[2015] JMCA App 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 83/2015

APPLICATION NO 137/2015

BETWEEN	**WINSTON FINZI**	**1st APPLICANT**
AND	**MAHOE BAY COMPANY LIMITED**	**2nd APPLICANT**
AND	**JMMB MERCHANT BANK LIMITED**	**RESPONDENT**

Hugh Wildman and Dr Christopher Malcolm instructed by Malcolm Gordon for the applicants

Michael Hylton QC and Miss Shanique Scott instructed by Hylton Powell for the respondent

Hugh Small QC and Jerome Spencer instructed by Patterson Mair Hamilton for the interested party Asset Securitisation Trust Limited

28, 29, 31 July and 5 August 2015

IN CHAMBERS

MORRISON JA

Introduction

[1] This is an application for an injunction pending the hearing of an appeal from the decision of Sykes J, given on 14 July 2015, to discharge an injunction previously granted *ex parte* by Stamp J on 9 July 2015.

[2] The 1st applicant (Mr Finzi) is a businessman and company director, while the 2nd applicant (Mahoe Bay), of which Mr Finzi is a director, is a company incorporated under the provisions of the Companies Act. I will refer to the applicants collectively as "Mr Finzi/Mahoe Bay".

[3] The respondent (JMMB) carries on business as a merchant bank and was formerly known as Capital and Credit Merchant Bank Limited (CCMB). The banking relationship between Mr Finzi/Mahoe Bay and JMMB, which has given rise to these proceedings, predates the change of name of CCMB to JMMB.

[4] This application comes before me by virtue of rule 2.11(1)(c) of the Court of Appeal Rules, 2002 (the CAR), which empowers a single judge of this court to make orders "for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal". But, before coming to a consideration of the background to this application, I must mention two matters, one preliminary, and the other collateral, which arose during the course of the hearing of the application.

The preliminary matter

[5] At the outset of the application, Dr Christopher Malcolm for Mr Finzi/Mahoe Bay asked me to defer the hearing until the decision of Sykes J was made known in an application which he had heard that same day, 28 July 2015, in the Supreme Court. That application was for an order barring Mr Michael Hylton QC and the firm of Hylton Powell from representing JMMB in the substantive litigation, on the ground that Mr

Hylton had acted for Mr Finzi in the past. I considered that that matter had no bearing on this application and therefore declined to accede to Dr Malcolm's request. Subsequent to this ruling, it was brought to my attention that the application before Sykes J had in any event been refused by the learned judge in a judgment delivered on 30 July 2015[1].

The matter arising

[6] This issue requires to be dealt with in somewhat greater detail. The hearing of the application commenced at approximately 2:40 pm on 28 July 2015. At that time, Dr Christopher Malcolm for the applicants began his submissions in support of the application and, at approximately 3:15 pm, by pre-arrangement with counsel, the matter was adjourned part-heard to the following day, 29 July 2015.

[7] On the evening of 28 July 2015, as I continued to review the documentation in preparation for the continuation of the hearing the following day, I was struck by something. This led me to make an enquiry of my wife, Mrs Janet Morrison, who is an attorney-at-law and a former partner in the firm of DunnCox. The answer to that enquiry confirmed that (i) DunnCox had acted for CCMB in connection with the share sale transaction with JMMB that ultimately led to the takeover of the former by the latter and the change of name; and (ii) my wife had been the partner of the firm with responsibility for the transaction.

[1] **JMMB Merchant Bank Ltd v Winston Finzi and Mahoe Bay Company Ltd (No 3)** [2015] JMCCD 16

[8] Upon receipt of this information, it immediately occurred to me that it should be disclosed to the parties for their consideration. Accordingly, when the hearing resumed at 2:00 pm on 29 July 2015, all counsel in the matter were (i) advised by me of my wife's involvement in the share sale transaction; (ii) invited to take instructions from their respective clients as to whether they would, in the circumstances, find it acceptable for me to continue the hearing; and (iii) told that, if there was a concern with my continuing to hear the matter, alternative arrangements would be made to allow the application to be heard by another judge of appeal. I then rose to allow counsel to undertake the necessary consultations, asking them to indicate to the registrar when they were ready for me to return to chambers.

[9] After an interval of about 15-20 minutes, I was summoned to return to chambers. There, I was told by all counsel present, including Dr Malcolm, that they had taken instructions and took no exception to my proceeding with the hearing of the matter. Mr Finzi was present when this information was conveyed to me. So the hearing resumed and Dr Malcolm picked up his submissions where he had left off the previous afternoon, continuing for approximately an hour and 20 minutes. Mr Hylton for JMMB then responded for approximately 20-25 minutes, followed by Mr Hugh Small QC for the interested party, Asset Securitisation Trust Limited (ASL), for perhaps a further five minutes. I then advised counsel that I would reserve my decision for delivery at 2:30 pm on 31 July 2015.

[10] In the late afternoon of 30 July 2015, I received from the registrar, by way of electronic mail, a letter of that date addressed to me by Malcolm Gordon, the attorneys-at-law on the record for Mr Finzi/Mahoe Bay. The letter, which was signed by Dr Malcolm, the senior partner in the firm, stated the following:

> "Dear Sir,
>
> **Re: Application for an Injunction heard by Morrison, JA – Winston Finzi and Mahoe Bay Company Limited v JMMBMB Limited Civil Appeal No 83 of 2015**
>
> We act for the Applicants in this matter, the hearing of which commenced before you on 28 July 2015 and continued to conclusion of submissions yesterday, 29 July 2015 with a decision to be rendered on 31 July 2015.
>
> Prior to commencing the hearing on 29 July 2015, you indicated to Counsel that your wife Janet Morrison had acted for JMMB in a connected transaction. You then invited counsel to consult with their clients and thereafter indicate to you whether or not they were comfortable with you proceeding in the matter.
>
> Our clients were asked to consider whether it would have been appropriate for you to remain as a Judge in this matter. It was a decision that they were pressured to make on the spur of the moment without any details of the connected transaction. The lack of information, and the short period of time in which they were required to respond crippled their ability to make a properly informed decision.
>
> Our clients having obtained the requisite information concerning the connection by your wife to the sale of Capital and Credit Merchant Bank to Jamaica Money Market Brokers Merchant Limited (JMMBMB), which is now the basis of our counter claim against JMMBMB Limited.
>
> To be fair to you, our clients do not believe that either your [sic] or they should be placed in this position.

> Subsequently, during the course of last evening, and into this morning, our client has reverted to us indicating that after having had more time to consider the matter, and after reviewing matters related to the circumstances of the transaction referred to by you, they are now experiencing a level of discomfort that leaves them with no option but to request that we formally communicate that they would prefer that you not be the one to render a decision on their application. In particular, our clients have indicated that their counterclaim is based on matters related to the sale of CCMB to JMMBMB, which sale, from the indication of yourself, included transactional work having been carried out by your wife Mrs. Janet Morrison.
>
> In the circumstances, and grounded firmly in our instructions, we humbly ask that you recuse yourself from any further adjudication in the matter and further that the matter be adjourned for hearing before another Judge, and that in the interim the injunction be further extended, pending such hearing and determination."

[11] Shortly afterwards, the registrar also sent me the responses to this letter which she had received from Hylton Powell and Patterson Mair Hamilton, attorneys-at-law on the record for JMMB and ASL, respectively. Hylton Powell wrote as follows:

> "Dear Madam Registrar:
>
> **Re: Application for an Injunction heard by Morrison JA – Winston Finzi and Mahoe Bay Company Limited v JMMB MB Limited Civil Appeal No 83 of 2015**
>
> As you know, we represent the Respondent, JMMB Merchant Bank Limited ("the Bank") in the captioned matter. We have just received a copy of the [applicant's] letter to Justice of Appeal Morrison of today's date.
>
> The suggestion that Justice Morrison only indicated that Mrs Morrison had acted for JMMB 'in a connected transaction' and that the [applicants] have since discovered her

involvement in the sale of the Bank to JMMB is entirely false. There was no lack of details. The learned judge specifically mentioned the share sale transaction.

The suggestion that anyone was pressured to make a decision 'on the spur of the moment' is also false. The learned judge rose to allow consultation with clients and only returned after all the parties indicated they were ready. Ironically, the [applicants] were the only parties present in court.

In the circumstances, we respectfully think that this application is entirely without merit. Indeed, if the court were to allow such an objection at this stage and in these circumstances it would open the door to the most serious abuse of the court's process."

[12] And Patterson Mair Hamilton wrote as follows:

"Dear Madam Registrar:

Re: Application for an injunction heard by Morrison JA – Winston Finzi and Mahoe Bay Company Limited v. JMMB MB Limited Civil Appeal No. 83/2015

We appear for Asset Securitisation Limited in relation to the captioned application.

We have seen the letter of July 30, 2015 from the [applicants'] Attorney-at-Law, Malcolm Gordon, requesting the Honourable Morrison JA recuse himself from further adjudication of this application, as well as a letter from Hylton Powell, Attorneys-at-Law for the Respondent, JMMB Merchant Bank Limited, responding to the letter from Malcolm Gordon.

Like Hylton Powell, we are of the opinion that the suggestion made by Malcolm Gordon that Mrs. Janet Morrison has acted for JMMB in a connected matter is inaccurate. Additionally, we must emphasise that absolutely no pressure was made to bear on any party present when the issue of whether

> Justice Morrison should hear the application was voluntarily raised by the Judge. In fact, his Lordship expressly indicated that if any party had a concern with him hearing the matter, alternative arrangements would have been made in order that the application proceed before another Justice of Appeal.
>
> Further, Counsel for all the parties had the chance to consult their clients and Mr Finzi, who would have had the opportunity to consult with his Attorney-at-Law, was present with his son when the court reconvened on July 28 and his Attorney-at-Law, Dr. Christopher Malcolm announced that neither [applicant] had any objection to Justice Morrison hearing the application. We therefore consider the [applicants'] request to be wholly unmeritorious and mischievous.
>
> Finally, any consideration whether the interim injunction should be further continued is a matter for submissions to be presented before the court and cannot be dealt with in the manner suggested in the letter from Malcolm Gordon."

[13] Upon resumption of the matter on 31 July 2015, I invited counsel to address me with regard to the subject matter of this correspondence. Dr Malcolm did not feel able to add much to his firm's letter of the previous day, save to indicate to the court that he was put in "a difficult position" based on his instructions, and that the letter was not to be taken as an intention to impugn the character of anyone. For his part, Mr Hylton pointed out that attorneys-at-law are officers of the court, and as such do not — and should not — do automatically whatever they are told by their clients to do. As his firm had done in their letter of the previous day, Mr Hylton also pointed out the factual inaccuracies in Malcolm Gordon's letter, in particular in relation to the nature of the information which I had conveyed to counsel as to my wife's involvement with CCMB. Mr Small, associating himself expressly with Mr Hylton's observations, told me that he

was "astonished and flabbergasted" by Malcolm Gordon's letter, which he described as a *volte-face*, effectively amounting to judge-shopping.

[14] I must say at once that, as far as the facts are concerned, I consider the version of what transpired in chambers on 29 July 2015 recounted by Hylton Powell and Patterson Mair Hamilton to be entirely accurate and, to any extent that Malcolm Gordon's account differs, I have no doubt that the former is clearly to be preferred to the latter. The information which I conveyed to counsel on 29 July 2015 was all the information that I had — and have — in the matter, which is that my wife acted for CCMB in the share sale transaction with JMMB. And, as to whether Dr Malcolm's clients were pressured to make a decision on the spur of the moment, I can only say with certainty that no such pressure was brought to bear on Mr Finzi by me.

[15] So the question which now arises is whether, the hearing of the application having proceeded to completion before me as a result of Mr Finzi/Mahoe Bay's election to continue, in the face of the information provided by me and the opportunity given to them to take a contrary position, I should nevertheless accede to their later application for me to recuse myself. The answer to this question must turn, it seems to me, on whether in all the circumstances Mr Finzi/Mahoe Bay are to be regarded as having waived their right to object to my participation in the proceedings on the basis of the matter disclosed to the parties by me.

[16] In **Millar v Dickson (Procurator Fiscal, Elgin) and other appeals**[2] (a decision of the Privy Council on appeal from the Scottish High Court of Justiciary), Lord Bingham of Cornhill said that "[i]n most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise"[3]. And further[4], that "the more obvious and notorious it is that a point is available to be taken, the more readily may it be inferred that failure to take it represented a deliberate intention not to take it".

[17] Further afield, in **Auckland Casino Ltd v Casino Control Authority**[5], Cooke P observed that:

> "There is much authority that a party who, in the course of a hearing, has become aware of facts which may constitute disqualification for bias or otherwise, will be held to have waived the objection, or refused discretionary relief, if he allows the hearing to continue without protest. This is sometimes stigmatised as keeping an objection up a party's sleeve, but the description may be harsh if a party through no fault of its own has been confronted with an agonising choice. "

[18] To these two clear judicial pronouncements on the question of waiver, I would add two textbook statements. First, the extra-judicial comment by Sir Grant Hammond[6], a Judge of the Court of Appeal of New Zealand, that "[i]t is clear on the recusal law

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[2] [2002] 3 All ER 1041
[3] See para. [31]
[4] At para. [35]
[5] [1995] 1 NZLR 142, 151
[6] In Judicial Recusal, Principles, Process and Problems (Hart Publishing Ltd, 2009), page 93

authorities, both in the British Commonwealth and in the United States of America, that a litigant can, either expressly or by their conduct, validly waive an objection that the court is not independent and impartial, or an objection grounded in apparent bias". And second, under the rubric "Where no objection is raised at time of disclosure", there is the following statement by the late Sir Fred Phillips[7]:

> "When in a hearing a judge makes a disclosure to which no objection is then raised, a party cannot later be heard to complain as to whether the judge should hear or continue to hear the case. The party would be deemed to have granted a waiver to any charge of bias...."

[19] In my view, these authoritative statements make it clear that an objection to a court or judge hearing a matter on the ground of apparent bias can validly be waived by a litigant, provided that his decision to do so is voluntary, informed and unequivocal. In the instant case, as I have already indicated, no pressure was exerted on the parties to opt for one course over the other. Indeed, it seems to me, the clear indication that alternative arrangements would be made, if there was any objection to my continuing to hear the matter, completely insulated any party who wished to object from prejudice. In these circumstances, I consider that the statement by Mr Finzi/Mahoe Bay, through their counsel, Dr Malcolm, that they would take no objection to my continuing to hear the matter after my wife's connection to CCMB was disclosed to them, fully satisfied the criterion of voluntariness.

[7] In The Modern Judiciary, Challenges, Stresses and Strains (Wildy, Simmons & Hill Publishing, 2010), page 159

[20] Through their counsel, Mr Finzi/Mahoe Bay had all the information that I had as to my wife's involvement with the CCMB share sale transaction and it is of interest to observe that, in the letter of 30 July 2015 asking me to recuse myself, the only reason advanced on their behalf is that, "after reviewing matters related to the circumstances of the transaction referred to by [me], they are now experiencing a level of discomfort". In my view, no satisfactory reason has been advanced to allow me to go behind what I consider to be the clear and unequivocal waiver by Mr Finzi/Mahoe Bay of their right to object to my continuing to hear the matter after my disclosure. The belated application for me to recuse myself is accordingly refused.

The background to the application before Sykes J

[21] Mr Finzi is the registered proprietor of two parcels of land known as Lots 13 and 14, Mahoe Bay, Saint James. Lots 13 and 14 are, respectively, comprised in certificates of title registered at Volume 936 Folio 167 and Volume 936 Folio 168 of the Register Book of Titles. Mahoe Bay is the registered proprietor of seven contiguous parcels of land known as Lots 15, 16, 17, 18, 19, 74 and 75 Mahoe Bay, Saint James. Lots 15-19 and Lots 74 and 75 are, respectively, comprised in certificates of title registered at Volume 1257 Folios 656-660 and Volume 1257 Folios 714-715 of the Register Book of Titles.

[22] Between 2006 and 2009, Mr Finzi borrowed substantial sums of money from CCMB and Mahoe Bay guaranteed repayment of Mr Finzi's indebtedness. Pursuant to these arrangements, JMMB is the mortgagee of (i) Lots 13 and 14, under mortgage

numbered 1612988 registered on 25 August 2009 (granted by Mr Finzi over a house in Beverly Hills, St Andrew, registered at Volume 1259 Folio 937[8], and Lots 13 and 14); and (ii) Lots 15-19 and Lots 74 and 75, under mortgage numbered 1633589, registered on 18 January 2010 (granted by Mahoe Bay).

[23] In 2013, JMMB, alleging repeated default by Mr Finzi on the terms of his indebtedness, instituted a claim against Mr Finzi/Mahoe Bay to recover sums in excess of US$3,000,000.00 and J$200,000,000.00 allegedly owed to it by Mr Finzi and guaranteed by Mahoe Bay. Mr Finzi/Mahoe Bay have defended this claim on various bases and have counterclaimed against JMMB for, among other things, an account and damages for breach of contract.

[24] By letter dated 15 May 2015, Hylton Powell wrote to Messrs Ballantyne, Beswick & Co, the then attorneys-at-law for Mr Finzi/Mahoe Bay, to advise, among other things, that (i) Lots 13, 14, 15, 16, 17, 18, 19, 74 and 75 had been sold to ASL for US$2,750,000.00; (ii) agreements for sale were executed on 21 April 2015; and (iii) that the sale was scheduled for completion on 21 June 2015.

[25] On 9 July 2015, apparently spurred by this letter, Mr Finzi/Mahoe Bay applied *ex parte* for an injunction to prohibit JMMB from transferring Lots 13 and 14. The application was supported by a brief affidavit sworn to by Mr Finzi on 9 July 2015, in which the following was stated:

> "...

[8] This property is not in dispute

2. That on April 18th, 2015 with no impediment to my so doing, I entered into an agreement for sale for [Lots 13 and 14]. A copy of the sale agreements are [sic] attached along with stamped transferred document. See exhibit 'WF–2'. The sale agreement has been stamped and cross-stamped and prepared for registration before any other sale.

3. [Lots 13 and 14] are now being sold at six hundred thousand [sic] dollars ($US 600,000) [sic] acre, down from one million united state [sic] dollars (US $1,000,000) per acre which is grossly undervalue [sic].

4. That [JMMB] misled [Mr Finzi/Mahoe Bay] when it spoke to a signed sale agreement and that the sale would have been completed by June 21, 2015. [JMMB] did not exhibit a signed sales [sic] agreement which was executed on April 21, 2015. To the best information and belief the sale has not been completed and the property has not been transferred. See exhibit 'WF–1'.

5. On April 19th, 2015 [sic][9] [Marcellas James] lodged a caveat against the sale of any of the properties citing her interests as the Purchaser as evidenced on the Certificate of Title. See 'WF–1'.

6. [JMMB] has sought to sell the properties at a price significantly lower than the purchase price of US$500,000 or that which can be otherwise obtained. A letter dated May 15, 2015 from Hylton Powell is attached and labeled 'WF-3'."

[26] Both of the agreements for sale exhibited to this affidavit by Mr Finzi were dated 18 April 2015 and were in respect of the sale to Marcellas James of Lots 13 and 14, for a consideration of US$500,000.00 each (the James agreement).

[9] The caveat was actually lodged on 26 May 2015

[27] On 9 July 2015, Stamp J granted an *ex parte* interim injunction for a period of five days (to expire at 4:00 pm on 14 July 2015). Mr Finzi/Mahoe Bay were required to give the usual undertaking as to damages and to undertake to pay into court the sum of $100,000,000.00 on or before 14 July 2015. Mr Finzi/Mahoe Bay were also ordered to file further affidavits showing that there was a serious issue to be tried and that damages would not provide them with an adequate remedy.

[28] In response to Stamp J's directive, Mr Finzi swore to a further affidavit on 13 July 2015. In this affidavit, Mr Finzi asserted that (i) as mortgagor, he was entitled to redeem his equity of redemption in the mortgaged properties; (ii) JMMB, as mortgagee, was obliged to sell at the best price and not to sell at an undervalue; (iii) he was prepared to pay the sum of $100,000,000.00, representing his estimate of the maximum sum due to JMMB; and (iv) the bona fide purchaser for value to whom he had sold was entitled to specific performance, and "there is no legitimate basis as a matter of law on which she should be prevented from receiving specific performance".

[29] By an application filed on 14 July 2015, JMMB applied for an order discharging the *ex parte* interim injunction granted by Stamp J. The grounds of the application to discharge were that Mr Finzi/Mahoe Bay's application had not disclosed (i) sufficient urgency, as required by rule 17.4(4)(a) of the Civil Procedure Rules, 2002, to justify the grant of *ex parte* relief; (ii) that there was a serious issue to be tried or that damages would not be an adequate remedy; (iii) a substantive claim that could justify the grant of an interim injunction; and (iv) material information which was relevant to the

determination of the application, such as (a) that another judge (Sykes J) had conduct of the action, the trial of which was then set for 20 July 2015, (b) Mr Finzi/Mahoe Bay had failed to comply with the terms of a previous injunction restraining JMMB from exercising its powers of sale, (c) that the alleged bona fide purchaser for value was a connected person, and (d) that JMMB's attorneys-at-law had informed Mr Finzi/Mahoe Bay's attorneys-at-law by letter dated 15 May 2015 that JMMB had sold the relevant properties.

[30] The application to discharge the *ex parte* interim injunction was supported by an affidavit sworn to on 14 July 2015 by Ms Trudy-Ann Bartley Thompson, an attorney-at-law and JMMB's legal counsel. This affidavit provided further details of the sale to ASL as follows:

> "4. On April 21, 2015, [JMMB] entered into an agreement with Asset Securitisation Trust Limited to sell the following properties ('the Properties') pursuant to a mortgage dated August 10, 2009:
>
> (a) Lot # 13 Mahoe Bay registered at Volume 936 Folio 167 of the Register Book of titles; and
> (b) Lot # 14 Mahoe Bay registered at Volume 936 Folio 168 of the Register Book of Titles.
>
> 5. [JMMB] sold the Properties with 5 other adjoining lots en bloc as it was not practicable to sell the Properties separately based on their location to the only available roadway. A diagram of the Properties and other lots that [JMMB] sold to Asset Securitisation Trust Limited is included in'**TT-1**'.

6. Copies of the valuation reports for the Properties and the other lots are also included in '**TT-1**'.

7. The transfer for the Properties was subsequently lodged at the Titles Office on July 7, 2015. Copies of the stamped Agreement for Sale and receipt showing the lodgement of the transfer are included in '**TT-1**'.

8. I have been informed by [JMMB's] attorneys-at-law, Hylton Powell and do verily believe that they informed [Mr Finzi/Mahoe Bay's] attorneys-at-law, Ballantyne Beswick & Company of the sale of the Properties by letter dated May 15, 2015. A copy of the letter is included in '**TT-1**'.

9. The May 15 letter also stated that [JMMB] had sold the property located at Volume 1259 Folio 937 and Volume 963 Folio 176 of the Register Book of Titles ('the Beverly Hill [sic] Property') to Marcellas James, the same person to whom Mr Finzi purportedly sold the Properties to.

10. I have been informed by [JMMB's] attorney, Mr Hylton and do verily believe that [Mr Finzi/Mahoe Bay's] attorney, Mr Paul Beswick told him that Marcellas James is the mother of Mr Finzi's child/children and that the sale of the Beverley Hill [sic] Property was entered into in an attempt by Mr Finzi to protect his interests.

11. JMMB in its Particulars of Claim indicated that as at October 7, 2013 Finzi owed [JMMB] the following sums:

LOANS	**PRINCIPAL**	**INTEREST**	**TOTAL**
Loan 1	US$2,102577.41	US$871,810.32	US$2,974,387.73

Loan 2	J$98,382,690.26	J$77,897,227.93	J$176,279,918.19
Loan 3	J$1,319,466.03	J$924,524.53	J$2,244,008.56

12. Those sums have since increased and as at August 19, 2014, Mr Finzi owed [JMMB] the following sums:

LOANS	**PRINCIPAL**	**INTEREST**	**TOTAL**
Loan 1	US$2,153,529.60	US$1,154,974.86	US$3,308,504.46
Loan 2	J$104,620,668.29	J$101,780,756.01	J$206,401,424.30
Loan 3	J$1,319,466.03	J$1,249,607.63	J$2,569,073.66

13. In the circumstances, [JMMB] respectfully requests that this Honourable Court grant the orders sought in its Application to Discharge Injunction."

[31] I should mention at this stage that the copy of the agreement for sale to ASL exhibited to Ms Bartley Thompson's affidavit showed the purchase price as US$2,675,000.00, and not the US$2,750,000.00 previously referred to[10].

[32] The "valuation reports" referred to at paragraph 6 of Ms Bartley Thompson's affidavit, and exhibited by her, were contained in four letters from D.C. Tavares & Finson Realty ('DCT & F'), Real Estate Agents, Appraisers, Auctioneers, Consultants. All four letters were dated 21 July 2014. The first related to Lots 13 and 14, the second to Lots 15, 16, 17 and 18, the third to Lot 19 (which was described as "vacant") and the

[10] At para. [24] above

fourth to Lots 74 and 75. The relevant letter in respect of each lot discussed the dimensions, the title position, the neighbourhood, the market demand, the nature of the "interest to be valued", the market value and the forced sale value. In each letter, under the headings "market value" and "forced sale value", respectively, an opinion was offered as to the negotiated price likely to be fetched by the lots if offered for sale on bona fide terms and on a forced sale. Each letter ended with the following caution:

> "This is a 'letter of opinion' and does not purport to be a detailed report, and should not be relied upon as such, but rather used as a guide only. Please note that figures may vary with a more detailed valuation."

Sykes J's decision[11]

[33] Sykes J remarked at the outset[12] on Mr Finzi's assertion in his affidavits that when he contracted to sell the property to Miss James there was no impediment in the path of his doing so. The learned judge's comment[13] was as follows:

> "The court is not so sure about this because there is a clause in the mortgage document that expressly states that the mortgagor shall not 'lease or demise or sell or part with the possession of the mortgaged lands … during the continuance of this security without the express consent in writing of the mortgagee first had and obtained' (see clause 1 (e)). There is no evidence that the mortgagee waived this provision or agreed not to rely on it and neither is there any evidence in the affidavits that Mr Finzi obtained the written consent of the mortgagee. If this is correct then it would seem that there was indeed a lawful impediment in the path of this disposition, namely, the contractual provision in the mortgage."

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[11] **JMMB Merchant Bank Limited v Winston Finzi & Mahoe Bay Company Limited (No 2)** [2015] JMCC Comm 11
[12] At para. [3]
[13] At para. [3]

[34] Next, after summarising the relevant facts, Sykes J noted[14] that there was no evidence that ASL knew of the James agreement or that JMMB knew of the James agreement. The learned judge then referred[15] to the case of **Lloyd Sheckleford v Mount Atlas Estate Limited**[16]. In that case, he said, this court accepted the mortgagee's contention that the effect of section 106 of the Registration of Titles Act was that an injunction will not lie to restrain the completion of a sale of mortgaged property to a bona fide purchaser for value on the basis of a complaint by the mortgagor as to the regularity or propriety of the sale. On this basis alone, the learned judge considered[17] that the interim injunction granted by Stamp J should be discharged:

> "As noted earlier, JMMB was not told of this contract with Miss James. There is no evidence that the purchaser knew of this agreement between Mr Finzi and Miss James. The purchaser's bona fides in this case, at this stage, is [sic] not up for question. [Mr Finzi/Mahoe Bay] in this case are not without a remedy. If JMMB went about this the wrong way then it is liable to the mortgagor in damages. Indeed, this is not a case where [Mr Finzi/Mahoe Bay] do not want to sell the property. The issue seems to be who should sell the property. In the view of this court, the facts are such that [JMMB's] sale to the purchaser should stand and the injunction discharged."

[35] The learned judge granted leave to appeal and stayed his order until 23 July 2015 pending an application for an injunction to this court.

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[14] At para. [6]
[15] At para. [7]
[16] SCCA No 148/2000 (delivered 20 December 2001)
[17] At para. [20]

The grounds of appeal

[36] In their notice of appeal filed on 22 July 2015, Mr Finzi/Mahoe Bay advanced five complaints, which may be summarised as follows:

1. With regard to Sykes J's comment on whether there was any impediment to Mr Finzi entering into the James agreement, the learned judge erred in placing reliance on a clause in a mortgage document that was not before the court.
2. The learned judge erred in failing to take into account the fraud/misrepresentation committed by JMMB in the sale agreement to ASL, by which JMMB asserted a right of sale over properties (Lots 15, 16, 17, 18, 19, 74 and 75) that were not part of mortgage numbered 1612988 under which the power of sale was purportedly being exercised.
3. The learned judge erred in finding that ASL was a bona fide purchaser for value without notice, since it should have been put on enquiry by the fact that the agreement for sale disclosed other interests not covered under mortgage numbered 1612988 under which JMMB purported to sell.

4. The learned judge erred in failing to appreciate that JMMB had not acted in good faith and was dishonest in its attempt to sell an additional seven lots not covered under mortgage numbered 1612988 and therefore not subject to the powers of sale contained in that mortgage.

5. The learned judge erred by allowing himself to be influenced by pleadings prepared by Hylton Powell in the light of Mr Finzi/Mahoe Bay's contention that the firm should be barred from acting in the matter (in the light of what I have already indicated at para. [5] above, it is not necessary for me to consider this ground).

[37] In the application for an injunction pending appeal also filed on 22 July 2015, Mr Finzi/Mahoe Bay contended, among other things, that an injunction pending appeal was necessary to preserve the status quo and that Sykes J erred in considering that the case fell squarely within the principle of **Sheckleford v Mount Atlas Estate Limited**. In his affidavit in support of this application sworn to on 22 July 2015, Mr Finzi retraced much of the ground which he had covered in his previous affidavits. He also raised issues not previously raised, including that (i) he had on several occasions in the past attempted to make payments on account of his indebtedness, but these had been refused by JMMB; (ii) better offers for the purchase of the properties had been received

and ignored by JMMB; (iii) the James agreement had been stamped and cross-stamped and prepared for registration before any other sale; (iv) the properties were being sold at an undervalue and it is demonstrable that completion of the James agreement will more substantially reduce his indebtedness to JMMB; (v) there had been a misrepresentation to the court as regards the extent of the power of sale under mortgage numbered 1612988; (vi) damages would be an inadequate remedy because JMMB has no power of sale over any of the properties outside of mortgage numbered 1612988; (vii) there was a variance between the originally stated sale price to ASL (US$2,750,000.00) and the price for which it appeared that the sale was now slated to be concluded (US$2,675,000.00); and (viii) Lot 19, which was described by DCT & F as "a vacant resort residential lot", was not "bare land", but contained valuable assets, namely half of an old hotel which is conjoined with Lot 20, also owned by Mahoe Bay.

[38] On 23 July 2015, the date on which the stay granted by Sykes J would have expired, McDonald-Bishop JA (Ag) granted an interim injunction restraining the transfer of Lots 13 and 14 to ASL pending the hearing of the appeal and a further interim stay of Sykes J's order until 28 July 2015, which was the date fixed for the hearing of the *inter partes* application.

[39] On 24 July 2015, JMMB filed a counter-notice of appeal, in which it contends that the decision of Sykes J to discharge the *ex parte* injunction granted by Stamp J should

be affirmed on the additional grounds upon which it had relied in its application to discharge filed on 14 July 2015[18].

Additional evidence

[40] As will readily be seen, the grounds of appeal and the affidavit in support of the application for an injunction pending appeal raise issues additional to those so far canvassed in the court below. In particular, the bulk of them derive from the fact that the agreement for sale by which JMMB has agreed to sell Lots 15, 16, 17, 18, 19, 74 and 75 to ASL expresses itself to be made pursuant to powers of sale contained in mortgage numbered 1612988, which relates to Lots 13 and 14 only. Both JMMB and ASL accordingly felt it necessary to file an additional affidavit each. The first was sworn to by Ms Bartley Thompson on 27 July 2015, while the second was sworn to by Mr Trevor Patterson, the senior partner in the firm of Patterson Mair Hamilton, ASL's attorneys-at-law, also on 27 July 2015.

[41] The effect of these affidavits may be summarised in this way. By letter dated 19 March 2015, an offer to purchase Lots 13, 14, 15, 16, 17, 18, 19, 74 and 75 for US$2,750,000.00 was made to JMMB on behalf of ASL. By letter of the same date, JMMB accepted this offer and, after a further exchange of correspondence, an agreement for sale was prepared and executed by both parties and the required deposits totalling US$550,000.00 were duly paid.

[18] See para. [29] above

[42] In the agreement for sale dated 21 April 2015, the vendor, JMMB, was characterised as "Mortgagee under Power of Sale contained in Mortgage numbered 1612988"; while the lands being sold were described as Lots 13, 14, 15, 16, 17, 18, 19, 74 and 75.

[43] By special condition 8, the agreement was made subject to ASL obtaining a satisfactory surveyor's identification report and required ASL to advise JMMB of any breaches of restrictive covenants and/or boundary discrepancies within 45 days of the date of execution of the agreement. In the event that ASL raised any objection within 45 days of the date of the agreement, JMMB was given the option to either correct any breach, discrepancies or encroachment at its expense or rescind the agreement.

[44] By letter dated 12 May 2015, Patterson Mair Hamilton advised JMMB that the surveyor's report dated 1 May 2015 (which was enclosed) had revealed that, due to a loss of land by erosion, the total acreage of the property being sold had suffered a loss of just under 10%. In electronic mail exchanges on 19 May 2015, JMMB accordingly proposed, and ASL accepted, a reduction in the sale price by US$75,000.00, from US$2,750,000.00 to US$2,675,000.00. It was agreed between the parties' attorneys-at-law that the necessary change would be made by substituting an amended second page of the agreement to reflect the reduced price. The agreement was then duly submitted for stamping and was stamped on 20 May 2015.

[45] In his affidavit[19], Mr Patterson explained that the agreement for sale had "incorrectly indicated that the properties were being sold under powers contained only in mortgage number 1612988". In a paragraph of his affidavit[20] which greatly attracted Dr Malcolm's attention in his submissions, Mr Patterson went on to state the following:

> "On June 26, 2015, we dispatched the instrument of transfer nominating Sandals Royal Caribbean Limited ('SRC'), the nominee under the agreement, and (having received the funds from our client to close the transaction) a letter of undertaking to JMMB promising to pay the balance of the purchase price and costs related to the transaction. The Instrument of Transfer clearly indicated that the properties were being sold under powers of sale conferred by mortgage numbers 1633589 and 1612988. Further, the sale price recited in the Instrument of Transfer was adjusted to US$2,675,000.00 (from US$2,750,000.00) due to a significant loss of land arising from soil erosion which was discovered after the agreement was signed."

[46] Mr Patterson stated further[21] that ASL had only become aware of the attempts by Mr Finzi/Mahoe Bay to prevent the transfer to SRC on 23 July 2015. That is, the date on which he was advised by JMMB that the transfer, which had been lodged for registration on 7 July 2015, had been blocked, firstly by the *ex parte* interim injunction and, secondly, after the discharge of that injunction, by the conservatory order made by McDonald-Bishop JA (Ag) on 23 July 2015.

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[19] At para. 6
[20] Para. 8
[21] At paras 9 and 10

The submissions

[47] I hope that I do no injustice to Dr Malcolm's wide-ranging submissions by summarising them as follows:

1. In the light of the discrepancies in the documentation as to the price of the sale to ASL and the fact that the agreement for sale referred to mortgage numbered 1612988, while purporting to sell other lots not included in that mortgage, there is, at the very least, a strong hint of fraud sufficient to vitiate JMMB's purported exercise of its powers of sale.
2. In any event, the downward adjustment in the price raises questions as to the bona fides of the entire transaction with ASL, given that (i) special condition 8 of the agreement did not permit renegotiation of the sale price in the manner in which it is alleged to have taken place in this case; and (ii) there is no evidence of an amended agreement documenting the alleged price adjustment and, in any event, it was misleading and improper to refer to the agreement as having been made on 21 April 2015, when it is clear the agreement, if any, as to the reduced price was not reached until 19 May 2015.

3. Further, there were material misrepresentations in Ms Bartley Thompson's affidavit sworn to on 14 July 2015, in that (i) paragraph 6 of that affidavit referred to "valuation reports", while the documents exhibited demonstrated that they were in fact "letters of opinion"; and (ii) the letter exhibited in respect of Lot 19 described it as "vacant", when there was a building, albeit in ruins, on the property.

4. The purported sale by JMMB to ASL is second in time to the sale by Mr Finzi/Mahoe Bay under the James agreement and as such the latter should prevail over the former.

5. The case of **Sheckleford v Mount Atlas Estate Limited** is clearly distinguishable, for "myriad reasons", including the fact that, in that case, (i) there was no issue of competing priorities; (ii) there was clear evidence of default on the part of the mortgagor; (iii) there was no question of fraud on the part of the mortgagee; and (iv) there was no question of the mortgaged property being sold at an undervalue.

6. The issues raised on this application are such as to give rise to questions of good faith in commercial dealings and, in these circumstances, an injunction should be granted to preserve the status quo pending the hearing of the appeal.

[48] Accepting that fraud is an exception to the general rule relating to the exercise of a mortgagee's powers of sale, Mr Hylton submitted that the application should fail unless Mr Finzi/Mahoe Bay are able to show fraud by the JMMB as mortgagee and ASL as purchaser. In this regard, Mr Hylton identified three areas in which fraud was alleged. Firstly, that Ms Bartley Thompson represented something to be a valuation report which was not a valuation report. Secondly, the issue of the reduced price and the date on which the agreement was reached. And thirdly, the reference in the agreement for sale to mortgage numbered 1612988 only.

[49] In relation to the first area, Mr Hylton pointed out that, while the document referred to by Dr Malcolm did say that it was "not a detailed report", it was nevertheless a professional opinion as to value. In relation to the second area, Mr Hylton rehearsed the chronology of the events leading up to the agreement for sale and the subsequent agreement to reduce the price. Against this background, it was submitted that there could be no ground for complaint about the method chosen by the only two parties of the agreement to reflect the price adjustment to which they had freely agreed. And finally, as regards the third area, Mr Hylton observed that, although the agreement for sale had made reference to one mortgage only, it was agreed by both the vendor and

the purchaser that this was an error, as the sale was in respect of all nine contiguous lots. The error was corrected in the transfer and, in these circumstances, it was submitted that the failure to refer to both mortgages in the agreement could not have been done with fraudulent intent, since there would have been no benefit or prejudice to either party, or to the revenue.

[50] On all other issues, such as whether there is a serious question to be tried, whether damages would be an adequate remedy and the matters raised by the counter-notice of appeal, Mr Hylton was content to refer to and rely on his written submissions.

[51] Mr Small adopted Mr Hylton's submissions on the issue of fraud and he too referred me to the written submissions filed on behalf of the ASL. In those submissions, it was strongly contended that the appeal raises no serious issues to be determined, because, firstly, in the absence of fraud, section 106 of the Registration of Titles Act (as applied in **Sheckleford v Mount Atlas Estate Limited**) provided full protection to a purchaser from a mortgagee acting under powers of sale; and, secondly, for various factors relevant to the exercise of the court's discretion, it would be inequitable to grant any further injunction.

Discussion and conclusions

[52] An applicant for an injunction pending appeal under rule 2.11(1)(c) of the CAR is required to show, as JMMB submitted, that he has "a good arguable appeal"[22]; or, as ASL submitted, "that he has reasonable grounds of appeal…or that there are serious issues to be canvassed on appeal"[23]. On either formulation, Mr Finzi/Mahoe Bay must show in this application that they have an appeal that stands a reasonable prospect of success as a precondition to injunctive relief.

[53] Before coming to the actual grounds of appeal, I must first consider the effect on this matter of section 106 of the Registration of Titles Act. That section, as is well known, gives a power of sale to a mortgagee of property under the Act in cases of default in payment or in performance or observance of covenants by the mortgagor, provided that certain conditions are satisfied. But no purchaser from the mortgagee shall be bound to see or inquire whether the conditions have been satisfied. Nor is the Registrar of Titles, upon production of a transfer made in professed exercise of the power of sale, required to make any such inquiries, "and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power [of sale]".

[54] In **Sheckleford v Mount Atlas Estate Limited**, the judge in the court below granted an interlocutory injunction to restrain the mortgagee, at the suit of the

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[22] As K Harrison JA put it in **Olint Corp Limited v National Commercial Bank Jamaica Limited**, SCCA No 40/2008, App No 58/2008 (delivered 30 April 2008), para. 6

[23] As I put it in **Michael Levy v Jamaica Re-Development Inc Fund and Kenneth Tomlinson**, SCCA No 26/2008, App No 47/2008 (delivered 11 July 2008), para. 17

mortgagor, from exercising her powers of sale under a mortgage until the trial of the action. The issue on appeal was whether section 106 precluded the court from granting an injunction, where a mortgagee in the exercise of the power of sale under the mortgage has entered into an agreement for sale of the mortgaged property with a bona fide purchaser, but the transfer of the property has not yet been registered.

[55] The court was unanimously of the view that it did. Delivering the leading judgment, Forte P said[24] that, "on a simple reading of section 106, it is clear and unambiguous that the legislature intended to give the purchaser the protection as soon as the mortgagee, in the exercise of his power of sale, enters into a contract with a bona fide purchaser for the sale of the mortgaged property". Harrison JA[25] considered[26] that "in section 106, the protection provided to both the purchaser from enquiry and the Registrar…exists before any registration of the transfer has been effected". And although Harrison JA did go on to say[27] that "[a] mortgagee may not, by ill-will or spite or sheer negligence misuse the power of sale and expect the protection of the statute", he was careful to conclude[28] that "[h]e is answerable to the mortgagor, albeit in damages, for any wrongdoing on his part by such exercise". And finally, Walker JA said[29] unequivocally that the provisions of section 106 "are clear and unambiguous…[and] effectively oust the jurisdiction of the Court to grant injunctive relief in a situation such as this".

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[24] At page 14
[25] As he then was
[26] At page 19
[27] At page 19
[28] At page 20
[29] At page 21

[56] In my view, save in the case of fraud, the broad generality of these statements do not admit of any distinction on the grounds propounded by Dr Malcolm in his submissions. In particular, nothing at all turns, it seems to me, on the fact that there is, as Dr Malcolm would have it, a competing sale: Sykes J found expressly that neither JMMB nor ASL had notice of the James agreement before the agreement for sale of 21 April 2015 was entered into. At the time of the hearing before Sykes J, no question of fraud had even been mentioned, either in Mr Finzi/Mahoe Bay's pleadings or in the affidavit evidence. It therefore seems to me that the learned judge was entirely correct to regard the decision in **Sheckleford v Mount Atlas Estate Limited** as dispositive of the question of whether an injunction should be granted to restrain JMMB from completing the sale to ASL. It may well be in recognition of the force of this consideration that, despite Dr Malcolm's attempts to distinguish the decision, there is no contention in the grounds of appeal that Sykes J was wrong in this view of the effect of the case.

[57] Turning now to the actual grounds of appeal, the first ground complains of the fact that the learned judge queried Mr Finzi's assertion that there was no impediment to his entering into the James agreement. This ground was not vigorously pursued either in the skeleton arguments or by Dr Malcolm in his oral submissions. It suffices to say, I think, that Sykes J did not decide the matter before him on the basis of what was plainly no more than a comment. But in any event, as JMMB pointed out in its written

submissions, a copy of mortgage numbered 1612988 is in fact to be found in the documents filed in the court below[30].

[58] This brings me then to the matter of fraud, the existence of which is at least implicit in the three remaining grounds, as amplified by Dr Malcolm in his oral submissions. For the purpose of assessing whether there is a prospect of a good arguable appeal on this ground, I will adopt Mr Hylton's classification of the allegations of fraud.

[59] First, there is the misrepresentation issue, which relates primarily to Ms Bartley Thompson's characterisation of DCT & F's "letters of opinion" as "valuation reports"[31]. In my view, it is clear from the plain language of the letters, all of which were exhibited to the affidavit, that the affidavit did not misrepresent their effect. Each letter proffered an opinion as to market value, qualified only by the consideration that the lots should be "offered for sale on bona fide terms". Against this background, it is equally clear that DCT & F's caveat that the letters were "letters of opinion" could only have related to the fact that they could not be regarded as "a detailed report".

[60] As regards the description in DCT & F's letter of Lot 19 as "vacant", the only evidence to the contrary to which we were referred by Dr Malcolm was the surveyor's report dated 1 May 2015, in which it was observed that "[t]here is a section of building in ruins on the property". In my view, the description of an unoccupied lot, on which there is a section of building in ruins, as vacant can hardly be described as a

[30] As an exhibit to the affidavit of Deryck Rose, sworn to on 24 September 2014.
[31] See para. [32] above

misrepresentation rising to the level of fraud. At worst, it seems to me, it could only be described as a loose — or perhaps colloquial — use of language.

[61] Second, there is the price reduction issue. In my respectful view, the unchallenged evidence of Ms Bartley Thompson and Mr Patterson as to how the price of the property being sold came to be reduced from US$2,750,000.00 to US$2,675,000.00 makes this a complete non-issue. This was a contract between two obviously substantial commercial entities, both represented at all stages of the transaction by attorneys-at-law. Special condition 8 of the agreement made the sale subject to the obtaining of a satisfactory surveyor's identification report and, in the event that the report revealed any breaches of restrictive covenants and/or boundary discrepancies, the vendor was given an option to either correct the breach or rescind the agreement. The surveyor's identification report having disclosed a boundary discrepancy, the parties, by negotiation and agreement, decided to deal with it by way of a reduction in the purchase price. They also agreed on the method by which they would reflect the reduction in the agreement. The amended document was submitted to the revenue authorities and the appropriate duties and taxes were paid. The only two parties to the agreement, apparently content with their bargain, are now anxious that it should be completed. In these circumstances, it is difficult to discern any element of wrongdoing, far less fraud, in the purposive approach taken by the parties in their dealings with each other.

[62] Finally, on the power of sale issue, there is no question that the agreement for sale from JMMB to ASL stated the sale to be in the exercise of the power of sale contained in mortgage numbered 1612988. That was a mortgage given by Mr Finzi to JMMB in respect of the Beverly Hills property and Lots 13 and 14 only. There is also no question that the agreement for sale purported to comprehend Lots 15, 16, 17, 18, 19, 74 and 75, which were subject to mortgage number 1633589, a mortgage granted by Mahoe Bay to JMMB.

[63] On the face of it, therefore, the agreement for sale purported to sell seven lots under a power of sale in a mortgage which did not cover those lots. Mr Finzi/Mahoe Bay asserted that this discrepancy gives rise to a strong hint of fraud, while both JMMB and ASL, the parties to the agreement, insisted that it arose from an error. There appears to be no dispute that mortgage numbered 1633589 was also in arrears and that JMMB's power of sale in respect of the lots covered by that mortgage had also arisen. In these circumstances, I find it difficult to appreciate of what possible advantage it could have been to JMMB, or to anyone else for that matter, to sell those seven lots under a mortgage other than the one in which they were in fact comprised. It therefore seems to me that, on a balance of probabilities, JMMB/ASL's explanation for the discrepancy appears, by a long way, to be preferable to that of Mr Finzi/Mahoe Bay. Once this explanation is accepted, then the question of fraud simply would not arise.

[64] In the absence of fraud, section 106 of the Act, as interpreted and applied by this court in **Sheckleford v Mount Atlas Estate Limited**, insulates a mortgagee

exercising the power of sale under a registered mortgage from a claim for injunctive relief by the mortgagor. Sykes J was therefore correct to apply this principle on the material before him in the court below. The additional material relied on by Mr Finzi/Mahoe Bay on this application for an injunction pending appeal has failed to demonstrate that there is even an arguable case on the ground of fraud. Accordingly, for all the reasons which I have attempted to state, I have come to the clear conclusion that this application, not having met the threshold of a good arguable appeal, must be dismissed without more. In the light of the view I take on this point, it is not necessary to go on to consider matters such as whether damages would be an adequate remedy and the balance of convenience. Nor have I found it necessary to consider JMMB's counter-notice of appeal, which therefore remains a matter for the court on the hearing of the substantive appeal.

Disposal of the application

[65] The application for an injunction pending appeal is dismissed. The parties are to make written submissions on the question of the costs of the application within 21 days of the date of this judgment. The court will deliver its written ruling on costs within a further 14 days of the date of receipt of the last submission.