IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO HCV 3632 OF 2007

BETWEEN	PREMIUM INVESTMENTS LIMITED (In Liquidation)	CLAIMANT
AND	JAMAICAN REDEVELOPMENT FOUNDATION INC	DEFENDANT

IN CHAMBERS

Paul Beswick instructed by G. Anthony Levy and Company for the claimant
Charles Piper and Kanika Tomlinson for the defendant

March 28, May 21, June 9 and 11, 2008

JUDGMENT IN DEFAULT OF DEFENCE - EXTENSION OF TIME WITHIN WHICH TO FILE DEFENCE - RULES 10.3 (9), 26. 1 (2) (C) AND 26.8 OF THE CIVIL PROCEDURE RULES - RESTRAINING MORTGAGEE'S POWER OF SALE - INJUNCTION - MARBELLA PRINCIPLE - RESTRICTION ON MARBELLA PRINCIPLE - SECTION 33 OF THE LIMITATION OF ACTIONS ACT - WHETHER LIQUIDATOR CAN ACKNOWLEDGE DEBT WHICH MAY BE STATUTE BARRED ON BEHALF OF COMPANY- WHETHER DIRECTOR'S SIGNATURE ON FINANCIAL STATEMENTS IS ACKNOWLEDGEMENT OF DEBT - WHETHER SIGNATURE OF DIRECTORS ON FINANCIAL STATEMENTS IS AN ACKNOWLEDGEMENT OF DEBT -

SYKES J.

1. A number of applications is before the court in this matter. The applications are:

a. an application by Jamaican Redevelopment Foundation Inc (JRF) to extend time within which to file the defence and to permit affidavits filed so far on its behalf to stand as a defence;

b. an application by Premium Investments Limited (In liquidation) (PIL) for judgment in default of defence;

c. an application by PIL for an extension until trial of the interim injunction granted at a without-notice hearing; and

d. an application by JRF for the injunction to be discharged.

The context

2. The claim arose out of a dispute between PIL and JRF. PIL is a company in voluntary liquidation and Mr. Douglas Chambers was appointed liquidator on August 12, 2003. JRF is now the holder of mortgages granted over certain properties by PIL to certain financial institutions. JRF wishes to enforce those mortgages on the basis that PIL has defaulted on its payments.

3. By way of a fixed date claim form dated September 13, 2007, PIL is seeking:

1. an order that the defendant do give to the claimant a full account of all monies alleged by the defendant to be owing by the claimant to the defendant such account(s) to commence on the 1st day of December 1993 up to the present time.

2. an order that such accounts be given by the defendant to the claimant in respect of each and every loan or advance made to the claimant in respect of which the defendant alleges that the claimant is indebted to it including the following particulars:

a. the date on which each and every loan or advance was made to the claimant, the amount of the principal of each and every such loan or advance, the

rate per centum per annum of interest charged in respect of each and every such loan or advance;

b. the amount of each and every payment already paid by the claimant and/or anyone else on behalf of the claimant in respect of each and every such loan and the date on which each such payment was made and the manner in which each and every such payment was appropriated or applied;

c. the amount of each and every sum claimed to be due to the defendant from the claimant but unpaid, the date on which it became due and the amount of interest due and unpaid in respect of every such sum;

d. the amount due of every such sum not yet due which remains outstanding, and the date on which it will become due;

e. the manner in which interest is computed (simple or compound) in respect of each and every such loan or advance and the rest at which it is applied or computed.

3. An injunction to restrain the defendant whether by itself or by its directors, officers, servants or agents or otherwise howsoever from dealing with or disposing of the land owned by the claimant comprised in certificates of title registered at volume 1127 folio 995, volume 1206 folio 261 and volume 1218 folio 285 of the Register Book of Titles (which are subject to a Registered Mortgage which the defendant claims to own) until the final determination of this action.

4. Costs.

5. Such other relief as this Court deems fit.

4. On September 17, 2007, PIL sought and obtained a without notice injunction restraining JRF or its directors, officers, servants or agents or otherwise, howsoever from dealing with or disposing of land owned by the claimant comprised in certificate of title registered at volume 1127 folio 995, volume 1206 folio 261 and volume 1218 folio 285 of the Register Book of Titles for a period of fourteen days from the date hereof or further order. It is this injunction that JRF wishes to have discharged.

5. There is no issue that JRF is now the legitimate holder of the mortgages entered into by PIL with its previous lenders. It is common ground that JRF appointed a receiver which according to the terms of the loan is the agent of PIL and not the agent of JRF, contrary to the submission of Mr. Beswick (see clause 6 of mortgage agreement).

Application to extend time within which to file defence and application for judgment in default of defence

6. The first two applications can be dealt with together since they are, in this case, different sides of the same coin. I shall relate the facts relevant to these applications. In response to the claim and injunction, JRF filed an acknowledgment of service on September 19, 2007. Miss Janet Farrow, on behalf of JRF, swore an affidavit dated September 28, 2007, in opposition to the application for the injunction which was granted on September 17, 2007. Miss Janet Farrow swore another affidavit dated November 16, 2007, also in response to the injunction. To this affidavit was attached several audited financial records for the years 2000 and 2001. By the time this affidavit was filed, PIL, on November 13, 2007, filed an application for judgment in default of defence. Miss Farrow's affidavit was filed three days later.

7. PIL contends that since JRF did not file an affidavit in response to the fixed date claim form within the time required by the rules, it is entitled to judgment in default of defence.

8. Mr. Piper is applying (a) for an extension of time within which to file the defence and (b) for an order that both affidavits of Miss Farrow be allowed to stand as the defence to the claim form.

9. Mr. Beswick submits that JRF has failed to comply with rule 10.3 of the Civil Procedure Rules (CPR). He submitted further that when a defence is not filed within the time and the parties have not agreed to extend the time the defendant cannot file the defence as of right and is therefore under an automatic sanction, which is that the defendant is barred from filing a defence unless he has the leave of the court. According to Mr. Beswick, the applicable rule is rule 26.8 which deals with relief from sanctions.

10. While appreciating Mr. Beswick's point, it must be remembered that rule 10.3 (9) permits a defendant to apply for an order extending the time for filing a defence. The rule does not say when the application is to be made. It does not say that the application must be made before the time for filing the defence has expired. Also there is rule 26.1 (2) (c) which states that the court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.

11. Neither rule 10.3 (9) nor rule 26.1 (2) (c) contains the criteria that govern the exercise of the power to enlarge time. I take the point that this application is being made out of the time set by the rules to file a defence. This means that the defendant cannot file his defence unless he has the agreement of the claimant or the leave of the court. It is therefore a sanction imposed by the rules. However, the application to extend time is not an application under rule 26.8., but under rules 10.3 (9) and 26.1 (2) (c). Nonetheless I would say that the court can take into account the factors listed there as a kind of guide when determining whether to exercise the discretion to extend time. But in the end it is the overriding objective which must guide the exercise of the discretion in the application I am now considering.

12. I have formed the view that it is just for me to extend the time within which JRF is to file its defence and it is also just for me to permit the affidavits filed in opposition to the application for the interim injunction to stand also as JRF's defence. I have come to these conclusions for the following reasons. First, the first affidavit

of Miss Farrow was filed on September 28, 2007. Her second affidavit was filed on November 16, 2007 which was outside the time permitted by the rules to file a defence. The second affidavit added more information but the core of the defence was in Miss Farrow's first affidavit. Second, the filing of the affidavit on September 28, 2007, albeit in response to an application for an injunction, was done within the time to file a defence and since the September 28 affidavit contains the defence of JRF, it is hard to see how PIL can be put at any disadvantage if I were to grant the extension of time because PIL would have known what JRF's case is. Third, there would hardly be any useful purpose served by requiring JRF to file two affidavits containing the same information - one in respect of the injunction application and the other as a defence. This would be indefensible profligacy. Fourth, in keeping with the court's obligation to keep costs within manageable proportions it would not be helpful if JRF were to incur unnecessary costs in filing additional documents when the ones filed can do double duty. Admittedly, JRF might have indicated that the affidavit it filed on September 28, 2007, was also its defence but the omission to state this has not resulted in any demonstrable injustice to PIL. Fifth, the additional affidavit filed on November 16, 2007, according to Mr. Piper came about because additional material came to JRF's attention after the September 28 affidavit was filed. Sixth, it could hardly be said that JRF has demonstrated any conduct designed to delay these proceedings unnecessarily or might have the effect delaying the matter unreasonably. Seventh, by November 16, 2007, JRF's defence was before the court albeit not called by that name. In these circumstances, I do not think it can be said that an exercise of my discretion to grant JRF's application to extend time within which to file its defence and permit the affidavits filed to stand as the defence is improper or unreasonable. I therefore grant that application of JRF. It necessarily follows from what I have said so far that the application for judgment in default of defence is not granted.

Application for extension of injunction until trial and application to discharge injunction

13. These two applications can be dealt with together. PIL is applying for an extension, until trial, of the ex parte injunction. This is a case involving a mortgagor and a mortgagee. Anyone familiar with the recent history in Jamaica of the struggles between mortgagors and mortgagees will know that mortgagors have not fared too well in the confrontations. A formidable judgment available to mortgagees is the Jamaican Court of Appeal's decision in the well known case of ***SSI (Cayman) Ltd and Others v International Marbella Club S.A.*** SCCA 57/86 (February 6, 1987). Essentially, the case decided that where there is a dispute between the mortgagor and the mortgagee over the sum owed, then the mortgagor seeking an injunction to restrain the mortgagee from exercising the power of sale must pay into court the sum claimed by the mortgagee. This decision has stood unchallenged for over twenty years. The court relied on a decision of the High Court of Australia in ***Inglis v Commonwealth Trading Bank*** (1972) 126 CLR 161 where that court approved the judgment of Walsh J.

14. The only notable case, in Jamaica, in which the borrower has stopped a mortgagee in its tracks is ***Flowers Foliage and Plants of Jamaica Ltd v Jamaica Citizens Bank Limited*** (1997) 34 J.L.R. 447. Before doing the analysis of this case, it ought to be observed that this case has not brought joy to mortgagors. No case was cited to me in which ***Flowers Foliage*** has been relied on successfully by a mortgagor. If truth be told, what has happened in Jamaica is that ***Marbella*** has become more than a strong general rule. It has become the only rule; it does not matter what the actual dispute between the mortgagor and the mortgagee is, the result is the same. So dominant has the case become that it has induced submissions of extraordinary breadth. The submissions go like this: any mortgagor who is seeking an injunction restraining the mortgagee from exercising his power of sale must pay what the mortgagee says is owed regardless of the issue between the parties. The submission continues: if the mortgagee in either the amount owed or whether the power of sale is exercisable at all is wrong then the remedy is damages. The inevitable conclusion is that no injunction ought to be granted. There is also this rider: the mortgagee is cash rich, it can pay any damages assessed

against him, therefore an injunction ought not to be granted. Issues such as whether the mortgage has been discharged or whether the power of sale has arisen are brushed aside. The remedy is in damages. What if the mortgagee is dishonest and wishes "to steal" the mortgagor's property under the guise of the power sale, that is to say, wrongfully and dishonestly exercising his power of sale? The remedy is in damages. What if the mortgagee made very serious errors in calculation? The remedy is in damages.

15. The judgment of Rattray P. in ***Flowers Foliage*** has not caused a pause to reexamine ***Marbella***. It would seem, therefore that as far as ***Flowers Foliage*** is concerned the attitude to this case is one of deliberate and studious avoidance. It is indeed quite significant that not even the high number of disputes between mortgagees and mortgagors over the last five or so years has prompted any reexamination of ***Marbella***. The fact that the disputes keep coming despite ***Marbella*** is an indication that there is strong dissatisfaction with the way in which the decision is being applied. It is fair to say that the courts in Jamaica have not looked to see if ***Marbella*** has limits, ***Flowers Foliage*** notwithstanding.

16. Since Rattray P. found in ***Flowers Foliage***, that the "justice of the case" demanded a different approach it is important to see what were the features of ***Flowers Foliage*** which led the learned President to conclude that the ***Marbella*** principle did not apply. According to Rattray P., the case before him raised issues of whether the guarantee was void for uncertainty and whether the consideration provided was past consideration. There was the further issue of whether the bank acted legally in upstamping the mortgage (see page 452E-F). Rattray P. observed that the judgments in ***Marbella*** were applying a general rule and in the view of the President courts of equity "do not shackle themselves with unbreakable fetters if the justice of the particular case demands a more flexible approach" (see page 452C). This observation by Rattray P. resonated with another President of the Court of Appeal, Panton P. in ***Global Trust Limited v Jamaica Re-Development Foundation INC.*** S.C.C.A. No 41/2004 (delivered July 27, 2007) who while not expressly referring to ***Flowers Foliage*** was expressing a similar idea. It seems that Rattray

P. was suggesting that where there is a strong possibility that the mortgage may be unenforceable, on any ground, then that may be a basis upon which an injunction restraining the mortgagee from exercising its power of sale may be granted on terms different from the usual ***Marbella*** terms.

17. It is necessary to examine ***Marbella*** to see if the distinction identified by Rattray P. was sufficient to justify a departure. This is all the more important because Rattray P. accepted that ***Marbella*** had identified the correct principles and he did not challenge their application in the ***Marbella*** case. In ***Marbella***, the defendants borrowed money from the claimant. The loan was secured by the personal guarantee of a Dr. Laufer. The claimant made a demand for the loan and when the defendants failed to pay, the claimant commenced an action to recover its money. The defendants, while admitting the loan and its magnitude as stated by the mortgagee, filed a defence and counter-claim alleging, among other things, that they were induced to enter the agreements by fraudulent misrepresentations. In other words, they were raising issues that called into question whether the claimant could enforce his security. To that extent, despite the difference in details, the guarantor in ***Flowers Foliage*** and the mortgagor in ***Marbella*** were raising issues that questioned the enforceability of the agreements they signed. Also, there was no dispute that the loan was made in ***Flowers Foliage***. It is therefore fair to say that both cases raised serious issues to be tried and the issues went to enforceability of the agreements. If this is correct, it is difficult to see the distinction between the two cases as suggested by Rattray P. that would justify the different result when both cases raised issues that went to enforceability unless the distinction is that in ***Marbella*** the remedy claimed was rescission. Rescission is available if it is possible to restore the parties to the position they were in before the contract was made. Alternatively, the wronged party could affirm the contract and claim damages. If the defendant was unable to repay the money lent then the remedy of rescission would not be available and so there would be no basis to restrain the mortgagee. Similarly, if the remedy sought was damages then there would equally be no basis to restrain the mortgagee. It would appear then that ***Marbella*** turned on the remedies sought and

the requirements that had to be met before the remedies became available.

18. Cooke J.A. distinguished ***Marbella*** and ***Flowers Foliage*** in ***Global Trust Limited v Jamaica Redevelopment Foundation Inc*** S.C.C.A. 41/2004 (delivered July 27, 2007), where his Lordship said at page 11:

> *The cases of **Newton** and **Flowers** (supra) indicated that it would be proper to grant an injunction to restrain the mortgagee's power of sale if there are triable issues as to the validity of the mortgage document upon which the mortgagee seeks to found his power of sale. That was not so in this case.*

19. Cooke J.A. is stating a possible restriction on ***Marbella*** in very narrow terms. His Lordship is not to be taken as saying that if the mortgage document is valid and prima facie enforceable but there is a serious issue concerning whether the claim is statute barred the usual ***Marbella*** principle applies.

20. Seven months earlier, in the case of ***Shades Limited v Jamaica Redevelopment Foundation*** S.C.C.A. No 55/05 (delivered December 20, 2006) the majority of the Court of Appeal observed at page 6:

> *The mortgages were, on the face of it, valid and enforceable, having been properly registered in October 1996. Any restriction by a court on the right of the mortgagee to exercise its power of sale, would necessitate that the mortgagor pay into court the amount claimed (**SSI (Cayman Ltd) v International Marbella Club S.A.** S.C.C.A. dated 6th February 1987 (unreported).*

21. There is nothing in the judgment of the Court of Appeal in ***Shades*** to suggest that the debt was not owing. The claimant did not allege that he had repaid the money. There was no issue regarding

enforceability of the mortgage. There is no surprise that he failed to restrain the mortgagee.

22. In ***Global Trust*** the mortgagors were unsuccessful in their attempt to restrain the exercise of the power of sale. The claimants were alleging that they had discharged the mortgage. In fact they specifically asserted that they had over paid their mortgage and it was the defendant which should be reimbursing them. Thus there was no issue going to contract formation or any other vitiating factor. The majority of the Court of Appeal, Panton P. dissenting, treated the matter as governed by the usual ***Marbella*** principle and the fact that there was a dispute over whether the mortgage was paid off was not sufficient to deflect the ***Marbella*** principle. This is all the more significant when there is no indication that the Court of Appeal disagreed with the court below that there was a serious issue to be tried on the quantum owed by the mortgagor or more accurately, whether the mortgagor owed any money at all. In effect, the mortgagors were saying that the mortgagee had no basis for exercising the power of sale. It is not altogether clear, from the judgment of the Court of Appeal, whether the claimants had, at the time of applying for the injunction, put forward anything other than the naked assertion that they had paid of the mortgage. There is no indication that they had tendered receipts of evidence of actual liquidation of the debt. Failing this, it is not surprising that they failed.

23. On the other hand it would seem that Panton P. was of the view that there was indeed a more than arguable case of whether the mortgagor owed any money at all. If this was so, then Panton P. was certainly on good ground to regard this as a restriction on the ***Marbella*** principle. As will be shown, Panton P. does not stand alone in his view. ***Marbella*** rests on the Australian case of ***Inglis v Commonwealth Trading Bank*** (1972) 126 CLR 161. It is appropriate to see how the law in this area has developed in Australia. Before doing this it must be observed that no decision of the Court of Appeal since ***Flowers Foliage*** has indicated that it was wrongly decided and that Rattray P.'s restriction on ***Marbella*** was not well founded. It is my

view that Rattray P.'s views are in line with existing authority on the point.

Inglis v Commonwealth Trading Bank and its limits

24. There is case law in Australia that has placed limits on ***Inglis***. It is therefore appropriate to reexamine ***Inglis*** to see the issues that were before the court, and consequently what was actually decided. Then from this I will see whether the limitations placed on the decision by the Australian courts are justified.

25. When ***Inglis*** came before Walsh J., the claimant sought damages for breach of contract, defamation, fraud and conspiracy. The claim was amended to ask for an order of account. To quote Walsh J. the claimant framed his action in this way at pages 163 - 164:

> *The plaintiffs do dispute in affidavit evidence which is before me in this application as well as in their amended statement of claim that any debt is owed by the plaintiffs to the defendant under the said mortgage,* ***but it is clear that they do not claim either that no indebtedness arose at any time or that the indebtedness has been discharged by payment.*** *The ground upon which the denial of the existence of any debt is based is that any debt that did exist is more than counter-balanced by the damages to which the plaintiffs claim to be entitled.*
>
> ...
>
> *It is proved that since that date no payment has been made in respect of that indebtedness. The plaintiffs have not made any offer to pay off the amount which the defendant claimed to be due under the mortgage or any of it or to pay any sum into court, whether that sum be the amount so claimed or any other amount.*

26. It is important to emphasise the highlighted portion of this passage. Why did Walsh J. find it necessary to state that the claimant was not basing his case on either discharge of the debt or

that there was no indebtedness at the time the mortgagee wished to exercise its power of sale? The answer must that had this been the case and there was sufficient evidence to support the allegation the court would have been faced with a situation in which the right to sell had not arisen. It is clear that the claimant was not saying that the mortgage was unenforceable. He accepted that the debt was owed but any debt owed was less than the damages he was claiming. It was in this context that Walsh J. said at page 164:

> *A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this be not in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into court.*

27. His Lordship continued at page 166:

> *I am aware, of course, that the amended statement of claim includes charges that in relation to the keeping of accounts and in failing to give proper statements of account to the plaintiffs and in other ways the defendant has acted wrongfully. In this connexion, (sic) I may refer particularly, perhaps, to pars 94 and 94A of the amended statement of claim.* ***But it is not those acts against which relief is sought in the present application.***
>
> *In my opinion the fact that those charges have been made and there has not yet been an adjudication upon them is not a reason for restraining the defendant from exercising its powers under the mortgage. As I have stated, it is not in dispute that there was an indebtedness under the mortgage, that is to say, that there were advances of money which were not repaid. Neither the existence of disputes as to the correct*

amount of that indebtedness nor the claim already mentioned that, whatever it was, it had been counter-balanced by the claim of the plaintiffs for damages is a ground, in my opinion, for preventing the mortgagee from exercising its rights under the mortgage instrument.

28. It is important then to underscore the ground on which the claimant rested his case. Even in the amended claim alleging all sorts of misconduct by the mortgagee, the claimant did not seek injunctive relief on those grounds. He never alleged that the money was not disbursed. He did not allege that he repaid the loan. In the final analysis, it appeared that the claimant accepted that he owed the very sum claimed by the mortgagee but that his claim for damages was greater than the sum he owed.

29. Thus the context in which Walsh J. laid down his general rule, which was approved by the High Court of Australia, was not one in which the mortgagor sought relief on the basis that the mortgage was unenforceable, or that he did not owe any money, or that the circumstances giving rise to the exercise of the power of sale had not arisen. Clearly, the general rule applied. Thus it would seem that ***Inglis*** was decided on very narrow grounds.

30. I now turn to the case law in Australia. In the case of ***Turner v Deepinghurst Pty Ltd*** [1999] WASC 155 (delivered August 3, 1999) McKechnie J. said at paragraph 7:

*The principles in **Inglis** related to the grant of an interlocutory injunction in circumstances where there was no dispute as to the existence of a debt. What was asserted in that case was that any debt was more than counterbalanced by damages due to the plaintiff.*

31. In the case of ***Glandore Pty Ltd. v Elders Finance*** [1984] F.C.A. 407; 57 A.L.R. 186; 4 F.C.R. 130, Morling J. stated at paragraph 12, 14 - 17, 20:

12. Before turning to consider the question of the

balance of convenience, I should refer to the well settled principle that as a general rule an injunction will not be granted restraining a mortgagee from exercising powers conferred by a mortgage, and in particular, a power of sale, unless the amount of the mortgage debt is paid into court. See Inglis v Commonwealth Trading Bank of Australia [1971] HCA 64; (1972) 126 C.L.R. 161 per Walsh J., which decision was affirmed on appeal - 126 C.L.R. 161-167. As that case shows, the general rule will not be departed from merely because the mortgagor claims to be entitled to set-off an amount of damages claimed against the mortgagee.

... (cited passages from Walsh J.)

***14.** These authorities were much relied upon by counsel for the respondent in the present case. Inglis' Case was not a case in which the mortgagor sought to impugn the validity of the mortgage transaction itself. Counsel for the applicant argued that the general rule referred to by Walsh J had no application to a case, such as the present, where the mortgagor's real complaint was that the written agreement for loan and security documents did not reflect the entirety of the agreement made between the mortgagor and mortgagee. Nor, so it was argued, did the general rule have any application where the basis of the mortgage claim for relief was an allegation that the mortgagee had engaged in misleading conduct in breach of s.52 of the Trade Practices Act. He contended that other authorities, of which the decision of Sugerman J. in Harvey v McWatters (1948) 49 S.R. (N.S.W.) 173 is one, were of more relevance to a case where misleading conduct was alleged against a mortgagee.*

***15.** It was held in Harvey v McWatters that where a mortgagor seeks an interlocutory injunction to restrain his mortgagee from selling, there is a distinction with respect to the terms that will be imposed as to payment into Court between the case in which the*

power of sale is admittedly exercisable and the only dispute is as to the amount due or the mode in which the mortgagee proposes to exercise the power, and the case in which the very matter in dispute is whether the power of sale is exercisable at all. Sugerman J. held that, in the first case, the general rule is that the mortgagor will be required to pay into Court the amount demanded by the mortgagee, unless it appears from the terms of the mortgage that the amount claimed by the mortgagee is wrong. He further held that in the second class of case, the amount which would be ordered to be paid into Court is not necessarily the whole amount claimed or appearing to be due under the terms of the mortgage, and in such a case the terms as to payment into Court that are imposed upon the mortgagor may be moulded so as to require payment in of so much only as will suffice to give adequate protection to the mortgagee.

***16.** Harvey v McWatters was cited with approval by Sheppard J in Brutan Investments Pty Limited v Underwriting and Insurances Limited (1981) 39 A.C.T.R. 47; see also Clarke v Japan Machines (Australia) Pty Limited (No. 2) (1984) 1 Qd.R. 421 at 423 per G.N. Williams A-J. A useful discussion of the principles upon which interlocutory relief will be granted in cases of the present kind is to be found in Equity Doctrines and Precedents, by Meagher Gummow & Lehane, 2nd ed., para. 316.*

***17** It is clear on the authorities that if the present case be regarded as one in which the mortgagor's real claim against the mortgagee is for damages only, interlocutory relief should be granted only upon terms that the amount of the mortgage debt is paid into court. The general rule referred to in Inglis' case would apply in such a case. But if it be not regarded as such a case, it is open to the court to grant the relief sought upon such terms other than payment of the full amount of the mortgage debt into court as the court*

thinks appropriate.

...

20 I do not think that the present case is a case of the kind to which the general principle in Inglis' Case applies. It falls more easily into the second class of case discussed by Sugerman J. in Harvey v McWatters. This being so I am not constrained by authority to require the applicants to pay into Court the whole amount of the mortgage debt as a condition of obtaining interlocutory relief. Rather I think the proper approach is to mould an order so as to ensure adequate protection to the mortgagee and to otherwise do justice between the parties during the period pending the final hearing.

32. On this analysis by Morling J., it could be said that the way in which ***Marbella*** was presented by the mortgagor's lawyers, the real issue was about damages and not whether the power of sale had become exercisable. ***Flowers Foliage*** was a dispute over whether the power of sale could be exercised at all. ***Global Trust*** raised the same issue of whether the power of sale was exercisable, just like ***Flowers Foliage***, but on the basis that the debt was repaid.

33. Before moving on from ***Glandore*** I shall cite two more paragraphs to indicate how orders can be moulded to meet the justice of the particular case. At paragraphs 21 and 22, his Honour stated:

21 Having regard to the fact that the value of the security held by Elders (at Elders' own valuation) is more than double the amount of the mortgage debt it is difficult to see how any prejudice will be suffered by Elders by the granting of interlocutory relief, provided the final hearing is not unduly delayed. During the course of argument it was agreed that the parties could be ready for a final hearing within three months. There is no suggestion that the secured property is falling in value and in those circumstances I do not think the applicants should be required to pay any part

of the principal debt into Court pending the final hearing.

*22. However it is not right that **Glandore** should have the use of the respondent's money without paying interest on it. There is already an amount of $307,000 unpaid interest and expenses owing to Elders and this must be paid as a term of the grant of interlocutory relief. Moreover, the unpaid interest must be paid to Elders, and not into Court. This will ensure that Elders has the use of the money pending the hearing, and will reduce the amount of its mortgage debt to about $1.5 million, for which it will have security in excess of $4 million. Because Elders does not appear to have any immediate plans for the sale of "Oonavale" and as the applicants will want some time to raise the $307,000 to pay Elders I propose to give them until 14 January 1985 to pay the unpaid interest and expenses.*

34. In the case of ***Linnpark Investments Pty Ltd v Macquarie Property Development Finance Company Ltd*** [2002] WASC 272 (delivered October 18, 2002), Barker J. stated at paragraphs 13 and 14:

*In **Harvey v McWatters** (1949) 49 SR (NSW) 173 at 178, Sugerman J recognised that there are circumstances where the general rule does not apply. His Honour said this:*

"There is a distinction between what I have called the ordinary case and the case in which the existence of the power of sale or the question whether it is exercisable at all is in question. The present case is of the second class. What is called the ordinary rule applies to cases of the first class, and to those cases only. This flows from the principles and reasoning on which that rule depends. Cases of the second class are, as regards interlocutory applications, governed by a rule of similar type. But it is a rule resting on

different principles and reasoning. These permit of a greater flexibility. They do not require that in every case the whole amount claimed or sworn to by the mortgagee or seen from the terms of the instrument to be the greatest amount that could be due should be paid in. The terms may be moulded so as to require payment in of so much only as suffices to give adequate protection to the mortgagee."

Thus, it appears that the only exceptions to the general rule stated by Walsh J are

(a) where the amount claimed by the mortgagee is obviously wrong and (b) possibly, when there is a question as to whether the mortgagee's power has become exercisable at all.

35. The quotation from Sugerman J. suggests that they are two classes of cases. One: the ordinary case and the other: where there is a dispute over whether the power of sale has become exercisable. The ordinary case seems to be one in which the issue is quantum owed and there is no issue of either exercisability (if I may be permitted to coin a word) or enforceability. There the usual rule applies, that is, payment of the amount claimed by mortgagee. In the second class of case, the usual rule is displaced and a more flexible approach is built into the exercise of the discretionary power to grant an injunction. It would seem to me that the second class may include a case in which the mortgagor is saying the debt is statute barred. If not, then it can be accommodated in the manner contemplated below.

36. Barker J. continued at paragraph 22:

*For my part, I would accept that the general rule describing **Inglis'** case is exactly that, a "general" rule. It should ordinarily be applied. However, it has been recognised on a number of occasions, as indicated above, that the rule is not an inflexible one and the Court has a discretion in an appropriate case to depart from the full stringency of the rule and to mould its*

order so as to require payment into court of only so much as will suffice to give adequate protection to the mortgagee.

37. Barker J. affirmed the existence of the general rule and that it ought to be applied in the ordinary case. It is important to note that Barker J. referred expressly to the two other cases to which I have referred and he did not suggest that they had enunciated incorrect principles.

38. From these cases, it would seem to me that the headnote of ***Glandore*** sums up the matter accurately. It reads:

[A] mortgagor who seeks an interlocutory injunction restraining his mortgagee from selling the mortgaged property pending determination of a dispute between them going to the validity of the mortgage transaction itself, [or is able to show that there are strong grounds that enforcement of the mortgage is statute barred] should not be required to pay into court the whole amount of the mortgage debt as a condition of obtaining interlocutory relief, rather the court should mould an order which ensures adequate protection for the mortgagee and otherwise does justice between the parties during the period prior to the final hearing.

39. It would seem to me that if Barker J. is correct and I believe that he is, then in a case where there is a real issue of whether the mortgagee is statute barred then that should be a strong reason for the court to grant an injunction. As the cases from Australia have indicated, if the restrictions on the general rule apply then it becomes a question of what are the appropriate terms. The cases indicate that where the ***Inglis*** rule does not apply, the total amount claimed is not payable as a condition of granting the injunction.

40. In examining these cases, the decision of Sugerman J. in ***Harvey v McWatters*** (1949) 49 SR (NSW) 173, had a decisive influence. It is therefore necessary to see what the facts were. The

source I have found is a secondary one but one that ought to be given significant weight. It is the case of the Fiji Islands Court of Appeal in the case of ***Westpac Banking Corporation Ltd v Prasad*** [1999] 45 FLR 1. The summary of ***Harvey*** is stated by the court thus:

> *This matter had earlier been the subject of a decision by Sugerman J (later President of the NSW Court of Appeal) of the NSW Supreme Court in Harvey v McWatters (1948) 49 SR (NSW) 173. Sugerman J said that, where a mortgagor sought an interlocutory injunction to restrain his mortgagee from selling, there was a distinction with respect to the terms that would be imposed as to payment into court between a case in which the power of sale was admittedly exercisable and the only dispute was as to the amount due or the mode in which the mortgagee proposed to exercise the power, and a case in which the very matter in dispute was whether the power of sale was exercisable at all.*
>
> *Sugerman J said (at 176) that the real dispute in the case before him was whether the power of sale was presently exercisable at all. The plaintiff's claim was that she had already paid more than sufficient to satisfy the instalments which had become due upon the terms that it was to be set-off in discharge of those instalments as they became due and that there was therefore no default. That claim was disputed and the amount was said by the defendant to have been paid on another account. His Honour said that the real nature of the dispute was not what amount was payable, there being an undisputed default, but whether a case for the exercise of the power of sale had arisen at all. After referring to some additional authorities, Sugerman J decided that he should require a lesser payment into court than would have been required if the ordinary rule had applied.*

41. As this summary makes clear, the issue in ***Harvey*** was whether the power to exercise the power of sale had arisen at all and not whether it was a dispute over quantum. To this extent it does indeed appear that ***Harvey*** is indistinguishable from ***Global Trust***. It should now be clear why I had stated earlier that Panton P. was not alone when he stated in ***Global Trust*** that because there was indeed a serious issue to be tried on whether the mortgage was paid off an injunction should be granted. To put the matter another way, there was a serious issue to be tried of whether the mortgagee could exercise the power of sale since it was being alleged that there was no debt.

42. So far the law in Jamaica, inspite of ***Flowers Foliage***, has not discussed, in depth, any qualification of the strong general rule laid down by ***Inglis*** which was followed in ***Marbella***. It would seem to me that restriction (a) in ***Linnpark*** would need to be established by the claimant. It is not sufficient to simply say, "I have already paid you." Any mortgagor seeking to rely on restriction (a) would need to put evidence, not mere say so, before the court so that the court is able to say at that early stage that the amount claimed is clearly wrong or that no money is due at all. This is because in many instances at the time the injunction is usually applied for the mortgagee often times has either not been served or has not filed a defence. PIL has not even begun to meet the demands of this restriction. A third restriction, if it cannot be accommodated under restriction (b), ought to be recognised and it is this, where there is a strong case that the mortgagee's claim may be statute barred then the ***Marbella*** terms ought not to be imposed. Some money ought to be paid but not the full amount claimed by the mortgagee.

43. How does all this affect the application of the strong general rule that where the debt is in fact owed and there is no dispute putting into question whether the mortgage is enforceable the mortgagee will only be restrained if the debt is paid or there if payment into court of what the mortgagee says is owing? Although the weight of authority suggests that the policy of the law is not to allow mortgagors to hold up enforcement of security by mortgagees by simply raising a dispute over the size of the debt, it is clear law, in

Australia, the ancestral home of the ***Marbella*** principle, that there are limit to the principle. It seems that even before ***Inglis,*** as the citations from the judgments make clear, there have been restrictions on the general rule which were known and applied as early as 1949 (per Sugerman J. in ***Henry v Watters***).

44. From this examination of these cases I have concluded that Walsh J. was not stating any new or earth shattering principle. The passage from Sugerman J. cited above, does not suggest that the mortgagee had full sway to do as he had a mind. His power to exercise the power of sale has never been unchecked. This is not surprising. It would be remarkable if equity allowed a mortgagee to embark upon a sale of another's property when there was good evidence to suggest that the mortgage was paid off or there was some serious defect in the contracting process that went to whether a valid agreement was concluded or if it was voidable and the mortgagor has elected to put the agreement at an end, the mortgagee could ignore all this and sell the property. Add to this, a serious issue of whether the mortgage is statute barred, then it should become clear that a mortgagee does not have unrestricted powers of sale as some mortgagees in Jamaica seem to believe. If none of these considerations is sufficient to stop a mortgagee until the issue is resolved then all the work of equity to transform to the lender into just a lender and not the holder of the legal estate would have been in vain. We would end up in the rather surprising position that the modern lender, in spite of equity's creation of the equity of redemption, is treated as if he were the holder of the legal estate and able to transfer the property without hindrance.

45. In the case before me Mr. Beswick, like the claimant in ***Global Trust***, contends that PIL does not owe any money on the mortgage. There is no evidence supporting this submission by counsel. I am bound by the decision in ***Marbella*** and ***Global Trust*** which are authority for the view that where the dispute is about quantum and not about the validity of the instrument then the ***Marbella*** principles apply. Thus Mr. Beswick cannot succeed simply by alleging that the money has been paid off. He may succeed on the bases indicated by the Australian cases.

Method of establishing debt

46. Mr. Beswick contended that the loan agreement on which JRF relies sets out how the accounting between the parties is to be done and therefore JRF must account in that way.

47. Mr. Piper, also relying on the same loan agreement points to clause 12.2 in response to Mr. Beswick's reliance on clause 12.1. Both clauses cover the issue of evidence and proof of debt. Clause 12.1 provides that the bank (i.e. JRF's predecessor) "shall maintain on its books of accounts in accordance with its usual practice, entries evidencing the Loan (sic) and the amounts from time to time owing to it hereunder." Clause 12.2 states that in "any legal action or proceeding arising out of or in connection with this Loan Agreement (sic) and otherwise for the purposes hereof, the entries made from time to time in such accounts shall, in the absence of manifest error, be final and conclusive and binding upon the Borrower (sic) as to the existence, amounts and currencies of the obligations of the Borrower (sic) therein recorded."

48. Other than saying that the accounts provided by JRF were "grossly inadequate and simply set balances and provided no proper accounting" (see para. 5 of Affidavit of Mr. Douglas Chambers dated 13th September 2007), there is nothing to suggest that the accounts presented by JRF were (a) not in accordance with the usual practice of the de facto lender and (b) manifestly erroneous. The adjective "manifest" in the expression "manifest error" must mean something. It was clearly designed to prevent the borrower from quibbling over errors which were not great or significant. In other words, the parties accepted that errors there may be but as long as they were not gross errors, then whatever figure the lender produced, in accordance with its "usual practice" (whatever that may be) would be binding. To put the matter another way, PIL has to make some effort to show "manifest error" before the obligation to account in the manner contended for in the claim form can arise. I agree with Mr. Piper that on the material presented that threshold has not been met and I would add, and neither has there been any suggestion that whatever was produced was not in accordance with the lender's "usual

practice." It may well be that there are triable issues in this regard but that does not amount to questioning the validity of the mortgage instrument. Thus an injunction cannot be granted on this basis.

Statute barred claims by the mortgagee

49. During the hearing Mr. Beswick submitted that the attempt by the mortgagee to enforce the mortgage was statute barred. Mr. Piper, on the other hand, submitted and with supporting authority that PIL acknowledged the debt owed to the lender. This it did in its financial statements for the years 2000 and 2001. Mr. Piper also added that PIL further acknowledged the debt in its declaration of solvency dated August 11, 2003. According to counsel, the financial statements and declaration of solvency are documents required to be filed with the Registrar of Companies. They are representations to the world at large that the company is indebted to creditors. Let me state quite clearly that in this case the precise dates were not identified that would make the mortgage statute barred but it appeared to have been accepted by Mr. Piper that unless he could make the case that there was an acknowledgement of the debt by the company so as to take the case outside of the limitation statute, the enforcement of the mortgage was statute barred.

50. Mr. Piper's principal case on this point was the case of ***Jones v Bellgrove Properties Ltd*** [1949] 2 K.B. 700. In that case the company, on December 31, 1946, presented a balance sheet at its annual general meeting and it had these words, "To sundry creditors 7,638l, 6s. 10d." The claimant who attended the meeting was told that the figure included the moneys owed to him. The loan was made between September 1936 and May 1937. The writ was issued in 1947. The company pleaded the statute of limitations which barred the claim after six years. The Court of Appeal held that the company had acknowledged the debt in its balance sheet, and to the plaintiff at the general meeting. Those acknowledgments were held sufficient to ground the cause of action by taking it out of the reach of the limitation statute.

51. Here I must make the confession that the authorities to which I am about to refer were not cited by either side and so I did not

have the benefit of submission from either counsel. Nonetheless I do not think that the issue of the limitation of the claim is as clear cut as Mr. Piper submitted.

52. I need to place the following analysis in the context of the law relating to the acknowledgment of debt that is sufficient to take the debt outside limitation statutes. Section 33 of the Limitation of Actions Act of Jamaica provides that any payment of principal or interest or a written acknowledgment of the debt given by the debtor to the creditor or his agent keeps the debt alive. The effect of the section is that a debt that would have become statute barred is kept alive if the debtor acknowledges the debt. The date of the acknowledgement of the debt becomes the new starting point from which time is measured for the purposes of determining whether the debt is statute barred. It is for this reason why Mr. Piper is relying on the financial statements of 2000 and 2001, as well as the declaration of solvency filed in 2003.

53. The law as I understand it is that where the creditor is saying that there was a written acknowledgment of the debt sufficient to take the case outside of the limitation statute, the creditor needs to establish three things. He needs to show (i) the writing, (ii) it was signed by the person liable or his agent, and (iii) made to the creditor or his agent. It is well settled that the written acknowledgment need not take any particular form. The law is the same for natural persons and corporate bodies.

54. In relation to companies, the issue (and I am framing it narrowly to meet the facts of the case before me) is whether the signing of financial statements as well as a declaration of insolvency, by duly authorized persons pursuant to a statutory obligation, in which the debt is stated as being owed, amounts to an acknowledgment of the debt sufficient to take the case outside of the Limitation of Actions Act.

55. I shall elaborate to give a more accurate picture of the nature of the problem. Financial statements are usually prepared for a particular accounting period. These statements are invariably signed

after the end of the accounting period. Sometimes the gap between the accounting period and the signature is measured in years, not months. The law relating to the acknowledgment of the debt in writing is that the effective date is the date the acknowledgment was signed. It is the signature that grounds the liability and normally, the date of the signature is the relevant date for determining whether the acknowledgment takes the case outside of the limitation statute.

56. What the English cases and the Australians have done is to create a fiction in the case of companies by saying that even though the financial statements are signed after the relevant accounting period, the signature relates back to the relevant financial period and so the signature is treated as if it were actually made at the end of the financial period and not the date on which the signature was actually affixed. I shall call this the "relation-back principle."

57. The position seems to very clear as far as England is concerned. I shall rely on a passage from Brightman J. (as he was at the time) in ***In Re Gee & Co*** [1975] Ch. 52, 70 - 71 where he accurately summarises the effect of the English cases:

> *I shall accordingly decide this case on the footing that a balance sheet, if duly signed by the directors, is capable of being an effective acknowledgment of the state of indebtedness as at the date of the balance sheet, and that, in an appropriate case, the cause of action will be deemed to have accrued at the date of the balance sheet, being the date to which the signature of the directors relates. In my judgment the balance sheet of the company as at December 31, 1965, signed by the directors on November 25, 1966, would have been an effective acknowledgment as at December 31, 1965, of the liability of the company so as to take the matter out of the Limitation Act 1939, if the acknowledgment had not been made by the directors in favour of one of themselves.*

58. The problem with this "relation back principle" was highlighted in the dissenting judgment of Gibb C.J. of the High Court of Australia in the case of ***Stage Club Ltd. V Miller Hotel Pty. Ltd*** 150 C.L.R. 535, 545:

> *The earlier cases in which it was held that a balance sheet may constitute an acknowledgment did not advert to the problem caused by the fact that a balance sheet, which states the position of the company as at the end of an accounting period, will almost inevitably be signed at some later date. The balance sheet may acknowledge that a particular debt was owed as at the end of the relevant financial year, but it may not be signed until months after that date. How, then, can it acknowledge a debt existing at the date of the acknowledgment? Of course in some cases it may be proper to assume that the liability persisted up to the date of signature, as their Lordships pointed out in Consolidated Agencies Ltd. v. Bertram Ltd. However, one cannot draw that inference simply because the statements attached to or submitted with the balance sheet, or the annual report of the company, make no mention of a change in the position regarding the liabilities shown in the balance sheet. I am unable to agree with the view taken by the Court of Appeal in the present case, that the balance sheets acknowledged a debt subsisting at the time of the annual report or general meeting.*

And at page 546 he stated:

> *The difficulty of relating back the signature is made even more clear in a case in which the limitation period expires after the date to which the signature is related back but before the date on which the balance sheet is signed. The fact that there can then be no effective acknowledgment, the debt having been extinguished, supports the view that the*

balance sheet cannot be treated as though it had been notionally signed at the earlier date.

59. The passages here highlight the weakness of the "relation back principle." If it is that there is no acknowledgement until the date the writing is signed by the person owing the debt and given to the person entitled to receive payment, by what legal alchemy can it be said that the date of actual signing is not the date of acknowledging the debt? Gibb C.J. asks the question, what if the limitation period expires between the period to which financial statements relate and the date they were actually signed?

60. The case of ***Jones***, relied on by Mr. Piper, had a unique feature. The balance sheets although signed years later were presented at a meeting at which the claimant was present and at that meeting the company told him expressly that the money owed to him. Further, as Lord Evershed in ***Consolidated Agencies Ltd v Bertram Ltd*** [1965] A.C. 470 points out below, the precise date of the acknowledgment was not in issue. Little wonder then, that Lord Goddard C.J. very early in his judgment in ***Jones*** said, "I wish to make it clear that our decision is based on the special facts of this case" (see page 703). One may say that the decision was hewn from the law to meet the justice of the particular case but it is debatable whether it is truly reflective of established principle.

61. The Judicial Committee of the Privy Council was not enamoured with the idea that signing of financial records by the directors was necessarily an acknowledgment of the debt. In the case of ***Consolidated Agencies Ltd v Bertram Ltd*** Lord Evershed said at page 484 - 485:

But in their Lordships' view it would not be right to suggest that it can be used as authority for the view that a signature on a balance sheet is in all circumstances an acknowledgment of an existing liability, within the meaning of section 23 (4) of the Limitation Act, 1939. Nor is it possible to suggest that it is an authority for the view that the signature on

the balance sheet is an effective acknowledgment within the Act of 1939 of the existence of the debt at the date of signature. No question arose in Jones v. Bellgrove Properties Ltd. as to the precise date to which the acknowledgment related, though Birkett J. had taken as effective the date of the annual general meeting for the reason that this was the date when the liability was acknowledged. In the Court of Appeal this date was accepted without question. So regarded, the case is therefore not inconsistent with the principle that the acknowledgment must be of an existing liability. This principle seems indeed to have been accepted in English law as early as 1849 (see Howcutt v. Bonser. See also Preston and Newsom, Limitation of Actions, 3rd ed. (1953), p. 240). In the only other case in which the question of a signature on a balance sheet arose, Ledingham v. Bermejo Estancia Co. Ltd., the question was never raised whether the acknowledgment was of an existing liability.

The Court of Appeal for Eastern Africa appear to have based their decision upon the view that Jones v. Bellgrove Properties Ltd. has been followed in India in Rajah of Vizianagaram v. Official Liquidator, Vizianagaram Mining Co. Ltd. The report of the latter case is very condensed, but the decision in their Lordships' view is based upon a misreading of Jones v. Bellgrove Properties Ltd. if the Indian court treated that case as authority for the view that balance sheets operate as acknowledgments at the date of their signature.

It may well be since the decision in the Atlantic Pacific Fibre case that balance sheets could in certain circumstances amount to acknowledgments of liability, that it has been assumed that the signature on the balance sheet speaks as from the date of the balance sheet, but the question has never been properly considered whether a signature on a balance sheet, which must of necessity be made some time after the

date to which the balance sheet has been made up, can amount to an acknowledgment of an existing liability. There may be cases where it would be proper to assume that the liability persisted up to the date of signature, which would then be an acknowledgment of an existing liability, though their Lordships venture to think that, if the effect of the English Limitation Act is the same as that of the Indian Act, some further consideration may have to be given to the general question whether and in what circumstances balance sheets may operate as acknowledgments of debts comprehended therein. In any case, their Lordships find it difficult to see in the cases cited any justification for the acknowledgment, consisting of the signature of the balance sheets, being taken to be of the continued existence, at the date of the signature, of the debt stated in the balance sheet.

In the view which their Lordships take of the purported acknowledgment on the balance sheets it is unnecessary to consider the defendants' other objection to the balance sheets, namely, that they were not communicated to any other person other than the defendants' agent.

62. A number of points emerge from this passage. First, it is well settled that when the acknowledgement in writing is signed by the debtor or his agent, it must be in relation to an existing liability and not for a liability in the past. Second, it must be given in writing to the person entitled to receive the debt payment or his agent. Third, a signature on a balance sheet is not necessarily, in all circumstances, an acknowledgment of the debt. Fourth, it is clear that ***Jones*** was an unusual case in that the date of the meeting was treated as the date of the acknowledgment even though there was no evidence that the balance sheets were signed on that date. If this is correct then the trial judge, Birkett J., (as he then was) and Lord Goddard C.J. may have done two things. First, if the balance sheets for a past accounting period were presented at the meeting and the sheets were signed after the end of the accounting period, then the court would

have had to be using the "relation back principle." Second, the courts would have treated the oral admission by the company officials on the date of the meeting as a confirmation of the acknowledgment if it were the case that the balance sheets were signed before the meeting but after the relevant accounting period. Thus what we would have in ***Jones*** would the "relation back principle" operating before the meeting, followed by an oral updating at the meeting. This would be fiction upon fiction. This is all the more extraordinary when the principle is that there is no acknowledgement until there is the writing but somehow the actual date of the acknowledgement is ignored and treated as if it were made at an earlier time. The analysis of Gibb C.J. has exposed the fallacy of this position.

63. I come to another important issue: the acknowledgment must be made to the creditor or his agent. Can it be said that records filed with the Registrar of Companies pursuant to a statutory obligation are an acknowledgment of debt to the creditor or his agent merely because the creditor has access to those records?

64. The judgment of Slade J. (as he then was) in ***In re Overmark Smith Warden Ltd*** [1982] 1 W.L.R. 1195, 1205 - 1206, made these remarks which, in my view, ought to be thoroughly examined at trial. He said:

> *I should, however, refer in passing to one or two points which have been ventilated in the course of argument and may still conceivably render a statement of affairs distinguishable from a balance sheet for the relevant purposes, even under the post-1939 law. First, it may be said that a statement of affairs is by its nature not a document by which the debtor or his agent admits to any personal liability on the part of the debtor to pay the debt in question, but that it is merely a statement that the creditor is entitled to be paid out of a particular fund: compare, for example Courtenay v. Williams (1844) 3 Hare 539, 550, per Sir James Wigram V.-C. and Lyall v. Fluker [1873] W.N. 208, 209. Secondly, it may be said that a statement of*

affairs cannot be an acknowledgment because it is made under compulsion of law: see the Courtenay case also at p. 550, though if this point has any force, it would apply prima facie to a company's balance sheet. Thirdly, it may be said that a statement of affairs cannot constitute an acknowledgment on the ground that it is not addressed to the creditor or his agent. On this ground it has been held that the inclusion of a debt by a personal representative in an affidavit sworn for probate purposes is not a sufficient acknowledgment: see, for example, In re Beavan [1912] 1 Ch. 196 and Bowring-Hanbury's Trustee v. Bowring-Hanbury [1943] Ch. 104.

Having touched on these points, however, I do not think that for reasons which will appear it is useful to prolong this judgment by examining them further. For present purposes I am content to assume in favour of the relevant creditors, without so deciding, that a statement produced on a company receivership or on a company liquidation, albeit in pursuance of a statutory obligation, is capable of constituting an effective acknowledgment for the purpose of the Limitation Act 1939.

65. Slade J., while appreciating that was indeed the real issue of whether a statement of affairs made under compulsion of law was an acknowledgment of debt, and assuming that it was, did not resolve the issue by actually deciding the point. He was prepared to assume that it was - a very favourable assumption in favour of the creditor. This passage emphasises that the issue of the effect of the signature of duly authorized agents on balances sheets or financial records of companies when determining whether it meets the requirement of being an acknowledgment to the creditor is not free from controversy.

66. There is a further point raised by Mr. Piper which needs consideration. It is that PIL has not demonstrated that it is able to meet any undertaking as to damages. According to Mr. Piper when PIL

filed its declaration of solvency it was in the context of a voluntary winding up and it had accepted that it owed the debt now claimed by JRF. There was no issue raised of the recovery of the debt being statute barred at that time. The evidence, according to Mr. Piper, does not reflect a cash rich company that is more than able to meet its debts. The ability to meet an undertaking as to damages is always an important consideration in injunction applications. I believe that this concern can be accommodated by framing the order to take account of this issue.

67. After I delivered my oral judgment, it was brought to my attention that I had not dealt with two letters signed by the liquidator which, on reading my notes, were referred to by Mr. Piper as being an acknowledgment of debt sufficient to take the matter outside of the limitation statute (see pp. 174 and 176 of the bundle). My note reveals that Mr. Beswick had submitted that those letters were not an acknowledgment of debt.

68. Let me go back to first principles. The duty of a liquidator in a voluntary winding up is to pay all the debts and liabilities as are existing at the date of his appointment. In this case the liquidator was appointed on August 12, 2003. Logically, this can only mean that the liquidator is only obliged to pay existing liabilities, that is to say, liabilities that were not statute barred and were not already settled.

69. Such authority as there is suggests that a liquidator does not have authority to pay statute barred debts unless the contributories consent. In the case of ***In re Art Production Co L.D.*** [1952] Ch 89, Wynn-Parry J. noted that when a company was being wound up pursuant to a court order, the liquidator was obliged to pay on debts that were not statute barred as of the date of the winding up order. His Lordship noted that under the relevant legislation, there were separate provisions for dealing with companies being wound up under a winding up order of the court and a voluntary liquidation. His Lordship noted that the word "liabilities" was used on both provisions and he formed the view that the word should bear the same meaning in both circumstances. He reasoned that if it were not so one would have one meaning for "liabilities" when there was a winding up order and

another meaning when there was a voluntary winding up with the consequence that there would be different rules relating to which liabilities were statute barred. The operation of the rule would be determined by whether there was winding up order or a voluntary liquidation. He found that this would be illogical and therefore he concluded that there should be but one rule, which was that only liabilities that are existing and not statute barred as of the date of the winding up order or the date of the appointment of the liquidator, as the case may be, could be proved in the liquidation. I can see no reason in law or logic why the same reasoning cannot be applied in Jamaica.

70. Having regard to the duties of a liquidator in a voluntary winding up and the reasoning of Wynn -Parry J. it would be quite remarkable if a liquidator had the authority to revive a statute barred debt. Mr. Piper's contention seems, at least in my eyes, all the more remarkable because the appointment of a liquidator terminates the powers of the directors of the company. Thus if the directors of the company did not acknowledge the debt in a manner that would negate the effect of the limitation law it does seem odd that a person whose duty is to pay debts that were not statute barred could unbar a statute barred debt. The inevitable conclusion is that the two letters referred to by Mr. Piper do not have the effect contended for by Mr. Piper. My research to date has not revealed any case in which a liquidator, without the approval of the contributories, has been allowed to pay a statute barred debt. Although it is not the best authority one can find having regard to its subsequent history, the case of ***In Re Fleetwood and District Electric Light and Power Syndicate*** [1915] 1 Ch. 486 is of some assistance. In that case Astbury J. held that the actual payment by the liquidator of a statute barred debt was an improper payment. As I understand the history of the case, what has been questioned is the reasoning of the judge but not his conclusion on the payment. The true principle is this: the right of a person who wishes to enforce a debt against a company is to be determined as of the date of the appointment of the liquidator, in the case of a voluntary winding up, and not the date of proof of the debt.

71. Finally, a word on why this matter took so long to be completed. The matter began in March of this year. I was assigned to the criminal courts within and outside the Corporate Area and this prevented the matter being completed within an acceptable time frame. I trust the litigants were not inconvenienced too greatly.

Conclusion

72. The claimant has established that there is a serious issue to be tried on whether the debt is statute barred. If this is established then it means that notwithstanding the fact that PIL may still owe the money the security would be unenforceable. I have decided to grant the injunction and it is now a matter of developing the appropriate terms. Let me be clear that one of the terms will not be that the full amount claimed by the mortgagee is paid into court as mandated by the usual run of cases. The terms of the order will be moulded to meet the justice of the case.

73. My decisions on the various applications are that:

1. Application to enter judgment in default of defence is dismissed.

2. Application to extend time within which to file defence is granted.

3. Defendant to file and serve defence on or before July 11, 2008.

4. Affidavits of Janet Farrow filed September 28, 2007 and November 16, 2007, to stand as defence.

5. Counsel are to submit a draft order to give effect to the decision to grant the injunction on terms until trial.

6. Costs to be costs in the claim.