

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO 2007 HCV 02027**

BETWEEN	PAULETTE HAMILTON	CLAIMANT
AND	GREGORY HAMILTON	FIRST DEFENDANT
AND	RONHAM & ASSOCIATES LTD	SECOND DEFENDANT
AND	JAMAICAN REDEVELOPMENT FDN	THIRD DEFENDANT

IN CHAMBERS

Gayle Nelson for the claimant

**Sandra Minott-Phillips and Ky-Ann Lee instructed by Myers Fletcher and Gordon
for the third defendant**

JULY 10 and 12, 2007

**APPLICATION FOR INJUNCTION, MORTGAGE, EXERCISE OF POWER OF SALE
BY PURCHASER OF MORTGAGE FROM MORTGAGEE, SECTIONS 3, 58, 63, 71
AND 105 OF THE REGISTRATION OF TITLES ACT, UNDUE INFLUENCE,
FRAUD**

SYKES J.

1. There is a house standing at 8 Carmel Crescent, in Cherry Gardens, in the parish of St. Andrew. The registered proprietors of the legal estate are Mr. Gregory Hamilton, the first defendant, and Mrs. Paulette Hamilton, the claimant. They are now husband and wife but at the time the property was transferred to both parties as joint tenants she was Miss McKenzie. The transfer was registered on August 5, 1994. The house is registered at volume 1056 folio 925 of the Register Book of Titles.

2. On January 7, 1999, Workers Savings and Loan Bank ("WSLB") registered a mortgage against the property. The mortgage instrument was stamped to cover a mortgage of up to \$20,000,000.00 with interest. There is no denial that money was borrowed and there is no denial that it has not been repaid. The debt was transferred to Jamaican Redevelopment Foundation ("JRF"), the third defendant, a company incorporated in the State of Texas in the United States of America and registered in Jamaica as an overseas company. JRF purchased the mortgage purchased the mortgage from the Financial Sector Adjustment Company ("Finsac") which had taken over the debt for WSLB. Finsac is a government controlled company that was established to salvage the financial sector after the financial sector crisis of the 1990s. The transfer of the mortgage to JRF was registered on the title on September 5, 2003. JRF to enforce the security for the mortgage.

3. Mrs. Hamilton is fighting JRF's enforcement action. Her response was to file a fixed date claim form on May 11, 2007, in which she is seeking relief from the mortgage on the grounds that her husband exercised undue influence over her. In addition, she sought and secured a without notice interim injunction from Morrison J (Ag) on May 11. The injunction restrained JRF for fourteen days from exercising its power of sale contained in the mortgage it bought from Finsac. When the matter came back for an inter partes hearing, on May 25, 2007, Mrs. Hamilton's attorney at the time, Mr. Oswald James was made aware that there was a letter, dated January 23, 1998, from Delroy Chuck & Company, attorneys at law, to WSLB, in which the attorneys stated that they "explained to Miss McKenzie a single wonam (sic) the legal implications and ramifications of having both properties one of which she is a joint tenant along with Mr. Gregory Hamilton, used as collateral to secure a loan from your institution." The letter, on the face of it, suggested that she had received independent advice. Naturally, faced with this, Mr. James decided not to pursue his application at the inter partes hearing because his case was based on the premise that Mrs. Hamilton had not received independent legal advice - position that he would have difficulty in maintaining in light of the January 23 letter (see para. 16 of Mrs. Hamilton's affidavit filed May 11, 2007 in support of without notice interim injunction). Mr. James withdrew his application.

4. Mrs. Hamilton changed attorneys and retained the services of Mr. Gayle Nelson who appeared before McDonald J. (Ag) on Friday, July, 6, 2007, seeking another without notice interim injunction restraining JRF from exercising its power of sale. Her Ladyship declined to deal with the matter ex parte and ordered that JRF be served. JRF has been served and the matter is now before me on an inter partes hearing in which Mrs. Hamilton wishes to restrain JRF from exercising its power of sale until her claim of undue influence is tried.

The claimant's submissions

5. Mr. Nelson has relied heavily on the House of Lords decision in *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] 3 W.L.R. 1021. In that case the House laid down principles that should guide lenders who are advancing loans in circumstances where they become aware that a wife is acting as guarantor or surety for her husband. Having regard to my conclusion it is not necessary for me to pronounce upon the merits of the decision of the House and whether I agree with their Lordships analysis and the direction in which they have pushed the law. In my view, Mrs. Minott-Phillips has erected an insurmountable response to Mr. Nelson's submission. I fear that Mr. Nelson's case has been swept completely from the table.

6. Mrs. Minott-Phillips made the very obvious but telling point that the fixed date claim form raised only the issue of undue influence exercised over Mrs. Hamilton by her husband, Mr. Gregory Hamilton, at the time the mortgage over the property was granted to WSLB. Mrs. Minott-Phillips made another elementary but far reaching submission that there is no allegation that JRF was a party to the mortgage in 1999

and neither is there any allegation or evidence that JRF acted dishonestly. These seemingly innocuous observations have produced an unanswerable defence. In order to appreciate this, I now turn to the Registration of Titles Act ("RTA").

7. It is perhaps unfortunate that the RTA is called the Registration of Titles Act. It should properly be called, the Title by Registration Act, because it is the registration of title or any other interest or estate in land that enables the proprietor of the interest or estate to receive the full benefit of the legislation provided there is no dishonesty in him.

8. Let me begin with the definition of proprietor. In section 3 of the RTA, *proprietor* is defined in these terms:

Proprietor shall mean the owner soley, or jointly or in common with any other person, whether in possession, remainder, reversion, expectancy or in tail, or otherwise, of land, or of a lease, mortgage or charge; and such word shall also include the donee of a power, or other person empowered or authorised to appoint or dispose; (My emphasis)

9. The punctuation of the definition of proprietor makes it obvious that the noun "owner" applies not only to those who "own" an estate in land, but also to those who "own" a *lease, mortgage or charge*. The whole scheme of the RTA is designed to protect registrable estates or interests that have in fact been registered. Under the RTA, the critical date for most purposes is the date of registration and not the date of creation. Before estates or interests granted in respect of land registered under the Act, can take effect, they must be registered (see sections 58 and 63). The importance of registration can hardly be overstated. In section 105, the mortgage or charge, *when registered*, has effect as a security. Now we come to section 71.

10. Section 71 of the Act states:

Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for which such proprietor or any previous proprietor was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud. (My emphasis)

11. When section 71 is read on the context of the RTA it is beyond dispute that the adjective "registered" in the phrase "registered land, lease, mortgage or charge", applies to and qualifies not only "land" but also "lease, mortgage or charge". If this were not so, then section 105, would be deprived of significant efficacy.

12. In section 71, fraud means actual dishonesty and not merely equitable fraud (see *Asset Company Limited v Mere Roihi* [1905] A.C. 176; *Enid Timoll-Uylett v George Timoll* (1980) 17 J.L.R. 257, 261D; *Willocks v George Wilson and Doreen Wilson* (1993) 30 J.L.R. 297). The significant point to note about section 71 is that it protects not only those taking an estate in land from a registered proprietor but also anyone contracting, dealing with or proposing to take any transfer from the proprietor of any registered mortgage. I say proprietor of a registered mortgage because of the definition of proprietor already stated. The person taking such a transfer from a registered mortgagee, just like the person taking a transfer from a registered proprietor of an estate in land, is not required to enquire or ascertain the circumstances under which the registered mortgagee came to be registered. The transferee of the mortgage is not affected by notice, actual or constructive or any unregistered interest despite the existence of any rule of law or equity saying the contrary. This provision in section 71 has wide consequences. The complex doctrines of notice, particularly constructive notice which as within it the doctrine of imputed notice does not apply to transfers covered by section 71. For the removal of doubt, the section concludes by pointing out that knowledge of any trust or unregistered interest shall not, without more, be imputed or treated as evidence of fraud. Unregistered interest in section 71 means unregistered interest in land and not a personal claim in equity that a claimant may have against another party to a transaction involving either the grant of a mortgage or charge over land or the disposition of an estate in land. Mrs. Hamilton's claim of undue influence is not an unregistered interest in land. It is a personal claim she has against her husband.

13. If the existence of undue influence is not an interest in land (and even if it were, the transferee of the mortgage is not required to make any enquiries and there is no allegation of dishonesty against the transferee), then it immediately becomes clear that Mrs. Hamilton's claim against JRF has been punctured below the waterline. The removal of any duty to ascertain or enquire into the circumstances leading up to the grant of the mortgage means that Mrs. Hamilton's claim against JRF is unsustainable in law unless she can prove fraud. The point therefore is that JRF which took the transfer of the mortgage from Finsac is not required to see whether WSLB took all appropriate steps as indicated by *Etridge*, because such steps would fall within the word "circumstance" as used in section 71.

14. Section 71 clearly recognises that there may be breaches of equitable principles that may entitle the mortgagor to have the mortgage set aside. If the mortgagor does not exercise that right before the mortgagee has transferred the mortgage to another, whatever defect there might have been in the circumstances leading up to

the mortgagee becoming a registered proprietor of the mortgage, that defect cannot affect the person taking the mortgage from the mortgagee unless that person is guilty of actual dishonesty.

15. JRF cannot be prevented from enforcing the mortgage it bought because of any defect which would have entitled Mrs. Hamilton to set aside the mortgage. There is no evidence of actual dishonesty in JRF. One of the purposes of the RTA is to protect persons who purchase registered interests from the registered proprietor of such interests. The law recognised that there will be a loss. The legislators had to decide which of the two parties should bear the risk of loss in the event of a defect in the contractual process leading up to a mortgage. Should it be the victim of undue influence or the person who purchased from the registered mortgagee? The legislators came down in favour of the purchaser, once he is not dishonest. There is no further balancing to be done by the courts. Section 71 has already struck the balance.

16. In the event that I am wrong in the conclusion just stated, I now consider whether an injunction should be granted in this case. In this jurisdiction, there is a very strong general rule that a mortgagee will not be restrained from exercising his power sale unless there are special circumstances which would prompt the court to restrain the mortgagee (see *SSI (Cayman) Limited v International Marbella Club S.A.* SCCA No 57/86 (delivered February 6, 1987)). If the mortgagee is restrained it is usually on terms such as payment of the full sum claimed by the mortgagee or such other sum as stipulated by the court. Mr. Nelson invited the court to say that his claim for undue influence was a very strong one with a very good prospect of success. Mr. Nelson's submissions have not satisfactorily accounted for JRF which has not been shown to have acted improperly when it acquired the mortgage debt. Indeed such information that was available to JRF indicated that Mrs. Hamilton had received independent legal advice (see letter from Delray Chuck & Company dated January 23, 1998). I am aware that Mrs. Hamilton is challenging this position but I am looking at the matter from JRF's perspective when it purchased this debt. It would seem to me that if I were to restrain JRF it would have to be on terms that Mrs. Hamilton pays into court the amount alleged to be owed which is now at least \$65,000,000.00. There is no evidence that Mrs. Hamilton is able to pay this amount. That aside, Mrs. Hamilton would have to give an undertaking as to damages. There is no evidence of the financial health of Mrs. Hamilton, who, until she is extricated from the mortgage, is a debtor. This is an additional reason why I refused to grant the injunction.

17. I must say a few words about an agreement struck between the claimant and JRF. It is called a restructured debt agreement. The claimant did not seek any relief in respect of this agreement in the fixed date claim form filed in this matter. It was dealt with in the affidavit of Mrs. Hamilton and Mr. Nelson during his submissions. Mrs. Minot-Phillips rightly took the point that Mr. Nelson could not

properly put that agreement in issue when he has not made it an issue in his claim form. Mr. Nelson expended much energy assailing the agreement and castigating JRF for its failure to comply with *Etridge* when concluding the agreement. This point is academic because JRF is the holder of the mortgage and is protected by section 71 of the Act. If the agreement goes, then the original debt still stands due and owing. I would have thought that since the agreement reduced the mortgage debt by one third that the claimant would have been pleased.

18. Finally, a word on the attempt by the claimant to suggest that Mr. Oswald James did not act in her best interest. Mr. James based his case on the premise that his client did not receive independent legal advice. He secured a without notice injunction for his client. When the matter came back for the inter partes hearing he was presented with the January 23 letter from Delroy Chuck & Company. No responsible attorney could have persisted with the application on the basis of none receipt of independent legal advice. The factual basis for the application had been removed. According to Mrs. Hamilton, the Judge at the inter partes hearing enquired of Mr. James about the restructured debt agreement but he nonetheless withdrew the application. As already noted, no complaint was made in the claim form about the agreement. Mr. James appreciated that the court, at the without notice hearing, was not apprised of all relevant information. I have spent some time on this because Mrs. Hamilton ought to understand that her then attorney was acting as any competent attorney ought to act.

Conclusion

19. JRF is protected by section 71 of the RTA. It is not under any obligation to find out whether WSLB complied with the *Etridge* guidelines and there is no evidence that JRF is guilty of actual dishonesty. This means that there is no serious issue to be tried between Mrs. Hamilton and JRF.

20. If the conclusion in paragraphs 14 and 15 is wrong, then I would still decline to grant the injunction because there is no evidence that Mrs. Hamilton is able to pay into court the sum currently said to be due. The application for the injunction is dismissed with costs to JRF to be agreed or taxed.