



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 01654/2015

BETWEEN	DAGOR LIMITED	CLAIMANT
AND	MSB LIMITED	1st DEFENDANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	2nd DEFENDANT

IN CHAMBERS

Maurice Long, L Phillipotts-Brown instructed by Clough Long & Co for Claimant.

Sandra Minott-Phillips Q.C. instructed by Myers, Fletcher & Gordon for Defendant

Heard 21st October 2015 & 4th December 2015.

Mortgagee's Power of Sale—Whether Limitation of Actions Act a bar- Whether Liability acknowledged

BATTS J

[1] At the commencement of this matter, the Defendants took objection to an Affidavit of Maurice Long, which was filed out of time and in breach of an Order dated 27th April 2015. The Claimant's counsel indicated that he intended to place no reliance on that affidavit and would proceed without it. The Affidavit filed on the 1st October 25, 2015 will therefore not be considered.

[2] This hearing is the trial in chambers of a Fixed Date Claim in which the final relief sought is as follows :

- (a) That that the Court decides the question whether the Mortgage No. 901164 registered on Certificate of Title at volume 1084 Folio 730 of the register book of titles is valid and enforceable against the Claimant.
- (b) A Declaration that the aforesaid mortgage is invalid, null and void and/or unenforceable against the Claimant.
- (c) An Order for the aforesaid Mortgage to be discharged from the said Title.

[3] In his oral submissions, the Claimant's counsel made it clear that the alleged unenforceability of the mortgage is based on the operation of the Limitations of Actions Act. There is no factual issue to be determined such as whether or not the security documentation had been executed by his client. In its reply the Defendants contend that :

- (a) There is no relevant or applicable limitation period and
- (b) There was an acknowledgement by the Claimant within the relevant period and hence time had not yet run.

[4] The material facts are as follows:

- (a) On the 7th November 1995 a mortgage numbered 901164 was registered on the Claimant's title registered at Volume 1084 Folio 730 of the Register Book of Titles.
- (b) The mortgagee was Mutual Security Bank which changed its name to MSB Ltd and later came under the control of National Commercial Bank Jamaica Limited. This was effected by a Vesting of Assets Order under the Banking Act.
- (c) Consequent on disputes as to the amount owing Suit Number C.L.D. 098 of 2000 was filed on 23 October, 2000 against the

mortgagee. Although pleadings were filed the proceedings were adjourned sine die. The Claimant was of the view that the debt had been written off.

(d) By registered letters dated March 13, 2014 statutory notices were mailed to the Claimant as well as to the guarantors.

(e) The Claimant by Affidavit of Pierrie Neville Chong dated 5th February 2015 denies receiving any formal demand for payment.

(f) By letter dated 19th May 2014 the Claimant's Attorney wrote as follows:

“ National Commercial Bank
Jamaica Limited
The Atrium
32 Trafalgar Road
Kingston 10

Attention: Mr. Damien Fletcher

Dear Sirs,

Re: Account Dagor Limited

We represent Dagor Limited through its Managing Director Mr. Pierre Chong.

We are advised that the account is presently in arrears and we should be grateful if you would advise us as to the principal and interest presently due and owing.

Mr Chong who has been resident overseas for a considerable period of time has advised us that he was of the opinion that the

account had been settled, although we are advised that a suit had been filed in this matter several years ago.

We do not have a record of the proceedings that had taken place and should be grateful if you could provide us with the claim number at the Supreme Court in order that we may research this matter more fully in order to resolve same.

Enclosed is a letter of authority from Mr. Pierre Chong.”

(g) On the 7th October, 2014 property owned by the guarantors was sold and the proceeds applied towards the discharge of the Claimant’s debt. A balance remains due and owing.

[5] Both parties filed written submissions and those were supported by submissions made orally.

[6] The Claimant contents that the Limitation of Actions Act is a bar to the Defendants proceeding to enforce the mortgage. Section 7 reads,

“It shall and may be lawful for any person entitled to or claiming under any mortgage of land to make an entry, or bring an action or suit to recover such land, at any time within twelve years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twelve years may have elapsed since the time at which the right to make such entry or bring such action or suit shall have first accrued.”

Section 30 states:

“At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might

have been made or brought within such period, shall be extinguished.”

Section 33 states:

“No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money , or some interest thereon, shall have been paid, or some acknowledgement of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceedings shall be brought but within twelve years after the last of such payment or acknowledgement, or the last of such payments or acknowledgements if more than one, was given.

[7] The Claimant supports his submission by reference to **Mazelle v Prescott (1959) 1 WIR 358**. In that case the Respondent (a transferee from the mortgagee) sought possession of the mortgaged premises. It was held that the mortgagee’s right and title had been extinguished by virtue of the Limitation of Action Statute and therefore he had no interest to convey. The Respondent was therefore not entitled to possession. Chief Justice Gomes said,

“The real question to be determined is whether under the provisions of the Real Property Limitation Ordinance the mere

passage of time extinguishes a mortgagee's right and title. The answer is to be found in s. 22 which is as follows:

“At the determination of the period limited by the Ordinance to any person for making an entry or distress, or bringing any action or suit, the right of title of such person to the land or rent for recovery whereof such entry , distress, action, or suit respectively might have been made or brought within such period shall be extinguished.”

It is quite clear that the words “any person” in that section include a mortgagee, for otherwise section 12 would not have been enacted.”

- [8] The Claimant also cited **Pasley v Jamaica Redevelopment Foundation Inc and the Registrar of Titles [2012] JMSC 58**. However I did not find it of great assistance. The Claimant's lawyer submitted also that there had in law been no acknowledgment. He relied on **Vol. 28 Hals 4ed (Reissue) para. 16.46** and **Agricultural Mortgage Corporation v Williams** judgment delivered **15 May 1995 (unreported) UKCA**.
- [9] Mrs. Sandra Phillips Q.C. for the Defendant submitted that the Limitations of Actions Act applies only to a mortgagee's power to enter or bring an action or suit. Since the passage of the Registration of Title's Act the mortgagee has a power of sale. This was not contemplated by the Limitation of Actions Act. The power of sale can be exercised without the taking of possession and without commencing suit. Counsel further submitted that the exercise of the power of sale is not “other proceedings” within the meaning of section 33. The *ejusdem generis* rule would prevent such an expansive interpretation. The mortgage instrument creates the power of sale and this can (and in this case did) override any statutory requirement for notice, **Jobson v Capital and Credit Merchant Bank Ltd & Ors [2007] UK PC 8**. The Defendant's counsel submitted that in any

event the Claimant had by their attorney acknowledged the debt in writing and hence no issue of limitation arises. Reliance was placed also on the credit to the mortgage account, consequent on sale of guarantors' property, as a payment to postpone the effect of limitation.

[10] Let me at once say that I do not agree that the letter of 19th May 2014 (fully quoted at paragraph four above) amounts to an acknowledgement of debt. Indeed the second paragraph makes it clear that the Claimant is contending that the debt is settled. It is clear the letter is one of enquiry as to what was the balance alleged to be outstanding. There was no intention to agree to indebtedness or to acknowledge a right to sell premises.

[11] The Defendant is I believe on firmer ground with her construction of the limitation statute. There is, it appears, no time limit on the exercise of the statutory power of sale contained in the Registration of Titles Act. The mortgage is a charge on the land. This is notified to the entire world. At anytime at which the premises are sold the mortgagee is entitled to be discharged in priority to all others even the mortgagor. It would be odd indeed if in such circumstances a mortgagee could lose its right to be paid merely because he elected to rely on the security of a registered interest (or charge) rather than pursue litigation or force a sale of the premises. There may after all be many good reasons why the sale is postponed: market conditions, sympathy with the mortgagor or satisfaction with the security held. I agree with learned queen's counsel that the authority relied upon by Claimant's counsel concerned a conveyance and hence a mortgage on common law title. No statutory power of sale was considered. Furthermore the appellant who claimed the possessory (or adverse) title, was the mortgagor's brother. The court was therefore correct to hold that neither the mortgagee or its successor in title could defeat the third party's possessory title. That much is clear from a review of the facts of the case. See also the words of Gomes, CJ at paragraph 362 D.

“The scheme and provisions of the Ordinance make it clear that it is one of general application and that the only exceptions and deviations from its prescription and its limitation on the time within which an action to recover real property may be brought and from the legal consequences that arises after that time limit is spent, are expressly stated in it.”

[12] Actions to recover possession whether by the mortgagee or purchasers from the mortgagee may be met with any applicable limitation defence. In this regard the mortgagee seeking possession is in law in no better possession than for example one joint owner claiming possession against another. The limitation bar it has been held applies in such circumstances see **Wills v Wills [2003] UKPC 84**. A mortgagor in possession for the requisite 12-year period, in circumstances where the mortgagee’s right to possession has accrued, is entitled to rely on sections 3 and 7 of the Limitation of Actions Act. It therefore behoves purchasers of land to enquire as to the status of those in possession, and it matters not whether the land is purchased from a mortgagee. The possessory title can defeat the title of the registered owner and hence his ability to give a valid title. In the matter at bar however the registered owner is in possession. He cannot defeat his own title. The Registration of Titles Act allows the mortgagee to transfer that title by way of sale. The sale is only one of several methods to enforce his security. The others are: (a) an action on the debt (b) appointment of a receiver (c) re-entry and possession (d) foreclosure. The Limitation of Actions Act applies to the making of an entry and the bringing of actions, see generally Fisher & Lightwood’s Law of Mortgage (2nd Australian edition) pages 384, 392 et seq.

[13] The defendant also contends that the credit to the mortgage account, consequent on the sale of a guarantor’s property is a “payment’ within the meaning of the limitations statute. I hold that it is not. It is not the act of the mortgagor, and hence cannot be said to bar his reliance on the limitation provisions.

[14] I hold however, and for the reasons articulated above, that the Limitation of Actions Act does not apply to the exercise of the mortgagee's statutory power of sale. In the result the claim is dismissed with costs to the Defendants to be taxed if not agreed.

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David Batts
Puisne Judge