IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 CD 00007

IN CHAMBERS

BETWEEN	DARIEN INVESTMENTS LTD.	CLAIMANT/APPLICANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LTD	DEFENDANT/RESPONDENT

Mr Ransford Braham, Mrs Suzanne Risden-Foster and Mr Miguel Palmer instructed by Grant Stewart Phillips and Co. for the Claimant/Applicant.

Mr Michael Hylton Q.C., and Mr Kevin Powell instructed by Michael Hylton and Associates for the Defendant/Respondent.

Civil Procedure - Application for injunction – Application to prevent mortgagee from exercising powers of sale contained in a mortgage – Mortgage granted to secure guarantee – Mortgagor alleging no longer bound by guarantee - Whether damages are an adequate remedy - Whether mortgagee should be restrained

Heard: 30 March and 7 April 2011

BROOKS J

This is an application by the claimant Darien Investments Ltd to restrain the defendant National Commercial Bank (NCB) from exercising, in respect of Darien's real property, the powers of sale given to NCB under a mortgage. According to Darien, NCB has lost any right to sell the property because:

a. Darien has satisfied all debts due to NCB in respect of the loan which originally gave rise to the mortgage, and,

b. NCB is prohibited from enforcing a guarantee (which was secured by the mortgage) given to it by Darien, in respect of loans given by NCB to the principal debtor, Tikal Ltd. This is because NCB, subsequent to receiving the guarantee, treated with Tikal in such a manner, and without the consent of Darien, that the guarantee has been discharged.

NCB denies that it acted improperly in dealing with Tikal, and asserts that, in any event, Darien was made aware of, and assented to, the transactions with Tikal. This is because Darien and Tikal had a common director who participated in Tikal's dealings with NCB. As Tikal still owes substantial amounts of money to NCB, the latter asserts that it is entitled to enforce the guarantee, given to it as security for the loans to Tikal.

The question for the court to decide is whether the dispute between the parties concerns the validity of the mortgage document or whether it is a dispute as to whether there is any money due thereunder. In the first instance the court may grant an injunction, with or without conditions, to stay any sale by NCB. In the latter case the court is unlikely to prevent an exercise of the power of sale without, at least, a payment into court by Darien of the sum which NCB claims.

Analysis

Although significant effort was made by counsel on both sides in researching and advocating the positions of each party, I regret that time does not permit a full exposition of the reasoning leading to the conclusion to which the court has arrived. The reasoning has proceeded in accordance with the guidance provided in the case of *American Cyanamid Co. v Ethicon* [1975] 1 All E.R. 504, for considering injunctive relief. I shall address each of the points set out in that case for the guidance of courts and thereafter consider the case as a whole. I trust that I shall not be guilty of "box-ticking" (see *National Commercial Bank Jamaica Ltd v Olint Corp. Ltd* PCA 61 of 2008 (delivered 28 April 2009)

Is there a serious question to be tried?

The first question to be answered, in following the guide provided in *American Cyanamid*, is whether the applicant for that relief has established that there is a serious

issue to be tried. In the instant case, the issue of whether or not a guarantor is discharged, in certain circumstances, looms large.

Counsel for Darien, Mr Braham, submitted that NCB acted improperly when it allowed Tikal to use the proceeds of sale of some of Tikal's assets, not to reduce Tikal's debt to NCB, but instead to:

a. discharge debts to other parties, including trade creditors, and,

b. pay redundancy payments to staff members, which Tikal had laid off.

Another improper step taken by NCB, submitted Mr Braham, was that NCB varied the terms of the guarantees "when it permitted [Tikal] to use the loan proceeds to discharge the debts of May Pen City Centre Limited". May Pen City Centre Ltd was a company connected to Tikal by virtue of common control. According to Mr Braham, NCB's action "was unlawful as on the documentary evidence, at no time did [Darien] undertake to guarantee the indebtedness of any company other than Tikal". The result of these improper actions would, on learned counsel's submission, be that Darien would be discharged from liability under the guarantee.

Although the questions of fact are not numerous, the issue involves significant questions of law. Mr Braham cited a number of authorities to demonstrate the point that a guarantor will be discharged where the creditor agrees with the principal debtor to vary the principal contract, without the guarantor's permission. On the other hand Mr Hylton Q.C., on behalf of NCB advanced, that the terms of the guarantee allowed NCB to make the concessions that it did and that the agreement concerning May Pen City Centre Ltd was done with the knowledge and co-operation of one of Tikal's directors who was also a director of Darien. The extensive submissions on both sides confirm that this case does involve significant questions of law. I find that the claim raises serious issues to be tried.

Are damages an adequate remedy?

The second question to be analysed, following *American Cyanamid,* is whether or not damages would provide an adequate remedy for a party who succeeds at trial but was denied an interim injunction. Where damages will provide an adequate remedy and the defendant is in a position to satisfy an award of damages then the injunction should not be granted. (*Per* Lord Diplock in *American Cyanamid* at page 510 g)

There is a school of thought that contends that, where land is concerned, it is presumed that damages are not an adequate remedy, and no enquiry should ever be made in that regard. The reason behind that thinking is that each parcel of land is said to be "unique" and to have "a peculiar and special value" (see p. 32 of *Specific Performance* 2nd Ed. by Gareth Jones and William Goodhart). That reasoning can be found in the judgement of Hardwicke, L.C. in *Buxton v Lister & Cooper* (1794) 3 Atkyns Reports 383, when he said at page 384:

> "As to the cases of contracts for the purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land, and it is quite a different thing from matters in the way of a trade."

The principle seems to apply even if the land has been bought as part of a commercial venture. In *Verrall v Great Yarmouth Borough Council* [1981] 1 QB 202 at page 220 B-C Roskill, L.J. said:

> "It seems to me that since the fusion of law and equity it is the duty of the court to protect, where it is appropriate to do so, any interest whether it be an estate in land or a licence by injunction or specific performance as the case may be."

Where, however, the mortgagor of the land is a corporate entity, different considerations may apply. In *Shades Ltd v Jamaica Redevelopment Foundation Inc.* SCCA 55 of 2005 (delivered 20 December 2006), our Court of Appeal was of the view

that such land would be "a mere asset of the company". Harrison P said at page 6 of the judgment:

> " Assuming that there was a serious issue to be tried, the learned judge was correct to find that damages would have been an adequate remedy if the injunction was refused and the appellant succeeded at the trial.
>
> The appellant was a mere holding company of the security[;] the dwelling house, registered…in the name of the appellant. **In the event of the sale of the dwelling-house the proceeds of sale would be all the appellant would be entitled to, if successful, at trial. The said house would be a mere asset of the company**.
>
> **The submission of counsel for the appellant that the learned judge was in error in not considering that the managing director and his son resided at the premises, is without merit. We agree with counsel for the respondent, that neither person was a party to the proceedings. In our view, neither person was entitled to any right of residence**." (Emphasis supplied)

The Court of Appeal seemed to follow that line of reasoning in *Global Trust Ltd and another v Jamaica Re-development Foundation Inc. and another* SCCA 41 of 2004 (delivered 27 July 2007). At page 15 of the judgment, Cooke J, as part of the majority, opined:

> "…the incomplete hotel was not a going concern. There was no particular, or at all, any intrinsic value attributable to the mortgaged property which would defy ready monetary conversion. **As between mortgagor and mortgagee it was a financial business transaction. It was all about money**...I would not say that the view of the court below, that damages is an adequate remedy should be disturbed." (Emphasis supplied)

The other member of the majority, Harris JA, on this aspect, said at page 26:

> " There is evidence that the building is incomplete. There is no evidence that the building, although unfinished, was at a stage at which the first appellant [the mortgagor Global Trust Ltd] had begun operation of a hotel, thus establishing that the venture was a growing (sic) concern. There is nothing to show that there would be loss of profit from the operation of a hotel, which, in the event of a sale, may be perceived as unquantifiable loss sustained by the appellants and thus, uncompensatable (sic) in damages.
>
> Should the mortgaged property be sold at an undervalue, as contemplated by the first appellant, any damages sustained by them would be ascertainable. Such damages would be the difference between the sum realized by the

> mortgagee, on sale, and the true market value. **An award of damages would be adequate compensation for any loss suffered by the first appellant**…" (Emphasis supplied)

Although the thrust of the argument by Global Trust Ltd on the point was that there was a risk that the property could be sold at an undervalue because of the auction process, the reasoning of the majority did not consider that there was any intrinsic value in the property itself that should cause the court to find that damages could not be an adequate remedy. The dissenting member of the court, Panton P, did not address that issue.

It seems therefore, based on the authorities cited, that damages would be an adequate remedy. Mr Braham's submission that damages would not be an adequate remedy, because the subject property represents the "life's work" of Darien's majority shareholder Mrs Antoinette Chen-Euker, and "provides the sole source of income to her", is without merit. This is because it seeks to blur the line between the corporate entity and its shareholders. As was demonstrated above, in the quote from the *Shades* case, there is a clear distinction, for these purposes, between the personal and the corporate considerations. Since Mrs Chen-Euker is not a party to the claim, her personal situation is not a relevant consideration.

There has been no suggestion that if NCB were unsuccessful at trial, that it would be unable to satisfy an award of damages. If I am correct in these conclusions then that would be an end to the application; the injunction should not be granted in such circumstances.

I should make reference to one further aspect before leaving the point of the adequacy of damages. On this issue, Mr Hylton sought to pray in aid, section 106 of the Registration of Titles Act, to the effect that the only remedy to which the mortgagee is

entitled is an award of damages. I cannot agree that that provision is applicable in the present context. It was pointed out by Cooke JA in the *Global Trust* case, mentioned above, that section 106 was only applicable **after** the mortgagee had entered into an agreement for sale of the mortgaged property. After quoting the relevant portion of the section, the learned judge stated at page 14 of the judgment:

> "This part concerns the remedy of a mortgagor when the mortgagee embarked on an "unauthorised or improper or irregular exercise" of the power of sale. **Accordingly the excerpted portion (supra) is not relevant as to whether or not an injunction should be granted to restrain the mortgagee from exercising the power of sale**. It is relevant after the power of sale has been exercised." (Emphasis supplied)

The balance of convenience

If however, I am wrong in arriving at that conclusion that damages would be an adequate remedy, I would be obliged to further consider the balance of convenience. In this context the question of the mortgagee's right to make use of the security given to him arises. The decision of our Court of Appeal in *SSI (Cayman) Ltd & Others v International Marbella Club SA* SCCA 57 of 1986 (delivered 6/2/87) is the leading local authority on the point. In *Marbella* Carey, J.A. said at page 15:

> "The rule is therefore well settled…nothing has been said, which in any way permits a Court of Equity to order restraint without providing an equivalent safeguard, which is, the payment into court of the amount due or claimed in dispute."

The decision and reasoning in *Marbella* has recently been again approved by the Court of Appeal in *Mosquito Cove Ltd and others v Mutual Security Bank Ltd and others* [2010] JMCA Civ 32 (delivered 30 July 2010). In delivering the judgment of the court, Morrison JA pointed out that cases, involving applications to restrain the exercise of a mortgagee's power of sale, were "*sui generis*". In a most comprehensive judgment, the learned judge of appeal, not only outlined and confirmed the bases on which a mortgagee

is given the safeguard afforded in equity, but went on to outline what were the exceptions to the general rule.

In outlining the exceptions he cited at paragraph 56 of his judgment, with approval, the following quotation from Fisher and Lightwood's Law of Mortgage (11th Ed. paragraph 20-34:

> "The mortgagee will be restrained from exercising his power of sale if, before there is a contract for the sale of the mortgaged property, the mortgagor tenders to the mortgagee or pays into court the amount claimed to be due. The amount due for that purpose is the amount which the mortgagee claimed to be due to him for principal, interest and costs **unless, on the fact of the mortgage, the claim is excessive, in which case the amount claimed less such excess must be tendered or paid**." (Emphasis supplied)

The learned judge, at paragraph 64 of the judgment stressed the wide protection given to mortgagees. He said:

> "While other or further exceptions to the rule are no doubt to be found in the books and will also emerge in the future, it seems to me that the kinds of instances discussed in the foregoing paragraphs suggest that **the court will only sanction departures from the general rule in highly exceptional cases**, based on very special facts, such as the existence of a fiduciary relationship between mortgagor and mortgagee or, perhaps, in cases of forgery. I naturally intend these as examples only, which are by no means exhaustive." (Emphasis supplied)

The balance of convenience, in cases involving the exercise of the power of sale, is, therefore, firmly tipped in favour of the mortgagee. It must be pointed out, that in the instant case, it is not the validity of the mortgage itself which is challenged, but whether, due to the asserted discharge of the guarantee, there is any money due to NCB to warrant its exercise of the powers of sale granted under the mortgage. In the circumstances I find that Darien's case does not fall within the category of exceptional cases identified by Morrison JA, nor do I find that it warrants an addition to the number of exceptions.

There is, however, yet another principle to be considered. That principle is the effect that a sale of the property would have on the registered proprietor. In the instant

case, Mrs Chen-Euker deposed on behalf of Darien, that apart from the value of the property in issue, **she** would not be able to pay the disputed amount into court. This inability was due to **her** lack of financial resources. This she had stated at paragraph 5 of her affidavit sworn to on 28 March 2011. It could be that Mrs Chen-Euker meant a reference to Darien rather than herself. In an earlier affidavit, sworn to on 8 February 2011, Mrs Chen-Euker also stated at paragraph 44 that this property was Darien's only asset and that if it were sold then Darien would also lose its goodwill.

It would seem from this evidence, that this property is Darien's only income-earning asset. There is, however, no evidence of the likelihood of financial ruin. Unlike the deponent in *Flowers Foliage and Plants of Jamaica Ltd and others v Jamaica Citizens Bank Ltd.* (1997) 34 JLR 447, who said that if her house were sold she would be ruined, there is no such assertion in this case. There was some blurring of the lines between Darien and Mrs Chen-Euker in the latter's affidavits but there was nothing to indicate that Darien would face financial ruin if the subject property were sold. If, however, the injunction is found, after a trial, to have been wrongly refused, Darien will have the benefit of an award of damages which will be able to be met by NCB.

Conclusion

In light of all the above and considering the case as a whole, I find that the balance of convenience remains in favour of refusing the grant of the injunction.

The orders therefore, are as follows:

1. The application for injunction dated 8 February 2011, is refused;

2. The Fixed Date Claim shall be set for hearing on a date to be fixed by the Registrar;

3. Costs to the defendant to be taxed if not agreed.