JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 29/2007

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.

BETWEEN **RUPERT BRADY** **APPELLANT**

AND **JAMAICA REDEVELOPMENT FOUNDATION INC.** **1ST RESPONDENT**

AND **DENNIS JOSLIN JAMAICA INC.** **2ND RESPONDENT**

AND **HAROLD BRADY** **ANCILLARY RESPONDENT**

Raphael Codlin instructed by Raphael Codlin & Company for the appellant

Charles Piper and Miss Kanika Tomlinson for 1st & 2nd respondent

March 11, 12, May 16 and June 12, 2008

PANTON, P.

1. The second and ancillary respondents were not represented at the hearing of this appeal, wherein the appellant challenged a part of the decision of Almarie Sinclair-Haynes, J. made on February 14, 2007. By that decision, the appellant was granted an injunction against the first and second respondents, restraining them from disposing of property, registered in the names of himself and his brother Harold Brady at Vol. 1200, Folio 161 of the Register Book of Titles, until

the trial of the action. That injunction was on condition that the appellant pay into court the sum of $14,226,046.35 on or before March 31, 2007.

2. The order of the learned judge stemmed from a claim filed by the appellant on April 4, 2005, in the Supreme Court. By that claim, the appellant is asking the court to decide whether mortgage no. 775274 registered on the certificate of title mentioned above is valid and enforceable against him. He is also seeking a declaration that the said mortgage is null and void, and an order that it be discharged from the title.

3. It should be added that the first and second respondents are disputing the appellant's right to the reliefs that he is seeking and have counterclaimed for a declaration that the first respondent is entitled to exercise all rights as mortgagee by assignment in respect of funds obtained by the appellant's brother Harold, and allegedly guaranteed by the appellant, from the now defunct Workers Savings and Loan Bank.

4. Before us, the appellant has challenged that part of the order of the learned judge which required him to pay into court the sum previously mentioned. The challenge is based on the appellant's undisputed evidence that he did not sign the relevant mortgage documents, and had not given his brother Harold any authorization to pledge the property, or to use his (the appellant's) name to secure money from the bank or to guarantee repayment.

5. The learned judge, in her judgment, (at page 7A of the Record) said the following:

> (a) "The court is of the view that the claimant has sufficiently particularized his claim of fraud. He has failed to state who the perpetrator is. However, he can only present his case according to the facts he is aware of."
>
> (b) "I am satisfied that the allegation that the claimant was never a party to the transaction and that his signature was forged is a serious question to be tried on its merit ..."

In the light of the above conclusions, the learned judge reasoned that in the circumstances it would be unjust to allow the property to be sold before the trial of the action. She expressed the view that where the allegation was that the guarantor's signature had been forged, justice demanded a "flexible approach".

6. The learned judge referred to leading authorities in this area of the law, including ***Flowers Foliage & Plants of Jamaica Ltd. & Others v Jamaica Citizens Bank Limited*** (1997) 34 J.L.R. 447, and concluded thus:

> "It is clear from the foregoing that there is no inflexible rule which requires that the sum of money claimed by the mortgagee should be paid into court as a requirement for the granting of an injunction at the request of the mortgagor". (p.11A of the Record of Appeal)

She then went on to state that in the instant case the bank advanced its monies to liquidate two earlier mortgages on the property which is jointly owned by the appellant and his brother (so) ...

> "The money was therefore used towards the property which he, the (appellant) owned. Mr. Harold Brady did not apply the loan to benefit himself solely. In the circumstances Dr. Brady would have derived a benefit, albeit ignorantly. Having so benefited equitable principles of fairness would dictate that the sum by which he benefited be repaid even though he alleges he was an ignorant beneficiary to the whole transaction".

7. In ordering as she did, the learned judge disregarded the very principle which she had gleaned from ***Flowers Foliage & Plants*** (supra)**.** The relevant facts therein were that summary judgment had been entered by Reid, J., in the Supreme Court in favour of the bank for a substantial sum of money. However, there were serious issues to be tried. An application for a stay of execution of the judgment was dismissed by Chester Orr, J., the Senior Puisne Judge. Thereafter, an appeal was filed, and Downer, J.A. granted an unconditional stay of execution of the judgment. A motion to discharge the order of Downer, J.A. was dismissed by the Court (Rattray, P., Gordon, J.A., and Walker, J.A. (Ag.). In dismissing the motion, the Court held that the general rule that the Court will not interfere to deprive the mortgagee of the benefit of his security, except where the sum stated to be due is paid into court, is distinguishable in this case as there were

triable issues concerning the validity of the guarantee and the legality of the upstamping of the mortgage.

8. Mr. Piper for the first respondent has contended that ***Flowers Foliage & Plants*** **(supra)** was a departure from the principle stated in ***SSI (Cayman) et al v International Marbella Club S.A.,*** and referred to in ***Flowers Foliage & Plants*** (supra). I do not agree. The fact of the matter is that the nature of the issues to be determined in the instant case is such that were the Court to permit a sale to take place before the determination of those issues, there would be the risk of a serious injustice being done to the appellant. In the circumstances, it would be unjust to demand that he deposit such a huge sum of money in order to protect his rights. The appropriate course at this time is for the matter in the Supreme Court to be tried as early as possible.

9. For the foregoing reasons, I agree with my learned brothers that the appeal ought to be allowed, and the condition in respect of the payment of the several millions of dollars set aside.

SMITH, J.A.

I have read in draft the judgments of Panton, P., and Cooke, J.A. I agree with their reasons and conclusions. There is nothing further I wish to add.

COOKE, J. A.

1. The appellant and the ancillary defendant are brothers. On the 7th April 1988 land comprised in Volume 1200 Folio 161 was transferred to them as joint tenants. The purchase price was $700,000.00. In respect of this land there were three mortgages. There was mortgage No. 487459 which was registered on the 2nd November 1988 to Scotiabank Jamaica Trust and Merchant Bank Limited as security for the sum of $600,000.00. On the 26th May, 1989 a second mortgage No. 495450 was registered to the Bank of Nova Scotia Jamaica Limited as security for the sum of $90,000.00. Then, there was mortgage No. 775274 to Workers Savings and Loan Bank as security for the sum of $3,200,000.00. The documentation as regards this mortgage reveals that the ancillary defendant was the borrower and the appellant was the guarantor. The 1st respondent is the successor in title to Workers Savings and Loan Bank. The 2nd respondent is the agent of the 1st respondent. It is the third mortgage which is the subject of the present litigation. The indebtedness pursuant to that mortgage soared. At the relevant time it had reached some $25,000,000.00. The mortgagee was about to exercise its power of sale which was the catalyst to the appellant invoking the aid of the court.

2. By a Fixed Date Claim Form filed on the 4th April, 2005, the following reliefs were sought by the appellant.

> "1. Ask that the Court decide the question of whether the Mortgage No. 775274 registered on Certificate of Title at Volume 1200 Folio 161 is valid and enforceable against the Claimant in circumstances where the Claimant (who is a Joint Tenant of the property) did not execute the said Mortgage.
>
> 2. Seeks a Declaration that the said Mortgage is null and void and/or is voidable and unenforceable as against the Claimant.
>
> 3. Seeks an Order for the Mortgage to be discharged from the Title.
>
> 4. Prays for an Interim Injunction restraining the Defendants, by themselves, their servants, employees, and agents, or any person acting under its instructions, from selling or attempting to sell the property comprised in Certificate of Title registered at Volume 1200 Folio 161 otherwise than by Order of the Court."

3. There was a hearing before Sinclair-Haynes, J. on the 2nd January, 2007. At this hearing the court was only concerned with para. 4 of the relief sought which pertained to the interim injunction. On the 14th January in a written judgment the learned trial judge ordered as follows:

> "1. The defendants are restrained by themselves, their servants, employees, agents or any person from selling or attempting to sell the property comprised in certificate of title registered at Volume 1200 Folio 161 until trial unless ordered by the court.

2. The order is conditioned upon the applicant paying into the court the sum of $14,226,046.35 on or before 31st March 2007.

3. Leave to appeal is granted.

4. Costs to be cost in the claim."

4. The sole issue before the court is whether or not the condition imposed by the court can be successfully challenged. Before I subject the learned judge's approach to scrutiny, I think that it is useful to state that on the 20th October, 2006 there was this consent judgment in a related matter.

"1. By consent, Judgment for First Defendant/Ancillary Claimant against the Ancillary Defendant, Mr. Harold C. W. Brady, in the sum of J$28,452,092.70 with interest at the rate of 30% per annum compounded with monthly rests from the 12th May, 2005.

2. In the event that the Ancillary Defendant pays to the First Defendant the sum of US$178,000.00 by December 10, 2006 the First Defendant/Ancillary Claimant will accept said payment in full and final satisfaction of the Judgment.

3. The question of costs for October 17, 2006 and of today deferred to December 11, 2006."

This consent judgment indicates that the ancillary defendant, an attorney-at-law undertook to satisfy the total indebtedness incurred as a result of the loan of $3,200,000.00 (the third mortgage No. 775274).

5. The appellant filed three affidavits in support of his cause. The following sworn assertions may be noted:

(a) He never signed the mortgage document (No. 775274). His purported signature was a forgery.

(b) At the time when he is purported to have signed the mortgage documents he was not in Jamaica. He exhibited his old passport in support which indicated that he arrived in Jamaica on the 10th February, 1993 and left on the 15th February that same year. Subsequently he returned to Jamaica on the 3rd of August, 1993. At the time of the execution of the mortgage documents he resided in the State of New York in the United States of America where he practiced as a medical practitioner. He also exhibited specimen copies of his signature as well as his signature in his passport and driver's licence.

(c) He was not a party to the mortgage. He did not guarantee the loan to the ancillary defendant. He did not request that any loan facilities should be extended to the ancillary defendant. He never had any agreement with the mortgagee to pledge his property as security for "any such loan, credit or financial facilities".

The appellant's stance is that because of these assertions he is under no legal obligation to repay any of the loan sum which the ancillary defendant had borrowed.

6. I now address the question of the imposition of the condition attached to the granting of the injunction restraining the mortgagee from the exercise of its power of sale until the trial. The learned trial judge in her judgment said:

> "As a general rule, a mortgagee ought not to be prevented from exercising its rights under the mortgage instrument, unless the amount of the mortgage debt, if not disputed, is paid, or if disputed

> the amount claimed by the mortgagee is paid into Court. However, as opined by Rattray, P. in **Flower, Foliage** at page 8:
>
> > "Courts of equity do not shackle themselves with unbreakable fetters if the justice of the particular case demands a more flexible approach."
>
> It is the court's view that in circumstances where it is alleged that a guarantor's signature was forged and he was never a party to, nor was he aware of the execution of a mortgage, the justice of that situation would demand a flexible approach. Equity would demand that such a case must be distinguished from the case in which it is not disputed that there was indebtedness under the mortgage." (Emphasis mine)

7. In this excerpted passage from her judgment, the learned trial judge is adverting to principally two authorities. The first is **SSI Cayman Limited et al v. International Marbella Club S.A.** S.C.C.A. No. 57/86 delivered on the 6th February, 1987. On p. 15 of this judgment Carey, J.A. succinctly stated the law in these words:

> "The rule is therefore well settled and indeed, despite Mr. George's valid efforts, nothing has been said, which in any way permits a Court of Equity to order restraint without providing an equivalent safeguard, which is, the payment into Court of the amount due or claimed in dispute."

In **Flowers, Foliage and Plants of Jamaica Limited & Others v. Jamaica Citizens Bank Limited (Foliage)** [1997] 34 J.L.R. 447 Rattray, P. delivered the judgment of this court which held that:

> "the general rule that the Court will not interfere to deprive the mortgagee of the benefit of his security, except where the sum stated to be due is paid into court, is distinguishable in this case as there are triable issues of fact and of law concerning the validity of the guarantee and the legality of the upstamping of the mortgage."

In respect of those principles I have no reason to change my views which were expressed in **Global Trust Limited & Others v. Jamaica Re-Development Foundation Inc. et al** S.C.C.A. No. 41/2004 delivered on the 27th July, 2007. I would take issue with the last sentence in the excerpted passage in the judgment of the court below. The correct distinction is between cases where the issue is in respect of the amount of money owed under a valid mortgage and cases where the validity of the mortgage is challenged (see the **Global** [supra]). In the instant case the appellant is challenging the validity of the mortgage document as it pertains to him.

8. After reviewing a number of authorities the learned trial judge concluded thus:

> "It is clear from the foregoing that there is no inflexible rule which requires that the sum of money claimed by the mortgagee should be paid into court as a requirement for the granting of an injunction at the request of the mortgagor. However, the facts of the instant case are not compelling enough to displace the general rule. In the **Flowers, Foliage** case, the applicant was a guarantor who derived no benefit from the funds secured against the property. In this case the bank advanced its monies to liquidate the two earlier mortgages on the property which is

> jointly owned by the applicant and his brother. The money was therefore used towards the property which he, the applicant owned. Mr. Harold Brady did not apply the loan to benefit himself solely. In the circumstances Dr. Brady would have derived a benefit, albeit ignorantly. Having so benefited equitable principles of fairness would dictate that the sum by which he benefited be repaid even though he alleges he was an ignorant beneficiary to the whole transaction." (Emphasis mine)

9. I am of the view that the learned trial judge adopted the wrong approach when she said that "The facts of the instant case are not compelling enough to displace the general rule". At this stage the court is not concerned with "facts". See **American Cyanamid Co. v. Ethicon** [1975] A.C. 396. The court's attention should be directed to the application of the correct judicial principles within the totality of the circumstances before it. A telling circumstance was the assertion by the appellant that he was a complete stranger to the execution of the mortgage document. This circumstance, the learned trial judge indicated, demanded "a flexible approach" by the court. However, she abandoned her postulated course and decided to apply "the general rule". She did not say why the principles enunciated in **Foliage**, (supra) — when the challenge is to the validity of the mortgage — should be completely ignored. Her basis for imposing the condition was that the appellant had "derived a benefit albeit ignorantly". The "benefit" was that part of the proceeds of the loan of $3,200,000.00, which was the sum of $708,452.80, was used to liquidate the amount owing on the first mortgage (No. 487459).

10. How did this so called "benefit" come about? A perusal of the correspondence between Scotiabank Jamaica Trust and Merchant Bank Limited and Workers Savings and Loan Bank at the relevant time indicates that for the ancillary defendant to have obtained the loan of $3,200,000.00 from the latter, it required the duplicate certificate of title which was in the possession of the mortgagee in respect of the first mortgage that is, Scotiabank Jamaica Trust and Merchant Bank Limited. This mortgagee would only send the registered duplicate certificate of title if the outstanding sum of $708,452.80 was paid and this was done (see pages 34 – 37 of the Record of Appeal Bundle 1). So it is not so that, strictly speaking "Mr. Harold Brady did not apply the loan to benefit himself solely". Before Harold Brady could get a loan from Workers Savings and Loan Bank, as indicated above, the outstanding sum of $708,452.80 had to be paid. So it is not as if having got the loan of $3,200,000.00, Harold Brady then paid up the arrears to the first mortgagee. It would appear that in securing the loan, Harold Brady intended to benefit himself. Any "benefit" to the appellant was incidental. There was no evidence before the court as to any arrangement between the brothers as to how the first mortgage loan was to be serviced. However, there is the consent judgment in which the ancillary defendant Harold Brady accepted full responsibility for the total debt. This is a very significant factor which the learned trial judge did not indicate she considered in her judgment.

11. The learned trial judge said that "the sum by which he benefited be repaid even though he alleges he was an ignorant beneficiary to the whole transaction". If she is correct in her formulation, it is impossible to appreciate how she arrived at the sum of $14,226,046.35 which is one-half of the total indebtedness. On her reasoning, the appellant should only have been required to pay into court a sum which shows some relationship with $708,452.80. In any event, even if the appellant derived "a benefit" this is a matter as between the brothers. Further, any consideration of the "benefit" derived by the appellant, cannot in these circumstances derogate from the principle established in **Foliage** (supra).

12. In summary I would disturb the exercise of the learned trial judge's discretion for the following reasons:

(i) She did not apply the guidance given in **Foliage** (supra).

(ii) She failed to consider the consent judgment in which the ancillary defendant took full responsibility for the debt.

13. Finally, I would grant the order sought by the appellant that the order of the court below, that, he should pay into court $14,226,046.35 be reversed. The

order that the injunction granted by the court below is to remain in force until the trial of the action is affirmed. This injunction will not be subject to any condition. The appellant should have his costs of this appeal.

PANTON, P.

ORDER

Appeal allowed. That part of the Order of the Court below for the appellant to pay into Court the sum of $14,226,046.35 as a condition of the injunction is set aside. Costs of the appeal to the appellant to be agreed or taxed.