JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 26/2008

(APPLICATION NO. 47/08)

BETWEEN	**MICHAEL LEVY**	**APPELLANT**
A N D	**JAMAICA RE-DEVELOPMENT INC. FUND**	**1ST RESPONDENT**
A N D	**KENNETH TOMLINSON**	**2ND RESPONDENT**

Mr. Raphael Codlin instructed by **Raphael Codlin & Co.** for the appellant
Mrs. Sandra Minott-Phillips and **Miss Sanya Young**, instructed by **Myers Fletcher & Gordon**, for the 1st respondent
Mr. Maurice Manning instructed by **Nunes, Scholefield, Deleon & Co.** for the 2nd respondent

IN CHAMBERS

July 2, and 11, 2008

MORRISON, J.A.

1. This is an application for an injunction pending the hearing of this appeal from an order made on 29 February 2008 by Jones J in the Supreme Court. The learned judge refused the appellant's application for an interlocutory injunction, until the trial of his action in that court, in terms similar but not identical to the injunction sought on this application, which is as follows:

> "That the 1st Defendant, Jamaican Re-development Foundation, Inc., either by itself, its servant, agent or otherwise or the 2nd Defendant, Kenneth Tomlinson, be restrained from selling, mortgaging or

> in any other way, disposing of the properties or any portion or portions of the properties listed in the Claim Form and Particulars of Claim in these presents until the appeal in this matter is heard or until this Honourable Court otherwise orders."

2. The appellant's claim against the respondents in the Supreme Court is for recovery of possession of land registered in some thirty Certificates of Title, for various declarations, for damages for trespass, as well as general damages, and for an injunction restraining the respondents from continuing to occupy the said properties.

3. This claim is prompted by the 1st respondent's claim to be entitled to exercise ifs powers as assignee and registered proprietor of mortgages of the appellant's properties, as a result of the alleged indebtedness of the appellant to the respondent in the sum of approximately $846 million, and the 1st respondent's appointment of the 2nd respondent as receiver pursuant to the mortgage deed.

4. The appellant challenges the respondent's right to recover the debt on the basis that, while he acknowledges having mortgaged certain of his properties to Jamaica Citizen's Bank in 1997 and also to Eagle Commercial Bank in 2001, he has made substantial payments on account of the debt, which is not therefore due. In any event, the appellant says further, the 1st respondent is "neither an assignee nor a legal successor in

title to any sum which [he] may owe to any other person. The appellant accordingly challenges the propriety of any purported assignment to the 1st respondent of any debt due from him and contends that the 1st respondent is therefore not entitled to make any claim against him "in relation to the properties aforesaid or at all."

5. The 1st defendant pleads by way of defence that it is the assignee of the mortgages and the debts thereunder, that it is as a result the registered mortgagee of the said properties and entitled thereby to exercise the rights of a mortgagee to appoint a receiver under the instruments of mortgage and under the Registration of Titles Act. The 1st respondent also claims to be entitled to recover the debt claimed pursuant to the said mortgages.

6. The appellant made an application to the Supreme Court for an interlocutory injunction barring the respondents from occupying or from doing any acts or taking any steps to exercise any control or authority over the said properties. This application was heard inter partes by Jones J and refused by him on 29 February 2008. While there is no written judgment, nor have I been provided with a note of the judge's reasons for declining to grant the injunction, the appellant in an affidavit filed in support of the application to this court has stated that the judge indicated "that the law is clear...that it is only if the claimant paid to

court, the amount claimed by the 1st [respondent] that an injunction could by law be granted".

7. Nothing now turns on the curious fact that on 11 March 2008, the same day on which the appeal was tiled, the appellant sought and obtained from Donald McIntosh J in the Supreme Court an ex parte interim injunction in terms identical to the order now sought for a period of 2] days. However, it is not readily apparent why this application was entertained ex parte a mere two weeks after the refusal of an inter partes application, at the hearing of which the parties had been represented by counsel.

8. The appellant's grounds of appeal are as follows:

> "1. The learned judge misdirected himself both on the facts and on the law in saying that the law is clear and the Claimant could not get an injunction unless the amount is paid into Court.
>
> 2. The learned judge did not apply the law as set out in the cases referred to him by the Claimant and in the Moneylending Act.
>
> 3. The learned judge's assertion that the law is clear and the Claimant is not entitled to the injunction, is not consonant with the principles enunciated both in the Court of Appeal and in the Privy Council.
>
> 4. It the injunction is not granted and the 1st Defendant, a foreign Company was to sell the Claimant's property which is valued over $800M and repatriate the proceedings, there could be

> no protection for the Claimant if the Claimant is successful when the matter is tried."

9. The appellant filed two affidavits in support of this application (to the first of which he exhibited earlier affidavits sworn to and filed by him in the Supreme Court proceedings), while 1st respondent relied on a single affidavit sworn to by its Chief Executive Officer, Miss Janet Farrow. The appellant's affidavits raised queries as to the corporate standing of the 1st respondent in Jamaica and the State of Texas (its place of incorporation), as to whether the 1strespondent's actions were in breach of the Moneylending Act and with regard to alleged discrepancies in the amount claimed to be due on the alleged debt from the appellant to the 1st respondent at different times. The appellant also averred (for the first time in his affidavit filed in this court, sworn to on 30 June 2008) that the mortgage deed signed by him on 20 February 2001 had been signed under duress and without the benefit of legal advice or knowledge of what he was doing. Miss Farrow's affidavit averred and exhibited documents to show that the company is in good standing, both in Jamaica and Texas, and also exhibited among other things the Instrument of Mortgage dated 20 February 2001 acknowledging a total indebtedness to Eagle Commercial Bank as at that date of $34.6 million as well as certificates of title showing the 1st respondent as the registered proprietor of mortgages on several of the appellant's titles.

10. Mr. Codlin for the appellant relied principally on the following four submissions:

> "(i) That the status of the respondent as a legal entity is "so precarious", that it ought not "to be entrusted with the right to sell the appellant's property, having regard to what would happen if it leaves the island or is struck off in Jamaica or in the United States."
>
> (ii) That the order made by the Minister of Finance purporting to exempt the 1st respondent from the provisions of the Moneylending Act are not in compliance with section 14 of that Act and are therefore null and void.
> (iii) The discrepancies in the various figures claimed from the appellant by the 1st respondent, and the failure to take into account payments made by the appellant, demonstrate that "very important factors have been omitted from the 1st respondent's case."
>
> (iv) On a balance of probabilities, the balance of convenience is "overwhelmingly in favour of the grant of an injunction."

11. Mrs. Minott-Phillips for the 1st respondent submitted that the court should first identify the "underlying issues" put forward in the substantive claim by the appellant and consider whether or not they are serious. She pointed out that the Particulars of Claim amounted entirely to a bare denial of the debt, coupled with a challenge to the validity of the assignment of the debt to the 1st respondent. In particular, Mrs. Minott Phillips observed, there was no claim of undue influence, of a breach of the Moneylending Act or that the 1st respondent was in danger of extinction, so that these issues did not therefore arise on the claim. But, she submitted, these issues are not serious issues, and in any event under section 106 of the Registration of Titles Act damages are the only remedy available to a person injured by a wrongful exercise of the statutory power of sale. The submission as to the validity of the assignment could not now avail the appellant in the light of the fact that the 1st respondent was now registered as mortgagee of the security.

12. Mrs. Minott-Phillips submitted finally, that if the court was of the view that an injunction should be granted, then it should only do so on condition that the appellant bring into court the amount claimed by the 1st respondent, on the authority of the well known decision of this court in ***SSI (Cayman) Limited v International Marbello Club SA*** (1987) 34 JLR 33.

13. Mr. Manning for the 2nd respondent adopted Mrs. Minott-Phillips' submissions and also pointed to the specific power given in the mortgage

deed to appoint a receiver to demonstrate that there was no triable issue with regard to the 2nd respondent's appointment as receiver.

14. With regard to the Marbella point, Mr. Codlin contended that that case "is no longer the law", in the light of subsequent decisions of the Court of Appeal which make it clear that there is no "inflexible rule that money has to be paid into Court before an injunction is granted." In answer to a specific enquiry from me, Mr. Codlin confirmed that his application was for an unconditional injunction pending the hearing of the appeal, subject only to the usual undertaking as to damages.

15. The authority of a single judge of this court to grant an injunction pending appeal is to be found in Rule 2.11(i)(c) of the Court of Appeal Rules 2002. In my view, the appropriate threshold test to apply on this application is whether the appellant has a reasonable ground of appeal (see ***Polini v Gray*** (1879) 12 Ch.D. 438, per Cotton U at page 446, ***Orion Property Trust Ltd. v Du Cane Court Ltd.*** [1962] 3 All ER 466, per Pennycuick J at pages 470-19 and ***Erin ford Properties Ltd. v Cheshire*** CC [1914] 2 All ER 448, per Megarry J at page 454).

16. I prefer this test, which is not dissimilar to the "serious question to be tried" test applicable at first instance ***(American Cyanamid v Ethicon*** [1975] 1 All ER 504), to the "good arguable appeal" test applied by the English Court of Appeal in the case of ***Ketchum International plc v Group Public Relations Holdings*** Ltd.[1996] 4 All ER 374, since that was a Mareva

Injunction case, in which the test at first instance is also whether the applicant can show a "good arguable case" (see ***Ninemia Maritime Corporation v Trave Schiffartsgessellschaft*** [1983] 1 WLR 1412).

17. Thus, if the appellant can show that he has reasonable grounds of appeal in this case, or that there are serious issues to be canvassed on appeal, he will be entitled to an injunction so as not to render his appeal nugatory ***(Polini v Gray,*** supra, per Cotton L.J at page 446).

18. Without going into any detailed analysis of the grounds at this stage, it appears to me that the two questions which arise on this application are whether the appellant is entitled to an injunction and, it so, upon what terms?

19. On the first question, I agree with Mrs. Minott-Phillips that the substantial basis of the appellant's pleaded case against the respondents is his challenge to the validity of the assignment of his debt to the 1S respondent's predecessor in title. Quite apart from his having put up absolutely no material in support of that challenge, it seems to me that the appellant has an even steeper challenge in the fact that the 1st respondent's mortgage is now registered under the provisions of the Registration of Titles Act. The effect of this, in my view, is that the efficacy of the mortgage therefore now flows from the fact of registration, and not from any antecedent circumstances relating to the assignment (as to

which, see ***Nunes & Appleton Hall Ltd. v. Williams and Others*** (1985) 22 JLR 339, especially per Campbell JA at pages 351-352).

20. In the absence of any allegation of fraud in the case against the 1st respondent as mortgagee, therefore, it appears to me that the appellant's proposed challenge to the validity of the assignment of the debt cannot get off the ground and that, on that basis alone, no injunction should be granted.

21. As to the other matters advanced by Mr. Codlin, with his usual skill and tenacity, it is sufficient to say, I think, that it has not been demonstrated that the 1st respondent's corporate status in Jamaica and in the United States is challenged in anyway, that the ministerial orders granting the 1st respondent exemption from the provisions of Moneylending Act appear on their face to have been validly made pursuant to section 14 of the Act, and that it appears to be clear that the appellant's loan account is not entitled to any further credit as a result of the amount of $18 million said by him to have been paid on his behalf in 1997 (given that in 2001, he himself had acknowledged a debt to Eagle Commercial Bank of $34.6M when he signed the mortgage instrument.)

22. I have therefore come to the view that this is a matter in which the material placed before me (as, indeed, before Jones J) has failed "to disclose that [the appellant] has any real prospect of succeeding in his

claim for a permanent injunction" on appeal and that the application for an injunction must therefore fail at the threshold (see ***American Cyanamid***, per Lord Diplock at page 510).

23. But I shall nevertheless go on to consider briefly, in the event that I am wrong in my primary conclusion, the second question identified at paragraph 18 above. In **Marbella,** Carey JA said this (at page 14): "There is no question but that the Court has an undoubted power to restrain a mortgagee from exercising his powers for sale, but if it is so orders, the term invariably imposed is that the amount claimed must be brought into Court."

24. ***Marbella*** did not receive universal approbation from either the practising profession or this court, as may be seen from the decision in ***Flowers*, Foliage & *Plants* of Jamaica *Ltd. v Jennifer Wright and others*** (1997) 34 JLR 447. Although this was in fact a stay of execution case, interlocutory injunction principles were obviously treated in argument and by the court as analogous and Marbella was distinguished on the basis that the general rule stated in that case was inapplicable to a case in which there were triable issues of fact and law concerning the validity of the mortgage and other security documentation. Rattray P also observed (in reference, it appears, to ***Marbella)*** that "Courts of Equity do not shackle themselves with unbreakable fetters if the justice of the particular

case demands a mere flexible approach" (page 452). Hardly surprisingly, Mr. Codlin on the instant application urged this obviously considered dictum of an eminent judge on me with great force.

25. This court has in fact revisited the question twice within the last year, firstly in Global ***Trust Limited and another v Jamaica Redevelopment Foundation Inc. and another*** (Supreme Court Civil Appeal No. 41/2004, judgment delivered 22 July 2007) and most recently in ***Rupert Brady v. Jamaica Redevelopment Foundation Inc. and others*** (Supreme Court Civil Appeal No. 29/2007, judgment delivered 12 June 2008).

26. In ***Global Trust*** the court by a majority decision (Panton P dissenting) dismissed an appeal from a decision of Marva Mcintosh J refusing an application for an interlocutory injunction to restrain a mortgagee's exercise of its powers of sale. Although the primary basis of Marva Mcintosh J's decision was that, as damages would be an adequate remedy, no injunction should be granted, she also appears to have dealt with the matter on the basis that, in any event, the ***Marbella*** principle would have required that the claimant pay the amount claimed under the mortgage as a condition of the grant of an injunction.

27. in the Court of Appeal, Cooke JA observed at the outset that "there is no challenge to the correctness of the legal criteria established in the ***Marbella*** line of authorities - nor any question as to whether the guidance given therein has been flouted or indeed misapplied" (page 9).

The learned judge went on to re-examine a few of the relevant authorities (including ***Flowers, Foliage and Plants)*** and concluded that they suggested "that it would be proper to grant an injunction to restrain the mortgagee's power of sale it there are triable issues as to the validity of the document upon which the mortgagee seeks to found his powers of sale" (page 11).

28. Harris JA, for her part, restated the ***Marbella*** principle that, as a general rule, a mortgagee will not be restrained from exercising his powers of sale on the ground that the amount due is disputed. He, however, may be restrained if the mortgagor pays into court, the sum which is claimed to be due" (page 18).

29. In Rupert ***Brady,*** on the other hand, the court allowed an appeal from that part of a decision of Sinclair-Haynes J in which she applied Marbella by granting an injunction restraining the mortgagee's exercise of its powers of sale on condition that the claimant/mortgagor pay into court the amount of $14.2 million said to be due under the mortgage. The result of the appeal was that the order of the learned judge was varied by the setting aside of the payment condition.

30. But this was a case in which the mortgagor's position was that he had not signed the relevant mortgage documents, that he had not given authority to anyone to pledge his property as security and that the

alleged mortgage was therefore null and void. Panton P referred with approval to ***Flowers,* Foliage and Plants** and commented that in the circumstances of this case "it would be unjust to demand that [the mortgagor) deposit such a huge sum of money in order to protect his rights" (paragraph 8).

31. Cooke JA again considered ***Marbella*** and ***Flowers,* Foliage & *Plants*** and concluded as follows:

> "The correct distinction is between cases where the issue is in respect of the amount of money owed under a valid mortgage and cases where the validity of the mortgage is challenged [see Global ***Trust***). In the instant case the appellant is challenging the validity of the mortgage document as it relates to him". (paragraph 7).

32. It appears to me therefore, on the basis of these decisions, that the ***Marbella*** principle is in fact, contrary to Mr. Codlin's contention, alive and well, subject only to the distinction so lucidly expressed by Cooke JA in ***Rupert Brady.***

33. In the instant case, the appellant does not challenge in his pleaded claim, the validity of the mortgage, as was done in Rupert ***Brady,*** and it follows from this in my view that, even if I am wrong in my primary conclusion that the appellant has no reasonable grounds of appeal, the only basis on which an injunction could be granted in this case is on

condition that the appellant pay into court the amount claimed by the 1st respondent.

34. On the basis of all of the foregoing, the application for an injunction pending the hearing of the appeal is therefore dismissed. The costs of the application will be costs in the appeal, with a special costs certificate granted to both parties.

MORRISON J.A:

ORDER:

The application for an injunction pending the hearing of the appeal is dismissed. The costs of the application are costs in the appeal with a special costs certificate granted to both parties.