[2011] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 26/2010

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE BROOKS JA (AG)

BETWEEN	**RAJ KAMAR ROCHLANI**	**APPELLANT**
AND	**RJCA DEVELOPMENT LIMITED**	**1st RESPONDENT**
AND	**JAMAICA MORTGAGE BANK LIMITED**	**2nd RESPONDENT**

Mrs Georgia Gibson-Henlin instructed by Mrs Minett Lawrence for the appellant

Ms Maliaca Wong and Miss Shuana-Kaye Hanson instructed by Myers, Fletcher & Gordon for the 2nd respondent

23, 24 June 2010 and 29 July 2011

HARRISON JA

[1] I have read in draft the judgment of my sister Harris JA and I agree with her reasoning and conclusion. There is nothing further that I wish to add.

HARRIS JA

[2] This is an appeal against the decision of Marsh J contained in an order dated 18 February 2010, whereby he discharged an injunction which had been made in favour of the appellant.

The relevant factual background

[3] By letter dated 16 August 2005, the 2nd respondent Jamaica Mortgage Bank ("the bank") notified the 1st respondent RJCA Developments Ltd ("the developer"), that it approved its application for the financing of $100,000,000.00 to facilitate the construction of a multiunit development on lands, owned by the developer, located at 96 ½ Old Hope Road, Saint Andrew, and registered at Volume 1194 Folio 357, Volume 419 Folio 88 now Volume 1399 Folio 565 and Volume 393 Folio 70, now known as Monte Cristo Apartment Complex.

[4] Pursuant to this agreement, the developer subsequently obtained from the bank, two loans over the property. The first was for the sum of $100,000,000.00 granted on 11 January 2006 and the second, for a further sum of $25,000,000.00, given on 27 June 2007. The loans were secured by mortgages which were endorsed on each of the certificates of title on 16 May 2006 and 15 August 2007, respectively.

[5] By an agreement for sale dated 1 July 2008, the appellant, Mr Rochlani entered into an agreement to purchase from the developer, unit no. 10, one of the apartments in the complex. He paid the purchase price of $11,000,000.00, following which he was

given possession of the said apartment as evidenced in a letter dated 21 November 2008.

[6] Upon the developer's default in the repayment of the loans, the bank decided to exercise its powers of sale under the mortgage and advertised the apartment for sale. The first advertisement appeared in the Daily Gleaner newspaper on 2 December 2009.

[7] Against this background, the appellant, on 15 December 2009, filed a fixed date claim form against the two respondents. The remedies sought are as follows:

> "1) Against the Defendants an Order for delivery up of the Titles to the said lands and for specific performance against the 1st Defendant.
>
> 2) A declaration that the Claimant's interest as purchaser under the fully paid up contract takes priority over the 2nd Defendant's interest as mortgagee/charge under the instruments of Debenture and mortgage; and that said charges are unenforceable against the Claimant's title.
>
> 3) A declaration that the Claimant is a bona fide purchaser for value of the said lands and that the 2nd Defendant, by its conduct, is estopped from enforcing its rights as mortgagee to the detriment of the Claimant. Alternatively, an order that the 1st defendant indemnifies the Claimant to the extent that further payments are made to the 2nd Defendant.
>
> 4) A declaration that the demand by the Defendants for the payment of additional monies in excess of the purchase price under the contracts for sale is wrongful, unconscionable, and constitutes an unlawful interference by the 2nd Defendant with the

contract between the Claimant and the 1st Defendant. Further and in the alternative; an order that 2nd Defendant makes an unconditional delivery to the Claimant of the Certificates of Titles for the said lands.

(5) A declaration that at all material times the 2nd Defendant's interest in the land that formed the subject of the Contract for Sale was limited to the balance of the purchase price due, if any, to the 1st Defendant.

6) Costs and Attorneys costs

7) Such further and/or other relief as this Honourable Court thinks just."

[8] On the same day, 15 December 2009, the appellant also filed a notice of application for court orders seeking an interim injunction to restrain the bank from parting with possession of and/or disposing, selling, transferring or otherwise dealing with the unit numbered 10. The orders sought are as follows:

"1. That the 2nd Defendant, their servants and/or agents be restrained whether by themselves or otherwise howsoever from parting with possession of and/or disposing, selling, mortgaging, pledging, transferring, assigning, charging or from otherwise dealing with the Unit/lot numbered 10 on the approved sub-division plans for the lands comprised in the Certificate of Title entered at Volume 1417 Folio 604, in the Register Book of Titles ("the said Land") pending the hearing of the Claim Form or until further ordered.

2. That the Claimant pays the sum of $5.5M into court forthwith and/or by its Counsel gives the usual undertaking as to damages.

3. That the costs of this application be costs in the cause.

4. Further and such other relief as the court deems fit."

[9] On the following day, the notice of application came on for hearing ex parte before King J, who, after hearing the appellant's attorney-at-law, granted an interim injunction and made certain other orders. These orders were couched in the following terms:

> "1) That the 2nd Defendant, their servants and/or agents be restrained whether by themselves or otherwise howsoever from parting with possession of and/or disposing, selling, mortgaging, pledging, transferring, assigning, charging or from otherwise dealing with the Unit/lot numbered 10 on the approved sub-division plans for the lands comprised in the Certificate of Title entered at Volume 1417 Folio 604, in the Register Book of Titles ("the said Land") until the 23rd day of December 2009 or until further ordered.
>
> 2) That the Claimant pays the sum of **EIGHT MILLION FIVE HUNDRED THOUSAND DOLLARS ($8,500,000.00)** into an interest bearing account, in the joint names of the Claimant and the 2nd Defendant, at a Financial Institution to be agreed by the Claimant and 2nd Defendant and if not agreed within 48 hours of the service of this Order; to be paid into Court by 1:00 PM on the 21st day of December 2009.
>
> 3) The Claimant by its Counsel gives the usual undertaking as to damages.
>
> 4) This Order will be further considered on the 22nd day of December 2009 at 10:00 o'clock in the forenoon."

[10] The bank, by notice of application for court orders and affidavit in support of application filed on 21 December 2009, sought, to set aside the ex parte order made by King J, on 16 December 2009, as well as to strike out the appellant's claim. In the alternative, the bank sought an order for summary judgment against the appellant's claim. The reliefs sought are as follows:

> "1. That the ex parte order numbered (1) granted by the Honourable Mr. Justice R. King on the 16th day of December 2009 restraining the 2nd Defendant, their servants and/or agents from parting with possession of and/or disposing, selling, mortgaging, pledging, transferring, assigning, charging or otherwise dealing with the Unit/lot numbered 10 on the approved sub-division plans for the lands comprised in the Certificate of Title entered at Volume 1417 Folio 604 in the Register Book of Title entered at Volume 1417 Folio 604 in the Register Book of Titles be discharged or set aside.
>
> 2. That the Claimant's claim numbered HCV 06565 of 2009 be struck out pursuant to rule 26.3 (1) (c) of the Civil Procedure Rules 2002.
>
> 3. In the alternative the 2nd Defendant be given summary judgment on the claim pursuant to rule 15.6 (1)(a) and (b) of the Civil Procedure Rules 2002.
>
> 4. Costs of this Application and Costs of the Claim and all costs associated with the mortgage process foregone be the 2nd Defendant's."

[11] After an *inter partes* hearing, which concluded on 13 January 2010, Marsh J, in a written judgment delivered 18 February 2010, granted the orders in the following terms:

> "1. That the ex parte order numbered (1) granted by the Honourable Mr. Justice R. King on the 16th day of December, 2009 restraining the 2nd Defendant, their servants and/or agents from parting with possession of and/or disposing, selling, mortgaging, pledging, transferring, assigning, charging or otherwise dealing with the Unit/lot numbered 10 on the approved sub-division plans for the lands comprised in the Certificate of Title entered at Volume 1417 Folio 604 in the Register Book of Titles be discharged or set aside;
>
> 2. That the Claimant's claim numbered HCV 06565 of 2009 be struck out pursuant to rule 26.3 (1) (c) of the Civil Procedure Rules 2002;
>
> 3. Costs of this Application and Costs of the Claim and all costs associated with the mortgage process foregone be the 2nd Defendant's;
>
> 4. Leave to appeal granted."

It is important to note, from the outset, that based on the order made by Marsh J, the alternative claim was not pursued. Therefore, no issue arises on appeal with respect to the summary judgment.

[12] On 5 March 2010, the appellant filed a notice of appeal. An application for an injunction and stay of execution of the order of Marsh J and for costs was also filed. This was refused by Dukharan JA on 17 March 2010. On 1 June 2010, the appellant then filed an amended notice of appeal, listing the grounds of appeal as follows:

"a. The learned judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in refusing to grant the application for the injunction such as to amount to a miscarriage of justice.

b. The learned judge erred as a matter of fact and/or law by making findings of fact and law at the interlocutory stage that the personal equities pleaded by the Claimant were not sufficient grounds for the grant of an injunction or for a reasonable cause of action against the 2nd Respondent.

c. The learned judge erred as a matter of fact and/or law and/or wrongly exercised his discretion by failing to find that there is a serious question to be tried as to whether the 2nd Respondent breached its common duty of care, and/or its fiduciary duties and/or is estopped or is unconscionable having regard to the following:

i. The 2nd Respondent at all material times treated the Appellant as a purchaser.

ii. The 2nd Respondent demanding the sum of $8.5M from the Appellant on account of the mortgage debt in exchange for his title, this sum being over and above the purchase price paid for the property by the Claimant. In other words, the sum demanded is not an amount equivalent to the balance of the purchase price.

iii. The 2nd Respondent had agreed that on completion of the sale of each unit only 50% of the purchase price was to be paid to it in reduction of the loan.

iv. In breach of its undertaking to release the titles on payment of the purchase

price the 2nd Respondent is seeking to override or overreach the Appellant's interest having entered into an arrangement that recognized the interest of third parties including the Appellant's. The arrangement is offering finance to a development scheme which by its nature involves third party rights and pre-payment contracts and in which it is understood and agreed that third parties would have an interest limited to the purchase price.

v. The Appellant's unit was not the only unit in respect of which the demand was being made contrary to the finding of the learned judge.

d. The learned judge erred in applying the test of no prospect of succeeding in relation to the application for an interim injunction.

e. The learned judge erred as a matter of fact and/or law in finding that the Claim disclosed no reasonable cause of action against the 2nd Respondent:

i. The Appellant was not served with the 2nd Respondent's Application prior to the 22nd December 2009 at Court and did not respond to the Application in Court or otherwise. The Defendant is therefore extremely prejudiced by this ruling.

ii. The learned judged [sic] mixed up the test under r. 26 with the test under r.15. This is evident from the fact that his reasons are based on the r.15 application, which is no prospect of succeeding even though his judgment relates to the r. 26 application.

iii. The learned judge treated the matter as one of indefeasibility of title as opposed to whether the appellant had a right to have his title released or redeemed of the mortgage in all the circumstances of the scheme of arrangement agreed by the 2nd Respondent.

iv. Whether the Appellant acted to his detriment in relyng on the scheme of arrangement agreed to by the 2nd Respondent.

v. Whether the 2nd Respondent is estopped by his conduct from exercising its powers of sale.

vi. Whether it is unconscionable for the 2nd Respondent to resile from the arrangement in circumstances where it knew that third party rights including those of the Appellant would intervene and be prejudiced if it failed to act in accordance with the arrangement to release the titles.

The submissions

Grounds (a), (b) and (c)

[13] Counsel for the appellant, Mrs Gibson-Henlin, argued grounds (a), (b) and (c) together. Covering these three grounds she focused on the relevant law and facts which she considered would have given rise to the doctrine of estoppel and the principle of unconscionable conduct as establishing a serious question to be tried in this case. In her written submissions, she stated that there are three issues in the claim which are relevant to the appellant's complaint. These issues are:

a. Whether the appellant is a bona fide purchaser for value of the said lands and the respondent, by its conduct, is estopped from enforcing its rights as mortgagee to the detriment of the appellant.

b. Whether the demand by the respondent for the payment of additional monies in excess of the purchase price under the contracts for sale is wrongful, unconscionable.

c. Whether at all material times the respondent's interest in the land that formed the subject matter of the contract for sale was limited to the balance of the purchase price due, if any, to the 1st defendant.

[14] She argued that the learned judge, in dismissing the appellant's argument in relation to the questions of estoppel and unconscionable conduct, was wrong to find that there is no serious question to be tried. He directed his focus only on the statutory exception contained in section 71 of the Registration of Titles Act, she submitted. In so doing, she argued, he based his findings on the indefeasibility of titles and it is this finding that led him to conclude that the claim has no real prospect of success. He also erred in confining the appellant to his remedy in damages, she submitted.

[15] In laying what counsel termed as the legal foundation for the foregoing, she submitted that firstly, an unregistered interest is recognizable under the Registration of Titles Act, notwithstanding section 63. For this submission, she relied on the unreported judgment of the High Court of Australia in ***Barry v Heider*** **-**BC 1400003, delivered 16 December 1914. Consequently, she submitted, there is a serious question to be tried and the learned judge should have so found.

[16] Secondly, she submitted, the idea that a mortgage or legal owner's interest could be challenged in circumstances giving rise to an estoppel or unconscionable conduct was explored in the case ***The Presbyterian Church (NSW) Property Trust v Scots Church Development Limited (In Receivership) & Ors*** [2007] NSWSC 676. The plaintiff in that case did not succeed on these points, however, she submitted, the case is authority for the submission that "matters connected with personal equities … might affect the registered proprietor". Counsel contended that this case is replete with instances of the court demonstrating that, apart from fraud, personal equities can be the bases for depriving a registered proprietor of his interest in land.

[17] The learned judge, she contended, also dismissed the appellant's reliance on the ***Presbyterian*** case for the reason that it is to be confined to its own facts. This finding, she submitted, is difficult to reconcile with the fact that "the estoppels and unconscionable conduct though affirmed as credible arguments against the concept of indefeasibility of title were not the bases for the decision". Given the facts of that case, the plaintiff, she submitted, did not succeed on those grounds, but on unconventional grounds which do not form the basis of this case. She further contended that the learned judge made a definitive finding on a difficult question of law at the interlocutory stage thereby ignoring Lord Diplock's entreaty in ***American Cyanamid Co. v Ethicon Limited*** [1975] 1 All ER 504, that "it is no part of the court's function at this stage to resolve difficult questions of law or conflicts on affidavits …". The findings in the ***Presbyterian*** case, she submitted, were after a "full trial including a detailed examination of all the facts and documents relevant to the case".

[18] Mrs Gibson-Henlin also submitted that in the ***Presbyterian*** case, Young CJ examined the circumstances in which estoppel arises and confirmed the modern view and at paragraph [145] said that it is unnecessary in proof of conventional estoppel to show that "the defendant induced the plaintiff's assumption or acquiesced in its formation". She further argued that the application of estoppel and unconscionability is confirmed in a number of cases and commentaries in the United Kingdom and she brought to our attention Halsbury's Laws of England Volume 16 (2) 5th Ed. Reissue at paragraphs 1080, 1089 and 1091 and ***Crabb v Arun District Council*** [1976] Ch 179 at 193.

[19] She further submitted that the facts on both the appellant's and the bank's case establish unconscionable conduct giving rise to an estoppel in favour of the appellant. She argued that the bank consented to and/or was part of a scheme of arrangement whereby the 32 units in the Monte Carlo complex which were for resale were offered to third party purchasers on terms that they would be transferred to them free from its mortgage. Evidence of the consent to the sale, she argued emerged from clause D of the preamble of the mortgage agreement as well as clause 3 (17) thereof and also clause 10 (a) of the bank's letter of commitment.

[20] Counsel further submitted that it is clear from the letter of commitment that "costs overrun" are to be financed from the developer's own resources and not by the purchasers (clause 13 (a)). There is a prima facie overrun as evidenced in the bank's demand letters asking for amounts over and above the purchase price from the

purchasers, she argued, and further, pursuant to clause 8 (f) of the said letter, copies of all signed sale agreements for the units sold must be submitted to the bank showing deposits collected and balances outstanding. The purchasers cannot at this stage be blamed if the developer did not comply, she contended. The fact is that there was an agreement and expectation that the units were to be sold and the appellant, she submitted, was willing to pay $5,500,000.00 being the amount that was agreed to be secured by the mortgage to be paid from the sale price.

[21] Ms Maliaca Wong, counsel for the bank, in reply, argued grounds (a), (b) and (c) separately. Relying on the case of ***American Cyanamid***, counsel submitted, in relation to ground (a) that in order for an applicant to succeed in an application for an interlocutory injunction, he must first satisfy the court that there is a serious question to be tried. If it is found that there is no serious question to be tried, then the application fails in limine, she argued. She further contended that if the applicant succeeds in satisfying that test, he needs to further satisfy the court that damages would not be an adequate remedy and if damages would be an adequate remedy, then the injunction ought not to be granted.

[22] In addressing the issue as to whether there is a serious question to be tried, counsel submitted that there is no basis for the contention that the learned judge erred or wrongly exercised his discretion in refusing the injunction so as to amount to a miscarriage of justice. The learned judge, she argued, correctly applied the well known principles in relation to the grant of interlocutory injunctions and relied on the leading

case of ***American Cyanamid*** when he found that there were no serious questions to be tried.

[23] In responding to the appellant's complaint in ground (b) that the learned judge erred in finding that the personal equities pleaded by the appellant were not sufficient for the grant of an injunction or for a reasonable cause of action against the bank, Ms Wong submitted that the learned judge was indeed correct when he found that there being no allegation of fraud, the interest of the appellant was insufficient to defeat the prior registered interest of the bank, having regard to section 71 of the Registration of Titles Act.

[24] She further submitted that the appellant's case indicates that he has an equitable interest in the property which is an unregistered interest which the bank need not take any notice of at law. The appellant, she submitted, has not alleged any fraud on the part of the bank, nor could they. For this submission she also referred us to the decision of Langrin JA (Ag) (as he then was) in the case ***Eileen Wedderburn v Capital Assurance Building Society*** SCCA No 77/1998 delivered 15 March 1999, in relation to section 71.

[25] Counsel also contended that the mortgages were signed by the developer and registered on the title; the mortgage sums are still owed and there has been no evidence that these mortgage sums owed have been repaid. Having regard to the preceding, she submitted, there is no serious issue to be tried, thus there should be no

interlocutory injunction prohibiting the bank from exercising its power of sale over the apartment the subject of the claim.

[26] In addressing ground (c) concerning the issue as to whether or not there is a serious issue to be tried as to whether the developer breached its common duty of care, or its fiduciary duties or is estopped or is unconscionable, Ms Wong submitted that the learned judge was correct in finding that there was no serious issue to be tried having regard to the principle of indefeasibility of title and there being no allegation of fraud or dispute as to whether the developer owed sums under the mortgages. The bank's interest, she submitted, cannot be defeated save in the case of actual fraud on its part. The bank owes no fiduciary duty to the appellant. The appellant, she said, cites no relevant authority to support the claim that the bank has a fiduciary relationship with the appellant but proceeded to rely on cases in which there are clear fiduciary relationships between them.

[27] Counsel further submitted that the learned judge was correct in finding that the ***Presbyterian*** case turned on its own special facts. Accordingly, she contended, this case does not assist the appellant since the mortgagee in that case was also the liquidator and the court found that the liquidators are treated as officers of the court. The case, she argued, supports the bank's submissions that its interest as legal mortgagee cannot be defeated by the appellant, a purchaser in possession. The bank's alleged knowledge of the appellant as a purchaser cannot defeat its statutory power to sell under the mortgage since the appellant became a purchaser long after the bank

registered its mortgages. On the contrary, she argued, the appellant entered into the agreement for sale with full notice of the bank's registered mortgages. This, she said, was not only evident from a title search but within the knowledge of the appellant's attorney-at-law who was also attorney for the developer.

Analysis

[28] The heart of the appellant's contention is that notwithstanding that fraud had not been alleged, the bank owes a common duty of care to the appellant and further it is estopped from enforcing its rights as a mortgagee to the detriment of the appellant who is a bona fide purchaser for value of the unit purchased by him and that the demand by the bank for payment of funds exceeding that which had been agreed on as the purchase price is unconscionable. For these reasons, he asserts that he is entitled to an injunction to restrain the bank from exercising its powers of sale under the mortgage as he has a good cause of action.

[29] The principles governing the grant of an injunction have been laid down in the well known case of **American Cyanamid**. A judge, in the exercise of his discretionary power in granting injunctive relief, must first be satisfied that an applicant for such relief has a serious question to be tried. If the material before the court shows that there is no serious issue to be tried, then an injunction ought not to be granted. However, even if it is shown that there is a serious question to be tried but damages are an adequate remedy, then likewise an injunction should be refused. There are however circumstances where the material before the court fails to disclose that an

applicant has a real prospect of succeeding on his claim, then and only then, the court is obliged to determine whether the balance of convenience favours a grant or refusal of the injunction. Lord Diplock, ***in American Cyanamid***, placed the requisite principles in the following perspective, at pages 510 and 511 when he said :

> "As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason for this ground to refuse an interlocutory injunction.
>
> It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

[30] Lord Diplock, in guiding the court in its approach in deciding whether there is a serious question to be tried, at page 510 said:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."

[31] The Privy Council, in ***National Commercial Bank Jamaica Limited v Olint Corporation Limited*** [2009] UKPC 16, cited by Ms Wong, in referring to the House of Lords' decision in ***American Cyanamid*** reiterated the principles as to the grant of an injunction. Lord Hoffmann, who delivered the judgment of the Board, said at paragraph [16]:

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

[32] The learned judge, in assessing the question as to whether the appellant was entitled to an injunction, stated at page 17 of his judgment:

> "The remedy sought by the claimant at para. 1 of the claim form cannot be granted against the 2nd defendant, for as the mortgagee of duly registered mortgages, it is entitled to exercise its power of sale as there is an imposed sum outstanding on the mortgage.
>
> The only remedy available against the 2nd defendant, if the claimant is injured or incurs damages by an improper exercise of the power of sale is in damages against the person exercising the power.
>
> The declarations sought on the Claim Form are essentially predicated on the claimant's proving that the claimant's interest as bona [sic] purchaser for value supercedes the 2nd defendant's duly registered mortgage.
>
> Is [sic] my opinion that a [sic] view of the facts and the law applicable to these facts, the claim has no real prospect of succeeding, there being no serious question to be tried.
>
> Having concluded that the claim has no prospect of succeeding, there is no need to consider the balance of convenience.
>
> This is therefore not a suitable case in which this Court will grant an interlocutory injunction."

[33] The bank is the duly registered mortgagee over the title to all the units in the development. The purchase of unit 10 by the appellant from the developer was done subsequent to the mortgage of the lands. Consequently, there can be no dispute that the appellant purchased the unit subject to the mortgage held by the bank. At the time of purchase the appellant had knowledge of the existence of the mortgages on the lands of the entire development. The developer had defaulted on the mortgages.

Section 71 of the Registration of Titles Act confers on the bank as a mortgagee, certain rights. The section reads:

> "Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

[34] The appellant contends that this case falls outside of the indefeasibility principle and stands independent of it. That is to say, the claim is not a challenge to the bank's title per se but it raises the question as to whether the appellant's interest in the subject matter of this appeal should be ignored, having regard to all the circumstances of this case, in that the bank owes a common duty of care to the appellant and by its unconscionable conduct is estopped from enforcing its right as a mortgagee. In dealing with the effect of personal equities which may enure to the benefit of an unregistered as against a registered interest, the appellant, in relying on the **Presbyterian** case placed great emphasis on the dicta of Austin J in the case of ***Heggies Bulkhaul Ltd v Global Minerals Australia Pty Ltd*** (2003) 59 NSWSC 312 to which reference was made in that case. At paragraph [103] he said, inter alia:

> "(1) if the registered proprietor engages in unconscionable conduct intended to deny or

> defeat the unregistered interest, the holder of the unregistered interest may obtain relief against the registered proprietor, either because the registered proprietor's conduct comes within the fraud exception to s 42, or because the conduct creates an equity which the holder of the unregistered interest may assert against the registered proprietor."

[35] The appellant's complaint that the learned judge was wrong in distinguishing the **Presbyterian** case by finding that the factual circumstances of that case are different from the present case, in my opinion, is without merit. The decision in the ***Presbyterian*** case turned on facts peculiar to that case, as rightly found by the learned judge. In 2001 Presbyterian, the plaintiff, was the registered proprietor of certain lands, and since 1999 it was engaged in negotiations with a company called Westpoint Corporation Pty Ltd, concerning the redevelopment of the lands. In May 2001 Presbyterian entered into a contract with Scots Church Development Limited, a subsidiary of Westpoint, by which Presbyterian would convey the lands to Scots Church following which Presbyterian would receive the purchase money as well as a strata title to a lot on which it had erected a church. Scots Church mortgaged the lands to Capital Finance Australia. A second mortgage was given to York Street Mezzanine Pty Ltd, another of Westpoint's subsidiaries. The second mortgagee went into liquidation. The court found that Presbyterian, which then had an unregistered interest, was without blame, that the liquidators of the second mortgagee were to be treated as officers of the court, they were not personally at fault and that preferring Presbyterian would be to the detriment of the parties who had acquired the second mortgagee's promissory

notes. It also found that there was no unconscionable conduct on the part of Presbyterian which would support any equitable relief. In the instant case, it is acknowledged that the appellant has an unregistered interest in unit 10. It is true that the ***Presbyterian*** case confirms the principle that the title of a registered proprietor might be affected by matters connected with personal equity. However, the principle does not extend to the case at bar.

[36] The bank did not owe the appellant a common duty of care as no fiduciary relationship existed between them. The appellant cited the cases of ***Attorney General for Hong Kong v Reid*** [1994] 1 All ER 1 and ***Macleod v Jones*** [1883] 24 Ch. D 289 in support of the submission of the existence of a fiduciary relationship between the bank and the appellant. Neither case is helpful to him. In ***Attorney General for Hong Kong***, a Crown prosecutor accepted bribes to acquire property. It was held that he owed a fiduciary duty to the Crown and that he held the lands in trust for the Crown. In **Mcleod v Jones,** the appellant, who was a solicitor, was the mortgagee and he also represented the mortgagor and the court granted an injunction restraining him from exercising his powers of sale, there being a fiduciary relationship between himself and the plaintiff. In the instant case the question of fiduciary relationship between the bank and the appellant does not arise as there is nothing to show the existence of any such relationship between them.

[37] I now turn to the appellant's contention touching the doctrine of an estoppel. A party who raises the doctrine of an estoppel must show that he acted to his detriment,

on the faith of and reliance on an assurance given to him by the other party, or, by the conduct of that other party. Detriment is an essential requirement. In ***Gilett v Holt*** [2000] 2 All ER 289, Lord Walker said at pages 307- 308:

> "The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.
> …
> Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved."

[38] The agreement between the bank and the developer was part and parcel of the mortgage agreement. It provided for the developer constructing, subdividing and selling the units and also outlined the terms of repayment of the mortgage loan as evidenced by clause 5 (c) and (d) of the commitment letter as follows:

> "(c) The principal sum together with interest accrued thereon shall be repaid upon sale of the units but not later than the end of the loan period…
>
> (d) On completion of the sale of each unit, at least **fifty per cent (50%)** of the gross proceeds (including escalation) from the sale of the units shall be applied in reduction of the loan unit until the loan is repaid."

[39] The appellant relied on clauses D, 3(17) of the mortgage agreement and clauses 10 (a) and 13 (a) of the letter of commitment to demonstrate that the bank consented to the acquisition by the several purchasers, of an interest in all 32 units.

Clause D states as follows:

> "(D) The Lender has agreed to make the said Loan upon the terms and conditions set out in a Letter of Commitment dated the 16th day of August, 2005, which include, inter alia, the execution by the Borrower of a Debenture of even date herewith as well as the execution by the Borrower of this Mortgage and the additional security referred to in the Letter of Commitment."

Clause 3 (17) of the mortgage states:

> "(17) The parties hereto hereby specifically incorporate by reference the terms and conditions (including the re-conditions for disbursement) set out in the said Loan Agreement entered between the parties bearing even date and the said Letter of Commitment dated the 16th August, 2005 as if they were set out at length herein and any breach of those shall constitute a breach of this Mortgage. In the event of any inconsistency between the provisions of this Mortgage, the said Loan Agreement and the said Letter of Commitment, the provisions of the Loan agreement shall prevail."

Clause 10(a) of the letter of commitment states:

> "(a) **All payments received from the sale of the units** must be deposited in an escrow account at an agreed financial institution, in the names of Jamaica Mortgage Bank and RJCA Developments Ltd (RJCA). All

> withdrawals from this account must bear the signatures of both representatives from the **JMB** and **RJCA** and shall be paid against a Quantity Surveyor's Certificate."

Clause 13 (a) of the letter of commitment is as under:

> "(a) The Borrower will finance from its own resources any cost overruns, which may occur on the development."

There can be no dispute that clause D shows that the mortgage instrument incorporates the terms and conditions of the letter of commitment. Arguably, there is nothing contained in the foregoing clauses from which it could be said that the bank agreed to the appellant acquiring an interest in the property.

[40] It cannot be denied that there is an agreement between the bank and the developer, which is outlined in the letter of commitment relating to the resale of 32 units and for the mortgage payments to be made from the proceeds of the sale to third party purchasers. Although it could be said that the bank agreed to the sale of the units, this does not mean that the bank had entered into a partnership with the developer by financing the development, as contended for by the appellant and importantly, the bank is under no obligation to take notice of the appellant's unregistered interest in unit 10. It could be argued that there is no evidence that the bank, by its conduct, had led the appellant to believe that the title would have been delivered to him, he having paid the purchase price of $11,000,000.00 and that there is nothing to show that the appellant was misled by the bank, or, that the bank had a

duty not to mislead him and that in misleading him, he acted to his detriment. Clearly, the agreement between the bank and the developer was principally to give a loan to the developer by way of a mortgage on the security of the land on which the units were constructed and for the repayment of the mortgage loan, by the developer, from the proceeds of sale which included sales to third parties**.** The developer defaulted on the mortgage and the bank would have a right to recover such sums as are due from the developer.

[41] In the contract between the bank and the developer, there can be little doubt that the principal sum and interest due to the bank, required the developer to pay, on the completion of the sale of each unit, a minimum of 50% of the gross proceeds of sale towards the debt. The appellant, having performed his part of the contract, between the developer and him, claims that he is entitled to receive his document of title. This would be true if the mortgage on the property had been discharged. The mortgage is still outstanding and as rightly submitted by Ms Wong, there is no evidence that the bank at anytime had undertaken to release titles on payment of the purchase price, especially in circumstances where the developer remains in default of its mortgage obligations.

[42] A further issue is whether there is material to show unconscionable conduct on the part of the bank in its dealings with the appellant. Unconscionable bargain was defined by the learned authors of Modern Equity by Hanbury and Maudsley 12th Edition (1985) as follows:

> "Equity intervenes to set aside unfair transactions made with "poor and ignorant" persons. It is not enough to show that the transaction was hard and unreasonable. Three elements must be established: First, that one party was to a serious disadvantage to the other by reason of poverty, ignorance, lack of advice or otherwise, so that circumstances existed on which unfair advantage could be taken; secondly, that this weakness was exploited by the other in a morally culpable manner; and thirdly, that the transaction was not merely hard, but oppressive."

[43] As correctly submitted by Ms Wong, none of the elements outlined in the foregoing extract is applicable to this case and it is not unreasonable for the bank to seek to exercise its statutory right. The case of ***Gordon Stewart and Ors v Merrick (Herman) Samuels*** SCCA No 2/2005, in which judgment was delivered on 18 November 2005 and was cited by the appellant in support of his complaint of unconscionable conduct, is clearly of no assistance to the appellant. The respondent in ***Stewart*** was a poor fisherman who trusted the appellants by entering into a transaction with them which was gravely unfair to him.

[44] In the instant case, the bank demanded the sum of $8,500,000.00 from the appellant on account of the mortgage debt in exchange for the title. The appellant agreed to pay $5,500,000.00. This, the bank refused to accept. In those circumstances, it could not be said that this negotiation between the bank and the appellant ought to be regarded as an agreement between them which points to unconscionable conduct on the part of the bank. Nor could it be said that the bank ought to be estopped from asserting its right to sell under its powers as a mortgagee.

[45] Clause 4 of the agreement for sale provides that if the developer does not deliver duplicate certificate of title duly registered to the appellant, the appellant is entitled to a refund of all sums paid. It is the developer with whom the appellant has a contractual arrangement and there is this express agreement for a refund of the monies paid should the developer fail to deliver title. The appellant, having agreed to this arrangement, cannot now seek to pray in aid equitable relief. The circumstances of this case do not raise any equity in favour of the appellant which would require this court's intervention. It is of significance to add that the bank's registered interest in the lands remains intact. The appellant's unregistered interest was acquired subsequent to that of the bank and obviously could not defeat that of the bank, there being no allegation or proof of fraud on the part of the bank.

[46] In my opinion, there is no serious issue to be tried as the appellant's claim reveals no reasonable triable issue. As a rule, a judge, in the discretionary exercise of his or her case management powers may strike out a claim in a plain and obvious case, that is, in circumstances where the statement of case discloses no reasonable cause of action. This, rule 26.3 of the Civil Procedure Rules permits the court to do. In the instant case, it cannot be said that the appellant has a claim which ought to be resolved at a trial. Hence, the learned judge in determining that there was no serious question to be tried would, without doubt, have been mindful of rule 26.3 when he struck out the claim.

[47] There being no serious question to be tried as between the appellant and the bank, I agree with the learned judge that the injunction should be discharged. I am also of the view that he was correct in ordering that the claim be struck out.

[48] I would dismiss the appeal with costs to the 2nd respondent to be agreed or taxed.

BROOKS JA (Ag)

[49] I too agree with the reasoning and conclusion of Harris JA and have nothing to add.

HARRISON JA

ORDER

Appeal dismissed. Costs to the 2nd respondent to be agreed or taxed.