[2022] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CIVIL APPEAL NOS COA2020CV00038 & COA2020CV00041

BETWEEN	**STEWART BROWN INVESTMENTS LIMITED**	**1ST APPELLANT**
AND	**ALTON WASHINGTON BROWN**	**2ND APPELLANT**
AND	**ERMINE STEWART**	**3RD APPELLANT**
AND	**NATIONAL EXPORT-IMPORT BANK OF JAMAICA LIMITED (T/A AS EXIM BANK JAMAICA)**	**RESPONDENT**

Conrad George and Andre Sheckleford instructed by Hart Muirhead Fatta for the appellants

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones & Company for the respondent

13, 14, 15 July 2020 and 23 September 2022

F WILLIAMS JA

[1] I have read in draft the judgment jointly prepared by my sisters Straw and Foster-Pusey JJA. I agree with their reasoning and conclusion and have nothing to add. We

sincerely apologize for the delay in the delivery of this judgment, due to various circumstances.

STRAW JA AND FOSTER-PUSEY JA

Introduction

[2] The 1st appellant, Stewart Brown Investments Limited, is a company duly incorporated under the laws of Jamaica with its registered head office at 105 Red Hills Road in the parish of Saint Andrew, and is in the business of mining and equipment rental. The 2nd appellant, Mr Alton Brown, is a director of the 1st appellant. The 3rd appellant, Mr Ermine Stewart, is the surviving mortgagor/guarantor who provided a legal mortgage over real property as part of the security for loan facilities granted by the respondent.

[3] The respondent, National Export-Import Bank of Jamaica Limited (T/A as Exim Bank Jamaica) is a company duly incorporated under the laws of Jamaica with its registered head office at 85 Hope Road in the parish of Saint Andrew. The respondent is a bank and a financial institution, but not a commercial bank.

[4] The 1st appellant received loans from the respondent.

[5] The appellants have brought two appeals (appeals numbers 38 and 41 of 2020) challenging decisions that Batts J ("the learned judge") made on 15 and 21 May 2020. These decisions emanated from a previous order that he made on 20 December 2019, whereby he granted an injunction restraining the respondent from exercising its power of sale on conditions including that the 1st appellant pay the sum of $170,262,983.90 into court on or before 31 March 2020 ("the Marbella condition").

[6] On 17 March 2020, the learned judge extended the time within which the 1st appellant was to comply with the Marbella condition, to 15 May 2020.

[7] The 1st appellant, on 15 May 2020, filed an application seeking the removal of the Marbella condition or, alternatively, an extension of time to 30 December 2020 for the 1st

appellant to comply with the condition. When the matter was being adjourned to 21 May 2020 for hearing, the 1st appellant made an oral application to the learned judge for either the unconditional extension of the injunction to 21 May 2020 or, alternatively, an extension of the time for compliance with the Marbella condition until 21 May 2020. The matter was adjourned to 21 May 2020 for hearing and the 1st appellant was ordered to serve the respondent. There was nothing in the order pointing to a grant or refusal of the oral application for an extension of the injunction. This is the issue raised in appeal number 41 of 2020.

[8] When the matter came up for hearing on 21 May 2020, the learned judge refused the 1st appellant's application to remove, or extend time for compliance with, the Marbella condition. It is this refusal that is the basis of appeal number 38 of 2020.

[9] In response to the appellants' notices of appeal, the respondent filed two counter notices of appeal contending, among other things, that the learned judge's decisions should be affirmed as there was no basis on which he could have removed and/or extended the time within which the 1st appellant was to comply with the Marbella condition. We apologize for the length of the background which follows, however it is necessary for the understanding of the issues which have been addressed in the appeals.

Background

[10] On 14 November 2017, the respondent granted the 1st appellant a loan facility comprised of a medium-term facility of $150,000,000.00 and a revolving short-term loan of $30,000,000.00. The loan facility was secured by various means including personal guarantees from the 1st appellant's principals (the 2nd and 3rd appellants) some of which are supported by legal mortgages over real property, a debenture, bills of sale over industrial equipment, the assignment of contract proceeds due under a contract dated 21 September 2017 between the 1st appellant and Noranda Jamaica Bauxite Partners II ("Noranda"), and the benefit of an insurance policy. The purpose of the loan facility was to assist the 1st appellant with acquiring trucks and equipment for the execution of an

ongoing contract and partnership with Noranda and to assist with working capital and operational expenses for two years.

[11] The respondent has alleged that the 1st appellant defaulted on the agreed payment terms of the loan facility. By letter dated 19 June 2019 the respondent informed the 1st appellant that it was facing a chronic level of delinquency, and on 5 November 2019 purported to call the loan pursuant to the Insolvency Act. It also gave notice of its intention to enforce its security over vehicles, machinery and equipment. This was what triggered legal proceedings in the court below.

Proceedings in the court below

The claim, defence and ancillary claim

[12] By way of a claim form filed on 5 December 2019, the 1st appellant commenced proceedings in the Supreme Court against the respondent seeking:

> "(1) damages for breach of contract;
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> (2) restitution for unjust enrichment;
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> (3) damages for negligent misrepresentation;
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> (4) a declaration that the contract regarding the loan facility provided to [the 1st appellant] by [the respondent] and initially governed by [the 1st appellant's] commitment letter of 14th November 2017 and subsequently varied ("the Loan Facility") had been further varied by the amortization schedule ("the Amortization Schedule") supplied by Ms. Debbie-Ann Young, [the respondent's] Business & Credit Operations Officer, on 18th August 2019, [the 1st appellant's] payments in conformity with the Amortization Schedule, and the acceptance of such payments by [the respondent];
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> (5) a declaration that the actions and statements of Mr. Allan Thomas, [the respondent's] Trade Origination and Business Development Manager, and Ms. Debbie-Ann Young, [the respondent's] Business & Credit

> Operations Officer each of whom had ostensible authority with respect to matters in the ordinary course of [the respondent's] business, in supplying [the 1st appellant] with the Amortization Schedule and accepting and/or acknowledging the receipt of payments pursuant to the Amortization Schedule have bound [the respondent] to the terms of the Amortization Schedule;
>
> (6) Further and/or in the alternative, a declaration that [the respondent] had waived its right to claim that the Loan Facility is not governed by the Amortization Schedule.
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> (7) Further and/or in the alternative, a declaration that [the respondent] is estopped from acting in a manner inconsistent with the Amortization Schedule;
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> (8) A declaration that the sums of $3,500,000 paid by [the 1st appellant] to [the respondent] on 1st October 2019, 1st November 2019 and 29th November 2019, as well [as] future payments made pursuant to the Amortization Schedule, be apportioned between principal and interest in accordance with the Amortization Schedule;
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> (9) A declaration that [the 1st appellant] is not an insolvent person within the meaning of the Insolvency Act;
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> (10) Interest;
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> …
>
> (11) costs."

[13] On 19 December 2019, the 1st appellant filed an amended particulars of claim. Therein, the 1st appellant particularized its claim for breach of contract, unjust enrichment and misrepresentation.

[14] The learned judge, in our view, in his judgment of 20 December 2019, provided a very useful summary of the 1st appellant's case, which we will adopt (see paragraphs 5 and 6 of the judgment). The 1st appellant asserted that the respondent acted in breach

of the loan facility which it had provided, and wrongfully applied the proceeds of the Noranda contract to interest instead of to principal, resulting in an inaccurate statement of the account, which led to late fees and penalties being charged. The 1st appellant claimed that this also led to the respondent wrongfully claiming that it was delinquent. The 1st appellant also contended that the respondent agreed to new repayment terms contained in 'the amortization schedule' and the 1st appellant's payments in accordance with the new terms were accepted. As a result, the 1st appellant contends that the respondent is precluded from alleging that the 1st appellant is in breach of the loan facility.

[15] The respondent filed a defence on 23 January 2020 in response to the 1st appellant's amended particulars of claim. In the defence, the respondent staunchly denied the averments made by the 1st appellant in its claim for damages for breach of contract, unjust enrichment and misrepresentation. The respondent averred that it applied the Noranda proceeds to both principal and interest, however, the earnings from that contract were less than anticipated, resulting in the accumulation of penal interest and charges. The loan facility was amended on several occasions resulting in amended letters of commitment being issued. It claimed that, contrary to the 1st appellant's contentions, there was no agreement to the proposed amortization schedule. In addition, the 1st appellant, in breach of contract, revoked the assignment of the Noranda contract.

[16] Additionally, the respondent filed an ancillary claim on 23 January 2020 against the 1st, 2nd and 3rd appellants seeking to recover, as at 16 December 2019, the principal sum of J$179,170,507.51 in respect of a loan, costs incurred in relation to the loan and post maturity interest on the principal balance. The appellants, in response, on 5 March 2020, filed a defence to the ancillary claim. They denied that they were in default of their obligations to the respondent and claimed that the respondent was unable to provide a stable and final figure of the sum it claims is due and owing to it. Also, the appellants claimed that they had indemnified the respondent by paying $3,500,000.00 monthly to the respondent pursuant to the amortization schedule. They stated that it was the respondent that had misapplied the payments in breach of various agreements, and had

provided wholly inconsistent calculations of the loan balances and alleged outstanding balances.

Relevant applications for injunctive relief

[17] The 1st appellant applied for an interim injunction restraining the respondent from taking any steps or enforcing any security pursuant to its "purported calling" of a loan in respect of the loan facility. In its notice of application filed on 5 December 2019, the 1st appellant sought the following orders:

> "1. an interim injunction restraining [the respondent] from taking steps pursuant to its purported calling of the loan with respect to the loan facility provided to [the 1st appellant] by [the respondent] and initially governed by [the 1st appellant's] commitment letter of 14th November 2017 and subsequently amended ("the Loan Facility") until the determination of the proceedings herein;
>
> 2. an interim injunction restraining [the respondent] from enforcing any security with respect to the Loan Facility until the determination of the proceedings herein; …"

[18] The grounds on which the 1st appellant relied are as follows:

> "(i) There is a serious issue to be tried in that [the 1st appellant's] case is that:
>
> (a) the Loan Facility was initially governed by a 'commitment letter' of 14th November 2017 as subsequently amended;
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> (b) [the respondent] breached the terms of the Loan Facility by failing to charge [the 1st appellant] interest on the reducing balance of the Loan, and instead applied all payments from [the 1st appellant] to interest, thereby precluding reduction of the balance of the Loan.
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> (c) the terms of the loan repayment have been altered by an amortization schedule ("the

Amortization Schedule") provided to [the 1st appellant], in response to a request by [the 1st appellant] for the loan repayment to be restructured, in relation to which payments have been made, [the respondent] clearly referencing the Amortization Schedule and accepted by [the respondent] without demure [sic];

(d) further and/or alternatively that, in light of the above, [the respondent] has waived its right to claim that the Loan Facility is not governed by the Amortization Schedule;

(e) further and/or in the alternative, [the respondent] is estopped from acting in a manner inconsistent with the Amortization Schedule;

(f) [the respondent] has already taken an initial step to enforce its security with respect to the Loan Facility in circumstances where it is not entitled to do so.

(ii) damages are not an adequate remedy given that:

(1) [the respondent] has served on [the 1st appellant] a notice of intention to enforce its security with respect to vehicles, machinery and equipment used by [the 1st appellant] in its business;

(2) should [the respondent] enforce its security in this manner, [the 1st appellant] will be deprived of vehicles, machinery and equipment being currently utilised by [the 1st appellant] in its contract with the partnership 'Noranda Jamaica Bauxite Partners II' ('The Noranda Contract'), causing [the 1st appellant] to breach the Noranda Contract;

(3) should [the 1st appellant] be deprived of the equipment which is vital to its business and be unable to conduct its business, its goodwill will be irreparably tarnished, and it will be unable to repay the Loan Facility and other indebtedness to Sygnus;

(4) [the respondent's] purported calling of the loan places real property interests at risk.

(iii) The balance of convenience lies in favour of granting the injunction as:

(1) the matters set out in (ii) above regarding he [sic] inadequacy of damages demonstrate the serious adverse consequences that would be suffered by [the 1st appellant] if an injunction is not granted;

(2) there will be no, alternatively, no substantial prejudice to [the respondent] if the injunction is granted as:

(a) [the 1st appellant] is paying to [the respondent] what it has agreed to accept under the Amortization Schedule;

(b) the Noranda Contract remains in place, so there is an expectation that [the 1st appellant] will be able to continue making the payments as set out in the Amortization Schedule;

(c) [the respondent] is over-secured with respect to the Loan Facility through a multiplicity of mechanisms;

(d) the undertaking as to damages given by [the 1st appellant] is adequate, [the 1st appellant] being an operating entity with an active cash flow;

(3) hence, maintaining the status quo will do no violence to the position of [the respondent], whereas the refusal of the injunction will cause irreparable damage to [the 1st appellant] …"

[19] The notice of application for court orders was supported by an affidavit of the 2nd appellant, also filed on 5 December 2019, in which he repeated much of what had been outlined in the amended particulars of claim, and stated that the 1st appellant was at risk in terms of its goodwill, reputation and real property interests if the respondent should

enforce its security in the manner proposed. He urged that the enforcement of the security would deprive the 1st appellant of vehicles, equipment and machinery, leading to the 1st appellant's inability to pay its other lenders. Therefore, damages were not an adequate remedy. He also urged that the respondent would not be prejudiced by the grant of an injunction as it was adequately secured, and the 1st appellant was paying the amount agreed under the amortization schedule.

[20] On 11 December 2019, Mr Liane Chung, attorney-at-law on behalf of the respondent, filed an affidavit in response to the 2nd appellant's affidavit. He deposed, among other things, that the amount that the respondent received from the Noranda contract was much less than was anticipated, resulting in the loan repayment falling into arrears and, contrary to the 1st appellant's assertions, the agreements did not require the respondent to turn over any portion of earnings under the Noranda contract to the 1st appellant. Since the loans were not properly serviced, late interest was accruing on the principal. As a result, the interest had to be cleared before the sums were applied to the principal. Therefore, the respondent had not breached any contract, and had not been unjustly enriched by wrongly charging interest on the unreduced balance and improperly applying proceeds from the Noranda contract. According to the respondent, at the time the letter dated 19 June 2019 was written, the 1st appellant was delinquent and remained so. As such, the respondent did not negligently misrepresent anything to the 1st appellant. The 1st appellant's direction for Noranda to pay the contract proceeds to it was in breach of the terms of the facility and the assignment. The respondent had not agreed to the proposed restructuring of the loan.

[21] The hearing of the notice of application for court orders was held on 11 December 2019 and the learned judge gave his decision and the reasons for same on 20 December 2019.

[22] The learned judge assessed the evidence before him against the background of the law, in order to determine whether or not there was a serious issue to be tried.

[23] He noted that the 1st appellant was asserting that the terms of the loan facility required an application of the payments made to principal before interest. The respondent, on the other hand, stated that, in accordance with their normal practice, they applied payments to interest before applying them to principal. The learned judge stated that it was a question of mixed law and fact, as well as a serious question to be tried, whether the contract specified or was to be interpreted as specifying, that payments were to be first applied to the principal. It was also a serious question to be tried as to whether the payments were properly applied and interest correctly calculated.

[24] The learned judge also indicated that it was a question of fact as to whether a new repayment schedule was agreed between the parties.

[25] The learned judge also determined that damages would not be sufficient to compensate the 1st appellant as "allowing [the respondent], to foreclose on the loan facility and liquidate all [the 1st appellant's] assets will cause severe and incalculable loss".

[26] Importantly, he went on to refer to **Mosquito Cove Ltd v Mutual Security Bank Ltd et al** [2010] JMCA Civ 32. The learned judge then stated at paragraphs [17] and [19]:

> "[17] … If a mortgagee is to be restrained, in the exercise of its powers of sale as mortgagee, the amount allegedly due and owing is to be paid into court. If the claimed amount is, on its face, excessive then the amount less the excess must be tendered or paid. Only in exceptional circumstances, such as where there existed a fiduciary relationship between mortgagor and mortgagee or in a case of fraud or forgery, will the principle be departed from ….
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> …
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> [19] The principle in Marbella is designed to dissuade persons restraining the mortgagee's exercise of his power of sale as this would reduce the value of the mortgage as a security. Persons are therefore required to demonstrate the good faith of their claim by paying

> the amount due into court. This is so even where there is a genuine dispute as to the amount due and owing. In this case [the 1st appellant] contends that, in a worst case scenario, the amount due ought not to exceed $170,262,983.90. [The 1st appellant] does not admit owing that amount. It is however, in all the circumstances, a fair amount to be paid into court as a precondition to the grant of the injunction against the mortgagee. It does seem, at this interlocutory stage, that the mortgagee's claim is on its face excessive. Given the quantum involved, and the fact that the security is adequate, I will give [the 1st appellant] some time to raise the amount to be paid into court."

[27] The learned judge therefore ordered, among other things:

> "2. Upon the [1st appellant] through its counsel, giving the usual undertaking as to damages [the respondent] is restrained, until the trial of this action or further order of the Court, whether by itself its servants and/or agents or otherwise howsoever from exercising its powers of sale as mortgagee, on condition that [the 1st appellant] pays into court the amount of $170,262,983.90 on or before 31st day of March 2020."

[28] He also ordered that there be liberty to apply.

[29] The 1st appellant filed, on 10 March 2020, a notice of application for court orders requesting a variation of the orders which the learned judge made on 20 December 2019 so as to remove the Marbella condition. The matter was set for hearing on 17 March 2020. It is important to note that the application that was made in December 2019, and in which the injunction was granted, was made by the 1st appellant solely against the respondent. However, after the ancillary claim made by the respondent against the 1st, 2nd and 3rd appellants in January 2020, the various notices of application for variation of the injunction, though made by the 1st appellant, included the 2nd and 3rd appellants as ancillary defendants.

[30] On 17 March 2020, the learned judge extended the time within which the 1st appellant was to comply with the Marbella condition to 15 May 2020.

[31] On 26 March 2020, the learned judge made an order for the 1st appellant to, among other things, make a certain payment failing which the injunction granted restraining the respondent from taking any steps, other than to exercise its powers as mortgagee, to recover any amounts allegedly due in respect of the loan facility, would be discharged.

[32] By notice of application for court orders filed on 9 April 2020, the 1st appellant sought various orders related to the money payments due, that is, non-Marbella condition payments. The learned judge extended the time within which the 1st appellant was to comply with the order made on 26 March 2020. The order expressly stated that no further application to extend time or vary the order would be considered on the grounds that had been advanced in the application. The grounds that had been advanced included an assertion that the covid-19 pandemic had prejudiced the 1st appellant's ability to raise funds since Noranda had scaled back its operations significantly, and the enforcement of the security in the context of the pandemic would be highly prejudicial.

[33] On 15 May 2020, the 1st appellant filed a notice of application for court orders, supported by the tenth affidavit of the 2nd appellant and affidavit of Gordon Langford seeking, among other things, to remove the Marbella condition, and alternatively, an extension of time until 30 December 2020 to comply with the Marbella condition. The 1st appellant relied on a myriad of grounds in support of this application but the salient grounds were as follows:

i. there is a serious issue to be tried arising from the agreement to amend the loan agreement pursuant to the amortization schedule;

ii. the covid-19 pandemic has caused a sharp decline in economic activities globally and locally which made compliance with the amortization schedule impossible;

iii. the covid-19 pandemic has caused a sharp decline in real property value and if the respondent were to enforce its security it is likely to receive an artificially low price;

iv. in times of war, legislation and the courts of equity in England and Wales placed constraints against the enforcement of security to prevent borrowers from losses;

v. the Bank of Jamaica has issued guidance to its licensees with a view to facilitating the grant of moratoria and accommodation to borrowers who are unable to perform their repayment obligations due to the economic effect of the pandemic;

vi. the respondent has not provided any counter evidence to refute that it has full security and that it would not be prejudiced if the condition is removed;

vii. the respondent had ruined the 1st appellant's chance of obtaining finance from other sources as a result of its erroneous and damaging credit report;

viii. the enforcement of the security would cause catastrophic hardship whereas the respondent would suffer little or no detriment; and

ix. the balance of convenience lies in favour of the 1st appellant in light of the Bank of Jamaica's guidance and the approach taken by England and Wales in times of war.

[34] The formal order for the hearing on 15 May 2020 indicates that the respondent was neither present nor represented. The learned judge adjourned the application to Thursday 21 May 2020 for hearing, and ordered the 1st appellant to serve a copy of the application, the affidavits in support of the application and a copy of the formal order on the respondent. Importantly, there is nothing in the order pointing to a grant or refusal of an extension of the injunction.

[35] In response, the respondent's legal counsel, Ms Maria Burke, filed an affidavit on 20 May 2020. She deposed that she had been advised that the court on 9 April 2020 indicated that no further application should be advanced by the 1st appellant on grounds relating to the covid-19 pandemic. She also averred that the 1st appellant's indebtedness had adversely impacted the respondent's liquidity, had hampered its ability to offer funds to small and medium-size businesses, and had negatively impacted its credit rating and creditworthiness to such an extent that in some instances it had to borrow from third party lending agencies. Furthermore, the respondent, not being a commercial bank did not have much flexibility. Counsel deposed that the respondent was unlicensed and unregulated, and therefore the Bank of Jamaica's guidance did not apply to it. Of significant note, the 1st appellant had for a substantial period before the covid-19 pandemic, been delinquent.

[36] After outlining the parties' submissions as well as the evidence led, the learned judge refused the application. At paragraphs [9] - [11] he stated:

"[9] … after hearing [the 1st appellant's] submissions, I did not see it necessary to call on [the respondent's] counsel to reply in a substantive way. This is because firstly, my judgment of the 20th December 2020 [sic], already considered the legal point Mr George

advanced. I considered the question, whether and in what circumstances Marbella conditions were to be imposed, and decided that this case did not fall within any relevant exception. If [the respondent] mortgagee is to be restrained the Marbella conditions are to be applied, see ***Stewart Brown Investments Limited v National Export Import Bank of Jamaica Limited (T/A Exim Bank Jamaica) [2019] JMCC Comm 39*** (unreported judgment dated 20th December 2019) at paragraphs 17, 18 and 19.

[10] The second reason, the application fails, is that I do not consider it would be fair to [the respondent] to grant the variation or to further postpone the condition. As at the 20th December 2020 [sic] [the respondent] was entitled, if an injunction were to be granted, to have the amount in dispute paid into court. It was, and still is, [the respondent's] case that [the 1st appellant's] mortgage payments are in arrears. I allowed [the 1st appellant] three months in which to satisfy the Marbella condition. [The 1st appellant] has not done so. Is it right that I should grant a further extension and/or vacate the order because of adverse economic circumstances, or things done, since the 20th December 2019? I do not think so. As to the matter of unfair discrimination I fail to see how, and in what manner, a court can intervene in the decision of a financial institution as to what category of borrower is to be given an accommodation. The ***Paragon Finance case***, relied upon by [the 1st appellant] is not very helpful. The English court of appeal was there prepared to imply a term that a contractual power, to vary interest rates, would not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily or unreasonably in the Wednesbury sense. The case is concerned with construction of a contractual power to vary interest rates and whether limitations on the power are to be implied. It has no bearing on a lender's decision whether, and/or to whom, a moratorium on loans is to be granted.

[11] Thirdly, [the 1st appellant] is as yet unable to put forward a credible scenario which will see it discharge the mortgage or honour the condition imposed. [The

> respondent] has a mortgage over assets which, on [the 1st appellant's] evidence, are now likely to fetch a lower price than if they had been sold in December 2019 when I injuncted the sale. [The 1st appellant], on the other hand, still has his cause of action. If he is correct, that there is no breach giving rise to a power of sale under the mortgage (because the amortization schedule of payments was agreed or for whatever other reason contended for), then [the 1st appellant] will succeed at trial. The fixed assets affected can be, and have been, valued. Therefore any loss incurred, as a result of the sale of these assets, can be recovered in damages. In these circumstances paragraph 2 of my order, of the 20th December 2020 [sic] will stand." (Emphasis as in the original)

[37] The learned judge therefore ordered:

> "1. Notice of Application filed 15th May 2020 is dismissed.
>
> 2. Leave to appeal is refused.
>
> 3. Costs to [the respondent] to be taxed if not agreed…"

[38] Aggrieved with the outcome of the applications, the appellants have now appealed to this court against the decisions of the learned judge.

Appeals and counter appeals

Appeal no COA2020CV00038

[39] On 27 May 2020, the appellants in seeking to challenge the decision of the learned judge dated 21 May 2020, filed a notice of appeal in this court. They relied on the following grounds:

> "a. the learned judge erred in [sic] discharging or postponing the **Marbella** condition as:
>
> i. the First Appellant is an enterprise in the bauxite mining sector;

ii. the COVID-19 pandemic has, as with many other enterprises, created a temporary, serious impediment to the ability of the First Appellant to operate;

iii. the worldwide, economic effects of the COVID-19 pandemic takes [sic] the present case outside of the 'ordinary circumstances' in which the mortgagor is usually required to satisfy the **Marbella** condition;

iv. the ability of the First Appellant to refinance the loan in the present economic climate is severely prejudiced not only by the general, global economic downturn, but also the contingent effect that lending institutions are unwilling to lend in the present economic climate;

v. the respondent is in breach of implied terms requiring it not without good reason, to treat the First Respondent [sic] less favourably than its other borrowers;

vi. equity ought to grant a remedy, in this case the removal of an equitable pre-condition to the granting of equitable relief in 'ordinary' circumstances, where:

1) the prevailing circumstances are not 'ordinary';

2) the appellant has established that here [sic] is a serious issue to be tried as to whether the original calling of the loan was correct in law;

3) There is evidence of bad faith on the part of the respondent;

4) The respondent has breached its implied duty not to discriminate against the appellant;

5) The enforcement of the respondent's security will destroy the claimant's [sic] capital base, and the appellant's prospects of taking the matter to trial and obtaining redress;

6) Equity ought to have regard to the unfairness inherent in the proposed sale in the current market of the appellant's assets in

circumstances where the proceeds of such sale will facilitate the moratoria granted to its borrowers from the tourism industry, in which its chairman holds huge interests, in the absence of any commercial justification for such behaviour;

7) The respondent, by contrast, is fully secured and forbearance will not appreciably increase its risk or exposure in relation to the appellant's account;

8) There are equitable principles that support the lifting of the Marbella condition in the circumstances of this case." (Emphasis as in the original)

[40] In light of the grounds of appeal above the appellants are seeking the following orders:

"a. the orders of Batts J be reversed;

b. an interim injunction restraining [the respondent] from enforcing any security with respect to the Loan Facility until the determination of the proceedings in the court below;

c. that there be a speedy trial of the issues;

d. costs to the Appellants."

Counter appeal

[41] In an amended counter notice of appeal filed on 10 June 2020, the respondent contended that the decision of the learned judge contained in the formal order dated 21 May 2020 should be affirmed on the following grounds:

"a. The injunction granted on December 20, 2019 restraining the Respondent whether by itself, its servant and/or agents or otherwise howsoever from exercising the powers of sale as mortgagee on condition that the First Appellant pays into court the sum of $170,262,983.90 on or before 31st day of March

2020 later extended to May 15, 2020 had lapsed when the First Appellant's application for inter alia the removal of the condition to pay the sum of $170,262,983.90 came on for hearing on May 21, 2020 and the Court had no power to extend it.

b. The First Applicant, being the only applicant in the Court below had not [sic] standing to make an application to restrain the Respondent from exercising its power of sale." (Underlining as in the original)

Appeal no COA2020CV00041

[42] On 10 June 2020, the appellants filed a notice of appeal in respect of the decisions made by the learned judge on 15 May 2020. They relied on the following grounds:

"a. the learned judge, who had before him an application ("the Application") concerning an extant injunction on 15 May 2020, erred in failing to extend the injunction of 20th December 2019 to 21st May 2020, i.e. the date to which the learned judge adjourned the hearing of the Application, in circumstances where the injunction lapsed on 15 May 2020;

b. alternatively, the learned judge erred in failing to extend the period of the time within which the Appellant was required to comply with the condition embodied in order no. 2 of the order of 20th December 2020 [sic] until 21st May 2020."

[43] As a result, the appellants have sought the orders as follows:

"a. the reversal of Batts J's decision not to extend the injunction in order no. 2 of the order of 20th December 2020 [sic] until 21st May 2020, unconditionally or extend the time for compliance with the condition embodied in the said order no. 2 until 21st May 2020;

b. a declaration [sic] the injunction continued from 15th May 2020 until 21st May 2020;

c. alternatively, an interim injunction from 15th May 2020 until 21st May 2020."

Counter appeal

[44] The respondent, in a counter notice of appeal filed on 16 June 2020, asserted that the learned judge's orders contained in the formal order dated 15 May 2020 should be affirmed. These are the grounds on which the respondent has relied:

> "a. The respondent had not been served and was not before the Court and therefore it was within the Judge's discretion to decline to hear the matter ex parte.
>
> b. The [1st appellant], being the only applicant in the Court had not [sic] standing to make an application for an injunction to restrain the Respondent from exercising its power of sale."

[45] On 13, 14 and 15 July 2020 we heard the appeals and counter appeals and reserved our decision and reasons. We now wish to give our decision and reasons and again sincerely apologize for the delay in doing so.

Application for injunctive relief in the Court of Appeal

[46] Before examining the issues that arise in the appeals and counter appeals, the applications for and in respect of injunctive relief in this court, must be outlined. On 27 May 2020, the 1st appellant, at the same time that it filed its notice of appeal numbered 38 of 2020, also filed a notice of application for court orders seeking an interim injunction pending appeal restraining the respondent from taking any steps pursuant to its purported calling of the loan with respect to the loan facility provided to the 1st appellant by the respondent and initially governed by the 1st appellant's commitment letter dated 14 November 2017 (and subsequently amended), until the determination of the proceedings. The 1st appellant also sought an interim injunction restraining the respondent from enforcing any security with respect to the loan facility until the determination of the proceedings.

[47] Phillips JA, on 23 June 2020, having heard the application granted the application in the following terms:

> "1. Upon [the 1st appellant] giving the usual undertaking as to damages, [the respondent] is restrained by itself, its servant and/or agents or otherwise however [sic] from taking steps pursuant to its purported calling of the loan and/or exercising its power of sale as mortgagee until the determination of the appeal, scheduled for hearing in the week of 13 July 2020.
>
> 2. Costs of this application to be costs in the appeal."

(See **Stewart Brown Investments Limited and others v National Export-Import Bank of Jamaica Limited (t/a Exim Bank Jamaica** [2020] JMCA App 30).

[48] Thereafter, one of the parties requested a clarification of the order. On 28 July 2020, Phillips JA made the following direction(s):

> "I have been asked to clarify the order made by me on 23rd June 2020 and say as follows:
>
> 1. The restraint imposed on the purported calling of the LOAN and/or to exercise of the powers of sale of the mortgage was not applicable to the monthly obligation due from the appellant in the sum of J$3.5 million to be paid on or before the 30th day of each month, which commence [sic] on 30th December 2019.
>
> 2. For the avoidance of doubt, the restraint of the calling of the loan and taking steps to exercise the power of sale of the mortgage did not restrain payment of the monthly sum due in the amount of J$3.5 million, as to condition of payment, or non-payment of the J$3.5 million, and the consequences thereof, not having being appealed, was not argued before me." (Underlining as in the original)

[49] There was some dispute concerning the impact of Phillip JA's clarification. Subsequently, the respondent, on 15 October 2020, filed an amended notice of application for court orders in this court seeking to vary the order that Phillips JA made on 23 June 2020. Counsel for the respondent contended that the appeal before the court concerned only real property and not personalty. Therefore, the issue pertaining to the non-real estate was not before Phillips JA. On 13 and 16 October 2020, this court

(consisting of a panel of Brooks JA (as he then was), Straw JA and Foster-Pusey JA) heard that application and made the following orders:

> "1. …
>
> 2. The Amended Notice of Application No. COA2020 APP 00182 filed on 15 October 2020 is granted in terms as follows:
>
> 3. The Respondent is granted an extension of time to file the Application to vary and/or discharge the Order of the Honourable Ms. Justice of Appeal Phillips' [sic] made on June 23, 2020.
>
> 4. …
>
> 5. …
>
> 6. The Order of Justice of Appeal Phillips made on June 23, 2020 on the Appellants' application for an injunction pending appeal is varied to read as follows:
>
>> 'Upon the 1st Applicant (Stewart Brown Investments Limited) giving the usual undertaking as to damages, the Respondent (EXIM) is restrained by itself, its servants and/or agents or otherwise howsoever from exercising its power of sale as mortgagee in relation to real estate held as security by the Respondent until the determination of the appeal or until further order of the court.'
>
> 7. No order as to costs in relation to both applications.
>
> 8. The oral application for interim injunction in relation to the enforcement of security of personalty is refused."

Issues

[50] Based on the two appeals and counter notices of appeal, the following issues arise for our consideration:

1. Whether the 1st appellant established exceptional circumstances which empowered the learned judge to exempt it from complying with the Marbella condition;

2. Whether the learned judge erred in not extending the date for the injunction from 15 May 2020 to 21 May 2020; if so, what was the effect of that error?

3. Whether the learned judge's refusal to so extend the date should be upheld on the basis that the application was ex parte and he had the discretion to refuse the application; and

4. Whether the 1st appellant had *locus standi* to apply for an injunction relevant to the mortgaged properties of the guarantor, the 3rd appellant.

[51] Issues 2, 3 and 4 will be dealt with first as counsel for the respondent has submitted that these issues raised, if successful, would be bars to this court's consideration and determination of issue 1.

Issue 2: Whether the learned judge erred in not extending the date for the injunction from 15 May 2020 to 21 May 2020; if so, what was the effect of that error

Issue 3: Whether the learned judge's refusal to so extend the date should be upheld on the basis that the application was ex parte and he had the discretion to refuse the application

[52] Issues 2 and 3 will be considered jointly.

Submissions

Appellants' submissions

[53] Counsel for the appellants submitted that when the 15 May 2020 application went before the learned judge on the same day, the learned judge was informed that counsel for the respondent had indicated that he would not be able to attend. Counsel stated that the learned judge adjourned the application until 21 May 2020 "but did not extend the injunction until that date despite an oral application that His Lordship do so" (see paragraph 6 of the submissions filed on 10 July 2020). According to counsel, the learned judge took that position on the basis that, since he was seized of the matter the extension of the injunction was not strictly necessary and that no prejudice could be suffered as the subject matter of the injunction could not be sold in such a short time. The respondent was represented on 21 May 2020 when the hearing took place and did not take any preliminary point that the injunction had not been extended.

[54] Counsel for the appellants argued that there was no doubt that the learned judge had adjourned the application on 15 May 2020 to 21 May 2020 to facilitate a hearing in which the respondent could be heard. A full hearing in fact took place at the end of which the learned judge refused to remove the Marbella condition. In the circumstances, counsel urged that it could never have been the learned judge's intention to throw an obstacle in the possibility of his order being appealed, by refusing to extend the injunction between 15 May 2020 and 21 May 2020. He therefore urged this court to reverse the learned judge's decision to not extend the time within which to comply with the Marbella condition until 21 May 2020, or grant a declaration that the injunction continued from 15 May 2020 to 21 May 2020, or grant an interim injunction from 15 May 2020 until 21 May 2020.

Respondent's submissions

[55] Counsel for the respondent, in support of the affirmation of the learned judge's decisions relied on **Jebmed S R L v Capitalease S P A Owners of M/V Trading Fabrizia** [2017] JMCA Civ 45 which emphasized that this court's duty is that of review and the court must not lightly interfere with the exercise of a judge's discretion.

[56] It is the contention of counsel for the respondent that the 1st appellant was not entitled to an injunction as of right. In the application before the court all that the 1st appellant asserted was the impact of covid-19 on its business. It did not put forward any factors suggesting that the matter was urgent. From as early as 17 March 2020, counsel argued, the 1st appellant was aware that the condition attached to the injunction should be met on 15 May 2020, and failing to do so the injunction would lapse. Further, the respondent was not served with documents prior to the hearing on 15 May 2020 and it was in the learned judge's discretion to decline to hear the matter ex parte. To bolster these points counsel relied on **Elinor Inglis and William McCabe v Verne Granburg** (1990) 27 JLR 107 and **National Commercial Bank Jamaica Limited v Olint Corp Ltd** [2009] UKPC 16.

[57] Counsel emphasized that when the matter came up for hearing on 21 May 2020, the appellants had not satisfied the condition. As a result, there was no injunction in place at the time of the hearing and no order for an extension could be made in those circumstances. Relying on the Trinidadian case of **Ramkaise Mangoeesingh and others v Airports Authority of Trinidad and Tobago and another** (1985) 42 WIR 301 which cited **Bolton v London School Board** (1878) 7 Ch D 766, counsel highlighted that the court found that where an injunction had been issued until a specified date, it continues to that date and can be dissolved at an earlier date by order of the court but it cannot be extended beyond that date unless a fresh or further order is made.

Analysis and determination

[58] Based on the orders made by the learned judge on 17 March 2020, the time for compliance with the Marbella condition had been extended to 15 May 2020. The learned judge did not consider the application at all on this latter date, as it appears the respondent had not been served with notice of the application. However, the learned judge did not refuse the application at that juncture. He adjourned the matter to be heard inter partes on 21 May 2020. This would have been a proper exercise of his discretion (see **National Commercial Bank Jamaica Limited v Olint Corp Ltd**; **Elinor Inglis and William McCabe v Verne Granburg** and **March v Campbell** (1939) 3 JLR 194). Ex parte injunctions, even if they are extensions of previous orders, should not be given lightly. It would also have been open to the learned judge to refuse the application without more on 15 May 2020.

[59] The learned judge having adjourned the application, unless the date for expiration had been extended, the injunction would have expired after 15 May 2020. However, as the learned judge applied his discretion to order an inter partes hearing, he ought to have extended the injunction to the date it was to be heard. To this extent, the appellants' submissions on this point would be correct.

[60] The appellants' ground of appeal (a) in appeal number COA2020CV00041 succeeds.

[61] However, the respondent's submission (as to the effect of this failure) would also be correct, that is, that the learned judge would have had no power to extend the injunction after 15 May 2020. That being said, the respondent's grounds of appeal (a) in both counter appeals cannot succeed for the reasons expressed below.

[62] It would have been open to the learned judge, having conducted an inter partes hearing, to make a fresh order on 21 May 2020 in relation to the date by which the Marbella condition should be satisfied. He conducted an inter partes hearing and could have facilitated such a process. Therefore, his refusal to extend the date for the Marbella

condition to be satisfied should not be affirmed on the basis that the injunction had already expired as of 15 May 2020.

[63] However, there is no evidence that the 1st appellant was prejudiced by the refusal of the learned judge to make the appropriate order on 15 May 2020. Further, nothing turns on the resolution of any of these issues as raised by the parties. They do not assist in the determination of the appeal, whether as a preliminary matter to be decided or in the substantial issue for determination. Therefore, we are not minded to make any declarations or orders as requested by the appellants or respondent relevant to these grounds covered in issues 2 and 3.

Issue 4: Whether the 1st appellant had *locus standi* to apply for an injunction in relation to the mortgaged properties of the guarantor, the 3rd appellant

Submissions

Respondent's submissions

[64] Counsel for the respondent contended that the 1st appellant being the only applicant in the court below had no standing to make the application to restrain it from exercising its power of sale in respect of properties that it does not own or in which it does not have an interest. Counsel pointed out that in the instruments of mortgage, Ermine Stewart, the 2nd appellant and Mary Stewart (now deceased) are the mortgagors. In addition, counsel argued that it is immaterial that the 1st appellant is the principal debtor who borrowed the money. He submitted that the unique relationship between the mortgagors and the respondent is not altered by the fact that they are not principal debtors (see **Mosquito Cove Ltd v Mutual Security Bank Ltd et al** at para. [65]). In the circumstance, counsel advanced that it was the mortgagors who were entitled to assert that the power of sale has not arisen and that the mortgagee was not acting in compliance with the terms of the contract. Viscount Haldane LC in **Dunlop Pneumatic Tyre Company Limited v Selfridge and Company Limited** [1915] AC 847

underscored that only a person who is a party to a contract can sue on it. Counsel also relied on **Fourie v Le Roux** [2007] UKHL 1 and **Noël v Société d'énergie de la Baie James** [2001] 2 SCR 207 in support of this point. Counsel also submitted that this court could consider the issue on appeal although it was never raised before the learned judge. Reliance was placed on the judgment of **Mega-Plex Entertainment Corporation v Eastern Caribbean Collective Organisation for Music Rights (ECCO) Inc (Formerly Hewannora Musical Society (HMS) Incorporated)** (unreported), Eastern Caribbean Supreme Court in the Court of Appeal, Saint Lucia, SLUHCVAP2017/0032, judgment delivered 30 January 2019.

[65] Additionally, counsel submitted that by virtue of clause 5.1 of the mortgage instruments and sections 105 and 106 of the Registration of Titles Act the respondent is entitled to exercise its power of sale since:

a. A demand for payment was made;

b. There was an event of default in relation to the loan facility (clause 5.1(b)); and

c. One of the mortgagors had died (clause 5.1(g)).

Appellants' submissions

[66] Counsel contended that a debtor has a right to restrain a breach by a lender. It was submitted that a debtor who claims that a lender had improperly sought to call a loan has *locus standi* to seek an interim relief to maintain the status quo pending trial of that issue. Counsel premised this argument on privity of contract between the borrower and the lender. Accordingly, the borrower has a real interest to protect and therefore sufficient interest to address the issue.

[67] Further, counsel submitted that a principal debtor is obligated to indemnify a guarantor for any losses that the guarantor suffers by virtue of the guarantee. This principle is widely applicable and does not depend on privity of contract (see, **Paget's Law of Banking,** 15th edition at para. [18.12], **Moule v Garrett** (1872) LR 7 Exch 101

and **Brook's Wharf and Bull Wharf Ltd v Goodman Brothers** [1937] 1 KB 534 at 543).

[68] In a similar vein, counsel contended that the contract with the guarantors (mortgage agreements) should be viewed as a collateral contract to the contract with the 1st appellant (loan agreements). Reliance was placed on the excerpt of the learned author Jason Chuah in **The Law of Contract**, 6th edition at paragraph 3.3 which states that "collateral contracts have also been found where the main contract is not made between the same two parties and, in effect, the finding of a collateral contract avoids the effect of the privity rule". Therefore, counsel submitted that in the instant case, privity of contract does not arise.

[69] On the point of jurisdiction, counsel argued that the respondent had made a voluntary submission to an application for an injunction by the 1st appellant. Relying on **Astro Exito Navegacion S A v W T HSU (The Messiniaki Tolmi)** [1984] 1 Lloyd's Rep 266 and **Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd** [1978] 1 Lloyd's Law Reports 357, counsel noted that a party makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The 1st appellant having filed the application with supporting affidavit, the respondent filed several affidavits in response and asked that the application be dismissed on legal and factual bases. In effect, this is a voluntary submission to the court's jurisdiction. Further, counsel argued that rule 2.3(3) of the Court of Appeal Rules could not be used to resurrect jurisdictional points which should have been taken in the court below. In support of this point, counsel referred to **Astro Exito Navegacion S A v W T HSU (The Messiniaki Tolmi)** and concluded that the respondent's contention in respect of standing is unmeritorious. As such, the counter appeal ought to be dismissed.

Respondent's response – Collateral contract

[70] In response to counsel's submission in respect of the applicability of the collateral contract principles, counsel argued that those principles are inapplicable to the instant case. According to counsel, collateral contracts refer to statements or promises made by one party to another which induced that other party to enter an agreement which it would not have otherwise entered. Also relying on paragraph 3.3 of **The Law of Contract**, 6th Edition, counsel pointed out that collateral contracts have tended to be found where there is some obstacle in the way of finding that the statement is a term of the main contract or where it would be ineffective if such a finding was made. Further, collateral contracts would only be relevant if the written agreement cannot be said to contain the entirety of the contract. According to counsel, this is not the case here as it is clear that there were separate contractual agreements.

Analysis and determination

[71] While the submissions of both counsel are stimulating and interesting, we do not find it necessary to consider the relevant principles of law at this time on the issue of *locus standi*. This is due to the specific circumstances of the appeal before us. Our reasoning on this point is set out below.

[72] The 1st appellant has claimed that the respondent has no right at this time to assert that the 1st appellant has breached its contract in relation to the loans granted. The mortgaged properties belonged to the 3rd appellant who, along with Mary Stewart, are guarantors to the loan agreements. (Apparently Mrs Stewart had died subsequent to the mortgage deeds being drawn up). The 1st appellant had required that the court restrain the respondent "from taking any steps pursuant to the purported calling of the loan" and "from enforcing any security with respect to the loan facility". The actions of the respondent would have negatively impacted both the property of the 1st appellant as well as the real estate of the 3rd appellant.

[73] It is correct that the 3rd appellant was never joined as party to the application for the injunction granted on 20 December 2019. Also, he was never joined as applicant to the extension sought on 15 May 2020. However, at the time of the application for the extension or removal of the Marbella condition, both the 2nd and 3rd appellants were now parties to the substantive claim, having been added as ancillary defendants. Further, the notice of application for variation of the injunction made by the 1st appellant included the 2nd and 3rd appellants as ancillary defendants.

[74] The 2nd appellant, who is also the director of the 1st appellant, had filed numerous affidavits relative to the various applications. He was and is an active participant in the proceedings. While the issue of privity of contract is still live (we are making no determination on this point) the point was never raised before the learned judge. As a question of law, it would not have been a fundamental consideration to the determination of the matter before the learned judge below as in the case of **Mega-Plex Entertainment Corporation v Eastern Caribbean Collective Organisation for Music Rights (ECCO) Inc (Formerly Hewannora Musical Society (HMS) Incorporated)**. In that case, the court had to determine the question of who had standing to sue for breach of copyright based on the relevant Act. The learned judge below had actually made the determination that the appellant had the requisite standing. The Court of Appeal found that the learned judge erred in that regard. The specific issue in the case at bar was whether the injunction in the specific terms was to be granted. The learned judge had made no determination in relation to *locus standi*. Had the point been taken below, it would have provided an opportunity to the 1st appellant to make a formal request that the 3rd appellant be joined as a party to the application (see Part 19 of the Civil Procedure Rules). As counsel for the appellants have submitted, the issue is at the most, a simple procedural matter that could be cured without prejudice to the respondent.

[75] In light of the above and, most importantly, bearing in mind our ultimate determination of the appeal in relation to issue 1 (which is set out below) we have no

hesitancy in holding that this ground should be entertained in an appropriate case that would have some impact on the outcome of the appeal.

[76] For the above reasons, the issue of *locus standi* raised in the counter notices relevant to both appeals failed and we concluded that there is no bar to our consideration of the substantive appeal as set out in issue 1.

Issue 1: **Whether the 1st appellant established exceptional circumstances which empowered the learned judge to exempt it from complying with the Marbella condition**

Submissions

Appellants' submissions

[77] Mr George stated that, in ordinary circumstances, before a mortgagor may be granted an injunction which restrains the mortgagee from exercising his power of sale, he must pay the sums being claimed by the mortgagee into court. He referred to **SSI (Cayman) Limited et al v International Marbella Club S A** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 57/1986, judgment delivered 6 February 1987, **Inglis v Commonwealth Trading Bank of Australia** [1972] HCA 74 and **Harvey v McWatters** (1948) 49 SR (NSW) 173.

[78] Mr George vigorously submitted, however, that the circumstances in the case at bar are far from ordinary, but instead were exceptional because:

i. there is a global pandemic which has led to a virtual shutdown of the global and local economy;

ii. the mortgagee in response to that pandemic, is discriminating amongst borrowers with respect to the relief it grants in breach of an implied term not to arbitrarily, capriciously, unreasonably or irrationally discriminate;

iii. the market for the security interests in question has been destroyed by the global pandemic; and

iv. the 1st appellant has made offers to refinance the debt, has sought refinancing, but has been hindered by the respondent in its ability due to the negative credit reports and negative remarks about its probity as a borrower. (He referred to **Grose v St George Commercial Credit Union Limited** (1991) NSW ConVR 55-586, **Harvey v Perpetual Nominees Ltd** [2009] NSWSC 1379, **Notaras v Sly and Weigall** [2005] NSWCA 275, **Bayblu Holdings Pty Ltd v Capital Finance Australia Limited** [2011] NSWCA 39 and **Cukurova Finance International Ltd and another v Alfa Telecom Turkey Ltd (Nos 3 to 5)** [2016] AC 923).

[79] According to counsel, while at first glance, the application of the Marbella principle may seem inflexible, it is not. He referred to **Flowers, Foliage and Plants of Jamaica Limited and others v Jamaica Citizens Bank Limited** (1997) 34 JLR 447 at 452 C, in which Rattray P noted that courts of equity do not shackle themselves with unbreakable fetters if the justice of the case demands a more flexible approach. In that case, counsel highlighted that the court granted a stay of execution preventing the mortgagee from enforcing its security in light of the triable issue concerning the legal validity of the guarantee.

[80] Counsel also urged the court to rely on Panton P's dissenting judgment in **Global Trust Limited and another v Jamaica Re-Development Foundation Inc and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 41/2004, judgment delivered 27 July 2007. He argued that Panton P, in his dissenting judgment, noted, among other things, that since there was a serious issue to be tried in respect of the appellant's accounting status with the mortgagee, the injunction ought to

have been granted with an undertaking being given as to damages. He submitted that in the case at bar there are two main issues, namely; the state of the 1st appellant's account with the respondent, which can be addressed by accounting evidence and the legal question as to the bearing of the amortization schedule on the relationship between the parties.

[81] Counsel highlighted that there were exceptional cases in which the Marbella condition was not imposed. Morrison JA outlined some of those cases in **Mosquito Cove Ltd v Mutual Security Bank Ltd et al**. He also relied on **Alexander House Limited v Reliance Group of Companies Limited** [2018] JMCA Civ 18. Counsel referred to the learned authors in **Fisher and Lightwood's Law of Mortgages**, 15th edition at para. [30.37] who also stated that the mortgagor need not offer to redeem where the mortgagee is not exercising his powers in good faith, or is otherwise acting improperly or if the mortgagor is alleging that the power of sale has not arisen. The latter was the case in **Clarke v Japan Machines (Australia) Pty Ltd (No 2)** [1984] 1 Qd R 421. Counsel nevertheless argued that the 1st appellant has made an offer of redemption through the amortization schedule where payments to the loan facility were being made.

[82] Counsel submitted that the effect of the covid-19 pandemic was similar to that of the impact of the first and second world wars which affected international and domestic economies. Accordingly, to address this devastating effect, the Parliament in England passed the Courts (Emergency Powers) Act 1914, the Courts (Emergency Powers) Act 1939 and the Possession of Mortgaged Land (Emergency Powers) Act 1939 in order to protect debtors and mortgagors. As such, creditors and mortgagees had to obtain leave from the court before initiating a claim, and the court was empowered to include in its consideration the effects of the war and the debtor's ability to meets its obligations. Here in Jamaica, the practice and guidance of the Bank of Jamaica facilitated the granting of moratoria to borrowers suffering in the crisis. In contrast however, the respondent has limited the scope of relief to a narrowed class of borrowers involved in tourism and its linkages only.

[83] It is counsel's submission that in light of the affidavit evidence of Mr Langford in respect of the inimical effects of covid-19 on the value of real property, any attempt to sell would amount to a lack of good faith and the respondent would not be able to recover the sums which it claims is outstanding. Counsel highlighted the view expressed by the learned judge that the respondent, based on unchallenged evidence, was protected, because the available assets which are held as security are quite adequate to secure the outstanding amount.

Respondent's submissions

[84] In commencing submissions on behalf of the respondent, counsel reiterated the oft-cited principle which governs this court's limitation in reviewing the decisions of a judge at first instance. Counsel referred to **Jamaica Infrastructure Operators Limited and another v Dwayne McGaw** [2018] JMCA Civ 4. Counsel submitted that this court, therefore can only interfere with the learned judge's discretion where there has been a misunderstanding of the law, the evidence, or an inference that a fact exists or does not exist which can be shown to be demonstrably wrong, or where the decision is so aberrant it must be set aside.

[85] Counsel contended that the 1st appellant has not demonstrated that the case at bar falls into any of the excepted categories as outlined by the authorities which are all of a particular class or nature. Counsel urged that any expansion of the exceptions should be of the same class.

[86] Counsel argued that the reasons canvassed by counsel for the appellants have been considered by courts in other jurisdictions and were rejected. In **Bolich v Insurance Co** 202 NC 789 (N C 1932) the plaintiff had asserted that:

> i. There existed a condition of depressions unprecedentedly bad, which conditions continued to exist at the time;

ii. That on account of the scarcity of money and poor market conditions, it was impossible to obtain the fair market value of lands at a judicial foreclosure or other forced or involuntary sale of same;

iii. If the lands were sold at a forced sale at the time, they would not bring their fair market value and this would do irreparable damage both to the plaintiffs and to the creditors of Bolich Holding Corporation;

iv. A delay for a reasonable time in foreclosing the deed of trust would do the defendants no damage;

v. The loan was more than adequately secured; and

vi. There were many indications that in a short time business conditions would have improved to such an extent that money would be available and property could be sold even at a forced sale at approximately its market value.

[87] In answer to this issue, Brogden J did not accept that such conditions allowed for restraining a power of sale in a deed of trust.

[88] Counsel outlined that similarly, in **Loma Holding Corp v Cripple Bush Realty Corp** 265 NYS 125, the defendant argued that there was an abnormal world and unprecedented cataclysm and disastrous depression causing a stagnation in the real estate market. Black J in rejecting the argument noted, among other things, that every moratorium is a temporary repudiation. This means that every bank, or other lender will be unable to collect interest or the principal of any debt causing an enormous reduction of funds available to pay employees, servants or any other creditor. If not paid, their purchasing power will be reduced and the vicious cycle will persist. Reference was also made to **Strochak v Glass Paper Making Supplies Co Inc** 239 App Div 312, where

Untermyer J concluded that if hardship ensues it is for the legislature, and not the courts, to take cognizance of the fact.

[89] Counsel, in response to the appellants' complaint that the respondent was in breach of implied terms, without reason, to treat the 1st appellant less favourably than other borrowers, contended that there is no basis on which any such term can be implied into the agreement. Counsel relied on **Attorney General of Belize and others v Belize Telecom Limited and another** [2009] UKPC 10 and urged that the court has no power to improve upon the instrument which it is called upon to construe whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is only concerned to discover what the instrument means. In the case at bar, counsel argued that the terms of the loan are set out in the commitment letter as amended, and the 1st appellant cannot ask the court to imply such terms when there is no material before the court indicating whether the remaining customers have accessed their loans through the same facilities, and without the court knowing the terms on which they accessed their loans. Alternatively, counsel contended that if this court finds that such term should be implied, there is no evidence before this court to substantiate a claim for breach of that term and bad faith.

[90] Counsel submitted that a property may be sold for less than market value and that is part and parcel of what may obtain if the mortgagee elects to sell, he does not have to wait for the market to rebound to sell. Therefore, this is not a sufficient basis on which to restrain the mortgagee without payment into court (see **Cuckmere Brick Company Limited and another v Mutual Finance Limited** [1971] Ch 949 and **Cornwall Agencies Limited v The Bank of Nova Scotia Jamaica Limited and another** [2016] JMCA Civ 49).

[91] In concluding the submissions, counsel stated that the 1st appellant's debt is one of the largest on the respondent's books, which has affected its credit ratings due to borrowing from third party lending agencies. Counsel submitted that the 1st appellant's conduct in breaching the assignment of contract proceeds and non-payment of the debt

cannot be ignored. Placing reliance on **Ministry of Justice v Prison Officers Association** [2008] EWHC 239 (QB), counsel noted that he who comes to equity must come with clean hands, and, based on the conduct of the 1st appellant, it is not entitled to any injunctive relief it seeks. Therefore, the learned judge's decision ought not be disturbed.

Analysis and determination

[92] The basis on which this court will set aside the exercise of discretion by a single judge is not in dispute. The relevant principles were succinctly outlined by Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1. Morrison JA stated at paragraph [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference that particular facts existed or did not exist-which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

These principles were accepted in **Jamaica Infrastructure Operators Limited and another v Dwayne McGaw**.

[93] Mr George has argued that he was not relying on any one factor to indicate exceptional circumstances taking the facts out of the Marbella rule. Instead, he was relying on "cumulative factors". However, it will be necessary to examine how the learned judge treated with each factor so as to determine whether he erred in any way in arriving at his decision to refuse to remove the Marbella condition.

[94] There is no gainsaying that the pandemic had a catastrophic impact on many businesses. Here in Jamaica, there was the legislative imposition of several lockdown and no movement days. No specific legislation was passed by the government mandating a

particular treatment of borrowers during the challenging economic times. Each financial and lending institution determined how it would respond to borrowers.

[95] The pandemic not only negatively impacted borrowers, it also negatively impacted lenders whose business was to loan funds and be repaid in order to make a profit. On the other hand, some businesses actually emerged and flourished during the pandemic and even amidst the lockdown and no movement days. Unsurprisingly, therefore, the impact of the pandemic on each borrower differed. It would be unworkable for a court to add the impact of the covid-19 pandemic in and of itself as an exception to the imposition of the Marbella condition. We therefore appreciate and agree with the position taken by the United States' courts in the authorities cited by the respondent on this issue, when arguments similar to those raised by the appellants were made before them (see **Bolich v Insurance Co**, **Loma Holding Corp v Cripple Bush Realty Corp** and **Strochak v Glass Paper Making Supplies Co Inc**). It was therefore open to the learned judge to refuse to accept the impact of the covid-19 pandemic as an exception to the imposition of the Marbella condition.

[96] It is well known that, during the height of the pandemic, many licensed financial institutions and other lending entities offered and entered into arrangements with their borrowers who faced difficulties in fulfilling their loan obligations. The Bank of Jamaica provided guidance to financial holding company designates, and deposit taking institutions, on how to deal with treatment of payment accommodations in preparing their prudential returns. While this guidance did not apply to the respondent, as it was not regulated by the Bank of Jamaica, the guidance does reflect the fact that such arrangements were common arising out of the impact of the covid-19 pandemic on some borrowers. But what of the appellants' complaint of discrimination because the respondent offered moratoria to tourism interests? The appellants have argued that the respondent has an implied duty to not discriminate amongst its borrowers in the circumstances. The learned judge stated that he did not see how and in what manner a court can intervene in the decision of a financial institution concerning which category of

borrower is to be given an accommodation. We see no error of law or fact in that position. Borrowers will differ, and financial and lending institutions, it is expected, will assess each borrower. There may also be national priorities and a raft of other matters that financial institutions or lending entities take into account in determining how to treat with borrowers who face difficulties complying with their loan obligations. The learned judge considered **Paragon Finance plc v Staunton; Paragon Finance plc v Nash** [2002] 2 All ER 248 on which the 1st appellant relied and correctly identified the issue that the case addressed. It was open to the learned judge to express the view that the case was not helpful.

[97] The appellants have argued that the enforcement of the security will destroy the 1st appellant's capital base and the appellants' prospects of taking the matter to trial and obtaining redress. The learned judge, however, noted that the 1st appellant was unable to indicate a "credible scenario" allowing for it to discharge the mortgage or honour the condition imposed. The fact is that the situation is difficult for both sides. As the learned judge stated, if there is in fact no breach giving rise to a power of sale under the mortgage, the 1st appellant can recover damages.

[98] Any sale of the property securing the 1st appellant's loan facility will be on the basis, allegedly, that the 1st appellant has been unable to live up to its obligations under the loan facility or is in breach of a term of the facility. It is difficult to follow the argument, and we have not seen any proof, that the proceeds of any such sale will benefit other borrowers.

[99] The appellants argue that the respondent is fully secured, but at the same time have stated that the property will fetch a lower price due to the impact of the pandemic, and argue that it is inappropriate for the respondent to enforce its security in the context of a depression in property values. The appellants have not brought to our attention any authority indicating that it is appropriate to restrain a mortgagee's exercise of power of sale due to prevailing negative market conditions. On the other hand, authorities such as **Cuckmere Brick Company Limited and another v Mutual Finance Limited**, to

which the respondent has referred, suggest that it would be inappropriate for the court to do so.

[100] The fact that there is a serious issue to be tried as to whether the original calling of the loan was correct in law justifies a grant of an injunction, but does not justify the waiver of the Marbella condition. The Marbella condition is imposed to ensure that the mortgagee's power of sale is not restrained without some protection for the mortgagee. The learned judge correctly recognized this position.

[101] In **Mosquito Cove Ltd v Mutual Security Bank Ltd et al** Morrison JA identified some of the exceptional cases in which it has been held that the mortgagor did not have to make a payment as a pre-condition to the grant of the injunction. In **Gill v Newton** (1866) 14 WR 490 the court referred to "the great peculiarity of the terms" of the deed under which the mortgagee had been let into possession of the property. **Macleod v Jones** (1883) 24 Ch D 289 involved unusual circumstances, as the mortgagee was also the mortgagor's solicitor, who owed her independent fiduciary duties. Morrison JA also highlighted that this court "engrafted" another exception upon Marbella principles in **Rupert Brady v Jamaica Redevelopment Foundation Inc and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 29/2007, judgment delivered 12 June 2008 which related to the situation in which a mortgagor stated that he had not signed the relevant mortgage and had not given anyone the authority to pledge his property as security, with the result that the mortgage was null and void. Morrison JA also noted that in cases where the mortgagor submits and it appears on the face of the mortgage, that the mortgagee's claim is excessive, the court will order that the mortgagor pay into court an amount that appears to be consistent with the terms of the mortgage. At paragraph [64] of the **Mosquito Cove Ltd v Mutual Security Bank Ltd et al** case, Morrison JA concluded his survey of some of the exceptional circumstances in which a Marbella condition would be imposed by stating:

> "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."

[102] In **Fisher and Lightwood's Law of Mortgages**, 15th edition the learned authors indicate that a mortgagor need not offer to redeem where the mortgagee is not exercising his powers in good faith, or if the mortgagor is alleging that the power of sale has not arisen. The appellants have argued that the power of sale was not being exercised in good faith, as an attempt to sell the security "will amount to a demonstrable lack of good faith by the bank" (see paragraph 53 of the appellants' submissions). This submission was in the context of the fall in property value due to the covid-19 pandemic and we have already explored the fact that, prima facie, the bank cannot be restrained from exercising its power of sale due to depressed property values.

[103] We note that the appellants also urged that the power of sale has not arisen, as the 1st appellant was complying with a new amortization schedule. In **Clarke v Japan Machines (Australia) Pty Ltd (No 2)**, G N Williams A-J was satisfied that the sum claimed was not due in terms of the security, and stated that until there was compliance with a particular clause of the lease "no specific amount can be established as the sum secured thereby" (see pages 422 - 423 of that judgment). In the case at bar the learned judge concluded that there was a serious issue to be tried as to whether a new repayment schedule had been agreed between the parties and whether the payments that the 1st appellant made had been properly applied. In our view, the learned judge treated with the issue correctly when he did not find this sufficient to displace the Marbella requirement. It seems to us that the court in **Clarke v Japan Machines (Australia) Pty Lyd (No 2)** was fairly certain as to the construction that it placed on the relevant documents, in contrast with the case at bar.

[104] While the appellants have argued that **Flowers, Foliage and Plants of Jamaica Limited and others v Jamaica Citizens Bank Limited** made inroads into the Marbella principle, we agree with the analysis of that case by Morrison JA in **Mosquito Cove Ltd v Mutual Security Bank Ltd et al** that there was some "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" (see paragraph [53]).

[105] The appellants have urged that this court follow the dissent of Panton P in **Global Trust Limited and another v Jamaica Re-Development Foundation Inc and another**. It is important to note that the grounds of appeal in that case did not challenge the correctness of the legal criteria established in the Marbella line of authorities. This court acknowledged that it would be proper to restrain a mortgagee's power of sale if there are triable issues as to the validity of the mortgage document upon which the mortgagee seeks to rely for his power of sale. However, a mortgagee, as a general rule, would not be restrained from exercising his power of sale on the ground that the amount due was disputed.

[106] The appellants have referred to authorities in which offers to redeem have been taken into account by the court in determining whether to impose the Marbella condition. However, in the end, the 1st appellant has not been able to provide a refinancing option. As a result, those authorities were not helpful. As the learned judge noted, the 1st appellant was not able to show a credible scenario allowing it to discharge or honour the condition which was imposed as a part of the injunction.

[107] Both sides referred to various Acts of Parliament passed in other countries in times of financial calamities. In our view, implicit in the appellants' reference to such legislation, is an acknowledgement that wide scale moratoria and relief to borrowers are best addressed in such a manner. It is not for the court to do so.

[108] In light of all of the above, we are not convinced by Mr George's argument that the learned judge ought to have found that there were cumulative factors creating a highly exceptional situation so as to justify dispensing with the condition of payment into court, or, in other words, the waiver of the Marbella condition.

[109] Consequently, they have not shown that the learned judge erred when he refused to remove the Marbella condition as a requirement for the grant of the injunction restraining the respondent from exercising its power of sale as mortgagee.

[110] In our view, appeal number 38 of 2020 should be dismissed. In addition, the injunction restraining the respondent from exercising its power of sale as mortgagee in relation to real estate which it holds as security with respect to the loan facility granted to the 1st appellant, should be lifted. It stands to reason that the application for an interim injunction restraining the respondent from enforcing any security with respect to the loan facility until the determination of the proceedings in the court below should also be refused. Dates for the trial of this matter should also be scheduled as speedily as possible.

F WILLIAMS JA

ORDER

1. The appeals are dismissed.

2. The counter appeals are dismissed.

3. The injunction restraining the respondent from exercising its power of sale as mortgagee in relation to real estate which it holds as security with respect to the loan facility granted to the 1st appellant, is hereby discharged.

4. The application for an interim injunction restraining the respondent from enforcing any security with respect to the

loan facility until the determination of the proceedings in the court below is refused.

5. The Registrar of the Supreme Court is directed to schedule the earliest possible trial date for this matter.

6. The appellants and the respondent shall, on or before 14 October 2022 file written submissions on the issue of costs of the appeals and counter appeals, after which the court will issue its ruling.