IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 05348 OF 2009

BETWEEN	HUGH SCOTT	FIRST CLAIMANT
AND	ELESA SCOTT	SECOND CLAIMANT
AND	UGI FINANCE & INVESTMENTS LIMITED	FIRST DEFENDANT
AND	PETROS INVESTMENTS LIMITED	SECOND DEFENDANT

IN CHAMBERS

Abraham Dabdoub instructed by Jacqueline Cummings of Archer, Cummings and Co for the claimants

Gordon Robinson instructed by Harold Brady of Harold Brady and Co for both defendants

Roderick Gordon instructed by Gordon McGrath for Leighton McKnight, Raymond Goulbourne and Paulette Latibbeaudiere (Interested Parties)

APPLICATION FOR SALE OF LAND UNDER PART 55 OF THE CIVIL PROCEDURE RULES – APPLICATION TO RESTRAIN MORTGAGEE FROM EXERCISING POWER OF SALE – APPLICATION TO RESTRAIN MORTGAGEE FROM USING PROCEEDS OF SALE TO LIQUIDATE DEBT – APPLICATION BY INTERESTED PARTIES TO INTERVENE

September 22, October 3, 4, 5, 6, 7, 18, 25 and November 4, 2011

SYKES J

[1] Mr. Hugh Scott and Mrs. Elesa Scott ('the Scotts') are not only spouses but also the only directors of and only shareholders in KES Development Company ('KES') which is now in voluntary liquidation. KES, as the name suggests, is a development company. It makes houses and sells them on the open market. In 2005, KES sought to develop land at a property known as Barbican Heights. KES borrowed money from UGI Finance & Investments Limited ('UGI') to undertake the development of the property which involved the making of houses that were to be sold to persons such as Mr. Leighton McKnight, Mr. Raymond Goulbourne and Mrs. Paulette Latibbeaudiere (the interested parties). The development has not gone as planned. It appears that the development is incomplete and there

are many worried persons, including the interested parties, who signed contracts with KES to purchase houses in the development. The court sympathises with them but has to decide the case according to well established legal principles.

[2] The Scotts guaranteed the loan to KES and the guarantee was supported by a mortgage of land owned by the Scotts in their personal capacity. KES has defaulted on the loan. The liquidator has indicated that the company does not have sufficient assets to pay its debts including the loan. As is well known, this is the very purpose of taking security for a loan – to be able to recoup the debt without joining the queue of creditors. The secured creditor, subject to statute and contract, stands above unsecured creditors. UGI sold the loan and the mortgage granted by the Scotts over their property to Petros Investment Limited ('Petros'). Petros has taken steps to enforce the mortgage given in support of the guarantee. The property has now been sold at an auction held on September 28, 2011.

[3] Before the property was sold at auction, Petros applied under part 55 of the Civil Procedure Rules ('CPR') for a court order to sell the property. The Scotts not only resisted this application but brought applications of their own. They asked for an injunction to prevent Petros from exercising its power of sale. Now that the property has been auctioned, the Scotts have amended their application and now ask for an order stopping Petros from using the proceeds of sale to settle the debt. The interested parties have brought an application seeking leave to intervene in the proceedings. These are the three applications before the court. The interested parties' application will be dealt with first.

Whether the interested parties should be allowed to intervene

[4] The court dismissed the application to intervene and also refused leave to appeal. Mr. Gordon submitted that the interested parties should be allowed to intervene because they have an interest in the property. That interest was said to be derived from the contract they had with KES. It was even being said, according to the written submissions, that they have an equitable interest in the property. It was conceded by Mr. Gordon that the interested parties do not have a contract with any of the defendants, neither is there any relationship governed by the law of torts and, needless to say, is there any relationship between the parties which would give rise to any liability in equity on the part of the defendants to any of the interested parties. With these concessions it is difficult to see why the interested parties should be allowed to intervene. Mr. Gordon suggested that they have an interest in the equity of redemption. The difficulty with this is that the interested parties are not the mortgagors and consequently it is not easy to see what legal or equitable interest they can have in the equity of redemption. They would necessarily have had to purchase all the Scotts' interest in the mortgaged property. The mortgagee would usually be notified and in order to protect himself the mortgagee would enter into a personal covenant with the mortgagors for the mortgagors to pay the mortgage. This is not the case here.

[5] According to Mr. Gordon, the interested parties' interest stems from the fact that they paid some JMD$20,000,000.00 directly to UGI in order to try and settle the indebtedness of KES. The circumstances that led up to this payment are these. In 2005 and 2006, the interested parties met the Scotts and had a number of

meetings in relation to a residential development that was to take place on land known as Barbican Heights. The interested parties contracted with KES to make the houses already mentioned in paragraph one. In 2005 and 2006 various sums of money due under the contracts were paid over by the interested parties to KES. In 2006 KES took a loan of JMD$20,000,000.00 from UGI to finance the project. Other than a single payment of JMD$400,000.00, no other sum was paid on the loan. Incidentally, this JMD$400,000.00 is identical to the sum identified in the loan agreement as the commitment fee charged by UGI. Thus it can reasonably be said that KES did not make a single payment on the loan once it was disbursed in 2006 because there is no evidence that KES paid any other sum other a sum that just happened to be the same as the commitment fee. This loan was secured by the personal guarantee of the Scotts and this guarantee was further secured by a mortgage over property owned by the Scotts in their personal capacity. It is this mortgage that Petros has enforced.

[6] By 2007, KES had fallen into serious arrears. Mr. Leighton McKnight and Mr. Raymond Goulbourne became concerned that they might lose their investments and came to the rescue of KES. The gentlemen say that they sought to 'to purchase the Scotts' interest in the debt and mortgage' (see affidavit of Mr. McKnight dated February 3, 2010). There is another affidavit of Mr. McKnight that contains these words: 'I along with other stakeholders have at all times been willing and able to redeem the mortgage' (affidavit dated July 7, 2010). However, as already noted neither of these gentlemen purchased the Scotts' interest in the

property which would have enabled to say they were in a position to redeem the mortgage within the full legal meaning of that expression.

[7] The case rumbled on through the courts until February 22, 2010 when Evan Brown J (Ag) made a consent order in which it was agreed that the Scotts were to pay JMD$20,000,000.00 'on account of their indebtedness on or before Friday, February 26, 2010' to Brady and Co who was receiving the money on behalf of the mortgagee. A term of the order was that the Scotts undertook to provide an undertaking from Jamaica National Building Society ('JN') to pay the balance of the mortgage on receipt by JN of a cross undertaking to discharge the mortgage and deliver the title to JN. In effect, JN was providing refinancing for the loan. The Scotts were to produce this undertaking on or before March 19, 2010. All these orders were directed to the Scotts and not to Messieurs McKnight and Goulbourne. There is no evidence that these gentlemen were under any legal obligation to provide the sum or assist KES to come up with the money. The undertaking was not produced until April 20, 2010. The Scotts filed an affidavit to support the unpromising submission that despite the lateness of the undertaking, no prejudice resulted to the mortgagee and so the court should overlook the tardiness.

[8] Messieurs McKnight and Goulbourne made the voluntary and deliberate decision, without any contractual, tortious or equitable obligation to any of the defendants, to pay over JMD$20,000,000.00 to Brady and Co. It was understood that this money was KES' attempt to satisfy the court order. The fact that the money originated from a source other than KES is of no moment. The fact that

the Messieurs McKnight and Goulbourne were the ones who paid over the money directly to Brady and Co does not alter the reality that the obligation was KES'. In light of this, this court does not understand the proposition the mortgagee was fettering the equity of redemption by preventing it from being redeemed by Messieurs McKnight and Goulbourne. These gentlemen have no standing in law to be making such a submission.

[9] As this court understands it, when one is looking at a mortgage, there are two separate and distinct rights of redemption. One is the contractual and purely legal right to redeem in accordance with the terms of the contract. This means that if the debtor repays the loan in strict compliance with the agreement then the property is released from the mortgage. The other is the equitable right of redemption which only arises after the contractual date for repayment of the loan has passed and the debtor has not repaid the loan. The equitable right to redeem only becomes significant if the date for repayment has passed without repayment of the debt. The persons who have a right to redeem are the mortgagor and his successors in title. An assignee of the mortgagor's equity of redemption is also entitled to redeem the mortgage. Sureties may also redeem. It is not the case of Mr. McKnight that he or any of the interested parties is a successor in title, an assignee or a surety for the Scotts. Consequently, Mr. McKnight and the other interested parties are not, legally, in relation to the mortgagee, in a position to demand that the mortgagee permits them to redeem the mortgage. In any event, the mortgagor is only able to make such a demand by paying the debt in full, which means all principal and interest. For these reasons and others stated

before, the court concludes that there is no legitimate basis to permit any of these interested parties to intervene.

[10] It would seem to the court that the more accurate statement is that Messieurs McKnight and Goulbourne sought to pay off KES's debt to free the property from debt or, at the very least, they wished to purchase the loan from the mortgagee. In October and November 2007, Messieurs McKnight and Goubourne sought to engage UGI on the matter. Initially, they put forward the sum of JMD$23,000,000.00 to UGI as the price they were willing to pay to release the property from the mortgage. UGI said it wanted JMD$26,000,000.00. Eventually, Messieurs McKnight and Goulbourne raised their offer to JMD$26,000,000.00. UGI did not respond to this offer. Instead, it sold the mortgage and loan to Petros. In November 2007, UGI and Petros agreed to the sale of the mortgage and loan which was completed by February 4, 2008.

[11] It was being suggested that since there was a transfer conveying the land to Messieurs McKnight and Goulbourne and to that extent they may have an interest in the equity of redemption. However, the affidavit of Mr. McKnight makes it clear that this interest is not at the expense of the mortgagee. Paragraph 10 of Mr. McKnight's affidavit states explicitly that the property was conveyed to himself and Mr. Goulbourne 'subject to the mortgage guaranteed by the Scotts as directors of KES Development Limited.' In these circumstances the court is unable to appreciate the value of adding the interested parties. The transfer is said to be subject to the mortgage which can only mean that the mortgagee can exercise all his powers. As stated earlier, they have to pay the full

debt. Until such time, they cannot prevent the mortgagee from exercising the power of sale. There is no issue to be resolved that requires the intervention of the interested parties. It is a case of the primary debtor defaulting and the creditor is seeking to enforce the guarantee given by the secondary debtor who undertook to make good any default by the primary debtor.

[12] The court cannot pronounce on the legal status of the payment by Messieurs McKnight and Goulbourne as between themselves and KES. That will have to await another day. A term of Evan Brown J's (Ag) order was that the Scotts were to secure a letter of undertaking by March 19, 2010 from JN to pay the balance. The Scotts failed to meet the deadline. This meant that the mortgagee was free to pursue its remedy which it has and the property has now been sold. The court now turns to the Scotts' application.

Whether an injunction should be granted restraining the mortgagee from using the proceeds of sale to pay off the debt.

[13] The Scotts' say that that there is no contractual provision to charge compound interest and in the absence of specific statutory provision, then the mortgagee can charge only simple interest. The consequence of this submission, according to Mr. Dabdoub, is that the mortgagee in this case is charging too much interest which is not in accordance with the terms of the loan. The conclusion being that the instant case falls squarely within one of the exceptions, namely, the amount claimed by the mortgagee is in excess of the what is permissible by the instruments creating the loan and the mortgage.

[14] Mr. Dabdoub added other matters which, he admitted, were not his strongest points but submitted that when taken together with the submission on the interest there was a sufficient case for the court to grant an injunction. Those points need not be addressed.

[15] When the hearing into Petros' application began the property had not yet been sold. The court understands that an auction was held and the property sold. The sale has not yet been completed and this led Mr. Dadboub to amend his application to apply for an injunction restraining Petros from using the proceeds of sale to pay off the debt until the claim is heard. His application to amend was opposed. The court granted the application to amend the original application.

[16] Learned counsel suggested that should the court be minded to grant an injunction, the court should frame the order in such a manner to take account of two possibilities. The first being to make order restraining the actual exercise of the power of sale should the sale at the auction not be completed for some reason. The second is this: if the sale is completed then the mortgagee should be restrained from using the proceeds of sale.

[17] The court declined to grant either order for these reasons. Once again the vexed issue of an injunction restraining the mortgagee from exercising the power of sale when there is a clear and admitted default on the loan.

[18] The Scotts' application brings into focus, depending on your perspective, the much heralded or maligned case of ***SSI (Cayman) Limited v International Marbella Club SA*** SCCA No. 57/1986 (delivered February 6, 1987). This case,

for the first time since independence, laid down the clear principle that there is a very, very strong general rule to the effect that where a mortgagee's right to exercise his power of sale has arisen then he will not be restrained from exercising the power of sale, if that right is challenged by the debtor, unless the debtor pays into court the full sum claimed by the mortgagee. This rule is now subject to exceptions which Mr. Dabdoub claims apply to the Scotts. This strong general rule, on the face of it, seems harmless enough but if the debtor borrowed money during the period of very high interest rates in Jamaica he may find that a seemingly small sum borrowed has ballooned into millions in a very short time. To ask a debtor to pay into court millions which he may not have on hand or be able to find a short notice is a very tall order in a high interest rate and high inflation economy.

[19] ***Marbella*** lay dormant for quite some time. The financial sector crisis of the 1990s brought this case back to the forefront of mortgagor/mortgagee disputes. This is what happened. A number of financial institutions ran aground and were taken over by the Government through a vehicle known as the Financial Structure Adjustment Company ('Finsac'). The plan was simple: Finsac takes the bad debt; the institutions are recapitalized and sold to private investors as a going entity. Finsac now had non-performing or bad performing loans which it needed to get rid of. It got rid of them by selling them to an overseas private company. This company and its successor began enforcing the loan agreements against the borrowers. The borrowers sought refuge in the courts. ***Marbella*** presented a formidable hurdle to even the most sympathetic and creative judge. The tone of

the ***Marbella*** judgments left one with the distinct impression that there was no room for flexibility. The borrowers decided to kick against the pricks of ***Marbella***. At first, there was little success but gradually the Court of Appeal has come to recognise, implicitly, that ***Marbella*** was too rigid. So rigid was the ***Marbella*** rule that in one case not even an allegation by the debtor that he had repaid the loan was sufficient to stave off the ***Marbella*** principle (***Global Trust Limited v Jamaica Re-development Foundation Inc*** S.C.C.A. No. 41/2004 (delivered July 27, 2007)).

[20] The challenges continued. Finally, in 2008 the borrowers had a small victory. They found out that if they could allege forgery then not only would they get an injunction but they would not be required to pay a single cent regardless of the amount outstanding (***Rupert Brady v Jamaica Redevelopment Foundation Inc*** S.C.C.A. No. 29/2007 (delivered June 12, 2008)).

[21] Thus by 2008, the debtors found out two things. First, alleging that you have paid off the money brought no relief. Second, alleging that your signature was forged brought an injunction and your money stayed in your pocket until the trial of the action. Two years later the debtors secured their greatest victory since ***Marbella***. Their persistence brought about a comprehensive reexamination in this corner of the law.

[22] July 30, 2010 was a great day for debtors. The shouts of celebration were heard for miles around. It was the day the judgment in the important case of ***Mosquito Cove v Mutual Security Bank Ltd*** (JMCA Civ 32) was handed down by the

Court of Appeal. For the first time since ***Marbella*** was decided over two decades ago, the Court of Appeal did an exhaustive, thorough and comprehensive review of the decision and subsequent cases, except ***Amauto Ltd v Jamaican Redevelopment Foundation Inc*** SCCA Nos. 27 and 28 of 2007 (delivered November 21, 2008). Morrison JA delivered the leading judgment. His Lordship restated the ***Marbella*** principle but more important delineated clear exceptions to the rule. His Lordship added that the exceptions were not closed.

[23] The clear exceptions are (a) where the mortgage instrument establishes a requirement that must be met before the power of sale is exercised; (b) forgery of the mortgagor's signature; and (c) where on the face of it the amount being claimed by the mortgagee is clearly wrong, that is to say, by simply doing the calculations based on the documents the mortgagee's claim is excessive.

[24] Morrison JA, ever mindful of the possibility, that his judgment may be seen as undermining the utility of mortgages, indicated that any future exceptions to the general rule will only be sanctioned 'in exceptional cases, based on very special facts' (see para. 64). The exceptions are not closed but they are not going to easily established.

[25] His Lordship also dealt with the troublesome case of ***Flowers, Foliage and Plants of Jamaica Ltd v Jamaica Citizens Bank Ltd*** (1997) 34 JLR 447. Ever since it was decided, the case has lived a precarious existence. In that case, the Court of Appeal sought to draw a distinction between a mortgage provided by a guarantor in support of the guarantee and a mortgage granted by the primary

borrower. The distinction was aimed at suggesting that the ***Marbella*** rule did not apply with the same rigour to mortgage in support of a guarantee. This distinction has lived a very perilously. It was finally interred by Morrison JA. His Lordship held that the distinction was not sustainable. In effect, the same rules apply to guarantors who provide a mortgage in support of a guarantee and to primary borrowers who grant a mortgage in support of the loan to them.

[26] These developments have left over one question which is this: in the cases where the exceptions exist must it necessarily be the case that no money at all is paid by the debtor since in the cases in which the debtor has secured an injunction in the Court of Appeal, in recent times, he has not been required to pay any money at all? The Court of Appeal seems to be of that view though they have not said so expressly (see ***Rupert Brady***).

[27] In addition to ***Mosquito Cove***, Mr. Dabdoub relied heavily on the Court of Appeal's decision in ***Amauto Ltd v Jamaican Redevelopment Foundation Inc*** SCCA Nos. 27 and 28 of 2007 (delivered November 21, 2008). In that case the Court of Appeal granted an injunction restraining the Foundation from using the proceeds of sale to pay off the debt until the substantive matter was tried. This court must confess that ***Amauto's*** case is not easy to understand. It was not mentioned in ***Mosquito Cove*** and it does not readily fit into any of the exceptions recognised by the court. The allegation in ***Amauto*** was that 'the transfer that gave the power of sale to the respondent was invalid because it was done fraudulently' (see para. 8). The basis of the fraud was 'that no authorization was given to those who effected the transfer' (see para. 8). The affidavit of Mr. David

Wong Ken in support of the allegation of fraud for the injunction alleged that 'the individuals who had signed as secretary and director on one of the instruments of transfer had not been validly appointed and accordingly had no authority to act on behalf of the mortgagee' (see para. 8). Part of the problem with this allegation is that it is consistent with negligence as well as fraud and there is strong authority for the proposition that if the pleadings are consistent with fraud and with negligence then those pleadings are not sufficient to ground fraud. Any allegation of fraud must be unequivocal that what is being alleged is actual dishonesty (see ***Harley Corporation Guarantee Investment Company Ltd v Estate Rudolph Daley*** [2010] JMCA Civ 46 [46] – [55]).

[28] When the dictum of Lord Lindley in ***Asset Company Ltd v Roihi*** [1905] A.C. 106 is bourne in mined it is not very easy to see what was the sin of the Foundation. Lord Lindley, in examining similar legislation to the Registration of Titles Act held that a bona fide purchaser of registered land from the registered proprietor has a better title than the vendor even if the vendor's title could be impeached on the ground of fraud. The only thing capable of bringing him down is actual dishonesty. Thus unless, in can be shown that the current registered proprietor of the mortgage is himself dishonest then his title stands regardless of how dishonest the previous holder of the title was. Lord Lindley went as far as declaring that even if the registered proprietor presents a document for registration that is in fact a forgery or has been fraudulently or improperly obtained, the registered proprietor's title cannot be impeached unless it can be shown that he himself knew of or was party to the forgery, fraud or improper

obtaining of the instrument. To put it another way, if the document leading to the registration is in fact a forgery that fact of forgery does not affect the registered proprietor unless he is party to that act of dishonesty. This is one of the few instances in law where it is possible for a purchaser to have a better title than the vendor. If this is so in the case of the document leading to registration of the legal interest, then even more so in the case of a document purporting to appoint someone to act on behalf of the registered proprietor. In Jamaica, the registered proprietor of a mortgage is given the identical protection as a registered proprietor of the legal title – he is impregnable subject only to a proof of his (not someone else's) actual dishonesty (see sections 3 and 71 of the Registration of Titles Act). It is not clear whether the Court of Appeal in ***Amauto*** is saying that the circumstances outlined amounted to dishonesty or whether what occurred was an irregularity and that this irregularity, although not amounting to dishonesty, is sufficient for an injunction restraining the mortgagee from exercising the power of sale. If it is the latter then that would indeed be a very significant development in the law.

[29] The response of Mr. Robinson was characteristically blunt and direct. He referred to the loan agreement which indicated that the mortgagee was entitled to impose a late payment charge of 'five percentage points (5%) above the prevailing annual effective interest rate' on instalments which were not received within seven working days after the due date of such instalment. Mortgage instalment repayments usually have two parts: principal and interest. If the loan document permits an additional interest to be charged on any outstanding instalments

which usually include principal and interest then it is clear that the calculation put forward by the Scotts, based as it was on simple interest, would not take account of the contractual provision. Once this is so, then it follows that Mr. Dabdoub's submissions on simple interest are not acceptable. There is evidence that the debt as well as the mortgage was transferred to Petros by UGI which means that Petros was entitled to activate the provisions of the loan giving the mortgage holder the right to charge interest upon interest.

Whether the court should order a sale under part 55 of the Civil Procedure Rules

[30] Actual events have overtaken this application. The court was informed that at an auction on September 28, 2011, the mortgaged property was sold. The sale has not yet been finalized. There is nothing to suggest that the sale will or may fall through. The power under part 55 is discretionary. The court may order a sale of land if such a sale is so authorised by any statute or if it appears to the court that a sale is necessary or expedient to enforce a judgment or for any other reason. In light of what has happened since the application began, the application is dismissed because there is simply no land to which the order can apply. It has been sold.

[31] There is another ground on which the application is dismissed and it is this: there is no current valuation of the land by a qualified land valuer or surveyor (see rule 55.2 (c)). The requirement is mandatory. This is one of the objections to the application taken by Mr. Dabdoub. The application by the defendants is being heard in September to October 2011. The valuation referred to in the application

was done in February 2010. The court does not purport to give a comprehensive definition of 'current' as used in rule 55.2 (c) but a report that is as old as this one (twenty months) cannot be regarded as current. It is true that there are several shades of meaning of the word 'current' but in the court's view, in this rule, it means relating to the time at which the court is hearing the application and not necessarily the time when the application is filed. If there is a long time lapse between the filing of the application and the hearing, then any valuation report filed then may not be current when the application is heard. This would suggest that an application of this nature should be heard quickly so that the applicant is not put through the additional and unnecessary cost of doing another valuation if there is a long time lapse between the application and the hearing. This is what has happened there. The application was filed in May 2010 and the valuation was done in February 2010. It may have been current then, but is not current now.

Disposition

[32] The application by the interested parties to intervene is dismissed. There is no good reason for them to be allowed to do so. The application for leave to appeal is also dismissed there being no real chance of success.

[33] The application for prohibiting the mortgagee from exercising its power sale or to use the proceeds of sale to satisfy the debt is dismissed because the standard

laid down by ***Mosquito Cove*** has not been met. The loan agreement permits the mortgagee to charge interest on outstanding instalments and it is common ground that the loan has not been repaid in full and even when the JMD$20,000,000.00 were paid, that was not full satisfaction of the principal and interest. Costs of the Scotts' application to the defendants to be agreed or taxed. Leave to appeal is refused.

[34] The application for sale of land is dismissed because subsequent events have overtaken the application. The property has now been sold and there is no property left on which the order can operate. Also there is no current valuation of the property before the court. Costs of the defendants' application to the Scotts to be agreed or taxed.