IN THE SUPREME COURT OF JUDICATURE

THE CIVIL DIVISION

CLAIM NO. 2014 HCV 03732

BETWEEN	**OSWALD FRANCIS**	**CLAIMANT / APPLICANT**
AND	**SAGICOR BANK JAMAICA LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Nigel Jones, Attorney-at-Law, instructed by Nigel Jones & Co. for the Claimant/Applicant.

Ms. Gillian Mullings, Attorney-at-Law, instructed by Naylor & Mullings, Attorneys-at-Law for the Defendant.

Heard: 22nd & 27th August 2014.

Interlocutory Injunctions – Application to restrain the Defendant from selling or in any way whatsoever disposing of or taking possession of property – Application to compel the Defendant to cancel its Agreement for Sale with purchaser – Applicant claims Mortgagee acted in bad faith – Mortgagee's Power of Sale – Payment into court – Whether damages an adequate remedy – Whether the Applicant is entitled to Injunctions in circumstances of this case – Application for Interlocutory Injunctions refused.

CAMPBELL J,

[1] The Applicant, Oswald Francis, is a businessman. He executed a Mortgage instrument, numbered 1613198, registered on the 2nd September 2009 in the sum of Eight Million Five Hundred Thousand Dollars ($8,500,000.00), against property situated at Lot 37, 9 Deeside Avenue, Dunrobin Acres, Kingston 10, and registered at Volume 1201 Folio 222 of the Register Book of Titles (hereinafter called "the property"). The property was used to secure a loan in respect of a company; Fourth World Investment Corporation Limited.

[2] The Defendant, Sagicor Bank Jamaica Limited ("the Bank"), formerly Pan Caribbean Bank Limited, is a company duly registered pursuant to the laws of Jamaica. The Bank holds the legal mortgage numbered 1613198, against the property.

[3] By way of a Notice of Application for Interlocutory Injunction dated the 29th July 2014, the Applicant seeks to restrain the Bank from selling or in any way, disposing of or taking possession of the property. In the alternative, the Applicant seeks a mandatory injunction compelling the Bank to cancel its Agreement for Sale in relation to the property.

[4] Among the grounds on which Mr. Francis based his application were; that he had given notice to the Bank of his intention to sell the property and had completed an Agreement for Sale. Nonetheless, the Bank entered into an Agreement for Sale under its power of sale. Mr. Francis complains that he advised the Bank's purchaser that the property had been sold. However, the Bank had agreed to sell the property for Nine Million Dollars ($9,000,000.00) despite the property being valued in excess of Thirteen Million Dollars ($13,000,000.00). Mr. Francis contends that there were serious issues to be tried and that damages will not be an adequate remedy. He claims he has an unusually strong and clear case.

The Applicant's case

[5] In his written submissions, Mr. Jones, Counsel for the Applicant, alleged bad faith on the part of the Bank. He contended that the property was valued at Thirteen Million Two Hundred Thousand Dollars ($13,200,000.00). However, the Bank embarked on selling the property far below the market value, at a time when the Bank knew the Applicant was selling the property. Counsel further submitted that the Defendant's purchaser was not a purchaser for value without notice.

[6] In his oral submission, Mr. Jones acknowledged, the line of cases supportive of the general principles enunciated in Marbella. He argued that, the Applicant was acting under a conditional consent of the Bank. According to Counsel, the Defendant was asserting that no undertaking had been given by a reputable financial institution. He further argued that the Court should consider the letter dated 7th July 2014 from Patterson Mair Hamilton to be an undertaking from Jamaica National Building Society, pursuant to a conditional consent given by the Attorneys-at-Law for the Bank.

The Defendant's Case

[7] Ms. Mullings, for the Bank, asserted that an application for injunctive relief to restrain the power of sale under a mortgage must satisfy two requirements. The first, is to pay into Court the amount claimed by the mortgagee and, secondly, that there are serious issues to be tried. She further asserted that this case does not involve the exceptions, to that ordinary rule as enunciated in **Mosquito Cove Limited v Mutual Security Bank Limited & Ors,** SCCA No. 57/2003.

[8] In relation to the Applicant's allegation of "bad faith", in that, the Defendant pursued a sale knowing that the Applicant had executed an Agreement for Sale; Ms. Mullings questioned whether the documentation before the Court supported the Applicant's contention that an Agreement for Sale had been executed at the time the Applicant claimed.

[9] In respect of the Transfer and the Agreement for Sale, only one was stamped in accordance with the **Stamp Duty Act**. The Stamp Duty Act, she asserted requires that an Agreement for Sale should be stamped within seven (7) days. It was contended that although the Applicant claimed that the Agreement for Sale was completed in April 2014, the duties of the Transfer were only paid in July 2014; with the Transfer being dated the 4th July 2014. Further in her submission, Ms. Mullings, questioned the reliability of the valuation which was done in 2009.

Discussion

[10] On an application for interim injunction to prevent a mortgagee from exercising a power of sale under a mortgage, special rules have evolved, which must be taken in mind, in considering such an application. These rules were applied for the first time in the jurisdiction in the case of **SSI (Cayman) Limited v International Marbella Club S.A** SCCA No.57/1986, judgment delivered on 6th February 1987. These rules have been subsequently adopted by Morrison JA in **Mosquito Cove**, and have been well settled in England more than a century.

[11] In **Patvad Holdings Limited & Ors. v Jamaica Redevelopment Foundation & Ors.,** Claim No. 2006HCV01377, judgment delivered on March 9, 2007**,** McDonald-Bishop, J (Ag.), opined that these special rules were to be considered as well as general principles governing the grant of an interim injunction. The learned judge relied on the principles enunciated in the **American Cyanamid v Ethicon Limited** (1975) AC 396 and then went on to say at paragraph 16, inter alia:

> "*Special rules have evolved governing this question of restraining a mortgagee's power of sale. It means then that those special rules must also be taken into account in determining whether interlocutory relief should be granted to the mortgagor in the given set of circumstances."*

[12] In **SSI (Cayman) Limited v International Marbella Club S.A**, Carey JA, quoted with approval Cotton LJ, in **McLeod v Jones** (1884) 24 Ch. D 289, at p299:

> *"Now under ordinary circumstances the Court never interferes unless there is something very strong; it does not interfere on any suggested case without requiring the plaintiff applying to pay into court not what the judge of the Court on hearing the evidence is satisfied will probably be the amount due, but what the mortgagee, the accounts having yet been taken swears his due to him on his security. And that is perfectly right, because we ought not to prevent the mortgagee from exercising the powers given to them by their security without seeing that they are perfectly safe.*

See also **Halsbury's Laws of England**, 3rd Edition, Vol. 27 at paragraph 301.

[13] The pith of Mr. Jones' submission is that, the circumstances of this mortgage is to be treated exceptional to the general principle adumbrated in the Marbella line of cases and provided evidence that there are serious issues to be tried. The circumstances outlined were; bad faith of the Defendant, who despite being aware that the Applicant was proceeding with the sale of the property, executed a sale of the said property at an undervalue, and thereby causing loss to the Applicant. The evidence provided in the affidavit of Michelle Naylor, as to the Applicant's conduct in dealing with this matter has not been challenged by the Applicant. The Bank's Attorneys-at-Law have contended that the date on the transfer is not 9th April 2014 but instead a date in July 2014 and requires strict proof that the date of the Agreement for Sale, is in fact 9th April 2014.

[14] The Defendant contends that the valuation relied on is not reliable for the purposes of assessing the current value of the property. The highest bid received at the auction sale held on the 11th July 2013, was Ten Million Three Hundred Thousand Dollars ($10,300,000.00). However, the bidder failed to present a cheque in a timely manner. The Defendant alleges that the bidder at that auction

was a relative of the Applicant and the Secretary of Fourth World Investment Corporation Limited, the company that the mortgage loan was used to secure the loan.

[15] The discretionary nature of the injunctive relief sought, has given rise to exceptions. The court does not interfere, "unless there is something very strong". (See, Carey J in Marbella). Morrison JA. categorized these exceptions in Mosquito Cove. In outlining the exceptions Morrison JA referred to several cases. In **Gill v Newton** (1866) 14 WR 490, the Court of Appeal, overturned the refusal of the judge below to grant an injunction where the mortgagee had been put into possession by a separate deed, which reserved all of the mortgagee's rights and remedies. The deed allowed upon trust the taking of the rents and profits of the property and to pay himself and certain prior encumbrances. Knight Bruce LJ and Turner LJ, opined that, they would not have interfered with the first instance ruling, were it not for the unusual terms of the deed. Turner LJ, was not "inclined to interfere upon the facts as they stood with reference to the mortgage security itself."

[16] The general principal was also departed from in **MacLeod v Jones** (1883) 24 Ch D. 289, by the unusual circumstance that the mortgagee was also the mortgagor's solicitor. The Court of Appeal, was of the view that the unique position of the mortgagee as not only mortgagee, but, critically, as the mortgagor's solicitor, and as such, owing independent fiduciary duty to her. The Court granted the injunction without the usual condition of payment into court of the amount due under the mortgages, but on condition the plaintiff pays into court, a sum sufficient to cover the actual amount of money which the defendant had advanced on her behalf. Despite the departure from the ordinary rule, the court protected the mortgagee to the extent of the sums actually expended by him, even if not the full amount due under the mortgages.

[17] In the Jamaican Court of Appeal case, **Rupert Brady v JDRF & Ors.** SSCA No. 29/2007 judgment delivered 12 June 2008, the mortgagor's complained that he had not signed the relevant mortgage documents and had not given authority to anyone to pledge his property as security and that the alleged mortgage was therefore null and void. In granting an injunction to restrain the mortgagee's exercise of the powers of sale, payment was ordered into court by the mortgagor in the sum of $414.2 Million, the amount due under the mortgage. Panton P, observed, "it would be unjust to demand that (the mortgagor) deposit such a huge sum." Cooke JA, made a distinction between cases, "*where the issue is in respect of the amount owed under a valid mortgage and cases where the validity of the mortgage is challenged*…".

[18] The Court of Appeal, in Mosquito Cove approved a statement of the rule as formulated by Fisher and Lightwood in **Law of Mortgage** (11th Edn.), which states;

> "*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 face of the mortgage, the claim is excessive, in which case the amount claimed less such excess must be tendered or paid****."[****Emphasis provided****].*

The Applicant complains of bad faith on the part of the Bank and a sale at an undervalue. This case does not fit into any of the existing exceptions. The motive of the mortgagee is not a factor for consideration in these proceedings.

[19] In keeping with the general principles on an application for interim injunction is the determination of whether there is a serious issue to be tried. The main contention of the Applicant is that the Defendant acted in bad faith. The Defendant has highlighted in the affidavit of Michelle Naylor, filed and dated 21st August 2014, in opposition of the application, what counsel calls "a course of dealings", by the Applicant. This according to her demonstrates a pattern of defaulting and not following through on the undertakings given. The Applicant listed the Defendant's letter of October 11, 2011, which indicated an intention to exercise a power of sale. It was pointed out that having made a part payment, the Applicant requested a further sixty (60) days to complete payment of the arrears. The amount was thereafter settled in full on October 25, 2011.

[20] However, six months later the Applicant was again in default of his mortgage payments. Consequently, the Bank notified him of an intention to exercise its power of sale and of the total sum outstanding. On 4th February 2013, the Applicant was further advised of the Bank's intention to exercise its power of sale. On 21st February 2013, a letter from the Applicant's Attorneys-at-Law promised "a significant payment within 14 - 21 days. On 26th February 2013, the Bank granted the Applicant an extension of twenty (20) days within which to make the payment of the outstanding sum of Three Million and Twenty Thousand Dollars ($3,020,000.00) on or before 18th March 2013. Three days after the extension date, a payment of One Million Dollars ($1,000,000.00) was made by the Applicant who promised to pay another One Million Dollars ($1,000,000.00)

on or before April 30th 2013. The Bank notified the Applicant on 21st March 2014 that no further extensions would be granted.

[21] The Applicant's Attorneys-at-Law advised on April 3, 2013 that they were selling the property and had found a purchaser and further advised that the details of the contract would be sent within another seven (7) days. On the 15th April 2013, the Bank's Attorneys-at-Law were instructed to exercise the power of sale. Thereafter, the auctioneers, D.C. Tavares Finson Limited, scheduled an auction for July 11, 2013. Subsequently, by letter dated 4th July 2013, the Applicant's Attorneys-at-Law advised that the property was sold and they were awaiting a commitment letter from the purchaser and were requesting that the property be removed from the auction list.

[22] On July 11, 2013, a bid of Ten Million Three Hundred Thousand Dollars ($10,300,000.00) was received. The auctioneer subsequently advised that there was a failure to present the cheque in a timely manner by the winning bidder. On that same day the Applicant presented the Defendant with a cheque for One Million Dollars ($1,000,000.00). It was alleged that the winning bidder was a relative of the Applicant and Secretary of Fourth World Investment Corporation Limited. The Applicant has since advised that the sale they had embarked on has been aborted. The allegations have not been answered by the Applicant.

[23] On the 31st October 2013, the Applicant's Attorneys-at-law, by letter indicated that the arrears would be cleared. They enclosed a commitment letter of another property and promised that the proceeds of sale would be used to clear the arrears. The Defendant's Attorneys-at-Law having viewed an undertaking from the Bank of Nova Scotia Jamaica Limited addressed to the Applicant's Attorneys-at-Law noted that the execution of the power of sale in respect of another property was stayed.

[24] On 20th January 2014, the Applicant advised that the sale of Mona Great House was proceeding and that the funds to settle the arrears would soon be forthcoming. However, the mortgage was not settled from the sale of the Mona Great House property. On April 9th 2014, the Defendant was sent a letter of undertaking that the property was being sold and that the mortgage account held by the Defendant would be settled.

[25] The Defendant's Attorneys-at-Law in a response dated 29th April 2014, stated:

> *"If we do not receive full settlement of the loan or alternatively from a reputable financial institution*

> *acceptable to the bank, the bank will be obliged to proceed with the sale of the property.*

In paragraph 39 of the affidavit of Michelle Naylor, the Defendant's Attorneys-at-Law noted that they were advised by letter dated May 1, 2014 from the Applicant's Attorneys-at-Law that the sale was proceeding.

However, the Defendant's Attorneys-at-Law complained at paragraph 39, of the affidavit of Michelle Naylor that:

> *"The firm Naylor & Mullings, did not receive any undertaking to settle the mortgage loan or payment of the arrears on the loan..."*

A similar complaint was made in respect of the Applicant's letter dated the 13th June 2014. Consequently, the Defendant proceeded to sell the property by private treaty.

[26] On the 7th July 2014, the Defendant's Attorneys-at-Law, received a letter of undertaking from a firm of Attorneys-at-Law, addressed to the Applicant's Attorneys-at-Law, in respect of the Applicant's property. The Defendant, response was that:

> *'the property was already sold…..at that time no undertaking had been issued by a reputable financial institution to the Defendant in respect of the mortgage loan.*

[27] In the circumstances of this case, it appears to me that damages would provide the Applicant with an adequate remedy for any loss caused by the refusal to grant an interlocutory injunction, if the Applicant were to succeed at the trial, in establishing his right to a permanent injunction. There is no evidence that the property enjoys any unique feature, for which damages would not compensate. No question had been raised that the Defendant, a financial institution would not be in a financial position to pay such damages. In his argument against the adequacy of damages, the Applicant complains that the Bank in the exercise of its power of sale had exposed him to a lawsuit for breach of contract and that damages would be at large. The answer to that concern; is the ability of the Applicant to bring an ancillary claim against the Defendant. It seems to me that damages are an adequate remedy. I would accordingly refuse the injunctions sought.