

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 28/2013

APPLICATION NOS 104/2014, 111/2014, 146/2015 AND 149/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	CHARMAINE BOWEN	APPELLANT
AND	ISLAND VICTORIA BANK LIMITED	1ST RESPONDENT
AND	UNION BANK LIMITED	2ND RESPONDENT
AND	RBTT BANK JAMAICA LIMITED	3RD RESPONDENT
AND	FINSAC LIMITED	4TH RESPONDENT
AND	JAMAICAN REDEVELOPMENT FOUNDATION INC	5TH RESPONDENT
AND	DENNIS JOSLIN JA INC	6TH RESPONDENT

Raphael Codlin and Ms Annishka Biggs instructed by Raphael Codlin & Co for the appellant

Miss Carlene Larmond instructed by the Director of State Proceedings for the 1st and 4th respondents

William Panton instructed by DunnCox for the 2nd and 3rd respondents

Charles Piper QC and Demar Hewitt instructed by Charles E Piper and Associates for the 5th respondent

6th respondent not appearing or being represented

17, 20 November 2015 and 2 June 2017

BROOKS JA

[1] On 20 November 2015, we made the following orders:

1. The application by Ms Bowen to vary the orders of the single judge of appeal or alternatively for fresh injunction is refused.
2. The application by Jamaican Redevelopment Foundation Inc to vary the orders of the single judge of appeal is granted.
3. The orders of the single judge of appeal granting injunctions preventing the sale of properties at Apartment E 119 Chelsea Manor, Kingston 5 and No 14 Penfield Avenue, Forrest Hills both in the parish of Saint Andrew are set aside.
4. The order of the single judge of appeal granting a stay of execution of the judgment entered in the Supreme Court herein on 21 March 2103 is set aside.
5. Costs of Ms Bowen's application No 104/2014 to the respondents to be taxed, if not agreed.

6. Costs of Jamaican Redevelopment Foundation, Inc's application No 111/2014 and of the application before the single judge of appeal to be borne by Ms Bowen.
7. No order as to costs in respect of application Nos 146 and 149/2015.

At the time of delivering those orders, we promised to put our reasons in writing. We now fulfil that promise, but apologise for the delay in doing so.

[2] Although there were four applications listed for hearing before the court in this matter, only two were argued. The first was an application by Ms Charmaine Bowen, the appellant in the substantive appeal. Ms Bowen sought an order to prevent Jamaican Redevelopment Foundation Inc (JRF) from exercising a power of sale contained in two instruments of mortgage for properties for which she is a registered proprietor and mortgagor. The second application was by JRF. It sought an order removing any judicial impediment to its right to exercise its powers of sale contained in each of the mortgages.

[3] Both applications complained about the orders of a single judge of this court. In those orders, the learned judge of appeal granted a stay of execution of a judgment at first instance which struck out Ms Bowen's claim and granted judgment on JRF's counterclaim that Ms Bowen was indebted to it and that it was entitled to exercise its powers of sale contained in the respective mortgages. The learned judge of appeal further granted injunctions preventing JRF from exercising its powers of sale contained

in the respective mortgages on condition that Ms Bowen paid certain sums into an interest-bearing account or into court in respect of each mortgage. The stay of execution and the injunctions were to remain in place pending the determination of Ms Bowen's appeal or further order of the court.

[4] Ms Bowen complained that the learned judge of appeal ought not to have imposed the condition of the payments, and that this court should set the condition aside in each case. Alternatively, she contended, this court should grant fresh injunctions which do not contain any condition of payment.

[5] JRF argued that the learned judge of appeal erred in granting the stay and the injunctions. It contended that the judgment in its favour was in respect of its counterclaim against Ms Bowen to which she did not file a defence. It further argued that Ms Bowen did not appeal against that aspect of the judgment in the court below. In the circumstances, JRF argued, Ms Bowen has no justiciable issue before this court which could adversely affect JRF's exercise of its rights under the respective mortgages.

The orders of the learned single judge of appeal

[6] The learned single judge of appeal made the following orders:

"(i) There be a stay of execution of the judgment of Pusey J made on 21 March 2013 pending the determination of the appeal or until further orders of the court.

(ii) The 5th respondent [JRF] is hereby restrained from disposing of or otherwise dealing with the property located at Chelsea Manor until the determination of the appeal or further order, on condition that the applicant [Ms Bowen] pays into an interest-bearing account in the joint names of the attorneys-at-law representing the applicant and the 5th

respondent or into court, the sum of J\$1,200,000.00 within 30 days of this order, failing which this restraint shall lapse.

(iii) The 5th respondent is hereby restrained from disposing of or otherwise dealing with the property located at 14 Penfield Avenue, Forrest Hills until the determination of the appeal or further order, on condition that the applicant pays into an interest-bearing account in the joint names of the attorneys-at-law representing the applicant and the 5th respondent or into court, the sum of J\$3,500,000.00 within 30 days of this order, failing which this restraint shall lapse.

(iv) The time for filing the written submissions in support of the notice of appeal is extended until 27 June 2014.

(v) The appeal shall be fixed for the earliest possible hearing date.

(vi) Costs of the application to the applicant, to be taxed if not agreed.”

Ms Bowen’s application

[7] There were two basic elements to Ms Bowen’s application that the condition for payment should be set aside. The first was that she is unable to find the money to satisfy the condition. The second was that she has a legitimate challenge to the validity of the mortgage. Where either of those situations exist, she contends, the imposition of a condition of payment is inappropriate. Neither contention could have been accepted.

[8] Although Miss Biggs, on behalf of Ms Bowen, argued that Ms Bowen’s inability to pay was a factor that this court should consider, the contention runs counter to the now established general principle that the rights of a mortgagee to sell under powers of sale will not be restrained unless the mortgagor pays into court the sum claimed by the mortgagee. The authority for that principle in our jurisdiction is **SSI (Cayman)**

Limited and Others v International Marbella Club SA SCCA No 57/1986 (delivered 6 February 1987). Inability to satisfy the payment requirement is not a basis for deviation from that general principle. If it were, there would hardly be any case in which the condition would be imposed. It is usually inability to pay that lands mortgagors in the position where mortgagees threaten to exercise powers of sale.

[9] On the issue of the validity of the mortgages, Miss Biggs reminded the court that one of the exceptions to the general rule in **Marbella**, is where the validity of the mortgage is challenged by the mortgagor. Miss Biggs submitted that Ms Bowen challenges the validity of the mortgages.

[10] The basis for the proposed challenge to the validity of the mortgages, Miss Biggs submitted, is a failure to conform to the requirements for the proper execution of documents which were registered under the Registration of Titles Act. Learned counsel accepted, however, that that contention was not placed before the learned single judge of appeal. In fact, Ms Bowen's position before that judge was that there was no challenge to the validity of the mortgages at inception. The challenge was to its continuing validity for the purposes of the exercise of powers of sale.

[11] Neither of those challenges to the validity of the mortgages has any real prospect of success. The authorities, as summarised in **Mosquito Cove Ltd v Mutual Security Bank and Others** [2010] JMCA Civ 32, show that for a challenge to the validity of a mortgage to have any real prospect of success, it must either attack the very root of the mortgage, that is, that the mortgage did not ever properly come into

being, or demonstrate that it is clear that the mortgagee's claim is excessive. Ms Bowen's challenge was not along the line of the former aspect and therefore her application to vary the order of the learned single judge of appeal, failed in respect of that aspect. The aspect of her challenge concerning the amount of the mortgagee's claim failed for lack of evidence. It will be dealt with further, below.

[12] The other element of Ms Bowen's application was for fresh injunctions to be granted. The basis for this aspect of the application was a forensic report from a forensic accountant, Mr Collin Greenland. The report asserts, submitted Miss Biggs, that Ms Bowen has settled all her liability in respect of the mortgage loans. As a consequence the claim by the mortgagee would have been excessive. Mr Greenland's report was, however, not before either the judge in the court below or the learned single judge of this court. Miss Biggs applied for it be considered as fresh evidence. We declined to admit it as fresh evidence as it was the absence of such a report that resulted in Ms Bowen's claim being struck out in the court below. Any admission of such evidence would have been unfair and prejudicial to the pending appeal. Any such application would have had to have been formally made at the hearing of the appeal from the decision to strike out the claim. Without the report being admitted, the application for fresh injunctions also failed.

[13] Miss Biggs also sought to argue that an order of the learned single judge of appeal granting a stay of the order of the judge in the court below acted as a general restraint on JRF's powers of sale. That contention was not accepted. Firstly, the orders in the court below, apart from the striking out of Ms Bowen's claims, were mainly

declarations that JRF was the mortgagee of Ms Bowen's properties and were entitled to exercise all rights contained in the mortgages. The orders were as follows:

1. The Claimant's [Ms Bowen's] Statement of Case is struck out.
2. Judgment entered for all Defendants against the Claimant.
3. Judgment be entered for the Fifth Defendant [JRF] against the Claimant, Charmaine Bowen, and the Defendant to the Counterclaim, Aldith Ellis, in the following terms:-
 - a. Judgment for the Fifth Defendant in the sum of US\$431,125.65 with interest thereon as at September 4, 2012 at the rate of 15% per annum or US\$50.50 per day before as well as after Judgment made up as follows:

Principal:	\$122,887.94
Interest to September 4, 2012	270,147.29
Fees:	<u>38,090.42</u>
Total	\$431,125.65

- b. It is declared that the Fifth Defendant is the Mortgagee of the Claimant's property known as Apartment E 119 Chelsea Manor, Kingston 5, in the parish of Saint Andrew being all that parcel of land registered at Volume 1253 Folio 552 of the Register Book of Titles, the Fourth Defendant having assigned the Claimant's Mortgage thereof, initially given to the First Defendant, to the Fifth Defendant.
 - c. It is declared that until all sums which are due and payable by the Claimant under the Third Letter of Commitment have been duly paid, the Fifth Defendant is entitled to exercise all of its rights, as Mortgagee by assignment, in respect of the said property registered at Volume 1253 Folio 552 aforesaid.
 - d. It is declared that the Fifth Defendant is the Second Mortgagee of all that parcel of land known as 14

Penfield Avenue, Forrest Hills Gardens, Kingston 19 in the parish of Saint Andrew being the land registered at Volume 1096 Folio 858 of the Register Book of Titles being land owned by the Claimant and one Aldith Quivador Ellis as Joint Tenants, the Fourth Defendant having assigned the Claimant's and the said Aldith Quivador Ellis' Mortgage thereof, initially given to the First Defendant, to the Fifth Defendant.

- e. It is declared that until all sums which are due and payable by the Claimant under the Third Letter of Commitment have been duly paid, the Fifth Defendant is entitled to exercise all of its rights as Second Mortgagee by assignment, in respect of the said property registered at Volume 1096 Folio 858 aforesaid.
- f. Costs of the proceedings to the 2nd, 3rd and 5th Defendants to be paid by the Claimant."

[14] A stay of those orders could not have affected the powers that were independently contained in the instruments of mortgage.

[15] The second difficulty with Ms Biggs' submission was that the orders of the learned single judge of appeal granting injunctions in respect of each of the properties would have been indicative that the order for the stay was not intended to apply to the powers of sale under the mortgages.

[16] Ms Bowen's application failed on that basis as well.

JRF's application

[17] JRF's application was for the order of the learned single judge of appeal, staying the execution of the judgment, to be set aside. Mr Piper QC, on behalf of JRF, stressed that although JRF had filed a counterclaim that monies, which were secured by the

mortgages, were owed to it, there was no defence to that counterclaim. Learned Queen's Counsel pointed out that JRF made an application for judgment on the counterclaim in the court below. That application was supported by an affidavit of Mr Jason Rudd.

[18] Learned Queen's Counsel submitted that there was, however, no issue raised by Ms Bowen disputing the contents of the counterclaim, or of Mr Rudd's evidence contained in his affidavit. There was, therefore, no contest in the court below to the judgment on the counterclaim. It was wrong in those circumstances, Mr Piper submitted, for the learned single judge of this court to have ordered a stay of that judgment. He argued that there was no material on which it could be said that Ms Bowen had any real prospect of success in an appeal against the judgment on the counterclaim.

[19] Learned Queen's Counsel pointed out that the learned single judge of appeal had noted that the judge in the court below gave judgment on the counterclaim without mentioning the counterclaim in his reasoning. Mr Piper defended the decision of the judge in the court below by saying that for the judge below to have given judgment on the counterclaim must have meant that he considered the merits of the counterclaim and had satisfied himself that the counterclaim had been proved.

[20] Despite Mr Piper's forceful submissions, it cannot be denied that the learned single judge of appeal considered the fact of the counterclaim in coming to a decision to grant the stay of execution. The grant was an exercise of a discretion with which the

learned judge of appeal is vested. This court would not normally disturb the result of such an exercise unless it was proved to have been executed in circumstances where an important principle of law or salient facts were ignored or were misapplied.

[21] Mr Piper was, however, correct in his submissions that the learned single judge of appeal had no material on which to consider if Ms Bowen had any prospect of success on appeal. A counterclaim is a separate claim and requires a response from the original claimant, if that claimant disputes the counterclaim in whole or in part. Rule 18.8(1) of the Civil Procedure Rules stipulates that a defence must be filed to a counterclaim. In the absence of a defence, the party who filed the counterclaim is entitled to judgment thereon.

[22] JRF's counterclaim asserted that Ms Bowen was still indebted to it for monies secured by the mortgages. Ms Bowen filed no defence to the counterclaim. It is true that in her claim she asserted that she had repaid the debts. The failure to support that assertion has already been addressed above.

Conclusion

[23] It is for those reasons that I agreed that the orders, set out at paragraph [1] hereof, should have been made.

SINCLAIR-HAYNES JA

[24] I have read, in draft, the reasons for judgment written by my brother Brooks JA. I agreed with the orders set out in that judgment as they were premised on the failure

of the applicant Ms Bowen to pay the sum of \$3,500,000.00 into court within the time stipulated.

P WILLIAMS JA (AG)

[25] I too have read the draft judgment of Brooks JA. It accurately records my reasons for the orders that the court made on 20 November 2015.