IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE INSOLVENCY DIVISION

CLAIM NO. SU2022IS00004

BETWEEN	**NIGEL PAGON (Executor of the Estate of Neville Parnell deceased)**	**CLAIMANT**
AND	**JAMAICAN REDEVELOPMENT FOUNDATION INC**	**DEFENDANT**

Insolvency – Notice of Intent to file Proposal – Whether automatic stay continues after death of proposer – Previous unfulfilled promises to pay – Whether court should lift automatic stay – Sections 4 (1) and 5 (1) Insolvency Act – Whether registration on title of forfeiture order is void because it occurred after filing and service of a Notice of Intent to file Proposal.

Daynia Allen and Timera Mason instructed by Hylton Powell for the Claimant.

Maurice Manning, K.C.,Tavia Dunn and Jacob Phillips instructed by Nunes Scholefield Deleon & Co. for the Defendant.

Jimhell King for the Supervisor of Insolvency.

Heard: 16th March 2022.

In Open Court

CORAM: BATTS, J.

[1] On the 16th March 2022, having considered the evidence and all submissions, I made the following orders and declaration:

a) The relief claimed in the Amended Fixed Date Claim filed on the 15th March 2022 is refused.

b) The automatic stay pursuant to sections 4(1) and/or 5(1) of the Insolvency Act in the matter of the Estate Neville Parnell, as a consequence of the filing of a Notice of Intention to File Proposal dated 20th May 2021 and Proposal dated 9th August 2021, no longer operates in respect of the Defendant.

c) No order as to costs

d) Liberty to apply

e) Defendant's attorney at law to prepare file and serve formal order.

I promised then to put my reasons in writing at a later date and now do so.

[2] This was the first day of hearing of an Amended Fixed Date Claim Form. The Claimant's attorney applied to have the hearing treated as the final hearing date. The Defendant had no objection. Also before the court was an application by the Defendant to have the automatic stay, imposed by virtue of sections 4 (1) or 5 (1) of the Insolvency Act, lifted. I allowed the hearing to be treated as the final hearing and both applications were argued at the same time. As will be seen each application is the alter ego, so to speak, of the other.

[3] The Claimant is the executor of the estate of Neville Parnell (deceased). The Defendant is the successor in title to a mortgagee, in respect of a mortgage, attached to property owned by the estate. By an Amended Fixed Date Claim the Claimant seeks to have the Defendant restrained from enforcing its security. The precise terms of the orders applied for are:

(a) An order restraining the Defendant from auctioning, transferring or otherwise dealing with property located at 22 Retirement Road in the parish of St. Andrew and registered at Volume 1548 Folio 778 in the Register Book of Titles ("the property), until the stay imposed by section 5 of the Insolvency Act has been lifted or the proposal and assignment process under the Insolvency Act has been completed.

(b) A declaration that the entry of the foreclosure order on the Certificate of Title by the Registrar on the 28th day of May 2021 and subsequent cancellation of certificate of title in respect of the property is void and of no effect.

(c) An order that certificate of title issued on July 7, 2021 for the property registered at Volume 1548 and Folio 778 and issued to the Defendant on July 7, 2021 be cancelled.

(d) *An order that the Registrar of Titles issue a new title for the property in the name of the Claimant*

[4] The relevant facts are that Mr. Neville Parnell (now deceased) was the registered proprietor of certain property subject to mortgages now held by the Defendant. He defaulted in his mortgage payments. On the 20th May 2021 Mr. Parnell filed a notice of intention to make a proposal to his creditors pursuant to section 11 of the Insolvency Act. The trustee (Mr. Cadian Campbell) on that same date gave notice of the filing to the Defendant. The proposal to creditors was filed on the 9th August 2021. The Defendant prior to all of that had, on the 8th January 2020, issued a Statutory Notice of Default to Mr. Parnell. This followed extensive negotiations with Mr. Parnell. On the 2nd July 2020 a Notice of Foreclosure was served on Mr. Parnell. On the 28th September 2020 the Defendant applied to the Registrar of Titles and the National Land Agency for a foreclosure order, pursuant to section 119 of the Registration of Titles Act. On the 11th March 2021 the office of the Registrar of Titles issued an order for foreclosure pursuant to section 120 of the Registration of Titles Act. That order was endorsed on the title on the 28th day of May 2021 some eight days after Mr Parnell filed his notice of intention to file a proposal. As at the 5th March 2021 the amount outstanding and due to the Defendant was $37,838,538.35 with interest accruing at a daily rate of $4,620.60. Mr. Parnell, it should be noted, died on the 7th October 2021. The Claimant contends that, as at the 18th September 2018, the property was valued at $144 million.

[5] The Claimant's counsel argued that the legal effect, of the filing of the notice of intent to file a proposal, was to prevent any further move to execute or recover the debt. In this regard she relies on section 4 (1) (a) of the Insolvency Act, the relevant part of which, which states:

" 4 (1) Subject to subsection (2) and section 7, where a notice of intention has been filed under section 11(2) in respect of an insolvent person-

(a) no creditor shall-

(i) have any remedy against the insolvent person or insolvent person's property:

(ii) commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy; and

(b) ……. "

Counsel also relied on section 5(1) (a) which makes a similar mandate with respect to the filing of a proposal. The Claimant's attorneys, in their written submissions, summarise the position thus:

> *"20. In effect, these sections preclude a creditor from exercising any remedy or continuing the execution of any rights of enforcement against a debtor's property where that debtor has filed either a notice of intention or an actual proposal."*

[6] This bar to enforcement, they contend, is automatic and the decision of Sykes J (as he then was) in **Development Bank of Jamaica v Proactive Financial Services [2017] JMCC Comm 31** at paragraphs 31 to 36 is relied on. They reference also the subsequent decision in **National Export – Import Bank of Jamaica v West Indies** – **Gypsum Company Limited** [2017] JMCC Comm 32 and some Canadian authorities. It is argued that the registration of a foreclosure order, and the issuance of a new title on the 7th July 2021, constitute *"execution or other proceedings for the recovery of a claim provable in bankruptcy*." Therefore,

the Registrar having granted this remedy, after the automatic stay took effect, it is null and void. The new title ought therefore to be cancelled and an order made pursuant to section 158 (2) of the Registration of Titles Act.

[7] The Defendant's counsel, in written submissions, accepts that sections 4 and 5 of the Insolvency Act impose an automatic stay of execution. Further, that the stay applies to judicial and extra-judicial proceedings and, that the word *'remedy'* should be given a broad and purposive interpretation. They accept also that the stay is automatically imposed on the filing of a Notice of Intention to File a Proposal. However, the Defendant argues, only the debtor can make a proposal. Therefore the death of the debtor ends the proposal. Reliance is placed on the **Employers Liability Assurance Corporation Limited** V **Ideal Petroleum** [1978] 1 S.C. R 230, **Proposal by 3245955 Canada Inc (2017)** QCCS 2659 at 54 and, **Productions RDF Inc (Proposal of) (2006) QCCS 7919** (CanLll), The proposal, like an offer to contract, cannot survive the death of the proposer, **Dickenson v Dodds** (1876) 2 Ch D 463 at 475. Since Mr. Parnell died a new proposal, on behalf of the estate Neville Parnell, is required see, I**n re Piotrowski** (1970) 16 CBR (N.S.) 28 (Ont S.C.). In any event the Defendant relies on section 33 of the Insolvency Act, and submits that as it filed no proof of claim the Defendant is deemed to have refused the proposal. The Defendant as a secured creditor, who has refused the proposal, is entitled to deal with its security.

[8] The Defendant argues further that, in the absence of fraud, an order for foreclosure entered on the title is indefeasible, **Atkinson v Development Bank of Jamaica et al** [2015] JMSC Civ 141 is relied on. It is submitted that the court has no power to re-open an order for foreclosure which was registered and not obtained by fraud, **Campbell v Bank of New South Wales** (1883) 16 N.S.W.R 285. Therefore, as the order for foreclosure was entered on the 11th March 2021 while the Notice of Intention to file proposal was served on the 20th May 2021, this court cannot re-open the matter. There being no allegation that registration was obtained by fraud the subsequent entry of the order, on the Certificate of Title by the Registrar of

Titles, was an administrative act and not an act of execution. Therefore, it was not subject to the automatic stay.

[9] The Defendant argues, in the alternative, that a creditor pursuant to section 7 of the Insolvency Act may apply to have the automatic stay lifted. It will be lifted, if continuation of the stay will lead to material prejudice or, if it is otherwise equitable to do so. **Golden Griddle Corp v Fort Erie Trust and Travel Plaza Inc** 2005 Can 11 81263 (ONSC) is relied on to explain "*material prejudice*." It is submitted that given the age of the debt, the several promises to pay and indulgences granted and, that the Defendant waited *"until virtually the last moment*" within the meaning of **Re Proposal of Cumberland Trading** [1994] (Can 11 7458 (ON SC), it is just and equitable to lift the stay.

[10] Therefore, the issues for me to decide are: (a) whether as a matter of law the automatic stay ought to be lifted (b) whether or not the automatic stay operated to prevent the Registrar registering the order for forfeiture and, (c) if it did, should the court declare the registration void and set aside the title. On the facts of this case I do not find it necessary, in coming to a decision on these issues, to address all the legal questions raised above.

[11] In this matter there is little doubt that the lifting of the automatic stay is appropriate. The history of the debt, the several promises to pay by the debtor, the failure to abide and live up to commitments made, and the rejection of the proposal by the secured creditor, militate against a continuation of the stay. The Defendant is a secured creditor. If it rejects the proposal put forward it will be entitled to pursue foreclosure or other action against the security. In this case it is manifest that the Defendant has no interest in the proposal made, see paragraph 217 of the affidavit of Nadia Sinclair dated 20th January 2021. Therefore, even assuming (without deciding) that the registration of the order for forfeiture is void, the result will be the same. A lift of the stay will enable the Registrar to again register the order and issue a new title. A court of equity does not act in vain. There is, on the facts before

me, no useful purpose to be gained by setting aside either, the registration of the order for forfeiture or, the new title issued.

[12] There is another consideration. In this case the Defendant took no step or steps after the automatic stay became effective. The Defendant had by then done all it was required to do in order to have its order for forfeiture registered on the title. I agree, with the Defendant's counsel, that the registration of the order by the Registrar was an administrative act. The Registrar was required only to ensure that the statutory requirements were met before registering the order of forfeiture. Those requirements included advertising and permitting, either the debtor or any interested person, to intervene prior to the registration of the order and cancellation of the title. Neither of these events occurred. It is contended that, registration having occurred after the statutory stay was in place, it is void. I do not agree. The Registrar's act of registering the order for forfeiture is voidable. It remains valid until and unless a court sets it aside. This may be easily demonstrated by asking what would be the position if a purchaser for value without notice had obtained a transfer of the new title. Obviously that transfer would be and remain valid. The Registrar's act is therefore valid until and unless declared void.

[13] It is manifest that a forfeiture proceeding is an *"action execution or other proceeding for the recovery of a claim provable in bankruptcy".* Section 4 (1) (a), as we have seen, prohibits the "*creditor*" commencing or continuing such steps after a notice of intention to file a proposal is filed. "*Creditor*" is defined in section 2 (1) as *"a person having a claim, unsecured, preferred by virtue of priority under section 202 or secured, provable as a claim under this Act and includes a surety or guarantor for the debt due to any such person."* It seems to me therefore that the prohibition does not extend to the Registrar of Titles while doing an administrative act consequent on the creditor's already completed acts of execution. In short forfeiture, by the creditor, was completed when it had done all it was required by law to do in order to achieve forfeiture. The registration of the order for forfeiture on the title, the cancellation of the title and, the issue of a new

title were not acts of the creditor within the meaning of the Act. The statutory stay did not therefore apply to the issue of the new title by the Registrar.

[14] As at present advised I do not agree with the submission that the death of a debtor nullifies or makes invalid the proposal or its effect. The authorities relied on by the Defendant (see paragraph 7 above) do not speak to this issue. The statutory scheme creates a chose in action (being the right to an automatic stay once either a proposal or notice of intent to file a proposal is filed) which the executors can adopt and continue, in their discretion, as they can with any other chose in action. I do not think authority is needed for such a proposition. My decision does not however turn on this because, as stated above, the creditor's acts of execution were completed before the notice of proposal was presented.

[15] The orders outlined at paragraph 1 of this judgment were made for all the reasons set out above.

David Batts
Puisne Judge