of fraud some restraint should be put on the plaintiff's power of sale. Russell L.J. at 953 (a) and (b) answered the contention thus:
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> > "However, speaking for myself it seems clear to me where the parties use a system of payment under a contract which involves in fact notional payment in full and a lending on mortgage of a sum, it could lead to abuse if the mortgagee was to be kept out his undoubted rights, expressly provided for, by allegations of some connected cross-claim which might prove without foundation."
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> I find that these principles are applicable to the instant case for if they were not, where there is an allegation of fraud by the mortgagor, and then the mortgagee would be deprived of his rights under the mortgage if a restraint is imposed without the appropriate conditions attached."

In those cases, there was no dispute that the applicants applied for and obtained loans from the respondents. In circumstances where parties have admitted the loan there

is no question to my mind that the principle is applicable. However, I disagree with Mr. Piper's contention that under no circumstance does a court have a discretion to order otherwise. In other words according to him the principle is cast in stone.

However, the following statement of Walsh J in **Inglis and another v Commonwealth Trading Bank of Australia** (1971-72) 126 CLR 161, at page 166 is a negation of his contention:

> "In my opinion the fact that those charges have been made and there has not yet been adjudication upon them is not a reason for restraining the defendant from exercising its powers under the mortgage. As I have stated, it is not in dispute that there was an indebtedness under the mortgage, that is to say, that there were advances of money which were not repaid. Neither the existence of disputes as to the correct amount of that indebtedness nor the claim already mentioned that, whatever it was, it had been counterbalanced by the claim of the plaintiffs for damages is a ground, in my opinion, for preventing the mortgagee from exercising its rights under the mortgage instrument."

He further stated at page 167 he said:

> "I have looked at the case of **Rawson v Samuel** (2) and I do not find in it any support for the argument of the plaintiffs in the present case, nor do I think that the decision in (3) assists them. That case was concerned with the question whether, against a plaintiff who had come to the court to enforce a security, the defendant could assert by a cross bill that nothing was due under the security, because the debt which it was intended to secure had never been incurred at all. That is not the situation in the present case.
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> In my opinion none of those early cases affect the principles enunciated in the recent case of **Samuel Keller (Holdings) Ltd. v Martins Bank Ltd.** (4), in which the court considered the case of **Morgan & Son Ltd. v. S. Martin Johnson & Co. Ltd.** (1)
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> The result then is that I consider that the well-established rule, to which I referred earlier as the general rule, is not displaced in the present case by the circumstance that the

plaintiffs have raised claims for damages and other claims against the defendant in an action brought by the plaintiffs in this court." (Emphasis mine)

In my view, in circumstances where the guarantor alleges that he never secured a loan must fall outside the general rule applicable, as such a person would have nothing to repay as he alleges he received nothing. The general rule, in these circumstances is displaced.

I disagree entirely with Mr. Piper's contention that the statements of Rattray P are not applicable to the instant case.

Since Mr. Piper is insistent that the case is of no relevance as the issue dealt with was one a stay of execution and the issue at hand is payment into court of the amount of mortgage debt, a brief examination of the facts of the **Flowers, Foliage** case is instructive.

In that case, Citizens Bank obtained summary judgment against the defendants in respect of a sum loaned by Citizens Bank to Flowers, Foliage. The loan was guaranteed by Douglas and Jennifer Wright and secured by a mortgage of property situated at Mount Dakin and a second mortgage on property situated at Norbrook Drive which was owned by Jennifer Wright. The defendants' application for leave to file their defence out of time and for an injunction restraining the plaintiff from exercising its power of sale under the mortgage over the property at Norbrook Drive was refused.

On an appeal from Chester Orr's J decision which dismissed their application for a stay of execution of judgment, Downer J A granted the stay of execution of judgment without conditions.

It was argued on behalf of the bank that Downer J A erred in failing to make an order that the stay of execution granted was subject to a condition that the amount of judgment to be paid by the appellant to the bank's attorney. Counsel for the bank placed heavy reliance on the **Marbella** decision.

Rattray P examined the Court of Appeal decision of **Marbella** and noted that the Court of Appeal in that case accepted as correct Walsh's J statement of the law and direction in **Inglis.** However, at page 8 he opined:

> "It is to be noted that the Rule relied upon is stated as a general rule. Courts of equity do not shackle themselves with unbreakable fetters if the justice of the particular case demands a more flexible approach."

The following statement of Rattray P makes it quite plain that the principle he considered was that enunciated in Marbella i.e. the payment of a sum in court before an injunction or any stay of execution maybe obtained.

> "Consequently, Mr. Henriques Q.C. urges that the Marbella principle would not apply in this case. He further maintained that the old rule upon which Marbella and such cases were determined is no longer followed and cites in support **Linotype-Hell Finance Ltd v Baker** (1992) 4 All ER 887 the Headnote of which reads:
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>> "Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. The old rule that a stay of execution would only be granted where the appellant satisfied the court that if the damages and costs were paid would be no reasonable prospect of recovering them if the appeal succeeded is now far too stringent a test and does not reflect the court's practice."

In the Court of Appeal, Staughton, L.J. stated at page 888:

> "In the Supreme Court Practice 1991 volume 1, paragraph 59/13/1 there are a large number of nineteenth century cases cited as to when there should be a stay of execution pending an appeal. At a brief glance they do not seem to me to reflect the current practice in this Court; and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side and that one should concentrate on the current practice. It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success that is a legitimate ground for granting a stay of execution. The passage quoted in the Supreme Court Practice from **Atkins v Great Western Rly Co** (1886) 2 TLR 400, "As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds, seems to be far too stringent a test today.
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> It is, in my opinion, an arguable appeal. It can be said that the judge should not have dismissed summarily the defendant's suggestion that he had not signed the authority to execute a guarantee. That may well have been a triable issue which should have gone on trial."

At page 10 he continued:

> "The principle stated by Staughton L J is more in accord with an acceptable concept of equity and justice, a relevant ingredient for the exercise of judicial discretion once it is established that there are these triable issues which would be denied the judicial scrutiny absent in a summary judgment."

It is clear from the foregoing that there is no inflexible rule which requires that the sum of money claimed by the mortgagee should be paid into court as a requirement for the granting of an injunction at the request of the mortgagor. However, the facts of the instant case are not compelling enough to displace the general rule. In the **Flowers, Foliage** case, the applicant was a guarantor who derived no benefit from the funds secured against the property. In this case the bank advanced its monies to liquidate the two earlier mortgages on the property which is jointly owned by the applicant and his

brother. The money was therefore used towards the property which he, the applicant owned. Mr. Harold Brady did not apply the loan to benefit himself solely. In the circumstances Dr. Brady would have derived a benefit, albeit ignorantly. Having so benefited equitable principles of fairness would dictate that the sum by which he benefited be repaid even though he alleges he was an ignorant beneficiary to the whole transaction.

Dr. Brady it appears has so far not reported the forgery and the impersonation to the police so that the perpetrator can be exposed. Further, there is no evidence that the defendants' predecessors had any knowledge of or were complicit in the alleged forgery. The applicant, it appears might have to seek redress elsewhere. In the foregoing circumstances the justice of this particular case demands the application of the general rule.

Accordingly,

1. The defendants are restrained by themselves, their servants, employees, agents or any person from selling or attempting to sell the property comprised in certificate of title registered at Volume 1200 Folio 161 until trial unless ordered by the court.
2. The order is conditioned upon the applicant paying into the court the sum of $14,226,046.35 on or before 31st March 2007.
3. Leave to appeal is granted.
4. Costs to be cost in the claim