

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 101/2014

APPLICATION NO 220/2014

BETWEEN	RONA THOMPSON	APPLICANT
AND	CITY OF KINGSTON SODALITY CO-OPERATIVE CREDIT UNION LIMITED	RESPONDENT

Nigel Jones and Ms Jessica Folkes instructed by Nigel Jones and Co for the applicant

Ms M Georgia Gibson-Henlin and Ms Kamau Ruddock instructed by Henlin Gibson Henlin for the respondent

3 and 10 February 2015

IN CHAMBERS

BROOKS JA

[1] This is an application by Mrs Rona Thompson for the grant of an injunction pending the completion of an appeal from the decision of Morrison J. In that decision, made on 16 December 2014, the learned judge refused an application for an injunction, pending the trial of a claim brought by Mrs Thompson against City of Kingston Sodality Co-operative Credit Union Limited (COK). COK had threatened to exercise powers of sale given to it under two separate mortgages executed by Mrs Thompson and her husband Errol Thompson. The mortgaged property involved is their home.

[2] The appeal raises a number of issues, but the major one turns on the question of whether the learned judge in the court below failed to give sufficient regard to Mrs Thompson's assertions that she executed the mortgages because of undue influence brought to bear on her by her husband. Learned counsel appearing for each side in this application presented very thorough submissions dealing with the question of undue influence. These will not be explored in great detail here, not out of disrespect to the industry of counsel, but because this is an interlocutory application and the appeal is yet to come. It is however, necessary to provide a brief background to Mrs Thompson's claim.

The background to the claim

[3] Mr Thompson is a member of COK but Mrs Thompson is not. In or about June 2012, he approached it for loan financing. The financing was divided into two portions. The first loan was for \$10,150,904.36, while the second was for \$3,710,000.00. Of the first, \$10,065,223.91 was used to pay off a debt owed to Insurance Employees Co-operative Credit Union (IECCU), which was itself secured by a mortgage of the Thompsons' home. The second was said by Mr Thompson to be used to clear debts owed in relation to Mrs Thompson's illness. COK paid out the bulk of the money between 19 and 20 December 2012.

[4] The loans were ostensibly secured by a loan agreement and a guarantor's mortgage signed by Mr and Mrs Thompson as well as a form of guarantee signed by Mrs Thompson only. The guarantee was signed on 7 August 2012, whilst the guarantor's mortgage for the smaller loan was dated 5 November 2012. The loan

agreement was incomplete and undated. The mortgage instrument for the larger loan was not put in evidence by either party. Both mortgages were, however, registered on 13 December 2012.

[5] By July 2013 Mr Thompson had defaulted on the loans. By letter dated 15 July 2013, addressed to both Mr and Mrs Thompson, COK demanded the full repayment of the loans and threatened an exercise of its powers of sale contained in the mortgages if the payments were not made. Mr Thompson, both personally and through his attorney-at-law, engaged COK in discussions over the next 12 months. It is apparent, however that his default continued and by COK's letter dated 23 July 2014, he was accused of being in default on each loan for in excess of 300 days. The sum then demanded by COK, as being due, was \$14,540,729.92 together with collection expenses. Interest was said to have been accruing at the rate of \$3,729.71 per day. COK again threatened sale.

[6] Mrs Thompson filed her claim on 22 August 2014. She asserted that she had executed the security documents by virtue of undue influence brought to bear on her by Mr Thompson. This was done, at a time, she said, when she was very ill and subject to Mr Thompson's will. She asserted that she was not aware of "the Mortgage, the Agreement, her husband's default and the decision of the Defendant to exercise its power of sale [until] her husband informed her in or around June 2014 that the Defendant had chosen to exercise its power of sale, and that they had an offer for the purchase of the Property" (paragraph 8 of her particulars of claim). She sought a

rescission of the guarantor's mortgage and the loan agreement on the basis of the undue influence.

[7] COK filed a defence to Mrs Thompson's claim. It asserted that she was fully aware of the loan transactions and pointed to the fact that she had authorised IECCU to provide COK with information with regard to IECCU's loan as well as the title for the property. COK denied the assertion of undue influence and pointed to the fact that their loans were not to pay off Mr Thompson's debts but to refinance the previous debt to IECCU and to settle Mrs Thompson's medical bills.

The application before Morrison J

[8] Mrs Thompson's application for an injunction pending the trial of her claim was supported by affidavit evidence. She emphasised her ignorance of the loans and asserted that she had no outstanding medical bills or debts in relation to those bills. COK responded with affidavit evidence of its own. There were disputes as to fact raised by that evidence. The hearing of the application took place over the course of several days and the learned judge delivered his oral decision shortly thereafter. Learned counsel, who also appeared before Morrison J, have reported that the learned judge held, as part of his reasoning, that there was no serious issue to be tried. A written judgment has been promised, but is not yet available.

The present application

[9] Mr Jones, on behalf of Mrs Thompson, analysed the essence of each of the nine grounds of her appeal. He stressed the ground that dealt with the matter of undue influence and Mrs Thompson's assertion that she did not benefit from either of the

mortgages. Learned counsel argued that these matters afforded Mrs Thompson a real prospect of success in her appeal against Morrison J's judgment.

[10] Learned counsel argued that COK had provided no evidence to negative Mrs Thompson's assertions that the execution was achieved through undue influence on her by Mr Thompson and that she had not benefitted from these loans. Mr Jones pointed to the fact that, although it was said that the smaller loan was to settle debts in relation to her health expenses, no evidence was provided to support those assertions. He argued that against that background there was no attempt to advise Mrs Thompson to secure separate legal representation or to advise her of the extent of the liability to which she was exposing herself by executing those documents.

[11] Mr Jones relied on a number of cases in support of his submissions in respect of these points. The cases included **National Commercial Bank (Jamaica) Ltd v Hew and Others** [2003] UKPC 51, **Royal Bank of Scotland plc v Etridge (No 2)** [2001] UKHL 44, **Barclay's Bank plc v O'Brien and Another** [1994] 1 AC 180 and **CIBC Mortgages plc v Pitt and Another** [1993] 3 WLR 802.

[12] On the question of whether Mrs Thompson should be asked to pay into court, as a condition of appeal, the amount demanded by COK, Mr Jones submitted that this requirement should not be imposed in this case. He agreed that it is usually imposed in cases where the court intends to restrain a mortgagee from exercising a power of sale. Learned counsel argued that this case fell within the category of exceptions to the general rule. The authorities show, Mr Jones submitted, that where the validity of the security document is impugned, that is an exception to the normal requirement

imposed on mortgagors. The authorities also show, he argued, that a finding of undue influence, as has been advanced by Mrs Thompson, renders the impugned document invalid. Mr Jones relied on **Rupert Brady v Jamaica Redevelopment Foundation Inc and Others** SCCA No 29/2007 (delivered 12 June 2008) in support of this aspect of his submissions.

[13] All these matters, Mr Jones submitted, showed that Mrs Thompson had satisfied all the requirements for the grant of an injunction by Morrison J. The learned judge, Mr Jones argued, erred when he refused the application in the fact of that evidence and the law in support of her case. In the circumstances, learned counsel submitted, Mrs Thompson's appeal has a real prospect of success.

The analysis

[14] A single judge of appeal is permitted, by rule 2.11(c) of the Court of Appeal Rules (CAR), to consider and grant applications for injunctions pending the determination of an appeal. In determining whether an injunction ought to be granted pending appeal, the single judge must find that the applicant has a good arguable appeal (see **Olint Corp Ltd v National Commercial Bank Jamaica Ltd** SCCA No 40/2008 Application No 58/2008 (delivered 30 April 2008)). As a part of that analysis, the single judge must bear in mind the fact that this court, when considering the appeal, will only disturb the decision of the learned judge below, if it finds that the judge exercised his or her discretion on an incorrect basis (see **The Attorney General v John Mackay** [2012] JMCA App 1).

[15] The guiding principle is whether, at this stage, the single judge finds that it is arguable that the learned judge in the court below was in error in a significant way in the decision handed down at first instance. As the crucial element of this case is the issue of undue influence and its result on the security documentation, it is necessary to examine that issue along the established guidelines dealing with injunctions, and in particular injunctions for restraining mortgagees from exercising powers of sale contained in a mortgage. The broad questions raised by those guidelines in this context are, is there a serious issue to be raised on appeal, are damages an adequate remedy and the requirements of the balance of convenience or, in other words, the interest of justice.

[16] Those guidelines have been set out in **American Cyanamid Co. v Ethicon Ltd** [1975] 1 All ER 504, which has been accepted by this court as applicable in this jurisdiction. The general consideration of the interests of justice as was emphasised in **National Commercial Bank Jamaica Ltd v Olint Corp. Ltd** PCA [2009] UKPC 16 must also be considered. This is not to usurp the process which the full court will undertake at the hearing of the appeal, but assists in determining whether it is appropriate that an injunction should be imposed pending the hearing of the appeal.

Is there a serious issue to be raised on appeal?

[17] The learned judge found that there is no serious issue to be tried. It is fair to say, however, that the assertions of undue influence raise an issue which cannot yet be considered to be so well settled that the actions of borrowers, guarantors and financiers can easily be determined as falling on one or other side of the issue of the validity of

security documentation. In this case, there are disputes as to fact as to whether Mrs Thompson was aware of the loans secured and the purpose of the loans. The letter of authority that Mrs Thompson signed for IECCU to release information and the title to COK would suggest that she was aware of the loan. The letter is, however, not definitive as it does not address the question of whether the documents were signed under duress.

[18] In addition to that dispute as to fact, there is no evidence that COK made any attempt to verify Mr Thompson's assertions that the smaller loan was to discharge debts incurred by Mrs Thompson's medical condition. There is also no evidence of COK attempting to meet the minimum requirements of a lender, as set out in **Royal Bank of Scotland v Etridge**, where a wife is being asked to provide security for a loan.

[19] In **Royal Bank of Scotland v Etridge**, the House of Lords ruled that there were certain minimum steps that a financier should take when a wife is asked to provide security for her husband's indebtedness. Among those steps is to ensure that she has independent advice as to the liability she has been asked to undertake, including the amount of the indebtedness involved, and the consequences of default.

[20] In Mrs Thompson's case, there do not seem to be any assertion that there was independent advice given. There are disputes as to fact on the issue of whether the requirement of independent advice was triggered. In the circumstances, it is arguable that some success could attend an appeal on the question of whether the learned judge was right in finding that there was no serious issue to be tried.

Are damages an adequate remedy?

[21] It is also fair to say that damages would not be an adequate remedy for Mrs Thompson. This property is her matrimonial home and there would at least be sentimental attachment to it.

[22] Conversely, COK could be compensated by an award of damages. Based on the value of the property, it does seem, from the level of the Thompsons' equity in it, that if the sale were not unduly delayed, COK would not be left out of pocket.

The other issues affecting the balance of convenience

[23] The other issues of the balance of convenience include consideration of the principle that a mortgagee will not be restrained unless the mortgagor pays into court the amount claimed by the mortgagee. That principle has been established in the case of **SSI (Cayman) Limited, Dr Steve Laufer and FSI Financial Services US Inc v International Marbella Club SA** SCCA No 57/1986 (delivered 6 February 1987). The principle was, confirmed and clarified in **Mosquito Cove Ltd and Others v Mutual Security Bank Ltd and Others** [2010] JMCA Civ 32.

[24] **Mosquito Cove** confirmed that the **Marbella** principle, requiring a payment in, is, however, subject to certain exceptions. One of those exceptions is where the validity of the mortgage is challenged. In **Rupert Brady** there was no requirement for the payment of the sum claimed despite the fact that the mortgagee was restrained. This is because Dr Brady, the claimant, asserted that he had not signed or approved the execution of the impugned mortgage.

[25] The assertion of undue influence, as Mr Jones has pointed out, does call the validity of the mortgage into question. The issue of whether COK did sufficient to meet the minimum requirements set out in **Royal Bank of Scotland v Etridge** is a live issue with regard to the question of the validity of the security documentation signed by Mrs Thompson. That however is not conclusive that the **Marbella** requirement should not be imposed.

[26] Although Mr Jones has stressed the absence of evidence in respect of the smaller loan, Mrs Gibson-Henlin, on behalf of COK, stressed that it is patent that the larger loan was used for re-financing the indebtedness to IECCU in respect of the property. Mrs Gibson-Henlin's stress is not misplaced. The certificate of title shows that the property is jointly owned and that mortgage to IECCU was endorsed thereon, as was a mortgage to the Bank of Nova Scotia, prior to that. That indebtedness would, therefore, not have been Mr Thompson's sole indebtedness, which is an essential element of the **Royal Bank of Scotland v Etridge** requirements, but rather a joint liability.

[27] It could well be argued that Mrs Thompson's attempt to say that the IECCU account was solely in Mr Thompson's name, as is the COK account, cannot avail her. The larger loan benefitted her insofar as it discharged her debt to IECCU. There is also unchallenged evidence that there would also have been a benefit by way of lower monthly instalments in respect of the COK loan as opposed to the IECCU liability.

[28] The alleged benefit to Mrs Thompson strongly indicates, at least in respect of the larger loan, that she cannot benefit from the line of authorities dealing with the setting aside of transactions as a result of undue influence. As a borrower, Mrs Thompson

cannot seek to have the security documents set aside without accounting for the benefit that she has received by them. In the judgment of the Privy Council in **National Commercial Bank (Jamaica) Ltd v Hew and Another**, Lord Millett stated, in part, at paragraph 43:

“Where a transaction is obtained by undue influence, it must be set aside *ab initio*; and this requires a mutual accounting with mutual restitution by both parties. Where the transaction is one of guarantee this presents no difficulty. A surety incurs a liability but obtains no benefit. It is sufficient to set aside his liability; there is nothing for him to disgorge by way of counter-restitution. **But where the transaction is one of loan the position is very different. It would not be just simply to set aside the loan; this would leave the borrower unjustly enriched. The proper course is to set aside the contract of loan and require the borrower to account for the moneys received with interest at a rate fixed by the court.**” (Emphasis supplied)

[29] COK, on the basis of that reasoning, would seem to be entitled to exercise its power of sale contained in the mortgage securing the larger loan. The fact that the same arguments are not obviously available in respect of the smaller loan should not detract from that entitlement.

[30] In balancing the inconvenience to these parties, it would seem that the appropriate order is to apply the **Marbella** principle, allowing Mrs Thompson to make the payment in, if she can.

Conclusion

[31] For the reasons stated above, the application for the grant of an injunction pending appeal is allowed on the condition that Mrs Thompson pays the sum demanded by COK into court.

Order

- (1) Upon the payment by the applicant Rona Thompson, into court, the sum of \$15,000,000.00, the respondent, City of Kingston Sodality Co-operative Credit Union Limited (COK), is restrained by itself, its servants or agents, or howsoever otherwise, from selling or in any way whatsoever disposing of any interest in, or taking possession of, all that property known as number 11½ Kings House Avenue in the parish of Saint Andrew, being all that property comprised in certificate of title registered at volume 1405 Folio 543 of the Register Book of Titles, until the resolution of the applicant's appeal herein or until further order of the court.
- (2) The payment shall be made on or before 28 February 2015, failing which this order shall lapse.
- (3) Costs of this application to be costs in the appeal.