[2024] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00057

BETWEEN	**HERZOG CONTRACTING CORPORATION**	**APPELLANT**
AND	**SEAL CONSTRUCTION COMPANY LIMITED**	**1ST RESPONDENT**
AND	**FIRST TROPICAL PROPERTIES LIMITED**	**2ND RESPONDENT**
AND	**COUNTERPOINT DEVELOPMENT COMPANY LIMITED**	**3RD RESPONDENT**
AND	**SEAL INVESTMENT COMPANY LIMITED**	**4TH RESPONDENT**
AND	**MATTHEW DONALDSON**	**5TH RESPONDENT**

Ms Carlene Larmond KC and Miss Giselle Campbell instructed by Patterson Mair Hamilton for the appellant

Keith Bishop instructed by Bishop and Partners for the respondents

13, 14 November 2023 and 28 June 2024

Civil procedure – Disobedience of case management directions – Application to impose sanctions for disobedience
Injunction – Injunction to restrain power of sale by mortgagee – Whether serious questions to be tried

STRAW JA

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and have nothing to add.

FOSTER-PUSEY JA

[2] This is an appeal against the grant of an interlocutory injunction on 17 December 2021, by Lawrence-Grainger J (Ag) ('the learned judge') restraining the appellant from exercising its power of sale as a mortgagee. On 16 May 2022, this court granted the appellant an extension of time within which to appeal and, on 17 May 2022, the appellant filed its notice and grounds of appeal. On 1 June 2022, the respondents also filed a counter-notice of appeal to affirm the decision of the learned judge on grounds other than those on which she relied in coming to her decision.

[3] In order to better follow the matter, it is important to set out the names of the parties to the appeal. Herzog Contracting Corporation ('Herzog Contracting'), a defendant in the claim below, is the appellant. Seal Construction Company Limited ('Seal Construction'), a claimant below, is the 1st respondent. First Tropical Properties Limited ('First Tropical'), a claimant below, is the 2nd respondent. Counterpoint Development Company Limited ('Counterpoint'), a claimant below, is the 3rd respondent. Seal Investment Company Limited ('Seal Investment'), also a claimant below, is the 4th respondent. Matthew Donaldson, a claimant below, is the 5th respondent.

[4] Though not appearing in this appeal, it is also important to set out the names of the other defendants in the claim. They are Herzog Jamaica Limited ('Herzog Jamaica'), Michael Eddey, the Housing Agency of Jamaica ('the HAJ') and the Minister of Housing. A claimant below, Herzog Seal Limited ('Herzog Seal') is also not a party to this appeal.

[5] The learned judge made the following orders (as recorded at pages 9-10 of the record of appeal):

> "(1) The [appellant], its servants and or agents to include D.C. Tavares Finson Realty Limited, are hereby restrained

from continuing to advertise the undermentioned properties for auction and sale and/or from selling whether by auction or private treaty pursuant to the power of sale in mortgages the following properties pending the trial of this claim:

a. Commercial Factory Building in the parish of St. James registered at Volume 1269 Folio 343 of the Register Book of Titles;

b. Lot L4, Rose Hall in the parish of St. James registered at Volume 1358 Folio 824 of the Register Book of Titles;

c. Townhouses Strata Lots 1 & 4 at Ironshore in the parish of St. James registered at Volume 1394 Folio 842 and Volume 1394 Folio 845 of the Register Book of Titles;

(2) The 1st, 2nd, 3rd, [4th and 5th respondents] give the usual undertaking as to damages.

(3) Costs of application to the 1st, 2nd, 3rd, [4th and 5th respondents] to be taxed if not agreed."

[6] Broadly speaking the issues that arise in this appeal concern whether the learned judge erred in law and or in fact in the exercise of her discretion to grant the injunction restraining the appellant mortgagee from exercising its powers of sale. In addition, whether, even if an injunction could have been properly granted, the respondents ought to have been required to pay the amount claimed by the appellant into court in accordance with the "Marbella principles", a term coined from the well-known authority from this court: **SSI (Cayman) Limited and others v International Marbella Club SA** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 57/1986, judgment delivered 6 February 1987.

Preliminary issues

[7] Prior to hearing the substantive appeal, the court heard an application filed by Herzog Contracting on 31 October 2023, seeking the following orders:

"1. Pursuant to order numbered (8) of Formal Order on case management dated the 8th of November 2022, the court hereby applies sanctions against the Respondents for failure to comply with the order to file and serve full written submissions and a bundle of authorities on or before the 28th of July 2023.

2. The Respondents' Counter-Notice of Appeal filed on the 1st of June 2022 is struck out.

3. The Respondents are not permitted to utilize the time allocated for oral submissions pursuant to order numbered 7(b) of the Formal Order dated 8th November 2022 or any other period of time to advance oral submissions in response to the appeal.

4. The Appellant's full written submissions filed on 11 April 2023 and served on 12 April 2023 be permitted to stand as having been properly served.

5. Costs of this application and of the Counter-Notice of Appeal to the Appellant to be taxed if not agreed."

[8] The grounds of the application were:

"1. Pursuant to orders on case management contained in Formal Order dated the 8th day of November 2022 ('the CMC Order'), this appeal was set for hearing during the week of 13 November 2023.

2. Pursuant to order numbered (4) of the CMC Order, the Respondents were required to file and serve full written submissions and a bundle of authorities on or before 28 July 2023.

3. The Respondents have not complied with the said order, in that, as at the date of this application they have not served on the Appellant full written submissions and a bundle of authorities filed by the prescribed date or at all.

4. By virtue of order numbered (8) of the CMC Order this Honourable Court put the parties on notice that it will apply a sanction in the event that the parties or any of

them fails to abide by the time limits set herein for filing and serving documents.

5. As at the date of this application, the Appellant has not been served with any application for extension of time and relief from sanction filed by the Respondents.

6. With a mere 2 weeks prior to the appeal hearing, the Appellant is prejudiced in its preparation of the appeal and response to the counter-notice of appeal by the Respondent's failure to comply with this order for 3 months since 28 July 2023. The Respondent has not been prejudiced by the 1-day delay in the service of the Appellant's submissions on 12 April 2023 caused by clerical oversight.

7. The overriding objective and proper administration of justice favour the grant of the orders sought herein."

[9] Brooks P made the orders stipulating the time by which the parties were to file and serve written submissions and authorities at a case management conference held on 8 November 2022. Herzog Contracting was to file its full written submissions on or before 7 April 2023, a date that turned out to have been Good Friday, a public holiday. Those submissions were filed on the first working day thereafter, 11 April 2023, and served on the following day. Importantly, Brooks P ordered that "[t]he court will apply a sanction in the event that the parties or any of them fails to abide by the time limits set herein for filing and serving documents".

[10] After hearing the application on 13 November 2023, this court made the following orders:

"1. Orders 3 and 4 of the Notice of Application filed 31 October 2023 are granted.

2. The issue of any costs sanction will be considered at the conclusion of the hearing of the appeal.

3. Costs of the application to the appellant to be agreed or taxed."

[11] I now outline the reasons for that ruling as promised.

[12] In written submissions filed on 9 November 2023, Ms Larmond, King's Counsel for Herzog Contracting, submitted that pursuant to rules 2.14 and 1.7 of the Court of Appeal Rules ('CAR') and part 26 of the Civil Procedure Rules ('CPR'), the court has power to impose sanctions for failure to comply with its orders. King's Counsel also relied on the case of **Crick and Another v Brown; Philip and Commissioner of Police and another** [2020] UKPC 32, to submit that the court should now impose sanctions for the respondents' failure to comply with the order for the filing and service of its full written submissions and authorities, although the sanction to be applied was not specified in the order.

[13] Further, King's Counsel submitted that the order as framed, placed the respondents on notice that if there was a breach, the court would impose sanction(s). King's Counsel also averred that though the exact sanction to be imposed is within the court's discretion, in the present circumstances, where the respondents had made no application for an extension of time within which to comply, neither have they placed any reasons for the failure to comply before the court, an adjournment is inappropriate. As such, striking out the respondents' counter-notice of appeal and not permitting the respondents to make oral submissions are appropriate sanctions because the respondents had ample time to regularise their non-compliance. King's Counsel also submitted that Herzog Contracting would be prejudiced if, having not filed and served their full written submissions, the respondents were permitted to advance oral arguments. King's Counsel submitted that in the alternative, the court could impose a costs order.

[14] Mr Bishop, counsel for the respondents, submitted that while he was not generally opposed to the imposition of a sanction, striking out the respondents' counter-notice of appeal was inappropriate. In his view, a costs order would be more appropriate.

Discussion

[15] The court must actively manage cases. This includes fixing timetables for the filing of various documents. Accordingly, the general position is that the rules and orders of the court must be obeyed. Likewise, in the event of non-compliance, the court has the

power to extend the time for compliance as well as impose sanctions for disobedience. As it pertains to civil appeals, rule 2.14 of the CAR provides that the Court of Appeal has the powers set out under rule 1.7 of the CAR, in addition to all the powers and duties of the Supreme Court, inclusive of the powers stipulated in rule 26 of the CPR.

[16] Rule 1.7(3) of the CAR provides that when the court makes an order or gives a direction, it may impose conditions and specify any consequence for failure to comply with the order or condition. Rules 26.1(2)(v) and (3) of the CPR, concerning the general case management powers of the court, give like power to the court to make orders and directions that are subject to conditions and have specified consequences for non-compliance. Rules 26.7(1) and (2) respectively also stipulate that whenever practicable, the court is to specify "the consequences of failure to comply" and that a sanction for non-compliance is effective unless relief from sanction is sought.

[17] Accordingly, it is within that discretionary parameter that the court considers the appropriateness of the sanction to be imposed for failure to comply with its order. I have considered the very helpful case of **Crick and Another v Brown; Philip and Commissioner of Police and another** cited by Herzog Contracting. The cases emanated from the Trinidad and Tobago Court of Appeal and were heard together by the Privy Council.

[18] In the first of the two cases, **Crick and Another v Brown**, the court had stipulated the time for the filing of written submissions. However, both parties failed to file written submissions. At the hearing of the appeal, the appellants sought an adjournment to enable them to prepare and file written submissions. No reason was advanced for the non-compliance and there was no objection from counsel for the respondent. The Court of Appeal, however, declined the request, finding that an adjournment would be an inefficient use of the court's time. The court proceeded to hear the appeal but did not allow the appellants to make substantive oral submissions on the basis that there had been no notice of the submissions to the court or the respondent. The appeal was dismissed by way of substantive determination on its merits.

[19] In considering the appeal their Lordships stated:

> "31. In the Board's judgment, the Court of Appeal was fully entitled not to grant the Cricks' application for an adjournment of the hearing of the appeal, which they only made on the day of the hearing. Also, in the circumstances which had arisen as a result of the Cricks' failure to comply with the court's order for directions, the Court of Appeal was fully entitled to decide that it would be unfair to Mr Brown to allow counsel for the Cricks to advance the appeal by means of submissions of which no notice whatever had been given to him.
>
> 32. The Cricks had ample notice under the directions to ensure that they filed their written submissions in time. If for any reason circumstances arose which meant they were unable to comply with the directions, they ought to have alerted the court to the problem by making a prompt application for an extension of time well in advance of the hearing date. This would have meant that the timetable could be adjusted (if that was fair to Mr Brown) in such a way as to ensure that the hearing date would be effective or would have allowed the court to list another hearing for that date while postponing the Cricks' appeal, so that overall other litigants would not be affected. The Cricks failed to make use of the opportunities available to them to present their case. There is no unfairness to them in the way the Court of Appeal determined their appeal. This is a case in which the Board has no hesitation in dismissing the Cricks' further appeal and in supporting the Court of Appeal's 'commendable desire to encourage a new litigation culture' and 'the steps that it is taking to rid Trinidad and Tobago of the 'cancerous *laisser-faire* approach to civil litigation' " (see *Keron Matthews*, para 19)."

[20] In the second case, **Phillip v Commissioner of Police and the Attorney General of Trinidad and Tobago**, similar case management orders were made, for the filing of documents. The appellant filed his written submissions late but did not seek an extension of time to regularise the late filing. The other parties did not file any written submissions. Two days before the hearing of the appeal, the respondents informed the court that they had only just instructed counsel and would be seeking an adjournment.

Counsel for the appellant did not object. At the hearing of the appeal, counsel for the respondents made an oral application for an adjournment and the appellant applied for an extension of time to regularise the late filing of his submissions. The court ruled that there was no good reason for the appellant's late filing and that an adjournment would not be a good use of the court's time. The appeal was accordingly dismissed.

[21] The Board found that while in **Crick and Another v Brown** the court had correctly acted to further the overriding objective, the same could not be said concerning **Philip and Commissioner of Police and another**, where, though filed late, the parties and the court were put on notice of the arguments to be advanced for Mr Philip. The Board found that in Mr Philips' case, there was no "obvious" unfairness in allowing him to present his submissions and allowed his appeal.

[22] Lord Sales, writing on behalf of the Board, stated at paras. 35 and 36:

> "34. The further issues in Mr Philip's case are whether it was just in all the circumstances for the Court of Appeal to dismiss his appeal and whether, even if it was not, Mr Philip's present appeal should be dismissed on the grounds that his underlying appeal to the Court of Appeal is wholly without merit.
>
> 35. The Board considers, with respect, that the Court of Appeal did proceed too hastily to dismiss Mr Philip's appeal. Although Mr Philip's written submissions had been filed late, they were still available to the Commissioner and AG, and also to the court, some weeks before the listed hearing date for the appeal. In the Board's view, had counsel for the Commissioner and AG been instructed in proper time at the start of 2017 (when their then attorney dropped out of the picture) or even promptly after the filing of Mr Phillip's written submissions on 24 February 2017, they would have been in a position to produce written submissions in advance of the appeal hearing in time to allow the hearing to proceed. The Commissioner and AG had a responsibility to assist the court to further the overriding objective (see CPR Part 1.3), and had they acted promptly and properly the hearing date could have been effective. Unlike in the Cricks' case, in the circumstances

> which had arisen it was by no means obvious that it would have been unfair to allow Mr Philip's counsel to proceed to present his submissions. The Commissioner and the AG had been on notice for weeks of what he was proposing to say. The court had had an opportunity to read the written submissions in advance of the hearing to assist it in its preparation.
>
> 36. In the Board's judgment, the Court of Appeal erred in Mr Philip's case by failing to consider whether it would be fair (and in accordance with the overriding objective) or not to allow his counsel to present substantive submissions on his appeal, either as part of its reasoning on the question whether an extension of time should be allowed for the filing of his written submissions or, even if a formal extension of time were refused in relation to such filing, by considering whether to allow his counsel to make oral submissions…"

[23] I do not believe that the draconian sanction of striking out the counter-notice of appeal is appropriate in these circumstances. Although the respondents did not file full written submissions as the court directed, they had filed skeleton submissions on 8 November 2022. These submissions were available to counsel for the appellant as well as the court and presented an outline of the arguments that the respondents were making in support of the counter-notice of appeal and in opposition to the appeal by Herzog Contracting. Striking out the counter-notice of appeal would not further the overriding objective of dealing with cases justly. On the other hand, it would indeed be prejudicial to Herzog Contracting and its counsel, for the respondents to be allowed to present oral arguments in support of the counter-notice of appeal and opposition to the appeal, supplementing or adding to the skeleton submissions, when the appellant's counsel had no notice of what these additions would be. The court would also be severely inconvenienced.

[24] In keeping with order 8 of the formal order filed on 10 November 2022, that indicated that this court will impose a sanction for failure to comply with the time limits set at the case management conference, we ruled that the respondent was prevented

from making oral submissions in this appeal, and was constrained to rely on their skeleton submissions filed on 8 November 2022, of which the court and Herzog Contracting had notice. However, this was not the end of the matter. The court brought Practice Note 1/2021 to the attention of counsel and requested their submissions. It states:

> "**Guidance note in respect of disobedience of timelines for filing of submissions in civil appeals**
>
> 1.1 This practice note is made with the concurrence of the President and Judges of Appeal.
>
> 1.2 The court has been concerned with the frequency with which counsel file submissions late. The late filing causes dislocation and inconvenience. Some of the effects are the inability of the other side to respond before the date of the hearing and the panel not having an opportunity to read the submissions before the hearing.
>
> 1.3 It is noted that Practice Direction No 1 of 2019 speaks to the sanction that will be applied in the case of applications. In the case of civil appeals, the court has a variety of responses that it can make to the late filing of submissions and bundles.
>
> 1.4 In an effort to bring these to the attention of parties and their respective counsel, they are set out below:
>
> 1.4.1 Removal of the appeal from the hearing list.
>
> 1.4.2 Standing down the appeal to allow the panel to read the late submissions. The panel may reduce the offender's time for oral submissions.
>
> 1.4.3 The imposition of one or more of the following costs sanctions at the completion of the appeal:
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> a. a wasted costs order;
>
> b. an indemnity costs order, if the offender is the unsuccessful party; or
>
> c. the reduction or denial of costs if the offender is the successful party."

[25] While the Practice Note has, in the main, referred to the late filing of submissions, it is clear that its provisions are also helpful in circumstances such as the case at bar where the respondents' attorneys-at-law failed to file full submissions. In line with para. 1.4.3 of the Practice Note, the court ruled that we would consider the issue of any costs sanction after the hearing of the appeal. We will do so in due course.

[26] In relation to Herzog Contracting's application for an extension of time to regularise the late service of its written submissions and authorities, Ms Giselle Campbell, deposed in her affidavit filed on 31 October 2024, that at the time of the case management conference, it was not apparent that the date fixed for the filing of Herzog Contracting's submissions and authorities, 7 April 2023, was Good Friday. As such, the submissions and authorities were filed the next working day, 11 April 2023, but were not served until the following day due to clerical oversight.

[27] In my view the delay was not inordinate and the appellant proffered a good reason for the late filing. Further, the respondents did not indicate that they suffered any prejudice. Accordingly, the court granted Herzog Contracting an extension of time to regularise the late service of its written submissions and authorities.

[28] I now proceed to consider the substantive appeal and counter-notice of appeal.

Background to the claim in the court below

[29] On 21 April 2021, the respondents and Herzog Seal filed a claim form and particulars of claim against Herzog Contracting, Herzog Jamaica, Michael Eddey, the HAJ and the Minister of Housing in which they sought an injunction to restrain the advertisement and sale of four properties. The respondents also sought orders for accounting for certain sums and declarations as to the repayment status, validity, enforceability and legality of mortgages in respect of the said properties that were used to secure certain loans granted by Herzog Contracting.

[30] By a further amended notice of application, filed 16 June 2021, the respondents applied for an 'interim' order to restrain the sale of the properties. That application was

supported by the affidavits of Mr Chescot Brownie, a director of Seal Construction and Herzog Seal, sworn on 26 April 2021, 10 May 2021, 17 May 2021 and 19 May 2021, respectively. The affidavits of Mr David Addison, company secretary for Herzog Contracting, sworn, respectively, on 11 May 2021, 13 May 2021 and 27 May 2021, were filed in opposition to the application.

[31] In its further amended notice of application, the respondents detailed the orders prayed as follows:

> "1. An interim injunction to restrain D.C. Tavares Finson Realty Limited, being an agent of the 1st and 2nd defendants, from continuing to advertise the undermentioned properties for auction and sale and/or to auction these properties on April 28, 2021 or on any other date without an Order from a Judge of the Supreme Court. The properties are:
>
> a. Commercial Factory Building in the parish of St. James registered at Volume 1269 Folio 343 of the Register Book of Titles;
>
> b. Lot L4, Rose Hall in the parish of St. James registered at Volume 1358 Folio 824 of the Register Book of Titles;
>
> c. Townhouses Strata Lots 1 & 4 at Ironshore in the parish of St. James registered at Volume 1394 Folio 842 and Volume 1394 Folio 845 of the Register Book of Titles;
>
> 2. D.C. Tavares Finson Realty Limited is restrained from advertising or auctioning the properties mentioned at captioned for 28 days from the date of this Order;
>
> 3. …
>
> 4. …
>
> 5. The 1st, 2nd, 3rd and 6th Claimant [sic] give the usual undertaking as to damages.
>
> 6. …
>
> 7. …"

[32] Mr Brownie, in his affidavit sworn 26 April 2021, averred that Seal Construction had agreed with Herzog Jamaica and Herzog Contracting to form Herzog Seal in order to obtain building contracts. Additionally, he stated that the shareholders' agreement outlined that the provision of capital to the company and the distribution of profits were to be shared 70% and 30% respectively, between Herzog Jamaica and Seal Construction. He further stated that over the course of their dealings, to finance a project at Green Pond, in the parish of Saint James ('the Green Pond project'), Herzog Contracting extended certain loan facilities to Herzog Seal, through Seal Construction and Seal Investment. He referred to these facilities as the mortgage of US$2,700,000.00 and the loan of US$1,250,000.00. Mr Brownie stated that the Green Pond project was governed by Public Private Partnership Agreements dated 2011 and 2015 ('PPPA 2011' and 'PPPA 2015', respectively). He asserted that the loans in question were connected to those agreements and were to be repaid from the proceeds of the sale of houses built in the project. In respect of the mortgage of US$2,700,000.00, Mr Brownie stated that following an arrangement for Herzog Contracting to deposit $120,000,000.00 in the account of the HAJ, it was always the understanding of the agents of Seal Construction, Herzog Contracting and Herzog Jamaica that the deposit of $120,000,000.00 would be repaid from $687,000,000.00 paid to Herzog Contracting and Herzog Seal by the HAJ. He also deposed that he had several conversations with Mr Stanley Herzog, then president of Herzog Contracting, who agreed that the loan of US$1,250,000.00 would be repaid from "proceeds due and payable to [Seal Construction] from the Green Pond project, but the payment would be made by the [HAJ]."

[33] Additionally, Mr Brownie averred that Seal Construction was appointed as a contractor under the Green Pond project, and was entitled to 70% of profits but was deprived of its share of $680,000.00 paid by the HAJ to Herzog Contracting and Herzog Jamaica under the project. As such, he stated that Seal Construction was entitled to $476,000,000.00 which was sufficient to discharge both loans. Further, it was posited that Herzog Contracting was to have accounted to Seal Construction for monies received from the HAJ in respect of the building projects, but that was not done. Accordingly, by

virtue of those agreements it was contended that the mortgages had been repaid in full and were invalid.

[34] The respondents also claimed that the mortgage deeds that were executed to secure the loans included peculiar and unusual terms. In respect of the mortgage endorsed on the title registered at Volume 1269, Folio 343, Mr Brownie averred that there was no statement of the loan amount. Mr Brownie also contended that the mortgage amount of US$2,700,000.00 was more than the sum of US$1,400,000.00 issued under the loan, which it was intended to protect. Further, he posited that the obligation to repay the loan fell on the mortgagor as opposed to the borrower. Mr Brownie also averred that the loan was unusual in that it stipulated repayment within 12 months of disbursement when there was no evidence that the loan was disbursed. He also stated that another unusual term was that it provided that the lender could sell within 10 days of default.

[35] Mr Brownie also asserted that the mortgages were illegal and unenforceable for reasons that: Herzog Contracting had breached section 22A of the Bank of Jamaica Act by carrying on the business of lending foreign exchange without being an authorised dealer; and that Seal Construction had not passed a resolution to authorise the borrowing of the loan of US$1,250,000.00.

[36] Additionally, Mr Brownie asserted that there was a breach of fiduciary duty among agents of Seal Construction and Herzog Contracting and Herzog Jamaica such that Seal Construction was induced to sign the mortgage documents without independent legal advice. Further, that agents of Herzog Contracting and Herzog Jamaica caused to be omitted from the loan agreements references that the sums borrowed under both loans were to be repaid from the proceeds of the PPPA 2011 and PPPA 2015.

[37] Further, it was asserted that in attempting to sell the mortgaged properties, Herzog Contracting had failed to adequately describe the properties in its advertisements for the auction, such that the properties would sell for a gross undervalue.

[38] Mr Brownie, on behalf of Seal Construction and Seal Investment, gave an undertaking to pay any damages arising from the grant of the injunction.

[39] Having set out his several contentions, in para. 54 of his first affidavit, Mr Brownie summarized 12 issues that he considered to be serious questions of law for the court to resolve:

> "a. Whether or not the 2015 Agreement supersedes the 2011 Agreement;
>
> b. Whether or not a Mortgage document, by itself without evidence of direct payment to the mortgagors or the mortgagors' nominee, is enforceable;
>
> c. Whether or not the 1st and 2nd defendants have been fully paid by the 4th defendant;
>
> d. Whether or not the 1st and 2nd defendants owe substantial sums to the 1st and 4th claimants;
>
> e. Whether or not the mortgage amount of US$2.7M, on the face of the mortgage is excessive;
>
> f. Whether or not the 1st defendant who is not an authorised dealer of foreign exchange in Jamaica is in breach of Section 22A of the Bank of Jamaica Act;
>
> g. Whether or not the loan of US$1,250,000 was authorized by the 1st defendant by way of Resolution from the Board of Directors of the 1st defendant;
>
> h. Whether or not the mortgage deed or [sic] peculiar and unusual;
>
> i. Whether or not there was a fiduciary relationship between the 1st and 2nd defendants and the agents of the 1st claimant;
>
> j. Whether or not the 'mortgage' of US$2.7M and the mortgage of US$1,250,000 are invalid;
>
> k. Whether or not the 1st and 2nd defendants fraudulently converted sums owed to the 1st and 5th claimants and sums which was agreed to be used to pay out the J$120,000,000

> facility and the US$1,250,000 loan, were fraudulently converted for their own use; and;
>
> l. Whether or not given all the circumstances the cumulative complaints outlined above fall into the exception to the **Marbella principle**." (Emphasis as in original)

[40] Mr Brownie also averred that the balance of convenience favoured the granting of the interlocutory injunction and that there would be little legal recourse available to the respondents if their properties were lost to a foreign company.

[41] For the appellant, Mr Addison, in his affidavit, opposed the application by providing information that he claimed correctly reflected the details of the loan arrangements. He also stated that Mr Brownie had obfuscated the relevant issues.

Loan number 1 - dated 28 September 2011

[42] Concerning the first loan, Mr Addison stated that Herzog Contracting lent Seal Construction the sum of US$1,250,000.00. That loan was secured by a promissory note, with joint and several guarantees dated 27 September 2011, entered into by First Tropical, Isiaa Madden, and Matthew Donaldson, and a mortgage given by First Tropical to Herzog Contracting over lot L4, Rose Hall, Saint James.

[43] He further stated that while Seal Construction had made some payments under the loan, the company defaulted and Herzog Contracting sent it a demand letter dated 15 December 2020. Herzog Contracting also sent a demand letter dated 16 December 2020 to First Tropical. Mr Addison stated that as of 30 April 2021, Seal Construction owed the sum of US$1,936,562.49, inclusive of principal and interest. He also deposed that a public auction was set for 28 April 2021 to sell the mortgaged property.

[44] Mr Addison rejected Mr Brownie's claim that this loan had been repaid, stating that, contrary to Mr Brownie's assertions, the transactions involving the HAJ are not connected to loan number 1. Accordingly, he also deposed that there was no obligation on Herzog Contracting to account for monies received from the HAJ.

Loan number 2 - dated 3 February 2012

[45] Mr Addison stated that Herzog Contracting also lent money to Seal Investment in the sum of US$2,700,000.00. From that amount, Seal Investment drew down US$1,400,000.00. That loan was guaranteed by Counterpoint, Matthew Donaldson, Garth Wilkinson, Patrice Ricketts, and Jeanetta Bucknor who signed joint and several guarantees dated 3 February 2012. Counterpoint also executed a mortgage in respect of two properties to support the guarantee: lots 1 and 4, Providence Estate, Ironshore, Saint James. Garth Wilkinson and Matthew Donaldson also mortgaged lot 2, Pimento Way, Freeport in the parish of Saint James.

[46] Mr Addison stated that this loan was granted to facilitate PPPA 2011 made on 22 August 2011 for the Green Pond project, among the Minister of Housing, the HAJ and Seal Investment, to develop certain lands in Saint James and to provide housing solutions. He further deposed that under that agreement, Seal Investment had to obtain financing for the development. Herzog Contracting agreed to provide financing within the terms and conditions outlined in a letter agreement dated 15 November 2011, among HAJ, Herzog Contracting and Seal Investment.

[47] Mr Addison stated that to give effect to the financing agreement, a joint bank account in the name "Housing Agency of Jamaica/Green Pond PPP" was established at National Commercial Bank Jamaica Limited. Herzog Contracting was to provide financing of up to US$2,700,000 to the joint bank account. Seal Investments would draw down on the account to perform work. As houses were sold, the proceeds of sale would be deposited to the joint bank account and be distributed as to the terms of the PPPA 2011, some of which would go toward payment of Seal Investment's debt to Herzog Contracting.

[48] Mr Addison claimed that, on or about 22 December 2011, Seal Investment made its first request to draw down US$1,400,000 as mobilisation costs for the development.

[1] 2011 PPA 22 August 2011 page 310 of the record of appeal

By transfer made on 29 December 2011, Herzog Contracting deposited $120,955,928.83 in the joint bank account. On or about 13 January 2012, $118,521,846.00 was disbursed from the joint account to Seal Investment.

[49] Mr Addison stated, however, that the PPPA 2011 was terminated in 2012 by mutual agreement between the HAJ and Seal Investment and that no additional funds went into the joint bank account other than those disbursed by Herzog Contracting. He additionally averred that Herzog Contracting did not receive any money from HAJ, Seal Investment, or any of the guarantors of loan number 2 in repayment of that loan.

[50] He posited that while there was a PPPA 2015 among the Minister of Housing, the HAJ and Herzog Jamaica, that agreement did not make any provision for the return of the mortgage collateral under loan number 2. Thus, the obligations of Seal Investments and the guarantees under loan number 2 with respect to PPPA 2011, remained unaffected by the later PPPA 2015. He explained that while the HAJ made payments to Herzog Jamaica pursuant to the provisions of the PPPA 2015, neither Seal Investment nor Seal Construction is a party to it.

[51] In light of the above, he stated that letters of demand dated 9 November 2020 were sent to Seal Investment and Seal Construction. In addition, demand letters each dated 10 November 2020 were sent to Counterpoint and Garth Wilkinson/Matthew Donaldson. The letters stated that as at 30 April 2021, the principal and interest owing was US$2,484,300.00.

[52] With respect to the subcontractor contract entered with Seal Investment under the PPPA 2015, Mr Addison stated that Herzog Jamaica terminated the agreement, due to Seal Investment's failure to perform. In addition, all sums due to Seal Investment under the sub-contractor agreement were duly paid.

[53] In his affidavit sworn 27 May 2021, Mr Addison, responding to the third and fourth affidavits of Mr Brownie, stated that the information outlined by Mr Brownie reflected that the limited amount of repayment that Herzog Contracting received in relation to loan

number 1 "came from the funds disbursed…under Loan Agreement No. 2" (para. 7 of Mr Addison's affidavit).

The notice and grounds of appeal

[54] The learned judge gave oral reasons for her grant of the interlocutory injunction. The appellant has incorporated these reasons in its notice and grounds of appeal. While in the usual case the court would only outline the grounds of appeal, because the reasons of the learned judge are crucial to a resolution of the appeal, and there is no written judgment from the learned judge, I have set out the entire notice and grounds of appeal, including the findings of facts and law that are challenged.

> "2) The following findings of facts are challenged:
>
> 1) There are questions to be answered and questions to be treated with at trial. Did the agreement to be paid from Green Pond proceeds of sale come into effect? Was the sum of $684M or any money paid to [the appellant] by HAJ? Is the [1st respondent] entitled to this $465 million JMD or any money from Herzog? Have the mortgages been repaid in full?
>
> 2) There are serious issues to be tried, and the evidence placed before the court, shows a real prospect of success in this matter at final determination for permanent injunction.
>
> 3) The [respondent(s)] is saying that these properties mean something to their owners, and that these properties were not owned by Seal but by other persons who felt there was no risk. Based on the evidence before the court, the court did not see any circumstances to warrant exception to [sic] principle that land is unique and special and that damages not adequate.
>
> 4) At paragraph 55(b) of the Affidavit of Mr Chescott [sic] Brownie filed on April 21, 2020, a number of aspects of the mortgage which are said by [the respondent(s)] to be peculiar or unusual. The court will say there are some aspects of what is there in

the evidence that court accepts as peculiar and unusual. For example,

4.1 The deed containing a provision that the mortgagor guarantee [sic] to the [appellant] the payment by the [1st respondent], yet the said deed had a provision for mortgagor to pay to the lender all monies that may at any time or times become from [sic] or owing by the mortgagor by virtue of guarantee. That was stated at paragraph 55(b). The court agrees that is in fact peculiar and unusual.

4.2 The deed provided that the mortgagor should 'pay costs etc. incurred by lender…' quoted at paragraph 55. The court accepts that as being peculiar and unusual.

4.3 Another aspect said to be peculiar and unusual is that the deed has a clause in case of default in respect of the principal monies, if the default continues for 10 days the premises to be sold without any notice, and that this is in conflict with the statutory requirements. The court was in agreement with that. There were some other aspects which the court agrees were peculiar and unusual.

5) In any event, the court did not see this as a typical and arms-length transaction and finds and accepts that the unusual and peculiar nature would qualify this transaction exceptional and therefore the Marabella [sic] principles may be departed from.

3) The following findings of law are challenged:

1. There are serious questions to be tried and there is a real prospect of success of this matter at final determination for a permanent injunction.

2. Damages is not an adequate remedy. The mortgaged properties are of 'unique' and a 'peculiar and special value' and there is no basis to depart from the principle in **Claim No. 2008 HCV 2729 Tewani Limited v Kes Development Co Ltd and Arc Systems Limited,** delivered 9th July 2008.

3. The Marbella Principle may be departed from as certain provisions of the Mortgages to support Guarantor's Liability are peculiar and unusual and conflict with statutory requirements.

4. The Marbella Principle may be departed from given the nature of the peculiar and unusual transaction that would qualify said transaction as exceptional." (Emphasis as in original)

[55] I come to the grounds of appeal that are outlined at para. 4 of the notice and grounds of appeal:

"1. The Learned Judge erred in concluding that on the evidence there are serious questions to be tried and failed to consider or appreciate that the factual evidence adduced by the Respondents was not sufficiently precise to satisfy a court, properly seized of same, that they have a real prospect of succeeding on the claim for reliefs sought at trial. In particular,

1.1 The Learned Judge erred in failing to consider the admissibility and/or weight of the evidence by the Respondents in support of the assertion as to the arrangements for repayment of Loan Agreement No. 1 in the principal sum of US$1,250,000.00 and to reject same, or find that at trial same may likely be rejected, as Parol Evidence or as otherwise inadmissible or as wholly insufficient;

1.2 The Learned Judge failed to consider that the Respondents failed to adduce sufficiently precise evidence that repayment of Loan Agreement No. 2, in the principal sum of US$2,700,000.00 of which US$1,400,000.00 was disbursed, was to be made in accordance with profit-sharing ratio in a Shareholder's Agreement to which neither the Borrower (Seal

Investments Limited) nor the Lender (Herzog Contracting Limited) to Loan Agreement No. 2 are parties.

1.3 The Learned Judge erred in failing to appreciate the undisputed fact that payments made by the Housing Agency of Jamaica to Herzog Jamaica Limited were under a Public Private Partnership Agreement to which neither the Lender nor the borrower were parties, and that the Respondents had not made out a *prima facie* case that those payments should be applied to the lender's debt.

2. In concluding that damages are not an adequate remedy, the Learned Judge erred in fact and in law in accepting the evidence of the deponent, Mr Chescott [sic] Brownie, that the mortgaged properties mean something to their various and respective owners.

3. The Learned Judge misunderstood the facts of, and erred in applying the principles stated in, **Tewani Limited v Kes Development Co Ltd and Arc Systems Limited,** delivered 9th July 2008 and/or placed undue emphasis on same in displacing the rules to protect a mortgagee in the exercise of its rights under the mortgage instrument.

4. The Learned Judge failed to give any consideration to the absence of evidence by the [respondents] to support the undertaking as to damages provided by the [respondents] and granted an order accepting the said undertaking without any judicial consideration of the principles applicable to the exercise of her discretion.

5. The Learned Judge erred in law and in the exercise of her discretion in granting the injunction without any reference to the relevant principles ordinarily considered as to the adequacy of the undertaking as to damages given by [the] applicants for an injunction.

6. The Learned Judge erred as a matter of law when she failed to appreciate the scope and application of the 'Marbella principle' and departed from same by placing undue, and /or legally unsustainable, emphasis on certain terms of the mortgages allegedly being peculiar and unusual.

> 7. The Learned Judge erred as a matter of fact and of law when she found that the terms of the mortgage deed are peculiar and unusual in circumstances where the terms and provisions of the mortgages, being Mortgages to Support Guarantor's Liability, were in compliance with the relevant provisions of the Registration of Titles Act.
>
> 8. The Learned Judge erred as a matter of law in widening the bases of departure from the 'Marbella principle' when [she] found that the transaction between the parties was not arms-length and was peculiar and unusual as to warrant a departure from the 'Marbella Principle." (Emphasis as in original)

[56] The appellant asks that the appeal be allowed, the orders made by the learned judge on 17 December 2021, be set aside, and for costs below and of the appeal to be awarded to it.

The counter-notice of appeal

[57] The respondents, in their counter-notice of appeal filed on 1 June 2022, asserted that the decision of the learned judge should be affirmed on additional or alternative grounds. These are:

> "1. The interim injunction restraining the Appellant's power of sale as contained in the mortgage should be granted without a requirement for payment into court of the sums claimed by the mortgagee (i.e. outside of the Marabella [sic] principle) given:
>
> a. There was a dispute as to whether the power of sale had arisen.
>
> b. The amount claimed to be due by the Appellant on the security could not be the sum that was in fact due in view of the various commercial agreements between the parties and the arrangements for the repayment of the loans and in this regard the sum claimed was excessive.
>
> c. There was serious dispute as to the account of the 1st Respondent with the Appellant and the Appellant had

failed to provide any accounting to the Respondents prior to the exercise of the power of sale.

2. The Appellant's power of sale should be restrained given there was inadequate description of the mortgaged properties in the various advertisements for sale and which was likely to result in the properties being sold for less than a fair price."

The issues

[58] Having regard to the grounds contained in the appeal and the counter-notice of appeal, this matter may properly be disposed of, by giving consideration to the following issues:

(i) Was the learned judge correct to find that there are serious issues to be tried? (Ground 1 of the appeal; and ground 2 of the counter-notice).

(ii) Was the learned judge correct to find that damages were not an adequate remedy? (Grounds 2 and 3 of the appeal).

(iii) Was the learned judge correct to find that there was a sufficient undertaking as to damages? (Grounds 4 and 5 of the appeal).

(iv) Was the learned judge correct to depart from the Marbella principle? Were there other bases on which the learned judge could have found that there were exceptions to the Marbella principle? (Grounds 6, 7, and 8 of the appeal; and grounds 1a to c of the counter-notice of appeal).

Issue (i): was the learned judge correct to find that there are serious issues to be tried? (Ground 1 of the appeal; and ground 2 of the counter-notice of appeal)

Submissions for Herzog Contracting

[59] Ms Larmond submitted that the learned judge erred in concluding that there are serious issues to be tried as, among other things, there was insufficient evidence that Seal Construction and Seal Investment had repaid the loans. King's Counsel further submitted that there was nothing in the loan agreement or any addendum to reflect the respondents' contention that both loans were to be repaid from the proceeds of sale of

units from the Green Pond project. King's Counsel also submitted that any alleged conversation between Mr Herzog and Mr Brownie that the loans were to be repaid from the proceeds of the sale of the lots was inadmissible parol evidence. Further, it was submitted that Seal Investment was duly paid under the sub-contract in which it was involved under the PPPA 2015. Accordingly, it was submitted that the respondents have no real prospect of succeeding on the claim. King's Counsel relied on the cases of **Reliance Group of Companies Limited and Others v Ken's Sales and Marketing Limited and another** [2011] JMCA Civ 12, **Leicester Green v Jamaican Redevelopment Foundation Inc** [2010] JMCA Civ 21; and **Commissioner of Police and Attorney General v Bermuda Broadcasting Co Limited and others** [2008] UKPC 5.

[60] Additionally, King's Counsel impressed on the court that the evidence showed that loan number 1 was not related to the PPPA 2011 while loan number 2 was provided to Seal Investment to fund the Green Pond project under the PPPA 2011. King's Counsel further posited that Herzog Contracting is not a party to the shareholders' agreement between Herzog Jamaica and Seal Construction and further asserted that the agreement is not relevant to the debt due and owing to Herzog Contracting by Seal Investment.

Submissions for the respondents

[61] Mr Bishop, in the skeleton submissions before the court, submitted that the learned judge was correct to find that there are serious issues to be tried. In the written submissions, the main contention of the respondents is that the loans were to have been repaid from the proceeds of the sale of housing units in the Green Pond project in respect of which Seal Construction was initially the developer under a PPPA 2011 with the Minister of Housing and the HAJ. Counsel further contended that the PPPA 2011 was replaced by a PPPA 2015 between Herzog Contracting, the Ministry of Housing, and the HAJ for the same housing solutions and for which Seal Construction was appointed as sub-contractor with responsibility for effecting the development works. Counsel submitted that Seal Construction built the infrastructure and houses and the net proceeds were paid by the

HAJ to Herzog Contracting in accordance with the partnership agreement, but Herzog Contracting failed to account to Seal Construction and Seal Investments for the sums received. Further, the application of the sums due to Seal Construction and Seal Investments under the subcontract and their share in the profit from the project would reduce or extinguish their debts.

[62] Counsel submitted that in all the circumstances the appeal ought to be dismissed as having no merit and or the learned judge's appeal affirmed on the grounds stated in the counter-notice of appeal.

Discussion

[63] There are settled legal principles that guide a judge's exercise of discretion as to whether to grant or refuse an interlocutory injunction. The appellate court when called upon to review such an exercise of discretion may only set aside the decision made, if the judge misunderstood the law or the evidence before her, drew an inference from the facts that is shown to be incorrect, or the decision to which the judge arrived is one to which no reasonable judge regardful of her duty could have arrived, (per Morrison JA, as he then was, in **Attorney General v John MacKay** [2012] JMCA App 1 relying on **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042).

[64] On an application for an interlocutory injunction, the court must be satisfied that the applicant has a real prospect of succeeding on his claim for a permanent injunction, (see **Reliance Group of Companies Limited and others v Ken's Sales and Marketing Limited**). However, while the court must be mindful to have sufficient evidence on which to exercise its discretion before it, it must not conduct a trial of the issues on affidavit evidence. As in the words of Lord Diplock, in the case of **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 at page 407, the court must not:

> "…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. These are matters to be dealt with at the trial..."

In the case at bar, however, in light of the assertions made, it was necessary to carefully review the affidavit evidence and, in particular the unchallenged documentation, to determine whether the respondents' assertions raised serious issues to be tried.

The affidavit evidence on critical issues on which the respondents have relied

[65] It is evident that there are certain major planks in the respondents' claim. A close examination of the assertions made in support of these major planks highlights the apparent weakness of their claim.

[66] On the evidence and documentation before this court, in my view, there is no serious issue to be tried on the question as to whether the loans were repaid. The respondents agree that loan number 1 was disbursed in full to Seal Construction. However, they assert that, notwithstanding the fact that collateral was provided, Mr Brownie and agents of Herzog Contracting agreed that the facility would be repaid from the proceeds of the sale of service lots in the Green Pond project in Saint James (paras. 24 and 25 of Mr Brownie's affidavit). The fact that the assertion as to how the loan was to be repaid is 'parol evidence' undermines its strength and is to be contrasted with the detailed documentation placed before the court.

[67] The record of appeal is replete with various loan agreements, mortgages and guarantor documents. While there is evidence that loan number 2 was directly related to the PPPA 2011, nothing in the record of appeal reflects that loan number 1, issued to Seal Construction, was related to PPPA 2011 or the Green Pond project. On the documentation, it is Seal Investment that was involved in a PPPA 2011 relating to the Green Pond project.

[68] Notably, the respondents have stated that in 2011 any reference to Seal Construction would mean Seal Investment t/a Seal Construction, thus suggesting that the names were used interchangeably. I note also that the letters of demand from Herzog Contracting also used the names of the companies interchangeably. Nevertheless, nothing on the record shows a link between loan number 1 and the Green Pond project,

and so this assertion by Seal Construction that loan number 1 was to have been repaid from the proceeds of the sale of houses in the Green Pond project or the PPPA 2011 does not appear to have good prospects of success.

[69] But what of the respondents' assertions that loan number 2 was to have been repaid from proceeds of the sale of housing units in the Green Pond project and PPPA 2011? Importantly, the documentation before this court indicates that the PPPA 2011 to which loan number 2 relates was terminated with effect from 5 November 2012. It is correct that the PPPA 2011 included a provision that monies paid for units in the project would have also gone towards payments that Seal Investment was to make to repay the funds that were disbursed to it. In addition, under a letter agreement among the Minister of Housing, HAJ, Seal Investment and Herzog Contracting, the Minister of Housing and HAJ approved and consented to Seal Investment's assignment of its rights under the PPPA 2011, including its right to receive money from the joint account, to Herzog Contracting. However, there is no evidence before this court that funds were ever paid for houses, as the PPPA 2011 was terminated.

[70] Although the respondents assert that the PPPA 2011 was replaced by the PPPA 2015 in respect of the same housing solutions, the provisions of the PPPA 2015 indicate otherwise. The PPPA 2015 included the following provision:

> "Prior to entering into this Agreement, [the HAJ] and the Minister had entered into a contract dated August 22, 2011 with Seal Investment Company Limited ('Seal') to develop the Development Lands, and [the HAJ], the Minister and Seal have mutually agreed to terminate said contract with effect from November 5, 2012**. Seal has no rights to perform the work on the Project** (as hereinafter defined) **as set forth in this Agreement. Seal has agreed to waive any claims or rights that they have to perform the Project.** The Minister, [the HAJ], the Developer, and Seal have entered into a separate Indemnity Agreement." (Emphasis added)

Thus issues relating to the PPPA 2011 and Seal Investment are to be addressed by an indemnity agreement entered into among the Minister, HAJ, Herzog Jamaica and Seal

Investment. Herzog Contracting is not referred to in relation to the separate indemnity agreement.

[71] By way of reiteration, the parties to the PPPA 2015 are the Minister of Housing, the HAJ and Herzog Jamaica Limited. Seal Investment, Seal Construction and Herzog Contracting are not parties to the PPPA 2015. Seal Investment was a party to the PPPA 2011. However, as indicated earlier, that PPPA was terminated and an express provision was put in the PPPA 2015 that a separate indemnity agreement is to address matters relating to the PPPA 2011.

[72] In relation to the respondents' assertion that there was an arrangement for the deposit of $120,000,000.00 (disbursed pursuant to loan number 2) to be repaid from the $687,000,000.00 paid to Herzog Contracting and Herzog Jamaica by the HAJ (see paras. 20 and 22 of Mr Brownie's affidavit), this assertion does not appear to have good prospects of success. The HAJ in its defence agrees that it paid monies to Herzog Jamaica arising from the PPPA 2015. The HAJ denied paying any money to Herzog Contracting, the mortgagee. This is not surprising as the documentation before the court indicates that loan number 2 had nothing to do with the PPPA 2015, but instead, as indicated above, emanated from the PPPA 2011 that was terminated.

[73] There remain the respondents' assertions that they were entitled to share in profits which were to be used to repay the loans. The parties to the Shareholder's Agreement are Herzog Jamaica, Seal Construction and Herzog Seal. Seal Investment, the borrower in loan number 2, is not a party to the shareholder's agreement. Any profit sharing ratio in the shareholder's agreement would therefore not apply to Seal Investment. Further, Herzog Contracting, the lender and mortgagee, is also not a party to the shareholder's agreement. Even if Seal Investment and Seal Construction are used interchangeably, the fact is that Herzog Contracting, the lender and mortgagee, is not a party to the shareholder's agreement and so any claim for an accounting under the shareholder's agreement would not apply to Herzog Contracting. Therefore, this assertion is not a valid response to Herzog Contracting's demand for repayment of the loans in question.

[74] There is also nothing on the record supporting the respondents' assertions that Herzog Jamaica owed it monies under the subcontracting agreement entered under the PPPA 2015. Even if that were so, Herzog Jamaica is not the mortgagee and, as indicated earlier, on the documentation before this court, neither loan number 1 nor loan number 2 is related to the PPPA 2015.

[75] It is noteworthy that Mr Brownie asserted that all the various entities were operating together to obtain building contracts including Seal Construction, Herzog Jamaica and Herzog Contracting. However, upon a review of the documentation before the court, I note that it was Seal Investments and Seal Construction who were to repay the loans they received from Herzog Contracting.

[76] The other issue raised by the respondents in the counter-notice of appeal, as a potential serious issue to be tried, concerned the issue of the alleged inadequate advertisement of the properties. Counsel for the appellant, on the other hand, approached the matter as another basis on which the respondents were arguing for a departure from **Marbella** principles. I approached the matter as another ground on which the respondents could have relied for an injunction that was limited in nature. The discussion below will reveal my reason for taking this approach.

[77] Ms Larmond submitted that the learned judge was not convinced that the allegation of inadequate description of the mortgaged properties in the advertisements was evidentially sound. King's Counsel referred to leading authorities on the issue of advertising: **John Ledgister et al v Sunnycrest Enterprises Inc and Jamaica Redevelopment Foundation Inc** [2013] JMCA App 10 ('**Ledgister v JRF'**), and **Royden Riettie v National Commercial Bank Jamaica Limited & Others** [2014] JMCA App 36 ('**Royden Riettie**'). King's Counsel stated that, arising from these cases, despite **Marbella**, the court can restrain a mortgagee from exercising its power of sale if irregularity or inadequacy in advertisement exists, giving rise to the possibility that the mortgagee may fail to act in good faith when selling the property. King's Counsel emphasised however, that the discretion of the court must only be applied where there

is evidence supporting that claim. Counsel highlighted that in **Ledgister v JRF** there was evidence that the property in question was originally zoned as agricultural land, was re-zoned for residential development, but was advertised as agricultural property, which could have led to it being sold at a gross undervalue.

[78] King's Counsel submitted that, in contrast, in the case at bar, there was no valuation of the property, no specific allegation as to what the advertisements omitted, no specifics as to what in the advertisements could be misleading and no specifics of Government plans and how it would improve the value of the properties. King's Counsel concluded on this issue by submitting that there was no evidence at the time that the injunction was being sought, of a real risk of the property being sold for an undervalue due to inadequate or misleading advertisement. She submitted that the learned judge cannot be faulted for refusing to accept this complaint as a basis for the grant of the injunction sought.

[79] Counsel for the respondents submitted that the appellant was exercising its power of sale in bad faith as it related to the advertisement of the properties for sale. Counsel referred to the statements made by Mr Brownie in his affidavit that the description of the properties in the auction notices was inadequate, and would not cause members of the public to purchase the properties for a fair market price. Counsel also highlighted Mr Brownie's assertions that the descriptions of the properties said nothing about the "neighbourhood and significant development in the communities".

[80] Counsel relied on **Cuckmere Brick Co Ltd and Another v Mutual Finance Ltd** [1971] 2 WLR 1207 and submitted that there were settled legal principles that a mortgagee, in the exercise of the power of sale, owes a duty to take reasonable precautions to obtain the true market value of the property on the date he decides to sell. He submitted that the court would protect the interest of the mortgagor if there is a possibility that the mortgagee will not fulfil this duty. Counsel also relied on **Royden Riettie** and **Ledgister v JRF**.

[81] There is no dispute that a mortgagee, in the exercise of the power of sale, is to take reasonable precautions to secure a proper price for the property in question (see **Cuckmere Brick Co Ltd and Another v Mutual Finance Ltd**). In that case, the plaintiffs owned land with planning permission to erect 100 flats. They charged the land to the defendants by way of a legal mortgage. Later the plaintiffs obtained planning permission to erect 35 houses. The defendant's power of sale became exercisable and they instructed auctioneers to sell the land by public auction. The advertisements mentioned the planning permission for 35 houses, but made no mention of the planning permission for the flats. The plaintiffs brought that fact to the attention of the defendants, and asked that the auction be postponed. The defendants refused to do so, but undertook to instruct the auctioneers to mention the existence of the planning permission for flats at the sale. The property was sold for £44,000.00. The plaintiffs alleged that the land was worth £75,000.00, and claimed an account from the defendants and damages arising from their default. At first instance, Plowman J found that the defendants failed in their duty to the plaintiffs when they failed to advertise the planning permission for the flats, and in refusing to postpone the sale. He also found the value of the land to be £65,000.00, and ordered accounts and inquiries. The defendants appealed the finding that they had failed in their duty of care and asked for a fresh inquiry into damages. The Court of Appeal ruled that a mortgagee, when exercising his power of sale, owed a duty to the mortgagor to take reasonable care to secure a proper price, and that Plowman J was justified in finding that the defendants had breached their duty when they did not adequately publicise the planning permission for flats and in refusing to postpone the sale.

[82] An inadequate description of properties could prevent the mortgagee from securing a proper price (see **Royden Riettie v National Commercial Bank and Others**). In that case the appellant sought a variation of Brooks JA's (as he then was) refusal to grant an interim injunction to restrain National Commercial Bank ('NCB') from holding an auction in the exercise of its power of sale under a mortgage. Before Brooks JA, Mrs Riettie-Atherton stated that the single advertisement describing the land as industrial land situated near to "Goat Island", was inadequate, and misrepresented the

true nature of the land being advertised. Mrs Riettie-Atherton deposed that the advertisement conveyed the impression that the land was primarily agricultural land and "downplayed the fact that it is now approved for use as industrial property."

[83] McDonald Bishop JA considered the power of the court in circumstances where such allegations are made, and examined carefully this court's judgment in **Ledgister v JRF**, in which a similar issue was raised. The majority of the court in **Ledgister v JRF** opined that the issue concerning the proposed sale of the property at an under-value was not properly before the court, and so consideration could not be given to the complaint. (see para. [28] Harris JA and para. [47] Brooks JA). Phillips JA, dissenting, however, wrote at para. 41:

> "In answering the question posed in the preceding paragraph, I **consider that the issues raised in the claim do not appear to be meritorious** (see paragraph [32]). **Therefore, an injunction could not be granted to subsist until the trial of the appeal.** I am, however, satisfied that if the respondent in the exercise of its power intends to pursue the sale as advertised presently in circumstances where the proceeds would be at a gross undervalue, this gives rise to the serious issue of whether in exercising its powers of sale, it is acting in breach of its duty to the mortgagor to act in good faith, which anticipated breach can be prevented by an injunction of limited scope relating solely to this serious issue. **I would therefore grant an injunction to prevent the respondent from proceeding to sell the property pursuant to the current advertisement, which does not reflect any subdivision approval granted and any investigation into the increased value of the property in light of the subdivision…It is my view that these circumstances would not require the payment into court of the amount claimed as owing, as the sale would not be restrained altogether or until trial but merely postponed until the steps can be taken to ensure that the proper market value is obtained**." (Emphasis added)

[84] It is understandable that McDonald Bishop JA opined that the Privy Council 'evidently' accepted Phillips JA's dissenting position in **Ledgister v JRF**, as their Lordships

made the following order (extracted from para. 70 of **Royden Riettie v National Commercial Bank and Others**):

> "(1) …
>
> (2) **until the Appellants' appeal to the Court of Appeal in Jamaica against the refusal of an interlocutory injunction has been determined an interim injunction should be GRANTED restraining the sale of the property as agricultural property or without full disclosure of the grant of approval for its re-zoning for residential development and of the relevant JAM$2.150 billion or US$25 million valuation put on it in December 2010. (Emphasis added)**"

[85] Bearing in mind the above, McDonald Bishop JA went on to state at para 71:

> "The Privy Council's ruling in **Ledgister v JRF** has served to reinforce the principle extracted from the several authorities cited and endorsed by Phillips JA, that despite **Marbella**, the court can act to restrain a mortgagee from exercising its power of sale where irregularity or inadequacy in advertisement exists, thereby giving rise to the real possibility that the mortgagee may fail to act in good faith at the time he decides to sell".

[86] McDonald-Bishop JA, however, found that, when examined, the advertisements did not bear out the allegations as to inadequacy of description of the property or otherwise, gave full description of the land, and indicated that approval had been obtained for its use as industrial land. As a result, there was no basis on which even a limited injunction as the Privy Council ordered, would have been appropriate.

[87] Importantly, in **Ledgister v JRF,** neither Phillips JA nor the Privy Council sought to restrain NCB from exercising its power of sale. The focus of the orders was on ensuring that any advertisement for the sale of the property should properly reflect the true nature and value of the property, including the re-zoning of the property for residential development.

[88] Turning to the case at bar, in his affidavit sworn 26 April 2021, Mr Brownie deposed at paras. 49 and 50 and 55 h:

> "49. That the description of the properties given in the auction notice for all properties have been most inadequate and would not cause members of the public to purchase any of the properties for a fair market price.
>
> 50. The descriptions given of the properties did not say enough about the immediate neighbourhood. Not much is said about other significant developments in those communities and the potential for future development in light of well-known plans for the development of three areas.
>
> 55(h) That the description given by the 1st defendant's agent in the advertisement for the sale of the 1st claimant's agent's properties is inadequate and as such would not cause members of the public to whom the advertisement is directed would want to purchase these properties for the fair market price. It is obvious that the description of the properties, as outlined in the newspaper advertisement to promote the auction, is wholly inadequate and did not provide sufficient information about the community/neighbourhood, the kind of community/area, the potential for development and growth and Government plans for the improvement of the area."

[89] The patently general assertions that Mr Brownie made in his affidavit, without any supporting evidence, are in stark contrast with the specific complaints made in **Cuckmere, Royden Riettie and Ledgister v JRF**. What more was needed to be said about the community and its immediate neighbourhood? What are the significant developments in the community? What is the potential for development and growth that was omitted? What are the "well-known" plans for the development of the area? What are the government's plans for the improvement of the area? What is misleading about the advertisements? Ms Larmond's submissions are correct. The respondents did not place sufficient material before the learned judge demonstrating that the mortgagee was, in all likelihood, not acting in good faith and so would fail to secure a proper price for the properties. The learned judge cannot be faulted when she did not accept these assertions as the basis for even an injunction limited in scope as that proposed by Phillips JA and

granted by the Privy Council in **Ledgister v JRF.** This ground of the counter-notice of appeal therefore fails. In any event, the properties are yet to be sold, and so any relevant planning permission or other development plans can be brought to the attention of the appellant.

[90] As a result, on the examination of the documentation before the court the learned judge erred in determining that the matters that she identified were serious issues to be tried. On that basis alone, the appeal should be allowed as there was no basis for the injunction to be granted.

[91] It is, therefore, unnecessary to consider the other grounds of appeal including those concerning the adequacy of damages and undertakings and whether the respondents had established exceptions to the **Marbella** principle.

Conclusion

[92] In all the circumstances, in my view, the learned judge erred in her assessment of the facts before her when she concluded that there were serious issues to be tried. As a result, there is no basis for an injunction restraining Herzog Contracting from exercising its power of sale as mortgagee. Since there is no basis for the grant of an injunction, there is no need to make any order for payment into court in accordance with the Marbella principles.

[93] In light of the court's conclusion that the respondents ought to be sanctioned for their failure to comply with the orders of the court, the parties should be invited to make submissions on the issue.

[94] I suggest that the court allow the appeal, dismiss the counter-notice of appeal and invite the parties to make written submissions on the issue of costs, including possible costs sanctions.

SIMMONS JA

[95] I have read the draft judgment of my sister Foster-Pusey JA and agree. There is nothing that I wish to add.

STRAW JA

ORDER

1. The appeal is allowed.

2. The counter-notice of appeal is dismissed.

3. The interlocutory injunction granted by Lawrence-Grainger J (Ag), on 17 December 2021, is set aside.

4. The appellants shall, on or before 15 July 2024, file and serve their submissions concerning costs of the appeal and the counter-notice of appeal, including possible costs sanctions.

5. The respondents shall, on or before 31 July 2024, file their submissions in response.

6. The court will consider the submissions on paper and, thereafter, issue its ruling.