

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 77/07

**BEFORE: THE HON. MR. JUSTICE SMITH, J. A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)**

**BETWEEN PAULETTE HAMILTON APPELLANT
AND GREGORY HAMILTON 1ST RESPONDENT
AND RONHAM & ASSOCIATES LTD 2ND RESPONDENT
AND JAMAICAN REDEVELOPMENT FOUNDATION INC. 3RD RESPONDENT**

Gayle Nelson, Winston Taylor & Abraham Dabdoub, instructed by Gayle Nelson & Co., for appellant.

Bishop & Fullerton on record for the 1st & 2nd respondents

Mrs. Sandra Minott-Phillips & Ky-Ann Lee, instructed by Myers, Fletcher & Gordon for the 3rd respondent

November 28, 2007 & July 31, 2008

SMITH, J.A.

I have read in draft the judgment of Harris, J.A. I agree with her reasoning and conclusions and there is nothing further that I wish to add.

HARRIS, J.A.

1. In this appeal the appellant challenges an order of Sykes, J. refusing an application by her for an injunction.

2. The appellant and the 1st respondent are registered proprietors of property known as 8 Carmel Crescent in the parish of Saint Andrew, registered at Volume 1056 Folio 925. The 2nd respondent is a company in which the appellant and the 1st respondent are shareholders and directors. On June 2, 1998 the appellant and the 1st respondent acquired a mortgage from the Workers Savings and Loan Bank, on the security of 8 Carmel Crescent, for the use and benefit of the 2nd respondent.

3. On September 5, 2003 the mortgage debt was transferred to the 3rd respondent, a company incorporated in Texas in the United States of America and registered in Jamaica as an overseas company, it having purchased the debt from the Financial Sector Adjustment Company. The mortgage fell into arrears. The 3rd respondent sought to exercise its powers of sale under the mortgage and as a consequence advertised the property for sale.

4. On May 11, 2007, the appellant filed a Fixed Date Claim Form, claiming the following:

"1. A Declaration that the Claimant was induced to give a mortgage on her interest in Lot 182, Part of Cherry Gardens, registered at Volume 1056 Folio 925 of the Register Book of Titles and being the premises situated at 8 Carmel Crescent, Kingston 8 in the parish of Saint Andrew on behalf of the Second Defendant and her signature was procured by the undue influence of the First Defendant.

2. A Declaration that the security given by the Claimant on behalf of the Second Defendant is invalid.

3. An Order that the security in respect of the Claimant's interest in premises situated at 8 Carmel Crescent, Kingston 8 in the parish of Saint Andrew be released.

4. An injunction restraining the Third Defendant, by itself or by its servants and agents from taking steps to sell and transfer 8 Carmel Crescent, Kingston 8 in the parish of Saint Andrew.

5. Costs.

6. Such further and/or other relief as may be just."

5. On the date on which the Fixed Date Claim Form was filed, the appellant sought and obtained an *ex parte* interim injunction against the 3rd respondent for 14 days restraining it from exercising its powers of sale. After the expiration of the 14 days, the application for the injunction came on for hearing before Morrison, J (Ag.). Mr. Oswald James, the then attorney-at-law for the appellant, produced a copy of a letter dated November 23, 1998, from Delroy Chuck & Co. under the hand of Miss Helen Birch, to the Workers Savings and Loan Bank), stating that she had advised the appellant "of the legal implications and ramifications" of having the property as a security for the loan. As a consequence, the application was withdrawn.

6. On July 6, 2007, Mr. Gayle Nelson, acting for the appellant filed a new application for an injunction against the 3rd respondent. The matter was heard by Sykes, J. on July 10 and 12, 2007. He refused to grant the injunction.

7. The following grounds of appeal were filed:

" A. The Learned Judge erred in law in finding that if Workers Savings & Loan Bank Limited failed to send the Claimant for independent legal advice such failure did not render the agreement for mortgage of the matrimonial home null and void.

B. That the Learned Judge erred in law in arriving at such a conclusion without hearing any oral evidence as to the circumstances of the particular case.

C. That the Learned Judge erred in law in finding that the failure of the 3rd Defendant to send the Claimant for independent legal advice in respect to the Agreement to Restructure Existing Debt did not render the entire mortgage arrangements void and unenforceable.

D. The Learned Judge failed to consider the legal implications of the fact that that the 3rd. Defendant in backdating the Agreement to Restructure Existing Debt without the knowledge or authorization of the Claimant did render the said Agreement null, void and unenforceable.

E. The Learned Judge erred in failing to take into account the fact that Delroy Chuck & Co., whom the 3rd Defendant alleges gave the Claimant independent legal advice, were in fact the Attorneys-at-Law of the 1st and 2nd Defendants and therefore in those circumstances the Claimant did not receive independent legal advice the lack of which renders the mortgage void and unenforceable.

F. The Learned Judge erred in law in concluding that the 3rd. defendant was not under any legal duty to find out if Workers Bank had followed the guidelines set out in the case of Royal bank [sic] of Scotland plc v Etridge (No.2) [2001] 3 WLR 1021.

G. The Learned Judge erred in law in concluding that the 3rd Defendant is protected by Section 71 of The Registration of Titles Act in respect to any failure to take the steps set out in the said [sic] of Royal bank [sic] of Scotland plc v Etridge (No.2) [2001] 3 WLR 1021 and that the 3rd Defendant would only lose that protection if they were guilty of dishonesty.

H. The Learned Judge erred in law in concluding, despite fraud, that Section 71 of The Registration of Titles Act applied: but actual undue influence is a species of fraud. Like any other victim of fraud a person who has been induced by undue influence to carry out a

transaction which he/she, did not freely and knowingly enter into, is entitled to have that transaction set aside as of right."

8. The first issue arising is whether there was material before the learned judge on which an injunction could have been granted. The remedy of an injunctive relief is available to a claimant who can show that his right has been infringed. He must show that he is entitled to the relief. This requires him to demonstrate that there is a substantial question to be tried and that the status quo should be preserved pending the determination of that question and that damages are inadequate as a remedy.

9. The principle that the grant of an interlocutory injunction is fundamentally grounded on the fact that there must be material disclosing a serious question to be tried, was eminently propounded by Lord Diplock in the often cited case of ***American Cyanamid Co. v. Ethicon Ltd.*** [1975] 1 All ER 504 when at page 510 he said:

"The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, there is a serious question to be tried."

10. The preceding proposition must be reviewed against the background that a mortgagee will not be restrained from exercising his powers of sale because the amount due is in dispute. See ***Gill v. Newton*** [1866] 14 T.L. 240. A mortgagee, however, may be restricted in the exercise of his powers of sale if the mortgagor pays into court the amount claimed by the mortgagee as due and owing. ***Inglis & Anor v. Commonwealth Trading Bank of Australia*** 126 C.L.R. 161; ***Duke v. Robson*** [1973] 1 All E.R. 481 and ***SSI (Cayman) Limited & Ors. v. International Marbella***

Club S.A. SCCA 57/66 delivered on February 6, 1987.

11. It cannot be denied that a mortgagor and mortgagee relationship exists between the appellant and the 3rd respondent. However, a court cannot entertain an application for injunctive relief against the 3rd respondent unless it is shown that the appellant, as claimant, had placed before the court material to establish that she has a triable action against that respondent. That is, it must be demonstrated that she has real prospect of succeeding against the 3rd respondent at the trial.

12. Mr. Nelson argued that the 1st respondent persuaded the appellant to agree to put up the property as a security for the loan to Workers Savings and Loan Bank without her having the benefit of independent legal advice. He further argued that Miss Birch's letter stating that she had informed the appellant of the implications and ramifications of putting up the matrimonial home as security for a mortgage was untrue and that Messrs. Delroy Chuck and Company could not be regarded as having given her independent legal advice, as, they also acted for the 1st and 2nd respondents. He also argued that the agreement restructuring the existing debt disclosed terms and conditions which were not embodied in the previous agreement and this new agreement would also require the appellant to have been given independent legal advice.

13. Mrs. Minnott Phillips submitted that the relief sought was against the 1st respondent for procuring the appellant's signature to the mortgage instrument by reason of undue influence. There were no allegations that the Workers Savings and

Loan Bank had notice of any undue influence of the appellant which was allegedly perpetrated by the 1st respondent, nor was there any allegation of actual undue influence by the bank, she argued.

14. The learned judge, in determining whether the appellant ought to obtain the benefit of an injunction, at paragraph 16 said:

"I now consider whether an injunction should be granted in this case. In this jurisdiction, there is a very strong general rule that a mortgagee will not be restrained from exercising his power (sic) sale unless there are special circumstances which would prompt the court to restrain the mortgagee (see ***SSI (Cayman) Limited v. International Marbella Club SA***. SCCA No. 57/86 (delivered February 6, 1987). If the mortgagee is restrained it is usually on terms such as payment of the full sum [sic] claimed by the mortgagee or such other sum as stipulated by the Court. Mr. Nelson invited the court to say that his claim for undue influence was a very strong one with a very good prospect of success. Mr. Nelson's submissions have not satisfactorily accounted for JRF which has not been shown to have acted improperly when it acquired the mortgage debt. Indeed such information that was available to JRF indicated that Mrs. Hamilton had received independent legal advice (see letter from Delroy Chuck & Company dated January 23, 1998). I am aware that Mrs. Hamilton is challenging this position but I am looking at the matter from JRF's perspective when it purchased this debt. It would seem to me that if I were to restrain JRF it would have to be on terms that Mrs. Hamilton pays into court the amount alleged to be owed which is now at least \$65,000,000.00. There is no evidence that Mrs. Hamilton is able to pay this amount. That aside, Mrs. Hamilton would have to give an undertaking as to damages. There is no evidence of the financial health of Mrs. Hamilton, who, until she is extricated from the mortgage, is a debtor. This is an additional reason why I refused to grant the injunction."

At paragraph 19 he concluded that:

"19. JRF is protected by section 71 of the RTA. It is not under any obligation to find out whether WSLB complied with the Etridge guidelines and there is no evidence that JRF is guilty of actual dishonesty. This means that there is no serious issue to be tried between Mrs. Hamilton and JRF."

15. The learned judge's conclusion that there is no serious issue to be tried as between the appellant and the 3rd respondent is correct. However, his findings appear to be grounded in the belief that there is a pending claim against the 3rd respondent. This finding seems to suggest that a claim relating to an allegation of impropriety, namely, undue influence had been made by the appellant against the 3rd respondent. No allegations of any kind have been pleaded against the 3rd respondent despite it being named a party to the suit.

16. Mr. Nelson's submissions were erroneously predicated on the premise that the pleadings disclose a claim for undue influence against the 3rd respondent. His submissions were misconceived. The appellant seeks relief in respect of a claim founded upon undue influence. In order to establish her claim, all facts upon which she intended to rely against each defendant, should have been specifically pleaded against every party named as a defendant. The first paragraph of the claim, as framed, expressly alleges a cause of action against the 1st respondent with respect to undue influence. The fact that a mortgagor/mortgagee relationship exists between the appellant and the 3rd respondent does not automatically permit the court to hear and determine a claim

for undue influence against the 3rd respondent.

17. If the appellant wished to challenge the 3rd respondent, it would have been incumbent on her to have expressly made a claim against it. However, no cause of action, or any material statement of facts have been pleaded against the 3rd respondent. No allegations have been made against the 3rd respondent, that, at the time the appellant executed the restructuring agreement, it was done as a result of the undue influence of the 3rd respondent *or* that it knew or ought to have known that her signature to the mortgage with the Workers Savings and Loan Bank was procured by reason of undue influence of the 1st respondent. It is remarkable that despite Mr. Nelson's submissions as to the failure of the Workers Saving and Loan Bank to have sent the appellant to obtain legal advice, and that her signature to the mortgage had been obtained as a result of the undue influence of the 1st respondent, no allegations have been made against that bank that it had knowledge that the appellant had executed the mortgage by reason of undue influence of the 1st respondent, or, that the bank had caused the appellant to execute the mortgage to it due to undue influence, as rightly contended by Mrs. Minnott Phillips.

18. It is of importance to note that at the time the appellant executed the mortgage instrument with the Workers Saving and Loan Bank and the restructuring agreement with the 3rd respondent, she was not only a shareholder but also a director of the 2nd respondent on behalf of which the mortgages had been created. This notwithstanding, any issue as to whether the 1st respondent had exercised such powers over the

appellant so as to have unduly influenced her to execute the original mortgage with Workers Savings and Loan Bank and subsequently the restructuring agreement with the 3rd respondent, had not been pleaded and would therefore not be of relevance so far as the 3rd respondent is concerned. It follows that, the Fixed Date Claim Form having not grounded any allegations against the 3rd respondent, there would be no issue to be resolved as between the appellant and the 3rd respondent.

19. A further issue which is of manifest importance relates to the effect of section 71 of the Registration of Titles Act. It offers a harbour in which the 3rd respondent may seek refuge. The section provides:

"Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

20. The meaning of the section was explored by the learned judge. In so doing, he first gave consideration to the meaning of the word "proprietor" as defined by section 3 of the Registration of Titles Act. Section 3 states:

"Proprietor shall mean the owner solely, jointly or in common with any other person, whether in possession, remainder, reversion expectancy or in tail,

or otherwise, of lands or of a lease, mortgage or charge; and such word shall also include the donee of a power, or other person empowered or authorized to appoint or dispose;"

The learned judge observed that the word 'owner' within the context of section 3 is applicable to those who own a lease, mortgage or charge

20a. In his analysis of section 71 of the Act, at paragraph 12, the learned judge said:

"In section 71, fraud means actual dishonesty and not merely equitable fraud (see ***Asset Company Limited v. Mere Roihi*** [1905] A.C. 176; ***Enid Timoll-Uylett v. George Timoll*** (1980) 17 J.L.R. 257, 261D; ***Willocks v. George Wilson and Doreen Wilson*** (1993) 30 J.L.R. 297).. The significant point to note about section 71 is that it protects not only those taking an estate in land from a registered proprietor but also anyone contracting, dealing with or proposing to take any transfer from the proprietor of any registered mortgage. I say proprietor of a registered mortgage because of the definition of proprietor already stated. The person taking such a transfer from a registered mortgagee, just like the person taking a transfer from a registered proprietor of an estate in land, is not required to enquire or ascertain the circumstances under which the registered mortgagee came to be registered. The transferee of the mortgage is not affected by notice, actual or constructive or any unregistered interest despite the existence of any rule of law or equity saying the contrary. This provision in section 71 has wide consequences. The complex doctrines of notice, particularly constructive notice which as within it the doctrine of imputed notice does not apply to transfers covered by section 71. For the removal of doubt, the section concludes by pointing out that knowledge of any trust or unregistered interest shall not, without more, be imputed or treated as evidence of fraud. Unregistered interest in section 71 means unregistered interest in land and not a personal claim in equity that a claimant

may have against another party to a transaction involving either the grant of a mortgage or charge over land or the disposition of an estate in land. Mrs. Hamilton's claim of undue influence is not an unregistered interest in land. It is a personal claim she has against her husband."

He continued at paragraph 14 by saying:

"Section 71 clearly recognizes that there may be breaches of equitable principles that may entitle the mortgagor to have the mortgage set aside. If the mortgagor does not exercise that right before the mortgagee has transferred the mortgage to another, whatever defect there might have been in the circumstances leading up to the mortgagee becoming a registered proprietor of the mortgage, that defect cannot affect the person taking the mortgage from the mortgagee unless that person is guilty of actual dishonesty."

21. I see no justification in departing from the interpretation placed on the section by the learned judge. The 3rd respondent falls within the purview of a proprietor as defined by section 3 of the Registration of Titles Act and this the learned judge appreciated. There is no claim against the 3rd respondent for fraud. In assuming the mortgage by way of transfer from the Workers Savings and Loan Bank, the 3rd respondent would have been under no obligation to have investigated the circumstances under which that bank came to be registered as a mortgagee, as the learned judge correctly found.

22. The learned judge was correct in concluding that the 3rd respondent was protected by section 71 of the Registration of Titles Act. He, however, in considering whether to grant the injunction, held in the alternative that no evidence was adduced by the appellant to show she had the ability to pay into court the sum of approximately

\$65,000,000.00 which was due and owing to the 3rd respondent. I am of the view that such a conclusion would have required the existence of a claim against the 3rd respondent disclosing a serious question to be tried between the appellant and the 3rd respondent. This, however, would not be fatal to the learned judge's conclusion that an injunction ought not to be granted.

23. An appellate court is disinclined to interfere with the findings and conclusions of a judge unless it can be shown that he is palpably wrong on the facts or misconstrued the law. See **Watt v. Thomas** [1947] 1 ALL.E.R 582; **Clarke v. Edwards** (1979) 12 J.L.R. 133. In all the circumstances, it cannot be said that the learned judge was plainly wrong.

24. I would dismiss the appeal with costs to the 3rd respondent.

DUKHARAN, J.A. (Ag.)

I agree.

SMITH, J.A.

ORDER

The appeal is dismissed with costs to the 3rd respondent.