[2015] JMCA App 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 90/2015

APPLICATION NO 151/2015

BETWEEN	**DENNIS ATKINSON**	**APPLICANT**
RESPONDENT	**DEVELOPMENT BANK OF JAMAICA LIMITED**	**RESPONDENT**

Joseph Jarrett instructed by Joseph Jarrett & Co for the applicant

Mrs Sandra Minott Phillips QC and Miss Rachel McLarty instructed by Myers, Fletcher & Gordon for the respondent

22 September and 20 October 2015

IN CHAMBERS

PHILLIPS JA

[1] This is an application for a stay of execution pending appeal of the judgment of E Brown J delivered on 31 July 2015.

Background

[2] The facts stated herein are gleaned from the affidavit of the applicant in support of a fixed date claim form, both filed on 16 October 2013, and the affidavits of Sheron

Henry filed on 11 November 2013 and Kenneth Tomlinson filed 10 December 2013, both in response to the applicant's fixed date claim form filed on 15 October 2013.

[3] The applicant is a businessman, hotelier and 2nd mortgagee of Ocean Sands Resorts Limited situated at 14 James Avenue, Ocho Rios in the parish of Saint Ann and registered at Volume 1269 Folio 97 of the Registered Book of Titles (the property).

[4] The respondent is a company duly incorporated with offices at 11a-15 Oxford Road, Kingston 5 in the parish of Saint Andrew and the 1st mortgagee of the property.

[5] By an agreement dated 30 March 1998, the applicant obtained a loan of US$308,106.00 from the respondent to expand and upgrade the property, which was then owned by the applicant. The respondent's interest was registered on the certificate of title to the property. The loan fell into arrears, and with the respondent's approval, the applicant sold his interest in the property to Cash Plus Development Limited (Cash Plus) for US$1,000,000.00 by way of cash and a vendor's mortgage of US$668,116.28. The transfer was effected by an instrument dated 9 July 2007 and was registered on the title to the property on 4 September 2007. Cash Plus thereby became the registered owner of the property.

[6] The respondent was a party to the transfer dated 9 July 2007 and, under that transfer, Cash Plus assumed liability for the payment of the total sum outstanding to the respondent, thereby making Cash Plus the mortgagor, the respondent the 1st mortgagee and the applicant the 2nd mortgagee. A lump sum of US$250,000.00 was

paid by Cash Plus to the respondent to be followed by monthly installments, but Cash Plus defaulted on payments on the debt.

[7] When Cash Plus defaulted on its payments to the respondent, the applicant served a statutory notice on Cash Plus and began to occupy the property. The applicant attempted to obtain revenue from the property by renting rooms and effecting renovations in an attempt to attract visitors, but these efforts proved futile and the loan fell into further arrears.

[8] Cash Plus later became bankrupt and the Trustee in Bankruptcy obtained an injunction prohibiting registration of any dealings in the property until further order of the court. That order was noted on the title of the property on 2 May 2009 by the Registrar of Titles. However, this injunction was later discharged on an application made by the respondent, at the applicant's request, which was noted on the certificate of title on 12 May 2009.

[9] To realize its mortgage security, the respondent decided to sell the property pursuant to its instrument of mortgage and on 30 September 2010, engaged the services of Kenneth Tomlinson, managing consultant and managing director of Business Recovery Services Limited with offices at 11 Connolley Avenue, Kingston 4 in the parish of Saint Andrew to assist in this endeavour.

[10] The property was first advertised for sale on 3 December 2010 at a value of US$1,900,000.00 and was subsequently advertised for sale 12 other times in various

newspapers. The best offer received was US$1,300,000.00 but it was rejected when the attorney making the offer refused to disclose the identity of his client. The other offers received were low, ranging from JA$3,000,000.00 to JA$15,500,000.00. Then Digiorder (Jamaica) Limited made an offer of JA$50,000,000.00 which was ultimately accepted by the respondent. By letter dated 9 October 2013, the applicant was advised that the property would be sold for JA$50,000,000.00 to Digiorder (Jamaica) Limited.

[11] The two most recent valuation reports in respect of the property had been effected by CD Alexander Company Realty Limited and Mr Theo Dixon. CD Alexander in an appraisal of the property dated 30 March 2012, that was attached to the affidavit of Kenneth Tomlinson filed 10 December 2013, stated the value of the property at JA$149,000,000.00 and the forced sale value at JA$105,000,000.00. The valuation report by Mr Theo Dixon dated 13 October 2013, attached to the affidavit of Dennis Atkinson filed 15 October 2013 stated the market value of the property at JA$207,088,000.00 and the forced sale value at JA$150,000,000.00.

[12] Aggrieved at, among other things, the low sale price of the property, the applicant brought a claim against the respondent, Business Recovery Services Limited, Kenneth Tomlinson and Digiorder (Jamaica) Limited. This claim was filed on 16 October 2013 by fixed date claim form which was later amended and filed on 7 February 2014, in which he sought the following orders:

> "1. A declaration that the Claimant (the [applicant]) is a mortgagee in possession of the property known as 14 James Avenue, Ocho Rios, in the parish of St. Ann, registered at Volume 1269 Folio 97 of The Registered Book of Titles, whose

mortgage is registered as No. 1486323 on the 4th day of September, 2007 for the sum of Six Hundred and Sixty Eight Thousand One Hundred and Sixteen Dollars and Twenty Eight Cents United States Currency (US$668,116.28).

2. A declaration that any sale of the property registered at Volume 1269 Folio 97 must be at a price, which takes into account the claimant's interest as a mortgagee and must be at the market value not less than the forced sale value.

3. A declaration that the proposed sale of the property registered at Volume 1269 Folio 97 by the 1st Defendant (the respondent) to the 4th Defendant (Digiorder (Jamaica) Limited) for a consideration of $50,000,000.00 Jamaican Dollars was below the forced sale value and a breach of the 1st Defendants obligations as a trustee for the Claimant and the mortgagor/s.

4. A declaration that the proposed sale of the property registered at Volume 1269 Folio 97 by the 1st Defendant to the 4th Defendant for a consideration of $50,000,000.00 Jamaican Dollars was fraudulent.

5. A declaration that the 2nd and 3rd Defendants (Business Recovery Services Limited and Kenneth Tomlinson respectively) as the agents of the 1st Defendant) are under an obligation to ensure that the property registered at Volume 1269 Folio 97 is sold at the market value or not below the forced sale value and that any prospective purchaser/s recommended by them meets the relevant criteria of being able to purchase at the market value or forced sale value.

6. An Order setting aside the sale of 14 James Avenue, Ocho Rios, St. Ann to the 4th Defendant who was at all material times the tenant of the Claimant and was aware that the sale to them was at a gross under value and fraudulent.

7. In the alternative, Damages jointly and severally for negligence and/or breach of fiduciary duty and/or breach of statutory duty that occurred when 14 James Avenue, Ocho Rios, St. Ann was sold at a gross undervalue by the 1st, 2nd and 3rd Defendants, acting in concert with each other, to the 4th Defendant for a consideration of $50 million Jamaican dollars.

8. Alternatively, the sum of $157,000,000.00 being the difference between the sale price and the true market value at the time of the sale against the 1st, 2nd and/or 3rd Defendants jointly and severally, less the amount owing by the Claimant to the 1st Defendant.

9. Interest on the said sums at the commercial rate of 30% per annum or such reasonable commercial rate assessed by the court.

10. Costs.

11. Such other remedies deemed appropriate by this Honourable Court.

12. Liberty to Apply."

[13] The claim was later discontinued against Business Recovery Services Limited, Kenneth Tomlinson and Digiorder (Jamaica) Limited. The orders sought numbered 4 - 9 of the amended fixed date claim form listed in paragraph 12 herein were abandoned, so only orders 1 - 3, 10 - 12 remained, and were pursued.

[14] The claim was heard by E Brown J on 9 July 2015 and he delivered a judgment on 31 July 2015. He considered three main issues: (i) whether the applicant was a mortgagee in possession; (ii) at what price should the property be sold; and (iii) whether the respondent was a trustee for the applicant as 2nd mortgagee.

[15] In considering whether the applicant was a mortgagee in possession, the learned judge examined the claim made by the applicant that because he, inter alia, had served a statutory notice of possession on Cash Plus, had tried to rehabilitate the property and had rented the property, he had proved that he was in physical possession of the property. E Brown J also relied on cases such as **Sunshine Dorothy Thomas v**

Winsome Blossom Thompson et al [2015] JMCA Civ 22, section 109 of the Registration of Titles Act and various texts from learned authors to outline the ways in which a mortgagee can take possession of a property and when a 2nd mortgagee may enter into possession of the property. He then found that since no order for possession had been made in favour of the applicant against Cash Plus, Cash Plus remained the owner in possession of the property. He also opined that as a 2nd mortgagee, the applicant's rights were subject to those of the respondent who was the 1st mortgagee. When Cash Plus defaulted on its payment, he concluded that the right to enter into possession of the property went to both the respondent and the applicant, but since the applicant was a 2nd mortgagee, the applicant's right to possession of the property was second to that of the respondent. Without an application to recover possession from Cash Plus, and since the applicant's exercise of his rights was second to that of the respondent, the applicant was not a mortgagee in possession.

[16] The second issue examined by E Brown J was the appropriate price at which the property should be sold. The learned judge relied on cases such as **Moses Dreckett v Rapid Vulcanzing Company Limited** (1988) 25 JLR 130 and **Cuckmere Brick Co. Ltd v Mutual Finance Ltd** [1971] 2 All ER 633 to show that "since a prior mortgagee has an obligation to exercise the power of sale with the same circumspection in relation to a subsequent mortgagee, as he would a mortgagor, the respondent is bound to consider the interests of the claimant". However, he went on to find that this did not mean that the price at which the respondent sold the property must be set having regard to the interests of the applicant. He found, relying on **Dreckett**, that a

mortgagee has a right to accept the highest bid, even if it is below the ascertained true market value. In the opinion of the learned judge, the respondent had deployed various mechanisms in order to obtain the best possible price, and in so doing he had considered the applicant's interest. Once this duty to the parties had been discharged, the market price will ultimately be determined by the market forces.

[17] The final issue E Brown J addressed was whether the respondent was a trustee for the applicant as 2nd mortgagee. He relied on the learned authors of Halsbury's Laws of England 4th edition reissue volume 32, paragraph 316 and the case **Weld-Blundell and Others v Synott** [1940] 2 KB 107 and stated that in exercise of the power of sale, the mortgagee is not a trustee for a mortgagor, and the mortgagee is not a trustee for a subsequent mortgagee. The mortgagee only becomes a trustee when there is excess in respect of any surplus arising from the sale of the mortgaged property. Since there was no trust relationship between the applicant and the respondent, the respondent was not in breach of a trust by agreeing to sell the property below the forced market value.

[18] After canvassing these issues, E Brown J then made the following orders:

> "1. The declarations sought by the Claimant are refused.
>
> 2. Judgment issues for the 1st Defendant, Development Bank of Jamaica Limited, on the Claimant's claim;
>
> 3. Costs are awarded to the 1st Defendant against the Claimant to be agreed or taxed;
>
> 4. The 1st Defendant is permitted to prepare this Formal Judgment."

The application

[19] The applicant filed a notice and grounds to appeal the judgment of the learned E Brown J and by amended notice of application for court orders dated 4 September 2015 sought the following orders:

1. That there be a stay of execution of the final judgment of E. Brown J delivered on 31 July 2015 pending the outcome of the appeal of the applicant Dennis Atkinson.
2. Costs to be costs to the applicant to be agreed or taxed.

[20] The grounds of appeal advanced in support of this application are summarized as follows:

1. E Brown J erred when he failed to consider the fact that the applicant was in receipt of rent from Digiorder (Jamaica) Limited at the time when the claim was filed in court pursuant to section 109 of the Registration of Titles Act.
2. E Brown J failed to consider that the applicant served a statutory notice on the registered mortgagor Cash Plus Development Limited in 2008 pursuant to his right to enter into possession of the property after Cash Plus defaulted on its vendor's mortgage, which it had entered into with the applicant with the consent and approval of the respondent.
3. E Brown J erred in finding that the respondent had not consented to the applicant taking possession of the property.

4. The trial judge erred in not accepting that the respondent acted in bad faith when they accepted the offer of JA$50,000,000.00 from Digiorder for the property and took no reasonable precaution to obtain the true market value.
5. E Brown J erred in not considering the argument that the offer made by Digiorder to the respondent could have been tainted by collusion.
6. E Brown J failed to consider the fact that the applicant wrote to the respondent asking it to halt the sale.
7. The learned judge erred in not considering the fact that there had been no depreciation in the value of the property since, at the time when the claim was filed, the property was valued at JA$207,088,000.00 and the forced sale value was JA$150,000,000.00. Under these circumstances, the offer from Digiorder was unreasonable.
8. Having regard to the overriding objective, E Brown J ought to have recognized that the respondent was not being fair when it disregarded the applicant's interest in the property by selling it at an undervalue.
9. Without a stay of execution of E Brown J's judgment, pending appeal, the applicant will suffer financial ruin. The applicant's interest in the property was US$1,000,000.00 and at 65 years

old, his interest was all he had 'left in the world'. Should the sale proceed he would be left destitute in his senior years.

Applicant's submissions

[21] Counsel for the applicant, Mr Joseph Jarrett, submitted that, because the applicant had over JA$100,000,000.00 invested in the property, if the application for a stay is refused the property may be sold and the applicant will lose his interest therein. He further asked the court to consider the fact that the applicant tried to generate revenue by renovating and renting the property, which proved futile, and he also tried to sell the property to discharge the mortgage, but also without success.

[22] He urged that the discretion of the court ought to be exercised to grant a stay and not to be shackled by previous rulings in relation to the stay of a declaratory judgment. He submitted that, in deciding to exercise the discretion to grant a stay, I should consider the fact that E Brown J failed to consider the valuation reports submitted by both parties for the property, which far exceeded the price, which had been offered by Digiorder. In fact, by the time Digiorder had made its offer, the 2012 valuation by CD Alexander Realty would, he submitted, have been out of date, as the property would have undergone extensive renovations. He also submitted that I should have regard to the overriding objective to do justice by granting a stay to prevent any sale of the property at an undervalue.

Respondent's submissions

[23] Mrs Sandra Minott-Phillips QC, for the respondent, asked that the application be dismissed on the basis that the orders made by E Brown J were declaratory in nature and cannot be stayed. She posited that declaratory orders do not create rights but merely indicate what those rights have always been. In placing reliance on **Norman Washington Manley Bowen v Shahine Robinson and Neville Williams** [2010] JMCA App 27, learned Queen's Counsel further asserted that a stay of execution must attach to a right created from the judgment to be stayed. Since the declarations sought were pointedly refused and E Brown J's orders did not create any rights for the respondent, the order cannot be the subject of a stay by this court.

[24] Mrs Minott-Phillips, also contended that E Brown J's order as to costs cannot be the subject of a stay as no arguments had been proffered on that basis before me. Reference was made to the case **Angelo Perotti v Kenneth Corbett Watson et al** [2001] EWCA Civ 506 to show that, absent special circumstances, orders for costs are not stayed.

[25] Mrs Minott-Phillips also took issue with the application for the stay itself. She noted that in the notice of application for court orders dated 4 September 2015, it is stated that the grounds upon which the applicant intended to rely were stated in the affidavit of Dennis Atkinson sworn to on 13 August 2015. It was submitted that the application therefore did not comply with rule 11.7 of the Civil Procedure Rules, 2002 (CPR) because it did not state the grounds upon which the applicant intended to rely,

and further was in violation of rule 30.3(1) of the CPR, which provides that an affidavit may contain facts as the deponent is able to prove from his or her own knowledge, but, in addition, had contained the grounds of the application. Consequently, as the grounds upon which the applicant intended to rely were not stated in the application, the application should be dismissed.

Issues and analysis

[26] Based on the submissions of both parties there seem to be four main issues for determination (i) whether an order can be made by a single judge to stay a declaration; (ii) whether there might be an order to stay costs; (iii) was the application properly drafted and (iv) what rights are there existing with regard to the 2nd mortgagee in respect of this application.

Issue 1: Stay of declarations

[27] The jurisdiction of a single judge to grant a stay is confirmed in rule 2.11(1)(b) of the Court of Appeal Rules, 2002 (CAR), which stipulates that a stay of execution can be granted for any judgment or order against which an appeal has been made pending the determination of the appeal. The principles governing the exercise of a judge's discretion to stay the execution of a judgment have been examined in several authorities such as **Hammond Suddard Solicitors v Agrichem International Holding Ltd** [2001] EWCA Civ 2065, **Milford Trading Company Limited v Garth Pearce** SCCA 31/2009, Application No 46/2009 judgment delivered 28 May 2009, **Caribbean Cement Company Ltd v Freight Management Ltd** [2013] JMCA App

29 and **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA Civ 29. I recently analyzed these cases in **Ferrnah Brown v Marjorie McClure** [2015] JMCA App 19, where at paragraph [32] of the judgment I said that in exercise of a discretion on whether or not to grant a stay, a judge should have regard to the following:

> "1. The applicant's prospect of success in the pending appeal.
>
> 2. The real risk of injustice to one or both parties recovering or enforcing the judgment at the end of the appeal."

[28] However, before making a determination as to whether or not I should proceed to consider whether to exercise the jurisdiction to grant a stay of execution of the judgment, the nature of the order given must be analyzed to ascertain whether it can properly be the subject of a stay. In my view, it is quite evident that the orders sought by the applicant numbered 1, 2 and 3 and stated in paragraph [12] herein were declarations that E Brown J refused to grant. There have been various cases before this court, which had considered the issue of whether declarations ought properly to be the subject of a stay.

[29] My learned brother Morrison JA (as he then was), in the well reasoned judgment of **Norman Washington Manley Bowen v Shahine Robinson**, held that the court had no power to stay a purely declaratory order. He stated that declarations merely pronounce and do not create rights that can be enforced by the court. He also mentioned the case **Director of Public Prosecutions v Mark Thwaites et al** SCCA Nos 13 & 14/2009, Application Nos 38 & 39/2009, judgment delivered 5 March 2009,

where an application was made before this court to the full court to stay execution of a series of declarations that had been granted and where it had been found that there was nothing on which the court could grant a stay.

[30] In **The Board of Management of the Bethlehem Moravian College v Dr Paul Thompson and The Teachers Appeals Tribunal** [2012] JMCA App 19, the Board of Management sought a stay of the decision of Daye J granting an order of certiorari to quash the decision of the Board to dismiss Dr Thompson. In relying on **Norman Washington Manley Bowen v Shahine Robinson** and recognizing the distinction between orders that were declaratory rather than executory, I found that the order of certiorari could not be the subject of a stay since it did not direct the parties to act in a certain way, order the payment of money, order reinstatement, or restrain any party from doing any act and so the order was not one that could be enforced by execution.

[31] Similarly, in **Carmen Farrell et al v Lascelle Reid et al** [2012] JMCA App 16 the applicants also sought a stay of orders that were purely declaratory. In paragraph [27] of the judgment, again in reliance on the dictum of Morrison JA in **Norman Washington Manley Bowen v Shahine Robinson**, I said:

> "It is clear that the rules permit a single judge of appeal to grant a stay of execution, of a judgment, as well as any order, against which an appeal has been filed. As indicated, counsel for the applicant withdrew her application for stay of the execution of the judgment of Mangatal J, on the basis of the decision of Morrison JA in the **Norman Washington Manley Bowen** case, which in my view was correct. In delivering his judgment Morrison, JA referred to two leading texts on Declaratory judgments and Declaratory Orders, to

> wit, by Zamir & Woolf and Mr P. W. Young QC respectively, which stated that whereas in an executory judgment the court determines the rights of the parties and then orders the parties to act in a certain way, either to pay money or to refrain from interfering with a party's rights, which can be enforced by the court by levying on a person's goods or by imprisoning him for contempt of court, a declaratory order declares the parties' rights but does not contain an order which can be enforced. Indeed in the latter text at para 2408, Mr Young , in confirming that the declaratory relief embraced no sanction stated: "The effect of the court's order is not to create rights but merely to indicate what they have always been… because of this, if an appeal is lodged against a declaratory order conceptually there can be no stay of proceedings". The order made by Mangatal J against the applicant in favour of the 3rd respondent, was in essence declaratory in nature, a stay of execution of which was therefore inapplicable."

[32] From an analysis of the authorities, it is clear that declaratory orders cannot be stayed. In the present case, the declaratory orders that were sought were refused and so absolutely no rights were created for either party by E Brown J's refusal of the declarations sought. One can go even further to say that E Brown J's refusal of the declarations sought by the applicant did not compel either party to do something, restrain either party from doing any act, order the payment of damages or make any order that required enforcement. Consequently E Brown J's refusal of the declarations sought cannot be stayed and the application for stay of execution in relation to the declaration to the learned trial judge's refusal to grant the declarations must therefore be refused.

Issue 2: Stay of costs

[33] I am unwilling to embark upon any analysis as it relates to costs since there were no arguments advanced by the applicant in relation to this issue. No evidence had

been placed before me as to the amount of costs payable to the respondent and whether it was exorbitant. There is also no information in respect of the applicants ability or inability to pay costs and whether, by effecting payment before the appeal, the applicant would be placed in financial ruin. I am unsure as to whether payment of costs would prevent the applicant from proceeding with his appeal. Mrs Minott- Phillips submitted that costs should only be stayed in exceptional circumstances, which was not challenged. Consequently, I am unable to consider the issue as to whether a stay of costs should be ordered and in the circumstances, I would not grant a stay of costs.

Issue 3: Effect of improperly drafted application

[34] Although I agree with counsel for the respondent that the grounds for the application ought not to be set out in the affidavit and referred to in that way in the application, in the instant case, the grounds originally contained in the affidavit were subsequently, in compliance with the rules, also stated in the amended application itself, dated the 3rd and filed on 4 September 2015. So, if this were the only challenge to the application it would not have succeeded.

Issue 4: Rights of the 2nd mortgagee

[35] Mr Jarrett submitted that the applicant has over US$1,000,000.00 interest in the property and the fact that the property was being sold at an undervalue is proof that the respondent has completely disregarded the applicant's interest. Issues as to the rights of a 2nd mortgagee and the principles governing the mortgagee's exercise of a power of sale have been explored in various texts and authorities.

[36] The applicant's rights as 2nd mortgagee were explained in Tolley's Claims to the Possession of Land by Adrian Davis and Emma Godfrey, published 30 April 2015 at part F1.6 which said that:

> "Subsequent mortgagees have the same powers as first mortgagees, but they can only exercise their powers subject to the rights of prior mortgagees… A second mortgagee who has taken possession is obliged to yield possession should the first mortgagee seek to displace him. Because the title of the second mortgagee is derived from the mortgagor's residual interest after the grant of the first mortgage, the second mortgagee is in the same position as the mortgagor was after the grant of the first mortgage."

[37] The learned authors of Halsburys Laws of England, 2010, Volume 77 at paragraph 458 noted that:

> "He (the mortgagee) is not obliged to exercise the power of sale even if advised to do so, or if the asset is depreciating, however advantageous a sale might be to the mortgagor. He is not obliged to delay in the hope of obtaining a higher price, or if redemption is imminent or until after the pursuit of an application for planning permission or the grant of a lease of the mortgaged property, though the outcome of the application and the effect of the grant of the lease may be to increase the market value of the mortgaged property and price obtained on sale. A mortgagee is entitled to sell the property in the condition in which it stands without investing money or time in increasing its likely sale value. He is entitled to discontinue efforts already undertaken to increase the likely sale value in favour of such a sale. He can decide if and when to sell on the basis of his own interests".

[38] The case of **Waring (Lord) v London and Manchester Assurance Company, Limited and Others** [1935] Ch 310 explores the mortgagee's exercise of a power of sale where the sale price is at an undervalue. In that case, the mortgagor sought an injunction to restrain completion of a sale on the ground that it was at an

undervalue and it was found that the only way that the sale could be set aside was to show that the mortgagee's power of sale was being exercised in bad faith. Crossman J at page 319 said:

> "…I can find no evidence showing anything like lack of good faith in the company's conduct with regard to the sale. The law, as stated by Kay J. in *Warner v. Jacob* (1), is perfectly clear. The learned judge there says: '**....** a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.' In my judgment, it is impossible on the facts of this case to conclude that the price is so low as in itself to be evidence of fraud. It is true that there is some suggestion that the Yorkshire company is willing to advance on mortgage an amount larger than that of the purchase money, which implies, presumably, that the value which the Yorkshire company puts upon the property must also be considerably larger. I do not consider, however, that that in itself is evidence of fraud. In my judgment there must be something far beyond the mere fact of under-value."

Nevertheless, greater analysis as to the extent of a second mortgagee's rights and interests, are matters to be explored and determined by the full court in the substantive appeal, and so I will make no further comment with regard to the duty of the mortgagee in the exercise of his power of sale and the basis on which he can be restrained.

Conclusion

[39] It follows therefore that the application for the stay of execution of E Brown J's judgment is refused. Costs of this application are awarded to the respondent to be taxed if not agreed.