

*Judgment
Book.*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
SUIT NO.V01 OF 2000

IN COMMON LAW

BETWEEN MARCELLA VASSELL PLAINTIFF
A N D VICTORIA MUTUAL BUILDING SOCIETY DEFENDANT

Mr. D. Foote instructed by Robertson, Smith, Ledgister and Co. for the Plaintiff

Miss N. Small instructed by Dunn Cox Orrett and Ashenheim for the Defendant

Heard: February 3, 10, 17, 18, 21; April 14, 2000

IN CHAMBERS

HARRISON J

I must apologise for the delay in delivering this judgment but it has been due mainly to my assignments in the Criminal Courts since I completed the matter on the 21st day of February 2000.

Background

The affidavit evidence reveals that on the 8th day of March 1996, the plaintiff received a mortgage from the defendant in respect of property situate at 24 Limestone Crescent, Kingston 10. She has fallen into arrears with the mortgage payments so, the defendant, who are mortgagees have exercised their powers of sale under the mortgage contract.

Patricia Fisher, Assistant Manager in charge of Arrears Control at the defendant Building Society has deposed in an affidavit sworn to on the 12th day of January, 2000 that a sale of the premises to a third party is in process and has reached the stage where an Agreement for Sale was signed on the 18th day of November, 1999. A Transfer has not yet been effected as an Interim Injunction was granted on the 6th January 2000 restraining the defendant from taking any further steps in furtherance or completion of the sale or transfer of the property.

A Writ of Summons was filed in this Honourable Court on the 4th day of January 2000 and the plaintiff is claiming inter alia, that the purported exercise by the defendant of its power of sale under the said mortgage was premature and improper and further that the said sale by private treaty is void.

Application for interlocutory injunction

The plaintiff now seeks an order for an interlocutory injunction against the defendant that:

1. The defendant be restrained from taking any further steps in furtherance or completion of the sale or transfer of premises registered at Volume 1270 Folio 419 by private treaty.
2. The defendant by its servants or agents or otherwise be restrained by injunction from continuing to exercise its remedy of power of sale of the premises known as 24 Limestone Crescent, Kingston 10, St. Andrew and registered at Volume 1270 Folio 419 by endorsing any new name on the Certificate of Title as proprietors until the trial herein.

Affidavit evidence and submissions

The plaintiff has admitted that she is in default with her mortgage payments. She was constantly in arrears and the defendant sent her Notices under the Registration of Titles Act in relation to the exercise of the powers of sale. She has deposed however, in her affidavit sworn to on the 6th January 2000:

“2. That the last demand for any payment made on me by the Defendant/Mortgagor was for payment of a part of the mortgage debt to wit \$83,585 to be paid no later than the 31st day of October 1999 to which I found myself in default and I exhibit herewith the said schedule demanding payment..

3 That since the ultimatum of the 31st October, 1999 for payment in the aforementioned schedule was served on me, I have received no further communication nor notice from the defendant/mortgagee with respect to its intention to sell my property either by Auction or Private Treaty..”

At paragraph 10 of her affidavit sworn to on the 18th January, 2000 she states:

“10 (b) ...I was happy to have received from the defendant the Notice of their revised monthly repayment requesting that I pay \$83,585.00 no later than the 31st October, 1999 by which the defendant lulled me into believing that they understood my predicament and would not further attempt to dispose of my property secretly without further reference to me.”

The Notice which the plaintiff refers to in paragraph 10 (supra) states inter alia:

“01 10 1999

SCHEDULE

MONTHLY REPAYMENT CHANGES ON A/C.....

Securities

1. SUM INSURED

Effective 01-Oct-1999.....\$8,919.00

2. MONTHLY REPAYMENT EFFECTIVE OCTOBER 1999.

3. OTHER PARTICULARS

PRINCIPAL & INTEREST.....	\$74,941.23
ESCROW(INCLUDING INTEREST)	8,643.77
REVISED MONTHLY REPAYMENT	\$83,585.00

(TO BE PAID NO LATER THAN)...31- OCT – 1999”

Patricia Fisher swore to an affidavit on the 12th January 2000 and at paragraph 28 she states:

“28. ...The plaintiff knew or ought to have known that the Schedule sent to her relates specifically to the Insurance on the property and not to the mortgage loan based on the schedule itself and the fact that the plaintiff had received several notices, all of which set out the amount outstanding on the loan as at the date of Notice. That this Schedule could therefore not be considered by the plaintiff as an “ultimatum” nor did the Schedule mark the date at which the defendant could exercise its power of sale.”

The plaintiff responded to the above paragraph and also to paragraph 29 and states:

“(a) That the Demand Notice contained in the schedule dated 1st October, 1999 is in fact an ultimatum to me for part payment of the mortgage debt no later than one (1) month after, to wit: the 31st October, 1999 which said Notice has legal implications pursuant to sections 105 and 106 of the Registration of Titles Act which protects my rights as a borrower/mortgagor to a further statutory notice for the full amount whereupon default has to continue for a further month after expiration of the said statutory notice....”

Having regards to the foregoing circumstances, Mr. Foote submitted that the Demand/Notice dated 1st October, 1999 served on the Plaintiff by the defendant for payment no later than 31st October, 1999 to which the Plaintiff was in default, is of legal significance in that it estops or suspends the defendant’s exercise of its power of sale:

- (i) Until after the expiration date named therein, the 31st October, 1999 and
- (ii) Until after continuance of such default for a further one (1) month after its expiration(to wit 30th November, 1999) pursuant to s. 106 of the Registration of Titles Act or
- (iii) Until at least upon reasonable notice of intention to exercise the Power of Sale after the date for payment of no later than the 31st October, 1999 has passed on the principle of equitable estoppel.

The plaintiff also contends that the property was grossly undervalued. She deposes at paragraph 8:

“....the sale price of \$5.8 million is in breach of the defendant/mortgagee’s duty of care to me the mortgagor to sell the property at the most reasonable price obtainable since such a price is grossly undervalued so much so that the same is suspicious and can be regarded as a fraudulently undervalued sale...”

With reference to the above allegation, Mr. Foote submitted, that when the purported sale took place on the 18th November, 1999 it was vitiated, it being “tainted by the fact that it was based upon the valuation of Langford and Brown which from the evidence is shown to be defective in its contents and contains several misrepresentation (either fraudulently and/or negligently) to arrive at a gross under valuation of the mortgage property, so much so that such a sale can be set aside on the basis of equitable fraud committed against the plaintiff.” He cited a number of cases in support of the submission. They include, Nocton v Asburton (1914) AC 932; Hodson v Deans [1903] 2 Ch. 647 and Perdeth v Castle Philip Finance (1986) 2 EGLR.

In dealing with the principles for granting an injunction, Mr. Foote placed reliance upon the cases of American Cynamid v Ethicon (1975) 1 ALL. E. R. 504 and National Commercial Bank Jamaica Ltd v Whitelocke (1982) 19 JLR 340. He submitted that in the instant case, the facts established on the affidavit evidence:

- “(a) that the Plaintiff’s claim to redeem her residential family estate is most serious and important to her and can in no way be regarded as frivolous or vexatious especially in light of the evidence that the property has been contracted to be sold at a gross undervalue on the basis of an inadequate secret valuation report with the possible fraudulent intention of depriving her of her valuable family estate.
- (b) That the effect of sections 105 & 106 of the Registration of Titles Act on the Demand Notice of the 1st October, 1999 served on the Plaintiff for part payment of the debt no later than the 31st October, 1999 is one of several serious questions to be considered as to when the Defendant/Mortgagee’s Power of Sale arises and is a decision to be made and its consideration should await the trial herein.
- (c) That at this interlocutory stage the Court ought to consider the effect of a refusal to grant a continuing injunction herein against the background that no irreparable damage would be done to the Defendant if the interim injunction already made were to be made interlocutory.
- (d) To refuse to make the interim injunction interlocutory would facilitate the Defendant selling the Plaintiff’s family estate at a gross under-value even below the mortgage debt which would thereafter leave her exposed to an action by the said Defendant/Mortgagee for the difference between the price paid for the sale of my mortgage debt.

(e) To refuse to make the interim injunction interlocutory would facilitate the defendant selling the Plaintiff's family estate and thereby extinguish her rights to redeem her said property from the Defendant mortgagee in a situation where damages would not be an adequate remedy to the plaintiff in lieu of her family house, which has intrinsic value to her AND SO, IT IS SUBMITTED THAT THE INJUNCTION SHOULD CONTINUE AND BE MADE INTERLOCUTORY ON THE TERMS ALLOWED BY WOLFE C.J. WHEN HE GRANTED THE INTERIM INJUNCTION ON THE 6TH JANUARY, 2000.

24. For the foregoing reasons it is submitted that the injunction should continue and, be made interlocutory on the terms allowed by Wolfe C.J. when he granted the interim Injunction on the 6th January, 2000, herein."

Miss Small on the other hand, submitted that the plaintiff had received Notices in accordance with the requirements of section 105 of the Registration of Titles Act and on more than one occasion she had requested an "accommodation" and the defendant acting in good faith granted same but the plaintiff did not honour her promises. She further submitted that a Notice dated June 2, 1998 was served on her. Further arrangements were made and the plaintiff had reneged on her promise to pay as arranged. At that time she was 6.9 months in arrears. On the 1st day of December 1998 when the plaintiff was 10.9 months in arrears the Defendant served another Notice on the Plaintiff. She referred to the affidavit of Fisher which states at paragraph 22:

"22. That on the 1st day of December, 1998, when the plaintiff was 10.9 months in arrears another Notice was served on the plaintiff and the property went to the Auction. However, it was not sold. That the reserve price was \$6,450,000.00. This was based on a valuation Report dated August 21, 1996 prepared by Langford and Brown. Exhibited as "PF 17" is a copy of the Valuation Report."

Miss Small in continuing with her submission said, "The plaintiff has not denied receipt of these Notices which are the relevant and operative Notices in this case." (I have observed that when the plaintiff responded to paragraph 22 (supra) she only made reference to the Valuation Report without any mention of the service of the December 1, 1998 Notice.)

Miss Small submitted that the plaintiff was properly served with the required Notice of the defendant's intention to exercise its powers of sale and that the operative Notices were June 2, 1998 and December 1, 1998 respectively. She submitted that the defendant was therefore entitled from July 2, 1998 to exercise its powers of sale or at the very least from January 1, 1999, a month from the date of the subsequent Notice dated December 1, 1998 because the plaintiff continued to be in default for a period in excess of one month. At paragraph 23 of her affidavit sworn to on the 12th January, 2000 Fisher has stated:

"23. That by letter dated February 18, 1999 the plaintiff was advised by the defendant that the property was not sold at the public auction which took place on

the 14th day of February, 1999 and that it would be sold by private treaty without further reference to her."

Miss Small also submitted that the Schedule dated October 1, 1999 was not a Notice as required under section 105 of the Registration of Titles Act and neither can it be construed to be a Demand Notice or a Demand Letter. She further submitted that even if the Court finds that the power of sale was improperly or irregularly exercised by the defendant in this case, the plaintiff's remedy would be in damages only.

To counter the submission regarding the operative notices, Mr. Foote submitted that there "cannot be two operative notices and that the power of sale when exercised must have been exercised referable to one Demand Notice in order to make the time calculations contemplated by section 105 and section 106 of the Registration of Titles Act..."

In relation to the issue of fraud, Miss Small submitted that the defendant had exercised its powers of sale without any bad faith or fraud on its part or collusion with the purchaser. Furthermore no sufficient evidence had been presented by the plaintiff to support the allegation of fraud.

In determining whether there is a serious question to be tried Miss Small submitted that the Court should also consider when the equity of redemption is extinguished. She made reference to the cases of Waring (Lord) v London and Manchester Assurance Company (1935) 1 Ch. D 310 and Property and Bloodstock v Emerton (1967) 3 All E.R 321. In the former case Crossman J held inter alia that it was too late after a sale to a purchaser for the mortgagor to tender the mortgage money. In the latter case, the Court held that it would not grant an injunction in the absence of bad faith on the part of the mortgagee and that a sale at an undervalue is not itself evidence to prove bad faith. Based on these authorities, Miss Small argued that there was no serious issue to be tried.

Finally, she submitted that having regards to the provisions of section 106 of the Registration of Titles Act, the defendant having sold the property to a bona fide purchaser for value without notice, the plaintiff's remedy, if any is in damages only against the defendant. Again, if the Court finds that there is a serious question to be tried, damages would be an adequate remedy in this case.

Application of the facts to the Law

The defendant having exercised its powers of sale, can the plaintiff redeem her property? She maintains that although an Agreement for Sale with a third party has been entered into, no transfer has yet been effected so she is still entitled to redeem it.

One of the issues the court will have to decide at trial is, whether at the time the Defendant exercised its power of sale on the 18th November, 1999, it did so properly and in accordance with the requirements of sections 105 and 106 respectively of the Registration of Titles Act. In Dreckett v Rapid Vulcanizing 25 JLR 130 Carberry J.A said :

"...if the mortgagee wishes to realize the mortgage by sale, then he must comply with the provisions contained in sections 105 and 106..."

Now, the Registration of Titles Act provide as follows:

"105. A mortgage and charge under this Act shall when registered as hereinbefore provided, have effect as a security, but shall, not operate as a transfer of the land thereby mortgaged or charged; and in case default be made in payment of the principal sum, interest or annuity secured, or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage or charge; or hereby declared to be implied in any mortgage, and such default be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee or annuitant, or his transferees, may give to the mortgagor or grantor or his transferees notice in writing to pay the money owing on such mortgage or charge, or to perform and observe the aforesaid covenants (as the case may be) by giving such notice to him or them, or by leaving the same on some conspicuous place on the mortgaged or charged land, or by sending the same through the post office by a registered letter directed to the then proprietor of the land at his address appearing in the Register Book.
(Emphasis supplied)

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 damaged by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power." (Emphasis supplied)

In deciding whether an application for interlocutory injunction ought to be granted the Court bears in mind the following:

1. Whether there is a serious question to be tried
2. If yes, would damages be an adequate remedy and,
3. If not, where does the balance of convenience lie?

See American Cyanamid v Ethicon (1975) 1 ALL. E. R. 504.

I also bear in mind the timely reminder of Lord Diplock in American Cyanamid Co v Ethicon Limited (*supra*) at page 510 where he states:

"It is no part of the court's function at this stage of the litigation ... to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

Now, section 105 of the Registration of Titles Act is triggered off once the mortgage is registered on the Certificate of Title. The evidence reveals that this was done by the defendant on the 8th day of March 1996 for a sum of \$4,516,000.00. The evidence is also clear that the plaintiff/mortgagor has been in default with her monthly payments and as such, the defendant/mortgagor would be required to give the necessary notice in writing to the plaintiff to pay the money owing on such mortgage. If such default in payment shall continue for one month after the service of such notice, the mortgagee may sell the land mortgaged by public auction or by private contract.

The plaintiff contends that although she has been in arrears over a period of time, the last demand for any payment was made on the 1st October 1999 and for payment no later than the 31st day of October, 1999. She claims that this default estops or suspends the defendant's exercise of the power of sale until after the expiration of the 31st October and for a further one month which puts it at November 30, 1999. According to Mr. Foote, the purported sale which took place on the 18th November, 1999 would be improper and of no effect.

Miss Small contends on the other hand, that the plaintiff was properly served with notices on 2nd June 1998 and December 1, 1998. She submits that these were the operative notices and that the Schedule dated October 1, 1999 was not a notice as required under section 105 of the Registration of Titles Act. She further submitted that the Schedule could neither be construed as a Demand Notice nor a Demand Letter but Mr. Foote made the point that there cannot be two operative Notices because when the power of sale is exercised it must be exercised referable to one Demand Notice in order to do the necessary computations under sections 105 and 106 respectively.

A question which the trial judge will have to decide is what is the meaning and true effect of the document headed SCHEDULE which is dated 1st October, 1999.

A Statutory Notice dated 2nd June, 1998 has been exhibited in the affidavit of Patricia Fisher and although the Notice dated December 1, 1998 was referred to as well in the affidavit, it was not exhibited. Miss Small contends however, that the plaintiff did not deny the receipt of both Notices in her Affidavit in response to Fisher's allegations. For my part, I find it very strange that the latter Notice was not exhibited or its absence explained. To my mind, the alleged Notice of the 1st December 1998, being the later of the two notices would set in motion the computation procedure prescribed in section 106. If there is none, would the document headed "Schedule" dated 1st October, 1999, be the

operative Notice albeit that the defendant claims it is only a Schedule and not a demand Notice? Clearly, if it is a demand Notice, then the question would be raised as to the defendant's right to exercise the power of sale on the 18th November, 1999.

On a totality of the evidence and on a balance of probabilities, I do agree with Mr. Foote that serious questions could arise for a trial Judge to determine the operative date for the mortgagee exercising its power of sale under the mortgage contract. I am also of the view that the Plaintiff's claim to redeem her residential family estate is most serious and important to her and can in no way be regarded as frivolous or vexatious especially in light of the allegation that the property has been contracted to be sold at a gross undervalue.

I therefore hold, that the balance of convenience lies more in favour of the injunction being granted than refusing it. However, certain conditions will have to be imposed.

Where the mortgagee's power of sale is being affected by an injunctive relief, the effect of which is to prevent the mortgagee from enforcing its security, the question arises as to the sum of money which is required to be paid into Court until litigation has ended. Mr. Foote submitted that only the arrears which amount to approximately Two Million Dollars(\$2 M) should be paid into Court. Miss Small on the other hand, submits that it is the full indebtedness of \$6,693,608.93 which should be lodged into Court. Having considered the authorities relied upon by the Attorneys, it is my considered view, that Miss Small is correct. The Court therefore orders that :

1. The defendant be restrained from taking any further steps in furtherance or completion of the sale or transfer of premises registered at Volume 1270 Folio 419 by private treaty.
2. The defendant by its servants or agents or otherwise be restrained from continuing to exercise its remedy of power of sale of the premises known as 24 Limestone Crescent, Kingston 10, St. Andrew and registered at Volume 1270 Folio 419 by endorsing any new name on the Certificate of Title as proprietors until the trial herein.
3. The plaintiff pays the sum of \$6,693,608.93 into Court within sixty (60) days of the date hereof in an interest bearing account in the joint names of the Attorneys at Law for both parties pending the outcome of the trial.
4. There shall be costs to the plaintiff to be taxed if not agreed.