[2023] JMCC Comm 39

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00537

BETWEEN	**ERROL WASHINGTON MORRISON**	**CLAIMANT**
AND	**NATIONAL PEOPLE'S CO-OPERATIVE BANK OF JAMAICA LIMITED**	**1ST DEFENDANT**
	KENNETH TOMLINSON	**2ND DEFENDANT**
	SECURITY INNOVATION CO. LTD.	**3RD DEFENDANT**
AND	**ERIC MORRISON**	**INTERESTED PARTY**

Consolidated with

CLAIM NO. SU2023CD00134

BETWEEN	**RAMON MORRISON**	**CLAIMANT**
AND	**NATIONAL PEOPLE'S CO-OPERATIVE BANK OF JAMAICA LIMITED**	**DEFENDANT**

Interlocutory Injunction – Arbitration Clause-Mortgage by way of guarantee - Whether mortgagee bank should be restrained from exercising power of sale - Borrower not a mortgagor- Whether agreement to arbitrate - Whether borrower has arguable claim - Whether estoppel arises - Whether notice to mortgagor required - Whether Marbella principle is applicable.

Mr. Sean Kinghorn instructed by Messrs. Kinghorn & Kinghorn Attorneys at Law for Mr. Errol Morrison

Mr. Keith Bishop instructed by Bishop Partners for Mr. Ramon Morrison

Mr. Stuart Stimpson, Ms. Kemilee Mclymont and, Ms. Kidisha Dennis instructed by Messrs. PeterMc & Associates Attorneys at Law for the National People's Cooperative Bank of Jamaica Limited

Mr. Maurice Manning KC and Ms. Allyendra Thompson instructed by Nunes Scholefield Deleon & Co. Attorneys at Law for Mr. Kenneth Tomlinson (The Receiver)

Mr. Everton Dewar instructed by Everton J. Dewar & Co. Attorneys at Law for the Interested Party Mr. Eric Morrison

Heard: 28th July and 18th September 2023

In Chambers by Video Conference with judgment delivered in Open Court.

Cor: BATTS, J.

[1] Three applications for injunctive relief were listed before me. The first was filed by Mr. Errol Morrison (Errol) and the second by Mr. Ramon Morrison (Ramon). The third was filed by the interested party, Mr. Eric Morrison (Eric), on the day before the date fixed for the interlocutory hearing of the other two. After exchanges with counsel for all the parties there was consensus, that the application by the interested party added nothing new, but there was objection to his lately served affidavit. I therefore before commencing the hearing, and having regard to orders made on the 25th May 2023, made the following orders:

a. Time extended to the 20th July 2023 for filing of the affidavit of Ramon Morrison and the affidavit as filed will stand.

b. Eric Morrison's application for permission to rely on his affidavit filed on the 27th July 2023, is refused.

c. Eric Morrison's counsel will be heard on his application for an injunction.

d. Ramon Morrison's application to adjourn is refused as there was ample time to obtain instructions and reply

to the affidavit filed on the 20th June, 2023.

Written submissions having been filed each counsel was allocated 30 minutes to make oral submissions. By and large this time frame was observed.

[2] These consolidated claims arise out of the same financial transaction. In a nutshell the National People's Cooperative Bank of Jamaica Ltd. (the bank) is a registered co-operative and savings and loan institution. It made a loan or loans to Ramon, who is a member of the bank, in connection with the operation of a quarry. That loan was secured by a mortgage over property, owned jointly by Errol and Eric, on which the quarry is located. The bank asserts that it has taken steps to enforce its mortgage, by appointing a Receiver and advertising the mortgaged property for sale, because the borrower (Ramon) is in default. Errol Eric and Ramon, the applicants for injunctive relief, seek to restrain the bank from doing so on three bases: (1) because there is a dispute as to whether there is an amount due and owing given certain oral agreements and/or representations made; (2) because the dispute should be arbitrated in accordance with an arbitration clause and an agreement between Ramon, the bank and the regulator; (3) because no notice to mortgagor was given by the bank to either Errol and/or Eric and; (4) because as guarantors Errol and Eric ought to have been given notice of the borrower's default. It is also urged upon me that the Marbella requirement (of payment into court of the amount alleged to be due) does not apply either to Ramon, (who is not a mortgagor) or to Errol and Eric (who are guarantors).

[3] Mr. Kinghorn, who represents Errol, argued that a court of equity, separate and apart from the issues raised above, will not allow the power of sale to be exercised at this juncture. In the first place he says that the issue between the borrower and the bank is yet unresolved. Furthermore, his client has been faithfully paying $660,000 per month to the bank since an alleged agreement was entered into with the bank. His client is a guarantor and is not a primary borrower. It would therefore, in these circumstances, be unjust to allow him to lose his property without the merits of the case being heard.

[4] Mr. Bishop, who represents the borrower Ramon, urged several points. Firstly,

that his client has a genuine dispute about the financials and the interest applied. He says the arbitration process, pursuant to rule 27 of the bank and section 44 of the Industrial and Provident Societies Act, had commenced in that the parties were endeavoring to agree an arbitrator. Even if, as the other side contends, his client was delinquent in responding to letters this does not prevent the court from now directing that the arbitration process resume. He also argued that the payment of $660,0000 per month represented a course of dealings and the bank could not now go back on its oral agreement. Furthermore, the advertisement placed in the papers was inadequate in its description of the land to be sold. There were, he said, serious issues to be tried and damages could not compensate for the loss that would occur if the bank was not restrained but his client was ultimately successful at trial.

[5] Mr. Dewar, who represented Eric, adopted the earlier submissions. He raised the question whether the agent of the Receiver had a conflict of interest given that he was recommending a purchase price for a company in which he had an interest.

[6] Mr. Stimpson, representing the bank, submitted that the mortgage had no clause requiring notice. Indeed, it expressly stated that no notice was required. As to the assertion of an arbitration clause he said that had no application to the mortgage or the bank's exercise of its right to enforce its security. Furthermore, although the bank had engaged with a view to arbitration, Ramon failed to go along. The monthly payments he submitted were being made pursuant to an interim order of Barnaby J. The asset in question is a quarry which is being worked. It therefore loses value each day and hence the Claimant's undertaking as to damages will not adequately protect the bank. The criticism of the advertisement he submitted, is unsupported by any expert evidence. The advertisement was adequate and attracted reasonable offers, see paragraph 32 of the affidavit of Donovan Cunningham filed on the 8th December 2022. Therefore, counsel submitted, the bank should be allowed to proceed to enforce its power of sale under the mortgage.

[7] Mr. Manning K.C., representing Mr. Kenneth Tomlinson (the Receiver), urged that the advertisement was satisfactory and in the absence of expert evidence there was no basis to say otherwise. The default of the borrower has continued for a long time and was explained because of a failure to secure a certain contract. He pointed to the fact that, although the court had made interim orders, Errol had not complied as it related to the opening of a joint interest-bearing account in which earnings from the mine were to be deposited.

[8] In considering these submissions, I remind myself that the court will not, lightly, restrain a party exercising contractual or other rights nor, compel a party to embark on conduct it might not otherwise have done. To persuade the court to grant injunctive relief, it must first be established that the applicant for relief has a cause of action with a real prospect of success. A prima facie case need not be established just that the claim is arguable and not frivolous. Secondly, the applicant must show that damages are not an adequate remedy otherwise the court will leave him to his remedy in damages at trial. The applicant must also establish that the defendant, if restrained but is ultimately successful at the trial, will be adequately protected by the applicant's undertaking as to damages. Finally, in the event consideration of the adequacy of damages is evenly balanced, the court must go on to consider the balance of convenience that is the overall justice of the case. This can involve consideration of the relative strength of each case as well as all the circumstances. In this arena, of equitable remedies, the court must at all times consider the overall justice of the case and should take whichever course is likely to cause the least irremediable prejudice, see ***American Cyanamid Co. v Ethicon Ltd [1975] 2 WLR 316*** applied in ***National Commercial Bank Limited v Olint Corp. Limited (Jamaica) [2009] UKPC 16*** **(decided 28th April 2009).**

[9] The application to this case, of the principles articulated above, presents a peculiar challenge as there are essentially three applicants with separate grounds of complaint. I remind myself that, at this interlocutory stage, the court is not to embark on a trial of the issues. I will therefore make no factual findings where there is a

factual dispute. In the course of this judgment, I will not be rehashing either, the various submissions or, the authorities cited. The parties are to be assured that I reviewed them all and am grateful as they informed my decision. However, in the final analysis I am satisfied that the justice of the case supports the grant rather than refusal of interlocutory relief. My reasons and the detailed orders now follow.

[10] Each applicant's case is arguable and adequately supported by evidential material. The borrower, Ramon, had been in arrears for a considerable time of that there is no doubt. He contends that in January 2022 the bank agreed to reduce his monthly payments, and to take no step to foreclose, provided the payments were made. He put in evidence correspondence, a taped phone call and receipts to support same, see exhibits RM8, RM8A, RM9 and, RM10 to the affidavit of Ramon Morrison filed on the 21st April 2023. He asserts that in breach of this agreement, which was oral and occurred after the intervention of a Minister of Government, a Receiver was appointed. He thereafter protested and instructed attorneys who issued a letter dated 7th May 2022, see exhibit RM 11 to the same affidavit. The response of the bank's attorneys was to reject the existence of any such agreement/arrangement and demand an immediate payment of $20 million, see exhibit RM 7 to the affidavit of Ramon Morrison filed on the 12th December 2022. In support of the existence of that agreement Ramon says that, shortly before the Receiver was appointed, the bank called him to remind him to make the payments agreed. He has exhibited, to his affidavit filed on the 21st April 2023, a taped telephone call in which the bank's agent acknowledged making such a call and expressed concern that he had not obtained an agreement in writing see, exhibits RM 9 and RM10.

[11] Ramon further supports his claim with the unchallenged evidence that all parties attended a "zoom meeting" with the Registrar of Cooperative Societies on the 21st September 2022, see exhibit RM 29 to his affidavit filed on the 21st September 2022. A verbatim record of that meeting is helpfully attached to an affidavit filed on behalf of the bank, see exhibit DC 3 to the affidavit of Donovan Cunningham filed on the 23rd December 2022. It is clear that, during the meeting, all were prepared to refer

the issue between the parties to arbitration. It is clear also that there was an agreement to appoint an arbitrator. Mr. Keith Bishop promised to send certain documents, which included a referral of dispute, to the bank's attorneys and it was understood that the bank would take no further steps to sell the property pending the arbitration. The Registrar stated that the arbitration should be completed by the 20th December, 2022. Mr. Bishop did not serve the documentation as promised and the bank argues that it was therefore entitled to proceed to sell the property, see letter dated 9th November 2022 exhibit DC 17 to the affidavit of Donovan Cunningham filed on the 8th December 2022. At paragraph 40, of the affidavit of Donovan Cunningham filed on the 8th December 2022 and, again at paragraph 13 of his affidavit filed on the 23rd December 2022, the bank asserts that it was unaware of the dispute alleged or its grounds.

[12] It is not for me, at this stage, to resolve the questions: whether there was an oral agreement in January 2022, whether it was binding or, whether it created an estoppel such as to make the appointment of the Receiver in February 2022 unlawful. Nor is it for me to decide whether the bank agreed to arbitrate or whether it knew, or ought reasonably to have known, the substance of the dispute to be referred for arbitration. It suffices, at this juncture, to indicate that it is arguable that Ramon had an enforceable agreement with the bank that it would not foreclose on his loan whilst specified payments were made and/or pending arbitration. There is evidence to support the contention that payments were made but it is not for me to decide their legal effect. It is also not for me to decide whether the failure of the attorney in September 2022, to supply documents within 7 days, sufficed to repudiate the alleged or any agreement to refer the issue to arbitration. It suffices that I find there is material to support a credible argument to the contrary. Neither party has yet proposed an arbitrator (who was to be agreed from a list supplied to the parties by the Registrar), see page 18 of the above referenced verbatim record of the meeting with the Registrar. There is an arguable case, it seems to me, that an equitable estoppel arose. The alleged detriment, in consequence of the bank's representation and conduct, is set out in Mr. Ramon Morrison's affidavit filed on the 21st April 2023, see paragraphs 36 to 39. In that affidavit, at paragraph 74, he also outlines the hardship refusal of interlocutory relief would cause.

[13] Insofar as Errol and Eric are concerned, they too rely on the above stated matters. This is so because, if the power to call the loan was wrongfully exercised then, so too is the purported exercise of the power of sale by the bank as mortgagee. They, however, are mortgagors who guaranteed Ramon's loan. They assert that, as guarantors and mortgagors, they did not receive the requisite notices and were not informed of the borrower's default. This is denied by the bank. This is again a disputed fact I will not determine. However, that factual issue may be irrelevant given the decision of the Judicial Committee of the Privy Council in ***Jobson v Capital & Credit Merchant Bank Ltd and others [2017] 70 WIR 204.*** In that case it was decided that parties may contract out of the requirement for notice in sections 1 0 5 and 106 of the Registration of Titles Act. In this case the mortgage by clause 3 G (xi) dispenses with any requirement for notice, see exhibit EM3 to the affidavit of Errol Morrison filed on the 29th November 2022. Notwithstanding my own concerns about that decision, it remains binding on this court and for reasons articulated in ***A1 Limited v Mary Grace Abrahams [2019] JMSC Civ 3*** **(unreported judgment delivered on 25th January 2019)** I must apply it. To the extent however that Errol and Eric rely on Ramon's right, to have the issues arbitrated, they do have an arguable case that the bank's right to sell under power of sale in the mortgage has not yet arisen or was being unlawfully exercised for all the reasons articulated above. In the circumstances of this case, it would make nonsense of the law to grant an injunction to Ramon, who as borrower is also a party to the mortgage deed, whilst refusing it to the others.

[14] The next question therefore is whether the applicants ought to be left to their remedy in damages. I think not. If Ramon is correct, and succeeds at the end of the day, it will mean he will have lost an opportunity to repay his loan in the manner he alleges was agreed and therefore keep his mining business afloat. Errol and Eric will therefore be able to retain their property. If the injunction is refused the income, goodwill and reputation lost, due to the closure of Ramon's business and the sale of the quarry, will be incalculable. On the other hand, can it be said the bank, if successful at trial, will be adequately protected by the applicants' respective undertakings as to damages. Again, I think not. The quarry is being worked and, as counsel submits, is therefore a depreciating asset. Interest on the

loan, which is badly in arrears, continues to accrue. If the injunction is granted the bank will be precluded from selling the property now and thereby recover the amounts due. There is no guarantee that another interested purchaser will be identified at or after a trial. The applicants have offered no evidence, other than the quarry the subject matter of the mortgage, that they are able to honour their undertaking as to damages. It must therefore be presumed that they are not able to pay the loan plus interest in full at this time. Therefore, although the amount due to the bank after a successful trial may be calculable, its risk of full recovery at that time is not. The consideration of the adequacy of damages therefore leads to an inconclusive result.

[15] I turn therefore to consider the balance of convenience being, in Lord Hoffman's reformulation, the overall justice of the case. In this regard the fact that the bank at some time expressed a willingness to accept monthly payments of $660,000 and much later indicated a preparedness to arbitrate the dispute between itself and Ramon, is telling. Furthermore, an injunction against proceeding to sell need not preclude the Receiver continuing to act. So, revenue earned while the quarry operates should be paid into a joint account and expenses related to the business appropriately disbursed. In this way the viability of the business and the retention of profits can be monitored by the bank's agent until trial or arbitration is completed. With such an arrangement the grant of interlocutory injunctive relief will be less likely to have a permanently detrimental effect on the bank as its refusal, is almost certain to have, on the applicants.

[16] On the matter of the applicability of the popularly called Marbella principle I do not think it is appropriate to impose the condition. The parameters of its application were clearly stated by Morrison JA, as he then was, in ***Mosquito Cove Ltd v Mutual Security Bank Ltd et al [2010] JMCA Civ 32*** **(unreported decision delivered 30th July 2010).** Exceptions were also stated although these were in "*highly exceptional*" cases. Morrison JA was clear that the principle was as applicable to mortgages by way of guarantee as it was to any other mortgage. In the case at bar Ramon is not a mortgagor as he has no legal interest in the mortgaged property, see exhibit EM 1 to the affidavit of Errol Morrison filed on the

29th November 2022. He is not seeking interim relief as a mortgagor, and therefore, the Marbella condition cannot be imposed on him. Restraining the bank's power of sale and/or power to appoint a Receiver will not therefore impact the efficacy of the mortgage which is the rationale for the Marbella principle. Errol and Eric are mortgagors by way of guarantee. If the principal debtor has credible reasons, not having to do with the quantum of the loan, to contend that the bank ought to be restrained at this interlocutory stage, it means, there is a credible basis to say the mortgagee's power of sale had not yet arisen. It would I think be unfair, to these guarantors, to impose on them a Marbella condition in all the circumstances of this case. Moreso because my injunctive order will leave the Receiver in place until trial so the bank will be able to preserve and monitor the collection of revenue from the property.

[17] Before closing I wish to say a brief word on the practice of counsel swearing an affidavit in a matter in which he or she appears. This arises because Mr. Keith Bishop swore to matters of disputed fact in an affidavit filed on the 17th January 2023. This court has previously expressed its views on the practice, see ***Cable & Wireless Jamaica Limited v Eric Jason Abrahams [2019] JMCC Comm 7*** **(unreported judgment delivered 15th March 2019)** and ***Andrew Issa Realty Limited (t/a Coldwell Banker Realty) et al v Everoy H. Chin & Co. Ltd [2020] JMCC Comm 21*** **(unreported judgment delivered 31st July 2020).** Although not an act of professional misconduct the practice is to be discouraged. In this regard therefore I will bar Mr. Bishop, however the matter is resolved, from recovering taxed costs for his appearance as counsel in this application for interlocutory relief.

[18] For all the reasons stated above my orders are as follows:

(1) The National Peoples' Cooperative Bank of Jamaica Limited (hereinafter referred to as The Bank) and Mr. Kenneth Tomlinson (hereinafter referred to as The Receiver) are hereby jointly and severally restrained whether by themselves their servants and/ or agents or otherwise howsoever from selling, transferring, or otherwise disposing of All that parcel of Land part of THE DOVE HALL ESTATE AND GRAYS HILL situated in Saint. Thomas in the Vale District in the parish of Saint

Catherine being ALL THAT PARCEL of land comprised in Volume 1369 and Folio 787 of the Register Book of Titles (hereinafter referred to as the said property) until the Trial of this action or the completion of Arbitration whichever is earlier or until a further Order of the Court.

(2) The Receiver is restrained, until the Trial of this action or the completion of Arbitration (whichever is earlier) or until further Order of the Court from taking steps to sell, transfer or otherwise dispose of the said property but save as aforesaid is permitted to continue with his duties as a receiver and specifically shall be at liberty to oversee and/or supervise the operation of the quarry, the collection of revenue and the payment of expenses.

(3) The Bank and the Receiver ,save and except to the extent necessary to oversee and/or supervise the operation of the quarry, the collection of revenue , the payment of expenses as aforesaid and, to secure the safety of the Receiver and his agents, are restrained whether by themselves their servants and/or agents from interfering with the quiet occupation enjoyment and operation of the quarry located on the said property by Messrs. Errol Eric and/or Ramon Morrison until the Trial of this action or the completion of Arbitration (whichever is earlier) or until further order of the Court.

(4) Order 5 of the Order made by The Honourable Miss Justice C. Barnaby on the 19th January 2023 is extended to the Trial of this action, its Arbitration or further Order of the Court.

(5) No equipment is to be removed from the said property, until the Trial or Arbitration, without the written permission of both the Receiver and Ramon Morrison being first had and obtained.

(6) Errol, Eric and/or Ramon, on the one hand, and the Receiver on the other shall pay into an interest-bearing account in their joint names all money collected in the ordinary course of business and which is over and above the ordinary expenses associated with the operation of the quarry until further Order of the Court.

(7) The said interest-bearing account shall be opened within 30 days of the date of this Judgment at a registered financial institution mutually agreed upon by the parties within 7 days of the date of this Judgment or, in the absence of agreement, selected by the Registrar of the Supreme Court from a list or lists supplied by the parties within 21 days of the date of this Judgment.

(8) Errol, Eric and Ramon Morrison each through their respective counsel give the usual undertaking as to damages.

(9) Liberty to apply to each party generally and, for the avoidance of doubt, an application to discharge the injunctive orders will be entertained in the event of a failure by Errol, Eric and/or Ramon to comply with paragraphs 4,5,6 and/or 7 of this Order.

(10) The question of costs is reserved for determination at the trial of this matter or upon completion of Arbitration, save and except that the costs of Mr. Keith Bishop, appearing as counsel in this application for interlocutory relief, are disallowed.

(11) The Registrar is directed to fix a date for the Case Management Conference at the earliest possible time.

(12) The parties are at liberty to pursue mediation and/ or arbitration prior to the date fixed for the Case Management Conference.

David Batts,
Puisne Judge.