[2013] JMCA App 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 130/2012

APPLICATION NO 11/2013

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**JOHN LEDGISTER**	**1ST APPLICANT/APPELLANT**
AND	**SUNNYCREST ENTERPRISES LTD**	**2ND APPLICANT/APPELLANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC.**	**RESPONDENT**

John Ledgister appears in person for himself and also represents the 2nd appellant

Mrs Sandra Minott Phillips QC and Mrs Alexis Robinson instructed by Myers Fletcher and Gordon for the respondent

18 March and 10 May 2013

HARRIS JA

[1] This is an application by the appellants to discharge or vary an order of Panton P made on 15 January 2013, refusing an application made by them for an interim injunction. The learned president refused to grant an injunction for the reason that the

application is without merit. The principal ground upon which the applicants seek to set aside or vary the order of the learned president is that such order is unjust.

[2] The 2nd applicant is the registered proprietor of lands at Forest Pen in the parishes of Westmoreland and Saint Elizabeth, registered at Volume 1175 Folio 850. The 1st applicant is the managing director and a shareholder of the 2nd applicant. The respondent acquired a debt which has its genesis in a loan to the applicants by the National Commercial Bank (NCB). Between 31 August 1992 and 4 October 1994, three loans were obtained by the applicants from the NCB on the security of the Forest Pen property by way of mortgages, namely, 729730, 764567 and 832252. On 27 July 2000, by a deed of assignment, the mortgages were transferred to Refin Trust. On 13 June 2003, they were transferred to the respondent. On 8 July 2005, the respondent and the applicants entered into an agreement restructuring the debt (the Restructure Agreement) in which it was stated to be US$855,000.00. On 2 May 2012 a notice, making a formal demand for a sum of US$1,101,978.25, was sent to the applicants by the respondent.

[3] In an amended claim form, filed on 29 June 2012, the applicants seek the following orders against the respondent:

> "1. Rescission of the Agreement To Restructure Existing Debt dated July 8th, 2005.
>
> 2. A Declaration that the Agreement To Restructure Existing Debt dated July 8th, 2005 is null and void and does not have legal charge over the premises at Volume 1175 Folio 850 of the Registered [sic] Book of Titles unless debt claim [sic] verified, validated and authenticated.

3. Damages, Restitution and Accounting of Profits for Fraudulent Misrepresentation, Undue Influence, Economic Duress, Unconscionable & Unjust Enrichment is [sic] alternative to number (1) herein.

4. An injunction to Restrain the Defendant (whether acting by itself, its servants, and or its agents or otherwise or howsoever) from doing any of the following acts:

   (i) Selling, pledging or disposing in any way of premises registered at Volume 1175 Folio 850 of the Registered [sic] Book of Titles.

5. An Order for Discharge of Mortgage #729730, #764567, #832252 for parcel registered at Volume 1175 Folio 850 of the Registered [sic] Book of Titles.

6. An Order for the return of Claimant's Duplicate Certificate of Title registered at Volume 1175 Folio 850.

7. Costs

...″

[4] The applicants had originally filed a fixed date claim form on 31 May 2012, and on that date they sought and obtained an interim injunction against the respondent, restraining it from selling the property. The interim injunction was renewed on several occasions. On 31 July 2012, the applicants filed an amended particulars of claim to which reference will be later made. On 5 September 2012, an inter partes hearing proceeded before Donald McIntosh J who refused to grant the injunction. The applicants filed a notice of appeal against the order of McIntosh J and subsequently sought to obtain an interim injunction pending the hearing of the appeal which was refused by the learned president.

[5] The 1st applicant submitted that the debt which the respondent has claimed as due and owing was obtained by fraud, fraudulent misrepresentation, extortion, undue influence and duress, and as a result the Restructure Agreement ought to be declared null and void or rescinded. It was also the applicants' contention that by unconscionable means the respondent had obtained an unjust enrichment.

[6] It was also the 1st applicant's submission that the respondent has advertised the property for sale without "validating, verifying or authenticating" its claim of an indebtedness by the applicants. The respondent, having not verified, validated or authenticated the debt, has no legal right of sale as a mortgagee, he argued. The respondent, he contended, issued threats in forcing the applicants to sign the Restructure Agreement notwithstanding their protests that the debt was invalid.

[7] He further contended that the respondent knew the debt was an unlawful penalty and that the debt was based upon a false claim by way of unlawful threats to sell, the respondent, being in considerable power, strength and influence over the indigent applicants. He cited the case of ***Financial Institutions Services Ltd v Negril Negril Holdings Ltd and Another*** [2004] GE WIR 227 in support of this submission.

[8] The respondent, he argued, by reason of fraudulent misrepresentation, knowing that the debt was false, issued false statements of account and failed to provide the applicants with relevant information concerning the account. It was further argued that the respondent by use of unlawful coercive powers seeks to enforce the unlawful debt.

[9] He contended that on 28 February 2012, he attended a meeting with the respondent, at which time he was shown three returned cheques, a mortgage document and other documentation. He raised certain questions with respect to the documents but the response he received was highly unsatisfactory.

[10] The property, he argued, although originally zoned as agricultural land, was re-zoned in 1995 as residential; a subdivision approval was obtained in December 2010 and an appraisal report placing the valuation of the property at US$25,000,000.00 was done. The respondent, in late 2011, secured a valuation of the land describing it as farm land despite the 1st applicant informing it that a subdivision approval had been obtained. Despite this, he submitted, the property was advertised for sale for US$900,000.00.

[11] There are serious issues to be tried, he submitted, and an injunction should be granted. The respondent, he contended, is foreign-based and could depart from the island at any time and this would preclude the applicants from recovering damages from it.

[12] Mrs Minott Phillips QC submitted that there are no serious issues to be tried in the applicants' claim. Their claim for rescission of the Restructure Agreement or that it be declared null and void must fail as the claim in these matters could only be based on allegations of fraudulent misrepresentation or fraud on the part of the respondent, and no allegations of fraudulent misrepresentation were set out in the amended particulars of claim, nor was fraud alleged or particularized.

[13] The Restructure Agreement does not give the respondent a legal charge over the property as claimed by the applicants, she argued, as the respondent's interest is derived from the mortgages which were transferred to it. The transfers were registered on the certificate of title on 13 June 2003. Further, she argued, the applicants agreed to the Restructure Agreement and the respondent was entitled to exercise its rights under the security which were enforceable at the time of the agreement.

[14] The complaint of undue influence has not been pleaded and further there is no special relationship between the applicants and the respondent giving rise to such claim, she submitted. Nor could any claim in respect of economic duress arise, as it was lawful for the respondent to compromise the debt, demand its repayment and exercise its powers of sale, she further submitted.

[15] The allegations made by the applicants against the respondent as being unjust and unconscionable, were against the background of the history of the applicants' relationship with NCB, which does not arise in this case as the respondent was the bona fide purchaser for value of the receivables from Refin Trust. Its title could only be challenged by fraud and there being no evidence of fraud, it cannot be vitiated, counsel submitted.

[16] Referring to the question of damages, it was her submission that where a mortgagee sells at an undervalue, he is liable for the difference between the market value and the sale price, and in keeping with section 106 of the Registration of Titles Act, damages are the only, and not merely an adequate remedy in such circumstances.

[17] The court is clothed with unfettered power to grant injunctive relief. However, this power is discretionary. It follows therefore, that the grant of an injunction is not a remedy to which an applicant is entitled as of right. An applicant, seeking the grant of an injunction, must show that his case is deserving of favourable consideration by the court.

[18] In giving consideration to an application for an injunction, the general principles by which the courts are guided have been laid down by Lord Diplock in ***American Cyanamid Co v Ethicon*** [1975] AC 396. These principles can be briefly stated as follows: firstly, the court must be satisfied that there is a serious issue to be tried and in the absence of a triable issue, an injunction should not be granted; secondly, although there may be a serious issue to be tried, if damages are an adequate remedy, an injunction should not be granted; thirdly, where a serious triable issue exists and although the claimant could be adequately compensated in damages, the court must go further to consider whether the balance of convenience favours a grant or refusal of an injunction.

[19] In ***National Commercial Bank v Olint Corporation*** Privy Council Appeal No 61/2008, delivered on 28 April 2009, the Privy Council, while endorsing the principles laid down in ***American Cyanamid***, pronounced the basic principle to be one in which the court should adopt a course which appears likely to result in the "least irremediable prejudice" to either party. Lord Hoffman, at paragraphs 16 and 17 said:

> "16 ... It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of

course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the ***American Cyanamid*** case [1975] AC 396, 408:

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

At paragraph 19 he continued by saying:

> "19 ... What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in ***Shepherd Homes Ltd v Sandham*** [1971] Ch 340, 351, 'a high degree of assurance that at the trial it will appear that at the trial [sic] the injunction was rightly granted."

[20] The critical issue in the appeal is whether the applicants, in their claim, have raised issues which should be resolved by the court at trial. In other words, do they have a real prospect of succeeding on their appeal? To succeed on the application, it must be shown that they have a good arguable appeal. The heart of their complaint is that the Restructure Agreement with the respondent is invalid and should either be rescinded or rendered null and void. The allegations surrounding the invalidity of the document are predicated on the premise, that the means by which the respondent acquired the debt was as a result of fraud, fraudulent misrepresentation, undue influence and duress. It is also the applicants' further complaint that the respondent, by way of constructive notice, was aware of their protests to NCB and FINSAC with regard to undue influence by NCB and FINSAC in respect of the loan. They further complain that the Restructure Agreement is demonstrative of an unconscionable bargain, economic duress and an unjust enrichment on the part of the respondent.

[21] The applicants, in filing their particulars of claim, failed to pay due regard to rule 8.9(2) of the Civil Procedure Rules which requires a statement of case to be as concise as practicable. In a prolix amended particulars of claim containing 74 paragraphs, allegations of fraud, fraudulent misrepresentation, undue influence, economic duress raised by the applicants are substantially based on their transactions with NCB and FINSAC. Accordingly, their claim that the debt is unlawful, essentially relates to their contractual relationship with NCB as well as FINSAC. No averment of fraud on the part of the respondent has been raised.

[22] There are certain paragraphs of the pleadings in which it could be said that the averments are directed at the respondent. In paragraphs 11 and 20, the applicants allege, among other things, that they did not receive a loan from NCB but that NCB "issued" a 'loan' from their own funds and they discovered on 28 February 2012, that the respondent had relied on documents from NCB to validate the bank's mortgages despite the fact that the transactions with NCB were born out of fraudulent misrepresentations on the part of NCB. This would not give rise to a triable issue.

[23] There are only three other paragraphs of the particulars of claim which ought to be mentioned, as those, in essence, could be regarded as capturing the applicants' allegations against the respondent. They are paragraphs 37, 39 and 40, which are as follows:

> "37. By way of letter dated November 14, 2003 the Defendant sent a Demand Notice for Claimants to pay Forty Six Million Fifty Two Thousand, Three Hundred and Sixty Seven Dollars and Sixty Two Cents ($46,052,367.62) and threatened to exercise Power

of Sale in 30 days. REFERENCE: Exhibit 'JL-34' annexed to Affidavit]

> [The] Defendants knew by way of Constructive Notice the history of Claimants [sic] protestations to NCB and FINSAC, of the unlawful penalty charges imposed by NCB on the overdraft account that this was a fraudulent misrepresentation with the intent to defraud or induce reliance on which Claimants relied to Claimants [sic] detriment and consequently suffered severe losses and damage.
>
> [The] Defendants knew that from their own court case against ***Financial Institutions Services Limited v Negril Negril Holdings Limited and Another*** in the Supreme Court of Jamaica in 2002 and the subsequent Privy Council Appeal No. 37 of 2003 delivered July 22, 2004 where it was ruled that it was unlawful for the banks to charge penalties on unauthorized overdraft facilities.

Therefore for them to enforce such a debt claim against Claimants during this period of time and even worse in 2005, was the most blatant of all fraudulent misrepresentations with the intent to defraud and induce reliance, undue influence, economic duress for unconscionable and unjust enrichment."

In paragraph 39 it was alleged as follows:

"39. Despite this Constructive Notice that Defendants were misrepresenting the debt claim imposed by NCB and FINSAC, Defendants from a position of strength over the weaker Claimants, sought by way of threats of legal action, to induce Claimants to sign an 'Agreement to Restructure Existing Debt' document with undue influence and economic duress for their unconscionable and unjust enrichment knowing well that the entire debt claim was a fraudulent misrepresentation with the intent to defraud and induce reliance on which Claimant relied to Claimants [sic] detriment and consequently suffered severe losses and damage. This makes the entire transaction fraudulent, invalid and voidable."

At paragraph 40 it was stated:

> "40. By way of letter [sic] June 7, 2005, the Claimants again protest [sic] and express [sic] feeling of undue pressure, influence and economic duress from threats being made by Defendant in demand notices aforementioned before Claimants signed the Agreement to Restructure Existing Debt [sic] July 8, 2005.
> REFERENCE: Exhibit 'JL- 20' annexed to Affidavit].
>
> Claimants felt so intimidated by the response to their 1etter of June 7, 2005 in a meeting with Mr. Jimmy Whitman on June 8, 2005 that they wrote another letter on June 13, 2005 making withdrawals, apologies and indicating a willingness to sign the restructured agreement proposed by Defendant without any changes.
>
> Subsequent to that episode Attorney Lindel Smith advised on June 8, 2005 that we have no choice but to sign the agreement without any further challenges to avoid more serious repercussions.
>
> Further to this consultation, Claimants signed the September 9, 2005 document without any further protestations even though the terms and conditions were fraudulent, oppressive, unacceptable to Claimants and unconscionable for Defendant's unjust enrichment.
>
> Claimants felt so much undue pressure and felt as if they were signing with a gun to their heads. These facts would make the entire transaction and contracts signed voidable."

[24] The applicants in raising an allegation that the respondent had constructive notice of their protests to NCB and FINSAC, merely presume knowledge on the part of the respondent. Such presumption is insufficient. Their issues with NCB and FINSAC are not matters which ought to be imported in this case, unless facts in support of these issues have been pleaded. The applicants, in seeking to make their claim, would have been obliged to have stated precise particulars of the facts on which they rely as well as the

circumstances giving rise to their averment to show that the respondent was aware of such protests. The pleading is devoid of the requisite particulars. Accordingly, it could not be said that the issue raised by the applicants is worthy of determination by the court.

[25] Further, as Mrs Minott Phillips rightly submitted, the applicants' complaint as to their transactions with NCB cannot be attributed to the respondent, which is a bona fide purchaser for value of NCB's receivables from Refin Trust without notice of any defect in title. The respondent, as the registered proprietor of the mortgages on the certificate of title, its interest in the property could only be assailed by fraud which had not been pleaded.

[26] The applicants have averred that they signed the Restructure Agreement under protest due to "undue pressure, influence and economic duress from threats" by the respondent which renders the agreement voidable. On perusal of the agreement, it has been observed that it was executed by the 1st applicant as a director of the 2nd applicant and in his capacity as a guarantor. Mrs Emma Ledgister also signed as guarantor. This was all done in the presence of their attorney-at-law. It has been clearly stated by the applicants that the document was executed on the advice of their attorney-at-law. Further, appended to the end of the document is a certificate signed by their attorney-at-law showing that the document had been explained to Mrs Emma Ledgister who appeared to have understood the purport thereof and that she signed same of her own free will. Although there is nothing to show that the 1st applicant had been advised of the ramifications, in signing the document, he executed it having

received legal advice to do so. Arguably, it cannot be said that the applicants were compelled, either by way of undue influence or duress, to execute the agreement so as to give rise to a triable issue.

[27] The applicants' contention that the debt ought to be verified, validated or authenticated by the respondent is without merit. In paragraph 16 of the affidavit of the 1st applicant, filed on 31 May 2012, he stated that he paid US$366,466.90, after signing the agreement to restructure the existing debt of US$855,000.00 and was furnished with a receipt by way of an accounting spreadsheet, yet he strenuously denies owing the debt. The fact that he has made repayments over a period would go to show that the real issue is whether the debt is due and owing. The applicants had lawfully executed the agreement. They would have been under an obligation to abide by the provisions stipulated therein. Any breach in respect of the payments of the amounts due and owing within the times prescribed under the agreement, would clearly afford the respondent the right to exercise its powers of sale under the mortgages. The applicants are in default of the payment of the debt. They were given the requisite statutory notice prior to the publication of the sale of the property. It follows therefore, that the respondent would be entitled to realize the security offered by them in respect of the loan. The question of the verification, authentication or validation of the debt would not be one for the court's consideration at a trial.

[28] The issue concerning the proposed sale of the property at an under-value was not pleaded in the particulars of claim. It was not contained in an affidavit before the learned president or the judge in the court below. An affidavit, which had not been

filed, was placed before the court, in which the applicants seek an order that: "**Valuation** of the property be established as Claimants received value of Twenty Five Million United States Dollars **(US$25,000,000.00)** by **Romans and Company Realty Limited** on **December 1, 2010** and **received and accepted an offer for sale at the value of Twenty Five Million United States Dollars (US$25,000,000.00) on October 12,2012** while Defendants are advertising Claimant's property for Nine Hundred Thousand United States Dollars **(US$900,000.00)**." The affidavit lacks averments in support of this order which is sought. The 1st applicant, in submitting that the respondent has advertised the property for sale, made reference to a valuation report for the property prepared by Romans and Company Realty Limited which has been included in the record but was not exhibited to an affidavit. The issue is not properly before the court. Therefore, consideration cannot be given to the complaint.

Conclusion

[29] The respondent's mortgage interest has been registered on the relevant certificate of title. The facts as pleaded must show that the acquisition of those mortgages was by way of fraud. This has not been done. Nor are there particulars in support of fraudulent misrepresentation, undue influence, duress, an unconscionable bargain or unjust enrichment. The Restructure Agreement was lawfully executed by the applicants in the presence of and on the advice of their attorney-at-law. The debt being outstanding, the respondent is at liberty to exercise its powers of sale. None of the claims raised by the applicants introduces a serious issue which requires resolution

by the court. There being no serious question to be determined by way of a trial, the grant of an injunction would not be appropriate, as a restraint in permitting the respondent to legitimately exercise its powers of sale would be prejudicial. In light of the foregoing, the applicants have not shown that they have a good arguable appeal and their application must fail.

[30] The application is dismissed. Costs are awarded to the respondent.

PHILLIPS JA (Dissenting)

[31] I have had the privilege of reading the draft judgment of my learned sister Harris JA and in the main agree with her reasoning but respectfully must differ from her conclusion in an important aspect. I have also had the privilege of reading, in draft, the judgment of my brother Brooks JA and have noted his concern, which is similar to my own. Regrettably, however, I disagree with him on the approach he has adopted. I therefore set out these few words of my own.

[32] The claim brought by the applicants in the court below sought a number of reliefs including an injunction. The application before this court, which is to vary or discharge the order of the single judge, has sought, among other things, an "immediate emergency injunction" as the "Respondent[s]/Defendants have already advertised our property for sale unlawfully". It is trite law that a precondition for the grant of an interlocutory injunction is that there must be a serious question to be tried (see **American Cyanamid v Ethicon Co** [1975] 1 All ER 504). The applicants have raised

questions concerning the validity of the instrument which gives rise to the sum being claimed, that is, the restructure agreement, but have not denied signing it. They have alleged undue influence, but such allegations seem unfounded as it appears that independent legal advice was given prior to signing. There are allegations of fraud, but no particulars have been supplied. Also, there does not seem to be any specific allegation made against the respondent save as set out in paras. [22]–[23] of the judgment of my learned sister Harris JA, which are not so framed as to detain the court in its deliberations. Additionally, the applicants do not seem to have understood the importance in law and significance of the transfer of the mortgages and their respective endorsements on the certificate of title. It appears then that at this stage, there is no serious dispute in relation to any of these allegations. What remains then is the allegation that the property, which is the subject of the proceedings, has been advertised unlawfully.

[33] The 1st applicant's affidavit did not give details of the facts amounting to the unlawful advertising of the property by the respondent. He, however, purported to exhibit certain documents relating to the value of the property and the respondent's advertising of the property: a letter dated 10 June 2009 granting subdivision approval; a valuation report prepared by Silbert Romans of Romans and Company Realty Limited on 1 December 2010, on the basis of the subdivision approval, indicating that the value of the property at that time was US$25,000,000.00; and an advertisement for the sale in which the property is referred to as agricultural land. These documents were not before the single judge or the court below. I recognise that generally when an

application is made to this court to vary or discharge an order made by a single judge of appeal, the matter is not viewed as a new application, but instead as a review by the court, and the test to be applied ought to be one wherein the court assesses whether the single judge was wrong in law or in principle or had misconceived the facts. However, in light of the fact that it is not an appeal of the single judge's order, it is my view that although the court will ordinarily not do so, it nevertheless has a residual power, in special circumstances, to consider information that was not before the single judge, in accordance with the overriding objective in dealing with cases justly. In this case, the information to be considered is crucial to the application, the applicants are unrepresented and the 1st applicant did attempt to attach these documents to the affidavit in support of the application. These circumstances make this an appropriate case for the documents in question to be examined notwithstanding that they were not before the single judge. The issues then are whether these documents demonstrate some "unlawful" advertising or irregularity in advertising and whether this is a serious question to be tried in the context of the respondent's duty as a mortgagee in the exercise of its power of sale.

[34] Irregularities in advertising the sale of a mortgaged property by a mortgagee, in pursuance of its power of sale, may give rise to a breach of the mortgagee's duty to act in good faith. That the mortgagee has a duty to act in good faith is indisputable: from as far back as **Kennedy v de Trafford** [1896] 1 Ch 762 it was held that the mortgagee has such a duty. Griffith CJ in the High Court of Australia in **Pendlebury v Colonial Mutual Life Assurance Society Ltd** [1912] HCA 9 examined the nature of

the mortgagee's duty to act in good faith. In doing so, he referred with approval to the dictum of Lord Herschell in **Kennedy v de Trafford** that if a mortgagee "wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed ... he had not been exercising his power of sale in good faith". Barton J in his judgment felt it necessary to refer to the words of Lindley LJ in **Kennedy v de Trafford** thus:

> "A mortgagee's right is to look after himself first. But he is not at liberty to look after his own interests alone...If he confines his attention to his own interests and sacrifices the mortgagor's property by doing so, he certainly acts unfairly, that is, in bad faith."

Isaacs J for his part indicated that a mortgagee is reckless when he shows a "disregard of the mortgagor's interest, ignoring his property in the possible surplus, in short not caring whether its fair and proper value was obtained or not, as distinguished from the mere want of care or prudence in the course of honestly trying to conserve it". In that case, the property was worth about £2000, but it was sold at a gross undervalue of £720, which was £6 over the debt. This was due in part to improper advertising. All three members of the court were agreed that the mortgagee did not exercise the power of sale in good faith because it sold the mortgagor's land without the smallest regard for his interests.

[35] In the present case, according to the 1st applicant's affidavit, at the time the demand letter was sent (May 2012), the amount stated to be owing was US$1,101,978.25. The 2009 letter granting subdivision approval from the Office of the

Prime Minister to the Secretary of the St Elizabeth Parish Council indicated that the approval is for "lands ... consisting of 4,908,799 square metres into ... 1,425 lots for residential/commercial/institutional purposes". The valuation report prepared by Silbert Romans of Romans and Company Realty Limited recognised that the property, which is 1210 acres "is sub-divided into one thousand four hundred and twenty-five lots mostly covered with natural vegetation" with lot types as follows:

" 1. 766 ¼ acre residential lots
2. 22 1/3 acre residential lots
3. 244 ½ acre residential lots
4. 48 1 acre residential lots
5. 5 1.5 acre residential lots
6. 34 ¼ to acre residential lots
7. 20 Town House, Guest House and Apartment Blocks
8. 86 ¼ acre commercial lots
9. 11 1/3 acre commercial lots
10. 56 1/3 acre Light Industrial park
11. 15 Commercial Blocks (Designated Facilities)
12. 48 Common Area Green Area Lots
13. 13 Open Space
14. 13 Day Care Nursery/Basic School/Community Shop and Commercial Lots
15. 4 Parking Area Lots
16. 23 Green Area Blocks"

The report also recognised that the property was originally zoned for agriculture under the Town and Country Planning (Westmoreland and St Elizabeth) Development Order 1966, but it has been approved for subdivision for residential, resort and commercial purposes. It noted that approximately 25% of reserved roads for the approved subdivision, two wells and a marl quarry are located on the property. The report indicated that the value of the property at that time was US$25,000,000.00. The respondent has advertised the property as being agricultural property that consists of "land ... with farm buildings". It is described as "land with rolling terrain partly cleared but mostly in ruinate [with] upper sections [which have] coastal and sea views" and the selling price is US$900,000.00. It would appear to me that the alarming disparity in price is on account of the type of property that it is being sold as.

[36] In **Cuckmere Brick Co Ltd and Another v Mutual Finance Ltd** [1971] 2 All ER 633, it was held that a mortgagee is not merely under a duty to act in good faith, that is, honestly and without reckless disregard for the mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chooses to sell it. In the light of this, can it be said in the instant case that the respondent has taken reasonable steps to obtain the true market value of the property? Can it be said that the respondent in proceeding to sell the property at the value advertised has shown a disregard for the interests of the mortgagor, particularly since if it is sold for US$25,000,000.00, there would be a surplus for the mortgagor? In acting in good faith, is the respondent obliged to investigate the subdivision approval claim and its consequential appreciation in the value of the

property? In my view, these questions are all germane to the question of a possible breach by the respondent of its duty to act in good faith. They are all serious issues to consider which ultimately are pertinent to whether the respondent will act in bad faith if allowed to sell in the present circumstances.

[37] I now turn to the question of damages. It is beyond dispute that even where there is a serious question to be tried, an injunction will not be granted if damages will be an adequate remedy to the applicant and the respondent is in a financial position to pay them. Likewise, if there is a serious issue to be tried and the applicant could be prejudiced by the acts or omissions of the respondent pending trial and the cross-undertaking in damages by the applicant would provide the respondent with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted. On this question, it is my view that it is not a sufficient answer to cite the portion of section 106 of the Registration of Titles Act which provides that any person "damnified by an improper or unauthorised sale" shall have his remedy in damages as, this, I think, is more relevant to circumstances where the property has already been sold. This court has said as much in **Global Trust Limited and Glanville v Jamaica Redevelopment Foundation** SCCA No 41/2004, delivered 27 July 2007 (per Cooke JA):

> "This part concerns the remedy of a mortgagor when the mortgagee embarked on an 'unauthorised or improper or irregular exercise' of the power of sale. Accordingly the excerpted portion (supra) is not relevant as to whether or not an injunction should be granted to restrain the mortgagee from exercising the power of sale. It is relevant after the power has been exercised."

As a consequence, this ought not to preclude a court from restraining the sale of mortgaged property if the circumstances so warrant and there is likely to be irremediable harm to the mortgagor. The amount claimed by the respondent in May 2012 was US$1,101,978.25, which continues to attract interest at 10% per annum. That means, by my rough calculations, if the property were to be sold at the current value of US$25,000,000.00, the applicants would realize a surplus of at least US$20,000,000.00 after the principal, interests and costs are deducted; there is no indication of the respondent's ability to pay this sum. Further, the quantification of the extent of the applicants' loss in the event of the sale for US$900,000.00 would not be without difficulty as it appears that the property was to be utilized in a business venture as contemplated by the obtaining of the subdivision approval, and negotiations were in fact in train, which were upset by the respondent's advertising of the property in the manner that it did.

[38] In considering whether the injunction should be granted, I have not lost sight of the general rule in matters such as these, that is, that the injunction should be granted only where the amount claimed by the mortgagee to be outstanding is paid into court. This is required in order to ensure that the mortgagee is not deprived of the benefit of his security, and the court will therefore not interfere to grant any interlocutory relief unless equivalent safeguards have been provided by the mortgagor to the mortgagee (see **Inglis v Commonwealth Bank of Australia** (1969) 119 CLR 334 and **SSI (Cayman) Limited v International Marbella Club** SCCA No 57/1986, delivered 6 February 1987). Sykes J in **Premium Investments Ltd v Jamaica Redevelopment**

Foundation claim no HCV 3632/2007, delivered on 11 June 2008, in a comprehensive canvassing of the authorities on this point, examined the scope of the rule and emerging exceptions. Morrison JA in **Mosquito Cove Ltd v Mutual Security Bank Ltd** [2010] JMCA Civ 32 in his usual erudite manner also reviewed the rule and its established exceptions (paras [57] – [63]). It is significant that Morrison JA recognised that there is scope for the further development of the law in this regard as "further exceptions to the rule are no doubt to be found in the books and will also emerge in the future".

[39] The Australian courts have demonstrated that notwithstanding the well-known exceptions, this rule may still be too inflexible. Campbell JA in the Court of Appeal of New South Wales in **Bayblu Holdings Pty Ltd v Capital Finance Australia Limited** [2011] NSWCA 39 set out several instances in which "the general rule" stated above has not been followed, for instance, in circumstances where there is an issue as to whether the power of sale has arisen at all (**Harvey v McWatters** (1949) 49 SR (NSW) 173), where the validity of the mortgage was in issue (**Allfox Building Pty Ltd v Bank of Melbourne Ltd** (1992) NSW Conv R 55-634), or where the amount claimed by the mortgagee was obviously wrong (**Clarke v Japan Machines (Australia) Pty Ltd** (No 2) [1984] 1 Qd R 421). These are consistent with the exceptions outlined by Morrison JA in **Mosquito Cove**. Campbell JA examined several instances under discussion such as where the mortgagor claims that he can redeem the mortgage in a fairly short time or he can get refinancing (**Grose v St George Commercial Credit Union Ltd** (1991) NSW Conv R 55-586).

[40] Campbell JA also referred to the judgment of McLelland J in **Ellison v Alliance Acceptance Ltd** (1984) NSW Conv R 55-217 where an amply secured mortgagee of rural property was restrained from proceeding with an auction where there was a strong prospect that the mortgagor could succeed in showing that the advertising had been inadequate and therefore that the sale would be in breach of the mortgagee's duty. In that case, the learned judge was of the view that there were sufficient funds to be recovered from the sale to cover the entire mortgage, interests and costs and granted the injunction without imposing any condition of paying money into court. The principle arising in that case seems to be that if the mortgagee is proposing to exercise its powers of sale in a manner that would infringe the rights of the mortgagor by disregarding his interests and which would be capable of giving rise, in certain circumstances, to manifest injustice, the general rule in **Inglis** ought not to be applied inflexibly as it may appear extremely harsh for the payment into court of the entire mortgage debt. Is the case under consideration one where the general rule in **Inglis** ought not to be applied?

[41] In answering the question posed in the preceding paragraph, I consider that the issues raised in the claim do not appear to be meritorious (see paragraph [32]). Therefore, an injunction could not be granted to subsist until the trial of the appeal. I am, however, satisfied that if the respondent in the exercise of its powers intends to pursue the sale as advertised presently in circumstances where the proceeds would be at a gross undervalue, this gives rise to the serious issue of whether in exercising its powers of sale, it is acting in breach of its duty to the mortgagor to act in good faith,

which anticipated breach can be prevented by an injunction of limited scope relating solely to this serious issue. I would therefore grant an injunction to prevent the respondent from proceeding to sell the property pursuant to the current advertisement, which does not reflect any subdivision approval granted and any investigation into the increased value of the property in the light of the subdivision. In granting this injunction, I consider that the respondent would not be prejudiced since if the property is found to have the value suggested by the applicants' valuator or a sum that is close to that amount and is sold for a value that is approximate to that as can be obtained on the day of sale, the respondent would be able to recover the entire amount owed (which would include US$1,101,978.25 plus interest of 10% per annum from May 2012 to the date of recovery of the debt); this is to be compared with the result that would obtain if no injunction is granted, which is that the respondent would not have recovered its entire debt and costs. The applicants' interest would also be taken into account as they would be entitled to their surplus. It is my view that these circumstances would not require the payment into court of the amount claimed as owing, as the sale would not be restrained altogether or until trial but merely postponed until the steps can be taken to ensure that the proper market value is obtained. In this regard, I would adopt the following words of McLelland J in **Ellison**:

> "This is a case in which it seems to me that the interests of justice do not require the imposition of a condition of the kind referred to before interlocutory relief is granted and, of course, the interlocutory relief will affect only the particular sale... One would assume that the defendant will proceed to arrange another [advertisement and sale], this time ... in a manner calculated to avoid the problem which has arisen in the present case."

[42] I would therefore vary the order of the single judge to restrain the sale of the property valued and advertised as agricultural property. I would also order that the respondent, in the exercise of its powers of sale, should take steps to verify the subdivision approval and to ensure that once confirmed, any sale is pursued with advertisements making specific reference to the contents of the approval. I would make no order as to costs.

BROOKS JA

[43] I have had the privilege of reading, in draft, the respective judgments of my learned sisters Harris JA and Phillips JA. I agree completely with the reasoning and conclusion of Harris JA in respect of the dismissal of the application and the refusal of an order for an injunction. Although I share the concern of my learned sister Phillips JA about the exercise of the power of sale in the instant case, I respectfully disagree that the issue is properly before this court. Because of the way that I view the ramifications involved in the issue, however, I offer some brief comments.

[44] The advertisement by the respondent for sale of the mortgaged property proposes a sale price of US$900,000.00. When it was brought to our attention that there was a valuation of US$25,000,000.00, which valuation was based on an approval for subdivision of the subject land, the situation seemed very reminiscent of that in **Cuckmere Brick Co Ltd and Another v Mutual Finance Ltd** [1971] 2 All ER 633.

In that case, it was held that mortgagees, who had sold a property under powers of sale contained in the mortgage, were negligent in allowing the sale to proceed without mentioning in their advertisements of it, that the property had the benefit of planning permission for development into flats. That permission would have resulted in a significant increase in the value. The mortgagees were held to be liable for the difference between the value, based on the planning permission, and the value actually realised on the sale.

[45] When the similarity between **Cuckmere** and the possible outcome of a sale in the instant case was pointed out to Mrs Minott-Phillips QC, she quite properly pointed out that the valuation produced by the applicants was not before either McIntosh J in the court below or the single judge of this court, who heard the application for the injunction pending appeal. The proposed sale at an undervalue is, in my respectful view, therefore, not properly before this court, despite the fact that the applicants are not represented by counsel.

[46] Learned Queen's Counsel also submitted that, in any event, the court is not entitled to prevent a mortgagee from exercising its power of sale merely because it may be selling at an undervalue. Such a sale, Mrs Minott-Phillips argued, would be an improper or irregular exercise of the power of sale. In such a situation, she said, the mortgagor's remedy is prescribed by section 106 of the Registration of Titles Act. That section stipulates that the mortgagor's only remedy is in damages. Learned Queen's

counsel did, however, accept that the court could remind the mortgagee that it should make sure that it does not sell at an undervalue.

[47] I am not convinced that, in a proper case, a court may not be entitled to prevent a mortgagee who demonstrates an intention to sell at a gross undervalue, where it is not immediately obvious or where there are serious doubts that he would be able to satisfy a claim for damages, if the sale were to be concluded. I would not, in the absence of proper submissions from both sides, be prepared to pronounce definitively on the issue. It is sufficient for me, at this stage, to state that I am satisfied that this issue has not been properly raised before this court in the instant case and to remind the respondent to bear in mind the issue, if and when it comes to exercise its power of sale in respect of the subject property.

[48] I also have grave reservations about Mrs Minott-Phillips' reference to section 106 of the Registration of Titles Act. It has been decided by this court that section 106 is not applicable before the exercise of the power of sale. In **Global Trust Limited and Another v Jamaica Re-Development Foundation Inc and Another** SCCA No 41/2004 (delivered 27 July 2007), Cooke JA considered the impact of section 106 on considerations of injunctions to prevent an exercise of the power of sale. At page 14 of the judgment, he quoted the relevant portion of the section dealing with the remedy of a person "damnified by an unauthorised or improper exercise of the power" of sale. He then said:

> "This part concerns the remedy of a mortgagor when the mortgagee embarked on an "unauthorised or improper or

> irregular exercise" of the power of sale. Accordingly the excerpted portion (supra) is not relevant as to whether or not an injunction should be granted to restrain the mortgagee from exercising the power of sale. It is relevant after the power of sale has been exercised."

[49] With the caution mentioned above, I would also refuse the application and award costs, to be taxed if not agreed, to the respondents.

HARRIS JA

ORDER

By a majority (Phillips JA dissenting) the application is dismissed. Costs are awarded to the respondent to be agreed or taxed.