[2010] JMCA Civ 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 124/2009

BEFORE: **THE HON. MRS JUSTICE HARRIS, J.A.**
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MRS JUSTICE MCINTOSH, J.A. (Ag)

BETWEEN	**LEICESTER GREEN**	**APPELLANT**
AND	**JAMAICAN REDEVELOPMENT FOUNDATION INC.**	**RESPONDENT**

Raphael Codlin, instructed by Raphael Codlin & Company for the appellant

Mrs. Sandra Minott Phillips and Mrs. Alexis Robinson, instructed by Myers Fletcher & Gordon for the respondent

1, 2 March and 21 May 2010

HARRIS, J.A.

[1] In this appeal the appellant seeks to set aside an order of Pusey, J. in which he refused an application by the appellant for an injunction.

[2] The appellant is the managing director of a company called Gold Star Motors & Rental Ltd (Gold Star). He is the registered proprietor of property at Knockpatrick in the parish of Manchester comprised in Certificate of Title

registered at Volume 1198 Folio 352 of the Register Book of Titles. Sometime in the 1990's various loans were granted to Gold Star by the Workers Savings & Loan Bank. On 29 October 1997 the appellant utilized his property as security for those loans. On 16 January 1998 Mortgage No 1002539 to cover $9,433,340.00 was duly endorsed on the aforesaid certificate of title.

[3] On 30 January 2002, the debt was assigned to the respondent by Deed of Assignment. As a consequence, the mortgage was transferred to the respondent, by way of Transfer No 1269987 which was endorsed on the certificate of title on 9 December 2003. Following the assignment of the debt, there was an agreement to restructure it.

[4] Gold Star fell into arrears with respect to the repayment of the loan. As a result, the respondent, as a precursor to exercising its statutory powers of sale, issued the requisite notice under the mortgage. Consequently, the property was advertised for sale by public auction. This goaded the appellant to commence proceedings against the respondent by way of a claim form seeking the following:

> "1. A declaration as to the applicable interest rate on the loan taken out by Gold Star Motors and Rental Ltd from Worker's Savings and Loan Bank for which the Claimant acted as guarantor.
>
> 2. A declaration as to what sums, if any, is owed on the said loan.

3. A declaration that the Orders of the Minister exempting the Defendant from the provisions of the Moneylending Act are void in that:

   a) the exemption is not in the public interest

   b) the exemption did not stipulate the loans contracts or security for loans that are the subject of the exemption

   c) the order did not subject the exemption to any terms or conditions

   d) the minister purported to exempt Jamaica Redevelopment Foundation Inc from the provisions of the entire Act despite the fact that sections of the Act which are punitive cannot be the subject of exemptions.

4. A declaration that the Defendant is subject to the common law principle that the charging of compound interest is illegal;

5. A declaration that the interest rate being applied to the loan is oppressive and unreasonable.

6. Any further or other relief the Court sees fit."

[5] In support of an application for an injunction, the appellant filed an affidavit averring that sometime before 1998 Gold Star borrowed the sum of $2,200,000.00 and obtained an additional sum of $2,000,000.00 by way of Banker's Acceptance from the Workers Savings and Loan Bank. He acknowledged that on 19 March 2002 he was in receipt of communication advising him that the respondent had acquired the debt. Gold Star, he asserted, continued to make payments towards the loan

amounting to US$33,251.12.00 (sic) and JA$1,203,649.00 in addition to $7 million which had earlier been paid to the bank. In October 2008 he received a letter dated July 2008 stating that the sum of $31,032,510.23 was owing. At paragraphs 13 to 19 he went on to state:

> "13) That I immediately got in touch with Mrs. Velda Grant-Taylor from Jamaica (sic) Redevelopment Foundation Inc. She advised me to make an offer to them in order to try and save my property. I wrote a letter to them in which I stated that I had expectation that the loan was 7 million and ask that the interest be waived. Mrs. Velda Grant-Taylor later spoke with me via telephone and advised that I make an offer of ten million. Based on her recommendation I wrote a second letter the said day in which I offered to pay fifteen million for loan and interest. I do not accept that ten million dollars is in fact the sum owing however I wrote the letters out of desperation. I did not want my family to be thrown on the streets and I believed that if I was able to buy myself enough time I would be able to prove that the Company does not owe ten million dollars and that the Company has already made payments of more than ten million dollars. Attached as Exhibit LG 4 are copies of the said two letters.
>
> 14) That I still maintain that if I am given time I will be able to gather the evidence to show how much the Company has already paid.
>
> 15) That despite my offer contained in the letter at Exhibit LG 4 my home has been advertised for sale by auction. Jamaica (sic) Redevelopment Foundation by letter

dated November 12, 2008 refused my offer. A copy of the refusal letter is attached as Exhibit LG5.

16) That Jamaica (sic) Redevelopment Foundation has been charging over 30% interest and at no point did Gold Star Motors and Rental Ltd agree or sign any agreement to a rate of interest of 30%.

17) That Jamaica (sic) Redevelopment Foundation Inc has advertised my family home that was used as collateral for the loan with Workers Savings and Loan Bank for sale by public auction to take place on the 18th of December 2008. Attached as Exhibit LG 6 is a copy of the said advertisement.

18) That I am willing to repay the true amount owed on the loan taking into account what has already been paid and the agreed rate of interest as soon as same is determined by a Court but I maintain that the sum of $31,032,510.23 is not owing.

19) That in the circumstances it would be unjust to rob me and my family of our home."

To this affidavit, he exhibited among other things, a statement listing payments made to Financial Sector Adjustment Company (FINSAC) by Gold Star for the period between 7 April, 1999 and 2 April 2007 and copies of correspondence between the respondent and Gold Star.

[6] In an affidavit in response, Miss Janet Farrow on behalf of the respondent averred that the respondent was a bona fide purchaser for

value of the receivables without notice of any defect in the title of the bank and that the debt remained unpaid. It was her further averment that interest of 30% charged on the Jamaican dollar facility was in keeping with clause 13 of the restructuring agreement. She exhibited the restructuring agreement, the mortgage deed, the duplicate certificate of title and a Franchise Certification of Account Status of the respondent.

[7] Paragraph 2 of a supplemental affidavit, sworn on 26 January, 2009, and filed by the appellant reads:

> "2) That in relation to the Agreement to Restructure Existing Debt exhibited to the Affidavit of Janet Farrow I will say that I signed the document without the benefit of independent legal advice and that I was not given an opportunity to properly peruse the document. It was told to me by a representative of Jamaica (sic) Redevelopment Foundation Inc at the time of signature that the interest rate on the restructured loan would be 12% per annum and not 30% as is now being alleged."

[8] The following are the grounds of appeal:

> "1. The learned Judge erred when he refused the grant of an injunction in that there are serious issues to be tried between the parties in relation to the amount owed on the debt and the applicable interest rate to be applied to the loan and the legality/validity of certain sections of the Agreement to Restructure the Debt; the document that governs the relationship between the parties.
>
> 2. The balance of convenience is overwhelmingly in favour of the grant of an injunction in that the

Appellant would suffer irreparable harm if his family home is sold whereas if the injunction is granted the Respondent would not have lost the benefit of the security and would be free to take whatever actions it may be entitled to after the determination of the substantive issues between the parties.

3. The learned Judge misdirected himself when he found that the application was similar to that of ***Michael Levy v. Jamaica*** (sic) **Redevelopment *Foundation Inc and Kenneth Tomlinson*** SCCA 26/08 decided July 11, 2008 since there are some key differences in the two cases which the learned judge did not consider and/or did not give sufficient weight to in arriving at his decision to refuse the Appellant's application, such as;

   i) The fact that the Appellant was not the principal borrower but acted as guarantor.

   ii) The challenge to the legality/validity of certain sections of the Agreement to Restructure the Existing Debt.

   iii) The question of the rate of interest to be applied under the said Agreement to Restructure the Existing Debt even if it (sic) the Court finds that the entire Agreement is binding and enforceable.

4. The learned judge's decision to refuse the application is not consonant with recent pronouncements in the Court of Appeal and the Privy Council as it relates to the granting of injunctions."

[9] It is a well settled principle that a mortgagee will not be restrained in the proper exercise of his powers of sale under a mortgage where the amount owing is in dispute - see **Gill v Noble** 1866 14 TL 240; **Hamilton v**

Jamaican Redevelopment Foundation 77/07 (unreported) delivered 31, July 2008. This notwithstanding, the court, however, in the exercise of its discretion, may grant an injunction. In determining whether to grant or refuse an injunction, the court, in the exercise of its discretionary powers, should ensure that the course which is adopted appears to offer the best perspective that injustice is avoided. Accordingly, "the basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other" - per Lord Hoffman in **National Commercial Bank Limited v Olint Corporation Ltd.** P.C Appeal No 61/2008 delivered on 28 April 2009. The court's task therefore, is to determine the most appropriate solution as warranted by the circumstances of the particular case.

[10] Where a party seeks to invoke the injunctive powers of the court, the principles by which its discretion is generally exercised, are laid down in the often cited case of **American Cyanamid Co v Ethicon Limited** [1975] 1 All ER 504. The approach, as dictated by these principles, is that the court should be guided as follows:

(a) The court should first consider whether there is material which discloses a serious issue to be tried. Where the court finds that there is no serious issue to be resolved at a trial, an application for an injunction would fail.

(b) Even in circumstances where there is material before the court disclosing serious questions to be tried, the issue of damages to the party seeking the injunctive relief plays an important role. In such circumstances, the court should then proceed to consider whether the applicant could be adequately compensated in damages. A finding that the applicant could be adequately compensated in damages, would lead to a refusal of the injunction.

(c) However, where the court finds that damages would not be an adequate remedy, then it should proceed to give consideration as to where the balance of convenience lies. At times however, the matter of assessing where the balance of convenience lies presents some measure of difficulty. In such a case, the court may, in an effort to maintain the status quo explore the relative strength and weaknesses of each party's case and is guided thereby.

[11] Mr. Codlin submitted that the learned judge fell into error by placing reliance on the case of **Michael Levy v Jamaican Redevelopment Foundation Inc and Others** SCCA No. 26/2008 delivered 11 July 2008. In the instant case, he argued, three critical issues arise, which are separate and distinct from the **Levy** case, demonstrating that there are serious issues to be tried. He contended that there was no

proper Deed of Assignment of the debt to the respondent and further, the agreement to restructure the existing debt was not executed by the appellant. He further argued that the agreement is dated 20 May 2003 but the date of its execution was 7 May 2003 and this discrepancy supports the appellant's contention concerning the creation and execution of the document.

[12] He further argued that there are serious conflicts as to the interest rates charged. The agreed interest rate was 12%, he argued, yet the respondent seeks to sell the appellant's property by charging an interest rate of 30% and the penal clause contained in clause 13 of the agreement cannot stand.

[13] Mrs Minott Phillips submitted that the learned judge had properly relied on the **Levy** case in refusing to grant the injunction. She argued that there was no serious issue to be tried and even if there were serious issues to be tried, should the respondent improperly exercise its powers of sale, in keeping with section 106 of the Registration of Titles Act, the appellant could be adequately compensated in damages. She argued that the Deed of Assignment is valid and there is an enforceable restructuring agreement in place. There is nothing in the particulars of claim challenging the fact that the debt is due and owing, nor is there any allegation in the pleading as to the manner in which the restructuring

agreement was signed, she argued. Save and except for an averment in paragraph 29 (a) of the particulars of claim, she contended, the respondent's succession to the debt had not been otherwise challenged.

[14] It is common ground that the learned judge relied on the **Levy** case. In that case the claimant unsuccessfully sought to restrain a mortgagee, who, interestingly, is also the respondent in the present case, from exercising its powers of sale. The facts and circumstances of that case were essentially that Levy borrowed money from Jamaica Citizens Bank in 1997 and from Eagle Merchant Bank in 2001 and by virtue of mortgages delivered several certificates of title as security for the loans. The Jamaican Redevelopment Foundation acquired the mortgages by way of a Deed of Assignment. Levy defaulted on the loans and the Jamaican Redevelopment Foundation sought to exercise its powers of sale. Levy, challenging Jamaican Redevelopment Foundation's eligibility to exercise its powers of sale, brought an action for recovery of possession of his properties, alleging that he had made substantial payments on the debt and nothing was due and owing. He also challenged the propriety of the assignment and the validity of the interest rate charged. This court accordingly refused to grant an injunction sought by him to restrain Jamaican Redevelopment Foundation from selling the properties.

[15] Has the appellant passed the first limb of the test, in that was there

sufficient material before the learned judge evidencing serious issues to be resolved by the court at a trial? There is no dispute that the pleadings show that Gold Star was indebted to the Workers Savings and Loan Bank by way of a loan which was guaranteed by the appellant on the security of the mortgaged property. There has been no contest as to the fact that the loan had been granted or that the mortgage deed exists. However, although the duplicate certificate of title reflects a transfer of the mortgage to the respondent, it has been contended by the appellant that there has been no proper assignment of the mortgage.

[16] I will now address the challenge to the assignment of the mortgage. The respondent, in paragraph 5 of the defence, avers that it acquired the debt by way of a Deed of Assignment dated 30 January, 2002. No reply was filed by the appellant joining issue with this averment. Importantly, as rightly submitted by Mrs. Minnott Phillips, the appellant failed to challenge the Deed of Assignment in its particulars of claim. There is nothing in the pleading impugning the integrity of the document. As shown by the endorsement on the certificate of title, the Deed of Assignment laid the foundation upon which the mortgage was assigned. Accordingly, it must be taken that the assignment is valid and has full force and effect. This assault launched against the validity of the deed is clearly unsustainable.

[17] The respondent holds a legal interest in the property by virtue of the mortgage which was duly registered under the Registration of Titles Act. Section 71 of that Act affords protection to the respondent, it being regarded as holding an indefeasible interest in the property, which interest can only be impeached by fraud. No issue as to fraud against the respondent has been raised on the appellant's pleading. It follows therefore that the efficacy of the mortgage remains unimpaired. The mortgage stands valid, subsisting and enforceable. Mr Codlin's contention that there was no proper assignment of the mortgage is clearly devoid of merit.

[18] I now turn to two further issues raised by the appellant. The first relates to the execution of the restructuring agreement and the second relates to the perceived discrepancies in the dates appearing in the restructuring agreement and the schedule thereto. The restructuring agreement and schedule outline the terms and conditions to which the parties should adhere. The agreement and the annexed schedule are dated 20 May 2003 but were executed by the appellant on 7 May 2003.

[19] On the last page of the document, the signatures of the parties appear. It is shown that on 7 May 2003, the appellant duly executed it in his capacity as director and secretary of Gold Star. He also signed in his personal capacity. His signatures were duly witnessed. However, the

date of execution by the respondent does not appear on the document.

[20] This, notwithstanding, it is arguable that the appellant did not only affix his signature to the last page of the document but placed his initials on each page of the document. He having signed the document, had done so on the faith of it being his document and cannot now disavow his signature. Having executed the document he would be bound thereby - see **Saunders v Anglia Building Society** [1971] AC 1004.

[21] Mrs Minott Phillips submitted that the document shows that it was executed by the appellant and as a matter of practice, in commercial transactions, a document is first sent to the debtor to be executed by him and is thereafter returned to be signed by the commercial entity. The agreement was signed on 7 May 2003 as an agreement made on 20 December 2002, as it was intended to have taken effect on 20 December 2002, she argued.

[22] Item 9 of the schedule lists the operative date of the agreement as 20 December 2002 while item 8 of the schedule states that repayments would commence on 20 January 2003. It is obvious that the agreement was in force as of 20 December, 2002. It could be argued that the agreement had been sent to the appellant which he executed and upon its return, the respondent affixed its signature thereto.

[23] It was also the contention of the appellant that he signed the document without having the benefit of legal advice and that he was informed by the respondent that the rate of interest was 12% and not 30%. There can be no dispute that at the time of the agreement the parties enjoyed a confidential relationship. The appellant is now implying that he was unaware of the true import of the document whereupon the respondent ought to have advised him of his right to obtain legal advice prior to his execution of the document. Implicit in his statement is that his signature on the agreement was obtained by reason of the undue influence of the respondent. No claim of undue influence was raised in the appellant's pleading which could have underpinned his assertion that the respondent failed to have advised him of an entitlement to seek legal advice. There is nothing to show that the respondent was under a duty to the appellant to give him such advice prior to his signing the document.

[24] The next matter which falls for consideration relates to the question as to the rates of interest charged. In paragraph 18 of his affidavit the appellant avers that $31,032,510.23 is not the correct sum owing. He, however, expresses a willingness to repay the amount due and owing at the agreed rate of interest "as soon as same is determined by the court". Clearly, this is an admission on his part that there is a sum owing to the respondent. The appellant, however, disputes the rate of interest charged by the respondent. He contends that, as stipulated by the

mortgage deed, the loan attracts a rate of interest of 12% per annum, yet interest on the principal sum was being computed and charged at 30% per annum.

[25] Clause 3 (1) of the restructuring agreement speaks to the compromise of the debt. In a statement of account exhibited to the affidavit of Janet Farrow, the outstanding debt as of 20 March, 2002 was US$402,412.00. Item 7 of the schedule to the Agreement shows that the debt was restructured to an agreed amount of US $150,000.00. The terms of repayment are outlined in item 8 of the schedule to the agreement as follows:

> "(a) US$1,652.00 upon execution and delivery of this Agreement
>
> (b) 59 equal consecutive monthly payments of US1,652.00 each inclusive of interest at the rate of 12% per annum calculated on the reducing balance of the Restructured Debt. The first payment shall be (sic) become due on January 20, 2003 and the 20th day of each and every month thereafter.
>
> (c) A final payment of all unpaid principal, accrued interest and fees shall be paid no later than the 20th day of December 2008.
>
> For the purpose of this Item in the Schedule the sign '$' means [United States] Dollars."

[26] Clause 13 of the restructuring agreement speaks to, among other

things, the consequences for breach or default of obligations under the agreement. It states:

> "13. In the event of a breach or default of any representations, warranties or obligations under this Agreement, including those set forth on the Schedule hereto which includes the failure to make any payments required by Item 8 of the Schedule hereto by the Borrower or the Guarantor, and this breach continues for a period of thirty (30) days (except for breaches under Clauses 10, 11(2) and 11(3) hereof as to which there shall be no cure period and such breach shall be immediately deemed a default hereunder); provided, however, that such thirty (30) day grace period shall only be applicable two (2) times during any twelve (12) month period following the date hereof, and if a breach or default (the 'third default') occurs during any such twelve (12) month period and if during such twelve (12) month period Borrower has committed a breach or default as described herein two (2) previous times, no thirty (30) day cure period shall apply to such third Default or any subsequent default or breach occurring during such twelve (12) month period, will constitute a default and JRF reserves the right to: (i) enforce all terms, provisions and conditions of the Security; and (ii) exercise and pursue all of the rights, remedies and powers under the Security; and (iii) sue to recover the entire amount of the unpaid Original Debt plus fees and interest at a rate of thirty percent (30%) on Jamaican Dollar facilities or twenty percent (20%) on United States Dollar facilities, whichever is applicable, from the effective date stipulated in Clause 3(2) subject to the Maximum Interest Rate defined below. JRF may elect to sue the Borrower and the Guarantor to recover the original debt less any installments pursuant to the provisions of Clause 3(1) hereof and to employ any or all available remedies to recover the

Original Debt…"

[27] Clearly, as specified by clause 13, in the event of Gold Star defaulting on the debt, it would attract interest at the rate of 30% per annum. The appellant had defaulted on the loan. At the date of issue of the statutory notice by the respondent, it is shown that the sum of $31,032,510.23 was due and owing by the appellant. If it is found that he executed the agreement, it is arguable that he could be bound by all the terms thereof inclusive of clause 13 which mandates the payment of interest at the rate of 30% per annum on the defaulting debt and the necessity would not arise for the rate of interest payable by the appellant on the loan to abide the court's determination.

[28] It was further submitted by Mr. Codlin that the respondent is not in good standing in the United States of America by reason of its breaches of taxation laws which render it liable to be struck off under the laws of that country. He urged the court to take into consideration the law of international trade, as he contended that these breaches are likely to place the appellant in jeopardy.

[29] Mrs. Minott Phillips argued that the respondent is in good standing and there is nothing pleaded in the particulars of claim relating to the tax standing of the respondent.

[30] Exhibited to an affidavit of the appellant of 10 December, 2008 are two documents, headed "Franchise Tax Certification of Account Status". The first is dated 26 February 2008, the contents of which show among other things that the respondent was certified as being in good standing up to 15 May 2008. The second, dated 24 June 2008, shows, inter alia, that the respondent was in good standing up to 15 August, 2008. As rightly submitted by Mrs. Minott-Phillips, nowhere in the appellant's pleading is there any allegation disclosing that the respondent was in breach of any law of the United States of America and a certificate of 2 January 2009 shows that up to 15 May 2009 the respondent was in good standing. There is nothing to show that any breaches were committed by the respondent as contended for by Mr. Codlin.

[31] Mr. Codlin further submitted that the interest rate of 30% is in breach of the Moneylending Act. The Act, he argued, is designed to ensure the regulation of fiscal policy as it relates to moneylending. It is a penal statute, he argued, which may give authority to a body to make regulations and when such body makes regulations in accordance with the Act, it can only do what the Act permits it to do. However, the parties, he argued, have contracted outside of the Act in breach of section 3 of the Act.

[32] Mrs. Minott Phillips argued that the respondent is exempt from the provisions of the Act but even if the Act applied, the rates of interest charged would not violate the provisions of the Act as being unconscionable.

Section 3 of the Act provides:

> "3(1) Where, in any proceedings in respect of any money lent after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the prescribed rate per annum, the court shall, unless the contrary is proved, presume for the purposes of section 2 that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding the prescribed rate per annum, is excessive.
>
> (2) In this section 'prescribed rate' means such rate as the Minister may from time to time, by order, prescribe."

[33] This section of the Act had been amended by a Gazette Notice published on 27 August, 1997 increasing the prescribed interest rate to 40% per annum. The rate of interest of which the appellant complains as being unconscionable is that which is charged at the rate of 30 % per annum. The debt was acquired by the respondent on 25 June, 2002 a date subsequent to the amendment of the Act. Accordingly, the

charging of a rate of interest of 30% per annum would not fall outside the purview of section 3. The complaint of the appellant that that interest rate exceeds that which is permissible by the statute would likely be unsustainable.

[34] Further, under section 14 of the Act, the Minister may grant exemptions from the provisions of the Act.

The section reads:

> "14 (1) Where the Minister is satisfied that it is in the public interest so to do, he may by order declare —
>
> (a) any loan or contract or security for the repayment of a loan specified in that order; or
>
> (b) any loan made, or any contract entered into, or any security for the repayment of a loan given by any person specified in that order,
>
> to be exempt from the provisions of this Act, subject to such terms and conditions as may be specified in the order.
>
> (2) Where there has been a breach of any term or condition specified in an order under subsection (1), or any fraudulent act in respect of the exemption obtained thereby, or where such order has been obtained by misrepresentation, whether innocent or otherwise, the Minister may by order revoke that exemption but without prejudice to the rights of any innocent third parties.

[35] In the **Levy** case, Morrison J.A., in dealing with the question as to whether rates of interest charged by the respondent is in violation of the Moneylending Act at paragraph 21 said:

> "…it is sufficient to say, I think, that it has not been demonstrated that the 1st respondent's [the Jamaican Redevelopment Foundation] corporate status in Jamaica and in the United States is challenged in any way, that the ministerial orders granting the 1st respondent exemption from the provisions of the Moneylending Act appear on their face to have been validly made pursuant to section 14 of the Act…"

I unhesitatingly adopt this pronouncement and see absolutely no reason why this court should depart from it.

[36] Mr. Codlin argued that the overriding consideration is the nature and quality of the serious issues to be tried and the *status quo* ought to be preserved. There is nothing to show that the property is depreciating and it can be insured against all perils, he argued. The **Marbella** principle is extant as there is no immutable dogma that requires payment into court of the money said to be due and owing, on the grant of an injunction, he argued. In support of this submission, he cited the cases of **Flowers, Foliage & Plants of Jamaica & Others v Jamaica Citizens Bank Limited** (1997) 34 JLR 447 and **Brady v Jamaican Redevelopment Foundation & Others** S.C.C.A. No. 29/2007 delivered 12 June, 2008.

[37] Mrs Minott Phillips submitted that no restraint can be placed on a mortgagee from exercising his powers of sale on the ground that the amount claimed is disputed. In **Marbella** there was a challenge to the validity of various loans. There is therefore no basis for any distinction as to cases in which an injunction is refused and those in which it has been granted on the basis of the **Marbella** principle.

[38] Although as a settled rule no restriction will be placed on a mortgagee in the proper exercise of his powers of sale, in compelling circumstances the court may depart from the general rule and grant an injunction attaching thereto an order for the payment into court of the sum which is alleged to be due, as was done in **SSI (Cayman) Ltd et al International Marbella Club** (1987) 24 JLR 33. It appears however that the court will also grant an injunction without ordering the payment into court of the money said to be due and owing in circumstances where fraud is raised as it had done in **Brady's** case. In that case the central issue was posited on a challenge to the validity of the mortgage document. On the facts before us, **Brady's** case would in no way afford the appellant any assistance. Nor would the **Flowers'** case aid him. In **Flowers'** case triable issues were raised with regard to the validity of a guarantee of a mortgagee and the validity of the upstamping of the mortgage. The cogency of the allegations raised in those cases were sufficiently coercive to persuade the court to grant an injunction without the

requirement of payment into court of the money said to be due and owing. It could be argued that the circumstances are entirely different in the present case.

[39] It was also contended by the appellant that the sale of the property would result in his family and himself being deprived of their home. At the time of the execution of the mortgage deed, the appellant would have been aware that if Gold Star defaulted on the loan, the property would become subject to being sold by the mortgagee. This is a risk which he had taken. He therefore cannot now justifiably complain about the prospects of the loss of his home.

[40] The respondent has proceeded to take steps to recover sums due under the mortgage. The appellant has not denied that an amount is due and owing. In essence, his real contention is that the amount as claimed by the respondent is not the sum due and owing. In any event, by virtue of section 106 of the Registration of Titles Act, he would have a remedy in damages should the mortgagee improperly exercise its power of sale. In all the circumstances I see no compelling reason which would have persuaded the learned judge to have granted an injunction and he had rightly refused the application.

[41] I would dismiss the appeal with costs to the respondent.

PHILLIPS, J.A.

I have read the judgment of my sister Harris, J.A. and agree with her reasoning and conclusion. I have nothing further to add.

MCINTOSH, J.A. (Ag)

I too agree.

ORDER

HARRIS, J.A.

Appeal dismissed. Costs to the respondent to be taxed if not agreed.