

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 107/2017

**BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE PUSEY JA (AG)**

BETWEEN	JOYCELYN THOMAS	APPELLANT
AND	MSB LIMITED	1ST RESPONDENT
AND	FINSAC LIMITED	2ND RESPONDENT
AND	JAMAICAN REDEVELOPMENT FOUNDATION INC	3RD RESPONDENT

Ransford Braham QC instructed by BrahamLegal for the appellant

Ms Shanique Scott instructed by Hylton Powell for the 1st and 2nd respondents

Mrs Sandra Minott-Phillips QC and Litrow Hickson instructed by Myers Fletcher and Gordon for the 3rd respondent

29, 30 May 2018 and 31 July 2019

BROOKS JA

[1] On 27 October 2017, Lindo J refused Mrs Joycelyn Thomas' application for an injunction to prevent a mortgagee from selling the premises for which Mrs Thomas and her husband were the mortgagors. Mrs Thomas appealed from that decision. On 30

May 2018, after hearing submissions from counsel, we dismissed the appeal and made the following orders:

- “1. The appeal is dismissed.
2. Reasons to be put in writing at a later date.
3. A decision in respect of the counter-notice of appeal is reserved.”

[2] The crux of Mrs Thomas’ complaint against the mortgagee, Jamaica Redevelopment Foundation Inc (JRF), is that it is purporting to exercise powers of sale based on invalid documentation. She accepts that she did sign an original mortgage instrument, but asserts that she did not sign the documents, by which the mortgage loan was purportedly increased and the mortgage upstamped. She complains that the signatures, on those documents, are not hers. It is on those documents, she says, that JRF is purporting to act. This scenario, she asserts, is a recognised basis for granting an injunction to prevent JRF from selling, until the issues are tried and resolved.

[3] JRF is not the original mortgagee. Mr and Mrs Thomas borrowed \$1,000,000.00 from Mutual Security Bank Limited in 1993. The loan was secured by a second mortgage on the Thomas’s’ premises. The first mortgage was later paid off and is immaterial for these purposes.

[4] Mutual Security Bank Limited later changed its name to MSB Limited (MSB).

[5] The second mortgage (the mortgage) was upstamped in 1998 to cover an additional \$10,000,000.00. In 1999, the loan repayment being in arrears, the premises were advertised for sale by way of public auction. It was then that Mrs Thomas filed

suit against MSB and Finsac Limited (Finsac). Finsac is said to have had responsibility for the collection of debts that had been owed to MSB.

[6] Mrs Thomas secured an interlocutory injunction in 1999, preventing MSB and Finsac from exercising the powers of sale contained in the mortgage. Thereafter, her claim lay dormant until 2016, when JRF, which had by then acquired the mortgage (by way of a transfer, which was registered on 3 February 2015), sought to sell the premises. Mrs Thomas then joined JRF as a defendant to the claim and sought an injunction against it as well. She obtained an interim injunction, pending a hearing of the application with all parties present. It is that application that Lindo J heard.

The learned judge's findings

[7] In arriving at her decision to refuse Mrs Thomas' application for an injunction until trial, the learned judge considered and applied the principles set out in the timeless case of **American Cyanamid Limited v Ethicon Limited** [1975] AC 396; [1975] UKHL 1; [1975] 1 All ER 504, as well as their Lordships' Privy Council decision in **National Commercial Bank Jamaica Limited v Olint Corporation Limited** [2009] UKPC 16; [2009] 1 WLR 1405. She considered:

- a. whether there was a serious issue to be tried;
- b. whether damages was an adequate remedy;
- c. whether Mrs Thomas had delayed unduly in taking action against JRF; and
- d. the location of the balance of convenience.

[8] The learned judge found that Mrs Thomas had raised a serious issue to be tried. She found that Mrs Thomas had not had actual notice of the default in making the mortgage payments and the mortgagee's intention to exercise its powers of sale. This finding was based on the fact that mail was not, at the relevant time, delivered to the area in which the premises are located. As a result the judge found that Mrs Thomas had not delayed in taking action against JRF. The learned judge, however, found that "an award of damages would provide [Mrs Thomas] with an adequate remedy for any loss caused if she were to succeed in establishing her claim at the trial" (see paragraph [46] of her judgment). She also stated at paragraph [46] of her judgment:

"...There is no evidence that the property enjoys any unique feature, for which damages would not compensate and the evidence is that she is not now residing there, but is temporarily residing in the United Kingdom, and no indication has been given as to when she went to live overseas or when she is likely to return to the home or if anyone is now residing there. I must note also that no issue has been raised that [JRF] would not be in a position to pay such damages."

[9] Despite making those findings, the learned judge still considered, apparently from an abundance of caution, the balance of convenience. She introduced that topic by properly stating that it is to be considered if there is a doubt as to the adequacy of damages (see paragraph [52] of her judgment). At paragraph [55], she concluded that the balance of convenience lay in favour of refusing the application. The learned judge came to that view based on her findings as to the ability to pay damages and Mrs Thomas' residence abroad. She said:

"I note that no issue has been raised in relation to [JRF's] ability to give and honour an undertaking as to damages if it

is found that the injunction should have been granted. Further, as stated earlier, [Mrs Thomas] has given an address outside of the jurisdiction of the court and although, by way of affidavit, she gave to the court an undertaking as to damages in respect of the interim injunction, she is at this point 'outside of its reach'."

The grounds of appeal

[10] Mrs Thomas' grounds of appeal are:

(1) "The Learned Judge in Chambers erred in law in refusing [Mrs Thomas'] application for interim injunction."

(2) "In circumstances where there is no purchaser or Agreement for Sale the Learned Judge in Chambers misconstrued and misapplied Section 106 of the Registration of titles Act as a statutory determination making damages an adequate remedy in the instant case."

(3) "The Learned Judge in Chambers having referred to **Tavares Ltd v Kes Development Co. Ltd & Arc Systems Ltd Claim No. 2008/HCV 02729** failed to properly apply same to the facts of the instant case and wrongly held that damages was an adequate remedy."

(4) "The Learned Judge in Chambers failed to appreciate that a claim in the prayer for damages did not by itself or at all make damages an adequate remedy."

(5) "The Learned Judge in Chambers failed to take into account the fact that there was no evidence before her that [JRF] was in a position to pay damages."

(6) "The Learned Judge in Chambers failed to properly or adequately assess the balance of convenience."

(7) "The Learned Judge in Chambers gave excess weight to the fact that [Mrs Thomas] was temporarily residing overseas and inadequate weight in the fact that [JRF] held [Mrs Thomas'] property as security."

The counter-notice of appeal

[11] JRF filed a counter-notice of appeal. It contended that there were additional bases on which the learned judge's decision should be upheld. The grounds set out in the counter-notice of appeal were:

- "1. There is no serious issue to be tried between [Mrs Thomas] and [JRF] for reasons that include the following:
 - a. The absence of an allegation of fraud by [JRF] and its entitlement to all the protections extended to registered mortgagees by the Registration of Titles Act;
 - b. The mortgagors [sic] (including [Mrs Thomas']) grant to the registered mortgagee of the power to upstamp the mortgage;
 - c. The claim is not maintainable by one only of two joint tenant mortgagors without the other also being joined as a party to the action;
 - d. [JRF's] status as an assignee of the relevant mortgage.
 - e. The Amended Claim Form having been served outside of its 12-month validity period is ineffective to commence these proceedings against [JRF] and to invoke the court's jurisdiction.
2. Damages are an adequate remedy for any improper exercise by a registered mortgagee of its power of sale.
3. [Mrs Thomas'] delay is a bar to equitable relief. Notice to [Mrs Thomas] in 2005 of the assignment of the joint mortgage interest of herself and her husband to [JRF] is deemed effective once given in accordance with the agreed terms for such notice set out in the instrument of mortgage.

4. Failing payment into court of the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of [JRF's] rights under the mortgage."

The issues to be analysed

[12] The various issues raised in the grounds of appeal and the counter-notice of appeal may be considered under two broad heads, namely:

- a. what is JRF's likely liability to Mrs Thomas, and
- b. whether damages is an adequate remedy in this case.

[13] From the counter-notice of appeal, only ground 1(a), (b) and (d) merits any specific consideration. Ground 1(c) and (e) was the subject of an application before the learned judge, which, on 24 July 2017, she refused. JRF did not seek leave to appeal from that decision. It is therefore barred from raising those points in a counter-notice of appeal. The fact that the learned judge referred to the points in her judgment did not revive the issue for the purposes of an appeal.

[14] The remainder of the grounds set out in the counter-notice of appeal, as framed and argued, fly in the face of established principles and authority.

Ground 2: **Global Trust Limited and Another v Jamaica Re-Development Foundation Inc** (unreported)
Court of Appeal, Jamaica, Supreme Court Civil Appeal No 41/2004, judgment delivered 27 July 2007, is authority for the principle that section 106 of the Registration of Titles Act

(the ROTA), dealing with the adequacy of damages, does not apply to applications for an injunction to restrain a mortgagee from exercising a power of sale.

Ground 3: The exercise of a discretion by a judge of first instance will not be lightly set aside by an appellate court unless proved to be clearly aberrant (see **Hadmor Productions Limited v Hamilton** [1982] 1 All ER 1042). This is particularly applicable in the exercise of an equitable jurisdiction. The learned judge gave a considered reason for rejecting the contention that Mrs Thomas had been given notice of default. It cannot be faulted.

Ground 4: **Brady v Jamaica Redevelopment Foundation Inc** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 29/2007, judgment delivered 12 June 2008 supports the principle that an injunction will be granted, without the need for a payment into court, if the mortgagor challenges the validity of the mortgage instrument.

[15] Some of the points raised during submissions concerning these latter grounds may be incidentally considered in the analysis of Mrs Thomas' grounds of appeal.

JRF's likely liability to Mrs Thomas

[16] The key to resolving this issue, is section 71 of the ROTA. The section provides protection to persons who, without fraud, acquire registered interests in land. The section states:

“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.” (Emphasis supplied)

It is necessary to stress that the section applies despite any other rule of law or equity.

[17] In this case, JRF is the “person” who has taken a transfer of the mortgage from the registered proprietor of the mortgage, namely, MSB. JRF was, accordingly, not obliged to enquire into the circumstances by which the mortgage, or its upstamping, was registered. There is no allegation that JRF was or is a party to any fraud in respect of the transfer of the mortgage.

[18] Their Lordships, in **Vehicles and Supplies Limited and another v Financial Institutions Services Limited** [2005] UKPC 24; (2005) 66 WIR 260, pointed out that section 71 of the ROTA is to the effect that, “in the absence of fraud, the transferee of

a registered interest is not affected by notice, actual or constructive, of any trust or unregistered interest” (page 264 a-b).

[19] In **Paulette Hamilton v George Hamilton and Others** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 77/2007, judgment delivered 31 July 2008, Mrs Hamilton had claimed that a mortgage instrument signed by her, pledging her real property to a bank as security for a loan, was invalid, because she had signed it under undue influence by her husband, and without independent legal advice. As in the present case, JRF was a transferee of that mortgage. Mrs Hamilton sought to restrain JRF from selling the property, but her application was refused. This court ruled that, in the absence of any allegation of wrongdoing by JRF, there was no issue, on the pleadings, to be resolved between her and JRF (see paragraph 18 of the judgment).

[20] The court also held that a transferee of a mortgage is protected by section 71 of the ROTA from any defect which may have affected the mortgage, prior to the transfer. It held that in the absence of an allegation of fraud against JRF, it would be protected by the section, as the transferee of a registered interest, namely the mortgage, in the property. On that reasoning, the section also proscribed the existence of any serious issue to be tried between Mrs Hamilton and JRF.

[21] The material issues in **Paulette Hamilton v George Hamilton and Others** are indistinguishable from the present case. Mrs Thomas has made no allegation of wrongdoing against JRF. There is, therefore, no issue to be resolved as between her

and JRF. Additionally, in the absence of fraud on its part, section 71 provides complete protection to JRF, as it is a transferee of the mortgage.

[22] Mr Braham QC submitted, on behalf of Mrs Thomas, that section 71 of the ROTA was not applicable to this case. Learned Queen's Counsel argued that JRF would have acquired the mortgage subject to all its defects. Alternatively, Mr Braham argued, JRF would have acquired the mortgage subject to all equities. He relied, in part, for those submissions, on section 49(f) of the Judicature (Supreme Court) Act. He argued that that section "makes assignment of a debt subject to all equities which the debtor would have against the assignor" (paragraph 19 of his written submissions). Section 71 of the ROTA was subject to section 49(f) of the Judicature (Supreme Court) Act.

[23] It is unnecessary to quote the provisions of section 49(f) of the Judicature (Supreme Court) Act. The submissions of learned Queen's Counsel founder on the express provisions of section 71 of the ROTA, which, was promulgated, in 1889, after section 49(f) which was promulgated in 1880. As has been highlighted in section 71, which has been quoted above, its provisions apply "any rule of law or equity to the contrary notwithstanding".

[24] On those bases, the learned judge's decision not to grant the injunction is correct. Grounds 1(a) and (d) of the counter-notice of appeal, therefore, succeed. This analysis is dispositive of the appeal.

The adequacy of damages as a remedy

[25] It is therefore unnecessary to embark on any detailed analysis of the issue of the adequacy of damages in the context of this case. It should, however, be stated, as Mr Braham QC urged on behalf of Mrs Thomas, that the learned judge did make an error in respect of the effect of section 106 of the ROTA.

[26] The learned judge, in dealing with the issue of the adequacy of damages, stated that section 106 prevented the grant of an injunction in this case. She said at paragraph [45] of her judgment:

“Additionally, I am of the view that the provisions of Section 106 of the [ROTA] apply, and I find that damages would be the only remedy available to [Mrs Thomas]. Section 106 stipulates that where a mortgagee purports to exercise its power of sale contained in a mortgage, the mortgagor’s remedy for any wrongful exercise of that power shall be a remedy in damages only.”

[27] The learned judge erred in asserting that section 106 applied to a case where the mortgagee had not yet entered into a contract for sale.

[28] Section 106 states, in part:

“If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, **the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof**...without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have

continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale...**and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.**" (Emphasis supplied)

[29] As has been mentioned above, **Global Trust Ltd and Another v Jamaica Redevelopment Foundation Inc** is authority for the principle that section 106 does not apply to applications for an injunction to restrain a mortgagee from exercising a power of sale. In **Global Trust Ltd and Another v Jamaica Redevelopment Foundation Inc**, that mortgagee, like JRF in this case, had advertised the property for sale by public auction, but had not yet entered into a contract for sale. Similarly, the judge at first instance in that case, relied on section 106 as one of the bases for refusing to grant an injunction to restrain the mortgagee.

[30] Although this court was divided on the outcome of the appeal from that decision, the panel was unanimous that section 106 did not apply to such circumstances. Panton P said at paragraph 5 of his minority judgment in that case (page 3):

"The learned judge relied on Section 106 of the [ROTA]. In my view, was in error in so doing. That section is of no relevance to the instant situation as it is aimed at giving protection to a *bona fide* purchaser, **where there has been a sale by a mortgagee**. The learned judge has apparently jumped well ahead of the determination of the serious issue she found to be in dispute..." (Emphasis supplied)

[31] Cooke JA took a different approach to the section, from the other members of the panel, but made a similar point about the irrelevance of section 106 to circumstances such as these. He said, at pages 13-14 (paragraph 9), of the judgment:

“...I agree that section 106 of the [ROTA] was inapplicable to ‘the circumstances of the instant case’. That part of section 106 which the learned Judge must have had in mind reads:

‘and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.’

That part concerns the remedy of a mortgagor when the mortgagee embarked on an ‘unauthorised or improper or irregular exercise’ of the power of sale. Accordingly the excerpted portion (supra) is not relevant as to whether or not an injunction should be granted to restrain the mortgagee from exercising the power of sale. **It is relevant after the power of sale has been exercised....”** (Emphasis supplied)

[32] Harris JA was the other member of the panel in that case. She also found that it did not apply. She said, in part, at page 25 of the judgment:

“It is clear that the provisions of section 106 seek ultimately to protect a bona fide purchaser for value. Where a mortgagee enters into a contract of sale with the purchaser, wrongly exercising his powers of sale, a right to damages is reserved to the purchaser against the mortgagee. **The statutory provision would, therefore, be inapplicable in the circumstances of the present case.**” (Emphasis added)

[33] Mrs Minott-Phillips QC, on behalf of JRF, argued that the learned judges were not correct in their interpretation of the section. She submitted that section 106 of the ROTA does not provide protection to anyone at all. Learned Queen’s Counsel argued

that the section only states that the only remedy available to a person, damnified by the sale, is damages. Ms Scott, on behalf of MSB and Finsac, supported those submissions.

[34] Although it is not strictly necessary to decide which of the contending views of the panel in **Global Trust Ltd and Another v Jamaica Redevelopment Foundation Inc** is correct, Cooke JA's approach, with respect, seems to be the more appropriate assessment of section 106 for the purposes of this issue. The person who would be the complainant, in the event of a sale by the mortgagee, would be, undoubtedly, either the mortgagor or a person claiming through the mortgagor. Neither a sale nor a contract for a sale of the registered property will be set aside, without more (see **Waring v London and Manchester Assurance Company Ltd** [1934] All ER Rep 642 and **Lloyd Sheckleford v Mount Atlas Estate** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 148/2000, judgment delivered 20 December 2001). The purchaser, consequently, will have his bargain fulfilled. The result will be that the mortgagor, or a person claiming through the mortgagor, will be the party damnified by an improper sale. The remedy given, by section 106 of the ROTA, to the mortgagor, in those circumstances, is a claim for damages.

[35] This conclusion is consistent with the recent decision of this court in **Aspinal Wayne Nunes v Jamaica Redevelopment Foundation Inc** [2019] JMCA Civ 20. The circumstances of that case are materially similar to those in this case, that is, there was an application for an injunction, where no contract for sale had yet been made. Morrison P, in his usual clear style, explained that section 106 is inapplicable in such

circumstances. In his judgment, with which the other members of the panel agreed, Morrison P said at paragraph [70] of his judgment:

“Accordingly, section 106 will not necessarily foreclose the grant of an interim injunction in every case in which there is a dispute between mortgagor and mortgagee. To the contrary, as the language of the section itself and both **Sheckleford** and **Global Trust** make clear, **the limitation in section 106 only applies to cases in which the mortgagee has in fact exercised the power of sale by entering into an agreement for sale of the mortgaged property to a bona fide purchaser.**” (Emphasis added)

[36] Apart from that correction of the learned judge’s reasoning, in respect of section 106, it is unnecessary to consider any of the other grounds of Mrs Thomas’ grounds of appeal.

Conclusion

[37] The provisions of section 71 of the ROTA are dispositive of this appeal. The section provides JRF with absolute protection from any action by Mrs Thomas. JRF, being a transferee of the mortgage, and Mrs Thomas having no complaint against JRF, apart from the fact that it is seeking to exercise a power of sale contained in the mortgage, there is no serious issue to be tried between them. She, therefore, could not pass the first test provided by **American Cyanamid**. Consequently, the learned judge correctly refused the injunction.

[38] It is for those reasons that I agreed that the appeal ought to be dismissed. The reasoning also means that the counter-notice of appeal has succeeded in part. I would grant JRF one-third of its costs in relation to the counter-notice of appeal.

SINCLAIR-HAYNES JA

[39] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning in respect of section 71 of the Registration of Titles Act. It is for those reasons that I agreed that the appeal should have been dismissed. I also agree with the reasoning and conclusion in respect of the counter-notice of appeal.

PUSEY JA (AG)

[40] I too have read the draft judgment of Brooks JA. His reasoning reflects my own reasons for having agreed to dismiss the appeal. I also agree with his reasoning and conclusion in respect of the counter-notice of appeal.

BROOKS JA

ORDER

- (a) The counter-notice of appeal is allowed in part.
- (b) Costs of the appeal to the respondents.
- (c) The appellant shall also pay to the 3rd respondent one-third of its costs in respect of the counter-notice of appeal.
- (d) The costs are to be agreed or taxed.