[2010] JMCA App 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 89/2010

APPLICATION NO 134/2010

BETWEEN	**FRANZ FLETCHER** **(Executor of the Estate of Ruby Fletcher who died on 7 July 2000 and in whose Estate probate was granted on 13 September 2006)**	**APPLICANT**
AND	**DAVID AND PETAGAYE MORGAN**	**2nd CLAIMANTS**
AND	**JAMAICAN REDEVELOPMENT FOUNDATION**	**RESPONDENT**

Paul Beswick and Georgia Gibson Henlin instructed by Christopher Dunkley of Phillips Partners for the applicant

Maurice Manning and Miss Tavia Dunn instructed by Nunes Scholefield Deleon & Co for the respondent

22, 27, 28, 29 July and 15 December 2010

IN CHAMBERS

PHILLIPS JA

[1] This is an application for a stay of execution pending appeal, of the order of Pusey J made on 9 July 2010, wherein he refused an application for an interlocutory

injunction. The grounds of the application were inter alia, that an application for injunction had been made on 4 June 2010 before Morrison J, who ordered that the status quo should remain until 21 June 2010; that the order was continued by Pusey J until 9 July 2010 when he refused the application for injunction but ordered that the status quo should remain to give the claimants an opportunity to appeal; that if the stay was not granted it would be to the applicant's detriment in that it would render the appeal nugatory; and that the appeal had a strong likelihood of success. There was an affidavit of urgency filed in support of the application but it did not contain any other information than what was set out in the grounds of the application, which was clearly inadequate. When the matter came before me on 22 July 2010 several orders were made for the parties to provide the court with the material on which they intended to rely, and the record of appeal and the core bundle comprising 187 and 204 pages respectively were filed the day before the hearing of the application commenced. Costs of the adjournment were granted to the respondent as the application had begun on a shaky footing.

Background Facts

[2] The fixed date claim form was dated and filed 1 June 2010, and in it the claimants sought an order that they (Franz Fletcher, as duly appointed executor of the estate of Ruby Fletcher, having been granted probate, and Peta-Gaye and David Morgan, purchasers and/or assignees of the equity of redemption) were entitled to redeem mortgages Nos. 470252, 497057 and 911389 registered on the certificate of title in respect of 27B Banana Walk, Orange Grove, Kingston 8 in the parish of Saint

Andrew, registered at volume 1060 folio 480 of the Register Book of Titles (Banana Walk). The claimants sought release of the certificate of title for Banana Walk on payment of the purchase price, in order to register the 2nd claimants' interest in the said property, and an injunction to restrain the sale of Banana Walk by the defendant other than to the 2nd claimants.

[3] An affidavit of Franz Fletcher was filed with and in support of the fixed date claim form. Mr Fletcher deposed to the grant of probate to him on 13 September 2006 subsequent to the death of Ruby Fletcher on 7 July 2000. On 11 September 2006, he entered into an agreement for sale of Banana Walk to the 2nd claimants for the sum of $15,000,000.00 which sum he said had been based on a current valuation report. The mortgages mentioned above were all registered on the certificate of title for Banana Walk, originally executed in support of a guarantee to Century National Bank Limited (Nos. 470252 and 497057) and as principal debtor to Century National Building Society (No. 911389). The transfer of the mortgages to the respondent was registered on 4 June 2004. Each mortgage contained a clause whereby the mortgagor covenanted not to sell or part with possession of the mortgaged premises without the express written consent of the mortgagee. The payments on the mortgages fell into arrears and Mr Fletcher said that it was in those circumstances that he entered into the agreement of sale with a view to redeeming the mortgages and paying down any indebtedness lawfully found to be due.

[4] Mr Fletcher further deposed that he had been reliably informed by his attorneys at law that in normal conveyancing practice the mortgagee's consent is not asked for,

but the mortgagee is informed of the sale and through arrangements and undertakings the transaction is concluded. However in this sale the mortgagee was insisting that their formal consent was required and that having not been obtained he was in breach of the terms of the mortgage. He did not think that the position taken by the mortgagee could have prevented him from concluding the sale as he had been advised that it operated as a bar on his ability to redeem the mortgages. He contended that the mortgagee has however, unreasonably persisted with its stance. In the interim the 2nd claimants have since repaired the property which the mortgagee would have been aware of. Notwithstanding all of that, the mortgagee, he said, sought to sell the property, firstly by public auction, and then by private treaty, for the sum of US $350,000.00, which would have included the enhanced value of the property.

[5] Mr. Fletcher made it clear that it was only the mortgagee's stance which prevented the completion of the sale to the 2nd claimants. He exhibited certain items of correspondence between the attorneys representing the claimants and the mortgagee's in-house attorney, indicating the purchasers' financial ability to close the sale, the request for the relevant documents including the certificate of title and discharge of mortgage from the respondent, and the respondent's clear communication that the terms for the release of the title had not been met. The notice to complete and making time of the essence was duly served on him. He could not do so, owing, he said, to the recalcitrance of the respondent. He said that he had even assigned the equity of redemption to the 2nd claimants, by authorizing them to pay the closing costs to the respondent and releasing their attorneys from their undertaking to pay those costs to

him, and by sending the documents registrable on transfer to the 2nd claimants, viz, the duly signed and cross stamped transfer, the estate duty certificate, and the application for registration on transmission.

[6] It was Mr Fletcher's position that the injunction ought to be granted as the claimants had a superior right to redeem the mortgage that damages were an adequate remedy for the respondent, and the claimants could meet an undertaking for those damages from the estate.

[7] The 2nd claimants filed an affidavit in the proceedings. They confirmed what Mr Fletcher had deposed to in his affidavit and stated that they were only at the time of the making of the affidavit being made aware of the clause in each of the mortgages stating the mortgagor's covenant not to sell or part with possession of Banana Walk without the written consent of the mortgagee, and the fact that due to the lack of consent or the failure to request the consent the mortgagee was refusing to permit the transfer and imposing conditions that the applicant could not meet. The 2nd claimants stated that they had entered into the sale in good faith, made all the necessary payments and arrangements to complete the same, had not known that the consent of the mortgagee had to be obtained prior to the sale and that failure to do so could jeopardize the sale completely, in spite of the funds to complete the transaction being available, and their mortgagee through their attorneys having given undertakings to close. They confirmed having been put into possession of Banana Walk and that they had made significant improvements to the same. They had, as they were desirous of completing the transaction, served notice to complete the sale on the applicant, without

success. They had agreed to pay the proceeds of sale directly to the respondent to redeem the mortgage to the full extent of the value of the property at the time of the sale. They considered it inequitable and unjust for the respondent to sell Banana Walk to anyone else. They therefore lodged caveat no. 1630543 to protect their interests, maintaining that they had a right to redeem the mortgage to the extent of the value of the property, and prayed the court's aid by way of an injunction to restrain the respondent from selling the property by public auction or private treaty to anyone else.

[8] The claimants then amended the fixed date claim form to include an alternative claim for relief. They now also sought:

> "A declaration that mortgages 470252, 497057 and 911389 are invalid and/or void and/or unenforceable against the Claimants."

Mr Fletcher deposed to a further affidavit in support of this alternative claim. He indicated that the mortgages had been granted on 23 June 1987, 7 June 1989, and 27 November 1995 respectively. He also stated that at the time the transfer of the mortgages was effected, the loans were in default and were part of the bad debt portfolio of the bank taken over by the Financial Institutions Services Limited. He said that the original debtor, Kingston Armature & Dynamo Works Limited (the company), had received formal notices of demand from the respondent for the amounts of J$139,254,535.00 and US$73,299.00 in May 2009 and he referred to the fact that he had been sent one also in the same amounts on the basis that he had guaranteed the loan. The company had received registered statutory notices in respect of the mortgages and one had been directed to Ruby Fletcher relative to Banana Walk. It was

pointed out that the restructured debt agreement between the company and the respondent had not been signed by Mr Fletcher in his capacity as executor of Ruby Fletcher, who had died by then, and further that any restructuring or departure from the terms of the original debt would discharge the estate of any liability as guarantor of the same. If the agreement was an acknowledgment of the debt, that would be an alteration which would also discharge the guarantor. Mr Fletcher also stated that he had been reliably informed by his attorneys that any indication that reliance was being placed on the acknowledgment of the debt in 2003, was an admission that the obligation to repay was statute barred by virtue of section 7 of the Statute of Limitations. He relied further on the Statute for the proposition that the obligation under the mortgage was discharged once the debt was statute barred, since no monies have been paid on the mortgages in excess of 12 years prior to the notices of default or statutory notices under the Registration of Titles Act.

[9] The respondent filed an affidavit by Tavia Dunn, in response, who stated that there was another suit, claim no. HCV 06728 of 2009, in which the company sued the respondent and made an application for injunctive relief with regard to certain properties of which Banana Walk was one, but in that application Banana Walk had been withdrawn from the consideration of the court. Documents filed in that suit were exhibited to her affidavit, namely the claim form, particulars of claim, affidavits of Franz Fletcher in his capacity of director of the company, and Janet Farrow, chief executive officer of the Jamaican branch of the respondent. The application for injunction was refused in the Supreme Court. An application for an injunction pending appeal was

heard by a single judge of appeal who refused injunctive relief. That decision was reviewed by the Full Court which has not yet given its decision.

[10] Miss Merline Pattterson, the loan recovery manager of the Jamaican branch of the respondent deposed in her affidavit that the covenant in the mortgages restraining the mortgagor from dealing with the properties without the consent of the mortgagees was a provision expressly included to guard against the situation which currently obtained, as by registration of the mortgage third parties would also have notice of the covenant. The question of formal or informal consent, she said, therefore did not arise. She further deposed that the Banana Walk property was part of a suite of securities given by Ruby Fletcher to cover the indebtedness of the company, and the redemption of the mortgage required the settlement of the entire indebtedness or such compromise as agreed. She said that Mr Franz Fletcher had negotiated a conditional agreement and referred to correspondence which was supposed to have captured the same, (but that letter seemed to indicate that those negotiations were conducted on behalf of the company). She denied that the respondent had refused any attempts made to redeem the mortgage, but instead said that the respondent had postponed enforcing its mortgage while it gave the company and those acting on behalf of the mortgagors an opportunity to settle the indebtedness. As no payments were made, and no arrangements concluded with undertakings or otherwise to satisfy the defendant, the properties, including Banana Walk, were put up for auction, but there were no bids.

[11] Miss Patterson said that there was no basis for the 2nd claimants to claim that they were bona fide purchasers as they were bound by the respondent's registered

mortgage which had been breached. Further the respondent had not received any communication from any financial institution until January 2009. They did not know about any documents in the 2nd claimants' possession to close the transaction and did not accept that there had been any proper assignment of the equity of redemption. Finally, she stated that any caveat filed could not override the respondent's registered legal mortgage and pointed out to the court that the claimants had not shown that they could satisfy any undertaking as to damages.

[12] The 2nd claimants' affidavit in reply challenged the position taken by the respondent generally, but insisted that the Banana Walk property could be released once the full purchase price was paid over to the mortgagee. Further, they indicated that the caveat protected the equity of redemption, and that could not be overridden by the legal mortgage. Finally, the 2nd claimants referred to the improved value of the Banana Walk property as a result of their efforts, and stated that it was their matrimonial home.

[13] Mr Huntley Watson, an attorney of 23 years standing, in his affidavit spoke about the conveyancing practice when acting for the vendor/mortgagor, requesting of the mortgagee the amount to settle and to close the mortgage account, and the exchange of undertakings to ensure completion. He said that he was familiar with the standard clause requiring the consent of the mortgagee. He also said that in the ordinary practice, and for practical reasons, a mortgagor who is desirous of dealing with his encumbered property would notify his mortgagee of his intention to sell the same. This is to avoid a penalty for prepayment and so a three month notice is usually given to

redeem the mortgage. In his view, "it is not a request with an expectation that the mortgagee will say no. In fact consent is usually granted as a matter of course".

[14] Miss Janet Farrow merely exhibited to her brief affidavit the instruments of guarantee executed by Ruby Fletcher on 23 June 1987 and 7 June 1989. She specifically referred to and relied on clause 9 of the guarantee which she said protected the respondent. She deposed that Mr Fletcher was the person who negotiated the restructured debt agreement, and so "as the party who negotiated the agreement and as the personal representative of the estate Ruby Fletcher, Mr Franz Fletcher knew and consented at all material times to the terms of that conditional agreement". The agreement was not however executed by the applicant in his capacity as executor of the estate, as the applicant was only appointed as executor by a grant of probate 3 years after the date of the agreement, as mentioned, (nor as her personal representative she having been deceased at the time). Miss Farrow also indicated that the respondent relied on section 33 of the Limitation of Actions Act as it provided "that any payment of principal or interest or a written acknowledgment of the debt given by the debtor to the creditor or his agent keeps the debt alive." Further she had been advised by her attorneys that "there is no statutory defence of limitation to the enforcement of the guarantee or the mortgage".

[15] With that factual background the Honourable judge refused the interlocutory injunction but as indicated maintained the status quo, giving the claimants an opportunity to file an appeal which they did, and so the status quo has continued.

[16] In his reasons for judgment the learned trial judge set out the background to the claim and on the basis of the principles enunciated in ***American Cyanamid v Ethicon*** [1975] 1 All ER 504 and ***National Commercial Bank Jamaica Ltd v Olint Corp Ltd*** Privy Council Appeal No 61 of 2008, delivered April 28, 2009 identified the factors to be considered on the grant/ refusal of an interlocutory injunction. These were:

> "(i) Whether there is a serious question to be tried.
>
> (ii) Where the balance of convenience lies.
>
> (iii) Whether damages is an adequate remedy."

He dealt with each factor separately. He identified what the claimants said were serious issues to be tried. These were:

> "(i) Whether the [defendant is] statute barred from seeking to enforce the mortgages in question.
>
> (ii) Whether the Estate of Ruby Fletcher was a party to the restructured agreement in relation to the mortgages above and whether her guarantee is therefore discharged.
>
> (iii) Whether the 2nd Claimants Peta-Gaye and David Morgan as the purchasers and/or assignees of the equity of redemption, are entitled to redeem mortgages Nos. 470252, 497057 and 911389 over the property in question."

[17] In his judgment the learned trial judge sets out sections 7, 30 and 33 of the Limitation of Actions Act. At page 5 of his judgment he stated thus:

> " Section 7 of the Limitations of Action Act provides:

'It shall and may be lawful for any person entitled to or claiming under any mortgage of land to make an entry, or bring an action or suit to recover such land, at any time within twelve years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twelve years may have elapsed since the time at which the right to make such entry or bring such action or suit shall have first accrued.'

Section 30 of the same Act goes on to say:

'At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.'

And according to Section 33:

'No action or suit or other proceedings shall be brought to recover any sum of money secured by the 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 giving 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 or 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'."

[18] He then arrived at the following conclusion which is set out in paragraph 21 of his reasons for judgment which was the subject of detailed submissions from both counsel before me and this specific finding is now the subject of a counter notice of appeal. I will therefore set out the paragraph in its entirety.

> "21. Since there is no evidence to contradict the fact that all the mortgages would have been statute barred by 2009 as alleged by the claimant and by which time 12 years would have passed, the question will turn on the Claimants' contention that the Agreement to Restructure Debt dated the 21st May 2003 was not made by or on behalf of the 1st claimant either in relation to the guarantees or the mortgage. The importance of this argument is that this Agreement could amount to an acknowledgment of the debt which would operate to defeat the Limitation point."

[19] The learned trial judge went on to find that pursuant to clause 9 of the guarantees executed by Ruby Fletcher, and on the basis of the principles derived from the authorities of ***Holme v Brunskill*** [1878] 3 QBD 495 and ***Perry v National Provincial Bank of England*** [1910] 1 Ch 464, "the guarantee preserves the Defendant's rights and in all the circumstances the 1st Claimant remains bound". He indicated that: "the applicable principles from the cases are that a guarantor is excused from further performance where there has been some material alteration to the original terms of the debt, unless (a) his consent is obtained or (b) the alteration is insubstantial, or (c) is beneficial to him". The judge concluded that: "The Agreement to Restructure the Debt dated the 21st May 2003 was actively negotiated by the 1st Claimant and he cannot therefore now argue that the Estate of the original guarantor

who he stands for in his capacity as personal representative is not thereby bound". He therefore found that the mortgage in question was not statute barred and/or invalid and/or void and/or unenforceable and that the Estate was bound by the Agreement.

[20] With regard to the question of the 2nd claimants' redeeming the mortgages, he relied on the judgment of McDonald Bishop J in ***Lorgay Construction & Equipment Co Ltd & Another v Jamaican Redevelopment Foundation Inc***. claim no 2009 HCV 4293 delivered 2 September 2009, indicating that third party rights which had arisen subsequent to the transfer of the mortgages, which had been endorsed on the certificate of title for the mortgaged property, in circumstances where no fraud had been alleged to affect the indefeasibility of title of the mortgagee, then the subsequent equitable and unregistered interests of purchasers would be subordinate to the legal rights of the registered mortgagee. He therefore dismissed this claim stating that the point raised no serious issue to be tried.

[21] Having found that there was no serious issue to be tried the learned trial judge said that it was unnecessary to deal with the adequacy of damages however he commented on the fact that the 2nd claimants had averred that they had made the property their matrimonial home but indicated that they had done so with knowledge of the respondent's interest. He said that as the permission of the respondent was sought to allow the transfer that ought to have put the 2nd claimants on notice that it could have been refused. Any improvement to the property effected by them would have been done with the knowledge of the respondent's interest and their reluctance to approve the sale, and in any event could be accommodated by damages. In the

judge's view the acquisition of the property was recent, and there was no indication that they were not able to obtain another property.

The Application in the Court of Appeal

The applicant's submissions

[22] The applicant submitted that in order to obtain a stay of execution of the order of Pusey J, or in effect to obtain an injunction pending appeal, the onus was on them to show either some prospect of success or a good arguable case on appeal.

[23] Counsel argued that the respondent by its notice of demand sent in May 2009 described the company's loan portfolio as non performing, and that the company as the principle debtor was in default, so the respondent called on the guarantor for payment. Counsel submitted however that at the time this demand was issued the respondent's right to recover under the mortgages was prima facie extinguished from 1999, 2001 and 2008 respectively, as they were statute barred. There was no evidence of any acknowledgment of the debt by the applicant and that would have had to have been done during the statutory lifetime of the loan as "one cannot revive that which is already dead". Additionally it was submitted that there was no evidence that the agreement to restructure the debt was signed by the applicant either in relation to the guarantees or the mortgage. Mr Fletcher signed as stated on the document as director of the company, and in his own right as a guarantor. In counsel's written submissions it was stated that the respondent was now attempting to say that it did not need the consent of the applicant, but it was argued that it had obviously been the intention of the respondent to have the applicant agree to be bound through the execution of the

agreement, and that not having occurred, the question that would arise is can the respondent now proceed to recover the debt which would otherwise have been extinguished?

[24] It was also the claimants contention that they were entitled to redeem the mortgages and they had been endeavouring to do so since 2006, without success. Banana Walk was only one of the properties held as security for the company's debt, and the property had a finite value and the net proceeds of sale had been offered to the respondent. It was submitted that the only way the applicant would reduce its indebtedness to the respondent is for the property to be sold, and so the posture adopted by the respondent in those circumstances had been unconscionable, and to expect to retain the property in order to obtain the enhanced value through the improvements effected by third parties would simply be unjust. This, it was further submitted, is possibly a circumstance in which the court would consider making an order for sale under Part 66 of the Civil Procedure Rules 2002 (CPR). In any event, it would be a serious question to be tried. Counsel pointed out also that the agreement for sale was entered into long before the demand for payment was sent to the applicant.

[25] Finally, counsel argued that the defendant's reliance on the term in the mortgage that the property ought not to be dealt with without the mortgagees express consent was to be read in the light of normal conveyancing practice, which had been put before the court, and within the context of the fact that the mortgagor as the registered legal owner has the power to deal with the property and " to transfer the legal estate,

not merely in equity as under the general law". It was submitted that in the circumstances of this case the actions of the mortgagee were operating as a fetter on the equity of redemption and the insistence on the " right to consent" may not be either justified and/or appropriate.

[26] Having submitted that there are serious questions to be tried, counsel argued that damages would not be an adequate remedy. Relying on both ***American Cyanamid*** and ***NCB v Olint*** she stated that the court in aiming to do justice should endeavour to take the course which results in the least prejudice to the parties. In this case injunctive relief would therefore be warranted as the 2nd claimants would lose their matrimonial home with all its improvements, and on the other hand the respondent had not averred that it would suffer any prejudice at all, and damages could satisfy any additional loss. Counsel also submitted that as there was a bona fide challenge to the validity of the mortgages in the context of the Limitations of Actions Act then in those circumstances relying on the principle enunciated in the case of Brady ***v Jamaica Redevelopment Foundation & Ors*** (SCCA No 29/2007, delivered 12 June 2008), the court ought to prevent the mortgagee from exercising its powers of sale.

The respondent's submissions

[27] The respondent submitted that the applicant had raised two legal issues in the application, namely the defence of limitation of actions, and that the guarantee of Ruby Fletcher had been discharged by reason of her estate not being a party to the restructured debt agreement. The contention of the applicant he said was not

supported by the facts, and in respect of the 2nd claimants they had no claim against the respondent and so must look to the applicant for any alleged relief due to them.

[28] Counsel submitted that the applicant had applied for a stay of execution, but there was nothing to stay. However, in the event that the application was intended to be an application for an injunction pending appeal, then the test on such an application is whether the applicant has a good arguable appeal. He relied on the following cases;- ***Michael Levy v Jamaican Redevelopment Foundation Inc and Another*** SCCA No 26/2008 Application No 47/2008 delivered on 11 July 2008; ***Polini v Gray*** (1879) 12 Ch. D. 438; ***Erin Ford Properties v Cheshire*** CC [1914] 2 All ER; ***Ketchum International plc v Group Public Relations Holdings Ltd*** [1996] 4 All ER 374.

[29] The respondent argued that the claimants had no prospect of success. The monies were owed, and the substantive claim was brought under Part 66 of the CPR, with the mortgagor's claim being one for sums on the sale of Banana Walk, which is a money claim and not one for injunctive relief. He submitted that the court should not therefore be concerned about the clog on the equity of redemption as both parties wanted the property sold. It was all about money. He submitted that the evidence disclosed that the mortgagor had defaulted (paragraph 7 of his affidavit), and in indicating that he, Franz Fletcher, as executor of the estate of Ruby Fletcher, had entered into the agreement with the 2nd claimants to pay off any sums that may be lawfully found to be due, he was acknowledging the debt to the respondent. Additionally, the claim that the mortgages were statute barred arose very late in the

day, and although the amendment was made in time, it was after the recognition by the applicant of the debt.

[30] The more important issue, however, it was submitted, was that there was no evidence before the learned trial judge as to the last payment on the loans which would be essential in order to raise the defence that the mortgages were statute barred. There must be a basis on which one is submitting that the mortgages are unenforceable. The dates submitted before Pusey J were the dates when the loans were made, which it was submitted was untenable, as no lending institution would have given successive loans if no payments had been made on the loan previously given. Further, it was submitted, that there was evidence in the computer generated exhibit to Miss Farrow's affidavit which showed to the contrary. So the wrong dates had been used as the starting point. Counsel also argued that time only starts to run against the surety, from the date of the demand (May 2009), and he relied on an excerpt from the ***Halsbury's Laws of England*** Volume 28 para 670 and respectfully submitted that paragraph 21 of the judgment of Pusey, J could not stand, and that these arguments formed the basis of a counter notice of appeal which had since been filed.

[31] With regard to the issue of the execution of the restructured debt agreement, it was the respondent's contention, that as Mr Fletcher negotiated and signed the same as a director on behalf of the company and on his own behalf, it does him no credit to say that he did not do so as executor of Ruby Fletcher when he had that capacity. Further, and in any event, he knew about the agreement and its terms and participated in concluding the same, and therefore the guarantor could not be relieved of her

liability. He relied on the case of ***High Mountain Feed Distributors Limited v Paw Pleasers Limited*** 2004 MBQB 220, to support this submission. Finally, he submitted that, pursuant to clause 18 of the guarantee, the guarantee survived the death of the guarantor, and clause 9 of the guarantee covered all debts, whether restructured or otherwise, as the terms embraced any renewals, extensions, releases, discharges and compromises from the customer. The respondent therefore did not require the 1st claimant's consent to the agreement. The respondent was endeavouring to exercise a right against the guarantor, the mortgagor and the principal debtor and once the debt still subsisted the respondent could proceed against all parties. Counsel argued that in any event the provisions in the Statute of Limitations do not provide a defence to the exercise of the powers of sale of a mortgagee under a legal registered mortgage. In all the circumstances it was argued therefore that there was no serious question to be tried and no good arguable appeal.

[32] With regard to the 2nd claimants, it was submitted that they could not be in any better position than the applicant, and they were not bona fide purchasers, as they were bound by the terms of the mortgage and they ought to have known that consent was required and that it had not been obtained. The agreement was entered into in September 2006, and there was no communication from the purchasers' mortgagee to the respondent until December 2009. This should have put the 2nd claimants on notice that the transaction may not be completed, and indeed the respondent had indicated an intention to the applicant not to do so from as far back as 2006, on the basis that their consent had not been obtained. Additionally, the lapse in time from the date of

execution of the agreement to the date of the hearing of the application, and worse the trial, was detrimental to the mortgagee as the agreement had not yet been completed, the purchase price had not been paid over, but the price for the property would have been fixed for three years. It was the respondent's contention that to exercise the equitable right to redeem the mortgage the mortgagor must pay the entire mortgage debt. Finally, in any event, the equity of redemption could not override the registered interest of the respondent. Counsel relied on the ***Lorgay*** case for this proposition of the law.

[33] Counsel submitted that there should be no injunctive relief as damages was an adequate remedy, but if the court was of the view that interim relief could be granted pending appeal, then there were no exceptional reasons why the principles enunciated in the case of ***SSI (Cayman) Ltd and others v International Marbella Club SA.*** SCCA No 57/1986 delivered on 6 February 1987 and ***Inglis & Another v Commonwealth Trading Bank of Australia*** [1971-72] volume 126 C.L.R 161 should not be followed and the claimants ordered to pay the sums claimed by the respondent into court.

[34] In response the claimants submitted that there is a difference between a contract of suretyship and one of guarantee. Further, all defences open to the principal debtor are open to the guarantor. It was submitted that the demand for payment could only be made if the obligation to repay still existed, and in this case it had been extinguished before the demand had been made. Counsel submitted also that the ***Lorgay*** case had no application as the claimants were trying to unseat the principle of

indefeasibiity of title, and the defence of the registered legal interest was not applicable as the claimants were asserting a claim based on it. It was important to note, said counsel that the applicant had obtained probate, and entered into the agreement for the sale of Banana Walk in 2006, some time after the restructured agreement was submitted which was in 2003, and so the applicant did not have the capacity, and was not acting as executor, at that material time.

Analysis

[35] I accept the submissions of counsel for the respondent that in respect of the order of Pusey J, there is nothing to stay the execution thereof, and I have treated the application as one for an interim injunction pending appeal as this was the approach adopted by counsel for both parties. It is clear that when an appellant is pursuing such an application, for an interim injunction pending appeal, under rule 2.11 (1) (c) of the Court of Appeal Rules 2002 the test pursuant to the dicta of Morrison JA in ***Michael Levy v Jamaica Redevelopment Foundation Inc*** and Harrison JA in ***NCB v Olint*** is whether the appellant has reasonable grounds of appeal, or has serious issues to be canvassed on appeal or has a good arguable appeal. In examining whether the appellant has crossed the threshold the question is, whether in exercising his discretion to refuse injunctive relief the learned trial judge was plainly wrong.

[36] There appear to be 4 main issues which may be pursued on appeal. These are:-

(i) At the time when the notices of demand were issued in May 2009 were the loans and mortgages statute barred and/or irrecoverable?

(ii) Was the agreement to restructure debt executed by the applicant? Was the execution by the applicant a necessary pre-condition to recovery by the respondent?

(iii) Do the preamble and clause 9 of the instruments of guarantee provide a complete defence?

(iv) Has there been an unlawful restraint on the equitable right of redemption of the mortgage, and/or has the respondent acted reasonably within the terms of the mortgage Deed?

Issue (i) - statute-barred

[37] Sections 7 and 30 of the Limitations of Actions Act cumulatively, inter alia, appear to permit an entry, action or suit to recover land by any person claiming to be entitled to such a right under any mortgage to land, if done within 12 years after the last payment of any part of the principal money or interest secured by the mortgage, even if more than 12 years have passed when the right first accrued (s. 7). But after the determination of that period, the right and title to the land, or rent, the recovery of which ought to have been made within the period specified, shall be extinguished (s. 30). There is also a limitation to bringing an action or suit or other proceeding to recover any moneys secured by any mortgage outside of 12 years after the right to receive the same shall have accrued, unless some part of the principal or interest has been paid, or an acknowledgement has been given, in writing by the person who should make the payment or his agent, in which case, the action must be within 12 years of that payment or acknowledgment or the last of them if more than one of them (s. 33).

[38] There was little or no evidence before the court with regard to any payments made under the mortgages, as the only statement of account proffered was the

computer generated statement attached to the affidavit of Miss Farrow dated 13 January 2010 exhibited to the affidavit of Tavia Dunn filed in the court below, but attaching documents filed in claim no. HCV 06728/2009, in which the company is the claimant, and is in respect of payments allegedly made by that claimant subsequent to the date of the agreement to restructure the debt. As a consequence, counsel for the applicant used the date of the mortgages as a reference point to determine when time should run in favour of the mortgagor, which may not be applicable, but which was arguable on the evidence. Counsel for the respondent complained that for the applicant to rely on the Statute, specific evidence with regard to payments made on principal and interest, and when the loans fell into default and became vulnerable for action, should have been placed before the court by the applicant. That not having been done, the learned trial judge, having regard to the years 1991, 2001 and 2008 being the years submitted when the respective mortgages would have been extinguished, made the finding that"… Since there is no evidence to contradict the fact that all the mortgages would have been statute barred by 2009 as alleged by the claimant and by which time 12 years would have passed…", which at this stage of the matter may well be a reasonable conclusion. Counsel for the respondent has submitted that in respect of the guarantees, as the liability arose after demand for payment had been made in writing time runs only from such demand, which on the evidence was from May 2009. This submission was based on clause 4 of the instruments of guarantee, and is supported by authority (see ***Re Brown's Estate, Brown v Brown*** [1893] 2 KB 833, CA). However clause 3 of the guarantee states that the guarantees

are continuing, and continue to secure outstanding balances and sums remaining unpaid to the Bank (now the respondent). The question must arise whether the guarantee subsists if the sums are no longer recoverable under the mortgage, the rights to do so having been extinguished. Is the debt extinguished? What is the true impact of that on the guarantees, if the cause of action arises separately, and in any event would that only affect an action against the guarantor for the recovery of the sums due, or can it affect the exercise of the powers of sale of the mortgagee and finally do the provisions of the statute affect that exercise?. It does appear that there are serious questions to be tried.

Issue (ii) - Execution of Agreement to Restructure Debt

[39] The learned trial judge found that the debt was acknowledged by the agreement to restructure debt and that clause 9 of the Instrument of guarantee covered that compromise and the applicant remained bound by the same.

What is clear is that on the signature page of the said agreement there is no signature of Franz Fletcher executing the same on behalf of the estate of Ruby Fletcher. He signed on behalf of the company, and on his own behalf as a guarantor. An issue must arise as to whether he can be presumed to have also been acting on behalf of the estate in 2003, the date of the agreement, being **one** of the executors of the estate, as he had not yet obtained probate and did not do so until September 2006. If he did not execute the agreement in that capacity, and one could therefore argue that he, on behalf of the estate, cannot be said to have acknowledged the debt, then the defence

of limitation of action as set out above as outlined in the Statute could be applicable. It would be a serious question to be tried.

Issue (iii) - the preamble and Clause 9 of the Instrument of Guarantee

[40] Clause 18 of the instrument of guarantee makes it clear that the guarantee is not discharged by death. As a consequence the estate continued to be liable pursuant to the guarantee, and Franz Fletcher would have been one of the representatives of the estate subsequent to the death of Ruby Fletcher on 7 July 2000 and then the sole executor appointed on the grant of probate in September 2006.

The preamble to the instrument of guarantee states as follows:

> "IN CONSIDERATION OF CENTURY NATIONAL BANK LIMITED (herein called the 'Bank') agreeing at the request of the undersigned and each of them if more than one to deal with or to continue to deal with or to continue to deal with KINGSTON ARMATURE & DYNAMO WORKS LIMITED (hereinafter called 'the Customer') in the way of its business as a bank the undersigned and each of them, if more than one, hereby jointly and severally guarantee(s) payment to the Bank of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the Customer to the Bank or remaining unpaid to the Bank whether arising from dealings between the Bank and the Customer or from other dealings or proceedings by which the Bank may be or become in any manner whatever a creditor of the Customer, and wherever incurred, or whether incurred by the Customer alone or with another or others and whether as principal or surety, including all interest, commissions legal and other costs, charges and expenses (such debts and liabilities being herein called the 'guaranteed liabilities'), the liability of the undersigned hereunder being limited to the sum of UNLIMITED Dollars with interest from the date of demand for payment at the rate or rates mentioned in paragraph 5 hereof."

Clause 9 of the instrument of guarantee reads as follows:

> "Without prejudice to or in any way limiting or lessening the Guarantor's liability and without obtaining the consent of or giving notice to the Guarantor, the Bank may discontinue, reduce, increase or otherwise vary the credit of the Customer, may grant time, renewals, extensions, indulgences, releases and discharges to and accept compositions from or otherwise deal with the Customer and others, including the Guarantor and any other guarantor as the Bank may see fit, and the Bank may take, abstain from taking or perfecting vary, exchange, renew, discharge, give up, realize on or otherwise deal with securities and guarantees in such manner as the Bank may see fit, and the Bank may apply all moneys received from the Customer or others or from securities or guarantees upon such parts of the guaranteed liabilities as the Bank may see fit and change any such application in whole or in part from time to time."

The learned trial judge found that based on any true interpretation of the above provisions, clause 9 would have embraced the compromise effected by the agreement, and he said that since Franz Fletcher had knowledge of its terms and had been involved in the negotiations leading up to its conclusion, the estate was bound by the agreement. But as indicated above the issue would arise as to whether the agreement was signed by him as representative of the estate, and also whether the knowledge of its terms were or could be imputed to the estate. If this finding by the learned trial judge is not correct, then there may not have been any acknowledgment of the debt, (which in any event could have been after the entitlement to recover the debt had been extinguished). The defence of limitations of actions could therefore be applicable, and if the mortgages may have been extinguished then the respondent would be without any recourse in relation to the property Banana Walk, the subject of the security. The

respondent sought to say that the terms of the guarantee did not require any consent of the guarantor and or any signature to the agreement for the guarantor to be bound, but in my view the actions of the respondent initially relying on the agreement for its efficacy and enforcement of the debt, make this approach somewhat insincere and, even if of some merit, may not find favour with the court ultimately. These issues would all pose serious questions to be tried.

Issue (iv) the equitable right of redemption

[41] There is no question that there is value in the equity of redemption, and that the mortgagor has a right to redeem the mortgage. However the law is clear that this is so on payment of all the monies outstanding including interest, attendant costs, charges and expenses. The issue in this case is, since there were a suite of properties mortgaged initially to the bank to secure the loans extended to the company, can one of those properties be sold to reduce the indebtedness, particularly if all the proceeds of sale are given to the mortgagee? It would seem that prima facie there could be no problem with that course of action as each property does have a finite value and the mortgagee's interest in the same is really only related to the liquidation of the debt. Part 66 of the CPR recognizes the filing of a fixed date claim form by a mortgagor or mortgagee for certain reliefs including the sale and/or possession of the mortgaged property and the redemption of the mortgage. This latter remedy is claimed in this action. Ruby Fletcher's estate continues to hold the registered legal interest in Banana Walk subject to the respondent's legal mortgage. Both are registered legal interests on the Certificate of Title, and both therefore hold the power to transfer the legal estate. I

do not hold the view that the equitable right of redemption can override the mortgagee's registered interest, similarly the mortgagee cannot deal with the mortgaged property without taking into consideration the rights of the mortgagor, in that the property must be sold for a reasonable value and the mortgagee must account to the mortgagor for the full proceeds of sale and remit to the mortgagor any monies in excess of the mortgage debt. The difficulty which arises in this matter is that the value of Banana Walk does not cover the entire mortgage debt, and the mortgagor has covenanted with the mortgagee, "Not to lease let or demise or part with the possession of the mortgaged lands or any part or parts thereof during the continuance of this security without the express consent in writing of the Bank first had and obtained" (clause 1 (d)). This provision seems very clear. The undisputed facts are that the applicant entered into the agreement for sale without first seeking the written consent of the mortgagee. This was sought after entering into the sale of the property. Further, possession has been given to the 2nd claimants. However, the mortgagee has not given its consent for the transaction. Years have passed, and the property has changed in value due to the efforts of the 2nd claimants, they having made the same their matrimonial home. The mortgagee is aware of this and is claiming the increased value of Banana Walk due to the fact that the 2nd claimants have acted with their eyes wide open and cannot claim that they are purchasers for value without notice of the prior registered legal interest of the respondent, and so have acted to their peril. The issue which must arise though is, ought the court to allow the mortgagee to stand by, and withhold its consent, perhaps unreasonably, with the hope to obtain the enhanced

value of the property to settle the indebtedness. Additionally what would be the effect on the mortgagee's rights to withhold consent if the mortgages and the rights of recovery thereunder have been extinguished? The mortgagor's right to redeem the mortgage or any assignee of that right could proceed to do so.

[42] These are all issues which would have to be determined at a trial. In my view it does appear that the applicant has serious issues to be canvassed on appeal and in those circumstances, the applicant should be entitled to an injunction so as not to render the appeal nugatory (see ***Polini v Gray*** at page 446 per Cotton LJ). In considering whether damages would be an adequate remedy the dicta of Lord Hoffmann 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. Additionally, as the case relates to the restraint of the exercise of the powers of sale of the mortgagee, I am of the view that the principle most applicable to the facts of this case is that to be distilled from ***Brady v Jamaica Redevelopment Foundation & Ors*** which was also a case in which the mortgagor was claiming that the mortgage was null and void, although in that case that claim was based on the fact that the mortgagor's position was that he had not signed the relevant mortgage documents, and that he had not given authority to anyone to pledge his property as security. In that case the court allowed an appeal to set aside conditions imposed on the grant of the injunction in the court below and Cooke JA said this, "The correct distinction is between cases where the issue is in respect of the amount of money owed under a valid mortgage and cases where the validity of the mortgage is

challenged [***see Global Trust***]. In the instant case the appellant is challenging the mortgage document as it relates to him" (paragraph 7).

[43] In the instant case the validity of the mortgages are challenged and indeed the learned trial judge has indicated a prima facie view that they are statute barred but were revived by acknowledgment which is vigorously challenged also.

[44] On the basis of the foregoing I would not grant a stay of execution of the judgment of Pusey J, it not being applicable in the circumstances, as indicated previously, but I will grant an interim injunction restraining the sale of Banana Walk pending appeal, or until further order, on the applicant's usual undertaking as to damages. Costs of the application will be costs in the appeal.