



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION

CLAIM NO 2010 HCV 03288

IN CHAMBERS

BETWEEN	JAMAICAN REDEVELOPMENT FOUNDATION INC	CLAIMANT
AND	ANTHONY EVERALD FERGUSON	DEFENDANT

Ms Tavia Dunn instructed by Nunes Scholefield DeLeon & Co. for the claimant.

Mortgage – Equitable mortgage - Loan made to registered proprietor of land – Agreement for land to be security for loan – Proprietor depositing certificate of title in pursuance of agreement – No instrument of mortgage executed – Whether equitable mortgage in place – Enforcement of equitable rights – Registration of Titles Act, section 103 - Conveyancing Act, section 28 (2) – Judicature (Supreme Court) Act, section 48

15 and 22 July 2011

BROOKS J

[1] In or about May 1996 Crown Eagle Life Insurance Company Limited (Crown Eagle) loaned \$900,000.00 to Mr Anthony Ferguson. As a condition of the loan and as security therefor, he handed over to Crown Eagle, his certificate of title for a vacant plot of registered land located in Chancery Hall in the parish of Saint Andrew.

[2] Mr Ferguson, however, defaulted on the repayment of the loan. Crown Eagle also had financial difficulties. Eventually, its loan portfolio (which included the debt by Mr Ferguson) was assigned to Jamaican Redevelopment Foundation Inc. (JRF).

[3] JRF wishes to collect the debt but has found that it cannot readily sell the fee simple interest in the land because Mr Ferguson did not execute a registrable

mortgage in respect of the land. JRF has therefore applied, by way of a Fixed Date Claim, for this court to declare that it holds an equitable mortgage in respect of the land. It also seeks, if the court accepts that it is a mortgagee, an order allowing it to sell the land to recover the sums outstanding.

[4] The issues for the court to resolve are:

- a. whether Mr Ferguson's actions amount to a mortgage of the land,
- b. what relief is available to the holder of an equitable mortgage.

The relevant law

Approaching the court

[5] Miss Dunn, who appeared for JRF, in a comprehensive presentation, pointed first to part 66 of the Judicature (Civil Procedure Rules) 2002 (the CPR), as outlining the relevant procedure for a mortgagee to approach the court in matters such as these. Rule 66.1 (1) paragraph (a) of the CPR allows a mortgagee to secure an order for the payment of monies secured by a mortgage. Paragraph (b) allows for an order for sale of the mortgaged property. Rules 66.2, 66.3 and 66.4 set out the procedural requirements for this type of claim.

Creation of an equitable mortgage

[6] Section 103 of the Registration of Titles Act (the ROTA) stipulates that the proprietor of land may mortgage same by signing a mortgage in a form authorised by one of three specified schedules of the ROTA. Unlike a mortgage of land which is not under the ROTA, a mortgage of registered land does not operate as a conveyance of the interest in that land. The registration of a mortgage under the ROTA does, however provide security to the mortgagee by

way of being a charge on the land. Registration allows the mortgagee specific powers provided by the ROTA. These powers are in addition to any powers contained in the mortgage instrument.

[7] Where the mortgagor executes a document purporting to charge his interest in land, which document does not satisfy the requirements of the ROTA, the question to be ascertained is what effect the document has, if any. In the general law relating to real property, there is no doubt that the owner of an interest in land may create an equitable mortgage.

[8] One method by which an equitable mortgage may be created is "by the delivery to the lender of the title deeds relating to the borrower's land, accompanied by a demonstrably clear intention to treat the land as security for the monies advanced" (per Graham-Perkins J (as he then was) in *Fitzritson v Administrator General* (1969) 11 JLR 288; (1969) 15 WIR 94.

[9] Similarly, Romer J, in *Cradock v Scottish Provident Institution* (1893) 69 LT 380, at p. 382 said: "To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security." (Emphasis supplied) That decision was affirmed on appeal. (See (1894) 70 LT 718).

Enforcement of an equitable mortgage

[10] The effect of creating an equitable mortgage is explained in *Fisher and Lightwood's Law of Mortgages* – 2nd Australian Ed. at paragraph 1.28. There the learned authors state:

“An equitable mortgage is a contract which operates as a security and is enforceable under the equitable jurisdiction of the court. The court carries it into effect either by giving the creditor immediately the appropriate remedies or by compelling the debtor to execute a security in accordance with the contract. (Emphasis supplied)

The learned authors cite the cases of *Ashton v Corrigan* (1871) LR 13 Eq 76 and *Hermann v Hodges* (1873) LR 16 Eq 18 as authority for that proposition. I accept the proposition as a correct statement of the relevant law.

[11] For the equitable mortgagee to have the right to call for a legal mortgage to be executed, requires an intention on the part of the mortgagor to create a mortgage. There, however, need be no specific words to that effect. So long as the right has not been excluded, the mortgagee, who has had a title deposited with him as security, may call for a legal mortgage. Authority for this proposition may be found in *Birch v Ellames and another* (1794) 2 Anst 427; 145 ER 924. In that case Macdonald CB said, at page 431:

“The deposit of title deeds as security for a debt, is now settled to be evidence of an agreement to make a mortgage, and that agreement is to be carried into execution by the Court, against the mortgagee or any who claim under him with notice, either actual or constructive, of such deposit having been made.”

The decision in *Birch v Ellames* has been cited with approval at paragraph 3.38 of *Fisher and Lightwood*, mentioned above, as well as in the Bahamian case of *Barclays Bank PLC v Clarke and others* BS 1998 SC 126.

[12] The principles cited above are also relevant to land brought under the Torrens system for registration of titles, including legislation such as the ROTA. *Fitzritson v Administrator General*, cited above, is an instance of this court declaring that an equitable mortgage was created in respect of registered land.

In *Barclays Bank DCO v Administrator General for Jamaica and another* (1973) 12 JLR 1223, the Court of Appeal accepted that a borrower from the appellant bank had “executed an equitable mortgage by way of charge and deposited as security a duplicate certificate of title”. (*Per* Fox JA, at page 1225 F).

[13] The enforcement principle, mentioned above, is also relevant to lands brought under the ROTA. The Torrens system is used in a number of other countries, including Australia, although the relevant legislation varies from territory to territory in that country. In the case of *Avco Finance Services Ltd v White* [1977] VR 561, a decision from Victoria in respect of registered land, Gillard J stated:

“An equitable charge for a debt is a security whereby only a right to payment of the debt out of the property is conferred by the owner of the property to the holder of the security. The remedy of the holder of the security on default in payment of the debt was to apply to a court of equity to have the property sold and the proceeds paid into court.” (Emphasis supplied)

Application to the instant case

[14] In the instant case, there is no doubt that an equitable mortgage was created. Crown Eagle, by a letter of commitment dated May 13, 1996, informed Mr Ferguson that it was prepared to lend him \$900,000.00 upon certain “terms and conditions”. Included in those terms were the following:

6. Security: Residential Lot at Chancery Hall in Saint Andrew registered at Volume 1227 Folio 292 in the name of Anthony Ferguson. Estimated value - \$1,600,000.00.
- ...
9. Disbursement: Upon completion of security documents.

[15] The letter went on to state:

“In signifying your understanding of, and agreement with the above terms and conditions, kindly sign the original and copy of this letter. The copy is to be signed and returned to us and you may keep the original for your records.

Mr Ferguson signed the document as requested. His signature followed these words: “I accept the above terms and conditions”. Mr Ferguson also signed a promissory note in respect of the sum.

[16] Importantly, the duplicate certificate of title was deposited with Crown Eagle. The signature and the deposit of the duplicate certificate of title fall squarely within the ambit of the terms used by Graham-Perkins J in the above quote from *Fitzritson v Administrator General*:

“...delivery to the lender of the title deeds relating to the borrower’s land, accompanied by a demonstrably clear intention to treat the land as security...”

[17] What therefore are the remedies available to JRF? Based on the principles cited above, it may obtain an order for sale or an order to have a mortgage registered against Mr Ferguson’s title. Those remedies are also authorised by statute. Firstly, section 48 of the Judicature (Supreme Court) Act authorises this court to grant any equitable remedy which could have been granted by the Court of Chancery before the passing of the Act. Secondly, section 28 (2) of the Conveyancing Act specifically authorises a sale of the mortgaged property in order to recover the monies owing on the debt.

[18] In respect of the option of registration of a mortgage, Ms Dunn referred to the fact that an instrument of mortgage had been prepared for execution by Mr Ferguson but was not, in fact, signed. I am not inclined to give any effect to that document as there is no evidence as to the circumstances of its preparation or as

to the reason for its non-execution. Ms Janet Farrow, who deposed on behalf of JRF, did not, and most likely, could not, bearing in mind that JRF was an assignee of the debt, give any evidence in respect of those matters. In the absence of an agreed mortgage document, it may well be open to the court to order that a mortgage be registered on the title in the terms of that set out in the eighth schedule of the ROTA. In my view, however, that step would unnecessarily complicate matters as, from the circumstances of Mr Ferguson's default and JRF's inability to locate him, it seems that a sale is inevitable.

[19] Based on the above, it is my view that the appropriate order to be made at this time is an order for sale.

Conclusion

[20] The evidence presented demonstrates that Mr Ferguson deposited the certificate of title for the land with the intention that it be used as security for the loan offered to him by Crown Eagle. The result is that an equitable mortgage was created by Mr Ferguson. There being evidence that the loan was disbursed and that there has been default, a claim may properly be brought against Mr Ferguson for recovery of the monies owed by him.

[21] JRF, being the assignee of the debt due to Crown Eagle, has fulfilled the procedural requirements set out in rules 66.2, 66.3 and 66.4, in that it has proceeded by way of the Fixed Date Claim and has filed an affidavit supporting the claim. It is entitled to a declaration that it is an equitable mortgagee of the land and it is entitled to an order for sale of the fee simple interest in the land.

It is therefore declared as follows:

- 1) The claimant holds an equitable mortgage of all that parcel of land part of Chancery Hall Plantation, now known as Chancery Hall, in the parish of Saint Andrew, being the lot numbered 230 on the plan of part of Chancery Hall aforesaid deposited in the office of titles on the 9th day of February 1990 and being all that parcel of land comprised in Certificate of Title registered at Volume 1227 Folio 292 of the Register Book of Titles (hereafter referred to as the land), which mortgage is to secure the sum of \$900,000.00 with interest thereon;
- 2) That as at July 1 2010, the Defendant is indebted to the Claimant in the sum of \$5,690,791.57 and that interest continues to accrue on the principal sum of \$900,000.00 at the rate of 30 per centum per annum or \$793.73 per diem until payment.

It is also ordered as follows:

- 1) The Defendant's interest in the land shall be sold to recover the total sums outstanding and secured by the abovementioned mortgage together with legal fees, costs, and expenses;
- 2) The sale shall be by public auction or in the event of that method failing, by private treaty;
- 3) The Registrar of the Supreme Court shall appoint a reputable valuer for the purpose of valuing the land;
- 4) The Registrar of the Supreme Court shall fix the reserve price for the sale by auction and shall appoint a reputable auctioneer for the purpose of conducting the sale of the Defendant's interest in the land;
- 5) The Registrar of the of the Supreme Court shall sign any and all documents necessary to give effect to these orders;
- 6) The proceeds of the sale shall be paid into court;
- 7) Liberty to apply;
- 8) Costs to the Claimant to be taxed if not agreed.