

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 26/2008

**BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
 THE HON. MR. JUSTICE COOKE, J.A.
 THE HON. MRS. JUSTICE HARRIS, J.A.**

BETWEEN	MICHAEL LEVY	APPELLANT
AND	JAMAICAN REDEVELOPMENT FOUNDATION INC.	1ST RESPONDENT
AND	KENNETH TOMLINSON	2ND RESPONDENT

Raphael Codlin and Miss Melissa Cunningham, instructed by Raphael Codlin & Company for the Appellant

Mrs. Sandra Minott-Phillips and Mrs. Sanya Goffe, instructed by Myers, Fletcher & Gordon for the 1st Respondent

Maurice Manning instructed by Nunes, Scholefield, Deleon & Company for the 2nd Respondent

January 26, 27, 28, 30 and October 16, 2009

COOKE, J.A.

1. The appellant is the mortgagor and the 1st respondent the mortgagee. The security is land registered in some thirty certificates of title. The 2nd respondent is the receiver appointed by the 1st respondent, acting, it is said, pursuant to section 125 (1) of the Registration of Titles Act

and to various clauses in the relevant Instruments of Mortgage. This appointment was effected on the 10th July 2007 and was duly registered on the relevant certificates of title. The appellant was advised of this appointment. The 1st respondent (the mortgagee) had on the 17th April 2007, by Registered Notice, demanded of the appellant, settlement of the entire mortgage debt within one month of the date of the Notice, failing which it would sell the mortgaged premises in exercise of the power of sale contained in the Registration of Titles Act. The sum claimed by the 1st respondent in the Notice was \$632,146,505.94 as of the 27th March 2007.

2. By Claim Form dated and filed 16th November 2007, the appellant sought various declarations and an injunction restraining the respondents from occupying the appellant's properties. The most significant declaration sought was that the appellant did not borrow any money from the 1st respondent nor did the latter advance any sums in circumstances which would make the appellant indebted in any way or at all to the 1st respondent. (At this stage, the debt claimed by the 1st respondent stood at \$846,231,815.92). There was also sought a declaration which would preclude the receiver from carrying out the duties attendant to his appointment.

3. In the Particulars of Claim the critical paragraphs are 4, 6, and 7.

Paragraph 4 stated as follows: -

"4 The Claimant will say that the 1st Defendant wrongly and unlawfully contends that the Claimant is indebted to the 1st Defendant in the sum of \$846,231,815.92 which the Claimant contends is not owed to the 1st Defendant by the Claimant, neither does the Claimant owes (sic) the 1st Defendant any sum of money whatsoever."

Paragraph 6 contended as follows: -

"6 The Claimant will further say that the 1st Defendant is neither an assignee nor a legal successor in title to any sum which the Claimant may owe to any other person and the Claimant maintains that the Claimant is not indebted to the 1st Defendant in the sum claimed or at all.

7. The Claimant will contend that in order for the Claimant to be liable to the 1st Defendant the 1st Defendant would be required to show that it, the 1st Defendant, was properly assigned a debt due to the assignor and that the said assignor had given notice of that debt to the Claimant in circumstances that are conducive to notice given under a proper assignment."

In a nutshell, the position of the appellant was that he owed no money to the 1st respondent and further if there was any sum which he "may owe", such debt was not to the 1st respondent.

4. In the Defence filed by the 1st respondent, the pertinent paragraphs are 3, 4, 6, 8, 9, 15, 19, 21, 22, 23 and 24. These are reproduced hereunder.

- “3. The 1st Defendant's right to recover the debt in question, as well as the mortgages executed in respect of the debts, was assigned to it by a Deed of Assignment both dated January 30, 2002 between Refin Trust Limited et al and the 1st Defendant. The Deed of Assignment dated January 30, is attached to the Affidavit of Janet Farrow sworn to and filed herein on January 18, 2008.
4. The 1st Defendant is the registered mortgagee of the said lands (sic). Copies of the Certificates of Titles for which are exhibited to the affidavit of Janet Farrow sworn to and filed herein on January 18, 2008.
5. Save that it is denied that the 1st Defendant is “purporting” to exercise the rights specified as it has in fact exercised them, paragraph 3 of the Particulars of Claim is admitted.
6. In exercise of its statutory power under the Registration of Titles Act and in pursuance of the powers conferred on it by virtue of the Instruments of Mortgage dated October 22, 1992 and February 20, 2001, the 1st Defendant appointed the 2nd Defendant as Receiver of the income of the mortgaged properties. The appointment of Receiver was registered on the Certificates of Titles on July 24, 2007. The Instruments of Mortgage dated October 22, 1992 and February 20, 2001 are exhibited to the affidavit of Janet

Farrow sworn to and filed herein on January 18, 2008.

7. Paragraph 4 is denied, because the debt claimed is owed by the Claimant to the 1st Defendant.
8. Furthermore, the 1st Defendant is the assignee for value of the receivable from Refin Trust Limited without notice of any defect in the latter's title to the receivable or its underlying securities.
9. In further answer to paragraph 4, the Claimant was notified by letter dated September 18, 2007 of the balances due and owing by him and a copy of the Claimant's statement of account was enclosed. By way of the said letter the Claimant was informed that the balances were calculated per the terms of the mortgage instrument dated February 20, 2001. A copy of the letter dated September 18, 2007 enclosing statement of account is exhibited to the affidavit of Janet Farrow sworn to and filed herein on January 18, 2008.
10. In answer to paragraph 5 of the Particulars of Claim, the 1st Defendant admits that there was a payment but denies the amount and the payee.
11. The amount of the payment was \$16 million and the payment was made by the Claimant's then attorneys, Playfair Junor Pearson & Co., to Nunes Scholefield Deleon & Company and appeared to represent net proceeds of sale. Annexed hereto as **A** are copies of letters from Nunes Scholefield Deleon & Co to Eagle Commercial Bank and Playfair Junor

Pearson & Co. both dated January 16, 1997 and letter dated January 20, 1997 from Eagle Commercial Bank to Nunes Scholefield Deleon & Co acknowledging receipt and application of the sum of \$16 million.

12. In or around January 2003, the 1st Defendant received a cheque for \$4,116,700.00 which did not represent a payment by the Claimant but represented partial proceeds from the deposits from the proposed sale of shop units, which are a part of the shopping centre to which the certificates of title, referred to at paragraph 2 of the Particulars of Claim, relate.
13. The sum of \$4,116,700.00 was applied to the Claimant's debt in January 2003, however, as the sales were never completed, the money collected on account of the sales had to be returned and the 1st Defendant reversed the payment. On November 5, 2007 it returned the sum of \$4,116,700.00 to the attorneys who had conduct of the sales of the units, Alton E. Morgan & Co. A copy of the Claimant's statement of account showing that the sum of \$4,116,700.00 was applied to the Claimant's balance in January 2003 and subsequently reversed in October 2007 is annexed hereto as **B**.
14. By letter dated November 5, 2007, Alton E. Morgan & Co refused to accept the cheque and returned it to the 1st Defendant. The 1st Defendant remains in possession of the funds and is in process of paying over said funds to Receiver. A copy of the said letter is annexed hereto as **C**.

15. The 1st Defendant's Statement of Account referred to in paragraph 13 above, sets out an opening balance of \$34,694,598.00. This sum was agreed by the Claimant in the Instrument of Mortgage dated February 20, 2001. A copy of the said Instrument of Mortgage is exhibited to the affidavit of Janet Farrow sworn to and filed herein on January 18, 2008.
16. The agreed balance owed on account at 2001 was subsequent to the date of the payment of \$16 million paid to Eagle Commercial Bank referred to above.
17. Paragraph 6 is denied. The 1st Defendant repeats the facts set out above.
18. Paragraph 7 is denied. The Claimant (sic) repeats the facts set out above.
19. In further answer to paragraphs 6 and 7 of the Particulars of Claim, by letter dated February 14, 2002 Dennis Joslin Jamaica Limited advised the Claimant that his debts and other obligations previously owed to Refin Trust had been acquired by the 1st Defendant and that Dennis Joslin Jamaica Limited had been appointed by the 1st Defendant to service all debts and obligations of the Claimant. A copy of the said letter dated February 14, 2002 is exhibited to the affidavit of Janet Farrow sworn to and filed herein on January 18, 2008.
20. Further in relation to paragraph 7, the Claimant by letter dated December 5, 2002 to Dennis Joslin Jamaica Limited, made an offer to settle the debt owed. A copy of the said letter dated December 5,

2002 is exhibited to the affidavit of Janet Farrow sworn to and filed herein on January 18, 2008.

21. The debt was not settled.
22. By letter dated October 21, 2005 the 1st Defendant notified the Claimant that his debts and obligations were no longer being serviced by Dennis Joslin Jamaica Limited and that it had assumed servicing the debts and obligations directly. A copy of the said letter dated October 21, 2005 is exhibited to the affidavit of Janet Farrow sworn to and filed herein on January 18, 2008.
23. The 1st Defendant subsequently issued a letter of demand, by registered mail, to the Claimant dated September 26, 2006. A copy of the said letter dated September 26, 2006 is exhibited to the affidavit of Janet Farrow sworn to and filed herein on January 18, 2008.
24. On April 17, 2007 the 1st Defendant served the Claimant with a Registered Notice restating the fact of the acquisition of the Claimant's mortgage debt and requiring the Claimant to settle the entire mortgage debt. A copy of the said Registered Notice is exhibited to the affidavit of Janet Farrow sworn to and filed herein on January 18, 2008."

5. Paragraphs 3 and 4 (supra), have set out the essential aspects of the rival pleadings at the time when the appellant, by an application for court orders dated 24th December 2007, sought orders for an injunction

"barring the 1st and 2nd Defendants ... from occupying the premises set out in the Volume and Folio numbers herein above stated or from doing any act or taking any steps to exercise any control or authority over the said premises."

6. The grounds on which the injunction was sought were:

- "1. The Claimant is the registered proprietor of all the lands mentioned and referred to in the 1st paragraph of these presents.
2. The 1st Defendant purportedly executed a document giving the 2nd Defendant a right to take possession of the Claimant's premises pursuant to a purported mortgage which the 1st Defendant claims he is entitled to enforce but which the Claimant says the 1st Defendant is not entitled to enforce because the Claimant did not have any business with the 1st Defendant to become liable to the 1st Defendant, neither was there any assignment of any debt from any person to the 1st Defendant against the Claimant.
3. The 1st Defendant purported to charge interest against the Claimant at the rate of fifty percent (50%) per annum and the 1st Defendant, under the laws of Jamaica, is not entitled to charge fifty per cent (50%) interest against the Claimant.
4. That there is no legal authority to support the 1st Defendant's action as against the Claimant."

7. The application for court orders was supported by an affidavit of Michael Levy, filed on the 27th December 2007. The relevant paragraphs pursuant to the grounds on which the application was made were 8, 9 and 10. The paragraphs stated as follows:-

- "8. That I have never had any dealings whatsoever with Jamaican Redevelopment Foundation. The document which purports to give authority for receivership, is not valid, in that, I have never had any transaction with Jamaican Redevelopment Foundation; no debt of money was ever assigned to them and no notice of any such assignment was ever given to me. I attach hereto mark (sic) **'ML 2'** copy of the said purported instrument of Receivership.
9. That it is observed that the Statement of Account purports to show that I am liable to pay interest at the rate of 50%. I had no such agreement with Jamaican Redevelopment Foundation and I have been informed by my Attorneys and do verily believe that the said Jamaican Redevelopment Foundation is not entitled to charge 50% interest on any indebtedness.
10. That the 2nd Defendant took possession of my properties on or about the 7th of August 2007 purportedly under the authority of the said Instrument of Receivership issued by the 1st Defendant. I repeat that the 1st Defendant had no authority to issue that Instrument and the taking over of my properties by the 2nd Defendant is illegal."

8. An affidavit of Janet Farrow dated 17th January 2008 was filed in response to the Levy affidavit. This, recounts, from the perspective of the 1st respondent, its involvement in this matter. This affidavit will be reproduced almost in its entirety:

- “4. The debts which are the subject of this claim were originally owed to Eagle Commercial Bank and Citizens Bank Limited (“the original creditor banks”). The right to recover the debts in question, as well as the mortgages executed in respect of the debts, was assigned to the 1st Defendant by Deed of Assignment dated January 30, 2002 by Refin Trust Limited, having previously been assigned to that company by the original creditor banks. The said Deed of Assignment is exhibited and marked “**JF1**” for identification.
5. The Deed of Assignment was lodged with the Registrar of Titles and the relevant Certificates of Title duly endorsed to reflect the transfer of mortgages to the 1st Defendant. The relevant Certificates of Title are exhibited and marked “**JF2**” for identification.
6. The 1st Defendant is the assignee for value of the receivable from Refin Trust Limited without notice of any defect in the latter’s title to the receivable or its underlying securities.
7. By letter dated February 14, 2002, Dennis Joslin Jamaica Limited, writing on behalf of the 1st Defendant, advised the Claimant that his debts and other obligations previously owed to Refin Trust had been acquired by the 1st Defendant and that

Dennis Joslin Jamaica Limited had been appointed by the 1st Defendant to service all debts and obligations of the Claimant. A copy of the said letter dated February 14, 2002 is exhibited and marked "**JF3**" for identification.

8. By letter dated December 5, 2002 from the Claimant to Dennis Joslin Jamaica Limited, the Claimant made an offer to settle the debt owed and thus acknowledged the existence of the debt. At no time has the Claimant disputed his obligation to settle his debt with the 1st Defendant upon his being notified of the 1st Defendant's acquisition of the said debt. A copy of the said letter dated December 5, 2002 is exhibited and marked "**JF4**" for identification.
9. By letter dated October 21, 2005 the Claimant was notified by the 1st Defendant that his debts and obligations were no longer being serviced by Dennis Joslin Jamaica Limited and were being serviced directly by the 1st Defendant. A copy of the said letter dated October 21, 2005 is exhibited and marked "**JF5**" for identification.
10. At the time of the assignment of the Claimant's receivable to the 1st Defendant, the Claimant's account was in arrears, a status which remains unchanged to date.
11. Accordingly the 1st Defendant issued a letter of demand to the Claimant dated September 26, 2006. This letter was sent to the Claimant by registered mail. The said letter dated September 26, 2006 is exhibited and marked "**JF6**" for identification.

12. On April 17, 2007 the 1st Defendant served the Claimant with a Registered Notice restating the fact of the 1st Defendant's acquisition of the Claimant's mortgage debt and requiring the Claimant to settle the entire mortgage debt. The said Registered Notice is exhibited and marked "**JF7**" for identification.
13. In exercise of its statutory power under the Registration of Titles Act and in pursuance of the powers conferred on it by virtue of the Instruments of Mortgage, the 1st Defendant, on July 10, 2007, appointed the 2nd Defendant, Kenneth Tomlinson of Business Recovery Services Limited, as Receiver of the income of the mortgaged properties. The appointment of receiver was registered on the Certificates of Titles on July 24, 2007. The said Instruments of Mortgage are exhibited and marked "**JF8**" for identification.
14. By letter dated September 18, 2007 the Claimant was notified of the balances due and owing by him to the 1st Defendant and a copy of the Claimant's statement of account was enclosed. By way of the said letter the Claimant was informed that the balances were calculated per the terms of the mortgage instrument dated February 20, 2001. A copy of the letter dated September 18, 2007 enclosing statement of account is exhibited and marked "**JF9**" for identification.
15. The loans from the original creditor banks agreed by the 1st Defendant are exempt from the provision of the Money lending Act. The Moneylending (Exemption) (Jamaican Redevelopment Foundation Inc.) Order for the years 2002, 2003, 2004,

2005, 2006 and 2007 are exhibited and marked "**JF10**" for identification.

16. The Claimant has always had proper notice of the assignment of his debt to the 1st Defendant and the subsequent appointment of the 2nd Defendant as receiver under the mortgage.

9. The foregoing has set out the circumstances which obtained when Jones J. heard the application, which he dismissed on the 29th February 2008. This appeal is from the dismissal of the application. There was no written judgment.

10. Based on the material which was before the court below, it is scarcely surprising that the application for court orders was dismissed. The respondent produced, by way of the affidavit of Janet Farrow, documentary evidence to establish that the appellant did have "business" with the respondent. Therefore, ground 2 of the basis for the application (*supra*) does not appear to be subject to any debate. Ground 3 on which the application was based (*supra*) was also met by documentary evidence. Paragraph 15 of the Farrow affidavit (*supra*), in response to the assertion that the charging of interest at the rate of fifty percent was unlawful 'under the laws of Jamaica', it is stated that there were orders of exemption granted to the respondent by which it was not bound by the provisions of the Moneylending Act. Thus, in respect of the

application for court orders, and the grounds which were put forward, it cannot be said that there was in the circumstances 'a serious question to be tried' see **American Cyanamid Co. v Ethicon Ltd.** [1975] 1 ALL ER 504.

11. On January 30, 2009, we dismissed the appeal and awarded costs to the respondents to be taxed if not agreed. The foregoing are our reasons for doing so.