JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON. MRS JUSTICE HARRIS, JA
THE HON. MR JUSTICE MORRISON, JA
THE HON. MR JUSTICE BROOKS, JA (Ag)

SUPREME COURT CIVIL APPEAL NO: 57/2003

BETWEEN	MOSQUITO COVE LTD	APPELLANT
AND	MUTUAL SECURITY BANK LTD	1ST RESPONDENT
AND	NATIONAL COMMERCIAL JAMAICA BANK (JAMAICA) LTD	2ND RESPONDENT
AND	REFIN TRUST LTD	3RD RESPONDENT
AND	JAMAICA RE-DEVELOPMENT FOUNDATION INC.	4TH RESPONDENT

SUPREME COURT CIVIL APPEAL NO: 58/2003

BETWEEN	GRANGE HILL FARMS LTD	APPELLANT
AND	KENNETH FRANCIS	APPELLANT
AND	MUTUAL SECURITY BANK LTD	1ST RESPONDENT
AND	NATIONAL COMMERCIAL BANK JAMAICA LTD	2ND RESPONDENT
AND	REFIN TRUST LTD	3rd RESPONDENT
AND	JAMAICA RE-DEVELOPMENT FOUNDATION INC.	4TH RESPONDENT

SUPREME COURT CIVIL APPEAL NO: 59/2003

AND	FRANCIS AGENCIES LTD	APPELLANT
AND	KENNETH FRANCIS	APPELLANT
AND	MUTUAL SECURITY BANK LTD	1ST RESPONDENT
AND	NATIONAL COMMERCIAL BANK JAMAICA LTD	2ND RESPONDENT
AND	REFIN TRUST LTD	3RD RESPONDENT
AND	JAMAICA RE-DEVELOPMENT FOUNDATION INC.	4TH RESPONDENT

William Panton, instructed by Ripton Macpherson & Co, for the appellants,

Miss Tenneshia Watkins, instructed by Vaccianna & Whittingham, for Mutual Security Bank Ltd and National Commercial Bank Jamaica Ltd

No appearance for Refin Trust Ltd

Mrs Sandra Minott-Phillips and Mrs Alexis Robinson, instructed by Myers, Fletcher & Gordon, for Jamaica Redevelopment Foundation Inc.

31 May, 1 June and 30 July 2010

HARRIS, J.A.

[1] I have read the draft judgment of my brother Morrison JA and I am in full agreement with his reasons and conclusions. I have nothing further to add.

MORRISON JA:

Introduction

[2] These appeals are from the decision of Cole Smith J to order, in three separate actions brought against a mortgagee by mortgagors, as a condition of the grant in each case of an interlocutory injunction restraining the mortgagee from exercising its powers of sale, that the mortgagors should bring into court the amount claimed by the mortgagee to be due under the mortgages. All three appeals therefore give rise, yet again, to the question of whether the judge was correct in her application of the well known decision of this court in ***SSI (Cayman) Limited v International Marbella Club SA*** (SCCA No. 57/1986, judgment delivered 6 February 1987) ("***Marbella***").

[3] The first named appellants in each of the appeals, Mosquito Cove Ltd, Grange Hill Farms Ltd and Francis Agencies Ltd, are all limited liability companies incorporated in Jamaica under the Companies Act. I will refer to them in this judgment as "Mosquito Cove", "Grange Hill Farms" and "Francis Agencies", respectively. Mr Kenneth Francis, who is in his own right an appellant in Civil Appeals Nos. 38 and 39, was at all material times

a businessman and landowner, resident in the parish of Westmoreland. I will refer to him as "Mr Francis".

[4] The first and second respondents in all of the appeals are companies incorporated under the Companies Act and were at all material times bankers, carrying on business at various locations throughout the island of Jamaica. The third respondent is also a company incorporated under the Companies Act and the fourth respondent is a company incorporated in the state of Texas in the United States of America and registered in Jamaica as an overseas company under the provisions of the Companies Act.

[5] On 21 October 1997, the first respondent changed its name to MSB Limited and merged with the second respondent and, on 20 June 2002, various mortgages and other securities, among them mortgages given by Mosquito Cove, Grange Hill Farms, Francis Agencies and Mr Francis to the first respondent, were transferred and assigned to the second respondent. By an agreement dated 1 February 1998, the second respondent sold all its rights, title and interest in all its credit receivables to Recon Trust Ltd, a company incorporated under the Companies Act, and by an assignment

dated 8 February 1998, several of these debts were assigned to the third respondent. By Deed of Assignment dated 30 January 2002, the third respondent assigned all its rights, title and interest and all interest and other monies due or subsequently to become due to it, to the fourth respondent. For the purposes of this judgment, it will only be necessary to refer again to the first, second and fourth defendants, as "MSB", "NCB" and "JRDF", respectively.

[6] Mr Francis is the principal shareholder and/or director of Grange Hill Farms and Francis Agencies, which are both, together with others, part of a group of companies said to be known as the Francis Group of Companies. It is alleged by JDRF, but denied by Grange Hill Farms, Francis Agencies and Mr Francis, that Mr Francis is also the principal shareholder and/or director of International Holidays and Development Company Ltd, to which I will refer hereafter as "International Holidays".

The mortgages

[7] The mortgages that have given rise to this litigation were all given to MSB as follows:

> "(a) Mortgage no. 901323, registered on 18 October 1995 (on three properties), from Mosquito Cove, as guarantor, to secure the indebtedness of International Holidays to MSB, in the sum of US$890,000.00.

(b) Mortgage no. 763728, registered on 14 May 1993, from Mr Francis, as guarantor, to secure the indebtedness of Grange Hill Farms to MSB, subject to a limit of $1,000,000.00.

(c) Mortgage no. 840399, registered on 7 December 1994, from Mr Francis, as guarantor, to secure the indebtedness of Grange Hill Farms to MSB, subject to a limit $1,000,000.00.

(d) Mortgage no. 927953, registered on 23 April 1996, from Mr Francis, as guarantor, to secure the indebtedness of Grange Hill Farms to MSB, subject to a limit of $5,500,000.00.

(e) Mortgage no. 754924, registered on 11 March 1993, from Mr Francis, as guarantor, to secure the indebtedness of Francis Agencies to MSB, subject to a limit of $500,000.00."

The statutory notices

[8] By statutory notices dated 11 July 2002, JDRF notified Mosquito Cove, Grange Hill Farms, Francis Agencies and Mr Francis of its intention to sell the mortgaged properties under powers of sale contained in the mortgages listed above if default in payment on the mortgages should continue for a period of one month from the date of service of the notice. The amounts of money (inclusive of principal and interest) stated in the notices by JRDF to be owing in respect of the mortgages as at I July 2002 were as follows:

(i) Mosquito Cove - $30,384,854 and US$2,235,090

(ii) Grange Hill Farms and Mr Francis - $37,515,276

(iii) Francis Agencies and Mr Francis - $31,799,840

The Supreme Court actions

[9] In an action commenced by originating summons against all the respondents on 7 October 2002 (Suit No. E. 2002/565), Mosquito Cove sought declarations that its guarantee allegedly given to MSB on or about 2 October 1995 to secure advances made by MSB to International Holidays, as well as mortgage no. 901323 allegedly given by Mosquito Cove in support of the said guarantee are invalid, void and unenforceable. In respect of the mortgage, the reasons advanced by Mosquito Cove for its invalidity are that it was not signed by a director of the company and that it is in breach of section 54 of the Companies Act then in force and therefore unlawful. The basis of the section 54 point is that the mortgage given by Mosquito Cove to MSB was for the purpose of securing the guarantee of a loan made to International Holidays by MSB to enable that company to acquire shares in Mosquito Cove. By way of relief, Mosquito Cove in this action seeks a permanent injunction restraining JDRF from exercising its powers of sale under the mortgage.

[10] In an action commenced by writ of summons on 8 October 2002 (Suit No. C.L. 2002/G-086), Grange Hill Farms and Mr Francis, claim against the respondents for an account of what is due from the mortgagors under the mortgages listed at para. [6] (b), (c) and (d) above (showing the amounts charged for interest and penalties), damages for negligence

due to the alleged breach by MSB and NCB of their fiduciary duties to Grange Hill Farms, Mr Francis and Francis Agencies, and a permanent injunction restraining JDRF from exercising its powers of sale under the mortgages. In this action, Grange Hill Farms and Mr Francis complain that MSB and NCB have used the "greater portion" of the loans given to the company "to credit the account of [International Holidays], in which the Plaintiffs have no share", have failed to render a full statement of account, despite having been requested to do so, and "have charged excessive interest rates, compounded interest and default rates of interest", as a result of all of which, Grange Hill Farms and Mr Francis dispute the amount claimed by MSB and NCB "and wish to have the matter tried by this honourable court".

[11] In an action also commenced by writ of summons on 8 October 2002 (Suit No. C.L. 2002/F-063), Francis Agencies and Mr Francis claim against the respondents for an account of what sums are due from the mortgagors under the mortgage listed at para. [6] (e) above (showing the amounts charged for interest and penalties), damages for negligence due to the alleged breach by MSB and NCB of their fiduciary duties to Francis Agencies and Mr Francis, and a permanent injunction restraining JDRF from exercising its powers of sale under the mortgage. The complaints of Francis Agencies and Mr Francis in this action are identical to those of Grange Hill Farms and Mr Francis in Suit No. C.L. 2002/G-

086, save that in this action the plaintiffs also complain that they have not been served with a statutory notice in respect of mortgage no. 92795.

[12] On 10 October 2002, applications for interlocutory injunctions were filed by the plaintiffs in all three actions, seeking orders in each case restraining the exercise of the powers of sale under the various mortgages until the trial of each action. These applications were all heard together on 2 and 3 July 2003 by Cole-Smith J, who, on 18 July 2003, made orders granting the applications for interlocutory injunctions, subject to the condition in each case that the plaintiffs bring into court the amounts claimed by JRDF within 30 days of the order. Thus, in Suit No. E. 2002/565, Mosquito Cove was ordered to pay into court the sum of US$890,000, in Suit No. C.L. 2002/G-086, Grange Hill Farms and Mr Francis were ordered to pay into court the sum of $37,000,000 and in Suit No. C.L. 3003/F-063, Francis Agencies and Mr Francis were ordered to pay into court the sum of $31,000,000.

[13] In a brief written judgment, Cole-Smith J considered the claims made by the mortgagors in each of the actions, as well as the mortgagee's statutory powers of sale under section 195 of the Registration of Titles Act. While the judge did not make a specific finding that the material before her disclosed that there was a serious issue to be tried between the parties, she clearly seemed to think that it did. She therefore

proceeded to consider the basis upon which the court could be asked to grant an injunction to restrain a mortgagee from exercising its powers of sale, referring to what she described as "the practice" developed by the courts "of insisting that to prevent the sale taking place by the issue of an injunction the claimants must pay the sum claimed [by the mortgagee] or such approximation of that sum into court". The judge then made the order granting the injunctions prayed for in all three suits, subject to the payments into court set out in the previous paragraph. As authority for this ruling, she specifically referred to ***Marbella***.

The appeals

[14] Mosquito Cove, Grange Hill Farms, Francis Agencies and Mr Francis all filed notices of appeal against the orders made by Cole-Smith J and immediately applied to a judge of this court for a stay pending the hearing of the appeals of that part of the judge's order requiring payments into court. These applications were heard by Panton JA, as he then was, and granted in the terms sought on 28 August 2003.

[15] Three of the matters raised by Mosquito Cove's grounds of appeal, which all question the legality of the guarantee and the mortgage allegedly given by the company to secure International Holidays' indebtedness to MSB, relate to Mosquito Cove only. Thus, it is contended that the guarantee and the mortgage are unlawful by virtue of section 54

of the Companies Act, the fact that neither document was signed by a director or secretary of the company and the fact that the guarantee is *ultra vires* the company.

[16] In addition, the grounds filed by all the appellants raise two broad issues that are common to all of them, as follows:

> (i) Whether the condition of payment imposed by Cole-Smith J amounted to a wrongful exercise of the judge's discretion and whether in each case the amount ordered by the judge to be paid into court is unfair and unreasonable; or whether in all the circumstances the judge ought to have made the orders preserving the status quo without conditions.
>
> (ii) Whether the statutory notices issued by JDRF dated 11 July 2002 were in breach of sections 105 and 106 of the Registration of Titles Act, in that the amounts set out in the memorandum of money owing by the mortgagors was grossly excessive and the notices were not issued by or on behalf of the mortgagee or its transferee.

The submissions

[17] Mr William Panton presented the appeals, which were heard together, on behalf of all of the appellants. With regard to the points relating to Mosquito Cove, Mr Panton submitted that the learned judge had failed to appreciate that the company had a real likelihood of success at trial in at least three respects. Firstly, that by section 54 of the Companies Act a mortgage by a company as surety for a guarantee

given in respect of a purchase of shares in the company itself is illegal and void. In support of this submission, Mr Panton referred us to ***Heald and another v O'Connor*** [1971] 2 All ER 1105. Mr Panton's second point was that the mortgage given by Mosquito Cove was also *ultra vires* the memorandum of association of the company and his third point was that the mortgage was not signed by a director of the company and it was therefore unenforceable against the company. In support of the proposition that a contract which is illegal is unenforceable and void *ab initio*, we were referred by Mr Panton to ***In re Mahmoud and Ispahani*** [1921] 2 KB 716 and Cheshire and Fifoot's Law of Contract, 8th edn.

[18] Mr Panton's more general points, applicable to all the appellants, were admirably summarised by him in his printed skeleton argument as follows:

> "It is the submission of the Appellants that the learned Judge at the first instance failed when imposing the conditions for payment into Court to take into account the following:
>
> (a) The distinction between a mortgagee who applies for an Injunction and a guarantor by way of mortgage who applies for an injunction;
>
> (b) The relevant principle of law that when imposing conditions they should not be such as to preclude the litigant from exercising the conditional right granted.

(c) That the guarantee and the mortgages were limited in amount and hence there was no warrant in ordering excessive amounts to be paid into Court.

(d) The relative strengths of the parties' case and the Plaintiffs' likelihood of success.

(e) The fact that in ordering both principal debtor and guarantor to pay money into Court, the amount in issue was being doubly secured.

(f) The learned Judge also failed to appreciate the exceptions to the Marbella principle that were applicable."

[19] In support of these submissions, we were referred by Mr Panton to a number of authorities, naturally including ***Marbella*** itself. In addition, Mr Panton relied heavily on the subsequent decision of this court in ***Flowers, Foliage and Plants of Jamaica Ltd et al v Jamaica Citizens Bank Ltd*** (1997) 34 JLR 447, to support his point that in this context a distinction falls to be made between a mortgagor and a guarantor. For what he described as "a well recognized principle" that the court will not impose conditions which a party is unable to perform, Mr Panton referred us to two unreported decisions of the English Court of Appeal in ***Chapple v Williams and Emmett*** (1999 WL 1579614, judgment delivered 8 December 1999) and ***Sweetman v Shepherd and Others*** (2000 WL 281270, judgment delivered 24 March 2000), as well as the better known decision of the

House of Lords in ***MV Yorke Motors (a firm) v Edwards*** [1982] 1 All ER 1024. And finally, to make the point that there are recognised exceptions to the rule laid down in ***Marbella***, Mr Panton referred us to ***Hickson v Darlow*** (1883) 23 Ch.D. 690 and ***Gill v Newton*** (1866) 14 L.T. 240, 14 WR 490.

[20] Miss Tenneshia Watkins, who appeared for NCB, reminded us that this was an appeal from the exercise by Cole-Smith J of her discretion and that, in these circumstances, this court should only interfere if it is satisfied that the judge misdirected herself in principle or exercised her discretion on an incorrect basis. Miss Watkins further pointed out that section 49(h) of the Judicature (Supreme Court) Act specifically empowers the Supreme Court to grant an injunction either unconditionally or upon such terms as the court thinks just. Miss Watkins then went on to demonstrate that the granting of an injunction with conditions attached was sanctioned by authority, not only provided by ***Marbella*** itself, but also by earlier cases, such as ***Inglis and Another v Commonwealth Trading Bank of Australia*** (1971-72) 126 CLR 161, upon which this court had relied in coming to its decision in ***Marbella***. On Mr Panton's company law points relating to Mosquito Cove, Miss Watkins submitted, firstly, that section 54 of the Companies Act deals primarily with the situation of a company which borrows money to purchase its own shares and was therefore not

applicable to the instant case, in which International Holidays was the purchaser of the shares and the borrower from NCB. And, secondly, with regard to the submission that the guarantee and the mortgage had not been signed by a director of the company, she invoked the principle of ostensible authority. Miss Watkins was prepared to allow, however, that there might be something in Mr Panton's point that the judge ought not to have ordered the payment into court of any amounts in excess of the limits of liability of the guarantor set out in the mortgage instruments themselves.

[21] Mrs Sandra Minott-Phillips, who appeared for JDRF, chose to take a radical approach, initially jettisoning almost entirely the skeleton argument which had been filed before the hearing of the appeal by JDRF's previous attorneys-at-law. Mrs Minott-Phillips dismissively described the claims filed on behalf of all of the appellants as "a piece of legal effrontery", based as they all were on the wholly novel approach of putting forward illegality, which is ordinarily a bar to relief, as a cause of action. By this, I understood Mrs Minott-Phillips to mean that to the extent that Mosquito Cove, for instance, relied on section 54 of the Companies Act to seek to invalidate a transaction in which it had been itself a willing participant, it was in effect setting up its own illegality as the basis upon which it sought relief from the court. In support of these submissions, we were referred to section 178 of the now repealed Judicature (Civil Procedure Code) Act

(to demonstrate that the procedural code at that time did not contemplate that illegality would be raised in pleadings otherwise than by way of defence) and to the decisions of the House of Lords in ***North Western Salt Company Ltd v Electrolytic Alkali Company Ltd*** [1914] AC 461, the High Court of Australia in ***Yango Pastoral Company Pty. Ltd and others v First Chicago Australia Ltd and others*** (1977-78) 139 CLR 410 and the Privy Council (on appeal from this court) in ***Morrell & Morrell v Workers Savings & Loan Bank*** (Privy Council Appeal No. 20 of 2006, judgment delivered 18 January 2007). As a result of these submissions and the authorities, Mrs Minott-Phillips invited us to dismiss the appeals, set aside the injunctions and strike out the appellants' pleadings in all the actions.

[22] Mrs Minott-Phillips did nevertheless go on to support the decision of the judge on the basis originally put forward in the skeleton argument filed on behalf of JRDF, that is, that she had correctly applied ***Marbella*** and that she could not therefore be said to have been plainly wrong in attaching conditions to the grant of the injunctions. ***Flowers & Foliage*** was distinguishable, it was submitted, as a stay of execution case, to which different principles applied, and not an injunction case, in respect of which ***Marbella*** was the governing authority. In any event, it was pointed out, one of the security documents in ***Marbella*** was in fact a guarantee, thus suggesting that there was no real distinction in principle between a case involving a mortgagor and a case involving a guarantor, as Mr

Panton had contended. We were also referred by Mrs Minott-Phillips to the recent decision of this court in ***Leicester Green v JRDF*** [2010] JMCA Civ 21.

[23] Finally, with the exception of ***Hickson v Darlow***, the relevance of which she accepted, Mrs Minott-Phillips sought to distinguish the authorities cited by Mr Panton. However, as Miss Watkins had done, she acknowledged that, where the liability of a mortgagor is limited by the instrument of mortgage, the amount of the payment in ordered as a condition of the grant of an injunction ought not to exceed that limit.

[24] In a brief reply, Mr Panton reminded the court that there was no cross appeal in this matter and that the only real issue before the court was whether the judge had been correct to impose the payment conditions which she had imposed. As a result, Mr Panton submitted, none of the other matters raised by Mrs Minott-Phillips arose for the court's determination.

[25] I will deal firstly - and briefly - with the points that affect Mosquito Cove only, before going on to consider the other points, which apply to all of the appellants, including Mosquito Cove.

The Mosquito Cove points

[26] The first of these arises from Mr Panton's submission, based on section 54 of the now repealed Companies Act, which was in force when Mosquito Cove guaranteed the loan to International Holidays and gave its mortgage to MSB in support of that guarantee, that the mortgage is void by virtue of its being in breach of the section. Section 54(1) provided as follows:

> "**54.** – (1) Subject as provided in this section, it shall not be lawful for a company to give whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary company, in its holding company:..."

[27] The proviso to section 54(1) contained some limited exceptions to the prohibition in the main body of the section, none of which is applicable to this case. Section 54(3) went on to provide that the consequence of a company acting in contravention of section 54(1) was that "the company and every officer of the company who is in default shall be liable to a fine not exceeding two hundred dollars". It was thus unlawful for a company to provide financial assistance in connection with the acquisition of its own shares.

[28] Section 54 is derived from section 45 of the English Companies Act 1929. The background to the section and its mischief were lucidly explained by Arden LJ in ***Chaston v SWP Group plc*** [2003] 1 BCLC 675 at [31]. Section 45 was enacted as a result of "the previously common practice of purchasing the shares of a company having a substantial cash balance or easily realisable assets and so arranging matters that the purchase money was lent by the company to the purchaser". The general mischief at which the section was aimed was therefore to prevent the resources of the target company and its subsidiaries from being used, directly or indirectly, to provide financial assistance to the purchaser to facilitate the acquisition. The danger of this practice was its potential to "prejudice the interests of the creditors of the target [company] or its group, and the interests of shareholders who do not accept the offer to acquire their shares or to whom the offer is not made".

[29] Section 45 in due course became section 54 of the English Companies Act 1948, which in turn found its way into the Jamaican Companies Act 1965, also as section 54.

[30] Mr Panton based his submissions on this point on the assertion in affidavits filed by the company in support of the originating summons that the purpose of the loan given by MSB to International Holidays, which was guaranteed by Mosquito Cove, was to enable the completion by

International Holidays of the purchase of shares in Mosquito Cove. As a result of this financial assistance, Mr Panton therefore contended, the mortgage was unlawful and as a consequence unenforceable by MSB, with the result that Mosquito Cove is likely to succeed in its claim against MSB for a declaration to this effect.

[31] In the court below, Cole-Smith J, as Miss Watkins urged us to do, dismissed the section 54 point, observing that "it has no applicability because it is primarily dealing with a company who borrows money to buy its own shares or shares in a holding company or subsidiary company". However, it seems to me to be difficult, as a matter of language, to read the section as having such a limited effect, the words "directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise" in fact appearing to point in the opposite direction (see Palmer's Company Law, 24th edn, volume 1, para. 39-01, where the prohibition in the section is stated to be expressed in "wide terms"). But while a breach of the section clearly gave rise to criminal liability on the part of not only the company but its officers, even a cursory consideration of the authorities over the years reveals that, in civil proceedings, the question of the validity or otherwise of transactions in breach of the section has not attracted a uniform judicial response.

[32] Thus, in ***Victor Battery Co. Ltd v Curry's Ltd and others*** [1946] 1 All ER 519, it was held that a mortgage of a company's assets was valid, even though it was given to secure a loan to the company which the lender knew would be used to acquire shares in the company. In that case, Roxburgh J considered that, upon its true construction, the object of the section was not to protect the company, but to punish it and its officers in the event of a breach. But the editors of Gower's Principles of Modern Company Law (6th edn, at page 275) have described ***Victor Battery Co. Ltd v Curry's Ltd*** as "a calamitous decision...[which is now]...accepted to be heretical". It was doubted by Ungoed-Thomas J in ***Selangor United Rubber Estates Ltd v Cradock (No. 3)*** [1968] 2 All ER 1073 (the judge adverting, at page 1154, to "the well-accepted ground of public policy that the courts will not aid unlawful transactions but let the consequences fall where they lie."), and in ***Heald and another v O'Connor***, cited by Mr Panton, it was not followed.

[33] ***Heald and another v O'Connor*** was a case in which the plaintiffs agreed, in a written agreement, to sell their shares in a company to the defendant and by the terms of the agreement the plaintiffs agreed to lend the defendant some of the purchase money, which was to be repaid by instalments, secured by a floating charge on the assets of the company, endorsed with a personal guarantee signed by the defendant. The company issued a debenture acknowledging its indebtedness to the

plaintiffs in the principal amount of the loan and charged its assets to the plaintiffs as security for that amount. The debenture was duly endorsed with a guarantee by the defendant. Summary judgment having been ordered against the defendant on a claim to enforce his guarantee, it was held on appeal that the defendant had a good defence to the claim and ought therefore to be given leave to defend. The basis of the decision (by Fisher J, also at first instance) was that the company had given financial assistance to the defendant as the purchaser of the shares by the provision of security to him to enable him to acquire those shares, within the meaning of section 54.

[34] But notwithstanding this distinct tendency in the more modern cases to treat transactions in breach of section 54 as void and of no effect, other limiting factors are also to be found in the cases. In ***Belmont Finance Corporation v Williams Furniture Ltd and others (No. 2)*** [1980] 1 All ER 393, for instance, the Court of Appeal held that if the transaction was part of a scheme intended to enable the purchaser to acquire the shares it would offend the section, even if it was at a fair price. However, the court expressly left open the question whether, if the transaction could be justified commercially in the company's own interests, and not merely as a means of assisting the purchaser to acquire the shares in the company, it would necessarily involve a contravention of the section (see per Buckley LJ, at page 402, per Goff LJ at pages 407-8, and per Waller LJ at page

414). The potentially wide scope of the prohibition in section 54 has to some extent been further tempered by the emphasis in later cases, starting with the influential decision of Hoffmann J (as he then was) in ***Charterhouse Investment Trust Ltd v Tempest Diesels Ltd*** [1986] BCLC 1, on the consideration that, when deciding whether a transaction can properly be described as the giving of financial assistance by the company, the commercial realities of the transaction as a whole must be considered, "bearing in mind that the section is a penal one and should not be strained to cover transactions which are not fairly within it" (per Hoffmann J, at page 10; more recently, this case was cited with approval by Toulson LJ in his judgment in ***Anglo Petroleum Ltd and another v TFB (Mortgages) Ltd*** [2008] 1 BCLC 185, at [27], and see, for a full discussion on the modern cases, Company Law, by Brenda Hannigan, 2nd edn, paras. 20-142 to 20-146).

[35] As a result of all of this, I do not think that it can be predicted with any certainty, at this still very preliminary stage of the litigation, that Mosquito Cove's challenge to the transaction on the ground of a breach of section 54 is more likely than not to prevail at the end of the day and much will no doubt depend on what the more detailed evidence adduced at trial will reveal. For this reason, I am of the view that Mosquito Cove's first point must therefore fail.

[36] It may perhaps also be worth observing (in passing, as this was not the main focus of the arguments advanced on this appeal) that the mortgages upon which JDRF relies may well be further insulated from challenge by section 71 of the Registration of Titles Act. That section expressly relieves the transferee of a mortgage of registered land of any obligation to enquire into the circumstances under which any previous proprietor of the mortgages came to be so registered (see ***Paulette Hamilton and another v Ronham & Associates Ltd***, SCCA No. 77/2007, judgment delivered on 31 July 2008, a decision of this court, in which the section was held to have that effect).

[37] By way of postscript to the discussion on the effect of section 54, however, I should add that it was amended and recast in England as sections 151-158 of the Companies Act 1985 and is now to be found in sections 677-683 of the Companies Act 2006 (in which the prohibition is no longer applicable to private companies). In Jamaica, the old section 54 is now to be found in section 184 of the Companies Act 2004, which came into force on 1 February 2005. While it preserves the original prohibition against a company giving financial assistance to anyone for the purpose of acquiring its shares, it limits the ambit of the prohibition to cases in which the company is unable or would, after giving the financial assistance, be unable to pay its liabilities as they become due or where the realisable value of the company's assets would, after giving the

financial assistance, be less than the aggregate of the company's liabilities and stated capital of all classes (section 184(2)(a) and (b)). Interestingly, section 184(3) provides, "For the avoidance of doubt", that a contract made by a company giving financial assistance in contravention of the section "shall not, by reason only of that contravention, be rendered void, or unenforceable by the company or the person giving financial assistance". The use of the introductory words "for the avoidance of doubt" certainly suggests that, in the mind of the draughtsman at any rate, there was a need to put beyond argument in the 2004 Act the position under the old section 54.

[38] Mosquito Cove's second and third points can, I think, be dealt with more shortly. By way of the second point, the company asserts that the giving of a guarantee in the circumstances of this case was *ultra vires* its memorandum of association. This is actually the way it is put in the originating summons and the affidavit in support, though in the skeleton argument filed on behalf of the company the complaint is stated to be in respect of the giving of a mortgage in support of the guarantee. The complaint in the third point is that the mortgage was not signed by a director of the company, as required by the articles of association. In so far as the complaint relates to the giving of a mortgage, the second point is answered by a reference to clause 3 A(iii) of the memorandum of association of Mosquito Cove, which identifies one of the objects for

which the company was formed to be to "sell, lease, let mortgage or otherwise dispose of the lands, houses, buildings and other property of the Company". Given that this appeal is about whether the respondent ought to be unconditionally restrained from exercising its powers of sale under the mortgage, it seems to me that it is the power to give a mortgage, rather than the power to give a guarantee which is relevant, but even if I am wrong about this, I would consider this to be an issue to be thrashed out between the parties at trial. And the third point was, in my view, sufficiently answered by Cole-Smith J, who said that, even if Mr Francis, who signed the mortgage on behalf of the company, was not a director, "he must have had ostensible authority to act for the company in procuring a loan of such magnitude" (as to which, see Palmer's Company Law, 24th edn, para. 21-10, et seq.). Again, I consider in any event that this is a matter to be resolved at trial when all the evidence is in. Accordingly, I think that these points must fail as well.

The *Marbella* principle

[39] This brings me then to the main point in the appeal, which affects the position of all of the appellants, that is, whether Cole-Smith J was correct in applying ***Marbella*** in all the circumstances of this case. I will first restate and discuss the principle for which the case is authority and then go on to address each of the appellants' concerns in turn.

[40] The appeal in ***Marbella*** came before this court in unusual circumstances, described by Carey JA as "a concatenation of irregularities" (page 17). This was an action in which the defendants, by way of counterclaim, sought rescission on the ground of fraud of various agreements, as well as certain securities (including a guarantee, a debenture and a mortgage) given by them to the plaintiff to secure a loan and further advances. An application by the defendants for an interlocutory injunction to restrain the plaintiff from attempting to realize its securities until trial of the action was commenced before a judge, but was adjourned sine die after three days of hearing without any order being made. The parties then decided to seek an early trial of the matter and it was agreed between them that the status quo would be maintained until the commencement of the trial.

[41] The trial in due course commenced on 7 November 1986 and proceeded from day to day until 29 November 1986, when counsel for the plaintiff intimated in open court that his client felt free to exercise whatever power it possessed under the security documents, in particular the mortgage, with reference to the mortgaged property. Counsel for the defendants then immediately sought and obtained from the judge, without any formal application or affidavits being filed, an order restraining the plaintiff from exercising its power of sale until the completion of the trial, on condition, among others, that the defendants

pay the sum of US$23,000 per month to maintain the mortgaged property in the interim. Dissatisfied with this order, both parties appealed, the defendants seeking a removal of the conditions and the plaintiff seeking either a complete removal of the restraint or, alternatively, that the condition to be imposed ought to be the payment into court or the provision of security for the amount claimed to be due under the mortgage by the plaintiff, that is US$6,338,586.

[42] The decision of a strong court (Rowe P, Carey and Downer JJA) went unanimously in favour of the plaintiff. Rowe P referred to what he described as "the special and peculiar rights which a mortgagee may exercise over...secured property", directing attention to the mortgage instrument and the power of sale conferred on the mortgagee in the event of certain defaults, all of which had occurred in that case. After detailed reference to a number of authorities cited on behalf of the plaintiff, the learned President concluded that the only basis upon which a mortgagee may be restrained from exercising his powers of sale is upon payment of the sum claimed by the mortgagee into court.

[43] Carey JA agreed, stating that while the court "has an undoubted power to restrain a mortgagee from exercising his powers of sale...the term invariably imposed is that the amount claimed must be brought into court" (page 14). Carey JA concluded, also after reference to some of

the authorities cited, that the rule was well settled that courts of equity would not order restraint in such a case "without providing an equivalent safeguard, which is, the payment into Court of the amount due or claimed in dispute" (page 15). Downer JA also considered that these principles were applicable, despite the allegation of fraud, "for if they were not, where there is an allegation of fraud by the mortgagor, then the mortgagee would be deprived of his rights under the mortgage if a restraint is imposed without the appropriate conditions attached" (page 26).

[44] In the result, the plaintiff's appeal was allowed and the order of the judge in the court below was varied to impose the condition that the defendants pay into court within a specified time the amount of US$6,338,556.

[45] The decision in ***Marbella*** broke new ground only in the sense that it appears to have been the first known application of the rule it described in this jurisdiction. A cursory examination of the authorities to which reference was made in the judgments of the court suffices to make the point. So in ***Gill v Newton*** (1866) 14 WR 490, the earliest of the cases cited, Turner LJ observed that to grant an injunction to restrain a mortgagee on the ground that the amount due was in dispute would mean that "a mortgagor would have but to raise a dispute about the sum due, in order

to deprive his mortgagee of his remedies under the mortgage deed". Similarly, in ***MacLeod v Jones*** (1883) 24 Ch. D. 289, 299-300, Cotton LJ, after restating the rule applicable "under ordinary circumstances", that is, that a mortgagee ought not to be restrained from exercising his powers of sale, save on payment into court by the mortgagor of the amount claimed to be due from him by the mortgagee, observed that that was "perfectly right, because we ought not to prevent mortgagees from exercising the powers given to them by their security without seeing that they are perfectly safe".

[46] And lastly, in ***Inglis and Another v Commonwealth Trading Bank of Australia*** (at pages 164-165), Walsh J, at first instance, said this:

> "If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon the terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due.
>
> The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed."

[47] This statement of the law was specifically approved by Barwick CJ in the High Court of Australia, dismissing the appeal, who stated that "the

general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument" was that, failing payment into court of the amount sworn by the mortgagee to be due under the mortgage instrument, "no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage".

[48] I have taken the time to retrace some of the ground so admirably covered by this court in ***Marbella***, mainly because the exercise demonstrates the provenance of the rule, from the standpoint of both precedent and principle. A mortgage is a security for a debt, given by the mortgagor in consideration of the mortgage loan and taken by the mortgagee as a safeguard against default in repayment. It is, as Garner's Dictionary of Modern Legal Usage (2nd edn, page 574) puts it, "a property owner's promise that, if some obligation is not met, the creditor may take the property to satisfy that obligation". It is precisely for this reason, in my view, that the cases all characterise the requirement of a payment into court as a condition of an injunction as the means of ensuring that, if the mortgagee is to be deprived by injunction of his remedy under the mortgage deed, he is provided with an equivalent safeguard or, as Cotton LJ would have it, kept "perfectly safe".

Flowers & Foliage

[49] But notwithstanding its impeccable pedigree, ***Marbella*** did not, as I observed in my judgment on an application for an injunction pending the hearing of an appeal in ***Michael Levy v JRDF and another*** (SCCA No. 26/2008, Application No. 47/2008, judgment delivered 11 July 2008, para. 24), "receive universal approbation from either the practising profession or this court". In this regard, the high-water mark was undoubtedly the decision of this court in ***Flowers & Foliage***, a case upon which Mr Panton naturally placed considerable reliance in this appeal. It may be of some importance to note at the outset that, as Mrs Minott-Phillips pointed out, ***Flowers & Foliage*** was in fact concerned with an application for a stay of execution, rather than for an injunction. In the court below, Reid J had ordered summary judgment against the appellants in favour of the respondent for a sum in excess of $11 million, inclusive of interest. The debt in respect of which judgment was ordered had been secured by personal guarantees and mortgages given by two of the appellants to secure the debt of the third, a limited liability company. Reid J also dismissed an application by the appellants for leave to file their defences out of time and for an injunction restraining the respondent from exercising its powers of sale under one of the mortgages. Reid J granted leave to appeal, but before any appeal was filed, an application for a stay of execution was dismissed by another judge of the Supreme Court

(Chester Orr J). However, the appeal having in due course been filed, the appellants applied for and were granted a stay of execution by Downer JA, sitting as a single judge of this court.

[50] The respondent applied to the court for an order discharging Downer JA's order, on the ground that the judge ought not to have entertained the application, because the rules required that that application should have been made in the first place to a judge of the Supreme Court (for the purpose of this submission, the respondent sought to exclude from the chronology of the case the application which had been heard and refused by Chester Orr J, on the ground that, when that application was made, the appeal against Reid J's judgment had not yet been filed). In a judgment in which the other members of the court (Bingham JA and Walker JA (Ag), as he then was) concurred, Rattray P took the view that the rules then in force in fact gave an intending appellant, having filed an appeal in this court, two options. The first was to apply in the first place to a judge of the court below for a stay of execution and, if unsuccessful, to renew that application to the court itself, and the second was to apply directly to a single judge of this court, as the appellants had done in this case, subject to a further application to discharge the order of that judge to the court itself. It followed from this that, in accordance with the second option, Downer JA had had the necessary jurisdiction to hear the application for a stay and to make the

order granting it, as he did. There is no reason to suppose that this was not a correct decision on the rules, as they then stood, but there is in any event nothing to be gained by a detailed examination of the court's reasoning and decision on this aspect of the matter, as those rules have since been replaced by the Court of Appeal Rules 2002.

[51] But despite the fact that the decision on this point was obviously sufficient to dispose of the application to discharge Downer JA's order, Rattray P nevertheless went on to deal in his judgment with the second, and alternative, ground upon which the respondent had sought to challenge that order. That ground was that a stay of execution ought not to have been granted without a condition having been imposed that the appellants pay the amount of the judgment to be held in escrow pending the hearing of the appeal. Counsel for the respondent relied for this submission on the decision in ***Marbella.*** After summarising the reasoning of the court in that case, Rattray P observed that the rule which it propounded was described in the authorities as "a general rule" and in a comment which continues to be cited in this context, declared that "Courts of equity do not shackle themselves with unbreakable fetters if the justice of the particular case demands a more flexible approach" (page 452). ***Marbella***, he continued, "is distinguishable from the instant case in that it concerns the borrowing of money secured by debentures...[while]...in the instant case, the applicant was not a primary

borrower but a guarantor and the mortgage was a collateral security...in support of the guarantee" (page 452). Finally, Rattray P appears to have accepted a submission made by counsel for the appellants that "the old rule upon which Marbella and such cases were determined is no longer followed". In support of this submission, reliance was placed by counsel on the decision of Staughton LJ, sitting as a single judge of the Court of Appeal of England in ***Linotype-Hell Finance Ltd v Baker*** [1992] 4 All ER 887.

[52] ***Linotype-Hell*** is still routinely cited by counsel in support of applications to stay execution pending appeal, particular reliance being placed on Staughton LJ's statement (at page 888) that "if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution". In ***Flowers & Foliage***, Rattray P accepted the submission based on this dictum, concluding that, "The principle stated by Staughton LJ is more in accord with an acceptable concept of equity and justice, a relevant ingredient for the exercise of judicial discretion once it is established that there are...triable issues which would be denied the judicial scrutiny absent in a summary judgment" (page 453).

[53] In so far as ***Flowers & Foliage*** has often since been cited, as in the instant case, as a decision which in some respects qualifies the decision in

Marbella, I feel bound to say, obviously with the greatest of respect to the considered views of a very learned judge, that I have found it to be an unsatisfactory decision in at least three respects. In the first place, Rattray P's observations on ***Marbella*** were strictly speaking *obiter*, since, as I have suggested, the conclusion that the rules permitted Downer JA to make the order staying execution until the hearing of the appeal was clearly sufficient to dispose of the application to discharge that order for non-compliance with the rules, which is all that was actually before the court. Secondly, as regards the nature of the securities with which ***Marbella*** and ***Flowers & Foliage*** were each concerned, there was no factual distinction between the cases, as Rattray P thought, both having equally to do with guarantees and mortgages given in support of those guarantees. But thirdly, and in my view perhaps most importantly, the court's reliance in ***Flowers & Foliage*** on Staughton LJ's statement in ***Linotype-Hell*** is an obvious conflation of the established principles upon which a court will grant an injunction restraining a mortgagee from exercising his powers of sale with the quite different principles that govern applications for stay of execution pending appeal. Cases in the former category have always been subject, as I have attempted to demonstrate, to a special rule flowing from the peculiar nature of a mortgage, while, in cases in the latter category, a judge asked to stay execution pending appeal is primarily concerned, as it was recently put by Harrison JA (in ***Watersports***

Enterprises Ltd v Jamaica Grande Ltd and others, SCCA No. 110/2008, judgment delivered 4 February 2009), with "whether there is a risk of injustice to one or other or both parties if [the court] grants or refuses a stay" (and see also ***Hammond Suddard Solicitors v Agrichem International Holding Ltd*** [2001] All ER (D) 258, (Dec), per Clarke LJ, as he then was, at para. 22).

[54] Despite these strictures, to which I think that ***Flowers & Foliage*** may fairly be subjected, I wish it to be equally clearly understood that I advance no criticism of the actual outcome of the case, which was to dismiss the application to discharge Downer JA's order granting a stay of execution pending appeal. Apart from the question of whether that judge had jurisdiction to hear and grant that application, which this court concluded that he did, it does not appear to have been suggested that, on the material that had been placed before Downer JA, the order for a stay had not been properly made. I am also aware that ***Flowers & Foliage*** has been referred to by this court on at least two subsequent occasions without apparent animadversion and, indeed, with a degree of approval for Rattray P's ringing declaration of the extensive powers of courts of equity (see ***Global Trust Ltd and another v JRDF and another***, SCCA No. 41/2004, judgment delivered 22 July 2007 and ***Rupert Brady v JRDF and others***, SCCA No. 29/2007, judgment delivered 12 June 2008). However, it appears to me that in neither of those cases did the issues before the

court call for as detailed a consideration of the decision, as at least one of the grounds argued by Mr Panton in the instant case does.

The *Marbella* principle – the current position

[55] In recent years, this court has been invited on a number of occasions to revisit ***Marbella***, but in my judgment in ***Michael Levy***, after a brief review of some of the later cases, I concluded (at para. 32) that "the Marbella principle is...alive and well". Most recently, in ***Leicester Green v JRDF*** (in a judgment with which Philips JA and McIntosh JA (Ag) agreed), Harris JA reaffirmed the principle (at para. [9]), referring to her own earlier statement in ***Paulette Hamilton v Gregory Hamilton and others*** (at para. 10) in which she had stated, again speaking for the court, that "a mortgagee will not be restrained in the exercise of his powers of sale because the amount due is in dispute...however, [he]...may be restricted in the exercise of his powers of sale if the mortgagor pays into court the amount claimed by the mortgagee as due and owing".

[56] That this also remains the position in England is confirmed by the following statement in the current edition of Fisher & Lightwood's Law of Mortgage (11th edn, para. 20-34):

> "The mortgagee will be restrained from exercising his power of sale if, before there is a contract for the sale of the mortgaged property, the mortgagor tenders to the mortgagee or pays into court the amount claimed to be due. The

> amount due for that purpose is the amount which the mortgagee claimed to be due to him for principal, interest and costs unless, on the face of the mortgage, the claim is excessive, in which case the amount claimed less such excess must be tendered or paid."

Some exceptional cases

[57] But given that an injunction is a discretionary remedy, it is hardly surprising that there have been exceptional cases in which payment in by the mortgagor has not been insisted on as a precondition to the grant of an injunction. ***Gill v Newton*** is itself an example. That was a case in which the mortgagee was put into possession of the mortgaged property by a separate deed, upon trust to take the rents and profits of the property and to pay himself and certain prior incumbrancers. By this deed, all of the mortgagee's rights and remedies under the mortgage were reserved and it was provided that he might at any time determine the trusts thereof by mere notice in writing and that, upon giving such notice to the mortgagor, he should be at liberty to use and exercise all his rights and remedies under the mortgage. The mortgagee having taken possession, the mortgagor subsequently died and the mortgagee gave three months' notice to his executor of his intention to sell the mortgaged property. The Court of Appeal granted an application for an interlocutory injunction, which was refused at first instance, primarily on the ground of what Knight Bruce LJ described as "the great peculiarity of the terms" of

the deed under which the mortgagee had been let into possession of the property. Both Knight Bruce LJ and Turner LJ made it clear that, were it not for the unusual terms of the deed, they would have agreed with the judge in the court below that no injunction should be granted, Turner LJ stating that he "should not have felt inclined to interfere upon the facts as they stood with reference to the mortgage security itself".

[58] Similarly, in ***MacLeod v Jones***, what the court considered to be the ordinary rule was partially displaced by the unusual circumstance that the mortgagee was also the mortgagor's solicitor. The mortgagor was a lady who was entitled to a life interest in leasehold property which she had mortgaged to various persons. As part of his efforts to settle her affairs and in order to save her from embarrassment, the mortgagee (her solicitor), with her sanction, bought up several of the incumbrances with his own money and took a transfer of them to himself, having previously taken a mortgage of her life interest to secure his past costs and the costs which he might incur in paying off the incumbrances. Some time afterwards, the mortgagor discharged the mortgagee as her solicitor and employed another solicitor, who then requested information from the mortgagee respecting the securities which he had transferred to himself. The mortgagee refused to supply the information unless the payment of what was due to him was guaranteed, and threatened to proceed to a

sale of the mortgagor's property, whereupon the mortgagor brought an action to impeach the securities and to restrain the sale of the property.

[59] The Court of Appeal was unanimous in thinking that, despite the ordinary rule, which was referred to and restated by each of the judges, this was a case in which the condition of payment into court ought not to be insisted upon. It is clear from the judgments that the decisive factor was the unique position of the mortgagee as not only mortgagee, but, critically, as the mortgagor's solicitor, and, as such, owing independent fiduciary duties to her. Brett MR considered that the mortgagee, in this dual role, had put himself in an "extremely dangerous" position by having, as the person whose duty it was to settle the mortgagor's affairs in the way most beneficial to her, also put himself "in the position of being one of her creditors" (page 295). The Master of the Rolls then went on to say this (at pages 296-7):

> "Now I ask myself whether the Court is bound to sit by when that state of things is brought before them, and to say, 'Yes, you may'. Now if he were simply a mortgagee I do not say he would not have a right to do that, subject to giving an account. So far as I understand the practice of the Court he could not be stopped from selling the estate without the mortgagor paying into Court or otherwise securing to him, not what the Court might think *prima facie* was due to him as far as they could ascertain, but without paying into Court that which he demanded, subject to a subsequent inquiry. But that is on the theory that he is nothing more than a mortgagee. But is this

> Defendant nothing more than but a mortgagee? He is a mortgagee and he has become mortgagee by reason of his being the lady's solicitor, and upon his own advice to her that that was the best manner of settling her estate.
>
> That seems to me to make the greatest difference. It brings him within an acknowledged jurisdiction of the Court. He was a solicitor, and she was his client at the time these transfers were made. That gives the Court a jurisdiction over him beyond the jurisdiction that it has over a mere mortgagee. It is the jurisdiction which the Court exercises as between solicitor and client, and I take it the real meaning of it is this. That where matters are called in question as between solicitor and client, inasmuch as the client has thereby lost the advice of the solicitor, the Court steps in and looks for itself, and as far as it can, to a certain extent, acts for the client in a way the solicitor would have done if he had been only solicitor, and expected to give her the advice for which he is paid as solicitor. Therefore where a solicitor is nominally the mortgagee, and when he assumes to exercise his right to sell as mortgagee, it seems to me the Court has jurisdiction to inquire immediately into the circumstances of the case, and will not allow the solicitor to exercise his unqualified rights as mortgagee, but will only allow him to exercise those rights subject to the control of the Court, and to his doing so in an equitable and fair manner as between a solicitor and his client."

[60] In the result, the injunction was granted without the usual condition of payment in of the amount due under the mortgages, but on condition that the plaintiff pay into court a sum sufficient to cover the actual amount of money which the defendant had advanced on her behalf. Concurring in this result, Bowen LJ said, "I do not think the ordinary rule

applies, because this is not a case against a mortgagee simply, it is a case against a mortgagee and something else" (page 304). It is nevertheless not without significance that the court sought by its order not to leave the mortgagee entirely unprotected by ordering that the sums actually expended by him, even if not the full amounts due under the mortgages, should be paid into court.

[61] It seems to me to be clear that, in both ***Gill v Newton*** and ***MacLeod v Jones***, the decisive factors that took the cases out of the general rule were, in the former case, the peculiar provisions of the deed under which the mortgagee was in possession of the mortgaged property on certain trusts that were independent of the mortgage itself, and, in the latter case, the fact that the mortgagee had concurrent, but also independent, fiduciary responsibilities to the mortgagor as her solicitor.

[62] In ***Rupert Brady v JDRF and others***, to which I have already made a passing reference (at para. [54] above), this court itself engrafted another exception upon the ***Marbella*** principle. This was a case in which the mortgagor's position was that he had not signed the relevant mortgage documents, that he had not given authority to anyone to pledge his property as security and that the alleged mortgage was therefore null and void. This court allowed an appeal from that part of the decision of Sinclair-Haynes J in which, as a condition of granting an injunction to

restrain the mortgagee's exercise of the power of sale, she had ordered payment into court by the mortgagor of the sum of $14.2 million, which was the amount said to be due under the mortgage. Panton P observed (at para. 8) that in the circumstances of the case "it would be unjust to demand that [the mortgagor] deposit such a huge sum of money in order to protect his rights", while Cooke JA, who was obviously concerned to reconcile ***Marbella*** with ***Flowers & Foliage***, said the following (at para. 7):

> "The correct distinction is between cases where the issue is in respect of the amount of money owed under a valid mortgage and cases where the validity of the mortgage is challenged...In the instant case the appellant is challenging the validity of the mortgage document as it relates to him."

[63] The only exception to the rule as formulated by Fisher & Lightwood (see para. [56] above), is where, on the face of the mortgage, the mortgagee's claim is excessive. The authority cited in the footnote to the text for this proposition is ***Hickson v Darlow***, to which we were also helpfully referred by Mr Panton. That was a case in which, at first instance, Fry J had granted an interlocutory injunction to a mortgagor restraining him from exercising the power of sale under a mortgage, on the usual terms that the plaintiff pay the amount claimed by the mortgagee to be due under the mortgage deed into court. The mortgagor's appeal from this order succeeded on the ground that the amount claimed by the mortgagee, and ordered by the judge to be paid into court, exceeded

the maximum amount to which he appeared to be due in accordance with the mortgage deed. Lindley LJ observed (at page 694) that "the court is not bound to attend to [the mortgagee's] affidavit if he swears that a sum is due which, according to the terms of his security, cannot be due upon it". The order for payment in was accordingly varied by reducing the amount that the mortgagor had to pay into court, so as to reflect the court's view of the amount that was consistent with the terms of the mortgage.

[64] While other or further exceptions to the rule are no doubt to be found in the books and will also emerge in the future, it seems to me that the kinds of instances discussed in the foregoing paragraphs suggest that the court will only sanction departures from the general rule in highly exceptional cases, based on very special facts, such as the existence of a fiduciary relationship between mortgagor and mortgagee or, perhaps, in cases of forgery. I naturally intend these as examples only, which are by no means exhaustive.

The instant case - discussion and analysis

[65] It is against this extended background (for the length of which I aplogise) that I come now to a detailed consideration of Mr Panton's submissions (see para. [18] above). His first point was based on the supposed distinction between the case of a guarantor, who has given a mortgage to support his guarantee, and a mortgagor *simpliciter*. Mr Panton cited as authority for this point the observation by Rattray P in ***Flowers & Foliage*** that that was in fact a point of distinction between that case and ***Marbella.*** As I have already indicated (at para. [53] above), I do not think, again respectfully, that as a matter of fact a comparison of the two cases can sustain any such distinction. But further, as a matter of principle, I have found it difficult to discern what difference there can or should be between a mortgage taken by a lender to secure a debt, independently of any underlying or related transaction, and a mortgage taken by a lender to support a guarantee given in respect of a debt created or owed as part of some larger transaction. It appears to me that in both cases the rights and obligations of the parties to the mortgage transaction, in the absence of any special agreement between them, must be those which inhere in their status as mortgagor and mortgagee, rather than with regard to such other status as they may also hold, either antecedent to or as an integral part of that very transaction. Save for the observation in ***Flowers & Foliage***, which, as I

have already suggested, is not borne out by the facts of ***Marbella***, no authority was cited to us to support the view that where, as in the instant case, it is said that the mortgage was only given to support a guarantee and that the mortgagor has derived no financial benefit from the transaction, the mortgagor is thereby entitled to different treatment from the court on an application for an injunction.

[66] Mr Panton's second contention was that, as a matter of law, conditions imposed by a court in making an order should not be such as to preclude the exercise of the conditional right given by the court's order. It is indeed the case that, on the face of the matter, all three of the authorities cited by Mr Panton on this point do provide some support for his submission. It is only necessary, I think, to refer to ***MV Yorke Motors***, a decision of the House of Lords, in which it was held that it would be a wrongful exercise of a judicial discretion to order, as a condition of granting leave to defend an application for summary judgment, the payment of a sum which the defendant would never be able to pay, since that would be tantamount to giving judgment for the plaintiff, notwithstanding the court's opinion that there is an issue or a dispute which ought to be tried. While in general a defendant cannot complain that a financial condition is difficult for him to fulfil, he can complain when a financial condition is imposed which it is impossible for him to fulfil and that impossibility was known or should have been known to the court by

reason of the evidence placed before it. However, in any case in which a party intends to rely on his own impecuniosity to avoid the imposition of a financial condition on him, the onus is upon him to put sufficient evidence before the court to enable it to make a proper determination on the issue.

[67] I do not think that anyone can fairly doubt the good sense of the principle which this decision confirms in the normal run of case, particularly in the era of the Civil Procedure Rules and the overriding objective of dealing with cases justly, including "ensuring, as far as practicable, that the parties are on an equal footing", as well as dealing with cases in ways that are proportionate to "the financial position of each party" (CPR Part 1.1(1) and (2)(a) and (c)(iv)). However, notwithstanding this obviously important consideration, I do not think that the principle can avail the appellants in the instant case, in the light of the virtually unbroken chain of authority to which I have referred which establishes the ordinary rule in cases in which a mortgagor seeks to restrain the exercise of the mortgagee of the powers of sale under a mortgage. What these cases demonstrate, it seems to me, is that the relationship between mortgagor and mortgagee is *sui generis* and is governed by the special rules that have been developed over many years to protect a mortgagee, as the condition of making an order restraining the exercise of his powers of sale, by affording him the "equivalent safeguard" that an order for payment into court provides.

[68] But it further seems to me that there is in this case yet another obstacle facing the appellants, which is that at the hearing before Cole-Smith J there was no evidence at all, save such as might have been inferred from the fact that there had been default under the mortgages, to suggest that it would have been impossible for the appellants, or any of them, to meet the usual condition upon which the injunctions which they sought are granted. In ***MV Yorke Motors***, the House of Lords placed the onus of establishing impecuniosity in these circumstances squarely on the party alleging it and declined to infer from the laconic assertion in an affidavit by the defendant, who was required to provide security of £12,000 as a condition of an order granting him unconditional leave to defend, that "I do not have £12,000 nor is there any likelihood of my raising that or any similar sum", that it was impossible for him to find security.

[69] Mr Panton's third point was that the learned judge had erred in the exercise of her discretion by ordering amounts to be paid into court as a condition of the grant of the injunctions which were in excess of the limits of the mortgagors' liability under the mortgages themselves. ***Hickson v Darlow*** is explicit authority in support of this point and both Miss Watkins and Mrs Minott-Phillips quite properly conceded during the argument that the appeals of both Grange Hill Farms and Francis Agencies, the limits in

respect of which were $7,500,000 and $500,000 respectively, were entitled to succeed in this regard.

[70] Mr Panton's fourth point had to do with what he described as the "relative strengths of the parties' cases and the [appellants'] likelihood of success". His main submissions on this point surrounded the issue of whether the borrowing in this case was in breach of section 54 of the Companies Act then in force, which I have already dealt with in some detail (see paras. [26] – [37] above) and indicated why I do not think that this point can succeed. I have also already dealt with the other two points raised by Mr Panton with regard to Mosquito Cove (see para. [38] above).

[71] Mr Panton's fifth point was that, in ordering that both the principal debtors and the guarantors should pay money into court, "the amount in issue was being doubly secured". On this point, Mrs Minott-Phillips, again quite properly, also told the court that her client did not interpret the judge's order as in fact calling for double payment and would therefore be governed accordingly.

[72] And finally, Mr Panton's sixth point was that the judge had failed to appreciate the exceptions "to the rule about payments into court", all of which were applicable to this matter. He listed these exceptions as (i) where there is a dispute whether a proper notice has been given by the

mortgagee of his intention to exercise his power of sale (ii) where the court can see on the face of the deed that the amount claimed could not be due on the security and (iii) where the mortgage is by way of guarantee. I have already dealt with the second and third of these so-called exceptions (at paras. [65] and [69] respectively. In respect of the second, I would only add that it is clear from ***Hickson v Darlow*** that where the court forms the view that the amount claimed by the mortgagee could not possibly be due on the security, which is what happened in that case, the result is not that no payment into court will be ordered, as Mr Panton appeared to suggest, but that the amount of the payment ordered will be reduced accordingly.

[73] With regard to Mr Panton's first exception, for which he cites ***Gill v Newton*** as authority, it seems to me that this flows from a misreading of the head note to the case. It will be recalled that that was a case in which, in addition to the mortgage deed, the mortgagor had entered into a second deed putting the mortgagee into possession of the property and giving him the right to collect the income from the property on trust and to pay himself and other incumbrancers (see paras. [58] and [59] above). The reference in the head note to the fact that "no notice had been given to determine the trusts thereof" and that for that reason the injunction would be ordered, is in fact plainly a reference to the second,

[78] I would accordingly propose the variation of the paragraph numbered three of the orders made by Cole-Smith J in each of the actions brought by Grange Hill Farms and Francis Agencies, to (i) reduce the amount to be paid into court in each case to $7,500,000 and $500,000 respectively, and (ii) to specify in each case that the payment into court is to be made by the second named plaintiff (that is, the actual mortgagor, only). Save for these variations, I would confirm the judgment of Cole-Smith J in every other respect.

[79] Finally, on the question of costs, I consider that the respondents who participated in these appeals, that is, MSB, NCB and JDRF, should have their costs of the appeal brought by Mosquito Cove (SCCA No. 57/2003) and two thirds of their costs of the appeals brought by Grange Hill Farms and Francis Agencies (SCCA No. 58/2003 and SCCA No. 59/2003 respectively), such costs to be agreed or taxed.

BROOOKS, J.A. (Ag)

[80] I agree and have nothing further to add.

HARRIS, J.A.

ORDER:

[81] Supreme Court Civil Appeal No. 57/2003 is dismissed. Supreme Court Civil Appeals Nos. 58/2003 and 59/2003 are allowed in part. Paragraph 3 of the order made by Cole Smith J, in the action brought by Grange Hill Farms is varied to read as follows:

> "That the 2nd plaintiff Kenneth Claude Francis pay into court the sum of $7,500,000.00 within thirty days of the date hereof failing which the injunction shall cease"

Paragraph 3 of the order made in the action brought by Francis Agencies is varied to read as follows:

> "That the 2nd plaintiff Kenneth Claude Francis pay into court the sum of $500,000.00 within thirty days of the date hereof failing which the injunction shall cease."

The judgment of the learned judge is affirmed in every other respect. Costs of the appeal in Supreme Court Civil Appeal No. 57/2003 to the 1st, 2nd and 4th respondents and two thirds of costs of the appeals in Supreme Court Civil Appeals Nos. 58/2003 and 59/2003 to the 1st, 2nd and 4th respondents to be agreed or taxed.