Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY E332 OF 1993

BETWEEN	CLAUDE BERNARD	FIRST PLAINTIFF
A N D	DAGMAR BERNARD	SECOND PLAINTIFF
A N D	WINDSOR COMMERCIAL LAND COMPANY LIMITED	FIRST DEFENDANT
A N D	CENTURY NATIONAL BANK LIMITED	SECOND DEFENDANT

Miss Nancy Anderson for Plaintiffs

Mr. R. Braham for second Defendant

HEARD: 4TH NOVEMBER 1993.

EDWARDS J.

On the 4th November 1993 an order was granted in terms of paragraphs 1 and 2 of Summons for Interlocutory Injunction dated 22nd September 1993 subject to the terms and conditions set out in the order.

The second defendant has appealed this order. In the summons dated 22nd September 1993 the plaintiff sought the following relief:

(1) An injunction against the second defendant as Mortgagee of the property registered at Volume 1225 Folio 166 of the Register Book of Titles, restraining it from exercising its power of sale or otherwise dealing with the said property.

(2) An order forbidding the Registrar of Titles from registering any transfer and thereafter any mortgage on the Certificate of Title registered at Volume 1225 Folio 166 of the Register Book of Titles until the trial of this action, or such other time as this Honourable Court shall order.

Interim orders in terms of paragraphs 1 and 2 were granted to the plaintiff up to the 3rd November 1993 - the day preceding the making of the order.

The matter arose out a purchase by the plaintiff from the first defendant of a strata lot Registered at Volume 1225 Folio 166 of the Register Book of Titles.

The lot was part of a devlopment by the first defendant and an agreement for sale was entered into in which the plaintiffs would acquire the lot at a purchase price of $520,000 paying for it in the manner set out in the agreement for sale.

The plaintiffs in support of the summons have filed an affidavit showing that they have paid to the first defendant as a deposit to date, the sum of $182,000 and the first defendant has failed to complete the transaction.

The agreement for sale is not dated although it shows that it was made in 1988.

The title to the land registered at Volume 1225 Folio 166 of the Register Book of Titles was issued to the first defendant on the 23rd April 1990 that is more than one year after the agreement for sale was entered into and the incumbrances referred to on the title included -

> "Mortgage No. 480215 registered in duplicate on the 30th March 1988 to Century National Bank Limited at 14 - 20 Port Royal Street, Kingston to secure the moneys mentioned in the Mortgage stamped to cover Three Million Dollars with interest by this and several others".

The Title at Volume 1225 Folio 166 was therefore not in existence either when the agreement for sale was entered into or when the mortgage was first registered.

The affidavit sworn to by Mr. Vincent Besley Vice-President, Credit of the second defendant on the 22nd October 1993 shows in paragraph 4, that the first defendant on or about the 22nd March 1988 executed a mortgage of lands from which the land at Certificate of Title registered at Folio 1225 Volume 166 derived its title.

It is not clear from the affidavit evidence whether this was done before or after the execution of the agreement for

sale and the payment of the $182,000 deposit by the plaintiff to the first defendant. The first defendant has defaulted on his payments in respect of the mortgage and the second defendant had the land valued and on the 23rd September 1993 put it up for sale by auction. The land was valued on the 5th June 1993 at One Million Seven Hundred Thousand Dollars ($1.7 million) by the valuer for an open market sale and One Million Four Hundred and Forty-Five Thousand Dollars ($1,445,000) for a forced sale.

The reserved price was not achieved at the auction and the sale was withdrawn.

The second defendant again intends to exercise his powers of sale and the plaintiff who stands to lose $182,000 and against whom there is no evidence that he was in breach of any agreement with the second defendant is asking the court to restrain the second defendant pending determination of the matter by the court.

This is a triable issue. The court is not justified at this stage of the litigation in embarking on anything resembling a trial of the Action on conflicting affidavits in order to evaluate the strength of either party's case.

It has to satisfy itself that the application is not frivolous or vexatious and that there is a serious question to be tried and it must take into account what has been referred to as the balance of convenience in deciding whether or not to grant an interim injunction until trial and it has to consider the position of the plaintiff and the defendant in arriving at its decision.

To refuse to grant the interim injunction might result in the plaintiff being permanently deprived of the land which he bought in good faith from the first defendant and for which he paid to the first defendant sums totalling $182,000 as part payment and as earnest of his good intentions.

The second defendant is a Bank and its primary concern is to recover money which it loaned to the first defendant under a mortgage.

The balance of convenience therefore lies in favour of the plaintiff.

Section 49(h) of the Judicature Supreme Court Act gives the court the power to grant an injunction where it is just and equitable to do so. The cases also indicate that in general a mortgagee should only be restrained from exercising the power of sale given to him on the condition that a deposit to cover the amount due to him is made by the applicant who is seeking injunctive relief.

Taking these two principles into account and bearing in mind the fact that the valuation done at the request of the second defendant placed a value of $1.7 million on the property on an open market sale and a value of $1.445 million on a forced sale and that the reserved price was not achieved when the power of sale was first exercised the court made the following order:

Order - Interlocutory injunction granted in terms of paragraphs 1 and 2 of Summons for Interlocutory Injunction dated 22nd September 1993 on the condition that the plaintiff will deposit into court an amount equal to the sum due to the second defendant under the mortgage in respect of land registered at Volume 1225 Folio 166 of the Register Book of Titles and claimed by the second defendant.

Said deposit to be made within 21 days after the second defendant submits the claim with supporting documents to the plaintiff, and provided further that the said deposit shall not exceed the amount which the second defendant could realise by exercising its power of sale in respect of the said land as indicated by the valuation done by D.C. Tavares and Finson at the request of the second defendant on the 5th June 1993. If the deposit is claimed by the second defendant then

in such an event the second defendant shall be deemed to have exercised its power of sale under the mortgage and shall transfer the said land to the plaintiff in similar manner to a transfer to a purchaser who acquired the land pursuant to the exercise by the second defendant of the power of sale given to him by the mortgage.

Liberty to apply.

Leave to appeal granted to the second defendant.