

*Sup Court - Interlocutory Injunction - Summons to restrain mortgagee from exercising power under mortgage instrument - whether valuable consideration - whether undue influence - whether breach of fiduciary duty - whether misrepresentation - whether serious issue to be tried - balance of convenience. Summons dismissed. Conferred to p 12 (end)*  
IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW  
SUIT NO. C.L. 1088/89

BETWEEN

BEVERLEY LEWIS

PLAINTIFF

A N D

WORKERS SAVINGS AND LOAN BANK

DEFENDANT

Miss Tracy Barnes of Messrs. Dunn, Cox and Orrett for Plaintiff.

Mr. Allan Wood and Mr. Carl Dowding instructed by Messrs. Woodham, Pickersgill and Dowding.

Miss Olive Lyn and Miss Valerie Alexander for Defendant.

Heard in Chambers 21st and 22nd September, and 1st November, 1989

Coram: MORRIS J. (Ag.)

#### JUDGMENT

This is a Summons for an Interlocutory Injunction brought by the Plaintiff against the Defendant.

Plaintiff and her husband Dr. Dwight Anthony Lewis who are Registered Medical Practitioners, are the registered proprietors of the Lands comprised in Certificate of Title registered at Volume 1095 Folio 872 of the Register Book of Titles known as 8 Farringdon Heights, Kingston 6 in the parish of Saint Andrew. The facts as set out in her affidavit are as follows:-

In the year 1982 her husband alone approached the Defendant through the Manager of its Maxfield Plaza Branch to provide interim financing to construct a dwelling house at Number 8 Farringdon Heights, Kingston 6. He was the sole negotiator and she had nothing whatever to do with what transpired between them. Her only involvement in this matter first came about on or about the morning of the 3rd day of June, 1982 while she was at home at 11A Newhaven Avenue, Kingston 6 recuperating from major surgery. On that occasion Dr. Anthony Lewis and a female representative of the Defendant met with her there.

This representative presented her with the Defendant's Letter of Commitment dated 3rd June, 1982 which was read, understood and agreed to by her jointly with Dr. Anthony Lewis that day. Both wife and husband agreed that the dwelling house would be constructed by Plaintiff's father, Mr. Aubrey Grant at an estimated total cost of \$270,000.00 of which at least the sum of \$200,000.00 was to be borrowed from the Defendant and paid directly to Mr. Aubrey Grant to be used solely for construction against

*Remedies*

certificates issued by Messrs. Goldson Barrett and Johnson with advances to be made on a basis prorated with progress in construction. It was hoped that the building would be completed commensurate with the receipt of the total advances of \$200,000.00 to be made by the Defendant.

It was Plaintiff's understanding that the principal amount of \$200,000.00 to be borrowed from the Defendant was to be repaid out of the full proceeds of the loan from Life of Jamaica payable upon completion of construction and that interest would be payable from time to time on the amounts advanced in keeping with the provision of the Defendant's Letter of Commitment.

Plaintiff never agreed that her husband would be the spokesman dealing with the day to day operation of the loan account or further that funds to be disbursed by the Defendant would be channelled through any account operated solely by him. Indeed she is emphatic that had her consent been sought to such an arrangement she would not have agreed as this would have prevented her from exercising any joint control over the use of the funds.

Mortgage numbered 405085 was given by Plaintiff and her husband as security for a loan of \$200,000.00 from the Defendant to them which sum was to be used to finance the construction of the dwelling house on the land at 8 Farrington Heights aforesaid. Prior to the execution of the mortgage numbered 405085 the Defendant advanced to Dr. Anthony Lewis solely the sum of \$63,500 allegedly on account of the said Mortgage loan of which \$25,000.00 was advanced on 3rd June, 1982 and \$38,500.00 on 3rd August, 1982. It is the Plaintiff's contention that only the sum of \$136,500.00 was advanced pursuant to the said mortgage and not the sum of \$200,000.00 which the mortgage was taken to secure. During the period 1982 - 1985 Defendant made loans to Dr. Anthony Lewis alone totalling \$29,786.35.

In early 1984 the Doctors Lewis took up residence in the dwelling house which was then in an incomplete state. Unfortunately, marital differences arose between them and Dr. Anthony Lewis left the matrimonial home in or about October 1984. In or about January 1985 Plaintiff became aware that a property owned by Dr. Anthony Lewis was to be sold by public auction and during a discussion with him about this development he advised

her that the Defendant intended to do likewise with 8 Farrington Heights.

This was the first occasion on which Plaintiff was being made aware that there was a problem with respect to the facilities provided by the Defendant.

As a result, she attended on the Defendant during early February at a time when she was in a state of severe emotional stress caused by the departure of her husband from the matrimonial home. The Defendant failed to disclose fully what arrangements had been made between themselves and Dr. Anthony Lewis. At that time the Defendant advised the Doctors Lewis that accrued interest on the loans to Dr. Anthony Lewis brought the total sum owed by him to the sum of \$42,621.94 and that accrued interest on the alleged mortgage loan of \$200,000.00 amounted to \$87,115.50.

Without obtaining the benefit of independent legal advice and on the urging and encouragement of the Defendant, Plaintiff was persuaded to consolidate into one demand loan the liabilities just referred to in the sum of \$129,742.44 which was executed by the Doctors Lewis.

In August 1985 the Defendant received from Life of Jamaica the sum of \$200,000.00 which was to be in satisfaction of the said mortgage loan. Following upon this the Defendant by letter dated 27th August, 1985 advised the Doctors Lewis that interest in the sum of \$29,946.00 was owed by them in respect of the alleged mortgage loan of \$200,000.00 and the sum of \$125,098. was owed by them on the said demand loan. Plaintiff was again urged and encouraged by Defendant to execute another instrument of mortgage to cover the said indebtedness. She did so believing that the sums were really owed and that the Defendant would exercise its powers of Sale under Mortgage No. 405085. This instrument was dated 19th September 1985 and was stated to be security for a loan of \$160,000.00. Up to then Plaintiff and her husband had made interest payments on the first mortgage amounting to some \$23,589.62. It is Plaintiff's contention that the sum of \$223,589.62 was sufficient to discharge the debt comprised in the first Mortgage No. 405085 since only \$136,500.00 had been loaned thereon. Accordingly, the Defendant's letter of the 25th August, 1985 knowingly or otherwise, misrepresented the sum which was due on account of the said mortgage loan and that it was

partly on account of such misrepresentation that she agreed to execute the second mortgage. The separate liabilities of Dr. Anthony Lewis were thus consolidated with their joint liabilities and incorporated in the second mortgage No. 441009. Plaintiff was advised by her then Attorney-at-Law that this Mortgage No. 441009 was unenforceable by reason of there being no or no valuable consideration to support it. As a result she ceased paying the mortgage debt. On Wednesday 12th July, 1989 premises 8 Farringdon Heights was advertised for sale by public auction in the Daily Gleaner newspaper.

The Defendant's case is as follows:-

In May 1982 the Doctors Lewis approached the Manager of the Maxfield Plaza Branch of the Defendant Bank to provide interim financing to allow them to construct a dwelling house on lands situate at 8 Farringdon Height, Saint Andrew. The Doctors Lewis intimated that they had sought and had been granted long term financing from Life of Jamaica in the amount of \$200,000.00. The Contractor who would be building the house was Mr. Aubrey Grant, the father of Plaintiff. It was agreed that the proposed loan would be drawn down upon presentation to the Bank of Certificates prepared by Messrs. Goldson, Barrett and Johnson, Quantity Surveyors. It was further agreed that Dr. Anthony Lewis would be the spokesman dealing with the day to day operation of the account at the Branch and further that as he already operated a Current Account with the Half Way Tree Branch this would be the account through which funds would be disbursed for work done. It was also agreed that while the loan from Life of Jamaica in the amount of \$200,000.00 would be paid on the completion of construction, interest would accrue and be payable as and when moneys were drawn down based on the presentation of Certificates.

In June 1982 the Bank advised the Doctors Lewis that they would lend them \$200,000.00 by way of interim finance to enable them to construct the dwelling house as aforesaid. The security for the loan would be (a) an irrevocable undertaking from Life of Jamaica to pay Workers Savings and Loan bank \$200,000.00 upon the completion of construction and (b) A mortgage over 8 Farringdon Heights, registered at Volume 1095 Folio 872 of the Register Book of Titles. The loan was accepted by the Doctors Lewis who thereafter knowingly and willingly executed the relevant documents. During the course

of construction, requests were made for draw downs on the loans based on Certificates presented by the Quantity Surveyors certifying that the amounts requested represented actual work done. The Bank would pay over these amounts as arranged with the Doctors Lewis. As time passed it became evident to the Bank that (a) the interest payments on moneys drawn down under the loan were not being made and (b) the over-run in construction costs greatly exceeded the estimated costs. As a result the Bank called the Doctors Lewis to express its dissatisfaction with the state of the loan. At the request of the Doctors Lewis the Bank agreed to continue financing the construction costs so long as the Bank was satisfied that the moneys were properly spent and that the Quantity Surveyors continued to monitor and certify requests for draw downs on the loan.

The Doctors Lewis agreed that they would seek to obtain a further undertaking from Life of Jamaica to cover the increased cost of the project or in the alternative to supply the Bank with some other security to cover the amounts borrowed in excess of the \$200,000.00 covered by the Life of Jamaica undertaking. By early 1984 the dwelling house was completed and the Doctors Lewis took up residence therein. They had failed in their efforts to obtain additional financing from Life of Jamaica and had been seeking alternate sources of financing. They had, in addition, apart from sporadic payments on account of accrued interest, fallen seriously into arrears with interest payments leading to the Bank formally demanding payment of its loan on 10th August, 1984. As a consequence the Doctors Lewis asked the Bank to give them time to secure additional financing; in addition they agreed to pledge assets by way of additional security. In consideration of this the Bank withdrew its demand for payment. At this time the amount outstanding for principal and interest stood at \$277,941.70.

By February 1985, Life of Jamaica advised the Bank that it would not extend additional financing to the Doctors Lewis who by then had again stopped paying interest on their loans. The Bank therefore advised them that it had no choice but to demand payment of its loans which it did formally by Notice dated 4th February, 1985. At this time outstanding principal and interest stood at \$323,448.74. In or about the month of August 1985 the Bank received \$200,000.00 from Life of Jamaica in settlement of its undertaking to the Bank. This amount was applied against the outstanding

amounts owed by the Doctors Lewis by way of principal and interest, resulting in a shortfall of approximately \$155,000.00. It was agreed with the Doctors Lewis that the Bank would extend a loan to them of \$155,000.00 payable on demand, secured by a mortgage over 8 Farrington Heights (ranking 2nd to Mortgage in favour of Life of Jamaica.). The Doctors Lewis agreed and accepted the offer and signed the relevant documents.

The Mortgage was registered on the 19th September, 1985. By early 1986 the account had again fallen into arrears. Dr. Anthony Lewis advised the Bank that due to marital differences he had left 8 Farrington Heights; he was having financial difficulties as this had affected his practice and he now had additional expenses. On the 20th August, 1986, the Bank received a letter from Mr. Stephen Virtue, Attorney-at-Law advising that he acted for Plaintiff. He asked for details of the loan, copies of security documents held and in addition asked the Bank not to seek to realise its securities until he had had an opportunity to advise his client. He also intimated that Plaintiff had made arrangements to lease the premises in question and that arrangements were being made to liquidate the loan to the Bank.

On 12th November, 1986 Mr. Virtue wrote to the Bank indicating that he had advised his client to make no further payments to the Bank. Since then no further payments have been made on account of the loan.

Miss Barnes stated the Plaintiff's case shortly.

The only consideration given for the first mortgage No. 405085 was the sum of \$136,500.00. The Defendant received from Life of Jamaica the sum of \$200,000.00 in August 1985 and a further sum of \$23,589.62 on account of interest on loan from Plaintiff and her husband. These sums taken together were sufficient to discharge the indebtedness of Plaintiff to Defendant under the said Mortgage. In relation to second mortgage No. 441009 Plaintiff contends that it is unenforceable and inoperative because:-

- (i) There was no valuable consideration because neither at or after the date of that mortgage was the sum of \$160,000.00 (stated to be the security) ever advanced to Plaintiff or her husband.
- (ii) Execution of Mortgage was brought about by the undue influence of Defendant.

- (iii) Defendant is in breach of its Fiduciary Duty to the Plaintiff in that she was not advised to seek independent legal advice in respect of second mortgage.
- (iv) Execution of second mortgage was brought about by misrepresentation by Defendant as to the amount owed under first mortgage. First mortgage had in fact been discharged.

Mortgagor should pay into Court sum allegedly owed in respect of debt - SSI (Cayman) Limited vs. International Marbella Club S.A. S.C.C.A. 57/86  
Fisher and Lighthouse on Mortgages 8th Edition page 311.

Inglis and Another vs. Commonwealth Trading Bank of Australia (1972)  
126 C.L.R. page 161.

Re Cambrian Mining Company Limited Ex Parte Fell 1881 15 L.J.  
Chancery 836 Gill vs. Newton 1866 W.R. Vol. 14 page 490.

Merret vs. Murray 1863 14 L.J. page 361.

Court should find:-

- (i) Serious issue to be tried.
- (ii) Balance of convenience lies in maintaining the Status Quo, i.e. by restraining the Defendant from selling the subject property as damages would not be an adequate remedy to the Plaintiff in the event property is sold and she is successful at trial.
- (iii) If Injunction granted there should be no condition attached.

It is in the interest of both parties that there should be a speedy trial.

Mr. Wood

(i) Serious Issue to be tried: On Plaintiff's affidavit a first mortgage was made to secure \$200,000.00. In addition, further advances were made to her husband. Defendant accepts that. Plaintiff contends that \$13,500 advanced prior to the making of first mortgage is past consideration. If that is correct, payment by Life of Jamaica plus interest payments made by Plaintiff would be sufficient. If so, in respect of Letter of Commitment

- (a) Interest would be smaller.
- (b) Remaining \$160,000.00 would have been more than ample to clear balance owed with residue to Plaintiff.

If Plaintiff is incorrect as to \$63,500.00 advanced being past consideration then there would be no past consideration. Payment by Life of Jamaica would have been insufficient to clear indebtedness to August 1985. An amount would still be outstanding. Plaintiff's application frivolous and vexatious.

Contracts under seal need not be made with consideration - Halsbury's Laws Volume 9 paragraphs 209, 210; Chitty on Contract paragraph 25 page 18.  
Both mortgages executed as deeds - Contracts under seal.

Past consideration is neither relevant or decisive to analyse chronological dates when advances were made but matter to be determined whether the advances fell within contract between the parties. Halsbury's Laws Volume 9 paragraph 320. There is common ground as to paragraph 7 of Plaintiff's affidavit dated 10th August, 1989. Plaintiff did not originally exhibit Letter of Commitment. \$63,500.00 not past consideration for reasons given. There would have been balance outstanding on first mortgage. Defendant would have had Power of Sale. Forbearance by Defendant to exercise that power as well as to recover from Plaintiff's husband costs outstanding from him would be good consideration for second mortgage, Halsbury's page 322.

(a) Undue Influence? Not necessary in transaction with Bank for party to obtain independent legal advice. Bank/customer relationship does not raise presumption of undue influence - National Westminster vs. Morgan (1985) 1 A.E.R. P. 82. No material from Plaintiff's case to suggest that relationship was other than banker and customer. Her contact with bank was minimal. Even if it is shown that in the course of giving advice the Bank is shown to have acted negligently in advising the customer, then although the customer would have an action for negligent misrepresentation, that would not be undue influence.

Cornish vs. Midland Bank (1985) 3A.E.R. page 513

The Bank cannot be held responsible for Plaintiff's severe emotional stress. Plaintiff acting to protect her home, Bank its advances.

Bank called in Plaintiff February, 1985, Mortgage executed September 1985. Plaintiff had ample time to consider and reconsider the matter and to seek all the advice she wished.



(2) Adequacy of Damages: Adverse publicity not proper evidence of Defendant's means - hearsay. Defendant incorporated by act of Parliament - still doing business - assets held by Government.

Has Plaintiff been able to satisfy Court that she has the means to pay damages in the sum recoverable by Defendant should Defendant succeed at trial? No evidence on that limb.

(3) Balance of Convenience: SSI vs. Harbottle supra - Principle laid down where Mortgagees seek to restrain Mortgagees from exercising Powers of Sale.

Rationale does not turn upon whether money owed or not, Applicant admits or does not admit debt. Rationale is - until set aside by Final Order of Court, a Mortgage duly registered carries legal consequences. Balance of convenience must therefore prima facie be with the person who can show his legal title. Thus where one is dealing with right of persons, balance lies with person showing lease, agreement for sale, mortgage - until set aside.

vs.  
American Cyanamid Company/Ethicon Limited (1975) 1 AER 504.

Judgment of Lord Diplock. Bona fides of Plaintiff relevant under this head.

#### Summary

1. Claim on uncontroverted material is frivolous and vexatious - Injunction ought to be refused.

2. Balance of Convenience - Strength of Defendant's case.

If Injunction to be granted sum claimed by defendant should be paid into Court or other security given therefor.

#### Miss Barnes

1. Documents under seal do not require consideration.
2. Advance to Plaintiff's husband came before execution of the instrument.
3. Mortgage is not contract under seal - instrument not signed, sealed and delivered.

#### 1. Serious Issue to be Tried

Has the Plaintiff established a right which should be protected by Injunctive Relief?

Paragraph 6(a) of Miss Barnes' Affidavit dated 17th July, 1939

and paragraphs 7 and 8 of Plaintiff's Affidavit dated 10th August, 1939 allege that Dr. Anthony Lewis received the sum of \$63,500.00 on his behalf or to put it another way, for his own use and benefit.

It is common ground that the said sum of \$63,500.00 was advanced in the manner agreed between the parties. What the Plaintiff desires is that the Court should put a particular construction or interpretation on what took place, which is that this sum constituted past consideration.

Plaintiff's case is that the only consideration for first mortgage was the sum of \$136,500.00. In respect of the second mortgage it was further submitted that neither at the time of execution nor thereafter did the Plaintiff ever receive the sum of \$166,000.00, therefore there was no or no valuable consideration for it.

It is therefore necessary to consider Mr. Wood's submission that both mortgages were executed as deeds, i.e. contracts under seal consequently the question of past consideration is neither relevant nor decisive when analysing dates of advances. Matter to be determined was whether the advances fell within contract between the parties - See Letter of Commitment.

If a document is executed as a deed, there is no need for it to be "signed, sealed and delivered" in the old sense - Chitty on Contracts paragraphs 19 - 23. This submission appears to me to be a valid one. In this context I will now go on to consider the true nature of a mortgage.

At page 4 of Fisher and Lightwood on mortgages a mortgage is defined

as:-

"... a form of security created by contract, creating an interest in property defeasible upon performing the condition of paying a given sum of money with or without interest...."

The classic description of a Mortgage was given by Lindley M.R.

Santley vs. Wilde (1899) 2 Ch. 474 (C.A.) in the following terms -

"A Mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given."

For the purpose of stamp duty "mortgage" means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or for the repayment of money to be thereafter lent, advanced or paid, or which may become due on

account current, whether or not with any sum already advanced or due - English Stamp Act 1891 Section 86(1). It follows ineluctably that mortgages can be taken to secure past debts, advances, present or future debts; everything depends on the contract between the parties.

I will now examine shortly some aspects of the facts in the Inglis case supra. At page 163 Walsh J. states:-

"It is not in dispute that a mortgage was executed by which the property 'Lammermuir' was mortgaged to the defendant to secure an overdraft or that the plaintiffs became indebted to the defendant in respect of a debt secured by the mortgage or that the debt has not been paid off in money or that the mortgage has not been discharged."

Here we can substitute the sum of \$200,000.00 for overdraft.

In the following paragraph he states:-

"..... it is clear that they do not claim either that no indebtedness arose at any time or that the indebtedness has been discharged by payment."

On page 164 he goes on -

"It is proved that since that date no payment has been made in respect of that indebtedness. The Plaintiffs have not made any offer to pay off the amount which the defendant claimed to be due under the mortgage or any of it or to pay any sum into Court, whether that sum be the amount so claimed or any other amount." A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this be not in dispute be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into Court."

He then cites a passage from Halsbury's Laws of England, 3rd Edition Volume 27, page 301. Further down the same page he continues -

"In my opinion, the authorities which I have been able to examine establish that for the purposes of the application of the general rule to which I have been referred, nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt."

In answering the question therefore whether the Plaintiff has established right which should be protected by Injunctive Relief or in other words whether there is a serious issue to be tried I once again quote from page 166 of the judgment -

"But the proprietary rights as owners which the Plaintiffs have are rights which are subject to and qualified by the

rights over the property given to the defendant by the mortgage. If the defendant exercises the latter rights or threatens to do so that is not, as such an act or a threatened act in contravention or infringement of the plaintiff's proprietary rights. Of course, a mortgagee does at some times act, in purported exercise of the rights and the powers given to him by the mortgage, in a manner which is not a proper exercise of them and which does infringe the rights of the mortgagor. But that is not what is in question in this application, which is an application designed to prevent, until the action is determined, any exercise of the mortgagee's powers."

In the case from which these passages are taken the Plaintiffs brought an action against the Defendant Mortgagees for unliquidated damages in a sum in excess of what was due under the mortgage. In the instant case the Plaintiff is saying that the sums advanced under the terms of the contract (Letter of Commitment) i.e. \$63,500.00 constitute past consideration. That being so, the sum of \$200,000.00 paid to the Defendant by Life of Jamaica plus the sum of \$23,589.62 interest payments by Plaintiff and her husband would be sufficient to discharge the debt which the first mortgage was taken to secure.

Finally, I come to another aspect of this application which I consider relevant to the intervention of Equity which is, the bona fides of the Plaintiff. It is interesting to observe that although the Letter of Commitment is referred to in paragraph 5 of the Plaintiff's Statement of Claim in the following terms:-

"5. That by letter dated the 3rd June 1982 the Defendant advised the Plaintiff and her husband that it would lend to them the aforesaid sum of \$200,000.00 and set out therein the terms and conditions on which the aforesaid sum was being loaned." (*Emphasis mine.*)

It was the Defendant who exhibited this document in an Affidavit by Miss Janice Robinson a Senior Assistant Manager dated the 14th September, 1989.

From the foregoing I have endeavoured to establish that the Plaintiff in the Inglis case supra as well as the present Plaintiff attempted by means other than direct payment of the debt to move the Court to hold that the respective mortgage debts had been thereby discharged.

I am therefore of the opinion that the case is not one in which the Court should intervene to restrain the exercise by the mortgagee of whatever powers it has under the mortgage instruments.

The summons is dismissed with costs to the Defendant to be agreed or taxed.

*Cases referred to*  
 ① *SSI (Cayman) Ltd v International Maritime Club S.A*

*SCCA 57/88*  
 ② *Inglis and Another v Commonwealth Trading Bank of Australia*  
*12 A CLR 151*