

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 52/2013**

**APPLICATION NO 12/2013**

**BETWEEN            DAVID GEORGE PHILLIPS                            1<sup>ST</sup> APPLICANT**

**AND                    TANYA SUSANNE PHILLIPS                            2<sup>ND</sup> APPLICANT**

**AND                    RBC ROYAL BANK (JAMAICA) LIMITED    RESPONDENT  
(Formerly known as RBTT Bank  
Jamaica Limited)**

**Ransford Braham QC and Miss Stacy-Ann Salmon instructed by Braham Legal for the applicants**

**William Panton and Miss Maria Burke instructed by DunnCox for the respondent**

**16 and 17 July 2013**

**IN CHAMBERS**

**ORAL JUDGMENT**

**BROOKS JA**

[1] This case involves the fairly complex financial arrangement whereby RBC Royal Bank (Jamaica) Limited (hereinafter called “the bank”) agreed to provide loan financing,

for working capital, to National Meats and Food Distributors Limited ("National Meats" or "the company").

[2] As part of the arrangement, the applicants, David and Tanya Phillips, who are the principal shareholders of the company, mortgaged their residence to the bank as partial security for the loan. Some monies were paid by the bank pursuant to the arrangement, but the company has failed to meet its obligations under the loan agreement and has gone into receivership.

[3] The applicants allege that the reason that the company failed to meet its obligations was that the bank had failed and/or refused to provide all the financing that it had promised to provide under the agreement. They have accused the bank of misrepresentation and have filed suit against the bank for the loss said to have been incurred as a result of the torts that they allege the bank has committed.

[4] In the meantime, the bank has sought to exercise its powers of sale under the mortgage. The applicants sought and obtained an injunction from the Supreme Court preventing the sale of the property by the bank until trial. Mangatal J, the learned judge who dealt with the matter below, however, imposed a condition for the grant, namely, that the sum of US\$2,314,673.30 be paid into court by the applicants. The applicants have appealed against this order and seek, in this application, an injunction pending appeal, which injunction would dispense with that condition.

[5] Learned Queen's Counsel, Mr Braham, very strenuously argued that not only should there be no condition imposed, but that this court should not require an undertaking as to damages from the applicants. He submitted that the usual principle applicable in the grant of such injunctions should not apply in the instant case, because the issues between the applicants and the bank include a contest as to the validity of the mortgage. In such circumstances, learned Queen's Counsel submits, the authorities show that the condition requiring the payment into court, of the sum claimed by the mortgagee, should not be imposed.

[6] Mr Panton, for the bank, submitted that this case was not any different from the *locus classicus* on this point, **SSI (Cayman) Limited v International Marbella Club SASCCA** No 57/1986 (delivered 6 February 1987), and that the applicants' case does not fall within the exceptions to the general rule established in that case.

[7] **American Cyanamid v Ethicon** [1975] 1 All ER 504 and **SSI (Cayman) Limited v International Marbella Club SA**, mentioned above, may be cited as authorities supporting the principle that the sale by a mortgagee under powers of sale contained in a mortgage will only be restrained if:

- (a) the mortgagor shows that there are serious issues to be tried; and
- (b) the mortgagor pays into court the amount claimed by the mortgagee as being owed.

[8] In more recent years, in a few cases, exceptions to those principles have been identified, and those exceptions were recently considered in **Mosquito Cove Ltd and Others v Mutual Security Bank Ltd and Others** [2010] JMCACiv 32. Whereas it has been recognized that the categories of exceptions have not been closed, the present application, in my view, does not justify being cited as an exception to the principle.

[9] The applicants do not deny having executed the mortgage on which the bank relies. What they do say is that they were promised a payment out of certain sums by the mortgagee, but that those sums were not paid. They also complain that the failure to pay caused the company to fail. The examination of the documentation that Messrs Braham and Panton have performed, during this application, has demonstrated that:

- (a) the mortgage document was executed with the understanding that the terms of a loan agreement between the bank and the company would have been an important element to the overall financing arrangement;
- (b) the loan agreement that was signed between the bank, the applicants and another company, DGPLtd, made the performance of National Meats a condition of continued financing by the bank, and,
- (c) there is now a dispute as to whether the bank was entitled to withhold further financing monies.

[10] Whereas there may be bases for claims against the mortgagee that will no doubt be the subject of the litigation between the parties, those claims do not affect the issue of the validity of the mortgage or derogate from the principle that a mortgagee must be allowed to rely on the security that was given to him when he parted with his money.

[11] The documentation does not reveal any basis on which the applicants may be said to fall within any of the exceptions mentioned in **Marbella** or **Mosquito Cove**. The flaw in Mr Braham's submission is that, unlike the cases that he has cited, demonstrating exceptions to the general principle, this case has no feature whereby it may be said that the mortgage is not the document of the applicants or that some other principle in equity allows them to deny being bound by it.

[12] In the circumstances, I find no reason to disagree with the decision and order of Mangatal J who, I agree with Mr Panton, carefully considered the relevant principles and exercised her discretion, in my view, in a well reasoned manner.

### **Order**

- (1) The application is refused.
- (2) Costs to the respondent to be taxed if not agreed.