

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV00038

APPLICATION NO COA2020APP00084

BETWEEN	STEWART BROWN INVESTMENTS LIMITED	1ST APPLICANT
AND	ALTON WASHINGTON BROWN	2ND APPLICANT
AND	ERMINE STEWART	3RD APPLICANT
AND	NATIONAL EXPORT-IMPORT BANK OF JAMAICA LIMITED (t/a EXIM BANK JAMAICA)	RESPONDENT

Conrad George and Andre Sheckleford instructed by Hart Muirhead Fatta for the 1st applicant

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

2, 5, 10 and 23 June 2020

IN CHAMBERS

PHILLIPS JA

[1] This is an application by Stewart Brown Investments Limited (the 1st applicant) for an interim injunction pending appeal restraining the respondent, National Export-Import Bank of Jamaica Limited (EXIM Bank), from taking any steps pursuant to its purported calling of a loan, provided to the 1st applicant by EXIM Bank, and from enforcing any security held by EXIM Bank in respect of the loan facility given to the 1st applicant.

[2] Two appeals have been filed (one in the currency of this hearing) challenging Batts J's order. The first relates to whether Batts J was wrong in the exercise of his discretion, in refusing to remove and/or extend a condition that he had attached to an injunction he had granted on 20 December 2019. That condition required the 1st applicant to pay the amount of \$170,262,983.90 into court, pursuant to the principle stated in **SSI (Cayman) Limited and Others v International Marbella Club SA** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 57/1986, judgment delivered 6 February 1987. The appeal filed during this hearing related to whether Batts J erred in not extending the time to comply with the condition to pay that sum into court until 21 May 2020, when the inter partes hearing was set to be heard. No doubt, both appeals will be heard together.

[3] Several affidavits were filed in relation to this application before me. I have read and considered them all. I have also read the judgment of Batts J; the submissions of both counsel which have been very detailed, comprehensive and helpful; and several of the authorities submitted, many of which I am familiar with. My brief remarks do not in any way detract from my recognition of counsel's industry in this matter and the thorough examination given to all the material placed before me.

[4] Initially, EXIM Bank had taken the position that I had no jurisdiction to hear the application, as the appeal required permission to first be obtained from this court, as the application for permission had been applied for and refused in the court below. I ruled in the hearing that I had the jurisdiction to hear the application for an interim injunction, as the extension or removal of the condition was relevant and attached to

the injunction granted on 20 December 2019 by Batts J, and was therefore exempted under section 11(1)(f)(ii) of the Judicature (Appellate Jurisdiction) Court Act.

[5] EXIM Bank thereafter took the point that since the condition to pay the sums of money into court expired on 15 May 2020, on that day, when the matter went before Batts J (ex parte), he ought to have extended the time to comply with that condition to 21 May 2020 (the day of the inter partes hearing). However, that was not done as the minute of order only disclosed that the application had been adjourned to 21 May 2020. As a consequence, no good arguable appeal could arise, as on the day that Batts J heard the inter partes application, the condition would have lapsed, and so too the injunction. Accordingly, no order could have been made either removing or extending the time to comply with the condition attached to the injunction, which was before him on that day. The 1st applicant applied to the Court of Appeal for extension of time to file an appeal on the basis that Batts J had erred in the exercise of his discretion not to extend the condition until the inter partes hearing. It was alleged that he was of the view, that as the matter was before him on 15 May 2020, it was not necessary. The application for extension of time was granted and the appeal was subsequently filed. If Batts J exercised his discretion incorrectly, the appeal would then have a realistic chance of success.

[6] The most recent challenge made in respect of the application by EXIM Bank related to whether the 1st applicant had the locus standi to restrain the exercise of the powers of sale of the mortgagee, EXIM Bank, as there was no privity of contract between it and the 1st applicant. This matter was not raised before Batts J, and there

were no written submissions on the point before me. I have noted that the 1st applicant is the principal debtor, and that there are guarantee mortgages in respect of the loan facility in the name of Ermine Stewart and Mary Stewart, in respect of which the 1st applicant is named as the debtor. Ermine Stewart and Mary Stewart are the guarantors and mortgagors being the registered proprietors of certain the properties given as collateral for the debt. Whereas Ermine Stewart is an ancillary respondent, Mary Stewart is not. Neither Ermine Stewart nor Mary Stewart are debtors. I am not aware of the relationship of either of them to the 1st applicant. Suffice it to say, that although they were not parties to the claim when the injunction was granted, Ermine Stewart became an ancillary defendant (in January 2020) prior to the extension of the condition (in March 2020), imposed by Batts J when the injunction was initially granted (in December 2019). Since the general configuration of the loan documentation has not been properly either placed or argued before me, I have only set out what I see are some of the concerns which, no doubt, will be raised with greater clarity before the full court, if thought necessary, in light of all that is at stake in this matter.

[7] In granting the injunction, Batts J indicated that the approach of the court when considering such an application is well established. The court must address whether there is a serious issue to be tried, the adequacy of damages, the balance of convenience, and whether it is just to grant the injunction in all the circumstances (see **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504 and **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16). Batts J made it clear that an injunction is an equitable remedy and although discretionary, it

must be applied in accordance with established principles, which in this case, he recognised, related to the **Marbella** principle, which was applicable when the court was considering a restraint on the mortgagee's exercise on its powers of sale. He indicated that, save in exceptional circumstances, pursuant to the **Marbella** principle, the amount claimed due by the mortgagee must be paid into court as a condition of the grant of an injunction preventing a mortgagee exercising its powers of sale.

[8] Batts J recognised that there were several serious issues to be tried and it was on that basis that he granted the injunction. A serious issue he identified was whether EXIM Bank had, pursuant to the contract with the 1st applicant, properly applied funds paid to it in settlement of the loan. The 1st applicant's contention was that sums paid were to be applied to the principal first and not interest, as it was to have been paid on "the reducing balance". EXIM Bank's submission was to the contrary. Had the amounts been applied as the 1st applicant stated, and as was agreed, the loan would not have been in arrears, and EXIM Bank could not have called the loan. Another issue related to the "Amortization Schedule". The 1st applicant contends that EXIM Bank had agreed to new repayment terms which were contained in that schedule, and had made payments in accordance with it, which therefore precluded EXIM Bank from claiming that the 1st applicant was in breach of the loan facility. However, Batts J found that these issues did not fall within "exceptional circumstances" as required by the **Marbella** principle, and so he was constrained to, and imposed the **Marbella** conditions.

[9] In this application before me, other serious issues to be tried were indentified. The 1st applicant claimed that EXIM Bank acted in bad faith by taking various steps that

prevented it from refinancing the loan or redeeming the mortgage. It had also claimed that there is currently existing a global pandemic (COVID-19) which had affected its ability to defray any financial obligations including the **Marbella** conditions. EXIM Bank has given a moratorium to the tourism sector due to this pandemic, without any consideration to the 1st applicant's industry (even though it is EXIM Bank's second largest customer), and in so doing, had acted unreasonably, capriciously, and irrationally.

[10] Additionally, the 1st applicant claims that there is more than sufficient value in the properties that secure the mortgages to cover the value of the loan, and has put forward an affidavit by Gordon Langford, filed 15 May 2020, indicating that if the properties were sold now, they would be sold at a substantial undervalue. Counsel for the 1st applicant submitted that any attempt to sell at this time would be punitive and reckless, in the light of the above, and this would be even more so given the fact that the 1st applicant's main source of business (a contract with Noranda Jamaica Bauxite Partners II) would recommence on 24 June 2020.

[11] The 1st applicant has also argued that since the commencement of the action, EXIM Bank has applied payment of monies received from it to the principal first, as agreed, doing a *volte face*, and indicating that they understood the contractual arrangements, between the parties. This, they say, makes their appeal even stronger, as if that approach had been adopted, from the beginning, they would not have been in arrears, and the loan could not properly have been called.

[12] One of the issues in this case, therefore, is whether all of the above circumstances cumulatively fall into the “exceptional circumstances” that have been recognised by the courts over the years, which could avoid the application of the **Marbella** conditions. The 1st applicant has submitted that all of these issues do fall into “exceptional circumstances” that would warrant an exception to the **Marbella** principle. However, most of the matters referred to above have been trenchantly denied by EXIM Bank, for example, they do not accept that they have acted contrary to the contract in the application of funds paid; the “Amortization Schedule” had not been agreed, and so was not binding on them; and they had not taken any steps preventing the applicant from redeeming the mortgage.

[13] At this stage, it is not necessary for me to make any findings with regard to any of these matters. Indeed, I ought not to do so. It is only important for me to assess whether there is a good arguable appeal, and on the many issues joined in this matter, I think that is the case.

[14] One might say that our courts have taken a rather stringent and/or inflexible approach over the years in protection of the rights of the mortgagee, but this has been a fairly universal approach which has evolved over time and has been stated in several authorities. However, there have also been statements made in the leading text on Fisher & Lightwood’s Law of Mortgage, 2nd Australian Edition, at paragraph 20.38, page 508, that “[w]here the mortgagor’s lack of credit makes it impossible for him to give the usual undertaking in damages, so long as there is evidence that the mortgaged property is and is likely to remain adequate security for the mortgagee, an injunction

may be granted without such undertaking: see **Eltran Pty Ltd v Westpac Banking Corp** [(1988) 32 FCR 195]". The authors have also stated that "[i]f the mortgagor is alleging that the power of sale has not arisen, or is alleging lack of good faith, there is no need for any payment, but if the mortgagor is seeking to stop the sale for any other reason, payment is necessary". In this case, all these allegations have been made. At the time of the hearing before me though, there was no proposed sale to any third party. The applicants seemed to be endeavouring to forestall such a situation, or were just acting in advance of any third party interests being relevant to the deliberations.

[15] In my view, the many extraordinary issues arising in this matter require a hearing before the full Court of Appeal. I am of the view that equity ought to come to the 1st applicant's aid in these circumstances, until these issues can be ventilated in the appeal. In the circumstances, I too share the view of Batts J, that damages would not be an adequate remedy, and I also hold the view that the balance of convenience is clearly with the 1st applicant. Additionally, I have managed to secure an early date for the hearing of the appeal, and so I would preserve the status quo until then by granting an interim injunction until the hearing of the appeal. However, I would not impose the **Marbella** conditions in the light of the specific serious issues raised and bearing in mind that the matter will be dealt with shortly. I would therefore make the following order:

1. Upon the 1st applicant (Stewart Brown Investments Limited) giving the usual undertaking as to damages, the respondent (EXIM Bank) is restrained by itself, its

servants and/or agents or otherwise however from taking any 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.