JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 15/2010

APPLICATION NO. 108/2010

BEFORE: **THE HON. MR JUSTICE HARRISON, J.A.**
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

BETWEEN	**FLETCHER & COMPANY LIMITED**	**APPLICANT**
AND	**BILLY CRAIG INVESTMENTS LIMITED (In Receivership)**	**RESPONDENT**

Miss Carol Davis instructed by Carol Davis and Company for the applicant

Michael Hylton Q.C. and Miss Jo-Anne Jackson instructed by Michael Hylton and Associates for the respondent

28 July and 17 November 2010

HARRIS, J.A.

[1] On 1 February 2010 Brooks J made an order, pending the trial of an action challenging the validity of a mortgage of which the respondent is now the registered mortgagee, restraining the respondent from exercising its powers of sale contained in mortgage no 908314 in Certificates of Title registered at Volume 1070 Folio 141 and Volume 1070 Folio 142 of the Register Book of Titles. It was a condition of the order that the applicant

should pay into court the sum of $59,220,878.95. The applicant has lodged an appeal against that order. The applicant subsequently sought an injunction pending the appeal which was refused by Panton P. The applicant now seeks a review of the order of the learned President.

[2] The applicant is the registered proprietor of lots H25 and H26 Bay Road, Montego Bay in the parish of Saint James registered at the volumes and folios as aforesaid. David and Alice Fletcher were the shareholders in the applicant company and on 26 October 1995 they sold and transferred all their shares to Robert Josephs, Clyve Lazarus and Constantine Nicolas for the sum of US $1,500,000.00. The sum of US $750,000.00 was paid and the balance was secured by way of a mortgage and a guarantee, registered against the properties, for the repayment of the loan, issued by the applicant. The purchasers were recorded as the principal borrowers in the mortgage instrument. The interest payable on the mortgage was at a quarterly rate of interest at 5% above the prime United States dollar rate, payable on the last day of each quarter.

[3] On 10 November 1995, the applicant entered into mortgage no 908314 with Sportula, a company incorporated under the laws of the Cayman Islands, to secure the loan of US$750,000.00 with interest at the rate of 5% above the United States prime rate. On 27 January 1997

mortgage no 908314 was transferred to the respondent. On 28 July 2004 one Kaylene Grant was appointed receiver of the respondent, it having been put in receivership.

[4] In an affidavit sworn to on 12 May 2010 Robert Joseph, the director of the applicant company, averred that in April 2009 the Bank of Nova Scotia Jamaica Limited advertised the land for sale at public auction but its effort to sell the lands at public auction failed. A renewed effort is being pursued by the bank to sell by private treaty. However, the bank, he declared, is not entitled to sell or does not have a right so to do. The applicant has owned the lands for many years and if these lands are sold, he stated, this would cause the applicant irreparable loss.

The application filed by the applicant was couched in the following terms:

> "1. That the Order of the Hon. Mr. Justice Panton, P. made on 8th June, 2010 be varied or discharged, the said Order being as follows:
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> > 'On the basis of the documents that I have perused in this file, - including the reasons for Judgment of Brooks J, I see no basis for granting the injunction applied for on 13th May, 2010. Application refused.'
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> 2. That the Respondents and/or the Bank of Nova Scotia Jamaica Limited be restrained by themselves, their servants employees agents or any other person whatsoever from exercising or attempting to exercise powers of sale contained in mortgage no. 908314 endorsed on certificate of title registered at Vol. 1070 Folio is (sic) 141 and 142 of the Register Book of Titles, or from selling or

otherwise dealing with the said land, until the hearing and determination of the appeal herein.

3. Further or other relief

4. Costs to the Appellants (sic) to be agreed or taxed."

We must at the outset state that the Bank of Nova Scotia Jamaica Limited was never a party to the action between the applicant and the respondent. Consequently, no order should have been sought against the bank.

[5] Prior to giving consideration to the application for the injunction, Panton P issued a direction that it should be ascertained from the applicant whether there were additional points which should be placed before him in writing by 8 June 2010. The applicant failed to comply with the direction. On 8 June 2010 Panton P made the order, refusing the injunction.

[6] In an affidavit by Miss Davis, sworn on 16 June 2010, she averred that the direction was received by fax but was inadvertently placed on a different file and was not brought to her attention until 9 June 2010. She communicated with the Registrar the very day she became aware of it and requested that she be afforded an opportunity to send submissions but the request was unsuccessful.

[7] Mr Hylton Q.C. argued that rule 2.10(2) of the Court of Appeal Rules does not require that submissions be made prior to an application being considered or that this court should make an inquiry as to whether submissions will be made. Further, he argued, rules 1. 15 (1) of the Court of Appeal Rules and 6.6 (1) of the Civil Procedure Rules operate to avoid the occurrence of a situation where a party, in order to avoid or challenge service, seeks to rely on an excuse as to when he or she became aware of a document.

[8] By rule 2.10 (1) of the Court of Appeal Rules, any application to the Court, other than an application for leave to appeal, must be made in writing and considered by a single judge. Rule 1.15 of the Court of Appeal Rules stipulates that Parts 5 and 6 of the Civil Procedure Rules apply to service of a notice of appeal as well as other documents.

[9] Rule 6.6 (1) of the Civil Procedure Rules provides:

> "A document which is served within the jurisdiction in accordance with these rules shall be deemed to be served if it transmitted [by FAX] on a business day before 4 pm: the day of transmission or in any other case, the business day after the day of transmission."

In light of the foregoing, the applicant is deemed to have received the fax on 8 June 2010. However, the learned president afforded the applicant an opportunity to file submissions but this was not done, albeit by reason of inadvertence. In order to avoid a situation such as that

which had occurred, it would have been prudent for the applicant to have filed written submissions along with the application and the affidavit in support. The learned president had rightly proceeded in giving consideration to the application. Despite this, the failure of the applicant to file the submissions would not operate as a bar from us giving consideration to the matter which is now before the court.

[10] Miss Davis submitted that Brooks, J, having granted the injunction, was wrong in imposing a condition thereon for the payment into court of $59,220,878.95. She argued that Fletcher and Company aided the purchasers of shares in the company by unlawfully giving a guarantee by way of mortgage of its lands as a security for the purchase of the shares in breach of section 54 of the Companies Act. The transaction, she argued, is illegal and void and the injunction ought to have been granted without the imposition of any conditions. Panton, P, she contended, would have been misled by the statement of the law as set out by Brooks J. Brooks J, she argued, in relying on the case of **Victor Battery Co Ltd v Curry's Ltd & Others** [1946] 1 ALL ER 519 appeared to have been of the opinion that although the contract was illegal, it could still be valid as it was the company which was intended to be protected by the statute. The mortgage being illegal, section 71 of the Registration of Titles Act would offer protection to the applicant, as found by Brooks J, she argued. The

validity of the mortgage being challenged, she contended that the applicant has a good chance of success of the appeal.

[11] Mr Hylton argued that no reasons having been given by Panton P, it is open to the court to embark on its own review of the matter. He submitted that the learned president considered the application and the affidavit of Robert Josephs and would have looked at the records containing Brooks J's judgment in which Brooks J stated that damages would have been an adequate remedy and there has been no challenge to that finding. This, he argued, may have been the basis upon which the learned president dismissed the application. The grant of an injunction, he argued, is discretionary; accordingly, the applicant must satisfy this court that Panton P was plainly wrong in arriving at his decision.

[12] Before embarking on the examination of the application, we must, at this stage, make reference to a submission made by Mr Hylton that Miss Davis appeared to have made her submissions by proceeding on the basis that the application before the court is one for an injunction and not for a review of the decision of Panton P. We are not of the view that Miss Davis framed her submissions in the manner outlined by Mr Hylton. However, we will now make it clear that the matter before us is a review of Panton P's order refusing the application by the applicant for an

injunction. The critical question therefore is whether Panton P was wrong in refusing the injunction.

[13] As a general rule, no restraint will be imposed upon a mortgagee from exercising his powers of sale of mortgaged property. Despite this, the court, in the exercise of its discretionary powers may grant injunctive relief to a mortgagor. The court, however, in invoking its discretion, should ensure that injustice is avoided by seeking to adopt a balancing exercise and pursue that which appears to be the best perspective in dealing with a matter. It follows therefore that the court should take "whichever course seems likely to cause the least irredemiable prejudice" to either party. The mandate of the court therefore, is to find the most perceptibly suitable solution in the circumstances of a particular case.

[14] A court, in deciding whether to grant or refuse an injunction is guided by the principles laid down in the well-known case of **American Cyanamid Co v Ethicon Limited** [1975]1All ER 504. These principles governing the grant of an injunction, as prescribed by that case, are that: there must be a serious issue to be tried, damages would not be an adequate remedy for an applicant and the balance of convenience favours the grant.

[15] In the application of these principles, consideration should first be given by the court as to whether the material presented discloses that

there is a serious issue to be tried. The question at this threshold is whether the material reveals some prospect of success at trial. If upon examination of the material before the court, it is of the opinion that there is no serious issue to be determined at a trial, then, an application for an injunction will fail.

[16] However, where there is material before the court supporting triable issue or issues, the court should then proceed to consider the question as to whether an applicant could be adequately compensated in damages. If it is found that the applicant can be so compensated, then this would militate against the grant of an injunction.

[17] Where it is found that damages would not be an adequate remedy, the question as to where the balance of convenience lies, should then be explored. The determination of the balance of convenience does in some cases, create some measure of difficulty. In such cases, the court, in an effort to maintain the status quo, may obtain guidance by investigating the strength and weaknesses of each party's case.

[18] In its appeal, the applicant seeks to invalidate the mortgage by setting up the transaction as being void by reason of the contravention of section 54 of the Companies Act. This transaction was carried out in 1995, consequently, the Companies Act of 1967 would be the relevant statute.

It is important to make reference to the provisions of section 54 of that Act. It reads:

> "54. - (1) Subject as provided in this section, it shall not be lawful for a company to give whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary company, in its holding company:
>
> Provided that nothing in this section shall be taken to prohibit –
>
> (a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;
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> (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company;
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> (c) the making by a company of loans to persons, other than directors, bona fide in the employment of the company with a view to enabling those persons to purchase or subscribe

> for fully paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.
>
> (2) ….
>
> (3) If a company acts in contravention of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding two hundred dollars."

[19] As will be readily observed, a breach of section 54 gives rise to criminal liability on the part of the company as well as its officers. It follows therefore that contravention of the statute is an illegality. In such circumstances, contractual arrangements arising out of a breach of section 54 may be rendered null and void and unenforceable. However, a review of the authorities over the years has revealed some inconsistency in the approach to the interpretation of the section.

[20] In **Victor Battery Co. Ltd v Curry's Ltd** a debenture was issued by Victor Battery as security for a loan for the payment of a part of the purchase price for its shares. It was contended by that company that the debenture was invalid, it being issued in contravention of section 45 of the Companies Act 1929. The section made it unlawful for a company to provide as security, financial assistance for the purchase of its shares. It was held that:

(i) 'Upon its true construction, sect. 45 did not invalidate or avoid the security to which it referred. The debenture was, therefore, valid.

(ii) assuming that the issue of the debenture was an illegal transaction by reason of section. 45, V.B Co. could not maintain an action to be relieved thereof, because the object of sect. 45 was not to protect but to punish a company providing security in contravention of the section, and therefore V.B. Co. did not come within the exception to the maxim "*in pari delicto potior est condition defendentis*.'

[21] The case of **Victor Battery Co Ltd v Curry's Ltd** was not followed in **Selangor United Rubber Estates Ltd v Cradock** (No 3) [1968] 2 All ER 1073. In that case Ungoed-Thomas J was highly critical of the decision in Victor **Battery Co. Ltd v Curry's Ltd.** In **Selangor United Rubber Estates Ltd v Cradock** the plaintiff company had liquid assets and credit of £232,500.00 with a bank. A banking company, C Ltd, acting on behalf of C, an undisclosed principal, made a bid for the plaintiff company's share capital. The offer was accepted by holders of 79% of the shares of the plaintiff company's share capital. At C's instance, an arrangement was made to credit C's account to meet the sum of £232,500.00 on a cheque drawn by the plaintiff company in favour of a private investment company W Ltd and endorsed on behalf of W Ltd to C. It was held, inter alia, that a loan by the plaintiff company to W Ltd was unlawful and void by virtue of section 54 of the Companies Act. (The section is, in essence, similar to section 54 of our Companies Act).

[22] **Victor Battery** was also not followed in **Heald and Another v O'Connor** [1971] 2 All ER 1105. In **Heald v O'Connor**, the plaintiffs agreed to sell their shares in a company to the defendant and agreed to lend the defendant some of the purchase money to secure a floating charge on the assets of the company. A debenture was issued by the company in respect of the indebtedness to the plaintiffs. The debenture was endorsed by the defendant guaranteeing the loan. The plaintiffs obtained summary judgment on a claim brought against the defendant to enforce the guarantee. On appeal, it was held that the company gave financial assistance to the defendant as purchaser by way of the provision of security within section 54 of the Companies Act 1948 and upon a true construction of the guarantee, the principal sum would not become due under the debenture because of the statutory prohibition. The defendant was granted leave to defend on the ground that he had a good defence to the action.

[23] Although **Victor Battery** has not been overruled, there has since been a trend in the uniformity of the approach in the court's construction of section 54. It has been observed from **Selangor United Rubber Estates Ltd v Cradock** and **Heald v O'Connor** as well as recent cases that transactions made under section 54 are rendered invalid. There are even cases which appear to have broadened the scope of the section, thus

incurring the risk of innocent transactions being rendered null and void: see **Belmont Finance Corp. v Williams Furniture Ltd (No. 2)** [1980] 1 All ER 393; and **Armour Hick Northern Ltd v Whitehouse** [1980] 1 WLR 1520. Despite this, the court, in giving consideration to transactions involving financial assistance by a company, within the context of section 54, must consider a transaction as a whole. Accordingly, because the section attracts a penalty, a decision should not be strained to cover transactions which are not within the scope of the section: see **Charterhouse Investment Trust Ltd v Tempest Diesels Ltd** [1986] BCLC 1 and **Anglo Petroleum Ltd and another v TFB (Mortgages) Ltd** [2008] 1BCLC 185.

[24] Brooks J, in considering the application for the grant of the injunction, was of the view that it was apparent, on the face of it, that there could be a breach of section 54 of the Companies Act. He found that this gave rise to a serious issue to be tried and that damages would be an adequate remedy. Having found that damages would be an adequate remedy, he went on to consider the effect of section 71 of the Registration of Titles Act and erroneously found that it offered the applicant protection and although he found that the applicant, in seeking the injunctive relief, had not come to equity with clean hands, subsequently granted the injunction and imposed a pre-condition for the payment of the sum of $59,220,878.95 into court.

[25] There can be no dispute that the evidence discloses that Fletcher and Company aided the purchasers of the shares owned by its company to buy its shares. It gave a mortgage of its lands as a security to facilitate the purchase. Section 54 of the Companies Act prohibits a company using its property as a security to purchase its shares. The cases of **Selangor United Rubber Estates v Cradock** and **Heald v O'Connor** clearly indicate that such a transaction is void. It is arguable that the contract between the applicant and the respondent may be grounded on an illegality by reason of the applicant's contravention of section 54. In such circumstance, this may render the mortgage deed null and void. It follows therefore that this is an issue which ought to be resolved by a trial.

[26] Having found that there is an issue which ought to be resolved at trial, the question which now emerges is, "Can the applicant be satisfactorily compensated by an award of damages if the respondent improperly exercises its powers of sale of the mortgaged property?" A mortgagor enjoys statutory protection should the mortgagee wrongly sell the mortgaged property. Under Section 106 of the Registration of Titles Act, a mortgagor is entitled to damages where the mortgagee improperly sells his property.

[27] However, if the respondent, without justification, carries out sale of the property, would damages be an adequate remedy for the

applicant? At the time the applicant entered into contractual relations with the mortgagee, the applicant would have, or ought to have contemplated that there could be the possibility of it defaulting on the loan. It thereby took upon itself the risk of having the property sold in the event of a default. If the property is wrongly sold by the mortgagee, the loss encountered by the sale is ascertainable. There would be no difficulty in calculating such loss. There is no doubt that the applicant could be satisfactorily compensated in damages in the event of an improper sale.

[28] It was submitted by Miss Davis that the respondent is in receivership and damages would not be an adequate remedy. There was no evidence in support of this submission before Panton P., nor was there such evidence before this court.

The application is refused with costs to the respondent.