

**IN THE SUPREME COURT OF BELIZE A.D. 2016**

**CLAIM NO. 166 of 2016**

**TRADE WINDS LIMITED**

**CLAIMANT**

**AND**

**INTERESORTS INVESTMENT NV  
BECTIVE OVERSEAS PROJECTS LIMITED  
REGISTRAR, LAND TITLES UNIT**

**DEFENDANTS  
INTERESTED PARTY**

**BEFORE the Honorable Madam Justice Sonya Young**

Hearings

2016

16<sup>th</sup> June

20<sup>th</sup> September

Mrs. Magali Marin-Young, SC for the Claimant.

Mr. Michael Young, SC for the 1<sup>st</sup> Defendant.

Mr. Nigel Ebanks for the 2<sup>nd</sup> Defendant.

Ms. Marcia Mohabir and Mr. Ravel Gonzalez for the 3<sup>rd</sup> Defendant.

**Keywords : Law of Property - Mortgages – Exercise of Power of Sale -  
Injunction to stop registration of Deed of Conveyance – Serious  
question to be tried – Adequacy of Damages – Material Non-disclosure  
– The Law of Property Act Cap 190**

**DECISION**

1. Trade Winds Limited, the Applicant herein (The Mortgagor) was the owner of the island of Water Caye which it mortgaged in February 2003 to Duane L. Greenfield to secure a loan of \$2,025,000. Repayment was to be by scheduled

installments. The first being on the 1<sup>st</sup> March 2004. There was an admitted default in payment and by letter dated 4<sup>th</sup> May, 2005 a demand was made by Duane L. Greenfield and notice of the intent to sell was published in three consecutive issues of the gazette and in the local newspaper. By an arrangement between the parties 9.935 acres of the mortgaged property was released and US\$125,000 was paid towards the loan.

2. On the 3<sup>rd</sup> March, 2006 Duane L. Greenfield assigned the mortgage of the remaining lands (The Property) to Interesorts Investment NV (The Mortgagees). The principal at that time was US\$1,750,000 which, with interest, brought it to a total of US\$2,286,847.00. The Mortgagor changed shareholders to the current ones around 2008. Nothing further has been paid on the loan to date. The Mortgagee says it decided to exercise its power of sale but over time received no serious offers. In 2012 it entered into an option agreement for the sale of The Property. In furtherance of that agreement The Property was sold to Bective Overseas Projects Ltd. (The Purchasers) for US\$3,450,000. That deed, was duly lodged but, for administrative reasons, has not yet been registered by the Land Registry.
3. The Mortgagor now seeks an interim injunction restraining The Mortgagees from transferring, disposing or otherwise alienating The Property and an order directing The Mortgagee to withdraw the said deed. Its claim is grounded on the economic torts of inducement of breach of contract, unlawful interference and intimidation as well as the improper exercise of the power of sale.
4. They maintain that the conditions for the exercise of the power of sale have not yet arisen. The Mortgagee has made no demand for payment as stipulated by the mortgage. There was no publication of the notice in the Gazette in

compliance with section 82 of the Law of Property Act. A sale price of US\$3,450,000 is far below the market value of the property and is therefore a sale at an undervalue. Furthermore, the same attorney acted for both The Purchaser and The Mortgagee. The Purchaser would therefore be put on notice as to any impropriety or lack of good faith on the part of The Mortgagee. On discovering during these proceedings that the sale was made pursuant to an option to purchase, they added that that was not a right granted under a mortgagee's power of sale. They also allege that they have made their own efforts to sell The Property, by private treaties, but these have been repeatedly frustrated by The Mortgagee.

5. They do not believe the exercise of the power of sale and transfer of title to be lawful, since it was done in bad faith and was intended to cause them to suffer loss. The Mortgagor fears that if the deed is allowed to be registered it would cause irreparable damage as it would be difficult to trace the proceeds of sale or recover damages. The Mortgagee is domiciled in Curacao. Moreover, they claim that it was always their intention to sell The Property, as a package, with other properties they own on Water Caye.

**The Issues:**

6. Whether an injunction ought to be granted.
  - a. Is there a serious question to be tried.
  - b. Is damages a sufficient remedy.
  - c. Is it just and convenient – where does the balance of convenience lie.

**Whether an injunction ought to be granted:**

7. Although the hearing of an application for an injunction ought not to be treated as a mini trial there must be some limited consideration of the evidence to determine whether there is a serious question to be tried - *American*

*Cyanamid Co v Ethicon Ltd [1975] AC 396* as applied in *Belize Telemedia Limited v Speednet Communications Limited Civil Appeal No. 27 of 2009*.

**Is there a serious question to be tried:**

**a. Written demand and publication**

8. The Mortgagor says there was no written demand or publication of the notice of sale and therefore the right of sale has not been properly exercised. The Mortgagee refers to the terms of The Mortgage and the schedule of payments. It appears that although one payment was made on the loan, it did not even amount to the first agreed instalment of US\$325,000 plus interest which was to have been made on the 1<sup>st</sup> March, 2004. Furthermore, Clause 5(4) of the mortgage deed allows that even without a demand, upon a breach of any of the covenants or conditions, the mortgage would become immediately enforceable. Nonetheless, they say a demand had been made by letter on 4<sup>th</sup> May, 2005 and a notice of intent to sell was published in three consecutively issues of the gazette starting from 24<sup>th</sup> September, 2005.
9. The Mortgagor subsequently admitted that a demand had been made in May 2005 and notices were gazetted after they experienced difficulty paying. They apologized for the omission and proffered by way of explanation, the fact that the present shareholders were not involved with The Mortgagor in 2005-2006.
10. Their argument seems now to be that the earlier demand and publication are somehow insufficient since they were not made after the \$125,000 was paid and prior to the sale of The Property in 2015. I am not aware of any law which waives the mortgagee's notice merely by giving some interim concession to the mortgagor. It remains open to the mortgagee or his assign to sell the property at any time thereafter. It makes no difference that The

Mortgagee in this matter has had the mortgage assigned. He simply steps into the shoes of the assignor. Further, if the power of sale has arisen it continues regardless to any in-complete sale contracts. This ground is without merit.

**b. Interference with sale and intimidation of potential purchasers:**

11. The Mortgagor says that after the default, but with the Mortgagee's knowledge, it sought purchasers since it felt it could fetch a higher purchase price than a sale under The Mortgagee's exercise of its power of sale. Several purchasers expressed interest. There was Gary Gloer with whom they successfully negotiated and entered into a contract for the sum of US\$12,000,000 on the 30<sup>th</sup> August, 2012.
12. However, from as early as 8<sup>th</sup> August, 2012 they sought the payment balance from The Mortgagor, to no avail. They tried again after the contract without success. During that period Mr. Gloer was told to contact The Mortgagee's Florida attorney who informed him that "*foreclosure action is proceeding at speed.*" Misrepresentations were then made to Mr. Gloer that the Applicants could not sell The Property as they had already foreclosed. They threatened that if Mr. Gloer did not cease to transact with the Applicant then The Mortgagees would not co-operate in the sale. The Mortgagee's deliberate withholding of information (as to the payment balance) and their subsequent actions, showed a distinct intent to deal directly with Mr. Gloer to the full exclusion of The Mortgagor. Eventually, Mr. Gloer refused to complete the sale even when The Mortgagee offered to sell at US\$5 million less than the Applicants.
13. Next, they say, came the Norwegian Cruise Line (NCL) in July 2012 where a purchase price of US\$11 million was discussed and "*agreed to in principle.*" I am uncertain what it means to agree in principle as it relates to a contract.

Nonetheless, The Mortgagee again interfered and sought to dissuade NCL from purchasing again misrepresenting that they had already foreclosed for the sale of land. NCL withdrew being afraid of any subsequent dispute between The Mortgagor and The Mortgagee.

14. The Mortgagee denies ever interfering in any way with The Mortgagor's attempts to sell. They submit that there has been no evidence provided that there was even a valid contract entered into between The Mortgagor and Mr. Gloer in August 2012. They point to an email dated 4<sup>th</sup> October 2012 where Mr. Gloer refers to an *"increased price on that listing."* They postulate that such an increase would be wholly inconsistent with a valid contract, and I agree.
15. In relation to both Mr. Gloer and NCL, The Mortgagee also points to another email which will be dealt with in detail later in this decision. Suffice it to say that that email casts quite a serious doubt on The Mortgagor's contention of interference by The Mortgagee.
16. So, as to the issue of unlawful interference and intimidation, the court cannot say the evidence presented in this regard was overwhelming or highly reliable for that matter.

**c. Was the sale improper:**

**1. Gross undervalue**

17. In May 2015, The Mortgagor says it was again approached by potential purchasers. In preparation to transact, a search at Land Registry was conducted. It revealed that The Mortgagor still owned The Property. So they

proceeded to have an appraisal done by a firm of valuers. The market value was found to be US\$21,950,500. There was no forced sale value provided.

18. The Mortgagee says that they too have had The Property appraised and they have made numerous efforts to market same without receiving any serious offers. The appraised figures they give (five appraisals between 2006 and 2013), are vastly different to that presented by The Mortgagor. So different, in fact, that the court is left in a place of true uncertainty. Even the acreage of what was appraised varies from report to report which render them all useless as an aid. The result being that there may be merit to this issue as the true market value needs to be determined. Additional evidence would certainly be helpful. In any event it is not the court's function at this stage to resolve conflicts of fact.

## **2. Option to purchase**

19. Likewise, there may be merit in the allegation of the improper exercise of the right to sell where sale was subject to an option to purchase. A reasonable challenge could be mounted in this regard. Whether or not it will meet with success where a sale has already over taken the option is indeed a serious question to be tried.

## **Will damages suffice:**

20. Having considered the evidence presented the court finds that there are serious issues to be tried. However, The Mortgagor's main thrust that The Property is being sold at an undervalue allows the court to exercise its discretion to set aside the sale or to award damages. Such damages should cause no difficulty to assess. The Mortgagor clearly states that its intention is to sell The

Property. This is a sure indication that there is no interest in the intrinsic nature of the land itself. I could find absolutely no reason why damages would not suffice. The sole fact that The Mortgagor is domiciled abroad is certainly insufficient. This on its own does not prove that it would be unlikely to be able to pay any award made.

**The Balance of Convenience:**

21. Nonetheless, the court considers the balance of convenience. Firstly, the undertaking in damages; The Mortgagor has not convinced me that it would be able to meet that undertaking if required. It speaks repeatedly of its impecunious state. The fact that it was The Mortgagee who had to pay arrears of back taxes from July 2004 to present day. The fact that neither principal nor interest, has been paid for a considerable period of time and with the continued accumulation of interest there is little prospect of the loan being paid. The court also considers that The Mortgagor has been kept out of money for a very long time in circumstances where The Mortgagor has sold other property on Water Caye for US\$6 million. All these factors weigh heavily against the relief sought.
22. Finally, the court considers what The Mortgagee presents as ‘a material non-disclosure and misleading statements’ by The Mortgagor. The Mortgagor raised and strenuously argued that there was a blatant show of bad faith by The Mortgagee. They said that they repeatedly wrote to the attorneys for The Mortgagee asking for disclosure of demand letters, notice of foreclosure and an updated loan history showing the outstanding balance. There was no response.

23. An appointment with The Mortgagor's Florida attorney was suddenly cancelled and they were directed to the Belizean attorneys, who eventually responded on the 5<sup>th</sup> August, 2015. At that time the Belizean Attorneys confirmed that the power of sale had been exercised but declined to disclose information of the sale (another show of bad faith). Through their own investigation The Mortgagor learnt of the purported sale to The Purchaser.
24. The Mortgagee, however, affirms that by letter dated 16<sup>th</sup> January, 2013 a response was sent on The Mortgagee's behalf giving a full statement of the mortgage debt, explaining that The Property had not been sold but that the debt had been overdue for far too long and they fully intended to exercise their power of sale unless full payment was made. The Upthegroves (Bart Upthegroves being a shareholder and director of The Mortgagor) had responded acknowledging receipt. By subsequent affidavit in these proceedings, Mr. Upthegrove admitted this non-disclosure. He blamed the omission on inadvertence caused by change of counsel.
25. The court refuses to accept this explanation especially when the email which acknowledged receipt (unlike the letter of request for information) was likewise not disclosed. Moreover, that email discussed nothing about interference by The Mortgagor causing the default in payment. Instead, it states that "*the pending sale to NCL collapsed,*" and "*our mother suffered a stroke which threw us into a tailspin. Although we received a letter from your attorney, Michael Young, in January of 2013 with the mortgage payoff details, we were not able to address it at that time.*" They continued about the extension of a lease agreement which would have allowed them "*the income to address the mortgage debt.*" This vision apparently failed to realize and proved to be "*a tremendous set back.*" They added that they were seeking private investors to possibly expand the resort.

They prayed for patience and understanding as they endeavoured to satisfy the mortgage debt.

26. To raise that you were never informed of the payment out sum as a demonstration of bad faith on the part of The Mortgagee in circumstances where a detailed statement had been issued to you is unpalatable. Especially when that statement explains that the sums are the same except for interest which accrues at the rate of US\$11,666.66 per month. This signifies that any reasonable person could calculate, to a fairly accurate, even if approximate figure, what the outstanding sum would be. To my mind this is indeed a material non-disclosure which the court acting in equity will not overlook. An oversight or inadvertence could be understood if the issue was not specifically raised as a deliberate withholding of information specifically and purposefully intended to portray The Mortgagee in a bad light to the court. An application for an injunction demands full and frank disclosure. That is not a requirement which is to be taken lightly.
27. Having considered all this, I decline to exercise my discretion to grant the injunction herein and award costs to the Respondents in a sum to be assessed if not agreed.

**SONYA YOUNG  
JUDGE OF THE SUPREME COURT**