IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2009 HCV 02459

IN CHAMBERS

BETWEEN	FLETCHER & COMPANY LTD.	CLAIMANT/APPLICANT
AND	BILLY CRAIG INVESTMENTS LTD. (In Receivership)	DEFENDANT/RESPONDENT

Ms. Carol Davis and Mr. Seyon Hanson for Claimant/Applicant.

Ms. Noelle Walker instructed by Hart, Muirhead, Fatta for Defendant/Respondent.

Civil Procedure - Injunction – Mortgage granted by company by way of guarantee of a loan to shareholders – Loan for the purpose of purchasing shares in the said company - Application to prevent mortgagee from exercising power of sale contained in a mortgage – Mortgagee a transferee of the mortgage - Whether mortgagee should be restrained – Whether applicant entitled to equitable remedy – Section 71 of the Registration of Titles Act

Heard: 18th and 22nd January 2010

BROOKS, J.

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

This quote from the judgment of Rattray, P. in *Flowers, Foliage and Plants of Jamaica Ltd. and Others v Jamaica Citizens Bank Ltd.* (1997) 34 JLR 447 was cited by Miss Davis on behalf of the claimant, Fletcher and Company Ltd. Learned counsel relied on this principle in submitting that this court should not follow the normal approach that a mortgagee should not be deprived of the benefit of his security.

Fletcher & Co. seeks to restrain Billy Craig Investments Ltd. (In Receivership) from exercising its powers of sale, contained in a mortgage of land, of which Fletcher & Co. is the registered proprietor. It alleges that there have been many breaches of the law

in arriving at the position where Billy Craig is now registered as mortgagee of the land. It contends that on that basis, the validity of the mortgage is in question and therefore the court should take the unusual step of restraining Billy Craig.

The Background

The background to this claim is as follows: Mr. and Mrs. David Fletcher owned the entire shareholding in Fletcher & Co. In 1995 they sold all the shares to Robert Joseph, Clyve Lazarus and Constantine Nicholas (together called "the purchasers") for US$1,500,000.00. The purchasers paid one-half of the purchase price and the remaining US$750,000.00 was deemed a loan. The loan was to be repaid to Sportula, a company apparently owned by the Fletchers. The purchasers issued a promissory note in respect of the loan, and, as was stipulated by the sale agreement, Fletcher and Co. issued a mortgage by way of guarantee for the repayment of the loan. Two parcels of land were mortgaged. The principal borrowers named in the mortgage document, were the purchasers.

Sportula sold the mortgage in 1997, to Glenrosa Ltd. and, on the direction of Glenrosa, transferred the mortgage to Billy Craig. The transfer of the mortgage was registered on both Certificates of title for the lands. Billy Craig's receiver has since threatened sale of the properties, on the basis that there had been a default in repayment of the loan. Fletcher & Co. seeks to prevent the sale.

The Complaints

Fletcher & Co. alleges that the mortgage is illegal and void. It asserts:

a. as it granted the mortgage to secure the purchase of its own shares, the mortgage is in breach of Section 54 of the Companies Act 1967, which was the relevant legislation at the time;

b. as the interest rate was expressed to be paid at a rate of 5% above the US prime rate, the mortgage is in breach of section 3 of the Moneylending Act which speaks to a maximum prescribed rate of interest;

In addition, says Fletcher & Co. subsequent acts make the mortgage unenforceable:

a. as Billy Craig did not provide consideration for the transfer of the mortgage to its name, the transfer is illegal, void and of no legal effect;

b. the debt was unilaterally converted by Billy Craig to a Jamaican dollar loan;

c. Billy Craig has sought to charge compound interest.

In my view, only the first complaint demands close attention. Firstly, the rate of interest complained of has not been shown to be in excess of the "prescribed rate". Secondly, whether it be a valid complaint or not, it has not been established that Billy Craig provided no consideration for the transfer. The fact that it is not manifest on the document effecting the transfer does not establish the validity of the complaint. Thirdly, the conversion of the loan currency is authorized by the mortgage document. Lastly, the mortgage document does not seek to authorize the charging of compound interest, which is the mischief that section 9 of the Moneylending Act seeks to address.

In considering the matter of the breach of the 1967 Companies Act, I first quote from section 54:

> "(1)... it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for shares in the company...
>
> (3) If a company acts in contravention of this section, the company and every officer of the company who is in default shall be liable to a fine..."

It would seem, on the face of it, that there has been a breach of section 54. In issue is whether the Fletcher & Co. may rely on section 54 to secure equitable relief from the sale which Billy Craig has threatened. *Global Trust Ltd. and another v Jamaica Redevelopment Foundation Inc. and another* SCCA 41/2004 (delivered 27/7/07) confirms "that it would be proper to grant an injunction to restrain the mortgagee's power of sale if there are triable issues as to the validity of the mortgage document upon which the mortgagee seeks to found his power of sale" (per Cooke, J.A).

There does therefore seem to be a serious question to be tried.

The American Cyanamid approach

Having established that there is a serious question to be tried, the next question to be asked, following the tried and proved approach adumbrated in *American Cyanamid Co. v Ethicon Ltd.* [1975] 1 All ER 504, is whether damages is an adequate remedy. The land in question, being held by a corporate entity, cannot have any "personal appeal" which would make it unique. This seems to be the position taken by Cooke, J.A. in *Global Trust*. He said, at page 15 of the judgment:

> "There was no...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."

Similarly, nothing has been said in this case about any intrinsic value in either of the properties involved. Nor has it been asserted that, should the payment be made, Fletcher & Co. would be ruined. On these bases, damages would be an adequate remedy and Fletcher & Co. is not entitled to have an injunction granted.

The Approach in Equity

The following picture seems to emerge from the background and the complaints set out above. The purchasers have secured the company's shareholding and the Fletchers have been paid in full for that shareholding but Billy Craig, having become the mortgagee, is to be left without remedy. This is because (a) the guarantor of the loan claims that it is not liable and (b) the reasons it asserts for this position would also exclude the principal borrowers from liability. The principal borrowers are the principals of the guarantor. In this context, is significant that the affidavit in support of the Fletcher & Co.'s application for the injunction, is sworn to by Mr. Robert Joseph; one of the purchasers/borrowers.

Would a court of equity grant relief in those circumstances? I think not. "He who comes to equity must do equity". "He who comes to equity must come with clean hands". These are two well known maxims concerning the dispensation of equitable relief such as is the grant of an injunction. Fletcher & Co., Mr. Joseph and the other shareholders do not appear to be qualified on either basis. Jones, J. in *Bank of Nova Scotia Jamaica Ltd. v Patrick Rosegreen and others* 1998 B-240 put it this way, "to borrow and to refuse to pay back is dishonourable".

In considering the matter of the breach of the 1967 Companies Act, it is well known that the court will not assist any person to benefit from an illegal act. Miss Davis submitted, however, that the borrowers did not know that they were acting unlawfully when they caused Fletcher & Co. to issue the mortgage. That may be a matter for the trial judge but at this stage I do not find that a compelling reason to depart from the

principle established in *SSI (Cayman) Ltd. and others v International Marabella Club S.A.* SCCA 57/86 (delivered on 6/2/87). In *Marabella* 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."

That principle was supported in the more recent decision of the Court of Appeal in *Hamilton v Hamilton and Others* SCCA 77/07 (delivered 31/7/08). At paragraph 10 of her judgment, Harris, J.A. repeated the principle that "a mortgagee will not be restrained from exercising his powers of sale because the amount due is in dispute".

The Approach at Law

There are two points which may be considered, separately and apart from the principles of equity. The first is that the sanction provided by Section 54 of the then Companies Act, for a breach of its provisions, was a fine. It "does not indicate an intention to avoid the security to which it refers or to punish the lender". Those were the words of Roxburgh, J. in *Victor Battery Co. Ltd. v Curry's Ltd.* [1946] 1 Ch. 242.

In *Victor Battery Co.* the fact situation concerning the creation of the security was very similar to the instant case; a debenture was issued by the company as security for the loan which was used to pay a portion of the purchase price for its shares. The company sought to have the debenture declared void. It was held, in dismissing the action:

> "(1) that the word "security" in [the equivalent to section 54] means "valid security" and that the section punishes the borrowing company on the footing that the security provided was and remains valid; (2) that, even assuming that the debenture was an illegal contract, the plaintiff company was not a person for whose protection the illegality had been created by statute so that there could be relief from it, and that that rule applied which is expressed in the maxim "*in pari delicto potior est conditio defendentis*".

The Latin phrase may be translated to mean, "Where parties are equally in fault, the condition of the defendant is preferred". From the judgement it seems that "this holds good although neither party had any intention of breaking the law".

In *Selangor United Rubber Estates Ltd. v Cradock (No. 3)* [1968] 1 WLR 1555, Ungoed-Thomas, J. (as he then was) criticized the first finding in *Victor Battery Co.* but confirmed that the Court of Appeal in England had confirmed the second. (See page 1657 D.)

The second point is that Section 71 of the Registration of Titles Act also undermines Fletcher & Co's. position. The effect of that section is that where the mortgagee is a transferee of the security, that mortgagee is protected from any impropriety which may have attended the creation of the security, provided there is no fraud on the part of that transferee. Such a mortgagee was held protected in the *Hamilton* case cited above. There, the mortgagor alleged undue influence in the creation of the mortgage. The Court of Appeal held that Section 71 applied, to the effect just explained.

Conclusion

Although courts of equity will not be slaves to maxims, those maxims assist in focusing attention on the method of achieving justice. Fletcher and Co. is not entitled to the equitable relief which it seeks. It may be adequately compensated by an order for damages and it has not come to equity with clean hands. The result of its contentions would, in my view, be a disservice to an apparently innocent party.

Its complaints may also, in large measure, be made irrelevant as against Billy Craig, which is not the original mortgagee but a transferee of the mortgage and so protected by Section 71 of the Registration of Titles Act.

On these bases, I find that whereas Fletcher & Co. may have a serious issue to be tried this court will not restrain Billy Craig from exercising its power of sale without securing for it, that which the mortgage was to have secured. Fletcher & Co. may only prevent the exercise of the power under the mortgage, if it pays into court the amount demanded by Billy Craig to redeem the mortgage. I shall make an order in those terms.

I am mindful of the decision in *Brady v Jamaica Redevelopment Foundation Inc. and Others* SCCA 29/2007 (delivered 12/6/08) and trust that I have explained, as seems to have been required in that case, why I have departed from the course recommended in *Flowers Foliage and Plants.*

The orders, therefore, are as follows:

1. The Defendant is hereby restrained by themselves, their servants, employees, agents or any person whomsoever, from exercising or attempting to exercise powers of sale contained in mortgage No. 908314 endorsed on certificates of title registered at Volume 1070 Folios 141 and 142 of the Register Book of Titles, or from selling or otherwise dealing with the fee simple of the lands comprised in the said Certificates of Title;

2. The order is conditional upon the Applicant paying into court the sum of $59,220,878.95;

3. The Claim shall be referred to mediation by the Registrar pursuant to Part 74 of the Civil Procedure Rules;

4. Costs are awarded to the Defendant to be taxed if not agreed.