[2014] JMCA App 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 28/2013

APPLICATION NO 31/2013

BETWEEN	**CHARMAINE BOWEN**	**APPLICANT**
AND	**ISLAND VICTORIA BANK LIMITED**	**1ST RESPONDENT**
AND	**UNION BANK LIMITED**	**2ND RESPONDENT**
AND	**RBTT BANK JAMAICA LIMITED**	**3RD RESPONDENT**
AND	**FINSAC LIMITED**	**4TH RESPONDENT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION**	**5TH RESPONDENT**
AND	**DENNIS JOSLIN JA INC**	**6TH RESPONDENT**

Hugh Wildman and Miss Kenisha Baker instructed by Charmaine Patterson and Associates for the applicant

Harrington McDermott instructed by the Director of State Proceedings for the 1st and 4th respondents

William Panton and Miss Cindy Lightbourne instructed by DunnCox for the 2nd and 3rd respondents

Charles Piper and Wayne Piper instructed by Charles E Piper & Associates for the 5th and 6th respondents

4, 6 March and 27 May 2014

IN CHAMBERS

PHILLIPS JA

[1] This is an application for a stay of execution of the decision of Pusey J made on 21 March 2013 in which he ordered that:

> 1. the applicant's claim be struck out;
> 2. judgment be entered for all the respondents against the applicant;
> 3. judgment be entered for the 5th respondent against the applicant and the defendant to the counterclaim (one Aldith Ellis, who is not a party to the appeal);
> 4. the 5th respondent is the mortgagee of the applicant's property located at Chelsea Manor in Kingston 5, in the parish of St Andrew, being all that parcel of land registered at volume 1253 folio 552 of the Register Book of Titles, the 4th respondent having assigned to the 5th respondent the applicant's mortgage, which had initially been given to the 1st respondent;
> 5. until all sums due and payable by the applicant under a letter of commitment had been paid, the 5threspondent is entitled to exercise all of its rights as mortgagee by assignment in respect of the above-mentioned property;
> 6. the 5th respondent is the second mortgagee of land located at 14 Penfield Avenue, Forrest Hill Gardens, Kingston

19 in the parish of St Andrew, being all that parcel of land registered at volume 1096 folio 858 of the Register Book of Titles, being land which is owned by the applicant and Aldith Ellis, the 4th respondent having assigned to the 5th respondent the mortgage in relation to that property, which mortgage was initially given to the 1st respondent;

7. until all sums payable under a letter of commitment have been paid, the 5th respondent is entitled to exercise all its rights as a second mortgagee by assignment in respect of the Penfield Avenue property; and

8. costs of the proceedings to the 2nd, 3rd and 5th respondents to be paid by the applicant.

[2] The orders were in terms of the reliefs sought on an application to strike out which was filed by all the respondents. The grounds relied on in support of those applications were that the applicant had failed to comply with an order made by P Williams J, which had been extended by K Anderson J; the circumstances justified the making of the orders sought; and the overriding objective of the Civil Procedure Rules (CPR) favoured the grant of the application.

[3] The application for stay of execution and injunction was supported by an affidavit of the applicant sworn to on 27 March 2013. In that affidavit the applicant stated that on 21 March 2013 Pusey J had struck out the claim for failing to file a

witness statement and accounting. She stated that the failure to do so had not been her fault but the fault of her previous attorneys, Lord Gifford QC, who had been seriously ill and who had instructed Mr Glenroy Mellish to act, but Mr Mellish had not complied with those instructions. She said that new material had since come to light which could explain why he had not complied with the instructions.

[4] The applicant further deposed that she had been unrepresented at the hearing as she had been unable to obtain counsel to represent her at that time. She contended that the order would result in significant prejudice, hardship and irreparable damage to herself and her elderly infirmed mother if the 5th respondent were allowed to act on the order, as they would be rendered homeless and would thereby suffer irreparable financial and psychological hardship and loss.

[5] In order to appreciate the circumstances in which the application was brought and the orders made, it is necessary to examine the history of the litigation. The matter initially started in 1999, was unable to proceed due to procedural deficiencies and was filed again in May 2004. When the application came before Pusey J, although there had been several trial dates, the claim had yet to be tried having been filed nearly nine years before.

[6] In the claim the applicant sought orders for, among other things: a declaration that all sums borrowed from the 1st respondent had been duly paid; a declaration that the applicant is not indebted to the "defendant"; a statement of account from the 1st respondent to the applicant showing any sums due and owing by the applicant to the

1st respondent arising out of the relationship of client and banker; and a declaration that the applicant having settled its indebtedness with the 1st respondent, that the 1st respondent returns to the applicant all the securities held by it, or an order that each or any of the respondents that may be in possession of the securities return same to the applicant free from any encumbrances save the restrictive covenants endorsed therein.

[7] In her particulars of claim, the applicant asserts that on or around 12 May 1994, she had had a demand loan account in the amount of $1,200,000.00 and an overdraft facility in the amount of $1,300,000.00 for which the agreed interest rate was 68% per annum. In September of 1994, she requested in writing that the overdraft be converted to a loan, but this was not done at the time and in October 1994, she attempted to clear the demand loan by delivering two cheques in the sum of $1,500,000.00 and $131,200.00 to the 1st respondent, which she asserts, were sufficient to pay out the loan. Despite this, the loan was never cleared and the money was applied to the overdraft facility and the overdraft facility was increased on a monthly basis to pay the demand loan, to which she did not consent. She alleges that as a consequence unlawful and penal charges were applied to her overdraft account with the result that the account had exceeded its agreed limit and was attracting penal rates. Sometime during this period, the Chelsea Manor property was pledged as security.

[8] The applicant further asserts that representations were made by agents of the 1st respondent that her account would be investigated and adjusted and in anticipation of this, she entered into further financial arrangements and made "good faith payments"

on the account. The 1st respondent, however, failed to honour its representations, and under threat that her Chelsea apartment would be sold, she executed a mortgage over the Penfield Avenue property. An investigation was eventually done and it was the view of the credit administrator who conducted the report that the applicant had been overcharged amount. However, the applicant was dissatisfied as the period under investigation was not the entire period of the loan as she had requested. The applicant asserts that the overcharged amount has never been refunded and her efforts to have it refunded and the entire period of the loan investigated were hampered. In the process the loan was converted to a United States dollar facility with the consequence that further charges for the conversion of the account were unlawfully levied on her account. She asserts that these sums are owed to her with interest at the rate charged by the 1st respondent. She further asserts that there had been no upstamping or further registration of a security interest on the "subject property". The applicant also asserts that under the threat of the impending sale of her property, she engaged the services of a Mr Dalma James to conduct a forensic audit. The audit, which was conducted on the basis that the interest rate should be compounded annually instead of at monthly rests, identified "several discrepancies resulting in the clear conclusion that the [applicant] has overpaid" the 1st respondent.

[9] In its defence, the 1st respondent admits that the interest rate for the facility was 68% per annum. It does not deny failing to convert the overdraft, but it instead has asserted that it did not think it prudent to do so as the demand loan was in arrears and

the agreed terms of the repayment had not been adhered to. It admits receiving the cheques to close the demand loan account but states that the amount was insufficient to close the account. It denies any finding by any of its officers that it had overcharged the applicant and the ensuing discussions to reimburse her. Further, it accounts for the United States account by stating that the applicant had requested financing in United States currency, which had been granted and it denies taking any action on the account without the applicant's authorization. It further denies any unlawful charges being levied and instead outlines a series of transactions and events explaining how the applicant came to be owing certain sums. It also denies that there had been no further registration of a security interest on "the property". The 1st respondent further states that by deed of assignment dated 30 September 1998, it transferred the mortgage to Refin Trust. A defence was also filed by the 5th and 6th respondents in which they deny that the interest was 68% per annum, asserting instead that this rate was variable at the discretion of the bank and that interest was payable monthly in arrears.

[10] In his affidavit filed on 11 April 2013, Mr Rudd, on behalf of the 5th and 6th respondents, from records of the loan which had been sold by the 1st respondent, stated that in or about 1993, the applicant did have loan facilities and overdraft facilities with the 1st respondent, which was evidenced by letters of commitment and secured by, among other things, mortgages over the two properties. He indicated that the applicant had paid in full various loan facilities but had chosen to renew the overdraft facility. Applications were made by her in 1995 to increase her credit line and overdraft limit. Mr Rudd's affidavit indicates that at the time that the applicant had applied to the bank

for the overdraft to be converted to a demand loan, the overdraft limit had been exceeded by over $300,000.00. Additional funds were applied for and funds disbursed. Her payments fell into arrears and in 1996, she again requested that the overdraft facility be converted into a demand loan. The 1st respondent requested that the applicant pay the overdraft balance. In relation to the applicant's assertion that an employee had agreed that the overdraft account would be converted to the loan account, Mr Rudd stated that although the 1st respondent's records did not reveal this, the 1st respondent did recalculate the balance due on the overdraft as if it had been converted to a demand loan. The result, he stated, was a decrease in the amount owed. Therefore, the amount which the applicant had claimed had been an overpayment had actually been the figure by which the applicant's indebtedness had been reduced. He also asserted that the United States dollar facility was extended as a result of the applicant's application for financing to restructure an existing demand loan. Mr Rudd stated that originally the United States dollar loan had been given in the amount of $143,000.00 but the applicant's indebtedness was US$431,125.65 as at 4 September 2012.

[11] The matter appears to have been first set for trial in June 2008. The applicant's witness statement was filed in February 2008, and her listing questionnaire on 2 March 2008. Pre-trial review was set for 4 March 2008. The listing questionnaire was filed by the 2nd and 3rd respondents on 4 March 2008, by the 5th and 6th respondents by 11 April 2008, and the statements of facts and issues were filed by all respondents on 11

April 2008. In April 2009, the applicant's attorneys, who were then Watson and Watson, filed an application for the firm's name to be removed from the record.

[12] On 20 October 2009, the trial of the action was adjourned at the request of the applicant because she was unrepresented. A case management conference was set for 19 March 2010 but was adjourned to 22 September 2010 on the application of the applicant's new attorney, Lord Anthony Gifford, Queen's Counsel. Trial dates for 7-11 February 2011 were fixed. However, on 22 September 2010, additional time was given for the preparation of the case for trial and the matter was removed from the trial list because the 5th and 6th respondents' witness, Miss Janet Farrow, had resigned and removed from the jurisdiction. An agreed bundle of documents and a bundle with witness statements were filed by the applicant on 13 January 2011. An application was filed by the 5th and 6th respondents for Mr Rudd, who was the new officer employed by the 5th respondent, to give evidence in place of Miss Farrow. Written submissions by the applicant and a supplemental witness statement of the applicant were filed on 18 October 2011. On the trial date, 31 October 2011, on the request of Lord Gifford, P Williams J adjourned the trial to September 2012 and made an order that the applicant, the 1st, 4th and 5th and 6th respondents do an accounting of the relevant accounts of the applicant by 31 March 2012. She also ordered that Mr Rudd would give evidence instead of Miss Farrow. Mr Rudd's witness statement was filed in November 2011.

[13] On 28 March 2012, the applicant applied for an extension of time within which to comply with the order for accounts. This was granted by K Anderson J to 30 June 2012.

The 5th and 6th respondents did their accounting by way of a supplemental witness statement of Jason Rudd filed on 30 March 2012. The applicant filed an application in person seeking to rely on the 2002 to 2004 report of Mr James and on 24 September 2012 an affidavit in relation to the said report of Dalma James was filed. On 24 September the trial was adjourned as the applicant's attorneys removed their names from the record, and a new trial date was set for 14 October 2013. The application of the 5th and 6th respondents dated 12 September 2012 to strike out the claim and for judgment on the counterclaim was fixed for 14 February 2013. On 4 February 2013, the 1st and 4th respondents filed an application to amend their defence and in the alternative for the claim to be struck out for non-compliance with the orders of Williams J and Anderson J. On 5 February 2013, the 2nd and 3rd respondents also filed an application to strike out the claim for non-compliance with the said court orders.

Judgment of Pusey J

[14] Pusey J stated that the claim of the applicant involved her loan facilities initially with the 1st respondent. The 1st respondent, he said, went through changes consequent on the banking crisis of the 1990s. This resulted in the loans being passed on to the 2nd and 3rd respondents then the 4th, 5th and 6th respondents. The applicant, he stated, disputed that any loan still existed and asserted that she had been overcharged interest by the banks. He referred to the particulars of claim filed on her behalf, wherein it stated that the applicant having been dissatisfied with the accounting

report prepared by the 3rd respondent agreed with her attorneys to retain a forensic auditor to investigate the account comprehensively, as the bank had failed to do that.

[15] Pursuant to that agreement the applicant, he stated, pleaded in paragraph 39 of the particulars of claim, that:

> " The Claimant subsequently retained Chartered Accountant Mr Dalma P James to conduct a forensic audit of her statements of accounts and contract documentation and this account when it was supplied to her identified several discrepancies resulting in the clear conclusion that the Claimant has overpayed [sic] the 1st Defendant bank and the Claimant accordingly claims the refund of the amount overpayed [sic] by her at the same rate of interest charged by the Defendants and using the same method of computation of costs."

The learned judge noted the applicant's intention to rely on the report of Mr James.

[16] He referred to the trial date of June 2008, which was adjourned due to a death in the family of the applicant and the fact that at least one other trial date had been adjourned so that the applicant could instruct new attorneys. He mentioned the orders made by P Williams J on 31 October 2011, with the deadline of filing accounts by 30 March 2012, which was later extended by K Anderson J until 18 July 2012, on the application of Lord Gifford, on behalf of the applicant, who indicated that an account would have been prepared by one Dawkins Brown.

[17] The learned trial judge set out the arguments of counsel for the respondents which were very similar to those expressed before me, which I shall refer to later in this

judgment, emphasizing the fact that the applicant required the report to substantiate her case and had been recalcitrant in not providing the same for such a protracted period of time. Counsel for the 2nd and 3rd respondents indicated that no order for an accounting had been made in respect of them. Counsel for the 1st and 4th respondents indicated that although an order had been made in respect of those respondents and, there had been non-compliance thereof to date, and that he was applying for time in order to comply, he nonetheless supported the application of the other respondents and hoped to obtain the benefit of the success of their applications.

[18] The learned judge made specific note of the fact that the applicant was unrepresented and the obvious position of disadvantage that that may have put her in, but stated that having recognized that fact, he had given her sufficient time to explain her position, which was that she intended to rely on the report of Mr James dated 2002 as she had always intended to do, as can be discerned from her pleadings. This was so, the judge noted, even though the application before Anderson J had referred to a new report of Mr James.

[19] Counsel for the 5th and 6th respondents submitted that reliance on the report of Mr James filed previously in 2002, could not be used "to thwart the order of the court" as that report had been filed before the order of P Williams J which order had been made at the request of Lord Gifford.

[20] The judge noted that the applicant wished additional time in order to obtain a further report from Mr James. He noted her obvious difficulty in arguing her case and

the fact that she had been deprived of the representation of Lord Gifford due to illness, but noted that she had been represented by at least four other attorneys since then, and that the attorneys who had represented her at the last trial date in September 2012 had since removed their names from the record.

[21] The court held that there had been sufficient time for the applicant to have obtained alternate representation and, also to have produced at least a draft accounting report for the court to review. He struck out the claim and ordered costs to all counsel save and except counsel representing the 1st and 4th respondents, as those respondents had not yet complied with the order of P Williams J.

[22] The learned judge made no mention whatsoever of the counterclaim filed by the 5th and 6th respondents.

The application - The submissions

For the applicant

[23] The thrust of the submissions by counsel for the applicant was that the substance of her claim was that she had honoured all her obligations to the banks, so the securities held by the banks in respect of her previous indebtedness, ought to have been released. Her main complaint was that the learned judge had erred in striking out her claim, as she had been unrepresented at the hearing of the application and the 1st and 4th respondents had also not complied with the said orders that were under review before the learned judge. Counsel complained that some of her delinquency before the

court related to a period when her counsel Lord Gifford QC had been ill. He had been her counsel of choice and had been unable to appear due to illness.

[24] Counsel submitted that the learned judge had not properly exercised his discretion in the matter and had not taken all the relevant circumstances into consideration.

[25] He referred to the threshold for the grant of a stay of execution of a judgment namely (i) that the applicant must show some prospect of success, (ii) that if the stay is not granted that she would be financially ruined or the appeal would be rendered nugatory and (iii) that the interests of justice would favour the grant of the stay. He submitted that in the instant case the applicant had met the threshold in all aspects.

[26] Counsel referred to the long and unfortunate history of the matter through the courts with its many trial dates and stated that not all the delay which had occurred in the matter was as a result of the applicant's actions. He said that when the trial was adjourned in February of 2011, at the behest of the 5th and 6th respondents there was a delay of nine months, and in October 2011 when the matter went before P Williams J the affidavit on which they intended to rely at the trial which had caused the initial delay in February had still not been filed.

[27] Counsel referred to several authorities in support of the application, namely **Capital Solutions Ltd v Terryon Walsh et al** [2010] JMCA App 4 and **Alexander Drysdale v Farquharson and Green** Claim No 1994/D130, delivered 16 April 2008,

to submit that the learned judge erred as he had not properly assessed the situation before him. What the applicant needed, he submitted, was an adjournment and although she did not specifically make such an application, her intention to put her house in order in respect of the expert of her choice, Mr James, was indicative of that position. The evidence before the court, he submitted, had not disclosed that the applicant had taken a cavalier approach to the litigation. She had throughout the years been vigorously prosecuting her case. The learned judge, he maintained, as an alternative to striking out the claim, could have made an unless order. Counsel submitted that even if the delay which had occurred since the order of K Anderson J, that is approximately eight months, and 16 months since the order of P Williams J, which latter period he stated could be considered inordinate, the real question was whether the case could still be dealt with justly. None of the counsel had submitted that had the trial date, which at the time was still pending, been observed, that anyone would have been prejudiced. There had been nothing before the court to suggest, that the applicant's main witness could not produce what was required of him, or was not available to give the evidence required to prove her case. The bank documents, he submitted, were still available. As a consequence, counsel argued, the exercise of a discretion utilising the overriding objective would require that the claim be restored.

[28] Counsel relied on **Ward v James** [1966] 1 QB 273 to contend that the reasons given by the learned judge for taking the draconian step that he did were insufficient and there was more than a real chance that it would be set aside on appeal. He referred to **Evans v Bartlam** [1937] AC 473 for the principle that a final judgment

ought not to be entered in a case without the court hearing the true contest between the parties, and that position, he submitted, ought to find favour with the Court of Appeal also. All the relevant cases suggested, he stated, that a balancing exercise ought to have been conducted with regard to the interests of the parties before the court and, counsel submitted, the learned judge had not done that in this case. Counsel submitted that the applicant had a real chance of success and if the securities were sold in order to obtain a debt not owed, the appeal would be nugatory and the applicant would be financially ruined, which is why the stay should be granted pending appeal.

[29] With regard to the injunction prayed for, counsel stated that this case could be distinguished from others previously decided in this court, namely **SSI (Cayman) Limited v International Marbella Club SA** SCCA No 57/1986, judgment delivered 6 February 1987 (**Marbella**)and **Mosquito Cove Ltd, Grange Hill Farms Ltd and Francis Agencies Ltd v Mutual Security Bank Ltd et al** [2010] JMCA Civ 32, (**Mosquito Cove**) as the applicant in the instant case brought the case to court for declarations stating that the mortgagees have no further interest in the securities and should hand them up as all their loans have been paid. There would be no basis to exercise their alleged powers of sale. The mortgagees, he submitted, are also not prejudiced in the interim if the injunction were granted as they still, although they should not, have control over the applicant's properties. There is clearly a serious question to be tried and in keeping with the principles enunciated in **American**

Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 damages would not be an adequate remedy, he argued, and the balance of convenience favours the applicant.

For the 1st and 4th respondents

[30] Counsel indicated that in addition to the application for extension of time to comply with the order of P Williams J and for the striking out of the claim, there was also before the court on behalf of the 1st and 4th respondents, an application to amend the defence to plead the statute of Limitation of Actions, but this had not been served on the applicant, due to difficulties being experienced in effecting service on the applicant as a result of her changing legal representation, and so it had not been properly before Pusey J.

[31] Counsel submitted that based on the applicant's detailed pleadings, it was incumbent on her to file an accountant's report to prove her case. It was her case that the banks had done certain things and had caused her loss, and she claimed that she owed them nothing. But before Pusey J, he submitted, there was no evidence to support her case. There was no witness statement. Counsel maintained that an accounting report from a different accountant should have been provided and, not a further report from Mr James, but there was no indication that any such report was in the process of being produced. Counsel submitted that the affidavit of the applicant filed in support of this application referring to instructions given by Lord Gifford which had not been complied with and, further information from Mr James supportive of that

allegation, was fresh evidence as it had not been before Pusey J. More importantly, it did not comply with the principles enunciated in **Ladd v Marshall** [1954] 3 All ER 745. It would not, he submitted, be accepted as evidence on appeal and should be disregarded as being irrelevant to the application before me.

[32] Counsel commented on the fact that the applicant had had at least four sets of attorneys and could not accurately complain of Lord Gifford's illness as a reason for her inability to file the accounting as ordered, as he had ceased to be her attorney some time before the hearing of the application by Pusey J. He also stated that although the 1st and 4th respondents had not filed the said accounting ordered by P Williams J, their case did not depend on the same, as the applicant's case did. He referred to the detailed information supplied by Jason Rudd and stated that although he had filed an application for extension of time to comply with the order of P Williams J, the 1st and 4th respondents also intended to rely on the affidavit of Jason Rudd, particularly as the 1st respondent no longer existed, and the 4th respondent had sold the applicant's debt to the 5th and 6th respondents.

<u>For the 2nd and 3rd respondents</u>

[33] Counsel traced the history of the assignment of the applicant's debt and submitted that the 2nd and 3rd respondents only had responsibility for the loan for a period of approximately four and one-half months, during which time two letters had been written demanding payment, but no monies had been paid. Counsel contended that the learned judge had dealt with the applications before him appropriately. Pusey J, he stated, had recognized that the applicant was unrepresented, but, he reiterated,

the illness of Lord Gifford had no bearing on the applicant's situation, as she ought to have obtained alternative representation. It was apparent that she had attempted to do so, as she had contacted Hugh Small QC, but her most recent attorneys-at-law had removed their names from the record.

[34] He indicated that the trial date had only been set in case the application to strike out the claim had not succeeded. The applicant had not requested an adjournment, instead she had indicated that she intended to rely on the "old" report of Mr James, yet when Lord Gifford had made the application before P Williams J it had been, it was submitted, on the basis that Mr James' report which was before the court was defective, which was why the order was made for the parties to "do accounting". But it appeared that before Pusey J the applicant then had no intention of providing any other accounting report, which had been expected. The learned judge, it was submitted had to deal with the matter as it stood before him, and was correct in striking out the claim, and the appeal, he submitted, must therefore fail.

[35] Counsel submitted that if the application before me was requesting an order to deprive the mortgagees of their right to foreclosure on their security, the authorities are clear that except in very exceptional circumstances, the mortgagor must bring the amount claimed by the mortgagee into court if he/she wishes to restrain the sale of the security. Counsel maintained that on the above bases the application ought to be refused.

For the 5th and 6th respondents

[36] Counsel referred to the detailed affidavit of Jason Rudd in opposition to the application and the challenge to Mr James' report. He stated that in the latter the accounts had been computed on the basis of interest being compounded annually and not at monthly rests as the mortgage deed requires. This, he said, was one of the bases why the report had been seriously attacked by the respondents and why, he submitted, Lord Gifford was of the view that some other person was required to assist the applicant in proving her case.

[37] Counsel also indicated that there had been no affidavit filed in response to the affidavit of Jason Rudd and no defence had been filed to the counterclaim filed by the 5th and 6th respondents. The exhibits attached to the affidavit of Jason Rudd showed that no payments had been made by the applicant on the loan of US$146,737.000.

[38] Counsel submitted that the learned judge knew that there was a trial date pending although he had not referred to it in his judgment, but he had dealt with the main matters before him for consideration, namely that the accounting was central to the applicant's case, and that she had not complied with two orders of the court. It was clear to all, he submitted, that the applicant could not proceed with Mr James report. Counsel submitted that in the absence of the defence to the counterclaim, and no reference to it in the notice of appeal, the appeal could not succeed in that respect alone, and the application for the stay of execution ought not to be granted. Counsel relied on **Mosquito Cove**, **Billy Craig Investments Limited v Fletcher and Company** Claim No 2009 HCV 02459 delivered 22 January 2010 and **Weir v Tree**

[2011] JMCA App 17 in support of his submissions opposing the grant of the stay of execution and the injunction restraining the disposal of the properties at Chelsea Manor and Penfield Avenue.

[39] At my request, counsel addressed the opinions expressed in **RBTT Bank Jamaica Limited v YP Seaton and Others**, SCCA No 107/2007, delivered 19 December 2008 a case out of this court, on this area of the law. He maintained that the case at bar was distinguishable as the facts in the instant case were radically and significantly different. He said that whereas in **RBTT Bank Jamaica Limited v YP Seaton** the application before Sykes J was an application to vary a previous order made by him, in order that a witness summary could be filed, Pusey J had nothing on which to exercise his discretion. Mr James' report had been exposed as defective and so the learned judge dealt with the matters as they were before him, which was non-compliance with two orders of the Supreme Court.

[40] In response, counsel for the applicant submitted that the **RBTT Bank Jamaica Limited v YP Seaton** case was applicable and the other authorities were not, as there was much that the applicant could have argued in her favour, but she was unrepresented and, was unaware of the principles on which she could have relied.

Analysis

[41] Part 2.11 (1) (b) of the Court of Appeal Rules (CAR) states as follows:

> "2.11 (1) A single judge may make orders:
>
> (a)….
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal;"

Rule 2.14 reads thus:

> "Except so far as the court below or the court or a single judge may otherwise direct-
>
> (a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and
>
> (b) no intermediate act or proceeding is invalidated by an appeal."

Thus one does not automatically obtain a stay of execution on the filing of an appeal but a single judge can make such an order during the pendency of the appeal.

[42] The threshold for the grant of a stay and the principles to be considered and applied on the hearing of the application have been settled for some time in this court. There must be material provided to the court which shows that the appeal has "some prospect of success". Then the court must examine whether there will be injustice to either side on the grant or the refusal of the stay. In doing so, the court must consider the following questions: Will the appeal be stifled, if the stay is not granted? Will the opposing party be able to enforce the judgment if it is? What are the risks inherent in the grant or refusal of a stay? Is there the possibility of irreparable harm to either party or financial ruin? What ought the court to do in balancing the interests of justice? What is also clear is that the discretion whether to grant or refuse a stay is an

unfettered one (see **Watersports Enterprises Ltd v Jamaica Grande Ltd and Ors** SCCA No 110/2008, Application No 159/2008, (delivered 4 February 2009), **Hammond Suddard Solicitors v Agrichem International Holdings** [2001] EWCA 2065, **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Services Limited and Another** [2011] JMCA App 1, **Reliant Enterprises Communications v Twomey Group and Anor** SCCA No 99/2009, Application Nos 144 and 181/2009, delivered 2 December 2009).

[43] The application before the court below was made under rule 26.3 (1) of the Civil Procedure Rules (CPR) which states:

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-
>
> (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;…

[44] There does not appear to be any question that the order of P Williams J and that of K Anderson J extending the time within which to comply had not been strictly obeyed. The question for me at this time is where do the interests of justice lie? Will a greater injustice be caused by the grant or the refusal of the stay of execution? I am mindful also that this is an application for a stay of execution of a judgment and the issues between the parties are the subject of an appeal, so at this stage, I should not give my view of the merit of the different positions of the parties (see **Sewing Machines Rentals Limited v Wilson and Anor** [1975] 3 All ER 553).I am also

mindful, as one must be when assessing an application for a stay of the execution of a judgment, and therefore the merits of the appeal, that this court will only interfere with the exercise of the discretion of the learned judge in the court below if he has gone palpably wrong (**Hadmor Productions v Hamilton** [1982] 1 All ER 1042). Accordingly, I will only make a few comments on some of the issues which will arise on appeal, and on a few of the relevant authorities, in an effort to assess whether the appeal has "some prospect of success" and in order to balance the interests of justice.

[45] The phrase that the court will have to review relative to the order of P Williams J is to "do an accounting". The questions that the competing positions pose in my view are inter alia:

(i) Could those words requiring the applicant to "do an accounting," in the context in which they were made, include the filing of Mr James report of 2002 updated in 2004 or was it clear that the order was only referable to a new report?

(ii) Was there any residual useful effect of Mr James' report which could be annexed to a witness statement and filed on behalf of the applicant, and still be in compliance with the order of P Williams J?

(iii) Could a further report of Mr James have been effected within a reasonable time frame?

(iv) Was the attack on Mr James' report such that the applicant could not proceed unless with a report from another person/ accountant?

(v) Could a further report of Mr James or of another accountant have been achieved in time for the preparation of the trial by all the parties?

(vi) Could the production of such a report have been obtained through the use of an "unless order"?

(vii) What can be concluded by a review of the chronological history of the litigation?

(viii) Has there been compliance throughout by all the parties?

(ix) Has there been delay by any of the other litigants?

(x) What is the effect of the non-compliance by the 1st and 4th respondents in respect of the same orders at that stage of the proceedings with eight months left for the trial?

(xi) Did the learned judge give sufficient consideration to the fact that a trial date had been set and was eight months away?

(xii) Could that trial date still have been achieved?

(xiii) Was there evidence of compliance generally on the part of the applicant, for instance, with regard to case management

orders, for example, pre-trial memorandum, listing questionnaire, witness statements and disclosure?

(xiv) Was the striking out of the claim proportionate to the infraction?

(xv) Could costs have been a more appropriate sanction?

(xvi) Was there any prejudice deposed to by any of the respondents?

(xvii) Was any prejudice discernible from the evidence?

(xviii) Was the failure to comply with the orders the fault of the applicant or her attorneys-at-law?

(xix) What effect does the order have on the administration of justice and does it comply with the overriding objective?

(xx) Was the delay inordinate? What was the reason given for it? Was there merit in the claim?

[46] In my opinion, if any of the questions listed above could be answered favourably for the applicant then it could not be said that the appeal is unarguable. If Mr James' report which existed at the time of the hearing of the application and or a further report could have been produced and annexed to his witness statement within a reasonable time so that it could neither embarrass nor prejudice the respondents in their preparation of the trial, so that the trial date in October 2013 could have been met, then the appeal has some prospect of success. The court will have to examine the history of the representation of the applicant, particularly with regard to Lord Gifford and what

role, if any, his illness played in relation to the same, and the changing subsequent representation with the removal of the names of Watson and Watson from the record. The latter seemed to me to be an agreed position with the applicant, as Watson and Watson only appeared to go on record to apply for the adjournment of the trial in October 2011, and so the removal of their names from the record immediately thereafter would not have come as a surprise. What is of some importance, however, and for which I have not been able to find any explanation, is the fact that the learned judge made no mention whatsoever of the counterclaim in his reasons for judgment, and there does not appear to be any information in the affidavit of Jason Rudd to explain the failure by the mortgagee to endorse the mortgage on the certificate of title of the Chelsea Manor property and or to support the declaration asked for in relation to it, which would have grounded the order made by Pusey J. Although no defence had been filed, there ought still to have been, I would have thought, some material before Pusey J to support the order. These, however, are all matters for the determination of the court on appeal.

[47] Essentially as the orders made by P Williams J and K Anderson J did not include any specific sanctions, the question must arise as to whether the court was exercising its discretion under rule 26.9(3) of the CPR where the court has the power to "put matters right," and would therefore have been applying the principles applicable, and also well settled in this court, with regard to an extension of time for complying with a rule, practice direction or order of the court. Of course, in this case an extension of time for compliance had already been given, so the court would have had to consider that also.

[48] In **Leymon Strachan v the Gleaner Co Ltd and Dudley Stokes**, Motion No 12/1999 delivered 6 December 1999, in considering whether an extension of time should have been granted to apply for leave to appeal, Harrison JA (as he then was) reiterated that the discretion must be judicially exercised. He recognized that the rules and orders of the court must be obeyed. The court also should only exercise its discretion if there is material before it on which it may do so. The length of the delay and the reasons for it must be considered, also the merit of the case, and whether any prejudice may be suffered by the opposing side. He indicated that the modern view of the principles influencing the grant of an extension of time for the filing of process was reflected in the case of **Finnegan v Parkside Health Authority** [1998] 1 All ER 595, which held that the absence of a good reason for the delay (and in that case no reason had been given) was not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension of time. The court however must consider all the circumstances of the case, "to recognize the overriding principle that justice must be done".

[49] In **Peter Haddad v Donald Silvera** SCCA No 31/2003, Motion No1/2007 delivered 31 July 2007, Smith JA on behalf of the court endorsed the principles stated by the court in **Leymon Strachan**, but clarified with reference to the dictum of Lord Edmund Davies LJ in **Revici v Prentice Hall Inc** [1969] 1 All ER 772, in which it was stated that if there was non-compliance, it must be explained away as "prima facie, if no excuse is offered, no indulgence should be granted..", to confirm that although the absence of a good reason for the delay is not in itself sufficient to justify the court in

refusing to exercise its discretion to grant an extension, "some reason must be proffered". The applicant had given some explanation for the delay before Pusey J, namely that the report was to be put in a format that would allow it to be used in court and that the accountant retained had failed to honour his obligation, and the explanation given to me as indicated previously (para [3] herein) was that her former attorney, Lord Gifford, had been ill and the subsequently instructed attorney had failed to act in accordance with her instructions. This court will have to determine which was the relevant reason for the delay and, if it was sufficient. But whatever the reason, one could not say that there is not some chance of success on that basis.

[50] This court has also given guidance in respect of the exercise of a discretion by a judge to grant an extension of time in **RBTT Bank Jamaica Limited v YP Seaton**. In that case the trial date was being adjourned, as the witness statements of the respondent had been filed but were late, the agreed bundle of documents had not been filed, and the claimant had not filed any witness statements at all. The claimant wished to file a witness summary as the only witness for the bank had been giving difficulties with regard to the production of the witness statement, which situation had not been disclosed at the pre-trial review. A new trial date had been set and there was a companion suit in which the parties were the claimant and defendants in reverse. The learned judge struck out the claim as he would not vary the unless order made by him to allow for the production of the witness statement to the production of a witness summary. The claimant was unable to provide the witness statement as ordered.

[51] This order was overturned on appeal. Panton P found that the learned judge fell into error as he had turned his mind to the history of the case and he had not been favourably disposed to the application as he found that the appellants had not been as frank to the court as they should have been. It was his view that:

> " …the learned judge fell into error by adopting this approach to the application. He had already given a command for a new trial date to be fixed. That had been complied with and a date set for March, 2009.He was simply being asked to replace the stipulation for a witness statement by a witness summary. Rule 29.6(1) of the Civil Procedure Rules, 2002 provides that a party who is required to serve a witness statement but is unable to obtain same, may serve a witness summary instead. In that situation, the party must certify why the statement could not be obtained. The summary must contain the name and address of the witness, and must be served within the period in which the statement would have been served.
>
> 7. In the circumstances, rule 29.6(1) was applicable. The learned judge ought to have been looking ahead, not backward. A trial date had been fixed, the focus ought to have been on facilitating the trial. The situation will be certainly different if the trial date arrives and the applicant is unable to proceed. For these brief reasons therefore I join with my learned brothers in saying that there is merit in the appeal, and it ought to be allowed."

Cooke JA expressed his concerns in this way:

> "17. In para. 42 of his judgment the learned trial judge is very concerned that because of the non-disclosure by the appellant of its difficulties, the court mistakenly set a trial date which allotted five days. The aspect of non-disclosure has been hotly contested. It is unnecessary for me to resolve this. At the time when the court heard the appellant's application a new trial date of the 3rd March, 2009 had already been set. That was the status of the litigation in respect of a hearing date. It means therefore that at this stage the court should not be casting its eyes backward. The future beckoned. In my view the court below

> should have concentrated on the application before it. Alas, it seemed it was more interested in punishing the appellant for its past delinquency. The application ought to have been determined, within the context of the circumstances which then obtained."

In this matter, the application before Pusey J was heard in February 2013 and the trial date had been fixed for October 2013. It will be a matter for this court to decide how the principles expressed in the **RBTT Bank Jamaica Limited v YP Seaton** case are to be applied to the instant case.

[52] Although no application had been made for an adjournment of the application to strike out the claim before Pusey J, since the applicant was seeking time to file a witness statement of Mr James with the report attached, for this to be done, an adjournment of the applications would seem to be implied before the application for a further extension of time to file the report could occur. The court is empowered by rule 26.1(2)(d) of the CPR to grant an adjournment. In **Boyle v Ford Motors Co Ltd** [1992] 1 WLR 476, which related to the adjournment of a trial date and not an application to strike out the claim for failure to comply with a court order, the English Court of Appeal held that although it was the task of the court to confront avoidable delay by vigorous control of applications for postponement, if justice could not be done if the hearing date was maintained, the matter would have to be postponed and the consequent delay would be unavoidable. The court also held that justice although impeded by delay might be defeated if administered on the basis of partially prepared cases. **Boyle v Ford Motors** was endorsed in the dictum of Downer JA in **Wilmot Perkins v Noel B Irving** SCCA No 80/1997, delivered on 31 July 1997. The court will have to assess whether in the

interests of justice an adjournment ought to have been granted rather than an order striking out the claim.

[53] The learned trial judge did not deal with the merits of the claim in his judgment, so I will say very little on it save to say that it has always been the applicant's case that she did not owe the respondents any sums at all, though of course, the defence of the respondents was to the contrary. Although Mr James had made some wrong assumptions in his report, it would appear that the competing averments on the respective accounts would have to be subjected to independent judicial analysis in order to assess whether her claim has any merit, that is if she were to succeed on the appeal. As indicated previously, no prejudice has been deposed and the securities are held by the 5th respondent. The remaining respondents have no interest in the allegedly outstanding sums.

[54] In the light of all that I have said above, I am of the view that there is a real prospect of success on appeal. I am also of the view that a refusal of the stay will cause more irremediable harm to the applicant than the respondents, and therefore, in the interests of justice, I would grant a stay of execution of the judgment of Pusey J pending the determination of the appeal.

The application for the injunction

[55] Rule 2.11 of the CAR empowers a single judge to grant an injunction pending appeal. The appropriate test to be applied in these circumstances is whether the

appellant has a reasonable ground of appeal (see **Michael Levy and Jamaica Redevelopment Foundation and Anor** SCCA No 26/2008, Application No 47/2008, delivered on 11 July 2008). I have already assessed the merits of the appeal, which concerns whether Pusey J was correct in acceding to the application to strike out, and concluded that there is some merit in the grounds. It follows that the question as to whether there is a reasonable ground of appeal in relation to the grant of the injunction must be answered in the affirmative. In my view, it is not necessary then to examine whether there is a serious question to be tried in relation to the substantive claim that the sums owed have been repaid, as this is not the subject of the appeal. In any event, I am of the view that although this matter touches and concerns the calculation of accounts, it is significant that there is a factual dispute between the parties as to, inter alia, whether any penal sums were unlawfully levied on the applicant's account, whether the demand loan should have been closed or extinguished in 1994 and whether the United States dollar facility had been requested by the applicant; these may very well have a significant impact on the calculation of the accounts by the mortgagee. Therefore, notwithstanding the fact that Mr James' report may have been based in part on an incorrect assumption as to the calculation of interest, there is a serious issue as to whether there are any sums owing.

[56] Having decided that there is a reasonable ground of appeal, or alternatively that there is a serious question to be tried, the question of the adequacy of damages arises. I recognize that there are decisions to the effect that a mortgagor who pledges his home as security, ought to have contemplated that the property would be sold in the

event of a default and as such damages ought to be an adequate remedy (**Patvad Holdings & Ors v Jamaica Redevelopment Foundation** 2006 HCV 01377, delivered 9 March 2007). However, it may be of significance that at the outset, it appears that the applicant had not contemplated using the properties as security and it was having been faced with a challenge as to the servicing of her debts, she pledged the properties. Further, in **Global Trust Limited & Anor v Jamaica Redevelopment Foundation** SCCA No 41/2004, delivered 27 July 2007, in assessing whether damages would be an adequate remedy for the mortgagor, Cooke JA in concluding that damages would be an adequate remedy considered that there was "no particular or any intrinsic value attributable to the mortgaged property which would defy ready monetary conversion". There is no doubt that there is adequate compensation for the value of the house, but it is doubtful whether depriving the mortgagor of a place to make available for her elderly infirmed mother and the "irreparable psychological hardship and loss" that would follow, may be regarded as being of a value, which cannot be adequately compensated. It is clear, however, that damages would be an adequate remedy for the 5th respondent although the ability of the applicant to pay it is in doubt. I am therefore inclined to resolve this issue in favour of the applicant.

[57] Having resolved that the applicant satisfies the pre-conditions to the grant of an injunction, it necessarily follows that the applicant would be entitled to the benefit of one. The inevitable question which arises therefore is upon what terms this should be done. The principles surrounding the terms on which an injunction will be granted to

restrain the exercise of the power of sale by the mortgagee are beyond doubt. There are several decisions to the effect that the sum that the mortgagee claims to be owing must be paid into court as a condition (**Marbella**, **Rupert Brady v Jamaica Redevelopment Foundation** SCCA No 29/2007, delivered 12 June 2008 and **Michael Levy Jamaica Redevelopment Foundation** SCCA No 26/2008 Application No 47/2008, delivered 11 July 2008). While this has long been accepted to be the usual rule, the Court of Appeal has recognized this as a general rule, to which there are exceptions. **Rupert Brady v Jamaica Redevelopment & Ors** demonstrates that where there is a challenge as to the validity of the mortgage, as there was in that case, the injunction will be granted without the condition imposed as to payment. More recently, the court in **Mosquito Cove** recognized two other exceptions as being where "the peculiar provisions of the deed under which the mortgagee was in possession on certain trusts that were independent of the mortgage itself" and "the mortgagee had concurrent, but also independent, fiduciary responsibilities to the mortgagor as solicitor". The court also considered the case of **Hickson v Darlow** (1883) 23 Ch D 690 where there was a great disparity between the sum being claimed by the mortgagee as owing and the sum which appeared to be owing. That case, may, however, only be regarded as a partial exception as the mortgagor still had to pay a sum into court, which did not coincide with the sum claimed by the mortgagee, but instead represented a lesser sum which the court was of the view should be paid. It is significant that the court recognized that the categories of exceptions are not closed

and that further exceptions will also emerge in the future, although it was of the view that a departure from the ordinary rule will only be sanctioned in exceptional cases.

[58] In the instant case, while there is no challenge to the validity of the mortgage at its inception, there is, it may be said, a challenge as to the continuing existence of the mortgage, which, it may be argued, directly affects the entitlement of the 5th respondent to exercise its powers of sale as an equitable mortgagee in relation to the Chelsea Manor apartment and as a legal mortgagee in relation to the Penfield property. In this case, the fact that there is an equitable mortgage does not preclude the exercise of the power of sale as the instrument of mortgage in paragraph (f) indicates that the statutory power of sale under the Registration of Titles Act is exercisable by the mortgagee.

[59] It seems to me, however, that where there is a strong challenge, on the face of it, as to whether the power of sale has arisen, this would provide an appropriate circumstance to depart from the usual rule. The applicant, however, has not provided any concrete support for her position that nothing is owed and that money is owed to her by the respondents. While it may be that the report prepared by Mr James could be adjusted to reflect the compounding of interest at monthly rests instead of annually, and this would not necessarily alter the position in favour of the respondents, there is no updated report before the court. On the face of it therefore, there is a substantial dispute between the parties which is the reason that an accounting was ordered by the court. In these circumstances, I am inclined to the view that the dispute, although not merely relating to the amount of monies owed, due to the lack of evidentiary support at

this stage, would fall into the usual rule that in order to restrain the mortgagee from exercising its powers of sale, the amount claimed to be due by the mortgagee must be paid into court.

[60] It is significant, however, that the instrument of mortgage in relation to the Chelsea Manor apartment states that the original amount for stamp duty purposes is $1,200,000.00 and clause (e) of the instrument of mortgage states that "the mortgage hereby created shall be a continuing security covering indebtedness from the mortgagor to the bank to such aggregate as the stamp duty impressed hereon will extend to cover". A provision of similar effect is to be found in the mortgage instrument in relation to the Penfield, Forrest Hill property, although the original amount for stamp duty purposes is stated therein to be $3,500,000.00. These facts naturally invoke the principle as stated by Morrison JA in **Mosquito Cove** that "where the liability of a mortgagor is limited by the instrument of mortgage, the amount of the payment in ordered as a condition of the grant of an injunction ought not to exceed that limit" (para [69]). It is my view, therefore, that the maximum amount that the applicant can be required to pay into court is $1,200,000.00 in respect of the Chelsea Manor apartment and $3,500,000.00 in respect of the Penfield Avenue.

[61] In the light of all of the above, I order that:

(i) There be a stay of execution of the judgment of Pusey J made on 21 March 2013 pending the determination of the appeal or until further orders of the court.

(ii) The 5th respondent is hereby restrained from disposing of or otherwise dealing with the property located at Chelsea Manor until the determination of the appeal or further order, on condition that the applicant pays into an interest-bearing account in the joint names of the attorneys-at-law representing the applicant and the 5th respondent or into court, the sum of J$1,200,000.00 within 30 days of this order, failing which this restraint shall lapse.

(iii) The 5th respondent is hereby restrained from disposing of or otherwise dealing with the property located at 14 Penfield Avenue, Forrest Hills until the determination of the appeal or further order, on condition that the applicant pays into an interest-bearing account in the joint names of the attorneys-at-law representing the applicant and the 5th respondent or into court, the sum of J$3,500,000.00 within 30 days of this order, failing which this restraint shall lapse.

(iv) The time for filing the written submissions in support of the notice of appeal is extended until 27 June 2014.

(v) The appeal shall be fixed for the earliest possible hearing date.

(vi) Costs of the application to the applicant, to be taxed if not agreed.