IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HVC 03444

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| BETWEEN | TEWANI LIMITED | CLAIMANT |
| AND | RJCA DEVELOPMENT LIMITED | 1ST DEFENDANT |
| AND | JAMAICA MORTGAGE BANK LIMITED | 2ND DEFENDANT |

IN CHAMBERS

M. Georgia Gibson-Henlin and Minett Lawrence for the Claimant.

Maliaca Wong and Robert Collie instructed by Myers Fletcher and Gordon for the 2nd Defendant.

**Heard on 23rd September 2009 and 20th November 2009**

**INJUNCTION TO RESTRAIN MORTGAGEE FROM EXERCISING POWER OF SALE - PURCHASER FOR VALUE IN POSSESSION - DEFAULT BY MORTGAGOR - ALLEGATION OF FRAUD - NO EVIDENCE OF ACTUAL FRAUD**

**G. Brown, J (Ag.)**

This was an application for court order to restrain the 2nd Defendant from exercising its power of sale contained in a mortgage.

The Claimant, in the Amended Claim Form dated 7th September 2009, claims against the Defendants, the following remedies;

1) *Against the 1st Defendant an order for the delivery up of the Titles to the said lands.*

2) *A declaration that the Claimant's interest as purchaser under the pre-payment contracts takes priority over the 2nd Defendant's as mortgagee/charge under the instruments of debenture and mortgage that were executed subsequent to the contract for sale.*

3) *A declaration that the Claimant is a bona fide purchaser for value of the said lands and that he is entitled to specific performance of the said contract for sale.*

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 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 said lands that* formed the subject of the contracts for sale was limited to the balance of the purchase price due, if any, to the 1st Defendant. Further, and in the alternative, a declaration that at all material times prior to the creation of the mortgage/debenture charge, the 2nd *Defendant had notice of the Claimant's interest as a purchaser under fully paid up contracts.*

6) *Further and in the alternative, a declaration that the 1st Defendant's conduct in failing to inform the 2nd Defendant of the Claimant's interest under the pre-paid contracts constitutes fraud within the meaning of Section 71 of the Registration of Titles Act.*

7) *Further and in the alternative, a declaration that the 2nd Defendant's willful blindness to the existence of the Claimant's interest under the prepaid contracts, and its failure to make appropriate enquiries as to the nature of the Claimant's acknowledged interest as a purchaser under the prepaid contracts, constitutes fraud within the meaning of Section 71 of the Registration of Titles Act.*

In the Amended Notice of Application for Court Order the Claimant sought an order

> *" that the Defendants, their servants and/or agents be restrained whether by themselves or otherwise however from parting with possession of and/or disposing, selling, mortgaging, pledging, transferring, assigning, charging or from otherwise dealing with the Units/Lots numbered 9,23,27,31 and 32 on the approved sub-division plans for the lands comprised in the Certificates of Title entered at Volume 393 Folio 70, Volume 419 Folio 88, and Volume 1194 Folio 357 in the Register Book of Titles ("the said Lands") pending the hearing."*

The Claimant alleged that he provided a loan of US$1,565,000.00 to the 1st Defendant for the acquisition of the said lands to be developed as "Monte Cristo." It was agreed "*that in consideration for, and as partial discharge of the loan, the Claimant and the 1st Defendant*

*entered into contracts of sales of Unit/Lots numbered 9, 23, 2, 31 and 32 of the approved sub-division plan for the real estate development on the said lands. The said contracts were entered into and dated November 14, 2005."* Thus, the Claimant had paid in full the purchase price for each unit/lot. On the 14th of February 2007 Jennifer Messado and Company, Attorneys-at-Law lodged a caveat on the Claimant's behalf to protect.

In May, 2005 the 1st Defendant sought and subsequently obtained financing from the 2nd Defendant towards the development of "*Monte Cristo.*" A mortgage of $100,000,000.00 was registered on the Certificate of Titles on the 16th of May 2006 along with the transfer to the 1st Defendant. An additional sum of $25,000,000.00 was loaned to the 1st Defendant and registered on the Certificate of Titles on the 17th of August 2007 subject to the Claimant's caveat. The lands were previously owned by Moonlight Properties Ltd and transferred to the 1st Defendant for the consideration of $12,000,000.00 the same date as the first mortgage.

The 1st Defendant constructed 32 apartments and obtained strata titles under the Registration of the Strata Act. It was a condition of the mortgage that the loan would be discharged from the proceeds of sale of the apartments. The 1st Defendant sold the units (except Units 9, 23, 27, 31, 32) and paid to the 2nd Defendant the proceeds of sale as agreed in exchange for the Duplicate Certificates of Title. However the 2nd Defendant has refused to release the five (5) Certificates of Title until the outstanding balance of Forty Three Million Dollars ($43,000,000.00) was paid to them, to discharge the registered mortgage.

Jennifer Messado and Co., acting on the 1st Defendant's behalf, entered into negotiations with the 2nd Defendant to discharge the mortgage from the proceeds of sale of the said units. Mr. Richard Atherton, 1st Defendant's managing director, sought to obtain a loan from NCB with Unit 31 the proposed security.

On March 10, 2009 Mrs. Jennifer Messado wrote to the 2nd Defendant. The letter reads:

*March 10, 2009*

*Jamaica Mortgage Bank*
*33 Tobago Avenue*
*KINGSTON 5*

*Attention: Mrs. Donna Samuels Stone*

*Dear Sirs:*

***Re: Monte Cristo, No 96A Old Hope Road, St. Andrew – RJCA Development Ltd.***

*We have your letter dated March 2nd, 2009 and note the contents thereof.*

*However, as you are aware and the schedule for repayment is dependent on the sales of the property and in particular the penthouse. Unit No. 31 has been sold and the purchases mortgage loan is being finalized to deliver the necessary Letter of Undertaking to your good selves.*

*The other penthouse No 32, is the unit that the National Commercial Bank will deliver the necessary Letter of Undertaking very shortly in the name of Richard Atherton, for the sum of Fifteen Million Dollars [$15,000,000.00]*

*The other units are for sale, as per the enclosed memorandum. We therefore ask that the deadline for production of the Sale Agreements and or undertaking be extended to the 30th of April, 2009.*

*We are marshalling the undertaking for the repayment of the indebtedness, which can be achieved far more successfully with the dialogue and correspondence has been done previously rather that the other methodology, so that we may produce some realistic results for the repayment of the loan.*

*Yours faithfully,*

***JENNIFER MESSADO &CO.***

*Per:*_____

*JENNIFER MESSADO*

Notwithstanding the assurances from Mrs. Jennifer Messado, the 1st Defendant has failed to sell the balance of units and the 2nd Defendant on the other hand has not released the titles to the Claimant. The latter has advised that it intends to "exercise its legal rights and sell the units at Public Auction to assist in recovering the debt outstanding."

The Claimant is concerned that unless an interlocutory injunction against the Defendants to preserve the status quo until the trial of the claim, the units will be sold.

In resolving the issue of whether or not to grant the injunction, the Court relies upon the principles laid down in American Cyanamid Company v Ethicon (1975) 1 AER504.

1) **Is there a Serious Issue to be tried?**

In Mothercare Ltd. v Robson Brooks Ltd. (1979) P.S.R. 466 at p. 476, Sir Robert Megarry V-C said:

> *The prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospect of success which, in substance and reality exists. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no exception of success but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails, for he point to no question to be tried which can be called 'serious', and no prospect of success which can be called 'real'.*

The 2nd Defendant has argued that there is no triable issue.

1) The affidavits filed on behalf of Tewani and the bank raise a factual issue as to whether Tewani is a fully paid up purchaser in possession of which the bank has notice. However the documentary evidence from the Claimant's attorney, i.e., Mrs. Jennifer Messado, showed the 1st Defendant seeking to discharge the bank's lien on 3 apartments claimed by the Claimant up to April 2009.

2) The bank's mortgages are registered on the Certificate of Titles and are legal interest. Tewani's interest as purchaser in possession is an equity interest and cannot take priority to the bank's legal interest.

The Claimant on the other hand argued that there are several serious issues to be tried in this case. The trial Judge will have to resolve both conflicts of evidence and decide difficult question of law. Thus, a Judge in chambers should not seek to resolve factual issues on affidavits evidence without the assistance of cross examination.

It was the Claimant's case that the 2nd Defendant knew at the time of the advances of it's or third party interests and it's expectation that the units were to be transferred to them once individual titles were issued. Any dispute for any additional amount outstanding must be between the 1st and 2nd Defendants and not the purchasers. Counsel for the Claimant, in her written submission wrote:

> "It *is against the foregoing background that the Claimant contents that the 2nd Defendant knew and consented to third parties including the Claimant acquiring an interest in all thirty-two (32) units. They undertook within the meaning of Waimha and Presbyterian to give effect to the interest of these purchasers and it is amoral fraud to act against that interest or in a manner to deprive the purchasers of that interest. One issue has to be whether it be said that the 2nd Defendant did not accept or recognize that interest in all the circumstances of this case?"*

The amended Claim Form seeks, as a relief, a declaration that the bank's willful blindness to the existence of the Claimant's interest under the prepaid contracts, and its failure to make appropriate enquiries as to the nature of the Claimant's acknowledged interest as a purchaser under the prepaid contracts, constitutes fraud within the meaning of section 71 of the Registration of Titles Act.

It is trite law that where fraud is alleged and proved, equity will come to the aid of the victim of the fraud. Section 71 of the act 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 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 equality 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"*

In Asset Company Ltd. v Mere Roihi & Others (1905) AC 176 at p. 210 the Court stated that

*". . . by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud- an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose* title *is impeached or to his agent. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he may have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not itself prove fraud on his part."*

Mere knowledge of an interest is not sufficient to establish fraud. In Waimiha Sawmilling Co. v Waione Timber Co. Ltd. (1926) AC101 at p.106-107 stated that;

*"if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear.....The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest."*

In Eileen Wedderburn v Capital Assurance Building Society SCCA 77/98 Langrin, J.A. said in relation to section 71:

*"It is abundantly clear from the ..... words in the cited provision that even knowledge of the existence of a trust or other unregistered interest does not constitute fraud. This section provides adequate protection to*

*parties dealing with the registered proprietor. The law in relation to notice as it may affect purchasers or mortgagees of unregistered land has no application to registered land. The system of registration of title is designed to free the purchasers or mortgagees from the hazard of notice real or constructive which in the case of unregistered land involved him in enquiries failing which he might be bound by equities."*

Counsel for the 2nd Defendant also relied on a recent decision of the Supreme Court of New South Wales. In Presbyterian Church (NSW) Property Trust (2007) NSWSC 676, the Court stated as follows:

*"Certainly the second mortgagee had notice of the plaintiff's prior unregistered interest in the Site when it entered the mortgage deed with the first defendant and when it entered the Subordination Deed with the plaintiff and the first defendant. The more difficult question is whether not only was there recognition of the Church's right, but also whether there was an undertaking to respect it. It is very difficult to make a finding that a fact does not exist as one has to trawl through a bulk of paper and there is always the possibility that some fact will pass on by. However, having done the trawl and having noted that to which counsel have particularly referred me, I cannot see where there has been anything more than recognition. In particular, clause 15.7 which is a promise by the second mortgage not to do anything that would prevent full effect being given to the Subordination Deed does not, in my view, amount to an undertaking not to frustrate the retransfer of the Church Lot. There is insufficient to show fraud and accordingly, I must find the first issue in favour of the second mortgagee."*

In the instant case, the 1st Defendant failed to take part in the proceedings. However, from the documentary evidence before the Court there was sufficient correspondence that showed that the mortgage was valid and enforceable. There was no dispute between the mortgagor and the mortgagee that a balance was outstanding which was to be paid from the unsold units.

Mrs. Jennifer Messado, Attorney-at-Law, who was:

a) representing the Claimant and the 1st Defendant in the sale of the units and had the carriage of sale.

b) Acting for the 1st Defendant's Managing Director and principal shareholder to obtain an undertaking from NCB to secure the title for Unit 31.

c) Lodging the caveat against the lands on the Claimant's behalf.

d) Listing with the Real Estate Agents the units for sale.

e) Negotiating with the 2nd Defendant with regards to the discharge of the mortgage.

She would have been aware of the Claimant's interest in the units while seeking to obtain an extension of the time from the 2nd Defendant.

It was the Claimant that sought to impute fraud on the 2nd Defendant as the latter attempted to exercise its power of sale to recover the loan. However, there was no evidence that it had committed any fraud or acted dishonestly against the Claimant or the 1st Defendant. On the contrary, it was the parties, through their Attorneys-at-Law, that mislead the 2nd Defendant as it negotiated to settle the dispute amicably.

I must agree with Counsel for the 2nd Defendant that unless there is fraud, i.e., actual and not moral fraud, knowledge of the existence of Tewani's interest is not sufficient to defeat Section 71 of the Registration of the Titles Act, otherwise, as Salmond, J. said in Waimiba case, "the section would be without effect." The Claimant's unregistered interest cannot take priority over the 2nd Defendant's registered mortgage.

I am therefore of the opinion that there is no serious issue to be tried. The injunction is refused. Costs to the 2nd Defendant to be agreed or taxed.