[2021] JMCC Comm 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2013CD00146

BETWEEN	**JMMB MERCHANT BANK**	**CLAIMANT**
AND	**WINSTON FINZI**	**FIRST DEFENDANT**
AND	**MAHOE BAY COMPANY LTD**	**SECOND DEFENDANT**

IN OPEN COURT

Michael Hylton QC and Shanique Scott instructed by Hylton Powell for the claimant

Paul Beswick and Georgia Buckley instructed by Ballantyne, Beswick & Company for both defendants

September 25, 26, 27, 28, 29, October 10, 2017 and February 2, 2021

MORTGAGE – EXERCISE OF POWER OF SALE – WHETHER LOAN REPAID – WHETHER MONEY PAID BY GUARANTOR ON ONE LOAN CAN BE APPLIED BY LENDER TO ANOTHER LOAN – WHETHER DEFENDANTS ENTITLED TO AN ACCOUNT FROM CREDITOR

SYKES CJ

The issues

[1] The main issues are whether (a) Mr Winston Finzi and Mahoe Bay Company Ltd (Mahoe) have successfully resisted the claim that they still in debt in respect of a loan granted to Mr Finzi in April 2006 (loan 1); (b) Mr Finzi and Mahoe are entitled to an accounting; and (c) whether Mr Finzi and Mahoe have suffered damage to the extent of US$14,048,615.12 of approximately. The answer to (a) and (b) is yes. In respect of (c) that can only be determined after the accounting is completed.

[2] The court will narrate the story of the relationship between Mr Winston Finzi and Mahoe Bay Development Company Ltd (Mahoe) on the one hand and the Capital and Credit Merchant Bank (CCMB) on the other. That bank was part of the Capital & Credit Financial Group Ltd (CCFG). Around 2012, was purchased by Jamaica Money Market Brokers (JMMB). CCMB was renamed JMMB Merchant Bank Limited (JMMBMB). On August 14, 2017 JMMBMB was granted a commercial banking licence and the name was changed to JMMB Bank Limited (JMMBB). JMMBMB no longer exists. It is a now a commercial bank. JMMBB is the litigant because it took over the assets of CCMB. It is now seeking to enforce its seeming right to collect money owed by Mr Finzi and Mahoe. The court will refer to CCMB as the bank or CCMB in these reasons for judgment.

[3] The sole witness for the bank was Mrs Trudy-Ann Bartley Thompson. She was not at the bank when loan 1 was granted. She came to the bank in 2008. Loan2 was granted during the time when the loans in question were granted. She is relying on records, practices, and procedures that she came and observed since 2008 (no month given) when she joined the bank.

[4] Mr Winston Finzi was the primary witness for the defendants. He testified in his personal capacity and for Mahoe, the company in which he is the principal if not the 100% owner of the shares. Mr Abraham Dabdoub, attorney at law, also gave evidence in this matter for the defendants.

[5] This court wishes to say that it does not view Mr Finzi as a man who came to deceive the court or to provide unreliable evidence deliberately as was suggested by Mr Hylton. The court has formed this view from a complete examination of the documents in this case and the transcript of testimony.

[6] Mr Finzi suspects that the accounting done by the bank was not properly done. He is deeply hurt by this because the then chairman, Mr Ryland Campbell and principal in the CCFG as a man he could trust. The is not making any finding about the trustworthiness of Mr Campbell. The court is indicating how it understood Mr Finzi's testimony.

[7] It became clear to the court that despite Mr Finzi's long experience in business and finance he was not a man given to following the details of the transactions with CCMB. He was a man who operated with broad strokes.

Assessment of credibility

[8] In resolving the facts in this case the court will rely on the documents that were created at the time the relevant transactions and exchanges were taking place when all appeared to be well between the parties. The court will do this because judicial experience has shown that contemporaneous documents created at a time when no one was contemplating litigation are more likely to approximate the truth of what took then recollection given at trial that may be influenced by the feeling that one's case is sacrosanct and the other party's case is to be viewed as anaemic.

[9] The court bears in mind the observations of Dunn LJ in **Armagas Ltd v Mundogas** [1986] AC 717, 757:

> *I respectfully agree with Browne L.J. when he said in In re F. (A Minor) (Wardship: Appeal) [1976] Fam. 238, 259, that in his experience it was difficult to decide from seeing and hearing witnesses whether or not they are speaking the truth at the moment. That has been my own experience as a judge of first instance. And especially if both principal witnesses show themselves to be*

unreliable, it is safer for a judge, before forming a view as to the truth of a particular fact, to look carefully at the probabilities as they emerge from the surrounding circumstances, and to consider the personal motives and interests of the witnesses.

As Lord Wright said in Powell v. Streatham Manor Nursing Home [1935] A.C. 243, 267-268:

> *"Yet even where the judge decides on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified, as for instance by some objective fact;…"*

and he referred in particular to some conclusive document or documents which constitute positive evidence refuting the oral evidence of the witnesses.

[10] Lord Bridge in the **Attorney General of Hong Kong v Wong Puk Ming** [1987] AC 501, 510 - a criminal case – has useful advice on assessing credibility of witnesses.

There may, of course, be extreme cases where a witness under cross-examination is driven to admit that his evidence-in- chief was false. Such triumphs for the cross-examiner are more frequently seen in fictional courtroom dramas than in real life. But in such an extreme case, if it should happen, there would no longer be any question of credibility. Evidence which a witness first gives and then admits to have been false is no longer his sworn testimony and, if a criminal prosecution depends on it, the judge should direct an acquittal. But, apart from such extremes, any tribunal of fact confronted with a conflict of testimony must evaluate the credibility of evidence in deciding whether the party who bears the burden of proof has discharged it. It is a commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability; it would, to their Lordships' minds,

> *be surprising if the law requiring juries to be warned of the danger of convicting on the uncorroborated evidence of a witness in one of the suspect categories should have developed to the point where, in some cases, the jury must be directed to make such an assessment of credibility in isolation.*

[11] The court will also bear in mind the third question posed by Lord Sumner for appellate courts when reviewing decisions of trial court. This third question is a word of advice to trial court judges to keep in mind when assessing facts. Lord Sumner said in **Owners of Steamship Hontestroom v Owners of Steamship Sagaporack** [1927] AC 37, 50:

> *Is there any glaring improbability about the story accepted, sufficient in itself to constitute "a governing fact, which in relation to others has created a wrong impression," or any specific misunderstanding or disregard of a material fact, or any "extreme and overwhelming pressure" that has had the same effect?*

[12] In providing reasons in support of the answer, the court will narrate only such facts as are necessary for understanding of the claim.

The April 2003 US$2.5m dollar line of credit

[13] This US$2.5m began as a loan of JA$60m. By letter of commitment dated April 9, 2003 – five years before the arrival of Mrs Bartley Thompson at CCMB – a loan was said to have been made to Mahoe in the sum of JA$60m for financing of residential development in Montego Bay, St James. The security was: (a) a legal all monies mortgage over 35 acres of land at Providence Estate in St James registered at volume 649 folio 68. The mortgage was to be held in registrable form; (b) personal unlimited guarantee of Mr Winston Finzi.

[14] In addition to the security mentioned there were special conditions. Part of land over which security was taken was to be sold to the Government of Jamaica (21.6 acres). One condition was the that the bank wanted written confirmation that the government was going to purchase the acreage. The letter should also indicate the time and method of payment. Another was that Mahoe should issue a letter

directing the government to send to CCMB the Jamaican equivalent of bonds with a face value of US$5.5m which represented the consideration for the 21.6 acres. This explains why the bonds were sent to CCMB. The court will return to this at the relevant part of the narrative.

[15] There was a letter dated April 26, 2003, CCMB signed by its officers and by Mr Finzi, that indicated that the loan facility was increased from JA$60m to US$2.5m. Out of this loan Mr Finzi directed the bank to use funds to purchase CCMB shares. The shares were purchased in the name of Weststar International Limited (Weststar), a company belonging to Mr Ryland Campbell. Mr Finzi say she did not give permission for this to be done.

[16] Then on April 30, 2003 three things happened. First, Mr Finzi wrote to CCMB giving it instructions that part of this US$2.5m line of credit should be turned over to the bank's foreign exchange department. The instructions were that these funds were to be converted to Jamaican currency at an exchange rate of JA$57.35 to the US dollar. The second, the bank issued a cheque in the name Veritat Corporation/CCMB in the amount of JA$75m to purchase 15,000,000.00 shares in CCMB. Third, CCS submitted an application for the shares but not in the name of Mr Finzi/Mahoe or either of them.

[17] In relation to the third occurrence on April 30, 2003, confirmation came by way of a letter from KPMG dated March 24, 2015 KPMG to Mr Winston Finzi. The letter stated that a National Commercial Bank Jamaica Limited cheque number 009715 dated April 30, 2003 was attached to an application form for the purchase of 15,000,000.00 shares in CCMB. The letter added that the application was not in the name of Mr Finzi or Mahoe. The application was submitted by CCS. The cheque was made payable to Veritat Corporation/CCMB share offer. Veritat Corporation was identified as a company that provided corporate services to various companies. The cheque contains the purpose of the payment and is consistent with Mr Finzi's assertion that he gave instructions to purchase the shares.

[18] Let us follow the time line. April 9, 2003 – loan to Mahoe in the sum of JA$60m to finance residential development in Montego Bay; April 26, 2003 – loan facility moved from JA$60m to US$2.5m; April 30, 2003 – cheque issued by CCMB to purchase shares in CCMB in the name of Weststar. We now know that this US$2.5m line of credit was one of the loans the bank used the proceeds of sale of property owned by Mahoe and Mr Finzi to pay off.

[19] When Mr Finzi secured information that the shares that should have been in his or his nominee's name he sought answers. None came. None from the bank. None from CCS. Even now, no one knows how a loan to Mahoe could be used to buy shares Weststar. No one knows how CCMB could continue to charge interest on a loan which was not used either in whole or in part for the borrower's benefit.

[20] CCMB says it issued the cheque according to Mr Finzi's instructions. CCMB has said it does not trade or deal in shares. That is correct. Some must have decided to purchase the shares in Weststar's name. There is no evidence indicating who made this decision. The only clear thing is that Mr Finzi is saying he did not give any such instructions.

[21] In this case the bank has contented itself with the technical position that the bank does not trade in shares. While this is so, it misses the broader point that part of the debt which it said it used the money raised from sale of Mr Finzi's/Mahoe assets to pay of this particular loan. Mr Finzi is saying that part or the whole of this particular loan was used by someone within CCFD, CCMB, and/or CCS to purchase the shares. In short, he is saying that he cannot be asked to repay a loan and interest on that loan when some within the CCFG used the loan to purchase shares for Weststar. Thus for the bank to say it issued the cheque in Mr Finzi's name on his instructions and stop there is not sufficient in this court's view. The evidence is plain that something went awry between Mr Finzi's instructions and the eventual issuing of the shares. This is, in part, why Mr Finzi says that there has not been proper accounting for this loan in terms of an accounting trail along with explanations showing – step by step – the movement of money from CCMB to

purchase including the instructions to purchase in the name of Weststar or Mr Campbell. The court agrees.

[22] This development culminated in a claim brought in the High Court of St Lucia by Mr Finzi against Weststar and Mr Ryland Campbell in 2011. The details of this claim are not before the court but it resulted in a judgment in his favour declaring that he is the owner or holder of 45% of the shareholding of Weststar. That judgment was registered in Jamaica on June 13, 2017.

[23] Mr Beswick goes further. He alleges that the loan was never disbursed to Mr Finzi at all despite Mr Finzi's letter of April 30, 2003. In effect, Mr Beswick is submitting that Mr Finzi thought the loan was disbursed for Mahoe's purposes or at least part of it that was not the case.

[24] This loan has come up for examination because the counter claim of Mr Finzi and Mahoe alleges that the money from this loan was used 'without the authorization and instruction of the defendants or any of them' for third parties. The communication from KPMG is consistent with this assertion. There is no evidence from the bank in this case that money used to purchase the shares from this US$2.5m were in fact purchased in the name of Mr Finzi or Mahoe. The bank says it issued the cheque based on Mr Finzi's instructions but the nagging question remains, how does the chairman's company, Weststar, come to own shares it did not pay for using its own money that came from the bank which was part of the chairman's group and the entity that submitted the application along with cheque is part of his group?

[25] Mr Beswick is also challenging whether the other disbursements of the loan were truly made. He says so because there is now clear evidence that money from the loan was used to benefit Weststar without Mr Finzi's permission or consent. He says there is no accounting – as distinct from assertions in a letter – that shows unequivocally when, how, to whom was the rest of the loan disbursed. How do we know, Mr Beswick asks, that the rest of the money was not just as improperly used

in similar manner that we now know the JA$75m was improperly used? How do we know that somebody else has not benefitted from the other part of the loan?

[26] Mrs Bartley Thompson sought to address this in her witness statement by saying that the bank was never instructed to purchase and never purchased shares on behalf of or in the name of Mr Finzi and/or Mahoe. However, what is clear is that CCS did apply for the shares and forwarded the Veritat cheque which was part of the loan to Mr Finzi.

[27] The point here is that this purchase of CCMB's shares in the name of Mr Campbell's company is unlikely to have taken place at the behest of Mr Finzi or Mahoe. The most likely explanation and the court so finds, is that this purchase was done by someone acting contrary to Mr Finzi's and Mahoe's interest. Put another way, the probabilities are not in favour of Mr Finzi or Mahoe instructing that the share be bought in Weststar's name. There is no evidential foundation for such a probable conclusion.

[28] It necessarily follows that the bank has not established that Mahoe is liable for that part of the US$2.5m loan that was used to purchase shares in CCMB in Weststar's name.

[29] This of the pleading that the bank used the US$2.5m for third parties, one of the third parties being the very chairman of the bank, Mr Ryland Campbell. This was pleaded in the counter claim and Mrs Bartley Thompson was not able to refute it effectively. She was not at the bank at the time and could not speak from personal knowledge. She could only speak from records and the records that were produced have not provided an answer to that pleading and evidence, yet Mahoe is being held accountable for principal and interest which it is doubtful was ever disbursed in accordance with Mahoe's instructions. Hence, one of the remedies sought is a complete and full accounting of that loan.

[30] In short, Mr Beswick has upended this aspect of the bank's response. He says assertion or denial is not proof in a context where the bank is supposed to have

the detailed records to show what it did with the money. It is a regulated entity. It must comply with regulatory standards. It is supposed to have records. The purchasing of the share was done by a company within the CCFG. This could only have been done with the approval or sanction, in the normal course of things, of someone high up enough in the organisation to give those instructions.

[31] The court wishes to make clear that for the loans between April 2003 and April 2006 Mrs Bartley Thompson could not speak to personally because she was not there at the time. Some questions only the principal players – Mr Ryland Campbell, Chairman of Capital & Credit Financial Group; Mr Curtis Martin, President and CEO of CCMB; Mr Andrew Cocking, Deputy Group President; Mr Richard Dyche, Executive Vice President and General Manager; Ms Dianne Bolton, Senior Manager, Credit; Mr Vincent Auld, Manager, Corporate Credit – could properly answer. Mrs Bartley Thompson became, in effect, the paschal lamb. She could only speak to policy, process, procedure as she understood it after she arrived in 2008. When she spoke to the process, policy, and procedure that preceded her it was at best, based on an assumption, that what she saw on her arrival, was, as a matter of fact, the same then as what she saw. In real terms, then, when it comes to hard fact for this period 2003 to when she arrived in 2008 Mrs Bartley Thompson was not on firm footing.

[32] The defendants' stated in their counter claim states that it 'was an expressed and implied term and condition of the line of credit that the same would only be utilised on the authorisation of the defendants or either of them.' When this is added to the pleading that money was used without authorization and instruction of the defendants, the point that is being asserted is that assuming the line of credit was granted to Mahoe, it must be used for Mahoe's purposes and benefit and not for third parties unless the borrower so indicated. For reasons already stated, Mrs Bartley Thompson could not answer this allegation unless she found it in the records. She did not find it in the records. It follows that the defendants must succeed on this aspect of the counter claim. The defendants are therefore entitled

to the remedy of accounts for the US$2.5m line of credit. They are also entitled to damages for this breach of contract.

The December 2005 loan

[33] The court now turns to another loan which is important background to the loans the bank sued on. By letter of commitment dated December 28, 2005 the bank made a personal demand loan to Mr Finzi. The letter of commitment was signed by Mr Richard Dyche and Mr Curtis Martin, both of the bank. Mr Finzi signed that letter on December 30, 2005. The borrower was Mr Winston Finzi. It was not any corporate entity. It was a demand loan. The purpose of the loan was to (a) clear all outstanding interest charges owing to CCMB and to enable subsequent interest charges to be met for up to six (6) months 'by which time it is expected that the acquisition by the Commissioner of Lands will be fully settled;'; and (b) 'to pay amount into court in relation to legal issue with the Jamaica Redevelopment Foundation Inc.'

[34] This loan was divided into two parts: US$1.3m and US$0.2m. Interest rate was 12% (variable).

[35] This loan was to be secured by 'an additional mortgage to be stamped for US$1.3m plus interest 'over thirty five acres of land known as Providence Estate in the parish of St James and registered at Volume 649 Folio 68'; first legal mortgage 'over land located at Ironshore, St James and registered at Volume 1259 Folio 534 in the name of Mahoe Bay Company Ltd'; 'first legal mortgage over land located at Providence St James and registered at Volume 1257 Folio 671 in the name of Mahoe Bay Company Ltd.' Two promissory notes were executed by Mr Finzi in the amounts of US$1.3m and US$0.2m. There were two certified board resolutions dated December 30, 2005, from Mahoe, indicating that Mahoe guaranteed the loans.

[36] By letter dated December 29, 2005 Mr Finzi wrote the bank. It said '[p]ursant to a telephone conversation (Finzi/Dyche) on December 29, 2005, please be kind

enough to disperse loan proceeds instructing the bank to disburse loan proceeds of US$200,000.00 or US$.2m as follows:' (a) RBTT Securities Jamaica Ltd (JA$12m); (b) Oswald James and Co (JA$400,000.00); and (c) balance payable to GoTel Acquisition.

[37] At the bottom of the letter there is a handwritten authorization from Mr Finzi to the bank 'to deduct commitment and processing fees of US$21,843.75 and charges relating to the stamping of the mortgage from the loan proceeds amount to be held in escrow account.'

[38] Two CCMB cheques drawn on Bank of Nova Scotia dated December 12, 2005 (JA$12m) payable to RBTT Securities Jamaica Ltd (JA$12m); and January 1, 2006 (JA$400,000.00) payable to Oswald James & Co were issued. This December 2005 is one of the loans the bank claims that the land bonds (dealt with later) and proceeds of sale of other properties were used to settle.

[39] We now come to the three loans the immediate subject matter of this claim.

The April 2006 or loan 1

[40] In respect of this loan the bank is claiming US$2,974,387.73 and J$178,523,926.75 being the balance owed by Mr Finzi.

[41] Part of the context to this loan is a letter dated April 25, 2006 from Mr Finzi to CCMB. The caption is *Re: Avalon Property, Volume 1326 Folio 624*. It reads in material part:

> *As you may see from the documents I have enclosed, this Order was handed down some time ago, and I had appealed the Judges (sic) decision, but now that we have a ready buyer, I am dropping the appeal.*
>
> *Richard, I am prepared to give you whatever security you may need to facilitate this loan along with a letter of commitment from Laurie Broderick to repay the full balance of this facility within the next forty – five (45) days, from the first contract with the Riu Group.*

[42] This loan began life as a US$1.5m personal demand loan to Mr Finzi. According to the commitment letter dated April 28, 2006, signed by the bank and Mr Finzi, the purpose of this loan was to 'settle court order awarded in favour of Jamaica Redevelopment Foundation – US$1,270,650.00'; and 'to cover legal costs and fees associated with the purchase of land located at Providence Estate, St James – US$229,349.20.' The interest rate was 12.75%. The security supporting this loan was a 'promissory note executed by Mr Finzi for the amount of US$1.5m, along with borrowing resolution and secured by corporate guarantee of [Mahoe] for the amount of US$1.5m and supported by first legal mortgage to be stamped to US$1.5m plus interest over five (5) parcels of land located at Providence, St James and registered at Volume 1257 Folio 656, 657, 658, 659, 660, 714 and 715 registered in the name of [Mahoe].' It was also said that the 'mortgage will be held in registrable form for the period of the loan along with duplicate certificates of title.' Do note that even though the narrative as in the words say five parcels of land it was actually seven parcels of land of the volume and folio numbers are correct.

[43] When asked to explain how the loan moved from US$1.5m to US$2,974,387.73, Mrs Bartley Thompson stated that the loan was restructured several times. She said that Mr Finzi asked that the loans be restructured. She further explained that that meant that any unpaid interest up to the time the loan was restructured was added to the principal and that new amount became the new principal in which interest was due. She referred to a letter dated May 14, 2008 in which Mr Finzi asked for an extension of the US$1.5m. She added that the extension was approved by the credit committee on May 14, 2008.

[44] Mr Finzi's response is that this loan was paid off by August 9, 2006 and any request by Mr Finzi requesting restructuring could not have had the effect indicated by Mrs Bartley Thompson because the loan no longer existed. As the philosophers say ex nihilo nihil fit – nothing comes from nothing or out of nothing, nothing can come.

[45] There was telephone communication between Mr Finzi and Mr Vincent Auld, Manager, Corporate Credit. This is confirmed by a letter dated August 9, 2006 from

Mr Auld wrote to LGS Broderick & Company (LGS), Mr Finzi's and Mahoe's attorney at law. The letter was captioned ***RE: Loan account in name of Winston Finzi US$1.5m***. The letter reads in part *We refer to telephone conversation Finzi/Auld and now advise that the amount required to pay out the captioned facility as at August 8, 2006 is as follows*

Principal – US$1,500,000.00

Interest accrue – US$6,287.67

Interest arrears – US$48,434.75

Total due – US$1,554,631.42

We look forward to receiving your cheque in settlement of the outstanding amount of … (US$1,554,641.42).

[46] By this letter the bank is saying to LGS 'pay the stated sum and loan is cleared.' On the same date LGS wrote to CCMB (Mr Richard Dyche) requesting that US$1,554,631.42 be transferred to your bank 'from the subject account ***being final payment of all undertakings given by our firm in respect of Mahoe Bay Company Limited***' (emphasis added). This letter from LGS is likely to have been written after Mr Auld's letter to him.

[47] The undertaking referred by LGS arose because of a letter of April 25, 2006. In that letter, LGS wrote to CCMB 'pursuant to court order dated July 15th 2005' indicating that Mr Finzi is required to pay US$1,270,650.80 in order to 'retrieve title registered at volume 1203 folio 671 in the name Avalon.' The heading of this letter was '**Jamaica Redevelopment Foundation/Avalon**.' LGS wrote specifically that he was instructed to give his professional undertaking to pay CCMB the sum of US$1.5m upon completion of sale of premises owned by Mahoe Bay registered at volume 1203 folio 671. The letter referenced a sale agreement between Mahoe Bay and RIU. LGS indicated that he anticipated completion of sale within 45 days and 'in this regard we give you our firms professional undertaking to pay to your

bank the sum of US$2.5m to be applied to the above mentioned debt as follows' US$1,270,650.80 (settlement of court order to Lival) and (b) legal fees and costs to be held in account until advised (US$229,349.20).

[48] Take notice that LGS's letter referred explicitly to the personal liability of Mr Finzi. The letter also made it clear that the purpose of meeting that liability was to retrieve the title volume 1203 folio 671 in the name of Avalon, another of Mr Finzi's company's. The undertaking was very specific: to repay the US$1.5 once the sale of land owned by Mahoe at volume 1203 folio 671.

[49] Mr Finzi says that the sale of land to RIU was completed. On August 4, 2006 a manager's cheque (US$2,641,811.00) representing the proceeds of sale was credited to an account at CCMB in the name Mahoe/LGS Broderick & Co (LGS).

[50] This account by Mr Finzi is supported by a letter dated August 4, 2006 from LGS to CCMB attention Mr Richard Dyche. The letter said, *Enclosed please find manager's cheque in the amount of ... (US$2,641,811.00) to be credited to above account.* The above account referred to was the title of the letter: *Account LGS Broderick & Co/Mahoe Bay Limited.*

[51] The court pauses to note that Mrs Bartley Thompson agreed that Mr Auld of CCMB in his August-9 letter to LGS was asking for a cheque to settle the April 2006 (loan 1). She also agreed that from LGS's letter there was no doubt that LGS was sending money to pay off loan 1.

[52] The bank has admitted that it used the money to pay of the December 2005 loan and future interest on loan 1. The bank said it received US$1,554,631.42. This is the cheque from LGS to pay off loan 1. Mrs Bartley Thompson says that to her knowledge no payment was made on loan 1 since it was disbursed.

[53] Mrs Bartley Thompson agreed with defendants' case that the cheque from LGS was intended by the defendants to pay off loan 1. Having conceded that, Mrs Bartley Thompson says that the bank had legal authority to take the money given to it by LGS and apply it to the December 2005 loan. The clause reads:

> *This security shall not be affected by nor affect any other security which the mortgagee may now or hearafter hold from the mortgagee and the mortgagee shall be at liberty to realise its securities in such order and manner and to apply and appropriate any moneys at any time or times paid by or on behalf of the mortgagor or resulting from a realization of this or any other security or any part thereof to such account or item of indebtedness and in such sequence, priority and order as the mortgagee may in its absolute discretion from time to time determine any direction from the mortgagor to the contrary notwithstanding.*

[54] The clause referred to by Mrs Bartley Thompson came from a mortgage instrument dated February 24, 2004. The 2004 instrument has Mahoe as the mortgagor and that was in respect of a loan set out in a letter of commitment dated March 8, 2002.

[55] The registrable transfer referred to by Mrs Bartley Thompson in relation to loan 1 is dated January 14, 2010, that is to say, almost four years after LGS paid off loan 1. It was under this instrument that the bank sold the seven parcels of land that Mahoe had given in support of the personal loan to Mr Finzi in respect of the April 2006 loan (loan 1). The lots were sold in 2015.

[56] Mrs Bartley Thompson indicated the accounting records that were in the bundle showed the starting balance in 2008 for this restructured US$1.5m loan as US$1,563,750.00. Mr Beswick challenged her on this. His point was that if her explanation that the loan was not serviced since April 2006 and Mr Finzi was asking for a restructuring in May 2008, one is talking about two year's interest (approximately) which would be in excess of US$300,000.00. Thus the interest could not have gone up just by US$63,000.00. This state of affairs prompted Mr Beswick to say that this loan was recreated in May 2008 and that is why, even on the bank's explanation, the numbers don't add up. The bank's numbers are not consistent with the bank's explanation.

[57] The bank did not advise LGS or Mr Finzi that the cheque was used to pay off the December 2005 loan and not the April 2006 loan. Mrs Bartley Thompson's position

is that the bank was under no legal obligation to do so; at least, that is how the court understood her responses on this aspect of the case.

[58] Mr Hylton QC submitted that as at August 9, 2006, Mr Finzi had not repaid the December 2005 loan which was a six-month loan and neither had he repaid the April 2006 loan which was a three-month loan. Thus, the argument goes, he was in default on both, Mahoe had guaranteed both and so Mahoe had now become liable. The bank therefore had the right to enforce the security and apply the money as it saw fit. On the premise that this is correct, the stubborn fact is that the bank had indicated to Mr Finzi by an officer whose action can be attributed to the bank under the **Meridian Global Funds** principle. He was doing something within his authority as credit manager, namely, advise the customer of is liability and what was needed to meet that liability. Mr Finzi acted on that representation and have done so the bank cannot now back track and ignore its representation.

[59] Finally, it was said that the defendants have not suffered because the December 2005 loan was paid off and the excess applied to the April 2006 loan. The customer has the right to organise his affairs as he sees fit. If the customer chooses to settle one loan now and not another that is his business.

[60] There is another point that the court enquired of Mrs Bartley Thompson. The court asked about the liability of the guarantor. Mrs Bartley Thompson's evidence, on the bank's case theory, makes the bank's position even more untenable. She said, in relation to the April 2006 loan, that when Mr Finzi defaulted, he was notified of his default. This means, on the bank's case, that the guarantor's liability was now activated. She even said she signed the formal notice of default. Assuming this to be true, it is inexplicable for the bank to take the money from the guarantor for this particular loan, apply it to another loan, and then say the primary borrower is still liable. Could it not be said that the guarantor had discharged is obligation? On Mrs Bartley Thompson's theory, is the guarantor still liable? If not, is it that the loan no longer has a guarantor?

[61] In his written and oral submission Mr Beswick added to this point. He says that the December 2005 loan and the April 2006 loans were personal loans to Mr Finzi and not to Mahoe. The money that Mr Broderick sent to the bank was Mahoe's money and not Mr Finzi's. The upshot of this is that Mahoe is entitled to spend its money as it sees fit. It was not up to the bank to use Mahoe's money to meet Mr Finzi's liability for another loan. Only Mahoe could do that. Mahoe did do that when LGS gave the instructions to the bank to use some of Mahoe's money to meet Mr Finzi's personal liability. The bank declined to do so and applied it as it saw fit. The bank, in my view, cannot do this. But more fundamental is that the guarantor, Mahoe, paid off the loan.

[62] As the court understands the law, the guarantor's liability only come into play when the primary debtor has defaulted. The primary debtor, on Mr Hylton's analysis, has defaulted and so the liability of the guarantor is activated. Following the logic of Mr Hylton, Mr Finzi defaulted and so the guarantor, Mahoe, is now liable to pay the amount. Mahoe has paid. This, to the court's mind, must mean that the primary debtor is no longer liable and necessarily, the guarantor is no longer liable in its capacity as guarantor because it has performed its obligation under its agreement. If that is correct, how can the creditor make the primary debtor liable again by using the money paid by the guarantor to meet another personal liability of the primary debtor in a context in which the December 2005 loan is separate and distinct from the April 2006 loan? Where does the guarantor stand in this situation? The court is of the view that the guarantor having discharge its liability and paid the primary debtor's obligation, the loan is no longer alive.

[63] This court is therefore of the firm conclusion that the April 2006 loan was discharged and cannot possibly exist. It follows that the bank has no legal or factual basis to enforce the its security by selling the properties by Mahoe to guarantee the April 2006 loan.

[64] The correspondence between Mr Finzi and the bank about extending, restructuring loan 1 was clearly based on erroneous or should the court say, non-existent facts. There was no loan and so there was nothing to restructure.

[65] The court has read the amended defence and counter claim and concludes that every single allegation in paragraphs 1 to 15 has been established. The bank's claim in respect of loan 1 therefore fails.

Legal propositions

[66] Mr Hylton cited a number of propositions which he said to took him to the promised land in respect of loan 1. He relied on the famous case of **Saunders v Anglia Building Society** [1971] AC 1004). The elderly widow learnt a very hard lesson. At the time she signed the document, which turned out to be an assignment of the house to her nephew's business associate, her glasses were broken and therefore she could not read the document. She thought it was a deed of gift to her nephew. The nephew's business associate promptly took the document and raised loans on it. He defaulted. The building society sought to enforce its power of sale. The House of Lords held that the law was unable to help the 78 year old widow, with broken glasses, who could not read the document at the time it was signed (Lord Reid with his customary clarity set out the underlying principle of pleading that one signed a document in error). Those facts are in a different category from this one. There was no question of the loan being repaid and then resurrected.

[67] Mr Hylton referred to **National Commercial Bank v Hew** (2003) 63 WIR 183 **[29]** to say that if Mr Finzi is relying on undue influence there are two objections: first, it was not pleaded, and second, the evidence does not meet the legal standard. The court is not of the view that Mr Finzi was relying on or hinting at undue influence. He was explaining the nature the relationship between himself and Mr Ryland Campbell.

[68] Respectfully, these cases do not have to anything to do with a person claiming to have already paid the debt and signed a document that the debt he paid still exists.

[69] I have examined other cases cited by learned Queen's Counsel and read the written submissions. In **Olympic Holdings Pty Ltd v Windslow Corporation** [2008] WASCA 80, Buss JA held that an all moneys clause was to be interpreted according to ordinary principles of contractual construction. Whether all sums are secured by the all moneys clause depends on the language of the clause. The courts noted that at paragraph 10 Buss JA noted that '[n]o issue arose … as to the manner in which payments by Windslow were or should have been appropriated.' That is the question in this case. Additionally, the case proceeded on the basis that there was a running account between borrower and lender. The trial judge was not asked to determine whether the running account in fact existed.

[70] Lord Walker in **Financial Institutions Services Ltd v Negril Holdings Ltd** (2004) 65 WIR 227 noted that 'the primary function of the 'all moneys' mortgages was, …, to provide the bank with security against the possibility of default' (**[39]**). That case does not address the present circumstances.

[71] The practical effect of this principle was seen in **Smith's Trucking Services Ltd v Jamaica Redevelopment Foundation Inc** [2012] JMCA Civ 63 where the Court of Appeal of Jamaica held that an all moneys clause means that the lender had the power to upstamp the mortgage to cover any additional debt after the initial debt was incurred by the borrower. This case and other cited by Mr Hylton QC did not address the question of appropriation of payments by relying on a document to which the debtor was not a part.

[72] None of these three latter cases cited by learned Queen's Counsel remotely approaches the situation here where a bank has been paid by the guarantor for the loan and the bank takes the guarantor's money and applies to another loan of the same primary debtor and then says that the loan the guarantor dealt with is still alive. The conclusion arrived earlier, still stands, namely, the bank had no lawful authority to apply the guarantor's money to another loan. This concludes the court's decision on the April 2006 loan or loan 1. The court now turns to the other

two loans in this case but before doing so the land bonds mentioned earlier will be addressed.

The interregnum – land bonds

[73] It will be recalled that it was a special condition of the April 2003 loan that Mahoe issue a letter to the government that it should forward the land bonds directly to the bank. By a letter dated March 10, 2006 from the bank Mahoe was advised that the bank had received the bonds. The nominal face value of the bonds was $266,000,000.00. In the same letter the bank agreed to purchase and Mahoe agreed to sell the bonds. The sum realised from the sale was JA$266,855,890.30. It was converted to United States currency at the exchange rate of JA$65.47. All this is in the letter.

[74] There is a second March 10, 2006 letter signed by all relevant parties which states that the net proceeds of the bond sale were JA$265,855,890.30 – one million dollars less than the figure stated in the first March 10, 2006 letter. Using the second figure the United States currency equivalent is US$4,060,728.43.

[75] There is a March 28, 2006 letter from Ms Dianne Bolton, Senior Manager Credit, to Mahoe. The body of the letter does not state the total indebtedness but the caption has a figure of US$4,199,406.52. Presumably, the figure in the caption represented the total indebtedness of Mahoe. The letter said that US$4,060,728.43 were applied to the debt. This left an outstanding balance of US$76,724.28. The letter asked that the bank be advised when the balance will be settled.

[76] Mrs Bartley Thompson said that these amounts were loans that existed before December 2005. She said that what was stated in her witness statement was how the bank accounted for the bond proceeds, that is to say, they were applied to Mahoe's loans. In the counter claim the defendants are Mr Beswick's response was that that was an assertion and not proof. He said that the bank had not produced any commitment letters, proposal, accounting records and the like.

saying that the bank has failed to account for the value of the bonds. This response of Mr Beswick is understandable given what occurred in respect of the US$2.5m line of credit and the CCMB share purchase.

[77] Mrs Bartley Thompson referred to the April 2003 loan of JA$60m which became the US$2.5m line of credit referred to much earlier in these reasons for judgment. What has been said there need not be repeated here.

[78] One of the amounts of the total indebtedness was the sum of US$2,493,696.01. Mr Beswick pressed Mrs Bartley Thompson on this. In particular, she was asked about the specific figure of US$2,493,696.01. This appears to be the sum arising from the US$2.5m line of credit. Other than the letters referred to above there is no accounting information supporting the assertions in the letter. Respectfully, that is not an accounting for the proceeds of sale by demonstrating the size of the debt as well as the application of the proceeds to the accurately calculated debt. Mrs Bartley Thompson accepted that what she referred to was a letter from the bank stating how the bond money was applied. She accepted that there were no accounting records before the court backing up what she was saying.

The January 2008 loan/loan 2

[79] On January 31, 2008 the bank agreed to lend Mr Finzi JA$50,000,000.00 for the purpose of settling indebtedness to JFR. The terms of the loan were set out in the commitment letter dated January 31, 2008. Mr Finzi was required to and did issue a promissory note (principal and interest) to the bank dated February 1, 2008. The loan was disbursed by way of cheque payable to JRF in February 2008.

The October 2009/loan 3

[80] The genesis of this loan appears to be a letter of October 2, 2009 by Mr Finzi to CCMB in which he stated that he had legal fees to meet as well as other expenses arising from court appearances. He listed the obligations he had to meet and this amounted to JA$990,000.00.

[81] By letter of commitment dated October 2, 2009 the bank granted a personal demand loan to Mr Finzi in the sum of JA$990,000.00.

(1) pay professional fees to counsel (JA$650,000.00);

(2) pay a realtor for a valuation report (JA$100,000.00);

(3) to cover personal expenses (JA$240,000.00).

[82] The security for this loan was (a)'[p]romissory note to be signed by Winston Finzi in the amount of J$990,000.00; up stamping of first legal mortgage by $990,000.00 over duplicate certificate of title in respect of lands part of Beverly Hills, St Andrew comprised in certificate of title registered at volume 1259 folio 937 in name of Winston Finzi

The analysis

[83] The court understands the defence to be saying that it is unclear precisely what is owed under loans 2 and 3 having regard to the opaque nature of the bank's accounting. The records before the court do not have detailed accounting in respect of the debts to which the land bonds were applied. It is also the case that the court has decided that loan 1 no longer existed after August 9, 2006. In this state of affairs, the bank has property accounted for the moneys it collected from the sale of Mr Finzi's and Mahoe's properties.

[84] The defendants are also saying that in respect of the purchase of shares in the name of Weststar, using money from a loan that was an increase from JA$50m to US$2.5m more needs to be said by the bank. The defendants are saying that the circumstances surrounding the purchase of the CCMB shares on an application that was in fact handed in by the another subsidiary of CCFG is not coincidental. It was CCS that submitted the application and that application did not have Mr Finzi's and/or Mahoe's and/or any nominee of Mr Finzi.

[85] It is now common ground that the bank has sold at least nine parcels of land owned by either Mr Finzi or Mahoe. In addition, the bank has consumed the money from the land bonds.

[86] It is the view of this court that the material presented by the bank does not show a clear, unambiguous use of the proceeds of sale of the nine properties that were owned by Mr Finzi and/or Mahoe.

Conclusion

[87] In respect of loan 1 the bank's claim fails. The bank's claim for loans 2 and 3 in the amounts stated fails. Mr Finzi and Mahoe borrowed money but the precise amounts to be repaid are not clear having regard to what has been said in relation the land bonds and the US$2.5m line of credit which may well have been diverted to uses other than for the borrower. When the accounting is done the loss arising from the misuse of the US$2.5m loan will be determined. An account is to be taken in respect of loans 2 and 3. Further decision is delayed pending the outcome of the accounts.

[88] This case in one in which liability is determined and then the final remedy will be determined after the accounts are taken. This is necessary to do justice between the parties. Money was borrowed. How much is to be repaid, if anything at all? That is unclear. The orders suggested are to bring clarity to this question.

Orders

[89] The parties are to agree an independent person to conduct the accounts not later than February 26, 2021 failing which they are to submit a combined list of persons being no less than four along with their résumés to the Registrar of the Supreme Court not later than March 12, 2021. The Registrar will make the selection not later than March 19, 2021.

[90] The independent person shall have the authority to:

(1) order the parties to produce any book, record, record of accounts, papers and writings considered necessary or helpful to arrive at an accurate account;

(2) order the parties to produce any other material that he/she/it in his/her/its discretion thinks may be of assistance in carrying out the taking of accounts;

(3) to make requests in writing to third parties who may have relevant books, records, records of accounts, papers and writings that touch and concern or resolve any matter which is considered necessary or helpful to arrive at an accurate account.

[91] The claimant and the defendants are to produce to the independent person all books, records, record of accounts, papers and writings in their custody or under their control that touch and concern the loans in questions as well as the loans of December 2005.

[92] The parties are to agree a draft order giving effect to these reasons for judgment not later than February 8, 2021 failing which defendants are to submit draft not later than February 10, 2021.

[93] Written submission on costs to be submitted not later that February 21, 2021.

[94] The court apologises to the parties for the long delay in delivering these reasons for judgment.