JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 112 /2010

APPLICATION NO. 176/2010

BETWEEN	EASTON FRANCIS Executor, Personal Representative Beneficiary in the Estate of Miriam Francis (deceased)	1ST APPLICANT
AND	CHRISTINE GORDON	2ND APPLICANT
AND	VICTOR FRANCIS	3RD APPLICANT
AND	KATHLEEN FRANCIS	4TH APPLICANT
AND	ALBERT FRANCIS	5TH APPLICANT
AND	ANTHONY FITZGERALD GIBBS	1ST RESPONDENT
AND	VICTORIA MUTUAL BUILDING SOCIETY	2ND RESPONDENT

Donald Gittens and Mrs Marjorie Shaw-Currie instructed by Miss Carleen McFarlane McNeil of McNeil & McFarlane for the applicants

Gavin Goffe instructed by Myers Fletcher & Gordon for the 2nd respondent

29 October 2010 and 26 May 2011

IN CHAMBERS

PHILLIPS JA

[1] This is an application for an order that the judgment of Thompson-James J, made on 24 September 2010, be stayed until the hearing of the appeal or in the alternative, for an interim injunction restraining the 2nd respondent by itself, its servants, employees or any person acting under its instructions from exercising powers of sale under mortgage no. 1504165 registered against the lands known as 107 Queen Hythe, Discovery Bay in the parish of Saint Ann, registered at Volume 1412 Folio 962 of the Register Book of Titles ("the said property"), other than by order of the court or until the trial of the matter.

[2] On 24 September 2010 Thompson-James J refused an application for an interim injunction in the terms stated above. There was also before her an application filed by the 2nd respondent seeking an order for the Registrar of Titles to remove caveat no. 1590876 from the certificate of title for the said property, which she granted, and an order to strike out the statement of case against the 2nd respondent, which she refused. The applicants have appealed both orders, that is the refusal of the injunction and the removal of the caveat, and the 2nd respondent has appealed the order refusing to strike out the claim against it.

[3] The claim below was brought by the executor and other beneficiaries of the estate of Miriam Francis, who was the former registered proprietor of the said property.

The claimants (who are the applicants) alleged that the said property was fraudulently transferred to the husband of the niece of the deceased (on a date after the deceased's death), who then procured mortgage no. 1504165 from the 2nd respondent, obtained the proceeds thereof, failed to pay any part of the loan, which therefore went into arrears, thus triggering the taking of steps by the 2nd respondent, to exercise its powers of sale over the said property. The husband, the 1st respondent herein, has not been located even to have the documents relative to the proceedings below served on him.

The proceedings below

[4] The applicants filed the claim form on 23 April 2009, stating that the deceased had been the registered proprietor of the said property when registered at Volume 976 Folio 281 of the Register Book of Titles. Perusal of the certificate of title however indicates that it was cancelled, pursuant to section 79 of the Registration of Titles Act (ROT), and the new title registered at Volume 1412 Folio 962 of the Register Book of Titles, was issued in the name of the 1st respondent. The claim by the applicants against the respondents was for damages for fraud, deceit, misrepresentation and/or negligence, in that the 1st respondent wrongfully and fraudulently caused himself to be registered on the title for the said property when he knew that no transfer had taken place, and the 2nd respondent had given the 1st respondent a mortgage without taking any steps to ensure that the title was a good title in all the circumstances. As a consequence of those actions, the applicants claimed that they had suffered loss, damage and expenses.

[5] In the particulars of claim, the claimants/applicants were described as all children and beneficiaries of the deceased. The 1st applicant is also the executor of the will of the deceased. They were all, save and except the 1st and 5th applicants, residing overseas, either in the United States of America or Canada. The 1st respondent is a Minister of Religion and the husband of Carol Gibbs, a niece of the 1st- 5th applicants, who was added as a 6th claimant to the suit below, but is not an applicant in this court. The 2nd respondent is a registered building society in Jamaica, engaged in providing banking and/or mortgage services to the public and is the registered mortgagee on the certificate of title for the said property (Volume 1412/Folio 962) in respect of mortgage no. 1501465 in the amount of $14,000,000.00.

[6] The applicants further averred that the deceased became the registered proprietor of the said property on 10 November 1961, executed her last Will and Testament on 27 August 1964 and died on 19 April 1968. She bequeathed the said property to all her eight children, three of whom have since died. The executor has over a long period of time tried to obtain probate of the will, but experienced difficulties, as he was unable to obtain the death certificate from the Registrar General's Department, in spite of substantial sums having been paid to that institution in 2004 and 2006. All the relevant documents pertaining to the estate, including the certificate of title for the said property had been given for safekeeping to Avis Francis, the stepdaughter of the deceased. When she became ill, suffered several strokes and started to develop Alzheimer's disease, the documents were given to Carol Gibbs, her niece, who had obtained consent from the other beneficiaries to, and had constructed,

a building on the said property, and resided there. The 1st respondent offered to help with extracting probate, and advised that he could assist in obtaining the death certificate. Through that ruse, a copy of the Will, the certificate of title and tax receipts in respect of the said property were given to him.

[7] The applicants claimed that there were three buildings constructed on the said property: the family house where the deceased had resided, and where the 5th applicant, 62 years old (in 2009), but who has been mentally retarded throughout his life resides, the home constructed by Carol Gibbs, where she resides with her family, and a dwelling house being constructed by a grandnephew, Jason Grant. The applicants became aware that the property had been transferred when communication addressed to the 1st respondent from the 2nd respondent was given to Carol Gibbs, and it was further discovered that there was a mortgage registered on the said property in the amount of $14,000,000.00 which was in arrears, and that the said property had been put up for sale by way of public auction, and by private treaty, by the 2nd respondent, on 27 January 2009. The applicants, through their attorneys and searches conducted at the National Land Agency, discovered that the 1st respondent had fraudulently misrepresented to the Registrar of Titles that the deceased had transferred the property to him, allegedly by way of natural love and affection, so he was the owner of all three buildings on the said property. Yet, he had submitted to the Registrar a declaration of value allegedly sworn to by the deceased on 17 July 2007, which stated that she had made no improvements to the said property and that the market and other value of the said property was $3,500,000.00.

[8] The applicants therefore set out 11 particulars of fraud, misrepresentation and/or deceit of the 1st respondent, including: that the 1st respondent had been fraudulent in procuring the transfer documents at a time when he knew that the deceased had died nearly 40 years ago; submitting the same knowing them to be false; forging the deceased's signature on the declaration of value and on the instrument of transfer; misrepresenting that there had been any transfer of the property to him by the deceased for natural love and affection and indicating that the said property was unimproved lands which he knew to be false.

[9] In respect of the 2nd respondent, the applicants claimed negligence in the failure to act with due diligence to ascertain the fact that there were three houses on the said property and, through search of the root of the title, to ascertain the true ownership of the said houses; failure to make any enquiries as to the occupancy of the same which could put one on inquiry; failure to be cautious as the sums being loaned were substantial and the title had only recently been issued, and any review of the documentation would have shown that the said property was being valued far less only recently, which ought to have put the 2nd respondent on notice; and for failure to act with reasonable prudence as a mortgagee in all the circumstances.

[10] The affidavit of the 1st applicant in support of the application for the injunction below essentially set out the facts in the particulars of claim but confirmed that his mother, the deceased, had died on 19 April 1968 and that he had attended her funeral and seen her buried at the family plot on the said property. The last Will and Testament of the deceased was attached. He deposed to the fact that action had been

filed to cancel the certificate of title registered at Volume 1412 Folio 962 as it had been obtained fraudulently, and that the mortgage endorsed thereon was void due to the fraudulent transaction relating to the title. He further averred that, despite several efforts, the 1st respondent had not been located, although there was information that he was operating the Mount Calvary Church of God in the Cayman Islands. The loan was not being serviced and interest continued to accrue thereon every day. As a consequence, the family had lodged a caveat no. 1590876 to protect their interest but had no faith that it could override the registered mortgage of the 2nd respondent.

[11] The 1st applicant deposed that his parents, one sibling and grandchildren who had died had all been buried on the said property; that all siblings had been born and raised there; that there were very strong sentimental attachments to the said property for which money could not compensate; and the loss of the said property would result in grave emotional and financial hardship to them. They had therefore reported the 1st respondent to the Fraud Squad in relation to the unlawful dealing with the property, and in the meantime, the situation was urgent, and required that the 2nd respondent be restrained from exercising its powers of sale under the mortgage, as its interest in the said property, such as it was, could only be a monetary one, and was far outweighed by the claimant's connection to the same.

[12] Jasmine Leslie also swore to an affidavit in support of the application for interim injunction by the applicants. She is the daughter of Avis Francis and resides in the family house on the property with the 5th applicant who is mentally ill and incapacitated and unable to take care of himself. She confirmed that Carol Gibbs and

family reside in a house on the said property constructed by the grandnephew Jason Grant, a contractor/construction worker, who himself was in the process of completing the construction of his own house on the said property.

[13] The 2nd respondent's application before Thompson-James J, as indicated, asked for the removal of caveat no. 1590876 filed by the applicants and for the claim against the 2nd applicant to be struck out, not unsurprisingly on the grounds that neither the applicant nor Carol Gibbs had any caveatable interest in the said property and that there were no reasonable prospects of succeeding against it at the trial. The affidavit in support of the 2nd respondent's application was very brief. Patricia Fisher attested that she was the manager in the processing department of the 2nd respondent, and the 1st respondent was indebted to the 2nd respondent in the sum of $19,158,406.44 and that interest continued to accrue on this sum at the daily rate of $5,813.26.

The decision of Thompson-James J

[14] Unfortunately I do not have the benefit of written reasons from the learned judge in order to fully understand her approach to the applications which were before her, but I do have a note of her oral judgment which was provided to the court by counsel for the 2nd respondent. It has not been approved by the judge, but was submitted at my request and has proven quite useful.

[15] In the note of the oral judgment submitted, the learned judge set out the relevant facts of the case and then stated the bases, as she saw them, in respect of the competing contentions:

For the applicants:

(1) The applicants were not parties to the mortgage;

(2) A fraud had been committed against them;

(3) They therefore had no legal obligation to pay the mortgage;

(4) There are triable issues regarding the mortgage; and

(5) If the injunction is not granted they will suffer severe prejudice and financial ruin.

For the 2nd respondent:

(1) The 2nd respondent is a bona vide mortgagee for value without any notice of any defect in the mortgage.

[16] The learned judge set out in her opinion how the relevant law applied to the facts which had been put before her. She referred to the case of ***National Commercial Bank Jamaica Limited v Olint Corp. Limited***, Privy Council Appeal No. 61 of 2008, delivered 28 April 2009, with regard to preserving the status quo, dealing with the adequacy of damages and the issue of who would suffer the most irremediable harm. She referred to the allegation that the said property had been transferred years after the death of the deceased; the substantial sentimental connection of the applicants to the land; the fact that no allegation of fraud had been

made against the 2nd respondent, and that it could therefore pass title to a 3rd party; the fact that the 2nd respondent had loaned $14,000,000.00 to the 1st respondent on the security of the said property; that section 68 of the ROT means that the title is indefeasible; and that section 71 of the ROT protects persons who deal with registered property and therefore the mortgagee is not obliged to investigate the root of the title.

[17] The learned judge then made her findings. She stated that ***Gibbs v Messer McIntyre and Cresswell*** [1891] AC 248 made it clear that the Torrens System of registration did not require investigation of the registered title as to its validity or authority. In this case, the 2nd respondent advanced monies on the strength of the registered title in the name of a real person, to a real person, not a fictitious one. She found that damages were not an adequate remedy with regard to the 2nd respondent and in any event it did not appear that the applicants could pay any damages. The 2nd respondent was not involved in the alleged fraud, and so although it was understood and accepted that there were sentiments attached to the said property, nonetheless in respect of the applicants, damages were an adequate remedy. Additionally, although there may be triable issues between the applicants and the 2nd respondent, the justice of the case demanded that the injunction be refused. There did not appear to be any ground for interfering with the 2nd respondent's "freedom of action".

[18] The learned judge therefore refused the interim injunction, ordered the withdrawal of caveat, but on the basis that there might be triable issues between the applicants and the 2nd respondent, refused to strike out the applicants' claim against the 2nd respondent.

[19] The applicants appealed challenging the decision of the learned judge with particular reference to the efficacy of the mortgage as the title was fraudulently obtained. The applicants' notice of appeal indicated that the learned judge had failed to give proper consideration to whether there were serious questions to be tried, particularly as the evidence in respect of the fraud was patently strong, clear and remained unchallenged; had erred in her ruling in relation to the issue of the adequacy of damages, specifically in respect of the applicants and also with regard to where the balance of convenience lay; and had failed to appreciate, inter alia, the substantial injustice wrought upon the applicants in the circumstances of this case.

[20] The 2nd respondent by counter notice of appeal, disputed the decision of the learned judge not to strike out the applicants' claim against it on the basis that "there may well be triable issues regarding VMBS", on the ground that, "the learned judge erred in failing to find that the Claimants had no reasonable grounds for bringing the claim against the 2nd Defendant, VMBS, by virtue of sections 68 and 71 of the Registration of Titles Act and the absence of any fraud affecting the mortgage given to VMBS".

The application

[21] In their written submissions, the applicants' focus was on the fact that the learned judge had failed to sufficiently consider that there was such intrinsic value attributable to the said property that monetary compensation could not replace the same, bearing in mind that graves of family members remained on the said property and that some family members still resided there. This was even more relevant when

there was no dispute that the 2nd respondent's interest was at all times "a mere pecuniary one". The learned judge should therefore have ensured that the status quo remained, and that there was no dissipation of the assets until trial. In oral submissions, counsel for the applicants indicated that the principles with regard to the grant of an interlocutory injunction were well known, and he referred to the oft-cited House of Lords' case of ***American Cyanamid v Ethicon*** [1975] All ER 504 and submitted that he had to cross three hurdles; viz, whether there was a serious question to be tried; whether damages were an adequate remedy; and where did the balance of convenience lie, taking into account which party would suffer the greater irreparable harm/ruin if the injunction was granted or refused. The court had erred, he submitted, in ruling against the applicants on all three limbs. Counsel indicated that he recognised that the applicants must cross the first hurdle for the others to be applicable, and submitted that the finding that there may well be triable issues between the applicants and the 2nd respondent, and refusing to strike out the claim, yet refusing the injunction were inconsistent findings by the judge and not sustainable on appeal.

[22] The next important point was the fraud on the title which, it was submitted, was an exemption with regard to the operation of sections 68 and 71 of the ROT. The applicant submitted that the evidence in relation to the fraud of the 1st respondent was strong and clear. The matter could not be considered frivolous and/or vexatious, and the learned judge had failed to consider that the effect of her ruling could permit, in the face of a clear claim to a fraudulently obtained title, a transfer to a 3rd party. It was submitted that there was, as yet, no transfer to an innocent 3rd party and the court

ought not to facilitate the 2nd respondent being able to pass a fraudulent title to a 3rd party. It was submitted that in any event, the mortgage was itself tainted, as it was given to a proprietor whose transfer was fraudulent, and in those circumstances the injunction ought to have been granted. Counsel relied on ***Rupert Brady v Jamaica Redevelopment Foundation Inc et al*** SCCA No. 29/2007 delivered 12 June 2008.

[23] It was the applicants' contention that once the issue of fraud arises there is an obligation on the part of the mortgagee (in this case) to "look beyond the four corners" of the certificate of title, particularly in this case where there were graves on the property, and three buildings which were occupied. The mortgagee is not entitled to avoid due diligence with regard to the investigation of the title, for in a clear case of fraud, the statutory protection is removed, as equity will not allow the statute to be used as an engine for fraud. It is necessary, therefore, in reviewing section 71 of the ROT, for the court to inquire into the notice the 2nd respondent had or ought reasonably to have been expected to have had, when entering into the transaction with the 1st respondent.

[24] The 2nd respondent submitted, quite correctly in my view, with regard to whether there was a serious question to be tried, that the main issue relevant to the application for an injunction in the court below, and before me, was whether the mortgage given to the 2nd respondent in respect of the said property was valid even if the allegations of fraud against the 1st respondent were proven. It was argued that sections 68 and 71 of the ROT govern the situation, and together provide conclusive proof of the ownership of the said property, and confirm that the mortgagee is not

obliged to investigate the root of title. The 2nd respondent, counsel submitted, was not affected by any unregistered interest. Additionally, the 2nd respondent would not be affected by any fraud that the 1st respondent may have committed, unless it had knowledge of the same before entering into the mortgage contract. Further, the exemptions in the section would be rendered entirely useless if the 2nd respondent could not rely on the same. Counsel relied on the Privy Council case, on appeal from the Supreme Court of Victoria, ***Gibbs v Messer*** which counsel submitted had conclusively disposed of the application for the interlocutory injunction below, as, he stated, the registered proprietor even if fraudulently registered, having executed a mortgage, with knowledge of the fraud, the mortgage once registered would still have constituted a valid encumbrance in favour of a bona fide mortgagee. Thus, a fraudster could give a valid mortgage.

[25] Counsel pointed out however that it was not the position of the 2nd respondent and it did not accept, that it was the victim of any fraud. There was no challenge to the mortgage instrument, and no claim that the 2nd respondent had any knowledge of the alleged fraud, particularly as the instrument of transfer and the declaration of value were both witnessed by a justice of the peace/attorney at law. The remedy for the applicants, if any, it was submitted, in the case of proven fraud by the 1st respondent, was a claim against the 1st respondent, and if the applicants did not think that they could obtain any redress from that approach, then they should add the Registrar of Titles as a nominal defendant, and proceed against the assurance fund. Counsel argued that the fund was the balance against the conclusive proof of the certificate of

title protection accorded to the registered proprietor and bona fide purchasers for value under sections 68 and 71 of the ROT. Any perceived equities which could claim priority otherwise must claim compensation from the fund.

[26] Counsel submitted further, that in any event, the applicants did not have any claim against the said property, as they were at best beneficiaries in an estate. There had not been any administration of the estate, and often gifts bequeathed by a testator fail. The applicants therefore could not claim that they had been deprived of any particular property in the estate (and specifically not the said property), but perhaps only a greater value of the estate, which, as beneficiaries, would give them a claim against the estate. As a consequence of all of the above, counsel argued there was no serious question to be tried and the court ought not to grant an injunction pending appeal.

[27] Counsel also entreated the court to take note of the fact that if the deceased had died in 1968, there was no acceptable reason for the personal representatives of her estate not taking into their custody the certificate of title for the said property and/or lodging a caveat against dealings with the property while the search continued for the death certificate. The applicants should therefore be barred from any equitable relief in light of the 1st applicant's delay and negligence. As counsel put it, "It is he, and not VMBS, who is answerable to the alleged beneficiaries if they are deprived of the land as a result of this alleged fraud".

[28] With regard to whether damages would be an adequate remedy and/or whether the balance of convenience lies in favour of the applicants, it was submitted that even if there was a serious question to be tried, then the general rule should be applied that a mortgagee will not be restrained from exercising its powers of sale unless the mortgagor first pays into court the sum claimed under the mortgage. It was further submitted that although a monetary claim, under the Torrens System of registration there must be certainty in dealing with registered proprietors, for failing that, the entire registration system under the ROT would be valueless. As a consequence of, and in the light of all of the above, the court ought not to grant any equitable relief to the applicants, and the injunction pending appeal should be refused.

Analysis

[29] The Court of Appeal Rules 2002 provide that a single judge has the jurisdiction to grant an injunction while a matter is on appeal. Rule 2.11 provides inter alia:

> " 2.11 (1) A single judge may make orders-
>
> ...
>
> (c) for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal."

Although the rules do not set out the factors or criteria to be used when considering whether to grant an injunction pending appeal, the principles can be distilled from several cases from this court and are in the main that there should be a good arguable appeal, and that the applicant ought to show that there is a risk that if the injunction is not granted the appeal may be rendered nugatory (see ***Olint Corp Limited v***

National Commercial Bank SCCA No 40/2008, Application No 58/2008 delivered 30 April 2008) As stated by Stuart Smith LJ in ***Ketchum International plc v Group Public Relations Holdings Limited and Others*** [1997] 1 WLR 4, the test of whether one has a good arguable appeal as against a good arguable case is likely to be a more difficult test to satisfy and "if the case turns upon questions of fact which the judge has resolved against the plaintiff, may well be insuperable".

[30] In the instant case the appeal relates to the exercise of the discretion of a single judge. Lord Diplock, in his seminal speech in ***Hadmor Productions v Hamilton*** [1982] 1 All ER 1042, restated the law with great clarity indicating that it was not the function of the appellate court, on an appeal from a judge's grant or refusal of an interlocutory injunction, to exercise its own independent decision, but it should defer to the judge's exercise of his discretion. Its role is one of review only, and it should only interfere if the judge's exercise of his discretion is based on a misunderstanding of the law, or the evidence before him, or an inference made on the facts which can clearly be shown to be wrong. One can say therefore that once the learned judge exercises her discretion on the correct principles of law applicable to the evidence disclosed, the hurdle to challenge the same successfully may be insuperable as the judgment of the judge cannot be overturned merely because the Court of Appeal may have exercised its discretion differently.

[31] In considering whether there is a good arguable appeal one must peruse the findings of the learned judge as against the challenges set out in the grounds of appeal. The issues as I see them relate to (1) whether the mortgage is tainted by the

potentially fraudulent transfer registered to the 1st respondent, and (2) whether in the circumstances of this case, there should be any restraint on the exercise of the powers of sale of the mortgagee. If the issues stated at (1) and (2) disclose serious questions to be tried, then one must go on to decide if damages are an adequate remedy, and in whose favour the balance of convenience lies (see ***American Cyanamid v Ethicon)***.

[32] I appreciate that it is not my function to sit on appeal from the judgment of Thompson-James J, as the applicants have a claim before the court against the respondents for damages for fraud, deceit, misrepresentation and/or negligence, which may ultimately go to trial against both respondents, or against the 1st respondent only depending on the outcome of the appeal and the counter-notice of appeal.

[33] The facts of this matter are clear, having been set out earlier in this judgment, and so I see no need to repeat them here, but I wish to draw an analogy with regard to the facts in the leading Privy Council case of ***Frazer v Walker*** [1967] 1 All ER 649, on appeal from an order of the Court of Appeal of New Zealand, as the decision of the Board in that case is very instructive with regard to the issues in this case. In that case a husband and wife were registered proprietors on the title to a certain property, which was subject to a mortgage in respect of which sums were owing. The wife representing that she was acting on her own behalf and that of her husband, borrowed £3,000.00 from the new mortgagees, by forging her husband's signature. The loan funds satisfied the earlier mortgage and the new mortgage became registered on the title. No sums were paid on the loan, and the mortgagees exercising their powers of sale in the mortgage sold the property to a 3rd party, a bona fide purchaser for value

without any notice of the forged instrument. The transfer to the purchaser was registered on the title. There was no claim that the mortgagees knew anything about the forged instrument of mortgage. The purchaser sued to recover possession of the property and the husband counterclaimed on the ground of the forgery of his signature on the mortgage; that his interest in the land had not been affected by the mortgage; that the mortgage was a nullity; and for an order that all relevant entries on the register be cancelled. The Board held that (1) the mortgage was an interest in land, and the action by the husband was therefore an action for the recovery of land and as it did not fall within any of the exceptions in section 63 of the Land Transfer Act 1952, (equivalent to section 161 of the ROT), it was barred by the section, and it was dismissed as against the mortgagees; (2) registration was effective to vest title in a registered proprietor notwithstanding that he acquired his interest under an instrument that was void; also, as the action was one to recover land and was barred by section 63, it failed as well against the purchaser.

[34] Lord Wilberforce in delivering the decision of the Board stated that the claim against the mortgagees raised questions as to whether it was open to bring proceedings attacking the validity of the mortgage when the mortgagees' interest was entered on the register. He referred to several sections of the legislation, which have their counterparts in the ROT. Firstly, he addressed the issue, argued by the husband, as to whether if the instrument was not in proper form and not in compliance with all the provisions, including proper signatures, it could not be received for registration or be validly registered and the mortgagees would therefore never have become entitled

to the benefit of the registration. Their Lordships stated that they could not accept that argument as they said that it would be "destructive of the whole system of registration", and opined that "registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise". They referred to sections 62 and 63 of the Land Transfer Act (sections 70 and 161 of the ROT) and said that the inhibiting effect of those sections and the probative effect of section 75 of the Land transfer Act (section 68 of the ROT) "in no way depend on any fact other than actual registration as proprietor. It is in fact the registration and not its antecedents which vests and divests title".

[35] The Board then dealt with the said provisions (sections 62 and 63) which accord the registered proprietor immunity from attack by adverse claims to the land or interest in respect of which he is registered, save in respect of specific exceptions, and which though not used in either legislation has come to be called and referred to as the "indefeasibility of title", and the provision (section 75) indicating that the title is conclusive evidence that the person named therein is seised of all the estate named in the title and that the land has been properly brought under the legislation. The Board also reviewed the provisions (sections 81 and 85, sections 153 and 158 of the ROT) permitting the calling in of the title for correction and those (sections 182 and 183, sections 71 and 163 of the ROT) which relate to the position of 3rd parties dealing with a registered proprietor. These latter provisions state that except in the case of fraud, no person dealing with the registered proprietor shall be required to enquire into the circumstances under which the proprietor, or any previous proprietor, was registered,

nor shall he be affected by notice, actual or constructive of any trust or unregistered interest, and even if any trust or unregistered interest exists, they shall not per se, be imputed as fraud. Also, any bona fide purchaser for valuable consideration will be protected from actions for recovery of land if the basis of the claim is that the person through whom he claims may have been registered as proprietor through fraud or error.

[36] Their Lordships having canvassed the provisions above concluded that the registration of the mortgagees was immune from adverse attack as the exceptions did not apply. They referred to ***Assets Co Ltd v Mere Roihi*** [1905] AC 176, for the rights of persons entered onto the title without fraud and ***Boyd v Major of Wellington Corporation*** [1924] NZLR 1174, for the position of a person who was entered on the title, in that case, under a void proclamation, for establishing the indefeasibility of title of registered proprietors derived from void instruments generally. The Board also referred to ***Gibbs v Messer*** and indicated that a different result obtained in that case only because of its unusual facts, to wit the position of a bona fide purchaser from a registered proprietor who was a fictitious person and not a **real** registered proprietor. Their Lordships further indicated that the word proprietor in the Land Transfer Act should not be considered narrowly to only refer to those persons who owned the real estate or the fee simple, but extended to the case of a mortgagee who is "proprietor" of the mortgage and who has power of sale over the fee simple. The Board also held that in the circumstances, the husband's counterclaim must fail against the bona fide

purchaser, once on the provisions as enunciated, the mortgagee's interest was immune from challenge.

[37] In ***Gibbs v Messer,*** although a different result obtained due to the fictitious character of the person entered on the title, Lord Watson confirmed the law as set out convincingly in ***Frazer v Walker***. He said this:

> "The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. In the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificates of title, so long as he remained undivested by the issue of new certificates to a bona fide transferee, would have been liable to cancellation at the instance of Mrs Messer; but a mortgage executed by Cameron himself, in the knowledge of Cresswell's fraud, would have constituted a valid incumbrance in favour of a bona fide mortgagee. The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration."

[38] On the basis of the principles distilled from ***Frazer v Walker***, and the other authorities referred to therein, it would seem clear that in dealing with the registered proprietor, one is not obliged to go behind the title to investigate the validity of the registered proprietor's title. The transfer to the 1st respondent, once registered therefore was effective to vest title in him, and anyone who dealt with him could assume that he held his registered estate free from all encumbrances, that his title was indefeasible and conclusive evidence that he held all the estate in the title therein described. Without any allegation of fraud on the part of the mortgagee, or knowledge of any alleged fraud, the bona fide mortgagee would have acquired a valid right which could be passed to 3rd parties. The first question posed in para. [31] herein would therefore appear to be settled in favour of the 2nd respondent, with no serious issue to be tried.

[39] There are several authorities issuing from this court which have restated the principle that as a general rule, a mortgagee ought not to be prevented from exercising its rights under the mortgage instrument, including its powers of sale, unless the amount of the mortgage debt claimed by the mortgagee, although disputed, is paid into court ***SSI (Cayman) Limited v International Marbella Club*** (1987) 34 JLR 33. In ***Global Trust Limited and another v Jamaica Redevelopment Foundation Inc. and Another*** SCCA No. 41/2004, judgment delivered 27 July 2007 this principle was upheld by a majority, Panton P dissenting. Cooke JA commented on page 9 of the judgment, that: "there is no challenge to the correctness of the legal criteria established in the Marbella line of authorities- nor any question as to whether the guidance given

therein has been flouted or indeed misapplied", but went on to say, " 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 document upon which the mortgagee seeks to found his power of sale". This seemed to be the position that the learned judge of appeal applied in ***Rupert Brady v Jamaica Redevelopment Foundation Inc. and others*** SCCA No. 29/2007, judgment delivered 12 June 2008, where in setting aside a condition imposed to pay the sum of $14,226 046.35, on the grant of an injunction to restrain the mortgagee from exercising its powers of sale, he said: "the court's attention should be directed to the application of the correct judicial principles within the totality of the circumstances before it. A telling circumstance was the assertion by the applicant that he was a complete stranger to the execution of the mortgage document". The validity of the mortgage instrument was therefore challenged, and the injunction restraining the mortgagee granted by the judge in the court below was otherwise not disturbed. In ***Mosquito Cove Ltd v Mutual Security Bank Ltd and others, and Grange Hill Farms et al v Mutual Security Bank Ltd and others, and Francis Agencies Ltd et al v Mutual security Bank Ltd and Others*** [2010] JMCA Civ 32, Morrison JA in delivering the judgment of the court, masterfully canvassed the authorities dealing with the ***Marbella*** principle and confirmed that the principle was "alive and well" and referred to what he described as some exceptional cases, with specific peculiar facts in which the general rule had not been applied, to wit, ***Gill v Newton*** (1866)14 WR 490, ***MacLeod v Jones*** (1883) 24 Ch.D.289, ***Hickson v Darlow*** (1883) 23 Ch.D 690 and ***Rupert Brady v Jamaica Redevelopment***

Foundation Gill v Newton was a case in which the mortgagee was in possession of the mortgaged property pursuant to a deed containing certain trusts which were independent of the mortgage itself; in ***MacLeod v Jones,*** the mortgagee had concurrent, but also independent fiduciary responsibilities to the mortgagor as her solicitor; in ***Hickson v Darlow,*** the amount claimed by the mortgagee and ordered to be paid into court exceeded the amount which appeared to be due to the mortgagee on the basis of the mortgage deed. In ***Rupert Brady v Jamaica Redevelopment Foundation,*** as indicated previously, the mortgage was a forged instrument.

[40] None of the peculiar facts set out in the exceptional cases referred to above are applicable in the instant case, and although, as the learned judge said, the applicants have powerful sentiments attached to the said property, the ***Marbella*** principle which is "alive and well" would appear to be a complete answer to the second issue in this application, and in particular, there being no challenge to the validity of the mortgage itself, there would be no basis to restrain the exercise of the powers of sale of the mortgagee.

[41] In the light of all of the above, I would conclude that there are no reasonable grounds of appeal and refuse the injunction pending appeal, and on the principles of ***Hadmor Productions v Hamilton,*** I would also refuse any stay of the judgment of Thompson James J.

Conclusion

[42] Application for interlocutory injunction and stay of judgment pending appeal is refused with costs to the 2nd respondent to be taxed if not agreed.