[2015] JMSC Civ. 138

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014 HCV 04079

BETWEEN	**FENTONS INVESTMENTS LIMITED**	**1ST CLAIMANT**
AND	**NEVILLE FENTON**	**2ND CLAIMANT**
AND	**ELOFF HANSSON INC.**	**DEFENDANT**

Mr. Nigel Jones and Ms. Shanique Crooks instructed by Nigel Jones & Co. for the Claimants

Ms. Maliaca Wong and Ms. Shani Nembhard instructed by Myers Fletcher & Gordon for the Defendant

Heard: February 12, and July 22, 2015

MORTGAGE AGREEMENT – MORTGAGEE EXERCISING POWER OF SALE – DISPUTE CONCERNING ARREARS – WHETHER RIGHT TO EXERCISE POWER OF SALE HAS ARISEN – APPLICATION FOR INTERLOCUTORY INJUNCTION

Straw J

The Parties

[1] The first claimant, Fentons Investment Ltd. (Fentons), a duly incorporated company under the laws of Jamaica has been operating as the agent for the defendant, Eloff Hansson Inc. for the territory of Jamaica. The 2nd claimant, Mr. Neville Fenton, a semi retired business man is the chairman for Fentons and claims that this agency relationship has existed since the 1980s. The defendant is a corporation with offices in the United States of America.

The Claim

[2] The claimants have brought an action against the defendant requesting, *inter alia*, an account of all sales of goods from 2007 to date concluded by the defendant through the 1st claimant's agency as well as an order that the defendant do pay the 1st claimant all sums found due as commission upon the taking of the account. In the meantime, they have applied for an interlocutory injunction to restrain the defendant from selling or disposing of property registered in the names of Neville Fenton and Judith Khan and described in the Certificate of Title registered at Volume 1420 Folio 627 of the Register Book of Titles.

The Interlocutory Application

[3] The above interlocutory application is what is before this court for a determination. Both parties agree that the defendant is the registered mortgagee on the above mentioned title. The mortgage agreement is dated the 20th of September 2010 and is signed by both Mr. Fenton and Ms. Judith Khan who are described as the borrowers. The mortgage agreement relates to a loan of US$114,000.00 which is the amount endorsed on the certificate of title to the defendant. The property was purchased from the defendant.

[4] Mr. Fenton has told this court that on or about the 13th day of September 2013, Mr. Ethan Sinclair, an attorney-at-law for the defendant, notified him by letter that his failure to settle the outstanding balance of the mortgage loan would result in them exercising their power of sale and/or taking possession of the said property.

[5] According to Mr. Fenton, he had purchased the property from the defendant predicated on the commission support payable to Fentons, and had entered into a verbal agreement with the defendant that the commissions earned would be applied to set off the loan balance. He stated that it was Mr. Sinclair's letter that made him aware that they had failed to apply the commissions earned to the mortgage as well as failed to pay the said sums to him.

[6] He stated also that prior to this development, he had been in communication with the previous manager of the defendant, Mr. Joel Osterloh in an attempt to obtain a statement of account from him but he had received none to date. He repeated his request to Mr. Sinclair but met with the same result. In about August 2014, he was notified via the daily newspaper that the defendant had decided to exercise its power of sale and placed the property up for public auction. It is as a result of this pending sale that he is applying for an injunction against the defendant in relation to any dealings with the property until the trial of this claim.

[7] Mr. Fenton is relying on the failure of the defendant to apply monies owed to Fentons towards the reduction of the mortgage debt as a factual basis for the application. He stated that if this had been done, his debt would have been extinguished. He is also challenging the defendant's right to exercise its power of sale at this time. Mr. Nigel Jones, counsel for the claimants, has submitted that the time to exercise this power has not yet arisen as the stamped mortgage document has no date of repayment endorsed on it.

[8] Mr. Richard Summa, the credit manager for the defendant disputes the debt for commissions and maintains that the mortgage debt with the principal of US$114,000.00 is due and owing. This debt was acknowledged at the time of the mortgage agreement and contradicts any claim for a set off of this admitted mortgage debt. Ms. Malica Wong, counsel for the defendant, contends also that the issue of whether or not the mortgage stated a repayment date is totally irrelevant since the mortgage provides for immediate demand and such a demand was made in September 2013. The defendant, as the registered mortgagee, should therefore be entitled to exercise its rights as no fraud or impropriety has been alleged to disentitle the exercise of the defendant's registered interest.

Issues for Determination

[9] In accordance with the principles laid out in the well known case of **American Cyanamid Co. v Ethicon Ltd** [1975] 1 ALL ER 504, the court, in the exercise of its

power to grant injunctive relief must first be satisfied that there is a serious issue to be tried. If there is no serious issue, the injunction should not be granted. If the material raised shows that there is a serious issue to be tried but damages would be an adequate remedy for the claimant and the defendant would be in a financial position to pay them, then the injunction should also not be granted.

[10] However, if damages would not provide an adequate remedy for the claimants if they were to succeed at the trial, then the court should undertake a further assessment. The court is to consider whether the defendant, if it was successful at the trial, would be adequately compensated under the claimants' undertaking as to damages for the loss that would have been sustained by being prevented from selling the property between the time of the application and the time of trial. If damages would be an adequate remedy and the claimants were in a financial position to pay them, there would be no reason to refuse the injunction. However, where there is doubt as to the adequacy of the respective remedies in damages, the court is to then consider the question of the balance of convenience, i.e., does it favour a grant or refusal of the injunction.

[11] The purpose of granting such an injunction was highlighted by the Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corporation Limited** [2009] UKPC 16. Lord Hoffman who delivered the judgment of the court reiterated the principles as to the grant of an injunction as set out in **American Cyanamid** and expressed the following [paragraph 16]:

> *"The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result."*

Serious Issue to be Tried

[12] The first issue to be considered therefore is whether the claimants have shown that there is a serious issue to be tried. The court at this stage is guided by the principle enunciated by Lord Diplock in **American Cyanamid** at page 510:

> *"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. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."*

The Case for the Claimant

[13] Mr. Fenton has admitted the debt of US$114,000.00 and stated that it is only in September 2013, after being notified that the defendant would be exercising its power of sale, that he realized that the defendant had failed to apply the said commission as had been verbally agreed.

[14] Although he has stated that the purchase of the property was all predicated on commission support, he has admitted that there was no written agreement in relation to this issue. However, it is his evidence that both parties entered into a verbal agreement that the commissions payable would offset the loan. He has alleged that he has not received any commission from 2007 for works done. Mr. Nigel Jones has submitted that the claimants are not pursuing the claim for commissions for the year 2007 since that debt would now be statute barred. However, they are requesting an accounting from 2008.

[15] Mr. Fenton explained that the claimants are responsible for brokering and getting contracts on behalf of the defendant for steel and lumber products with different companies in Jamaica. He stated that these companies include, Hardware and Lumber Ltd., Tankweld Ltd., E & R Hardware Ltd., Island Hardware Ltd., Stewart's Hardware Ltd., Mainline International Ltd., Brumalia House Ltd., and others.

[16] He stated further that the established practice for years was that he would obtain commission varying from 1-3% per contract received by the defendant through his agency. He explained further that the established practice was that all commissions were to be paid to him on all sales and shipments done in Jamaica whether directly or indirectly through the above named agency. He alleges that he has received no proper statement of account setting out the details of all sales since 2007.

[17] He has said that the last transaction done by Fentons, directly for and behalf of the defendant was negotiated in October 2011, shipped on June 2 and was paid for on August 8, 2012. He is relying on a copy of a commercial invoice dated June 22, 2012 and e-mails dated July and August 2012 between the parties to support his assertions.

[18] This invoice relates to an order for consignee E & R Hardware. It is to be noted, however, that in the e-mail dated July 20, 2012, Mr. Fenton offered to surrender this commission and interest as compensation to the client due to an apparent delay in shipment. The e-mail actually states that the client be allowed to transfer the balance owing less the commission.

[19] The claimants are also relying on various other e-mail correspondence between Mr. Fenton and representatives of the defendant, namely Mr. Joel Osterloh, Ms. Bonnie Grey Flynt and Mr. Mel Lunderberg. These include correspondence dated September 25, 2008 that details a receipt drafted by Mr. Osterloh that would give credence to a verbal agreement between the parties.

[20] The e-mail is from Mr Joel Osterloh and addressed to Mr. Ethan Sinclair. The receipt contains the conditions that were agreed to by the parties and speaks to a deposit of US$380,000.00 as commitment deposit on the said property. The relevant portion is set out below:

> *"6 Balance due US$180,000.00 to be paid vide the first available commissions achieved from the sales for timber products to Jamaica, via Neville Fenton and or his organization or to any other territory where the*

> *sales therein was initiated and or concluded by Neville Fenton. The balance is due to be settled within 36 months."*

[21] The court notes that there is also e-mail correspondence in 2009 between the parties relating to enquiries about a shipment involving the parties and one Dawn Harrisingh [who is apparently associated with Hardware and Lumber Ltd.] The e-mail correspondence continues in 2010 and is between Mel Lundberg and Neville Fenton. Mr. Fenton is enquiring if the shipment for 'Dawn' has been completed. Mr. Lunderberg replies that the vessel is to leave on May 8 and he does not know whether he will be able to get any cargo on this vessel. It is not clear to this court if it applies to the previous shipment described in the 2009 correspondence. The e-mail correspondence in relation to H & L continues to May 18, 2010.

[22] Other e-mail correspondence between Mr. Joel Osterloh and Mr. Neville Fenton continued in May 2011 in relation to enquiries concerning MDF & Construction form ply and other material. However, this relates to enquiries for prices on behalf of some companies.

[23] In a final affidavit dated November 12, 2014, Mr. Fenton stated that the practice had been for the claimant to forward the brokered business to the defendant or the defendant would normally send Fentons copies of the orders along with invoices of each order but that this practice diminished in 2008. Commissions were then paid every quarter or at times on a monthly request once the ship's bill of lading to the defendant and an invoice had been raised.

[24] Mr. Fenton also disputed the evidence of, Mr. Richard Summa in respect of the method of termination of the agency and stated that the accepted norm [based on the contractual arrangements with the defendant under the timber division] was to the effect that each party had 60 days in which to disconnect. He stated that this contract has been misplaced due to a fire years ago at the office of Fentons as well as hurricanes which caused damage to some documents. He stated that the defendant has a copy of

the said document and asked the court to consider that the e-mail is evidence of a business relationship after 2008.

[25] It is on the basis of this evidence that Mr. Jones has submitted that they are claiming commissions from 2008 onwards and that an accounting should be given. He states that the e-mail document of September 25, 2008 is only being relied on for the limited purpose of evidence of commissions and not the agreement as it predates the mortgage agreement.

[26] The balance due at that time [2008] was US$180,000.00 but by the time the mortgage deed was executed, it was US$114,000.00. He submitted that what can be extracted from paragraph 6 of this e-mail document is that it was contemplated that the parties would have factored in commissions toward the repayment. This document supports Mr. Fenton's assertion that there was some form of a verbal agreement. He has submitted that if it is found that sums are owed to the claimants, then it ought to be paid over to extinguish the mortgage.

[27] Mr. Jones has asked that I bear in mind that there has been no response to this last affidavit of Mr. Neville Fenton which speaks to a final transaction between the parties in October 2011. The claimants would therefore be entitled to commissions between July 2009 and May 24, 2011. He has submitted that the statement of account supplied by Mr Ethan Sinclair in a document [attached to e-mail correspondence] dated February 2012 between Mr. Sinclair and Mr. Harold Brady in relation to Jamaica Multitraders Corporation is irrelevant. Mr. Harold Brady was an attorney at law acting on behalf of Mr. Fenton at that time. He states that, while Mr. Fenton is the chairman of that company, it is a separate legal entity from Fentons and the accounts of that company are not in dispute.

[28] Mr. Fenton is contending, however, that there has been no accounting of the last payments made to Fentons and has stated that there is no way to properly identify the transactions as the name of the consignees and consignment vessels has not been

exhibited. These commission payments can only be verified by the defendants' accountants.

[29] Counsel has submitted that, having regard to all of the above, there is a serious issue to be tried and the claimants have given an undertaking as to damages. He states that a valuation of the subject property provided by the defendant speaks to a valuation of J$46 million. It is abundantly clear therefore that there is equity in the property and the court is to bear in mind that it is the family home of Mr. Fenton which would have sentimental value. Under these circumstances, damages would not be an adequate remedy for Mr. Fenton. Mr. Jones submitted that, at this stage of the proceedings, the claimants can well give an undertaking in damages based on the equity. On the other hand, the defendant has given no evidence to support the assertion that they will be able to meet any losses sustained by Mr Fenton and any loss suffered by them could be quantified and recovered. He referred the court to **Rona Thompson v City of Kingston Sodality Co-operative Credit Union Limited,** [2015] JMCA App. delivered on February 10, 2015**.**

[30] In that case, Brooks JA had before him an application to grant an injunction pending the completion of an appeal. In considering whether damages would be convenient, he came to the conclusion that in the circumstances the credit union [the mortgagee] could be compensated by an award of damages as based on the value of the property and the equity of the owners, the credit union would not be left out of pocket. [per paragraph 22]

[31] Mr. Jones has also submitted that this is not a suitable case for the mortgage amount to be paid into court as the amounts owed to the claimants are in dispute. It is his opinion that, under such circumstances, Mr. Fenton has yet to see what, if any commissions were applied to his mortgage. He referred the court to the case of **Global Trust Limited v Jamaica Re-Development Foundation Inc. and Dennis Joslin Jamaica, Inc.** SCCA No 41/2004 delivered on July 27, 2007 at paragraph 4 where

Panton P stated that persons should not be deprived of their property before a trial where there is a serious dispute as to the status of their account with the mortgagee.

The Case for the Defendant

[32] Mr. Richard Summa has stated that the defendants' records show that the last transaction with Mr. Fenton concluded in 2008. They are relying on a document reflecting the five last commission payments from Eloff Hansson to Mr. Fenton. These transactions are dated between 2007 and 2008. Mr. Summa also stated that once the agent requests a quotation for the supply of a certain quantity of a particular item, the defendant would provide the quotation including the terms for the agent's payment. Once the agent places the order, the defendant would supply the goods and invoice the goods. The agent would be paid his commission once the invoice has been paid in full.

[33] Mr. Summa admitted that there was no formal communication to Mr. Fenton indicating that the agency relationship was terminated. . He also stated that when the defendant intends to discontinue its business relationship with an agent, the defendant usually refuses to provide that agent with any further quotations. He speaks, however, of a letter from Mr. Fenton, through e-mail correspondence dated June 1, 2009, to Joel Osterloh and Mel Lundberg.

[34] This correspondence speaks to a payment on an invoice to the defendant for goods shipped to a third party customer being diverted to a payment on Mr. Fenton's personal account in relation to the debt. He stated that this letter occurred close to the time of the last transaction between the parties .Mr. Summa stated that based on the company's record, there is no outstanding debt owed to the claimants.

[35] Mr. Fenton has sought to explain this e-mail correspondence which speaks of- a diverted payment as an explanation from him to the effect that instead of sending sums owed by Multitraders Corporation, he was sending said sums to be applied to the purchase of the subject property and that money came from his own personal account.

[36] In relation to Mr. Fenton's request for a statement of account, Mr. Ethan Sinclair stated that this was provided to him through his then attorneys, Harold Brady & Company. This is the e-mail correspondence between Mr. Sinclair which was referred to previously. This correspondence lists several invoices under the name Jamaica Multitraders Co. These invoices are dated between 2008, 2009 and 2010. In the reply of Mr. Brady dated February 29, 2012, Mr. Brady indicated that he would send the report to Mr. Fenton.

[37] Ms. Wong, counsel for the defendant, has asked me not to draw any inference of the truthfulness of the last affidavit of Mr. Fenton which speaks to the method of payment of commission and termination of the relationship. She stated that it is unclear whether the claimant received any permission to file this affidavit as the court had ordered that all further affidavits be filed on or before October 7, 2014. Counsel also submitted that the claimants' alleged claim for commissions arose prior to the mortgage balance being agreed in September 2010 and therefore would have been taken into account when the amount of US$114,000.00 was agreed. She argues therefore that bona fides of Mr. Fenton is questionable and also that the correspondence from Mr. Fenton and his then attorney, Mr. Brady in 2010 and 2011 also reflect this outstanding debt to Mr. Eloff Hansson and attempts to negotiate the same. These documents would therefore contradict his claim for any set off. She submits that Mr. Fenton has submitted no correspondence between himself and the defendant concerning monies owed to him. This court is unsure as to what documents are being referred to by Ms. Wong as these do not form part of the documents exhibited.

[38] Ms. Wong also asked the court to consider that Mr. Fenton has stated that the practice in relation to the processing of commission diminished in 2008, yet he seeks to use e-mail correspondence in relation to E & R Hardware in 2012 to substantiate his claim. She has asked the court to bear in mind, that while the e-mail has a bill of lading attached, it is actually speaking of Mr. Fenton's decision to waive the commission for the sake of the client. There is therefore no evidence to support the contention that transactions continued in 2012. She argues also that Mr. Fenton has also said that at

times the commission would be paid quarterly but this is not borne out by any document.

[39] In relation to the 2010-2011 e-mails referred to in the summary of the claimants' case, she has submitted that these do not disclose any transactions pointing to commissions but merely clients seeking price quotes. In relation to the mail of June 1, 2009, she states that it raises an issue that took place in 2008 and is consistent with some controversy between the parties around that time and would tend to support the defendant's assertion that there was a termination of the relationship.

[40] She has also asked the court to consider what would be the effect on the mortgage agreement if there is no future commission. Is it that the debt would remain unpaid? The issue of accounts due and owing therefore cannot be the answer. She submits that Mr. Jones reliance on **Rona Thompson** is misplaced as that concerns an issue of undue influence. She also stated that the court should bear in mind that Panton P's statement in **Global Trust** was contained in a dissenting judgment.

[41] Ms. Wong has submitted that the court should come to the conclusion that there is no serious issue to be tried as there is no principle in law that would allow a debtor to restrain a mortgagee from exercising his power of sale based only on a dispute as to the amount owed. She stated that there is no issue that the principal sum of US$114,000.00 is owed and the claim for the set off has not been particularized or properly pleaded and is incapable of proof.

[42] Ms. Wong referred the court also to the principle enunciated by the Court of Appeal in **SSI [Cayman] Limited and Dr. Steve Laufer Financial Services US Inc. v International & Marabello Club SA** SCCA No. 57/86 [unreported] delivered 6th February 1987, that even if there is an issue surrounding the amount of arrears, unless the mortgage transaction is void, the amount due should be paid into court.

[43] In relation to the adequacy of damages, she stated that Mr. Fenton has not shown that he has the ability to pay the debt but is merely hoping that he is owed some money. She submitted also that there is no evidence of emotional attachment to the property as it is property that arose in a commercial transaction. It is also clear that Mr. Fenton had a previous valuation done which belies any emotional attachment.

[44] Counsel's final submission on this issue is that if the claimants do not disclose sufficient documentation to show a debt is owed, the court does not have to go on to consider the issue of damages or the balance of convenience

Analysis of the Evidence in Relation to the Existing Mortgage Debt

[45] In relation to the first issue, the evidence does suggest a verbal understanding between the parties prior to the signing of the mortgage deed that commission payments were to be used towards the mortgage debt. This is revealed in the e-mail correspondence of September 2008. At that time the loan stood at $US180,000.00. The court notes also that the said document also stated that the balance was to be settled within 36 months which would be September 2013. It is undisputed that this correspondence does not form any part of the mortgage deed which contains no reference to commission payments. However, the deed does make provision for the defendant to demand immediate repayment of the total amount owing.

[46] This deed reflects that the debt owed is US $114,000.00. The letter of September 30, 2013 from Ethan Sinclair to Mr. Fenton speaks to a default of payment and that the amount due and owing was US$114,000.00. It is undisputed that nothing was paid between September 2010 and September 2013 directly towards the debt by the mortgagors.

[47] In that same letter, Mr. Fenton was given 30 days to pay over the entire amount and warned that failure would result in the defendant taking steps to recover the amount by virtue of the said Mortgage deed. He was also given formal notice that the mortgagee would proceed to exercise any or all of its powers granted to it by virtue of

the mortgage and/or by the Registration of Titles Act (ROTA) including exercising the power of sale.

[48] The evidence also reveals that Mr. Fenton obtained a valuation for the said premises in January 2011. At that time, the market value was J$57,500,000.00 to J$60,000,000.00. The purpose of the valuation was noted to be to ascertain the true market value should the premises be sold on the open market. This action does suggest a pragmatic approach and preparation for a possible future sale of the property. A subsequent valuation obtained on behalf of the defendant in June 2014 speaks to a market value of J$46,000,000.00 to J$48,000,000.00.

[49] While the evidence does support Mr. Fenton's assertion that he attempted to obtain a statement of account from the defendant prior to the letter of September 2013 [as revealed by the e-mail correspondence between Mr. Harold Brady and Mr. Ethan Sinclair of February 2012], there is no evidence that he challenged that statement of account in relation to Jamaica Multitraders as being irrelevant at that point in time. There is also no documentary evidence that Mr. Fenton attempted to obtain any other statement of account in relation to Fentons between September 2013 and August 2014 [the period between the demand for full payment and publication of the notice in the daily newspaper].

[50] The said statement of account in relation to Jamaica Multitraders reflects transactions for the years 2008, 2009 and 2010. However, the copy of the last five commission payments exhibited to Mr. Richard Summa's affidavit in relation to Fentons reflects transactions between 2007 and 2008 only so there appears to be an unexplained discrepancy by the defendant at this stage of the proceedings between these two sets of dates.

[51] An assessment of the e-mails in relation to H & L between 2009 and 2010 as well as requests for quotations between 2010 and 2011 and the e-mails of June and July 2012 do provide some corroboration that the business dealings continued between

the parties after 2008 (including a willingness on the part of the defendant to provide quotations). However, the documents exhibited by Mr. Fenton do not reveal *prima facie* evidence of transactions that would result in payments of commissions. He has not even suggested what the total amount might be, only that it would extinguish the debt.

[52] It is clear also that Mr. Fenton has not set out any specific transactions for which he is waiting on commission payments. One would have expected that the claimants would have a documentary trail to support the request for any accounting. This is so in particular as Mr. Fenton has stated that a certain practice had diminished in 2008 but that commissions were subsequently paid quarterly or sometimes monthly on request once the bill of lading and an invoice had been raised.

[53] In **Global Trust,** the trial judge had found that there was a serious issue to be tried but that damages would be an adequate compensation. Cooke JA and Harris JA, by a majority verdict, [Panton, P dissenting] dismissed the appeal in circumstances where the mortgagor claimed to have overpaid the mortgage debt by a specific amount. Both judges reiterated the principles as expressed in **Marabella** and accepted that damages would be an adequate compensation for any loss suffered by the mortgagee. Panton P, however, was of the view that persons should not be deprived of their property before a trial in a situation where there is a serious dispute as to the status of their account with the mortgagee.

[54] The key phrase in Panton P's dissenting judgment is' **serious dispute as to the status of their account.' [Emphasis added]** Having considered all of the above and without attempting to resolve conflicts in the evidence, I am of the view that the evidence has failed to reveal that there is a serious issue to be tried in relation to accounts due and owing. However, even if the court were of the view that there was a serious issue to be resolved on this point, the authorities in relation to the granting of an injunction in disputes of this nature clearly support the submissions of Ms. Wong. Firstly, an injunction ought not to be granted merely on the basis of a dispute as to the debt owed. This was reiterated by Cooke JA in **Global Trust** at page 7 who also

referred to Turner LJ's judgment in **Gill v Newton** 1866 14 WR, 490, an authority relied on by Mr. Jones. In **Gill,** Turner LJ expressed the following at page 491:

> *"With great respect to the Master of the Rolls, I also think that the injunction is due. In saying this I wish to be clearly understood that I do not proceed upon the ground that the amount due upon the mortgage is in dispute. If that were so, a mortgagor would have but to raise a dispute about the sum due, in order to deprive his mortgagee of his remedies under the mortgage deed."*

Secondly, the authorities clearly establish that any such injunction should only be granted on condition of the full amount claimed by the mortgagee being paid into court.

[55] The Court of Appeal in **Marabella** established this legal criteria. Carey JA stated that any injunction to restrain a mortgagee in the exercise of his power of sale is usually granted with safeguards [page 15]:

> *'The rule is therefore well settled and indeed------ nothing has been said, which in any way permits a Court of Equity to order restraint[of the mortgagee's power of sale] without providing an equivalent safeguard, which is the payment into court of the amount due as claimed in the dispute.'*

[56] In the later Court of Appeal decision of **Global Trust,** Cooke JA referred with approval to the principle enunciated in **Marabella** as well as the ratio *decidendi* in the headnote of the Australian case of **Inglis v Anor v Commonwealth Trading Bank of Australia** [1971-2] Vol 126 C.L.R.161 which reads as follows:

> *'As a general rule an injunction will not be granted restraining a mortgagee from exercising powers conferred by a mortgage and, in particular, a power of sale unless the amount of the mortgage debt, if this is not in dispute, is paid or unless, if the amount is disputed, the amount claimed by the mortgagee is paid into court; and this rule will not be departed from merely because the mortgagor claims to be entitled to set off the amount of damages claimed against the mortgagee.'*

THE ISSUE CONCERNING THE DEFENDANT'S POWER OF SALE

Submissions on Behalf of the Claimants

[57] Mr. Jones offensive arsenal in support of the injunction includes a second issue, that is, whether the mortgagee's right to exercise the power of sale has arisen. He acknowledges that the power of sale arises as soon as the date fixed for repayment has passed or, in the case of a mortgage repayable by installments, as soon as the installment is due and unpaid. [Per Gilbert Kodilinye, **Commonwealth Caribbean Property Law**, 3rd Edition page 380]. He has submitted, however, that because there is no date of repayment specified or for any arrangements to pay back sums in installments, the power has not yet arisen. The literal construction of the deed reveals that the mortgagee surrendered its right to make an immediate demand.

[58] He has asked the court to consider both items 3 and 4 of the preamble to the mortgage agreement which is set out below:

> "[3] *The Lender is entitled to demand the immediate repayment of the said loan.*
>
> *[4] In consideration of the Lender forebearing from demanding the immediate repayment of the said loan the Borrower has agreed to give the security of these presents."*

[59] Counsel submitted that while item #3 speaks to the entitlement to demand immediate repayment, item #4 speaks to the consideration which is the agreement to provide security in exchange for not demanding immediate repayment. He submitted further that as long as the security is in place, there can be no demand for immediate repayment as item #4 extinguishes that power. The court should therefore give regard to the literal interpretation of the deed. He stated that this is due to the verbal agreement in relation to the use of commission.

[60] He submitted also that Ms. Wong's reliance on the judgment of Brooks J [as he then was] in **Smith's Trucking Service Limited v Jamaica Redevelopment Foundation Inc.** Claim No. 194 E- 327 consolidated with **Selvyn Seymour Smith v**

Jamaica Redevelopment Foundation Inc. Claim No. 1994 E- 328 delivered on 6th May 2009, lacks cogency as it is distinguishable**.** In the case at bar, it is not being contended that the mortgage is unenforceable but that the power to exercise the right of sale does not as yet exist. In **Smith's Trucking,** Brooks J at page 26 expressed that there was no merit in counsel's contention that the failure to state in the mortgage instrument a date for repayment of the debt rendered it unenforceable. Brooks J also made reference to the fact that the instrument specified that the sum was due on demand.

[61] Mr. Jones also referred the court to paragraph 1[a] of the mortgage deed which speaks to payment being made in accordance with the date set out in item #4 of the schedule, however, he points to the fact that there is no date of repayment set out in relation to item #4. He is contending that these are issues in dispute and the court should conclude that there is a serious issue to be tried.

[62] Counsel has submitted also that this is not a case to ask that the disputed amount be paid into court. He referred the court to the Australian case of **Allfox Building Pty Ltd** [1992] NSW Conv R 55-634 where Powell J outlined 'apparent exceptions' to the general rule [that payment should be made into court of the sum owed] and considered that these exceptions were limited to cases in which either:

> [a] The validity of the mortgage is in issue;
>
> [b] The present availability of the power of sale is in issue, because either:
>
> > [i] The alleged breach of covenant which is relied upon by the mortgagee is challenged; or
> >
> > [ii] The occurrence of some other pre-condition, whether statutory or otherwise, to the arising of the power of sale is in issue.

[63] Mr. Jones contends that the case for the claimants fall within exception [b] [ii] as there was no agreed date of repayment and so the defendant's power of sale would not be exercisable.

Lack of Regard for Mortgagor's Interest

[64] Mr. Jones has also submitted that the injunction ought to be granted as the mortgagee is treating with the property without any regard for the interest of Mr. Fenton as he will not receive the full equity from the property but will be left without a home for his family. He contrasts this to the position of the defendant and states that any loss suffered by that party could be easily quantified and there would be recourse to Mr. Fenton's undertaking as to damage. He cites **Pendlebury v The Colonial Mutual Life Assurance Society Ltd., a case** from the High court of Australia, delivered on March 29, 1912 in support of this contention.

[65] In **Pendlebury**, Griffith CJ [page 679] made reference to **Kennedy v De Traffard** [1897] A.C. 180 and quoted from the Lord Chancelor's judgment as set out below:

> *'… if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty….Of course, if he willfully and recklessly deals with the property in such a manner that the interests of the mortgagee are sacrificed, I should say that he had not been exercising his power of sale in good faith…'*

[66] Griffiths CJ stated at page 680 that he accepted as sound the analogy that if the mortgagee omits to take precautions to ensure a fair price and the facts show he was absolutely careless whether a fair price was obtained, then he does not act in good faith.

[67] In **Smiths Trucking,** Brooks J, spoke of this duty of a mortgagee to act in good faith [page 23, 24] and referred to the decision of Salmon LJ in **Cuckmere Brick Co. Ltd v Mutual Finance Ltd.** [1971] 2 W.L.R. 1207 as expressed at page 1221B and 1218 B-D respectively: In **Cuckmere**, Salmon, LJ made it clear that a mortgagee is not a trustee of the power of sale for the mortgagor. He said, at page 1218B-D:

> *"**Once the power [of sale] has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so**. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. **Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low**. Providing none of those adverse factors is due to any fault of the mortgagee, he can do so as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor." **(Emphasis supplied)***

Brooks J did go to affirm that the mortgagee has a duty to act in good faith and referred again to Cuckmere where Salmon LJ spoke of this duty at page 1221B:

> *"…a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and **he will not be adjudged to be in default unless he is plainly on the wrong side of the line**." **(Emphasis supplied)***

Submissions of Defendant

[68] Ms. Wong has submitted that the argument in relation to the exercise of the power of sale is misconceived and irrelevant since the mortgage deed provides for immediate demand which was made in September 2013. She also submitted that no fraud or impropriety has been alleged on the part of the defendant to disentitle that party from exercising its registered interest and that there is no issue arising in relation to undue influence as in **Rona Thompson.**

[69] Ms. Wong also referred the court to section103 of the ROTA which permits a proprietor of land to register a mortgage in the form as set out in the eight schedules. Pursuant to section 105 of the ROTA, once registered, it shall have effect as a security. She also referred to section 172 of the said Act which allows for modifications or alterations in expression from the forms contained in the schedule and states that these variations will not affect their validity or regularity as they are not matters of substance.

[70] It is to be noted also that section 106 of the ROTA grants the mortgagee power of sale by public auction or private contract if default in payment of the mortgage continues after the mortgagee gives one month's notice to the mortgagor to pay the money owing under the deed. Section 71 of the said Act also provides a shield to any person contracting with a registered mortgagee except in the case of fraud.

Analysis of the Legal Issues

[71] Although the mortgage document stipulates no date for repayment, it speaks clearly of the lender's entitlement to demand immediate repayment. The consideration for not demanding immediate repayment was actually active for three years. During that time, unless Mr. Fenton is successful in his claim, it would appear that nothing was paid towards the debt.

[72] The notice requiring repayment of the loan was made in September 2013, so as of November 2013, based on the statutory requirement for one month's notice, the defendant would have been entitled to exercise the power of sale. **Gilbert Kodyline, Commonwealth Caribbean Property Law,** at page 229 under "Power of SALE'' refers also to statutory provisions in the Caribbean jurisdiction in relation to the power of sale where the mortgage is made by deed and summarizes as follows:

> *"The power arises as soon as the date fixed for repayment has passed or, in the case of a mortgage repayable by installments, as soon as an installment is due and unpaid; but the power only becomes exercisable when either:*
>
> *[a] notice requiring repayment of the mortgage money has been served on the mortgagor and default has*

> *been made in payment of part or all of it for three months thereafter: or*
>
> *----------"*

The provisions for Jamaica are contained in sections 22 and 23 of the Conveyancing Act. The power of sale granted under this Act however will only apply if there is no contrary intention expressed in the mortgage deed and the provisions therein.

[73] **In Global Trust,** Cooke JA, at page 7, referred to **Gill** as well as the case of **Flowers, Foliage and Plants of Jamaica Ltd and others v Jamaica Citizens Bank Ltd**. [1997] 34 JLR,447. He stated that these two cases indicate that it would be proper to grant an injunction to restrain the mortgagee's power of sale if there **are triable issues as to the validity of the mortgage document upon which the mortgagee seeks to found his power of sale. [Emphasis added]**

[74] In **Gill,** Turner LJ did reverse the order of the Master of the Rolls and granted an injunction against the mortgagee's exercise of the power of sale. However, this was not on the basis as to a dispute over the amount owed but whether the power of sale could only be exercised upon certain conditions being met. [per page 491] He also made it clear that he would not interfere with the Master of the Rolls refusal to grant the injunction in circumstances as it related to the Mortgage deed:

> *"That deed has provided a particular mode in which notice of the intention to exercise the power of sale must be given. The party who has entered into such a contract cannot complain of its consequences."*

[75] The injunction was granted because there was a second deed that contained an express clause as to when the mortgagee's rights to exercise his powers and rights would arise. Turner LJ found that there was a serious issue in relation to the construction of the deed to be determined.

[76] There is no issue in the case at bar in relation to the validity of the mortgage deed as Mr. Jones himself as conceded. However, he is contending that the circumstances of this case fall within a similar concept which should result in the restraint of the mortgagee. In **Flowers**, an injunction was granted without any payment into court. The issue in that case involved questions concerning the validity of the guarantee and the legality of the upstamping of the mortgage. Rattray P examined **Marabella** and concluded that the principle relied on was a general one but expressed that the courts of equity would apply a more flexible approach if justice so demanded. [page 452c]

[77] In **Rupert Brady v Jamaica Redevelopment Foundation Inc. and Dennis Joslyn Jamaica Inc. and Harold Brady** SCCA No. 29/2007 delivered June 12, 2008. The court, as in **Flowers**, granted an injunction without requiring any payment into court. Cooke JA at paragraph 7 stated as follows:

> "*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."*

[78] The courts are therefore demonstrating a willingness to examine each particular set of circumstances to decide whether the **Marabella** principle should be fully embraced. However, even if this court could be persuaded that the circumstances of this case were exceptional and that the interests of justice demanded a more flexible approach, the question is whether there is really a serious issue on the point that the power of sale has not yet arisen. If the answer is no, the injunction ought not to be granted even with the condition of payment into court of the amount stated by the mortgagee to be owed.

[79] The court notes that Mr. Fenton and Ms. Kahn signed the mortgage deed that contained no provision for payment by installments nor a date for repayment but contained a provision that allowed for an immediate demand of the entire sum owed. It

made no reference to payment of the debt by commissions earned. I note also that the deed made no requirement for interest to be paid. It is extremely difficult, under these circumstances to arrive at a conclusion that there is a serious issue to be tried in relation to the right to exercise the power of sale. As Turner LJ expressed in **Gill,** 'parties who enter into such contracts cannot complain of the consequences.'

[80] Mr. Jones' submission in relation to damages does not assist in relation to whether there is a serious issue to be tried. In any event, in **Global Trust,** Cooke JA at page 7, expressed that such issues are irrelevant considerations:

> *"Assertions such as that the property and its development potential far exceeded in value the amount being claimed as due by the defendant, or that a sale by auction would inflict irreparable harm to the mortgagor do not appear to be relevant considerations for determining whether or not to grant an injunction to restrain a mortgagee from exercising the power of sale."*

[81] In relation to the issue of the lack of good faith, the claimants have not disclosed any evidence from which I could infer or find that there is a basis to suggest any such breach by the defendant. Mr. Jones has merely reiterated that Mr. Fenton will suffer prejudice as well as monetary and emotional loss. In **Pendlebury,** the circumstances of the complaint included the fact that the auction was conducted under such circumstances as to preclude any chance of fair competition. The land was worth 2000 pounds and realized only 720 pounds. Secondly, there was collusion between a person who was the employee of the defendant and directed the sale and the purchaser. This issue is not a live one at this stage of the proceedings. In any event, Section 106 of the ROTA makes provision that in the event of an unauthorized, improper or irregular exercise of the power of sale, damages would be an adequate remedy. This provision ultimately seeks to protect a bona fide purchaser for value.

[82] In applying the principles enunciated in **American Cyanamid**, the court has to balance these in light of the law relevant to an application to restrain a mortgagee from

exercising his power under the mortgage agreement. As discussed above, these are against the grant of any injunction except under certain circumstances relating to the validity of the mortgage deed. Lord Diplock in enunciating the principles to guide the judge in **American Cyanamid** referred to earlier continued at page 510e by saying:

> "*One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was it's great objective, viz abstaining from expressing any opinions upon the merits of the case until the hearing' [Wakefield v Duke of Buccleuch]. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."*

[83] I have concluded that the material available to me has failed to disclose that the claimants have any real prospect of success in the claim for a permanent injunction. However, as a precautionary measure, I will consider the issue of where the balance of convenience lies in any event.

[84] I am of the view that damages would be adequate remedy for the claimants in light of all the circumstances. The mortgage deed was signed in September 2010. There is no evidence as to when Mr. Fenton took up occupation but the inference would be that it would be in that same year or later. Mr. Fenton obtained a valuation for the said premises in the following year. I am not of the view that the issue of emotional attachment is a valid criteria for the purposes of my evaluation. However, I do note that there is no undertaking or any evidence led by the defendant in relation to their ability in relation to damages. Ms Wong has merely stated that the defendant has the ability to meet any loss that the claimants may sustain.

[85] On the other hand, I am also of the view that damages would not be adequate for the defendant even with the claimants undertaking as to damages. There has been, on the face of it, no payment on the mortgage debt since the inception of the mortgage deed and I note that has been a decrease in the market value of the premises as determined in a subsequent valuation of 2014. The claimants have not evinced any willingness to pay the amount alleged owed or any amount into court. In my assessment, the balance of convenience would favor the refusal of any injunction bearing in mind the actions of the claimants who filed the claim for accounts due and owing after the advertisement of the auction in the newspaper.

THE ORDERS OF THIS COURT ARE THEREFORE AS FOLLOWS:

- The application for the interlocutory injunction is refused.
- Costs to the defendant to be agreed or taxed.