[2015] JMCD CD. 17

IN THE SUPREME COURTOF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2015 CD00059

BETWEEN ASPINAL WAYNE NUNES CLAIMANT

AND JAMAICA REDEVELOPMENT FOUNDATION, INC. DEFENDANT

Mr. Jerome Spencer and Mr. Hadrian Christie instructed by Patterson Mair Hamilton for the Claimant

Mrs. Sandra Minot-Phillips Q.C. and Ms. Rachel McLarty instructed by Myers Fletcher & Gordon for the Defendant

Heard: 30 June, 20 July and 31 July 2015

Practice and Procedure – Injunction-Application for injunction to restrain Mortgagee's exercise of its power of sale contained in a mortgage- Whether Mortgagee may be restrained-Whether damages is an adequate remedy-Section 106 of The Registration of Titles Act-Limitation of Actions Act. Evidence – Use of without prejudice communication.

K. LAING J

<u>The Application</u>

[1] The Claimant, Aspinal Wayne Nunes by Notice of Application filed on May 22, 2015 sought, *inter alia*:

> *"1. An injunction restraining the Defendant by itself or its servants, employees, agents, or otherwise howsoever from taking any steps*

whatsoever to sell all those parcels of land registered at Volume 1482 Folio 188 and Volume 1480 Folio 858 of the Register Book of Titles ("the relevant parcels of land") pending the determination of this claim.

2. An injunction restraining the Defendant by itself or its servants, employees, agents, or otherwise howsoever from entering upon the relevant parcels of land or taking any steps to disposses the Claimant of the relevant parcels of land pending the determination of this claim."

The Claim

[2] The Claimant by his Claim Form and Particulars of Claim filed on May 22, 2015 claims the following relief:

(1) A declaration that the Mortgage to support Guarantor's Foreign Currency Liability issued by Aspinal Wayne Nunes also known as Aspinal W. Nunes dated May 6, 1994 bearing mortgage number 816340 to MSB is discharged.

(2.1) A declaration that the Defendant is estopped from exercising its powers of sale over all those parcels of land registered at Volume 1482 Folio 188 and Volume 1480 Folio 858 of the Register Book of Titles ("the relevant parcels of land").

(2.2) Alternatively, a declaration that the Defendant has waived the right to exercise its powers of sale over the relevant parcels of land.

(3) An order that the Defendant execute a Discharge of Mortgage releasing the relevant parcels of land from mortgage number 816340.

(4) An order that should the Defendant fail to execute the Instrument of Transfer within fourteen (14) days, the Registrar of the Supreme Court shall execute the Discharge of Mortgage and this shall have the same effect as if it were executed by the Defendant.

(5) An injunction restraining the Defendant by itself or its servants, employees, agents, or otherwise howsoever from taking any steps whatsoever to sell the relevant parcels of land including advertising the property for sale pending the determination of this claim.

(6) An injunction restraining the Defendant by itself or its servants, employees agents, or otherwise howsoever from entering upon the relevant parcels of land or taking any steps to disposses the Claimant pending the determination of this claim.

Background

[3] The Claimant is a businessman who has resided for over 20 years and continues to reside at 16 Shenstone Drive in the Parish of St Andrew.

[4] In May 1994, the Claimant executed a Guarantee in favour of Mutual Security Bank ("***MSB***") in respect of a United States Dollar denominated loan(s) and credit facilities granted to Produce Export Enterprises Limited ("**PEEL**") totalling US$100,000.00 ("***the Loan***").

[5] The Guarantee was secured by a mortgage (**"the mortgage"**) over all those parcels of land registered at Volume 1482 Folio 188 and Volume 1480 Folio 858 of the Register Book of Titles, located at civic address 16 Shenstone Drive St Andrew ("***the Secured Land***s"). The Volume and Folio numbers of the Secured Lands have since changed but such changes are not material for purposes of this application.

[6] The Claimant asserts that he had emphasised in his discussions with the relevant officers of MSB and officers of PEEL that it was of great importance to him that his liability under the Mortgage be denominated in US Dollars because of the significant disparity between US Dollar and Jamaican Dollar loans at the time.

[7] PEEL failed to adequately service the Loan and in or about March 1995 the Claimant was required to make payments pursuant to the Guarantee. The Claimant asserts that after March 1995 he protested and challenged the conversion of the debt arising from the Loan to a Jamaican Dollar denominated liability. His protests were

lodged with MSB and subsequently with the National Commercial Bank Jamaica Limited ("***NCB***") which acquired MSB's interest in the loan and the related security. The Claimant says that notwithstanding his protests, the debt arising from the loan has morphed in to a Jamaican Dollar liability with an "alarming" interest rate of 25% per annum.

[8] The Claimant's case is that based on his calculations, he has discharged his liability under the Guarantee by way of Mortgage since November 24, 2000. The Claimant therefore asserts that there was no basis for the notice dated August 25, 2014 issued by the Defendant (which now owns the interest in the Loan and the related security), alleging that he owes the sum of J$18,904,634.53. As a consequence he says there is no proper basis for the Defendant to take any steps to enforce its security interest in the Secured Lands.

Applicable Law and Submissions

[9] In determining the circumstances in which an interim injunction ought to be granted our Courts have consistently been guided by the principles laid down **American Cyanamid v. Ethicon** [1975] 1 All ER 504 which for purposes of this case can be reduced to 3 main considerations, namely:

1. Is there a serious issue to be tried?
2. Would damages be an adequate remedy?
3. Does the balance of convenience favour the granting of an injunction?

Is there a serious issue to be tried?

[10] The Claimant submits that there is a serious issue to be tried on its Claim on a number of bases. Firstly, as it relates to what might for ease of convenience be described as '*the discharge of debt issue*' the Claimant's Counsel submitted that the Claimant had discharged its debt obligations under the Guarantee and Mortgage.

[11] Secondly, as it relates to what may for convenience be described as '*the conversion issue*' it was submitted by Counsel for the Claimant in reliance on **Holme v Brunskill (1878)** 3 QBD 495 that any material variation to the terms of the principal

agreement which could prejudice a guarantor discharges the guarantor from liability unless he consents to it. He argues that the conversion of the Loan from a US Dollar facility to a Jamaican Dollar Facility without the Claimant's consent (especially in light of the fact that he refused to consent to the variation when asked) was such a material variation.

[12] It was further submitted on behalf of the Claimant, that as it relates to the conversion, clause 5 of the Guarantee does not avail the Defendant. Clause 5 provides as follows:

> *5. The lender, without exonerating in whole or in part the Guarantor may grant time or other indulgence to the Borrower or to any person/persons or corporations liable to the Lender for or in respect of the monies or any part thereof owing by the Borrower and may accept compositions from and may otherwise deal with the Borrower and with such other person/persons and corporations as the lender may think expedient and may give up modify and abstain from perfecting or taking advantage of any securities or contracts held by it as collateral and may realise the securities in such manner as the lender may think expedient, all without obtaining the consent of the Guarantor, and without giving notice to the Guarantor and no loss of or in respect of any securities received by the Lender from the Borrower or others, whether occasioned by the fault of the Lender or otherwise, shall in any way limit or lessen the liability of the Guarantor under this Guarantee.*

[13] Thirdly, as it relates to what for convenience be described as '*the limitation issue*' it was submitted that the Defendant's exercise of its powers of sale is statute barred under section 33 of the **Limitation of Actions Act** since such enforcement falls under and is caught within the expression "other proceedings". Section 33 of the **Limitation of Actions Act** reads:

> *"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 gaining 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 suit or proceeding shall be brought but within twelve years after such payment or acknowledgement, or the last of such payments or acknowledgements if more than one, was given."

[14] In response to the Submissions made on behalf of the Claimant, Mrs. Sandra Minott-Phillips Q.C. submitted that there was no serious issue to be tried. In relation to the conversion point, Counsel urged the Court to accept that the discussions between the Claimant and MSB as to his desire to have his liability denominated in US Dollars did not form an express term of any of the documents and did not amount to an implied term of any agreement between the Defendant and MSB. Counsel did not seek to place much reliance on clause 5 of the Guarantee but the Court was instead referred to the Loan Agreement (the use of which was agreed by consent) clauses 6 and 7 of which provide as follows:

6. In the event that the Borrower shall

(a) fail to earn the amount of foreign currency projected by the Borrower in its application for the loan; or

(b) fail to remit the agreed percentage of each export shipment referred to in clause 4 hereof; or

(c) fail to sail to the Bank the foreign currency earnings generated by the use of the loan; or

(d) fail to repay the loan on demand being made by the Bank

The Bank shall be at liberty to convert the United States Dollar loan to a Jamaican Dollar loan. The rate of conversion shall be the Bank's weighted average selling rate for United States currency on the day of conversion.

7. *In the event that the loan is converted to a Jamaican Dollar loan then interest shall accrue from the date of conversion to the date of payment at the rate per annum set out in Item 5 of the Schedule hereto.*

[15] Learned Queen's Counsel argued that PEEL having failed to satisfy one or more of the requirements outlined in clause 6, the Defendant was entitled to have converted the Loan and this had the natural consequence of similarly converting the Claimant's liability arising under the Guarantee.

[16] In relation to the discharge point, it was submitted by learned Queen's Counsel that there was overwhelming evidence that the Claimant had not discharged his liability under the Guarantee and Mortgage. Counsel relied on, and painstakingly took the Court through the exchange of correspondence between the Claimant and the various holders of the interest in the Loan and security. These letters were exhibited as exhibit "KHS-3" to the Affidavit of Karlene Hepburn Smith an Account Officer employed to the Defendant. It was submitted that the correspondence demonstrates that the Claimant had not discharged his liability, since included among the letters exhibited is an offer on behalf of the Claimant to settle the balance on the Loan in the Amount of US$50,000.00, a counter offer by Dennis Joslin Jamaica, Inc., in the amount of US$80,000 and what Counsel submits is a clear acceptance of that counter-offer by letter dated August 26, 2003 by Oswald P James, then Counsel for the Claimant, and an enquiry as to whether the $80,000.00 includes the US$40,000.00 already paid leaving a balance US$40,000.

[17] As it relates to the limitation point, it was submitted by learned Queen's Counsel as her main position, that the exercise of a power of sale is not the bringing of an "action suit or other proceeding" within the meaning of section 33 of the Limitation Act. Counsel urged the Court to treat with some degree of circumspection the case of **Franz Fletcher and Ors v Jamaica Redevelopment Foundation** [2011] JMCA App 31 since in that

case the issue of the applicability of section 33 to the exercise of a power of sale was not argued and the matter simply proceeded on the basis that it did. However, Counsel argued that in any event, the Defendant as mortgagee has attempted to exercise its power of sale within 12 years of some acknowledgment in writing of the Defendant/Mortgagee's right to do so and this acknowledgment was signed by the Mortgagor or his agent. It was further submitted that the correspondence exhibited to the affidavit of Karlene Hepburn Smith is clear evidence of this acknowledgment.

Without Prejudice Communication

[18] The Defendant has objected to the admission and use of the letters exhibited at "KHS-3" to which the Court has referred and raised what might for convenience be described as '*the without prejudice issue*'. Counsel for the Claimant submitted that the letters were the result of a genuine attempt to settle issues while the Claimant was pursuing a claim against NCB (which he says was never brought to judgment and is therefore continuing). The letters were marked "Without Prejudice" or in the case of the letter dated 28 June 2005 although not expressly labelled is still to be so considered. Counsel submits that it is improper for the Defendant to exhibit those document in proceedings bearing in mind the applicable law relating to the limited use "without prejudice" communication.

[19] In support of his submissions Counsel for the Claimant relied on the House of Lords decision of **Ofulue and Another v Bossert and another** [2009] UKHL 16 and the following extract from the decision of Lord Hope of Craighead:

> "*[9] Normally, when negotiations are entered into with a view to settling a claim that has already been brought, one or other of two things happens: either they result in an agreement or they break down and the claim proceeds to judgment. If they result in agreement, the letter that was written without prejudice is available to show what the government was. If the claim proceeds to judgment, the protection remains in place while liability is still in issue but it ceases to have any purpose when the court has resolved the dispute. This case is unusual because the negotiations*

did not result in an agreement and the claim did not proceed to judgment. It went to sleep and was then struck out. But I would hold that this turn of events did not remove the need for protection. The dispute had not been resolved, so there was still a risk that things said in the letter might be used to the Bosserts' prejudice. The issue which had given rise to the original proceedings had not gone away. Ultimately of course, if the Bosserts remained in possession and no further steps were taken against them, they would acquire a right of ownership under the provisions of the 1980 Act. But so long as the Ofulues remained the owners."

[20] Queen's Counsel for the Defendant submitted that the ordinary rule is that unsuccessful negotiations are protected from disclosure in subsequent legal proceedings unless the parties waive their right to protection from prejudice occasioned by such disclosure. It was further submitted that when the Claimant exhibited correspondence between mortgagor and mortgagee, he waived his right to claim protection from any prejudice to himself or PEEL, occasioned by the negotiations which were the subject of the correspondence aimed at settlement. Counsel argued that it was open to the Defendant to object to the unlawful disclosure by the Claimant or pursue the course adopted which was to itself waive its right to protection from disclosure of the contents of the negotiations.

[21] Learned Queen's Counsel also relied on the case of **Unilever plc v The Proctor and Gamble Co** [2001] 1 All ER 783 to support the Defendant's use of the correspondence of which the Claimant complains. In **Unilever** the English Court of Appeal expressly recognised that:

"there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission in to evidence of what one or both of the parties said or wrote"

[22] Included in the most important instances where this is permitted is the situation where "the exclusion of the evidence would act as a cloak for perjury, blackmail or other ambiguous impropriety". Queen's Counsel suggested that this was such a case

because the Claimant is asserting falsely that he had discharged his liability and is seeking to avail himself of the protection of the Limitation of Actions Act, knowing full well that he had not discharged the liability and that he is not able to properly benefit from the protection of the Act. She submits that these are all matters which are evidenced by the correspondence which the Claimant is now seeking to exclude.

[23] Learned Queen's Counsel also relied on the authority of **Bradford v Bingley plc v Rashid** [2006] UKHL 37. In that case the Court had to consider the without prejudice rule in the context of an acknowledgment of the Claimants claim within the meaning of s 29 (5) of the UK Limitation Act (the section of the act which in essence provides that an acknowledgment of a claim shall cause a claim to be treated as having accrued on the date of the acknowledgment and not before). On the particular facts of that case the Court held that the letters in question were not protected by the without prejudice rule from being admitted in evidence as an acknowledgment because there was no dispute to be compromised since "*the correspondence treated the debt as an undisputed liability and dealt only with whether, what and to what extent the debt could meet the liability"*

[24] It is settled law based on the now established **American Cyanamid** principles that the Court is not required to conduct a detailed revision of the case and that the Claimant must show that there is a serious issue to be tried. This is a relatively low threshold in that the Claimant is required to only show that his claim is neither frivolous nor vexatious. I find that the Claimant has satisfied this threshold. Learned Queen's Counsel has made forceful submissions to the contrary, but the Court is of the view that there is a serious issue to be tried in relation to, *inter alia*, whether the debt has been discharged, whether the conversion was allowed under the Loan Agreement and/or the Mortgage; the importance of the conversion to US$ (if any) to the quantum of the debt being claimed and whether the Claimant can rely on the Limitation of Actions Act. The Court will also need to grapple with the applicability of the without prejudice rule in cases of this sort. These are all matters which need to be resolved in the forum of a trial.

Would Damages Be An Adequate Remedy For The Claimant

[25] Damages would plainly be an adequate remedy for the Defendant. The Defendant, relying on **section 106 of the Registration of Titles Act** and **SSI (Cayman) Limited et al v International Marbella Club S.A.** SCCA No 57 of 1986 delivered February 6, 1987 submitted that damages would be an adequate remedy for the Claimant. Section 106 provides as follows:

> *"106. If such default in payment, or in performance or observance of Covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether, or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."*

[26] In **Paul Cabot v Victoria Mutual Building Society Claim No. 2007 HCV 05120 delivered 29 February 2008**, the Claimant sought an injunction to restrain the Defendant Mortgagee from registering a transfer of property that had been sold pursuant to powers of sale contained in a mortgage. The Court had to consider the

question of the adequacy of damages and his Lordship Brooks J (as he then was) approached the issue in the following way:

> *"There is a well established line of reasoning that, where land is concerned, it is presumed that damages are not an adequate remedy, and no enquiry is ever made in that regard. The reason behind that principle is that each parcel of land is said to be "unique" and have "a peculiar and special value". (See p. 32 of Specific Performance 2nd Ed. by Gareth Jones and William Goodhart) As a result of that reasoning, a money payment could never secure a parcel with all the attributes of that which was originally lost. Mr. Piper also submitted that because the property is Mr. Paul's family home, damages could not be an adequate remedy.*
>
> *Despite these usual considerations there is however, a statutory provision to be considered. Such a provision, if applicable would override the usual common law considerations. Section 106 of the Registration of Titles Act stipulates that where a mortgagee purports to exercise its power of sale contained in the mortgage:*
>
> *a. neither the purchaser from the mortgagee (in this case the Society) nor the Registrar of Titles is bound to enquire whether the power has indeed been properly exercised, and,*
> *b. the mortgagor's (i.e. Mr. Paul) remedy from any wrongful exercise of the power shall be a remedy in damages only."*

[27] Although this is not a case in which the Mortgagee has already exercised the power of sale that does not appear to weaken the argument that if the injunction is not granted and such a sale is permitted, which turns out to be a wrongful exercise of the power of sale, damages would be an adequate remedy for the successful Claimant in this case, by virtue of the operation of section 106 of the Registration of Titles Act.

[28] The Claimant on the other hand, relying on **Franz Fletcher**, has submitted that damages would not be an adequate remedy since the sale of the Claimant's

home would displace him and his family. In **Franz Fletcher** there was an application before a single Justice of Appeal for a stay of execution pending appeal of an order of a single judge refusing an application for an injunction. The injunction was to restrain the sale of property by a mortgagee to anyone other than the Second Claimants. In **Franz Fletcher** the Court appears to have taken a more flexible approach to the determination of the adequacy of damages and at paragraph 42 of the Judgment the Learned Justice of Appeal states:

> *"...In considering whether damages would be an adequate remedy the dicta of Lord Hoffman in **NCB V Olint** is instructive in that the Court must aim to do justice between the parties and in so doing must pursue a path which is likely to result in the least prejudice to either side."*

[29] Despite the existence of section 106 of the Registration of Titles Act, there have been a number of cases in which our Courts have nevertheless granted injunctions to restrain mortgagees from exercising their power of sale and the common thread running through those cases such as **Franz Fletcher**, **Brady v Jamaica Redevelopment Foundation SCCA No 29/2007 (delivered 12 June 2008)** and **Marbella,** appears to me to be that in those cases the validity of the Mortgage was being challenged on the ground of fraud/forgery. As a consequence there was a question raised as to whether there was a mortgagee exercising its power of sale for purposes of section 106 of the Registration of Titles Act. As Downer JA said in **Marbella** at page 24 of that judgment:

> "*The important aspect of the law is that where there is an allegation of fraud equity tends to qualify the right of the Mortgagee to enforce his remedy of sale but the terms and conditions which are impressed is that the mortgagor pays the amount claimed or such other amount as the court considers just into court"*

[30] In this case the Claimant is not challenging the validity of the Loan Agreement the Guarantee or the Mortgage but he is asserting that the debt has been extinguished and he is claiming the protection of the Limitation Of Actions Act. I must confess that I am attracted to the approach taken by Phillips JA in **Franz Fletcher** but I recognize that

such an approach is justified in that case because the validity of the Mortgage was being challenged.

[31] I am not prepared to accept the submission of Counsel for the Claimant that a similar approach ought to be taken in this case. If I were to do so, my approach would arguably be more consistent with the dicta of Sachs LJ in the pre-American Cyanamid case of **Evans Marshall &Co Ltd v Bertola SA** [1973] 1 WLR 349 at 379 H where his Lordship states:

> *"the Standard Question in relation to the grant of an injunction 'are damages an adequate remedy'?-might perhaps, in the light of recent authorities of recent years , be rewritten-'is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"*

[32] The Court recognises that the Claimant has been living at the Secured Lands for over 20 years and it is the home of his family. If the Injunction is not granted there is a real risk that the Secured Lands will be sold and in the event that the Claimant succeeds, he and his family will be forced to acquire another home elsewhere. Nevertheless, in all the circumstances and being convinced that section 106 of the registration of Titles Act applies, I am of the view that damages would be an adequate remedy for the Claimant in this case.

Conclusion

[33] In **NCB V Olint** at paragraph 16, their Lordships give the following guidance:

> "*It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. 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."

[34] For the reasons given earlier in this judgment, I find that damages would be an adequate remedy for the Claimant if succeeds at the trial. For this reason it is unnecessary for me to go on to consider whether the balance of convenience favors the granting of an injunction, although had I done so, I would have been inclined to find that it does.

[35] For the reasons outlined above the Court makes the following orders;

1. The application for interim injunctions filed May 22, 2015 is refused.

2. Costs of the application to the Defendant to be taxed if not agreed.