

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 10/2014

**BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)**

BETWEEN	RBC ROYAL BANK (JAMAICA) LIMITED	APPELLANT
AND	TANYA SUSANNE PHILLIPS	RESPONDENT

**William Panton, Courtney Bailey and Christopher Brown instructed by
DunnCox for the appellant**

**Allan Wood QC and Mrs Symone Mayhew instructed by Mrs Symone Mayhew
for the respondent**

10, 11 and 12 December 2014

ORAL JUDGMENT

DUKHARAN JA

[1] I have read, in draft, the text of the judgment of Brooks JA is about to deliver. I agree with his reasoning and conclusion and have nothing further to add.

BROOKS JA

[2] This is an appeal from the decision of Sinclair-Haynes J to grant an interim injunction preventing RBC Royal Bank (Jamaica) Ltd (RBC) from exercising powers of sale over property which is home to Mrs Tanya Susanne Phillips and her husband David. Mrs Phillips sought the injunction in a claim that she brought against RBC, her husband, and her husband's company, National Meats and Food Distributors Limited (National Meats). The injunction was ordered, pending the trial of Mrs Phillips' claim.

[3] In her claim, Mrs Phillips sought, among other things, a declaration that the security documents, a mortgage, a guarantee, a loan agreement and a forbearance agreement, which affected the title to her home, and ostensibly authorised RBC's power of sale, were invalid and therefore unenforceable. She accepted that she had signed the mortgage which granted the powers of sale to RBC, but asserted that the mortgage and other documents were void because, when she signed them, she was not aware of their respective significance.

[4] She asserted that she signed the documents because her husband told her that she needed to sign them. The basis of her claim was that the marital relationship, her personal inability, through dyslexia, to comprehend such complicated documents and the inadequate information and advice that were given to her by the attorney-at-law who should have advised her on the documentation, resulted in a case of undue influence being imposed upon her. RBC, she claimed, did not ensure that she received proper independent legal advice concerning these documents. It, therefore, she asserted, could not rely on the documents.

[5] RBC, which is seeking to recover the sum of US\$2,314,673.30 due under its loan to the Phillipses, has contended in this appeal that the learned judge was wrong in exercising her discretion to grant the injunction. It has filed a number of grounds of appeal complaining against the learned judge's very comprehensive written judgment.

[6] The grounds of appeal are set out below for completeness:

- i. The learned Judge erred in failing to consider and rule upon the Appellant's submission that, in so far as the Claim and the Application for Injunction are grounded upon the 2007 guarantee, the Claim is statute barred by reason of the fact that the guarantee was signed on September 7, [2007] and the Claim was filed in the Supreme Court on October 11, 2013.
- ii. The learned Judge erred on the facts and arrived at conclusions contrary to the evidence in that she held that the transactions between the Appellant and Respondent were patently and manifestly to the Respondent's disadvantage.
- iii. The learned Judge erred in law and misconstrued the evidence in granting an interlocutory injunction to the Respondent against the mortgagee bank without the requirement to bring the amount due to the mortgagee, or some other sum, into court.
- iv. The learned Judge erred in law in failing to follow and apply the principles of law, approved by the Court of Appeal, in *SSI (Cayman) 'The Marbella'* and *Mosquito Cove* that the requirement for a payment into court should be departed from only in 'highly exceptional cases, based on very special facts ...'
- v. The learned [sic] erred when in deciding to grant the interim injunction she wrongly ignored the previous order of the Supreme Court granting the Respondent and her husband an interim injunction, (based on the same agreements, but different allegations of fraud and misrepresentation), with a condition that she paid

the amount claimed into court, which condition was affirmed an [sic] the Court of Appeal on July 17, 2013.

- vi. The learned Judge erred when, in granting the interim injunction, she failed to consider and/or ignored the Respondent's application in the Supreme Court on October 11, 2013 to amend her other Claim to allege undue influence, which the court in dismissing the application described as 'insincere and disingenuous'.
- vii. Further, the Respondent appealed to the Court of Appeal and thereafter filed the new claim alleging undue influence. The said appeal was abandoned only after it was submitted during the hearing of the application for [sic] injunction that the process of the court was being abused.
- viii. The learned Judge erred in finding that the Respondent did not receive adequate independent legal advice.
- ix. The learned judge erred in law in her conclusion that: 'At this stage, it is not for this court to determine Mrs. Phillips [sic] credibility regarding her allegation of undue influence'.
- x. The learned Judge erred in failing to consider and/or give any weight to the Respondent's earlier evidence and documents which she signed attesting to receiving independent legal advice; that at the time in 2007 she signed a 'Waiver of Independent Legal Advice; that the Appellant had explained the nature of the transaction and that she fully understood the same matters which the learned [sic] concluded were not explained to her.
- xi. The learned Judge erred in finding that the Appellant did not fulfill its obligations to the Respondent.
- xii. The learned judge erred and/or misconstrued and/or ignored evidence from the Respondent in the form of Statements of Case and Affidavits in support of Applications for court orders which contradicted

and/or undermined the contention that the Respondent did not have detailed knowledge of the financial affairs of National Meats.

- xiii. The learned Judge erred in failing to consider uncontroverted evidence that at the time the Respondent signed the guarantee in 2007 and about the time of the loan agreement, mortgage and guarantee in 2009 on behalf of herself and D.G.P Limited, a company in which she was a 50% shareholder and director, she also granted mortgages over the same properties to another, jointly with her husband, which have not been the subject of any claim of undue influence by her husband.
- xiv. The learned judge improperly exercised her discretion by failing to have any regard or any proper regard to the overriding objective of the Civil Procedure Rules, 2002, in coming to her decision."

[7] It is not intended to assess these grounds individually in this judgment. A brief factual background of the case will be outlined and thereafter the case will be assessed along the guidelines set out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396; [1975] 2 All ER 504, **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** PCA No 61 of 2008 (delivered 28 April 2009) and **Hadmor Productions v Hamilton** [1983] 1 AC 191. As there is a special set of principles dealing with injunctions restraining mortgagees from exercising powers of sale, the cases of **SSI (Cayman) Limited, Dr Steve Laufer and FSI Financial Services US Inc v International Marbella Club SA** SCCA No 57/1986 (delivered 6 February 1987) and **Mosquito Cove Ltd and Others v Mutual Security Bank Ltd and Others** [2010] JMCA Civ 32 will also be used for guidance.

The factual background

[8] Mr David Phillips is the principal shareholder of National Meats. Mrs Phillips is a housewife. She is not a shareholder, director or employee of National Meats. She has no direct financial interest in the company but it has been the vehicle by which Mr Phillips has provided for his family for the majority if not the duration of their marriage.

[9] In or about 2007 Mr Phillips embarked on a massive expansion of National Meats. He borrowed from RBC in order to assist in financing the venture. RBC required guarantees from both spouses. Mrs Phillips executed the required documentation including a document by which she waived her right to independent legal advice.

[10] In 2008, Mr Phillips borrowed more money. It later became apparent, however, at least to RBC, that National Meats' earnings were insufficient to service the loans. When, in late 2008, Mr Phillips wanted to borrow even more money, RBC balked. In May 2009, it sought advice from its Canadian associates. In response to RBC's request for assistance, a team came to Jamaica to assess National Meats with a view to determining whether RBC could properly accept further exposure through loans to National Meats.

[11] The team recommended a further loan on the basis that RBC should have additional security. It was agreed that the Phillipses would give guarantees for National Meats' exposure. By the agreement, the mechanism for RBC providing the additional financing was that a "new loan" would be made to the Phillipses, and to certain companies in which they were the shareholders, on condition that the money would be

"on-lent" to National Meats. This "new loan" was secured by the mortgage of real property held by the Phillipses and the respective companies. An important aspect of the financing agreement was that the security required by RBC in 2009 was to cover not only the "new loan" but related to the earlier loans as well. The loans were said to be "cross-collateralised". It, in effect, meant that the 2009 mortgage would also have secured the earlier loans.

[12] RBC did not provide all the money as envisaged by the Phillipses when the 2009 documents were executed. It paid some but refused to pay any more. RBC's reason for its refusal was that National Meats had failed to meet certain required benchmarks in its performance and that, under the terms of the agreements, RBC was entitled to cease paying the tranches that were to have been paid under the agreements.

[13] The Phillipses had a very different interpretation of RBC's refusal to advance more money. They accused RBC of never intending to pay over the full sum but only promising the financing for the sole reason of extracting further security from them.

[14] RBC later placed National Meats into receivership and threatened the sale of the various parcels of real estate forming the security for the loans. The Phillipses and their other companies filed claims seeking to have the security documentation declared invalid and sought to stop the exercise of powers of sale.

[15] In one of those claims, the Phillipses did secure an injunction but it was granted on the condition that they should pay certain monies into court. They were unable to meet the condition and the injunction lapsed. Thereafter, Mrs Phillips embarked on the

solo path, described in paragraph [3] and [4] above, where she asserted the invalidity of the documents that she had signed, on the basis of undue influence by Mr Phillips and recklessness by RBC as to whether she had been properly advised.

[16] One judge of the Supreme Court, who had presided over some of the earlier aspects of the litigation between RBC and the Phillipses, described Mrs Phillips' venture along this path as "insincere and disingenuous". Sinclair-Haynes J, coming to the matter at a later stage, and having the further information about Mrs Phillips' dyslexia, apparently did not share that view, as she granted the injunction after a careful analysis of the law regarding undue influence.

The relevant legal principles

[17] The first of the relevant principles is the basic guidance set out for assessing applications for injunctions. **American Cyanamid** has been the main guide for judges who are charged with considering applications for injunctions. Its principles have been accepted by this court and have been applied in many of the cases decided in this jurisdiction. Lord Diplock's seminal judgment on the point establishes the questions that a judge should consider when assessing an application for an injunction. They are:

- a. Is there a serious issue to be tried?
- b. Are damages an adequate remedy?
- c. Where does the balance of convenience lie?

It is with regard to the last of those issues that **NCB v Olin** is largely concerned. Their Lordships in the Privy Council were concerned that the assessment of applications

for injunctions should not be a mechanical exercise but instead should be so conducted and concluded that the interests of justice should have been served by it.

[18] The second general principle to be considered in this assessment is that established in **Marbella**. It is that a mortgagee will not normally be restrained from exercising his powers of sale contained in the mortgage unless the mortgagor pays into court the sum claimed by the mortgagee. There are, however, exceptions to this general principle.

[19] The third broad principle to be applied in considering this appeal is that established in **Hadmor Productions v Hamilton**. It is that this court will not interfere with a decision made by a judge at first instance in exercise of a discretion given to the judge unless the judge has clearly misunderstood or misapplied the law or facts in respect of the particular case.

The analysis

[20] In this case, the learned judge undertook a comprehensive analysis of the law relating to undue influence and sought to relate it to the facts of this case. Her analysis involved a detailed look at the principles set out in **Royal Bank of Scotland plc v Etridge (No 2)** [2002] 2 AC 773 concerning the minimum precautions that a bank should take when dealing with a wife who is being asked to pledge her property as security for her husband's business dealings.

[21] What is clear from the learned judge's analysis is that there are serious issues of law and fact to be tried. Some of those issues arising on the evidence are:

- a. whether Mr Phillips exerted undue influence over Mrs Phillips in order to have her sign the documents;
- b. whether the transaction incorporating the security documentation was manifestly to Mrs Phillips' disadvantage so as to put RBC on notice that special steps should be taken with respect to her;
- c. whether RBC was required to take or had taken the minimum precautions (set out in **Royal Bank of Scotland plc v Etridge**) required when a wife is requested to sign security documents for a loan to be granted to her husband or to his business;
- d. whether the issues raised by Mrs Phillips allowed the court to grant an injunction to prevent RBC from exercising a power of sale;
- e. whether the issues raised by Mrs Phillips allowed the court to depart from the usual principle that the sum claimed by the mortgagee should be paid into court as a condition of any injunction.

[22] The answer to the question of whether or not this was a case that required RBC to comply with the minimum standards suggested in **Royal Bank of Scotland plc v Etridge**, is one which depends on the facts of the particular case. Mrs Phillips made very damning allegations about the quality of the legal advice that she received before

signing the documents but there was no effort to answer or negative those allegations. She was not cross-examined on those allegations, or at all. Regrettably, the absence of an answer or any challenge on cross-examination seemed to have led the learned judge to accept some of Mrs Phillips' evidence as fact, although that was not her role in the exercise. The lapse was, however, not fatal to the overall finding that this was an issue to be tried.

[23] Similarly, the question of whether this is a case that falls outside the normal scope of the application of the principles concerning the grant of injunctions in cases involving the exercise of powers of sale by mortgagees is one that jurists may honestly disagree upon. Certainly, counsel appearing before us had very different positions in respect of the point. The breadth and effect of the principal case on the point, in this jurisdiction, **Marbella**, was explained in **Mosquito Cove**.

[24] In **Mosquito Cove**, Morrison JA identified methods, by which a mortgagor may seek to avoid the impact of the **Marbella** principle. One such method is to attack the validity of the mortgage. That method was distilled from the decision in **Rupert Brady v Jamaica Redevelopment Foundation Inc** SCCA No 29/2007 (delivered 12 June 2008). In **Brady**, Cooke JA, in assessing the point, said that an exception to the principle in **Marbella** was created "where the validity of the mortgage is challenged" (paragraph 7 of his judgment).

[25] Similar to the approach in **Brady**, Mrs Phillips' claim seeks to attack the validity of the security documentation, including the mortgage. She asserts that the mortgage is

invalid because it was signed without the benefit of independent legal advice, which was a basic minimum requirement in the circumstances. Mr Wood QC, on behalf of Mrs Phillips, stressed the requirements set out in **Royal Bank of Scotland plc v Etridge**. Learned Queen's counsel submitted that RBC had not sought to answer Mrs Phillips' assertions that it did not provide to the attorney-at-law advising Mrs Phillips, full documentation of the financial situation involving National Meats, so as to allow for her to make an informed decision.

[26] Mr Panton, on behalf of RBC, submitted that RBC did give evidence that its attorneys-at-law sent the documentation to Mrs Phillips' attorney-at-law. He pointed to the affidavit of Ms Natasha O'Neill, filed on 6 December 2013, as indicating at paragraph 22 that "the 2009 Loan and security documents" were forwarded to Mrs Phillips' attorney-at-law. He argued that there was nothing exceptional about the circumstances of this case and therefore it did not fall within any of the exceptions to the **Marbella** principle of requiring a payment-in of the sum that RBC had claimed.

[27] Mr Panton is only partially correct in respect of the documentation being sent. It is to be noted that no specifics were given in the affidavit as to the documents that were sent. The evidence does not identify what was sent. It is, particularly, not reflected in the evidence whether the fact of the incorporation of the liability of the earlier loans, or the status of National Meats, (matters that **Royal Bank of Scotland plc v Etridge**, required to be outlined) were included in the information. The judgment of Peter Gibson J in **Yorkshire Bank plc v Tinsley** [2004] 1 WLR 2380 at paragraph 35 seems to suggest that information in respect of previous relevant transactions ought to be

provided. These are serious issues to be tried in determining whether Mrs Phillips would be liable to RBC by virtue of this documentation.

[28] Whether Mrs Phillips' attack is one that allows an exception to the **Marbella** principle requires an assessment of the facts of the case, which are to be distilled by a trial. No case that is on all fours with this case was brought to our attention or, apparently, to that of the learned judge. She exercised her discretion on the basis of Mrs Phillips' unchallenged evidence concerning the way that the documents came to be signed.

[29] Mr Panton further submitted that the learned judge erred in accepting Mrs Phillips' evidence concerning the allegation of undue influence. He argued that the learned judge had ignored the previous claims in which Mrs Phillips and her husband together sought to bar RBC's sale. Mr Panton submitted that it was only when those efforts failed that Mrs Phillips, after she "discussed the matter with friends", sought refuge in the allegation of undue influence. He submitted that that evidence undermined Mrs Phillips' credibility and that the learned judge erred in that regard.

[30] Mr Wood pointed out that the bulk of the activity in the previous claims was undertaken by Mr Phillips alone. He submitted that it was only in one aspect of the litigation, the appellate stage, that Mrs Phillips had signed any documents. He accepted that Mrs Phillips had, at an early stage of the litigation (Claim No 2011 CD 00074 by RBC) had separate legal representation, but said that that was but for a brief period.

Her defence was thereafter handled by attorneys-at-law jointly representing her, her husband and their companies.

[31] The issue of credibility has to be viewed against the background of the absence of any evidence from RBC, which challenged Mrs Phillips' contentions. It cannot be said, at this stage, and without cross-examination, that Mrs Phillips' more recent assertions, concerning undue influence and inadequate advice, are inconsistent with those made by her in the previous aspects of the litigation. Mr Panton is not on good ground with this complaint. Those issues are to be reserved for a trial of the claim.

[32] In his written submissions, Mr Panton also raised the issue of the limitation period having run. That is also a matter for trial, especially as he sought to address the 2007 documentation, whilst the mortgage would have been signed in 2009. Six years would not have elapsed since its execution.

[33] The fact that there are serious issues to be tried satisfies the first requirement in **American Cyanamid**.

[34] The next issue is whether damages would be an adequate remedy. It is to be noted that the property at stake in this claim is said to be Mrs Phillips' home and that of her family. It is also to be noted, and there is a school of thought that each parcel of real property may have a "peculiar and special value" to the party interested in it (see **Adderley v Dixon** (1824) 57 ER 239). On those bases, it may be said that damages would not be an adequate remedy if the Phillips' property were lost to them due to an improper sale. It is true that RBC would be delayed in recovering its outlay, but the

property would still be available for disposal by sale in the event that RBC is successful at the trial.

[35] A further issue is the balancing exercise regarding inconvenience. It would be more devastating for Mrs Phillips to have improperly lost the house, which is her home, than for RBC to be delayed in the recovery of the monies due to it. The balance of convenience is clearly in favour of granting an injunction. The **Marbella** principle, which would normally be assessed in this context, has already been addressed, except that one further point should be mentioned.

[36] It should be noted that Mr Wood, in seeking to further distinguish Mrs Phillips' circumstances from the principle in **Marbella**, pointed to the fact that she did not obtain any benefit from the loans by RBC. He submitted that if it were otherwise she would have been properly required to repay that which she had benefitted from. He cited paragraph 42 of the judgment of the Privy Council in **National Commercial Bank (Jamaica) Ltd v Hew and Another** [2003] UKPC 51 in support of that principle.

There Lord Millett stated:

"Where a transaction is obtained by undue influence, it must be set aside *ab initio*; and this requires a mutual accounting with mutual restitution by both parties. **Where the transaction is one of guarantee this presents no difficulty. A surety incurs a liability but obtains no benefit. It is sufficient to set aside his liability; there is nothing for him to disgorge by way of counter-restitution.** But where the transaction is one of loan the position is very different. It would not be just simply to set aside the loan; this would leave the borrower unjustly enriched. The proper course is to set aside the contract of loan and require the borrower to account for the moneys

received with interest at a rate fixed by the court.”
(Emphasis supplied)

[37] The evidence suggests that all the monies loaned by RBC were for use in National Meats. Mrs Phillips was, however, both borrower and guarantor. It would be a mixed question of law and fact whether, in this case, payment was required in accordance with the principle in **NCB v Hew**. The answer to that question must await a trial. It would be sufficient at the stage of an application for an injunction to say that this court should not disturb the exercise of the learned judge’s discretion on this point. It must be noted that both **Marbella** and **Mosquito Cove** address the situation of guarantors as well as principal borrowers, but those cases were not concerned with the issue of undue influence.

[38] The final issue is the question of whether justice requires the grant or the refusal of this injunction. Although one may take the view, as one judge clearly did, that Mrs Phillips, through this claim, is being “insincere and disingenuous”, this court should not take that position. Mrs Phillips’ position has to be assessed at a trial where her credibility can be tested in cross-examination. It may fairly be said, at this stage, that the grant of the injunction was the just and convenient thing to have done in the circumstances. The learned judge’s decision to do so should not be disturbed. Nor should her decision not to impose the condition of a payment into court of the sum demanded. The case falls within the principle set out in **Brady**, in which, given the challenge to the validity of the mortgage, this court found that it would be wrong to have imposed the usual condition.

Conclusion

[39] The learned judge's decision was a fair and well-considered exercise of a discretion given to her by section 49(h) of the Judicature (Supreme Court) Act. There has been no misunderstanding or misapplication of any of the facts or relevant law in this case. The decision should not be disturbed.

McDONALD-BISHOP JA (Ag)

[40] I have read in draft the text of the judgment delivered by Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

DUKHARAN JA

ORDER

1. The appeal is dismissed.
2. The decision and judgment of Sinclair-Haynes J is affirmed.
3. Costs of the appeal to the respondent to be taxed if not agreed.

