[2014] JMCCCD 10

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013CD00146

BETWEEN	**JMMB MERCHANT BANK LTD**	**CLAIMANT**
AND	**WINSTON FINZI**	**FIRST DEFENDANT**
AND	**MAHOE BAY COMPANY LTD**	**SECOND DEFENDANT**

Michael Hylton QC and Shanique Scott instructed by Hylton Powell for the claimant

Paul Beswick, Carissa Bryan and Kayode Smith instructed by Georgia Buckley of Ballantyne, Beswick & Co for both defendants

October 8 and 13, 2014

INJUNCTION – APPLICATION TO RESTRAIN MORTGAGEE EXERCISING POWER OF SALE

SYKES J

[1] Mr Winston Finzi is trying to prevent the sale of his house where he has lived, worked, did business and raised his family for the past thirty years. JMMB Merchant Bank Ltd ('the bank') is insisting that it has the right to exercise the

power of sale contained in the mortgage which was executed by Mr Finzi when personal loans were made to him which were guaranteed by Mahoe Bay Company Limited ('the company'). These loans were said to have been made to Mr Finzi between 2006 and 2009. The bank acquired the mortgages when it bought Capital and Credit Merchant Bank ('CCMB') which was the original mortgagee. Mr Finzi has applied for an injunction to stop the bank from exercising its power of sale on the basis that the loans the bank is seeking enforce were already paid.

[2] Not only is Mr Finzi saying that the power of sale is not exercisable because he has already paid off all the loans but he is also asserting that the bank is liable to him for failing to account for money it collected on his behalf and applied in a manner contrary to his instructions and it is this malapplication of funds that has led to the current impasse between himself and the bank. Had the bank, he submits through counsel Mr Paul Beswick, utilised the funds in accordance with his instructions, the loans, which the bank wishes to enforce against the house, would have been paid in full. He further says that the bank has, at its highest, a fiduciary relationship with him and it has breached that duty when it misapplied the funds. This alleged breach forms the basis of his counterclaim against the bank which he says, if successful, is greater than the amount he is alleged to owe to the bank. In the alternative, Mr Finzi maintains that, at the lowest, the bank is in the kind of relationship with him that would entitle him to secure the remedy of account against the bank and this accounting, if ordered at trial, will reveal that the sums owed to him exceeds what he owes. Therefore, for all these reasons, the injunction should be granted without requiring him to pay, into court, the full amount the bank says he owes. Counsel added that should the court be minded to order sums paid into court it should be based on the amount the bank was willing to accept when it offered the house for sale at auction.

[3] For its part, the bank contends that there are two sets of loans. One set to Mr Finzi in his personal capacity and the other to the company. According to the

bank, the money which Mr Finzi alleges was misapplied was applied to the loans made to the company and those loans are now fully paid up. The loans in respect of which this enforcement action is being taken are those made to Mr Finzi personally. These loans were guaranteed by the company. Consequently, there is no misapplication of funds received on his behalf. The funds were in fact applied as agreed between Mr Finzi and the bank. The bank asserts that the documentary evidence are consistent with its position.

The legal principles

[4] The general rule is that any mortgagor who wishes to restrain the mortgagee from exercising his power of sale should pay the sum alleged by the mortgagee to be owed. In other words, the fact that the mortgagor disputes this amount does not mean that the sum to be paid is that alleged by the mortgagor; it is the sum stated by the mortgagee. This general rule has the following corollaries: (a) an allegation that the mortgagor has a counterclaim which, if successful, will be greater than the sum owed under mortgage is not a strong enough basis to prevent the exercise of the power of sale and (b) even if there is no counterclaim and the dispute is just about the amount of the debt that dispute does not provide a sufficient reason to prevent the mortgagee exercising his power of sale. This position was established in Jamaica by **SSI (Cayman) Limited v International Marbella Club SA** SCCA No 57/1986 (unreported) (delivered February 6, 1987).

[5] This rule has been applied ever since. If truth be told the interpretation and application of the **Marbella** rule by the Court of Appeal has never been satisfactory. It was applied as if it were a hardened common law rule rather than one which reflected the flexibility of equity. Mortgagees were happy but mortgagors were under constant threat of losing their property. Despite the consistency and rigidity with which the Court of Appeal interpreted and applied the rule, there were 'discordant' voices. For example, see Panton P (dissenting) in **Global Trust Limited v Jamaica Re-Development Foundation Inc** SCCA No 41/2004 (unreported) (delivered July 27, 2007) who was not entirely happy with application of the rule. Rattray P in **Flowers Foliage and Plants of Jamaica**

Ltd v Jamaica Citizens Bank Limited (1997) 34 JLR 447, while not mentioning **Marbella** by name, clearly had it in mind when he said that equity was not bound by unbreakable fetters and should be focused on what the facts and circumstances of the particular case requires.

[6] After two decades of struggle by mortgagors, the Court of Appeal of Jamaica, building on the legacy of Rattray P in **Flowers Foliage** and the disquiet of Panton P in **Global Trust** significantly altered course (**Mosquito Cove v Mutual Security Bank Ltd** [2010] JMCA Civ 32). The court explicitly confirmed that there were exceptions **Marbella**. Even more important, the court finally acknowledged what previous decisions had declined to do, namely, stating that further exceptions could be created. The qualification to this power to recognise exceptions is 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' (**Mosquito Cove** Morrison JA at paragraph 64). His Lordship added that 'these [enumerated possible exceptions] [are] examples only, which are by no means exhaustive' (**[64]**). It is therefore not surprising that Mr Finzi strove mightily to erect a fiduciary relationship between himself and the bank since this type of relationship was named as one of the possible exceptions.

[7] Morrison JA also stated that mortgagor/mortgagee disputes are sui generis which have seen the development of special principles to regulate the disputes. This court has had occasion to examine this area of law in the past. With the benefit of Morrison JA's examination of the law this court sees no reason to alter the position it took in **Farrell v Reid** Claim No 2008HCV05873 (unreported) (delivered May 5, 2009) at paragraphs 26 – 66. The position taken there has informed how the court has approached this matter.

The loans and their documentation

[8] Beginning with the personal loans to Mr Finzi, Mr Deryck Rose, on behalf of the bank, swore that between April 2006 and October 2009, Mr Finzi borrowed a

total of JA$50,990,000.00 and US$1,500,000.00. Properties, including Mr Finzi's home, were used to secure the loans. Mr Finzi defaulted. The bank demanded repayment by letter dated February 5, 2013. Mr Rose also stated the following: in March 2006, the bank received land bonds valuing JA$260,000,000.00 from the Commissioner of Land in respect of land acquired from the company. These bonds were sold for US$4,040,728.43 and these sums were applied to loans granted to the company.

[9] Mr Finzi also filed affidavits. Mr Finzi accepted that he borrowed in excess of JA$50m and used his house and other properties as security. He alleged that since that time the bank had been deducting money from his account held at the bank to service the loans. He has formed the view that the amounts deducted liquidated the debt completely inclusive of interest payments. He states that, should he be wrong, he is fully prepared to pay the full amount of money owed on a proper accounting. So much for the assertions. It is important to look at contemporaneous documents.

[10] The following two letters were placed on CCMB stationery because it was the lender and banker of Mr Finzi and the company at all material times. In a letter dated March 10, 2006, CCMB wrote to the company to say, '[a]s the outstanding debt in the company's name is denominated in United States currency, the net cash proceeds of J$265,855,890.30 will be converted to United States Dollars at today's selling exchange rate of JA$65.47 to the US dollar. This will result in a US dollar equivalent of US$4,060,728.43, which amount, will be applied to the company's debt today in reduction of same.'

[11] This letter was signed by the President and General Manager of CCMB. Below these signatures appeared this sentence: '*We have read the above and are in agreement with the same.*' Below this sentence was a space for the signature of the company. The letter was signed by an authorised person on behalf of the company and returned.

[12] There is another letter from CCMB to the company also of March 10, 2006. The letter told the company that CCMB had received land bonds from the Commissioner of Land valued at JA$260,000,000.00. The company was also told that the bonds could not be applied to the company's debts until they were sold or transferred or redeemed. CCMB suggested that it would sell or transfer the bonds and that it was 'seeking [the company's] immediate written confirmation that upon sale of the bonds, the said amount of $265,855,890.30 which the bank receives will be the amount applied to your loan upon conversion to United States currency at today's prevailing exchange rage of J$65.47 to the US dollar.' This letter was signed by the President and General Manager. Under those signatures is this sentence: '*Agreed and accepted as indicated above*.' The space for the signature was signed by an authorised person on behalf of the company.

[13] Comment on what has just been stated is hardly necessary but in order to reinforce the obvious the court observes that in the second letter mentioned at paragraph 12 above, CCMB proposed to the company that (a) the company was indebted to the bank; (b) CCMB had received the bonds; (c) the bonds would be converted to United States currency and (d) the money, on conversion, would be applied to the debt. The company indicated its agreement by signing the proposal and it was returned. In short, the company accepted that it was indeed indebted to CCMB. Once this admission was made then Mr Finzi's case for an injunction on terms outside of the general rule began to list badly.

[14] What we now have in light of all that has been said so far is this: Mr Finzi has admitted taking personal loans in excess of JA$50m. The letters confirm loans to the company. This is consistent with the mortgagee's position that there were two sets of loans and only one of those loans has been fully repaid.

[15] The first letter referred to in paragraphs 10 and 11 above indicated that CCMB would purchase the bonds if the company agreed. The company agreed by signing the letter and returned it. The conclusion has to be that the company

agreed to the proposal. On this premise the land bonds were applied to the loans made to the company. This was in 2006.

[16] The personal loans to Mr Finzi began in 2006, that is to say, these loans came into being when the loans to the company were being liquidated or were completely paid off and therefore by 2009 when the last personal loan was made to Mr Finzi the bonds were applied to company's loans three years earlier.

[17] Mr Beswick has sought to erect a fiduciary relationship and a consequential breach of fiduciary duty on what began as a debtor/creditor relationship. He relied on five factors:

a. the bank was the banker of Mr Finzi;

b. the bank received the bonds on behalf of Mr Finzi;

c. the acted for him when converting the bonds;

d. the proceeds were to be applied in the manner indicated by Mr Finzi;

e. the bank bought the bonds themselves

[18] As can be seen from this list, this is very unpromising material out of which a fiduciary relationship can arise. The banker and customer relationship is not a presumptively fiduciary such as lawyer/client, trustee/beneficiary or company/ company director. The reasons are obvious. A lender and the debtor from the commencement of the relationship have two different interests. The lender is not looking out for the best interest of the debtor. He has not undertaken any obligation of fidelity and loyalty. He has not promised to look out for the best interest of the debtor. The sole interest of the lender is getting back his money with interest at the appointed time and if not, he enforces the security. The authorities show that before a lender is held to be in a fiduciary relationship with a debtor it has to be shown that the lender crossed the line from an ordinary

lender and became advisor and confidante to such an extent that it can safely be said that he undertook to act for and on behalf of the debtor in a particular matter and by virtue of that decision a relationship of trust and confidence arose.

[19] It must be appreciated that a lender who holds security thereby becoming a secured lender holds the power of sale for his purposes. It is not held on trust in order to be exercised in a manner beneficial to the debtor. The mortgagee can exercise the power of sale even if the time at which the power is exercised may be disastrous to the debtor. The duty owed by the mortgagee to the mortgagor is that the power of sale must be exercised for the purpose for which it was inserted into the mortgage instrument, namely, to realise or convert the security into cash. All this shows why a banker/lender does not fall within the presumptively fiduciary relationships. It also shows why the case law insists that there must be something more before the banker/lender can be held to be a fiduciary to the debtor. Once the mortgagee properly describes the property and makes a good faith effort to get the best possible price, it is virtually impossible to hold him accountable.

[20] From the outset of a debtor/creditor relationship the creditor's interest is antagonistic to the debtor. The creditor or lender does not advise on the wisdom of any particular transaction. He has no duty to tell the debtor that the purpose of the loan is foolish. Once the debtor demonstrates he can repay the loan the creditor may choose to lend. These principles are derived from **National Commercial Bank (Jamaica) Limited v Hew** (2003) 63 WIR 183; **Financial Institutions Services Ltd v Negril Holdings Ltd and Another** (2004) 65 W.I.R. 227; **Commonwealth Bank of Australia v Smith** 42 FCR 390; **Golby v Commonwealth Bank of Australia** 72 FCR 134 and **Bristol and West Building Society v Mothew (t/a Stapley & Co)** [1996] 4 All ER 698.

[21] As Millett LJ said in **Mothew** at page 712, breach of fiduciary obligation speaks to disloyalty and infidelity and not mere negligence or incompetence. A loyal fiduciary who does silly things is not guilty of a breach of fiduciary duty. He may

be stupid but not disloyal. From this discourse, what Mr Beswick is relying on to raise a fiduciary duty cannot do so and definitely not in the face of signed letters agreeing to the specified course of conduct proposed by CCMB. From the material presented so far, there is no evidence of a fiduciary relationship and consequently there is no evidence of any breach of fiduciary relationship. The best that can be said is that since they are debtor/creditor then the creditor is obliged to account for the proceeds of sale of security at the end of the enforcement process.

[22] Mr Finzi has not said that no loans were owed by the company. He has not denied that the letters were signed by the company. Neither has the company said the letters were not signed by an authorised officer.

[23] The attempt to turn CCMB into fiduciary was linked with the assertion that it failed to account for the land bond money. The reasoning is that CCMB as a fiduciary is under a duty to account to the company. It was also said that what it did was to apply the money to loans which were statute barred and by applying the money to these loans deprived the company or Mr Finzi from raising the limitation defence. This was said to be surreptitious behaviour and provides another reason why an injunction should be granted outside of the general rule.

[24] From the admission by Mr Finzi that he borrowed money from the bank, from the letters of March 10, 2006 and from the all the affidavit evidence it is not easy to determine why it is was said that CCMB failed to account for the land bond money. It used the money, with the company's written agreement, to pay off the loans owed by the company. It is not immediately obvious what more needed to have been done by the bank particularly since it appears that since 2006 neither Mr Finzi nor the company raised any concerns about the arithmetic regarding the outstanding loans owed by the company. Surely, the lender would be entitled to conclude that the debtor had no complaints.

[25] Mr Beswick sought to say that there is a serious dispute over whether the power of sale has arisen. This admittedly, is one of the grounds on which an injunction can be granted but unfortunately the contemporaneous documentation which came into being when litigation was far from the minds of the parties undermines this contention. Once the land bonds money was applied to the company's loans and there was no other sum of money paid to the bank in respect of Mr Finzi's personal loans then it is difficult to see how the exercise of the power of sale can be halted on terms which do not apply the general rule.

[26] The final point urged by Mr Beswick was that the parties are to attend mediation. The submission was that in light of this development, then should the bank exercise its power of sale before the mediation process had run its course mediation would be undermined. This court accepts the concerns of Mr Hylton QC that the mediation process has nothing to do with the exercise of the power of sale. However, the point is that under the current system of civil procedure, unless the case is exempt, once the defence is filed there is mandatory mediation. The purpose of mediation is to have the parties resolve their dispute without a trial. On the other hand, there is the regulatory framework within which banks and other lenders operate which is that once a loan has not been serviced for three months then it has to be treated as if it will not be recovered and the institution has to make provision for this loan as a bad debt. If this continues indefinitely the capital base of the institution may be impaired and affect its ability to make further loans. In this particular case, the loans have been outstanding for some time and there is no evidence of ill effects on the lender. Also in any event, if the money is paid into court, it does not go to the mortgagee and thus the mortgagee is still out of pocket until the claim is heard and determined. As a practical matter, the consequence is that the mortgagee would still have to make provision for the loan as a bad debt or unrecoverable loan and the impact on its capital base would be the same. Looking at things in the round, a case can be made for the grant of an injunction but on terms that respects the mediation process and supports it while at the same time recognising the rights of the

mortgagee. The question is what terms should be in the order to give effect to what has been said

[27] The mediation process is due to begin on October 16, 2014. That is just a few days away. The court is of the view that that process should be given an opportunity to work. Having said this, the parties must work under a time constraint to bring the mediation to closure soon. So too the mediator must make himself or herself available to hear and complete the mediation.

Disposition

[28] The court is minded to grant the injunction so that mediation process can take place. The court thinks that three weeks are sufficient for that process to begin and end. The parties must be prepared to work outside of regular working hours and on weekends if necessary.

[29] The injunction is granted on these terms. The mediation process must commence on October 16, 2014 and must end by November 6, 2014, unless the court orders otherwise. During this period, that is October 16, 2014 to November 6, 2014, the applicant is not required to pay any money into court. However, if there is agreement or no resolution then the injunction dissolves on November 7, 2014 unless the applicant pays the full amount claimed by the mortgagee into court or produces an appropriate letter of undertaking from a financial institution licenced to operate in Jamaica to pay the full sum claimed by the mortgagee. This letter of undertaking should not expire until the matter is tried. The court is of the view that this way of managing this dispute recognises the new culture of the civil procedure rules of mandatory mediation while at the same time recognising the right of the mortgagee to exercise his power of sale. The parties are to submit an order giving effect to these reasons for judgment.