[2016] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 88/2014 & 43/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**LIJYASU M KANDEKORE**	**APPELLANT**
AND	**COK SODALITY CO-OPERATIVE CREDIT UNION LIMITED**	**1ST RESPONDENT**
AND	**DEIDRE DALEY**	**2ND RESPONDENT**
AND	**DONNOVON WARD**	**3RD RESPONDENT**

Consolidated with

BETWEEN	**LIJYASU M KANDEKORE**	**APPELLANT**
AND	**COK SODALITY CO-OPERATIVE CREDIT UNION LIMITED**	**1ST RESPONDENT**
AND	**DEIDRE DALEY**	**2ND RESPONDENT**
AND	**DONNOVON WARD**	**3RD RESPONDENT**

Lijyasu M Kandekore in person

Mrs Georgia Gibson-Henlin, QC and Miss Coleasia Edmondson instructed by Henlin Gibson Henlin for the respondents

7, 8, 18 March and 6 May 2016

PHILLIPS JA

[1] In this consolidated appeal, the appellant sought to challenge the decision of Fraser J who, *inter alia*, refused to grant an order for the return of his motor vehicle

pending a determination of the claim and he also sought to challenge the orders of Batts J which, *inter alia*, granted summary judgment in the respondents' favour. We heard this matter on 7 and 8 March 2016 and on 18 March 2016, we made the following orders:

> "The consolidated appeal in respect of SCCA No 88/2014 and SCCA No 43/2015 is dismissed as follows:
>
> 1) Appeal No 88/2014 from the judgment of Fraser J dated 10 October 2014 is dismissed.
>
> 2) The judgment of Fraser J is affirmed.
>
> 3) Appeal No 43/2015 from the judgment of Batts J dated 17 April 2015 is dismissed.
>
> 4) Summary judgment granted by Batts J in favour of the respondents is affirmed.
>
> 5) Costs of both proceedings in the court below and in respect of this consolidated appeal are awarded to the respondents to be taxed if not agreed.
>
> 6) The court refrains from making any order on the counter notice of appeal dated 1 October 2015 filed in respect of Appeal No 43/2015."

We promised to give our reasons for that decision and this judgment is a fulfilment of that promise.

Factual background

[2] The facts stated herein are gleaned from the appellant's particulars of claim filed 9 September 2014; his affidavit filed 19 September 2014 in support of his application for interim relief and that filed 10 April 2014 in opposition to the respondents' application for summary judgment. Facts have also been derived from the affidavits of Roshene Betton, legal counsel of the 1st respondent, filed 7 October 2014 and Deidre

Daley, the 2nd respondent and asset management clerk of the debt management unit in the 1st respondent organisation, filed 10 October 2014.

[3] The appellant is an attorney-at-law and a member of the 1st respondent which is a duly registered credit union. The 2nd respondent and 3rd respondent (a bailiff employed with the 1st respondent) were at all material times, acting as the servants and/or agents of the 1st respondent.

[4] On 19 June 2013, the appellant obtained a loan of $750,000.00 from the 1st respondent at an interest rate of 22% per annum for a period of 36 months. While the respondents contend that the appellant's monthly payment was $31,507.12 comprising of loan payment of $28,642.84 and share contribution of $2,864.28, the appellant insists that his monthly payment was $28,642.84. The appellant's 2004 Toyota Corolla motor vehicle licensed FA 7979 had been used as security for the loan. The title for the said motor vehicle was surrendered to the 1st respondent and the 1st respondent also held his shares in the sum of $75,000.00. In order to obtain the loan, the appellant signed an offer letter and a loan agreement, provided a bill of sale to the 1st respondent and gave the 1st respondent power of attorney in respect of the said motor vehicle. These documents were relevant in deciding a number of contested issues in both appeals.

[5] Aspects of the offer letter signed by the appellant are as follows:

"Our Ref:DJR/5203708

June 19, 2013

Mr. Lijyasu Kandekore
29 Norbrook Drive
Apartment 2D
KINGSTON 8

Dear Mr. Kandekore

Re: Proposed COK Sodality Loan Facility - $750,000.00

We are pleased to make you, the borrower/member, this Offer of Finance of the project as outlined in your application to us. The basic terms and conditions of our offer are set out below and shall apply should our offer be accepted:

1. **AMOUNT OF LOAN FACILITY**
   The Sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00) broken down as follows:

Previous Loan Amount	Nil
Current Loan Amount	$750,000.00

   The loan shall be repaid in Jamaican Dollars.

2. **PURPOSE OF THE LOAN**
   To be used as capital for business.

3. **RATE AND PAYMENT OF INTEREST**
   An interest rate of Twenty Two percent (22%) per annum calculated on the reducing balance is applicable. The interest rate is variable at the discretion of COK Sodality Co-operative Credit Union Limited and payable monthly on "payment dates" with the first payment becoming due one month after the date of first disbursement and monthly thereafter.

4. **PAYMENT OF PRINCIPAL**
   Principal to be paid in monthly instalments, the first payment to be made one (1) month after the date of first disbursement and monthly thereafter.

5. **SHARES CONTRIBUTION**
   It is hereby agreed and understood that you will make a further 10% of total monthly payment (principal & interest) will be made by you per month to shares (referred to as Share-Contribution).

6. **MONTHLY PAYMENTS AND LOAN TERM**

The sum of $31,507.12 per month for Thirty Six months as follows:

Loan & Interest Payment	$28,642.84
Share Contribution	$ 2,864.28
Other	NIL

- Where the Member/Borrower fails to make their monthly payments as set out at Items 3, 4 and 6 hereof the COK Sodality may at its sole discretion deduct such payment from the member's Shares. If, however, the member/borrower fails to payback the amount so deducted from Shares within 10 days, their account will for all intent and purposes considered to be in arrears as set out in Item 8 hereof.

7. **SHARE REQUIREMENT**

The member/borrower is required to meets [sic] the share requirement of the loan prior to disbursement. This amount equates to $75,000.00

8. **DEFAULT INTEREST CHARGES**

- Should the monthly payment of Loan and Interest as set out in Clause 6 above fall in arrears for two or more months (consecutive or combined) the member/borrow [sic] will pay a fee of 2% per month on the total arrears beginning the second month and each month thereafter until all such arrears have been paid.
- On demand to pay to COK Sodality all costs charges and expenses incurred or to be incurred by COK Sodality from time to time in relation to these presents or any default there under or the enforcement or protection of any rights to COK Sodality under these presents. Attorney's fees to be on an indemnity basis.

9. **DOCUMENTATION FEE**

A fee of $10,200.00 plus G.C.T, refundable at COK Sodality's sole discretion, is payable on upon execution of collateral security and prior to the disbursement of loans funds herein as follows. [sic]

Registration	$5,000.00
Credit check	$3,000.00

Inspection Fee	$1,000.00
Other	$1,200.00

...

12. **SECURITY**
    a) Loan Agreement in form prescribed by C.O.K.
    b) Shares in the sum of $75,000.00
    c) Promissory Note from the Borrower in the amount of $750,000.00
    d) Bill of Sale on 2004 Toyota Corolla Chassis #MR053ZEC107052282 and Engine # 3ZZ4311681.

13. **CONDITIONS PRECEDENT TO DISBURSEMENT**
    The obligation of COK Sodality to make the loan available to the member/borrower shall be subject to the following:

    e) Signing and returning of this Offer Letter;
    f) Execution of such documents as shall be required by COK's Legal Counsel having due regard to the collateral security requirements herein before mentioned;
    g) Permanent Shares of that will remain intact with the Credit Union until all amounts due and payable hereunder have been satisfied and your COK Sodality's account being closed.

In acceptance of our Offer of Finance, please sign the copy letter enclosed at the place indicated. Then return to us within fourteen (14) days of the date hereof together with the sum of Twenty Thousand Six Hundred and Twenty Five Dollars ($20,625.00) plus G.C.T. (16.5%) payable by cash or Managers Cheque. This being fees referred to in Clauses 10 & 11 hereof. Failure to do so will be deemed non-acceptance of our offer.

Notwithstanding the acceptance of the Offer herein, should you fail to satisfy all the conditions precedent to disbursement in accordance with Clauses [sic] 14 hereof within fourteen days (14) of the date of acceptance hereof or should COK Sodality become aware of any material factor which in its sole opinion mitigates against its making the loan COK Sodality reserves the right at its sole discretion to cancel the facility herein.

Yours co-operatively
COK SODALITY CO-OPERATIVE CREDIT UNION LIMITED

Signed _____
Morris Livingston
BRANCH MANAGER

ACCEPTED BY:

Signed _____ ON THE 19 DAY OF JUNE 2013
MEMBER BORROWER

Signed _____ ON THE 19 DAY OF JUNE 2013
Witnessed By:"

[6] The appellant also signed a loan agreement aspects of which are as follows:

"LOAN AGREEMENT

THIS INSTRUMENT is made on the **19th** day of **June 2013** BETWEEN the party setout at Item 1 of the Schedule hereto (hereinafter referred to as 'the Borrower') which expression where the context so admits shall include his/her Heirs and Personal Representatives of the ONE PART, the party setout at Item 2 of the Schedule hereto (hereinafter referred to as 'the Guarantor') which expression where the context so admits shall include his/her Heirs and Personal Representatives of the SECOND PART and COK SODALITY CO-OPERATIVE CREDIT UNION LTD a Co-operative Society duly incorporated under the Co-operative Society's Act of Jamaica with Registered Office at 66 Slipe Road, Kingston 5 in the parish of Saint Andrew (hereinafter referred to as 'the Lender') which expression shall include its successors and assigns of the THIRD PART.

WHEREAS the Borrower has requested from the Lender a loan/an additional loan facility of **SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS** Dollars [sic] **($750,000.00)** at the rate of interest set out at Item 3 of the Schedule hereto (hereinafter referred to as 'The Rate of Interest') and the Lender has agreed to Lend subject to the terms and conditions hereinafter contained and the terms and conditions of an Offer Letter by the Lender dated

the **19th** day of **June 2013** (hereinafter referred to as 'the Offer Letter')

(1) AVAILABILITY CONDITIONS

On compliance with the terms and conditions of the Offer Letter and upon completion of the security documentation to the satisfaction of the Lender's Attorney-at-Law credit will be available for disbursement. The representations and warranties set forth herein (under Clause 3 below) shall be true on and as of the date of disbursement with the same effect as though such representations and warranties had been made on and as of the date of such disbursement. Nothing shall have happened which might materially and adversely affect the carrying out of the undertaking or the business prospects or financial conditions of the Borrower or which shall make it impossible that the Borrower will be able to fulfil his obligations to the Lender hereunder or under any securities nor shall the Borrower have incurred any material loss or liability. The securities shall have been entered into between the respective parties thereto and shall each become unconditional and fully effective in accordance with their terms.

(2) SECURITY

As security for the Repayment of the loan and payment of interest and all other amounts owing by the Borrower to the Lender under these presents or under any of the securities the Borrower shall issue or cause to be issued, to the Lender the following:-

(a) Shares in the sum of $75000.00 *DJR*

(b) A Promissory Note from the Borrower in the amount of **$750,000.00**

(c) 2004 Toyota Corolla Altis
Ch#MR053ZEC107052282
$892,500.00

These Securities shall be valid, binding and enforceable against the Borrower and/or other security party.

(3) REPRESENTATION AND WARRANTIES

The Borrower and Guarantor represent and warrants to and undertakes with the Lender that:-

...

(o) That so long as any money shall be owing on the security of these presents notwithstanding that the same may not as yet have become payable, the Credit Union, its servants or agents may, without previous notice to the Guarantor, seize and take possession of the said chattels in whatever place or places they may happen to be.

(p) That in exercise of the power to seize the said chattels assigned, the Credit Union, its servants and agents may enter and remain upon any premises where the said chattels may be or believed to be and if necessary may break open doors and windows, gates or fences in order to obtain possession thereof and to seize and take away the same and, after the expiration of seven clear days from the date of the seizure may sell the said chattels either separately or in lots by public auction or private contract on or off the said premises and retain out of the proceeds the balance of the moneys hereby secured and interest as may then remain unpaid and all costs and expenses incurred, made or sustained in or about entering upon the said premises and in discharging any distress, execution or other encumbrances on the said chattels and seizing, taking, retaining and keeping possession of the said chattels and in and about the removal or sale (including the costs of advertising) of the said chattels and from and after the full payment of all moneys then due or owing to the Credit Union and such costs, charges, payments, expenses and encumbrances as aforesaid shall pay over the surplus (if any) of the proceeds of such sale to the Guarantor.

...

(z) A demand for payment or any other demand or notice hereunder may be properly and effectually made by any Manager or Assistant Manager of any branch of the Credit Union or by an agent, attorney or Attorney-at-Law of the Credit Union by letter sent by post (although we are not limited by this and may employ any other means including electronic) addressed to the Borrower or Guarantor at the address given in this security or at the last known place of

business of the Borrower or Guarantor and every demand so made shall be deemed to have been made on the third day following the day the letter was posted in any post office in Jamaica.

...

SIGNED BY THE BORROWER) Signed_____

IN THE PRESENCE OF:..."

[7] The relevant portions of the bill of sale are as follows:

"BILL OF SALE

THIS BILL OF SALE IS SUPPLEMENTAL TO

A LOAN AGREEMENT OF EVEN DATE

THIS INDENTURE is made on the date set out in Item I of the First Schedule hereto BETWEEN the party whose name and address is set out in Item 2 and 3 of the First Schedule hereto (hereinafter referred to as "the Guarantor") of the ONE PART AND COK SODALITY CO-OPERATIVE CREDIT UNION LIMITED a Co-operative Society duly incorporated under the Laws of Jamaica and having its registered office at 66 Slipe Road, Kingston 5, in the parish of St. Andrew (hereinafter referred to as 'the Credit Union" which expression shall, where the context admits, include its successors and assigns) of the OTHER PART

WHEREAS

The Guarantor is the absolute owner is possession free from encumbrances of the chattels and things more particularly mentioned and described in the Second Schedule hereto (hereinafter referred to as "the said chattels").

The person whose name and address is setout to at Item 4 and 5 [Hereafter referred to as "The Borrower"] has applied to the Credit Union for a loan of the sum set out in Item 6 of the schedule hereto which the Credit Union has consented to make upon having the repayment thereof with interest as hereinafter mentioned secured in manner hereafter appearing and upon the term and conditions therein

contained and implied in a Loan Agreement of even date [Hereinafter referred to as "The Principal Document"].

NOW THIS INDENTURE WITNESSETH:

In consideration of the Credit Union making or continuing advances or otherwise giving credit or affording banking facilities for so long as the Credit Union may think fit to the Borrower, the Guarantor as BENEFICIAL OWNER free from encumbrances HEREBY ASSIGNS, TRANSFERS and SETS OVER UNTO the Credit Union absolutely subject to the proviso for entry of satisfaction contained in the Principal Document.

For the consideration aforesaid the Guarantor for himself, his executors and administrators HEREBY COVENANTS and agrees with the Credit Union, its successors and assigns as follows:

1. To pay to the Credit Union on demand at the head Office of the Credit Union at 66 Slipe Road, Kingston 5, in the parish of St Andrew or such branch of the Credit Union as the Credit Union may at any time or from time to time notify to the Guarantor all sums of money which now or at any time hereafter may be due or owing by the Borrower to the Credit Union.

2. At all reasonable times to permit the Credit Union by its servants or agents to enter any premises or building under the control of the Guarantor in which the said chattels may be for the time being and to view and inspect and take inventories thereof.

3. To insure and keep insured the said chattels as required by law and against fire, theft and damage and such other contingencies and risks as the Credit Union shall reasonable require in the name of the Credit Union to the full insurable value thereof or such other amount as may reasonably be required by the Credit Union.

4. That in exercise of the power to seize the said chattels assigned, the Credit Union, its servants and agents may enter and remain upon any premises

where the said chattels maybe or believed to be and if necessary may break open doors and windows, gates or fences in order to obtain possession thereof and to seize and take away the same.

The Guarantor HEREBY AUTHORISES and EMPOWERS the Credit Union to fill up and complete any documents signed by the Borrower and delivered to the Credit union and which may be necessary to be filled up and completed in order to effectually transfer the said chattels to a purchaser in the event of the Credit Union exercising its powers of sale under these presents.

IN WITNESS WHEREOF the Guarantor has hereunto set his hand the day and year set out in Item 1 of the First Schedule hereto.

A/C # 5203708

FIRST SCHEDULE

Item 1	- Date of Indenture	:	The 19th of June 2013
Item 2	- Name of Guarantor	:	Lijyasu Kandekore, Attorney-At-Law
Item 3	- Address of Guarantor	:	29 Norbrook Drive, Apartment 2D, Kingston 8 in the parish of St. Andrew
Item 4	- Name of Borrower	:	Lijyasu Kandekore, Attorney-At-Law
Item 5	- Address of Borrower	:	29 Norbrook Drive Apartment 2D, Kingston 8 in the parish of St. Andrew
Item 6	- Amount of Loan	:	Seven Hundred and Fifty Thousand Dollars ($750,000.00) plus interest.
Item 7	- Rate of interest on amounts	:	22% per annum on the reducing balance

SECOND SCHEDULE

(List of Chattels and things hereinbefore referred to)

2004 TOYOTA COROLLA

CHASSIS # MR053ZEC107052282

ENGINE # 3ZZ4311681

SIGNED SEALED AND DELIVERED)

By the said)

LIJYASU KANDEKORE)

) Signed

LIJYASU KANDEKORE..."

[8] The power of attorney signed by the appellant on 19 June 2013, gave the 1st respondent power of attorney to, *inter alia*, carry into effect and perform all agreements entered into, and to carry out any act in respect of the said motor vehicle.

[9] The respondents alleged that the appellant defaulted on his loan payments and on each occasion was notified of his arrears and the 1st respondent's power to take steps to recover the outstanding balances, but the appellant's default continued. The respondents further alleged that on 3 July 2014, the appellant was three months in arrears amounting to $111,556.83 with the next payment being due on 20 July 2014. Fearing an escalation of this amount, the 1st respondent contended that it instructed the 3rd respondent to seize the appellant's motor vehicle. This motor vehicle was seized on 9 July 2014.

[10] The appellant denied owing the 1st respondent any money. He alleged that up to 9 July 2014 when his motor vehicle was seized, he paid the monthly instalments which amounted to $297,079.00 plus shares in the sum of $82,000.00 for a total of $379,079.00. He further alleged that with his monthly payment of $28,642.84 for 11 months, the total due was $315,071.21 and so the seizure of his motor vehicle was unlawful. He further alleged that on 9 July 2014, the 1st respondent and its agents, the 2nd and 3rd respondents, unlawfully entered his home, seized his motor vehicle without any legal justification and during this seizure damaged his electronic gate.

[11] Roshene Betton, in her affidavit, filed 7 October 2014, deponed that the appellant resisted the removal of his motor vehicle from the premises. She stated that she had been informed by the bailiff (3rd respondent) and verily believed that the police had been summoned, and as the appellant had not provided the keys for the motor vehicle, the motor vehicle was removed with the use of a wrecker. The respondents denied that any damage had been done to the appellant's gate during the removal of the motor vehicle from the premises, and provided the court with photographs to substantiate that position. The respondents claimed that the seizure of the motor vehicle was lawful and that monies and interest continued to accrue on the loan until the loan was liquidated.

[12] On 9 September 2014, the appellant filed a claim form and particulars of claim against the respondents for, *inter alia*, unlawful seizure of his motor vehicle; unlawful entry into his home; damage to his electronic gate; aggravated damages; damages; and the return of his motor vehicle. An acknowledgment of service was filed by the 1st

respondent on 17 September 2014 and by the 2nd and 3rd respondents on 19 September 2014. The respondents' defence to this claim was filed on 27 October 2014.

[13] On 19 September 2014, the appellant filed a notice of application for interim relief with supporting affidavit seeking orders that would, *inter alia*, compel the 1st respondent to return his motor vehicle, which was seized, and prohibit the respondent from acting on the bill of sale and taking steps to transfer his motor vehicle pending a determination of the claim. The matter was heard by Fraser J on 9 October 2014 and on 10 October 2014, he refused the interim order sought by the appellant; awarded costs to the respondents to be agreed or taxed; placed the application for summary judgment for hearing on 17 April 2014; and granted the appellant's application for leave to appeal.

[14] On 7 October 2014, the respondents filed an application for summary judgment to be entered in their favour on the basis that, *inter alia*, the appellant had no real prospect of succeeding in the claim; he was in default of a loan agreement which he had signed and there was no cause of action against the 2nd and 3rd respondents. This application was supported by the affidavits of Roshene Betton, filed on 7 October 2014; Deidre Daley, filed on 10 October 2014 and the affidavits of Taniesha Rowe, filed on 15 and 16 April 2015. This application was heard on 17 April 2015 by Batts J who granted summary judgment; awarded costs to the respondents to be taxed if not agreed; and also granted leave to appeal.

[15] The appellant filed an application for default judgment on 27 October 2014, which had been made on the basis that the time for filing and serving the defence had expired; no defence or counterclaim was served on the appellant; and the claim was not settled. However, on 4 February 2015, the deputy registrar of the Supreme Court issued a requisition indicating that the respondents' application for summary judgment was filed before the applicant's request for default judgment, and so the applicant's request for default judgment could not be considered until the summary judgment application was heard.

[16] The appellant filed two notices of appeal. The first notice of appeal (SCCA No 88/2014), filed on 15 October 2014, sought to challenge the orders made by Fraser J on 10 October 2015, stated in paragraph [13] herein. The second notice of appeal (SCCA No 43/2015) was filed on 21 April 2015 and sought to challenge the orders made by Batts J on 17 April 2015 stated in paragraph [14] herein. On 22 September 2015, an order was granted that consolidated SCCA No 88/2014 and SCCA No 43/2015. On 1 October 2014, the respondents filed a counter notice of appeal seeking to affirm Batts J's decision on other grounds. As previously indicated, this consolidated appeal was heard on 7 and 8 March 2016 and submissions were made by the appellant in person and Mrs Gibson-Henlin QC, for the respondents, in respect of both appeals which are outlined later in this judgement.

Discussion, issues, submissions and analysis

Setting aside a decision of a judge in the court below

[17] The appellant asked this court to set aside the decisions of Fraser J and Batts J. The factors which aid this court in such a consideration are those gleaned from the dictum of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, where at page 1046 he said:

> "It [the Court of Appeal] may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own..."

This principle has been endorsed and applied by this court in numerous cases such as **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, **Peter Hargitay and Ricco Gartmann** [2015] JMCA App 44 and most recently in **David Orlando Tapper v Heneka Watkis-Porter** [2016] JMCA Civ 11.

[18] Ultimately, the factors which aid this court in determining whether to interfere with a judge's exercise of discretion are: (i) whether that judge misunderstood or misapplied the law or misconceived facts; or (ii) failed to give relevant consideration to the material before him; or (iii) whether there has been a change in circumstances since the discretion was exercised which justifies it being varied or discharged, and therefore that judge's decision can be shown to be palpably or demonstrably wrong.

[19] In making an assessment as to whether the decision of both judges had been palpably or demonstrably wrong, it is necessary to engage in an analysis of the various issues that arose in both appeals. However, both appeals raised separate and varied issues and so I will first examine the decision of Fraser J in SCCA No 88/2014 and thereafter examine the decision of Batts J in SCCA No 43/2015.

SCCA No 88/2014: Appeal against Fraser J's decision

The Application for interim relief

[20] The application for interim relief mentioned in paragraph [13] herein had been made on grounds that, *inter alia*, the appellant had initiated a claim against the respondents alleging that the seizure of his motor vehicle was illegal; he had surrendered cash in the form of shares in the sum of $82,000.00; the bill of sale was executed for his motor vehicle, household furniture and office furniture; the appellant was being unlawfully deprived of the use of his motor vehicle; the 1st respondent was still claiming money while the motor vehicle was in their possession; and the continued detention of the appellant's motor vehicle was being done out of malice, ill-will and was an attempt to embarrass the appellant.

[21] In the appellant's affidavit in support of this application, filed on 19 September 2013, he deponed that his monthly payment which includes principal and interest is $28,642.84. The appellant also deponed that in addition to offering his motor vehicle as security for the loan, he also gave the 1st respondent a charge on his office and home furniture. He deponed that despite paying the amount due under the loan his motor vehicle was seized. He alleged that the claim against him was false since the total amount due with 11 monthly instalments was $315,071.24 and he had already paid $379,079.00 which includes his monthly payment of $28,642.84 and shares of $82,000.00. Despite this overpayment, he was still receiving bills for monthly payments while the motor vehicle remained in the 1st respondent's possession. He also deponed that it was a condition of the loan facility that he would remain in possession of the motor vehicle and he was willing to make the monthly payments of $28,642.84 in accordance with the loan agreement.

[22] The application for interim relief was placed before Fraser J on 1 October 2014. However, on that date Fraser J adjourned the matter to 9 October 2014 and he also permitted the respondents to file and serve any affidavits in response on or before 7 October 2014. The respondents responded to this application in the affidavit of Roshene Betton filed on 7 October 2014 in which she deponed that the appellant signed an offer letter and a loan agreement outlining the terms of his loan. He also granted a bill of sale and power of attorney to the 1st respondent in respect of the said motor vehicle. She indicated that his monthly payment was $31,507.12 and not $28,642.28 as the appellant had indicated. The appellant had been given multiple opportunities to settle

his indebtedness but he had failed to do so. She stated that, at the time his motor vehicle was seized, he was in arrears and had thereby breached the loan agreement. Pursuant to their contractual arrangements, the 1st respondent was entitled to seize the appellant's motor vehicle and therefore he was not entitled to the interim relief he sought.

[23] Fraser J ultimately heard the application on 9 October 2014. During the hearing, the learned judge requested clarification of the loan account statements that were exhibited to the affidavit of Roshene Betton. This clarification was provided by Deidre Daley in her affidavit filed on 10 October 2014, where she deponed that the appellant was, indeed, in arrears and that the attempts made for him to regularise his account had proved futile. She indicated that when money is paid by a defaulting member, portions are assigned to default interest payment, interest payment, principal, share account and bailiff collection fees. She thereafter exhibited a statement showing detailed apportionments of payments made by the appellant.

Fraser J's decision

[24] The learned judge delivered written reasons on 24 November 2014. The learned judge noted at paragraph [22] of his judgment that the appellant had objected to his reference to the affidavit of Deidre Daley on the basis that the respondent failed to comply with his earlier order that all affidavits were to be filed by 7 October 2014. The learned judge explained that during the hearing of the application on 9 October 2014, he had requested clarification of the loan account statements that were exhibited to the affidavit of Roshene Betton. This request was made in the appellant's presence and

without objection. In compliance with this request, the unsigned affidavit of Deidre Daley was emailed to the appellant on the evening of 9 October 2014 and the executed affidavit was filed and served on the appellant on 10 October 2014 before the commencement of the hearing. However, it was only after the judgment was delivered that the appellant indicated to the court via email his concern about the date and time he had been emailed and served with the affidavit.

[25] In his analysis of the issues before him, the learned judge highlighted various aspects of the alleged facts contained in the affidavits filed in the application and submissions made. He opined that the outcome of the application turned on the legal effect of the loan agreement and the bill of sale that had been signed by the parties. He cited the case of **National Commercial Bank v Owen Campbell and Toushane Green** [2014] JMCA Civ 19 to support his finding that the 1st respondent had title of the appellant's motor vehicle by virtue of the bill of sale, and since the payments were in arrears, the 1st respondent was entitled to effect seizure of his motor vehicle.

[26] The learned judge then went on to consider the risk of irremediable prejudice to both parties. He noted that the appellant was seeking a mandatory injunction (mandating the return of his motor vehicle) and a prohibitory injunction (prohibiting any further action under the bill of sale pending a determination of the claim). The learned judge found that in the instant case, both aspects of the injunction would unfairly prejudice the interests of the 1st respondent. The first basis was the finding that, in his view, if it were to be concluded that the 1st respondent had acted unfairly, the appellant could be adequately compensated in damages, but, on the other hand, if the motor

vehicle was lawfully seized and the court ordered its return, the court would in effect be preventing the 1st respondent from exercising its contractual rights under agreements that were signed by the appellant. This would undermine the security for the loan; prevent the 1st respondent from exercising any rights under the bill of sale; and prevent the 1st respondent from being able to recover its loan.

[27] The learned judge also considered the fact that the appellant had indicated that he would repay the loan but had failed to do so, and that even if the 1st respondent was willing to return the motor vehicle, the appellant only wanted to pay $28,642.84 per month and not the $31,507.12 that he was contractually obligated to pay. The learned judge also noted that a motor vehicle is a depreciating asset and that the motor vehicle in question at the time of the judgment was 10 years old. He further opined that at the time of the judgment, the forced sale value was slightly higher than the appellant's total current indebtedness under the loan, including collection expenses. These factors may also severely affect the 1st respondent's prospect of recovering its loan.

[28] In assessing the risk of prejudice to the appellant, the learned judge noted that damages would be an adequate remedy for him in the event that his claim was successful.

[29] The learned judge found that in all the circumstances, the balance of convenience did not favour the court granting the interim relief sought. The learned judge therefore made orders set out in paragraph [13] herein.

Notice of appeal

[30] In the notice of appeal filed 15 October 2014 challenging Fraser J's decision, the appellant sought the following orders:

> "That the denial of the Interim Relief by the Supreme Court be vacated and the 1st Respondent forthwith return the car to the Appellant and the Appellant continue to pay the monthly payment of $28,642.84 pending the determination of the substantive matter in the Supreme Court or such other or further order as is just and fair in all the circumstances.
>
> The Court of Appeal is asked to exercise its power to ensure that justice and fairness is applied as an overriding objective of the Court's authority.

[31] These orders were sought on the following grounds:

> "a) The trial judge erred when he adjourned the matter on the 1st October, 2014 and extended the time for the Respondents' attorney to file a response to the Appellant's application for interim relief.
>
> b) The trial judge erred when he permitted the Respondents' attorney to give oral evidence to supplement the Respondents' affidavit even though the rule said all evidence must be by affidavit.
>
> c) The trial judge erred when he had previously fixed a date for the filing and serving of the Respondents' affidavit in response and subsequently on the day after the hearing was terminated he permitted the Respondents' attorney to file an affidavit and he used it to supplement the evidence thereby depriving the Appellant an opportunity to respond to the affidavit.
>
> d) The trial judge erred when he applied the wrong rule of law in assessing the Appellant's application for interim relief by assessing the Appellant's chances of success in the ultimate issue.
>
> e) The trial judge finding that at the time of the seizure the Claimant was in default was aberrant.

f) The trial judge erred when he found without affidavit evidence that the defendant's attorney showed that the Claimant was in default.

g) The trial judge erred when he interpreted the decision of the Court of Appeal in National Commercial Bank v. Owen Campbell and Toushane Green, [2014] JMCA Civ 19 to mean that the signing of a Bill of Sale is a sale of the chattel to the beneficiary of the bill of sale; the Appellant never sold his car to the Defendants or any of them."

Issues

[32] Both the appellant, in person, and Mrs Gibson-Henlin made submissions before us. Based on the arguments and grounds of appeal advanced in this appeal, I am of the view that the instant case raises three main issues:

(1) Whether the manner in which the learned judge conducted the hearing was improper and irregular? (grounds (a), (b) and (c)).

(2) Whether the learned judge used the proper test to assess the appellant's application for interim relief? (ground (d))

(3) Whether the learned judge correctly applied the principles gleaned from **National Commercial Bank v Owen Campbell and Toushane Green**? (grounds (e), (f) and (g))

Issue (1): Whether the manner in which the learned judge conducted the hearing was improper and irregular? (grounds (a), (b) and (c))

Appellant's submissions

[33] In support of grounds (a), (b) and (c) the appellant alleged that on 1 October 2014 when the matter was first listed before Fraser J, the respondents had failed to file a response to his application and so he urged the learned judge to grant the relief he sought. The learned judge, he submitted, then prompted the respondents' attorney to object to the application and she then indicated that she would be objecting to the same. He submitted that thereafter, the learned judge adjourned the matter to 9 October 2014 and permitted the respondents to file and serve any affidavits in response on or before 7 October 2014.

[34] The appellant contended that the affidavit of Roshene Betton filed on 7 October 2014 was deficient because it did not address the issue of whether he should receive the orders sought in his claim with regard to the amount of money he had paid so far, and his shares that had been withheld. The appellant asserted that the learned judge then asked the respondents' attorney various questions to supplement the deficiencies in Roshene Betton's affidavit in contravention of the rule that evidence in these proceedings should be by affidavit. He further alleged that on 9 October 2014 at 6:07 pm, the respondents' attorney sent an unsworn draft affidavit to him via email and on 10 October 2014 served the duly signed said additional affidavit on him. On 10 October 2014, when the matter came before Fraser J, the appellant submitted that he had objected to Deidre Daley's affidavit filed 10 October 2014 being considered in the hearing, but his objection and the orders he sought were refused by the learned judge.

[35] The appellant asserted that these irregularities contravened rule 1.1 of the Civil Procedure Rules, 2002 (CPR) because the learned judge should not have allowed the respondents to file a response to his application since they had failed to do so within the stipulated time. He said the trial judge erred when he wrongly allowed the respondents to supplement the deficient affidavit evidence of Roshene Betton filed 7 October 2014 with oral statements from the respondents' attorney because such statements were not contained in any affidavit and were therefore inadmissible. He also posited that the learned judge's consideration of the affidavit of Deidre Daley filed 10 October 2014 was wrong since he had not given the appellant a chance to respond to it.

Respondents' submissions

[36] Mrs Gibson Henlin, in response to ground (a), posited that there was no evidence or factual basis supporting the appellant's allegations. She asserted that the respondents were served with the application for interim order on 24 September 2014, six clear days before the hearing on 1 October 2014 and she applied for and received an adjournment. Having regard to the factors to be considered when deciding whether to grant an adjournment as stated in **Donald Panton et al v Financial Institutions Services Limited** SCCA No 6/2006 delivered 7 April 2006, there would have been a greater risk of prejudice to the 1st respondent than that to the appellant if the adjournment was not granted. The learned judge was correct to exercise his discretion to grant one. Moreover, rule 26.1(2)(c) of the CPR gives the court the power to extend or shorten time for compliance with the rules.

[37] Mrs Gibson-Henlin denied the appellant's allegation under grounds (b) and (c) that the respondents' counsel gave oral evidence to supplement their affidavit. She instead posited that the affidavit evidence was explained to the judge who thereafter requested clarification with regard to the loan account to aid in his analysis and determination of the application. As stated in paragraph [22] of his judgment, he asked that this information be provided by way of additional affidavit deponed to by Deidre Daley filed 10 October 2014. The appellant was present when the request for clarification was made and he did not object to it or the filing of the additional affidavit. The appellant was served with Deidre Daley's affidavit from the evening of 9 October 2016 and there was no indication that he was prejudiced by receipt of the said affidavit on the date of the hearing before the learned judge.

Analysis

[38] The issue therefore, is whether the learned judge erred when he gave the respondents an opportunity to challenge the application for interim relief. Rule 26.1(2)(c) states that the court may "extend or shorten the time for compliance with any rule, practice direction, order or direction of the court, even if the application for an extension is made after the time for compliance has passed". Under rule 26.1(2)(v) of the CPR, the court may "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective". In light of the court's powers to grant this adjournment and to extend time for compliance with any rules and coupled with the fact that the application in the case at bar could severely limit or negate the 1st respondents' rights under a contractual

agreement, Fraser J's exercise of his discretion to do so cannot be faulted and cannot be said to be plainly wrong.

[39] The next issue in relation to grounds (a), (b) and (c) was whether the learned judge should have considered the affidavit of Deidre Daley. The learned judge in his judgment at paragraph [22] stated that he requested clarification of the loan account statements that were exhibited to the affidavit of Roshene Betton in the appellant's presence and without his objection. The learned judge indicated that it was only after the judgment had been delivered that the appellant indicated his displeasure in that regard. Rules 1.1, 1.2 and 26.1(2)(v) of the CPR give the court the power to make orders to give effect to the overriding objective. If during a hearing there is an area on which the learned judge requires clarification, there is nothing irregular or improper with a request from the learned judge for information, and so, in the instant case, he was not wrong to so do. Moreover, this request had been made in the appellant's presence and he, being an attorney-at-law, would have been cognizant of his right to challenge or respond to this affidavit when it was filed if he had so desired. The appellant, having not challenged the request and having not sought an opportunity to file a response to that affidavit before Fraser J, he would have been in effect asking this court to overturn an order based on his inaction. However, his inaction cannot be attributable to the learned judge.

In the main, there was nothing improper or irregular in the learned judge giving the respondents an opportunity to challenge the application for interim relief and there was nothing unlawful about his request for further clarification on a particular issue. The

exercise of his discretion in that regard cannot be deemed to be demonstrably wrong and so grounds (a), (b) and (c) failed.

Issue (2): Whether the learned judge used the proper test to assess the appellant's application for interim relief? (ground (d))

Appellant's and respondents' submissions

[40] In relation to ground (d), the appellant posited that Fraser J applied the wrong test in his assessment of the application for interim relief. For him, the learned judge ought to have given effect to the overriding objective as stated in rule 1.1(1) and (2) of the CPR, by considering issues of fairness and justice, instead of making an assessment of the likelihood of success of the appellant's claim. Mrs Gibson-Henlin submitted that the correct principles are those stated by the Judicial Committee of the Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UKPC 16. These same principles were endorsed and applied by Fraser J in the case at bar and so his judgment ought not to be disturbed.

Analysis

[41] At the interlocutory stage, the factors that guide the court as to whether or not to refuse the application are indeed those comprehensively stated by Lord Diplock on behalf of the House of Lords in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 and which have been more recently endorsed by the Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd**. In the latter case, Lord Hoffmann at paragraphs 16-19 of the judgment said:

> "[16] ...It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course

impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

[17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. 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. This is an assessment in which, as Lord Diplock said in *American Cyanamid* [1975] 1 All ER 504 at 511:

> 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'

[18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or

> enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.
>
> [19] There is, however, no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey of Tullichettle in *R v Secretary of State for Transport, ex p Factortame Ltd* (*No 2*) [1991] 1 All ER 70 at 127. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772 at 780-781. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1970] 3 All ER 402 at 412, 'a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted'."

It is interesting to note, as the Privy Council pointed out, that a mandatory injunction, such as that sought by the appellant in the instant case, is often more likely to cause irremediable prejudice than in cases where a prohibitory injunction is sought and the court therefore may be reluctant to grant it.

[42] Most recently, the above principles set out so clearly in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd**, were endorsed in **David Orlando Tapper v Heneka Watkis-Porter** where at paragraph [36] I stated as follows:

> "1. The court must be satisfied that there is a serious issue to be tried, that is, that the claim is not frivolous or vexatious.
>
> 2. The court should then go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought. In considering where the balance of convenience lies, the court must have regard to the following:
>
> (i) Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not be granted. However, if damages would be an adequate remedy for the respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted.
>
> (ii) If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party's case.
>
> (iii) In deciding whether to withhold or grant the injunction the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.
>
> (iv) If the balance of convenience is even then the court should preserve the status quo."

[43] It is clear that the learned judge did utilize these factors in making his determination as to whether to grant the interim relief the appellant sought. He found that the appellant was in arrears in his loan payments and so the 1st respondent was entitled to seize his motor vehicle, which, in effect, removes any likelihood of success of the appellant's claim. The learned judge examined the likelihood of irremediable prejudice to both parties and found that the 1st respondent would suffer greater prejudice than that which would affect the appellant since such an order may operate to prevent the 1st respondent from recovering its loan. The learned judge also found that damages would be an adequate remedy for the appellant. In all the circumstances, the balance of convenience lay with the respondents and so he refused the order sought. These findings clearly illustrate that the learned judge did consider the factors stipulated in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** and so it cannot be said that in the exercise of his discretion he was plainly wrong. It follows therefore that ground (d) must also fail.

Issue (3): Whether the learned judge correctly applied the principles gleaned from National Commercial Bank v Owen Campbell and Toushane Green? (grounds (e), (f) and (g))

Appellant's submissions

[44] The appellant submitted in support of grounds (e), (f) and (g) that the learned judge erred in his interpretation of **National Commercial Bank v Owen Campbell and Toushane Green** because, he contended, that that case did not find that a bill of sale is a sale of chattel to the beneficiary of the bill of sale. Instead, he stated that the case of **National Commercial Bank v Owen Campbell and Toushane Green**

found that a bill of sale is not a transfer of title to the goods in exchange for a money consideration, but rather it is a transfer of property in goods in order to secure a debt. In all the circumstances, he urged this court to accept that Fraser J's exercise of his discretion was wrong and should be set aside.

Respondents' submissions

[45] In response to the appellant's arguments on grounds (e), (f) and (g) Mrs Gibson-Henlin submitted that Fraser J correctly stated and applied the principles gleaned from **National Commercial Bank v Owen Campbell and Toushane Green** and that based on these principles, the 1st respondent was entitled to possession of the appellant's motor vehicle and the seizure was therefore lawful. Counsel also contended that in the bill of sale, the appellant's motor vehicle is the only chattel listed in the second schedule, and was therefore covered by the bill of sale. The bill of sale was properly registered and its validity had not been challenged by the appellant, and so the act of seizure of the motor vehicle, under the authority and power of the bill of sale, was therefore lawful. Moreover, the appellant's possession of the motor vehicle was subject to him honouring his obligations under the loan agreement and bill of sale. Since his loan had been in arrears at the time of the seizure, the seizure was lawful and there was no basis for interfering with Fraser J's decision in that regard.

Analysis

[46] This issue turns on whether the learned judge misinterpreted or misapplied the principles stated in **National Commercial Bank and Owen Campbell v Toushane Green**. In that case, Mr Shawn Scott, a customer of the bank, was indebted to it for

$5,000,000.00 and granted a bill of sale over his 2007 BMW 328i (BMW) motor vehicle as security for the debt. The bank also registered a lien on the said BMW. Mr Toushane Green purchased the BMW from a car mart for $3,200,000.00 and the name on the title was Beverly Belnavis. No lien or mortgage had been noted on the title. The relevant documents were later delivered to Mr Green and the BMW was insured in his name. Mr Scott fell into arrears and the bank authorized Mr Owen Campbell to seize the BMW, which was done. Mr Green, thereafter, filed a claim against the bank and Mr Campbell for, *inter alia*, recovery of possession of the said BMW. The bank and Mr Campbell made an application for summary judgment which was refused by Straw J. They filed an appeal in this court. By a majority, the appeal was allowed, the judgment of Straw J set aside and summary judgment was granted to the bank and Mr Campbell. This was because the court, by a majority, found that a bill of sale is to be treated as akin to a title. This title may only be defeated by a better title and transfers property in chattels from the grantor to the grantee. Consequently, the BMW had been transferred from Mr Scott to the bank and so the bank had a right to possess the BMW. In deciding the issue of whether sections 22, 23 and 25(1) of the Sale of Goods Act affected the bank's title to the BMW, Brooks JA at paragraph [68] of the judgment said:

> "Three points may be made about the application of these provisions of the Sale of Goods Act. The first is that the assignment of title to goods by virtue of a bill of sale is not a sale of the item. It is not a transfer of title to the goods in exchange for a money consideration, as defined by section 2 of the Sale of Goods Act. It is, instead, a transfer of property in goods in order to secure a debt. The second point is that a bill of sale is an absolute transfer of title to the subject property. The grantor of the bill of sale does not, thereafter, have a voidable title. He has no title whatsoever. The third

> point is that, in order to benefit from the provisions of sections 23 and 25, a purchaser who buys in good faith must produce evidence of the circumstances of that purchase."

[47] Based on the summary of the case in issue, it is evident that Fraser J was correct to find that the bill of sale transferred title of the motor vehicle to the 1st respondent. There was no evidence demonstrated that the 1st respondent was not entitled to assert its title and take possession of the appellant's motor vehicle where the loan was in arrears. The learned judge was not wrong for so doing and this ground of appeal also failed.

Conclusion on SCCA No 88/2014

[48] It was quite evident that all the arguments advanced by the appellant in support of SCCA No 88/2014 had failed and so the appeal was dismissed. I will now go on to address SCCA No 43/2015.

SCCA No 43/2014: Appeal against Batts J's decision

Application for summary judgment

[49] The respondents filed their notice of application for summary judgment on 7 October 2014. The grounds on which the respondents were seeking summary judgement were that, *inter alia*, pursuant to part 15.2 of the CPR, the appellant had no real prospect of succeeding on the claim; the appellant had borrowed a sum of $750,000.00 from the 1st respondent at an interest rate of 22% per annum for a period of 36 months, payable by way of monthly instalments of $31,507.12; and having received, as security for the loan, a bill of sale over the appellant's motor vehicle bearing licence no FA 7979, the appellant had defaulted in the repayment of his loan

obligations and the 1st respondent was therefore entitled to possession of the motor vehicle.

[50] With regard to the 2nd and 3rd respondents, they relied on the ground that there was no cause of action against them as they were acting throughout in the course of their employment and were therefore servants and or agents of the 1st respondent. As such, in those circumstances, there should be no separate cause of action against them.

[51] The application for summary judgment was supported by the affidavits of Roshene Betton filed 7 October 2014 and that of Deidre Daley filed 10 October 2014 as set out previously in paragraphs [22]-[23] herein.

[52] The appellant swore to and filed an affidavit in response to the application for summary judgment on 10 April 2015. He referred to his claim initiated in the court in respect of the alleged wrongful seizure of his motor vehicle, for damage to his electronic gate, general damages and aggravated damages. He made mention of the fact that the summary judgment application had been filed on 7 October 2014, and was scheduled for hearing on 17 April 2015. He also indicated that on 29 October 2014, the time for filing the defence in respect of each of the respondents had passed and none of them had filed a defence. He stated that on 31 October 2014, he had filed a request for judgment in default of defence and for the assessment of damages. The deputy registrar, however, by requisition had informed the appellant that she was unable to enter the judgment in default of defence as requested by the appellant while the

application for summary judgment was still pending. The appellant relied on rule 12.13 of the CPR to say that the respondents were prohibited from making submissions and could only be heard on costs, the time for payment of any judgment debt and the enforcement of the judgment; or an application under rule 12.10(2) of the CPR. As a consequence, the appellant said, that the application for summary judgment could not be sustained and must be struck out.

[53] It was the appellant's testimony also that there was an appeal pending in respect of the substantive issues between the parties which was scheduled for a case management conference on 21 April 2014, four days after the date scheduled for the hearing of the summary judgment application. The success of the appeal (SCCA No 88/2014), he stated, would have made the hearing of the summary judgment application a nullity. As a consequence, he insisted that the latter ought not to be entertained by the court "because such a summary judgment hearing would be an impermissible exercise of authority by the Supreme Court over a matter currently within the jurisdiction of the Court of Appeal".

[54] Miss Taniesha Rowe, one of the attorneys-at-law representing the respondents, swore to and filed an affidavit on 15 April 2015, on behalf of the respondents, wherein she indicated that the claim form and particulars of claim had been served on the respondents on 11 September 2014, and that the defence on behalf of the respondents was filed on the 27 October 2014, and had been served on the appellant at 3:52 pm on the same day. She deponed that the respondents had complied with the rules, and that the request for default judgment, which had been filed by the appellant on 27 October

2014, was premature. She stated that the appellant had filed an application for an interim order for the recovery of the motor vehicle which had been refused by Fraser J. This order, she submitted, was the subject of an appeal, and as there was no stay of the judgment and no risk of an inconsistent judgment being given, the application for summary judgment could proceed, particularly as there was no real prospect of the appellant succeeding on the claim.

Batts J's decision

[55] The learned judge outlined the chronological history of the matter, the pleadings and the issues between the parties. He referred to the basis for the respondents' application, being rule 15.2 of the CPR. He also referred to the respondents' contention that if the claimant's case was bound to fail it was in his interest to know that as soon as possible. Counsel, he said, had relied on the authority of **Gordon Stewart et al v Merrick Samuels** SCCA No 2/2005 delivered on 18 November 2005 for that position, and on **Swain v Hillman** [2001] 1 All ER 91 where Lord Woolf addressed the application of the overriding objective of the CPR in the summary disposal of matters in order to save time and expense, achieve expedition, avoid the court's resources being used up for cases where it serves no purpose and being, generally, in the interests of justice.

[56] Batts J took time to analyse the respective positions of the parties. The learned judge stated in paragraph [6] of his judgment that the respondents claimed that the seizure of the motor vehicle was lawful on the following grounds:

"I. The Bill of Sale gave to the [1st respondent] an absolute right to the property in the assigned motorcar and a right to possession of it upon the [appellants] default in his loan repayment

II. The [appellant] was in default of his loan agreement with the [1st respondent]. He did not pay the amounts due under the loan

III. The act of the seizure of the motor vehicle was done under the authority and power of the Bill of Sale and loan agreement

IV. The [appellant] has not challenged the validity of the Bill of Sale

V. The [appellant's] possession of the motorcar is subject to his honouring of his obligations under the Loan Agreement and Bill of Sale.

VI. The [appellant's] loan account remains in arrears as amounts are still due and owing; the Claimant has not paid off his account.

VII. The [1st respondent] was therefore entitled to possession of the motorcar."

[57] The learned judge also noted that the appellant had vigorously resisted the respondents' contentions. The learned judge chronicled the appellant's position in paragraph [8] of his judgment thus:

"I. The [respondents] previously sought summary judgment against the [appellant].

II. The time for filing a defence had expired.

III. The [appellant] has filed a request for default judgment.

IV. The [appellant] was informed by the Registrar that judgment could not be entered on his behalf while the application for summary judgment was pending.

V. That Pursuant to Rule 12.13 the [respondents] are prohibited from making submissions and may not be heard on anything except '(a) costs; (b) the time of payment of judgment debt; (c) enforcement of the judgment and (d) an application under rule 12.10(2)'.

VI. The court should not entertain the application for a summary judgment and it must of necessity be struck out.

VII. An appeal to the Court of Appeal against the decision of Fraser J. [sic] is pending and is scheduled for case management conference four days after the scheduled hearing of this application.

VIII. The success of the [appellant] in the Court of Appeal would render the summary judgment a nullity.

IX. The scheduled request for summary judgment cannot be entertained while the appeal of the substantive matter is pending before the Court of Appeal because such a summary judgment hearing would be an impermissible exercise of authority by the Supreme Court over a matter currently within the jurisdiction of the Court of Appeal."

[58] The learned judge considered rule 15.2 of the CPR carefully. He concluded that the fact that there was a pending matter dealing with an injunction relating to similar facts concerning the application before him, would not preclude him from hearing the application as both applications involved "somewhat different considerations".

[59] The learned judge reasoned that the real question to be answered was: "did the [appellant] have a real prospect of succeeding on the claim?" He decided in the

negative. He referred particularly to rule 12 of the CPR, where it states that a party can only enter a default judgment if certain conditions are extant, namely in keeping with rule 9 that the defendant has failed to file an acknowledgment of service, and in respect of rule 10, that he has failed to file a defence. Batts J made it clear that a default judgment could only be properly entered if neither of those two documents had been filed as required by the rules. The learned judge explained rule 12.13 of the CPR and how it ought to be interpreted, which is that only certain rights existed once the default judgment had been entered and no order had been obtained setting it aside, namely that at an assessment after the entry of the default judgment, in the main, the defendant could only address the court on the question of costs and the time of payment or enforcement of any judgment debt. However, that only obtained when the default judgment had been entered, and in the instant case, he stated there was no need for an application to set aside the judgment. He therefore found that the respondents had filed their acknowledgment of service and defence in time.

[60] Batts J also referred to the fact that Fraser J had refused the application for injunction and he took particular note of the following statement of Fraser J at paragraph [26] of his judgment:

> "...On the face of the evidence before the court the Claimant is in arrears but in any event even if I am wrong in that finding I have found from a construction of the agreement that even if he was not in arrears once money was outstanding on the loan the security could be seized."

[61] Batts J stated that the evidence before him was clear. The appellant had borrowed $750,000.00 from the 1st respondent with a specific amount to be paid

monthly. The appellant, he said, had given a bill of sale and power of attorney as security for the loan. He had subsequently defaulted on the loan. On the basis of the documentation given on the security of the loan, the respondents at the material time were entitled to possession of the motor vehicle and therefore to enter the appellant's premises and seize it. The seizure, he found, was therefore lawful. He referred to clause 4 of the bill of sale (as set out in paragraph [7] herein) which permitted the respondents to use force to gain entry to the appellant's premises to regain possession of the motor vehicle. He commented that the appellant, being an attorney-at-law, would have understood the content and import of that document. Batts J stated that there was no evidence before him that the respondents had used unreasonable or excessive force to gain access to the property or the motor vehicle, or had acted other than in compliance with the terms of the bill of sale.

[62] The learned judge, although he had made it clear that in his opinion the respondents had filed their acknowledgement of service and defence in time, stated that in the circumstances of this case, even if they had not done so, he would have given them an extension of time to do so. He pointed out that no judgment had been entered at the time when the defence had been filed. Additionally the terms of the bill of sale were clear and unequivocal. Indeed, he concluded that the merit of the respondents' case was overwhelming. He therefore, as indicated, granted summary judgment in favour of the respondents.

Notice of appeal

[63] The appellant was wholly dissatisfied with the above findings and the decision of Batts J and promptly filed a notice and grounds of appeal on 21 April 2015. The six grounds of appeal were as follows:

> "a) The trial judge erred when it [sic] entertained an application for summary judgment at a time when the applicant was in default of defence and the identical issues were currently before the Court of Appeal; Minister of Finance et al v. Latibeaudiere, [sic] [2014] JMCA Civ 22.
>
> b) The trial judge erred when he admitted in evidence an offer letter from the 1st Respondent addressed to the Appellant by which the 1st Respondent made an offer to the Appellant to give the loan facility in violation of the rule announced in Prenn v. Simmonds, [1973] 3 All E.R. 237, 240-41 (H.L.) (per Lord Wilberforce);
>
> c) The trial judge erred when he disregarded the rules of the CPR for the time for filing of a defence and the time for filing an affidavit to be used in a hearing;
>
> d) The trial judge erred when he permitted the Respondents' attorney to give oral evidence to supplement the Respondents' affidavit even though the relevant CPR rule is that all evidence must be by affidavit;
>
> e) The trial judge erroneously applied the relevant law when he determined that the Appellant had no realistic prospect of success although there were substantial factual disputes between the parties;
>
> f) The trial judge [sic] finding that at the time of the seizure the [appellant] was in default was aberrant;"

[64] The appellant ultimately sought the following orders:

> "That the Order of Summary Judgment in favour of the Respondents was wrong and is therefore vacated and that

costs be awarded against the Respondents in this Court and in the Court below;

The Court of Appeal is asked to exercise its power to ensure that justice and fairness is applied as an overriding objective of the Court's authority."

Real prospect of success

[65] Rule 15.2 of the CPR reads as follows:

> "The court may give summary judgment on the claim or on a particular issue if it considers that-
>
> a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> b) The defendant has no real prospect of successfully defending the claim or the issue."

[66] As stated in **Jamaica Public Service Company Limited v Rose Marie Samuels** [2012] JMCA Civ 42, it was therefore incumbent on the respondents to demonstrate that the appellant had no real prospect of succeeding on the claim. In deciding whether or not to set aside Batts J's judgment, this principle must be assessed in the context of whether he was palpably wrong as stated in paragraphs [17]-[18] herein.

Issues

[67] In my view, the issues in SCCA No 43/2015 are as set out below and in my discussion and analysis of the grounds and the submissions, I will treat with them accordingly:

(i) Were the respondents truly in default of defence at the time that the appellant filed his request for default judgment or were they in compliance with the CPR? (grounds (a) and (c))

(ii) Did the learned judge err in admitting into evidence the offer letter in respect of the loan from the 1st respondent to the appellant? (ground (b)).

(iii) Had the appellant showed that he had any real prospect of succeeding on the claim? (grounds (e) and (f))

(iv) Was the learned judge in error in his treatment of the affidavit evidence? (ground (d))

Issue (i): Were the respondents in default of defence or were they in compliance with the CPR? (grounds (a) and (c))

Appellant's submissions

[68] In support of grounds (a) and (c), the appellant relied on rule 12.13 of the CPR to support his argument that the respondent ought not to have been heard on the summary judgment application as they were late in the filing of their defence and could not do so without the consent of the appellant or an order of the court. Neither his consent nor a court order had been obtained, and so the request for default judgment had therefore been properly filed. The appellant relied on **Robert v Momentum Services Ltd** [2003] 1 WLR 1577 and the Privy Council case from this jurisdiction, **Strachan v The Gleaner Company Limited et al** [2005] UKPC 33 in support of this

proposition. The decision of Batts J was, he stated, in violation of those principles, and had resulted in prejudice to him, and it therefore could not stand.

[69] With regard to the issue of the time for the filing of a defence, the appellant referred to **Sayers v Clarke Walker (A Firm)** [2002] 3 All ER 490 for the general principle that rules, court orders and practice directions are there to be obeyed, and if a sanction is imposed for non compliance, then the application for relief from sanction must contain and/or refer to all the factors that the rules require to be addressed. The appellant further argued that the defence was required to be filed within 42 clear days of the service of the claim form and the particulars of claim, and in this case that had not been done as the respondents had relied on rule 3.5 of the CPR in their calculation of the time period. Their interpretation of the same was wrong, he argued, with regard to time not running in the vacation, as the rule had been amended on 15 November 2011 to say that time did not run in respect of the claim form and the particulars of claim. He relied on the dictum of Morrison JA (as he then was) in **Minister of Finance and Planning & Public Service et al v Viralee Bailey-Latibeaudiere** [2014] JMCA Civ 22 in support of this position.

[70] The appellant also submitted that Batts J had permitted the affidavit of Taniesha Rowe, sworn to on 15 April 2015 and filed on the same day, to be used in the hearing over his objection. In paragraph 21 of his skeleton arguments filed 16 July 2015, the appellant stated that the learned judge was wrong in that regard, as he was:

> "...not authorized by law to disregard the time limitations contained in the CPR or to override the decision of the Court of Appeal in that regard."

Respondents' submissions

[71] Mrs Gibson-Henlin set out the chronology of events but drew the court's attention to the approach which this court must undertake in its review of the exercise of the discretion of the judge in the court below, namely in the instant case, to examine whether Batts J, in the exercise of his discretion, could be shown to be demonstrably wrong (see **The Attorney General v John MacKay**).

[72] Learned Queen's Counsel refuted the allegations that the respondents were in default of defence as being inaccurate. She demonstrated that the defence was due on 27 October 2014 and had been filed on that day and so the learned judge's ruling to that effect was correct. She referred to rules 3, 9, 10 and 12 of the CPR, with regard to the time frame for the filing of the defence and how the same was to be computed, and maintained that the learned judge had canvassed all the relevant rules in his determination of this issue and could not be faulted.

[73] Mrs Gibson-Henlin further submitted that the learned judge was correct in proceeding to hear the application for summary judgment when the order of Fraser J was on appeal, as the appellant could not obtain the same relief in respect of the two applications, and so there was no risk of inconsistent decisions. Additionally, Queen's Counsel argued that the test for the grant of an injunction being whether there was a serious issue to be tried, which equated with a "good and arguable case", was a test which was directed at the preliminary assessment of the party's contention, and not at the ultimate result of the matter which was the test when one was considering the

application for summary judgment. She referred to the dictum of P Harrison JA (as he then was) in **Gordon Stewart v Merrick Samuels** for that statement of the law.

Analysis

[74] The issue as to whether the respondents were in default of defence or whether they were in compliance with the CPR can be disposed of quite easily. The rules in relation thereto are very clear and in certain circumstances, this court has already given guidance with regard to their interpretation. The referable dates which in my view were not disputed are as follows:

(1) The claim form and particulars of claim were served on 11 September 2014;

(2) The application for summary judgment was filed on 7 October 2014;

(3) The defence was filed and served on 27 October 2014;

(4) The request for default judgment was filed on 27 October 2014; and

(5) The summary judgment application was heard on 17 April 2015.

I wish to point out that there were certain errors made by the appellant in his affidavit filed 10 April 2015 (as set out in paragraph [53] herein) in respect of certain dates, but the above dates are correct and so I will treat with them as stated accordingly.

[75] There does not seem to be any dispute that the acknowledgements of service in respect of the 1st, 2nd and 3rd respondents were filed properly and in time, namely on

17, 19 and 19 September 2014 respectively. They were due 14 clear days after the date of service of the claim form and the particulars of claim (11 September 2014), that is, 26 September 2014 (rule 9.3(1) of the CPR). The acknowledgment of service not being a statement of case, time runs for the filing of the same in the long vacation. The real concern, in this issue on appeal, related to the filing of the defence. The respondents had 42 clear days after the date of service of the claim form and the particulars of claim (11 September 2014) within which to do so (rule 10.3(1) of the CPR). There is also another relevant rule, namely 3.5(1) of the CPR which (as amended 15 November 2011) reads as follows:

> "During the long vacation the time prescribed for filing and serving any statement of case other than the claim form, or the particulars of claim contained in or served with the claim form, does not run."

[76] In the long vacation, therefore, time does not run in respect of the filing and service of the defence, the latter being a "statement of case" pursuant to the definition section 2.4 of the CPR. Morrison JA (as he then was) in **Minister of Finance and Planning & Public Service et al v Viralee Bailey-Latibeaudiere** made that very clear when, in paragraph [108] of the judgment (in reference to the unamended rule), he noted that rule 3.5 of the CPR states that the time for filing any statement of case does not run during the long vacation. In paragraph [114] he pointed out that "the amended rule thus makes it clear that the long vacation does not affect any time prescribed for the filing of a claim form or the particulars of claim contained in or served with the claim form". So, from that comment, it is clear, that the general rule remains the same and time does not run in the long vacation for all other statements of case,

including the defence. But time does run in the long vacation in respect of the claim form and particulars of claim.

[77] So, in counting the 42 clear days, one must begin on 16 September 2014, at the end of the long vacation, the day of the commencement of the Michaelmas Term. The day on which the period begins, namely 11 September 2014, the date of service, is not included (rules 3.2(2) and (3) of the CPR). This would in effect be four days after the date of service of the claim form and the particulars of claim, and would mean that the defence should have been filed any day thereafter up until 27 October 2014, inclusive. The defence filed on that day was therefore filed in time. The learned judge was correct. As a consequence, the filing of the request for judgment on 27 October 2014 by the appellant was premature and irregular, as rule 12.5(c) of the CPR would not have obtained in that the period for filing a defence and any extension agreed by the parties or ordered by the court would not yet have expired.

[78] The rules require that for the hearing of the application, the respondents were required to give 14 clear days notice of the hearing and of their affidavits in support (rule 15.4(3) and 15.5(1) of the CPR). This appears to have been done. The appellant was required to give seven clear days notice of his affidavit in response (rule 15.5(2) of the CPR). The appellant's affidavit sworn to on 10 April 2015, even if served on the day of filing would have been short served in respect of the hearing date fixed for 17 April 2015. However, if no objection had been taken, and it appears that none was taken at the hearing of the application for summary judgment, then when the matter came before the learned judge, it was his duty to examine the affidavit evidence adduced and

review the submissions made to him. Rule 12.13 of the CPR had no applicability whatsoever in these circumstances. There was no default judgment in place, therefore no application was necessary to set aside the same, and the respondents were, as a consequence, not limited or restricted in the manner set out in that rule. (It is important to note that rule 12.13 of the CPR had been held to be in breach of the Constitution and therefore null and void by the Constitutional Court (Batts, Straw JJ, Lindo J (Ag)) on 14 March 2016 in **Natasha Richards and Phillip Richards v Errol Brown v and The Attorney General** [2016] JMSC Civ 22. However, this judgment has not yet been considered by the Court of Appeal.)

[79] The affidavits of Taniesha Rowe, both sworn to and filed on 15 and 16 April 2015 respectively, were submitted in response to an affidavit which had only been filed the week before. The first affidavit exhibited the "admit page" of the defence showing that it had been served on the appellant at 3:52 pm on 27 October 2014, and the "admit page" showing that the request for default had been served on their offices at 3:59 pm on 27 October 2014. The second affidavit exhibited a copy of the registered bill of sale. These documents were clearly necessary for the determination of the application as the appellant was taking issue with the time of filing of the defence vis-à-vis the filing and serving of the request for the default judgment. The appellant has not challenged these exhibits. There was no need for a further response from him as the dates shown were correct. The dates of service would have been known to him, so he could not have claimed that he had been taken by surprise. He had signed the bill of sale. This exhibit

was in relation to the registered bill of sale, merely showing that the instrument had been duly recorded as was required by law.

[80] The appellant could not have been prejudiced by the late production of these exhibits. The purpose of the affidavits was so that the learned judge would have been provided with documentary evidence of service of the relevant documents, and that the bill of sale had been duly registered. This could only have assisted the court in its deliberations. In any event, it is entirely within the discretion of the court whether time in respect of the service of documents to be used in an application ought to be abridged in the interests of justice. The question is whether that exercise of his discretion was fair in all the circumstances. I would certainly say that it was. These grounds were, in my view, entirely without merit.

Issue (ii): Did the learned judge err in admitting into evidence the offer letter in respect of the loan from the 1st respondent to the appellant? (ground (b))

Appellant's submissions

[81] The appellant relied on the rule in **Prenn v Simmonds** [1971] 3 All ER 237 in support of ground (b). He referred to the dictum of Lord Wilberforce, to state that documentation which relates to negotiations does not necessarily assist in the interpretation of the contractual words, or to ascertain the common intention of the parties. As a consequence, he submitted, that evidence of the negotiations or the parties' intentions ought not to have been received, and the evidence adduced should have been limited to the background known to the parties at or before the date of the contract. The offer letter dated 19 June 2013 (stated in paragraph [5] herein) fell afoul

of that position, and there was no room, he argued, for the offer letter to be adduced into evidence as evidence of the contract to which he was bound. The learned judge erred in so doing.

Respondents' submissions

[82] Queen's Counsel submitted that the offer letter dated 19 June 2013 was executed by the appellant contemporaneously with the loan agreement of even date. The documents, she stated, were "conditional and collateral to each other and were required to complete the transaction". Mrs Gibson-Henlin referred to certain clauses in both documents which confirmed that the documents were meant to be read together and to be implemented as such. Mrs Gibson-Henlin submitted also that the signature of the appellant on both documents precluded him from endeavouring to claim that the terms of the offer letter were not part of the loan agreement. Mrs Gibson-Henlin submitted that the appellant could not argue that the offer letter was "extrinsic evidence", and submitted that as a consequence, **Prenn v Simmonds** was inapplicable to the case at bar.

Analysis

[83] The case of **Prenn v Simmonds** has no applicability to this appeal. In that case, the House of Lords felt impelled to make it clear, as set out in the head note (per curiam) at page 238, that:

> "Although in construing a written agreement the court is entitled to take account of the surrounding circumstances with reference to which the words of the agreement were used and the object, appearing from those circumstances, which the person using them had in view, the court ought not to look at the prior

> negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations. Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and, objectively, the 'aim' of the transaction."

[84] In Halsbury's Laws of England, 3rd Edition, Vol 11 paragraph 646, the learned authors state that:

> "Where the intention of the parties has been reduced to writing it is, in general, not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles conditions of sale, or preliminary agreements either to show that intention or to contradict, vary, or add to the terms of the document..."

At paragraph 648, the authors refer to the impact of negotiations undertaken before contract. They state:

> "The construction of a document cannot be controlled by previous negotiations; and when a written agreement is carried into effect by a conveyance, the conveyance becomes the final evidence of the intention of the parties, and is not liable to be varied by reference to the agreement; nor is the construction of a written instrument varied by the subsequent declaration or conduct of the parties. The instrument is to be construed as at the time of its execution."

In paragraph 649, the authors specifically address the impact of extrinsic evidence in relation to contracts. They state further:

> "As regards contracts the rule as to the exclusion of extrinsic evidence is not confined to contracts which are required by law to be evidenced by writing in order to be enforceable, but applies generally in all cases where the agreement between the parties is in fact reduced to writing and, apart from proceedings for discretionary remedies such as rectification, rescission or specific performance, the rule is in equal force as in equity as at law.

> Parol evidence is not only excluded as a general rule in reference to matters which are expressly dealt with by the written agreement, but also in reference to terms implied by law with regard to which the document is silent."

[85] It is manifest from the above that the court must therefore endeavour to ascertain whether the parties' negotiations have been concluded, reduced into writing and executed to become the agreement between them. This is so because parol evidence would not be admissible to contradict, vary or add to the terms so agreed. In the instant case, the offer letter had been signed by the appellant. It bore the same date as the loan agreement which was also signed by him. The documents were not only executed contemporaneously, but were specifically prepared and plainly related one to the other as a part of the said transaction. The offer letter, in my view, cannot therefore be regarded as extrinsic evidence. It does not represent negotiations which had not been reduced into writing as being part of the contract. No parol evidence was required to give clarity to its terms.

[86] There is no doubt, that on any true and proper construction, the offer letter and the loan agreement (set out herein in paragraphs [5] and [6] respectively) were meant to be read together. The loan was granted on the basis of the terms set out in the offer letter (as stated in clause 1 of the loan agreement), which terms the appellant had to accept as a condition precedent for the funds to be made available. The security requested also had to be supplied as a condition precedent to the provision of funds and the loan agreement in its preamble addressed that fact. Two clauses in the offer letter specifically resonated with me, namely, the breakdown of the monthly payments

in clause 6 and the security for the loan detailed in clause 12. As indicated previously, this was not a case of negotiations extrinsic to the agreement as discussed in **Prenn v Simmonds**. The loan agreement plainly embraced and endorsed the terms and conditions of the offer letter, and as stated, significantly, both documents had been signed on the same day. They formed a part of the transaction. The letter, as a consequence, was clearly admissible in evidence. This ground failed.

Issue (iii): Had the appellant showed that he had any real prospect of succeeding on the claim?

Appellant's submissions

[87] It was always the appellant's contention that the monthly repayment of the loan of $750,000.00 was the sum of $28,642.84 simpliciter. He did not accept that there was an additional amount payable that the 1st respondent attributed to the share contribution. As indicated, the appellant, had maintained that after a year he had made monthly payments amounting to $379,070.00, including share contribution of $82,000.00. This he contended was in excess of his obligations under the loan contract which, in June 2013 amounted to $343,714.00, being, 12 payments of $28,642.84. That notwithstanding, he submitted that the respondents still unlawfully repossessed his motor vehicle. He stated that inspite of repeated requests for its return, the respondents failed to do so and he was forced to file his claim.

[88] The appellant argued strenuously that the learned judge had accepted information as true which was disputed, and which ought to have been tested at trial. The main thrust of his contention appeared to relate to the fact that his payments on

the loan were not in arrears. He specifically challenged the fact that the learned judge had accepted the agreed monthly payment to be $31,507.12, without stating where that figure had come from in circumstances where he had maintained that his monthly obligation was the sum of $28,642.84. Also, it was unclear how the sums that had been paid monthly by him had been allocated. It was his contention that the documentary exhibits supported his submission and the disparate amounts were at the "heart of the dispute". The learned judge had made no attempt to resolve the conflict, he argued. The disputed figures, he submitted, were worthy of a trial and the learned judge was wrong in stating that he was in default.

[89] The appellant submitted that at the hearing of the application for interim relief on 10 October 2014, the application for summary judgment, having been filed on 7 October 2014, was handed to him. Fraser J then scheduled the hearing of that application for interim relief for a future date. The respondents failed to file their defence and so he filed for judgment in default while the application for summary judgment was pending. Batts J however, he stated, inspite of the request for judgment having been filed, still heard the application for summary judgment in those circumstances.

[90] The appellant further challenged the learned judge's interpretation of rule 12.3 of the CPR and his finding that the default judgment had not been entered as the only reason why that was so was due to the filing of the summary judgment application. However, he submitted, that as the defence was out of time and could not be filed as no consent or court order had been obtained, rule 12.13 of the CPR ought to have been

found to be applicable. Moreover, as the rule should be interpreted that default means failure to file a defence, and once the defence is out of time, as it was in the instant case (as it was due on his calculation on the 24 October 2014 and was filed on 27 October 2014), then the proper finding ought to have been that no defence had been filed at all, and that the respondents were limited as to their participation as set out in rule 12.13 of the CPR, the request for default judgment having been properly filed. He submitted further that the affidavits of Taniesha Rowe had been utilized contrary to the rules.

[91] The learned judge, he said, also erred in his interpretation of **National Commercial Bank v Toushane Green** as in that case, the lender owned the motor vehicle pursuant to the bill of sale whereas in the instant case, his motor vehicle was only provided as a security for the loan. The learned judge, he argued, had further misinterpreted the bill of sale when he stated that the respondents had not used excessive or unreasonable force when they seized his motor vehicle but had acted within the power given in the bill of sale. The appellant submitted that the learned judge had in that finding placed the burden of proof on him which was in error.

[92] Finally, the appellant submitted that the learned judge had failed to order that an accounting be provided by the respondents when the facts of the case clearly called for one to be ordered.

[93] In fine, the appellant maintained that the learned judge had erred in the grant of the order for summary judgment and the order ought therefore to be set aside.

Respondents' submissions

[94] In response to these arguments, Mrs Gibson-Henlin referred to rule 15.2 of the CPR, and submitted that the learned judge applied the correct approach to the application, utilizing the principles set out in **Gordon Stewart v Merrick Samuels** in doing an assessment of the party's case, "to determine its probable ultimate success or failure", with the real prospect of success not being a fanciful one. Queen's Counsel referred to the findings of the learned judge, set out in paragraphs [56]-[63] herein, and submitted that they were unchallengeable. Mrs Gibson-Henlin reiterated that the learned judge had been correct in his finding that the defence had been filed in time and that no consent and/or an order extending the time within which to do so was required. The learned judge was also correct, she argued, in relying on the principles enunciated in **National Commercial Bank v Toushane Green**. She also accepted the reasons of Fraser J, in the application for interim relief, that the applicant was in arrears, but submitted that, even if he had not been, once there were monies outstanding on the loan the motor vehicle could be seized.

[95] Mrs Gibson-Henlin referred to the affidavits of Roshene Betton and Deidre Daley and submitted that the evidence adduced was clear and compelling that the appellant had been in default at the date when the motor vehicle had been seized, as he had not honoured his obligations under the bill of sale. Queen's Counsel referred to the fact that under the bill of sale the appellant was the grantor of the chattels and guarantor of the loan, and he had assigned the motor vehicle to the 1st respondent who therefore had the right to repossess it, and had acted lawfully in doing so. She pointed out that the

appellant had not challenged the validity of the bill of sale and that the bill of sale had been duly registered under section 3 of the Bills of Sale Act at the Island Records Office. Queen's Counsel maintained that the respondents were relying on the principles set out in **National Commercial Bank v Toushane Green** in their entirety in respect of this ground also and submitted that the learned judge had been correct in granting summary judgment in the matter based on the evidence adduced and the submissions made before him.

Analysis

[96] With regard to whether the appellant had any real prospect of succeeding on the claim, it is important to note that the learned judge found that the defence of the respondents had been filed in time and that the request for default judgment had not been entered at the time of the filing of the defence. He found that in those circumstances rule 12.13 of the CPR did not apply. I have already indicated my views on those findings in respect of issue (i) and will not repeat them in relation to whether the appellant had a real prospect of succeeding on the claim (issue (iii)), as on those aspects, in my opinion, he clearly did not.

[97] The issue with regard to whether the appellant was in default on his payments on the loan was deponed to by Roshene Betton in paragraph 9 of her affidavit where she indicated that the appellant consistently failed to pay the share contribution of $2,864.28, and there were, therefore, amounts outstanding in respect of the terms of the loan. She indicated that the appellant had been notified of his default and she exhibited the letter of 3 July 2014 from the 1st respondent to the appellant indicating

that the loan was 3.3 months in arrears and which set out how the sum of $111,556.83 had been computed. The learned judge accepted this evidence and the appellant did not dispute that he had not been paying the share contributions as it was his contention that it was not part of his monthly obligations.

[98] The bill of sale states that it was supplemental to the loan agreement of even date. It recognized that the appellant was the absolute owner in possession of his motor vehicle free from encumbrances, and in consideration of the advances made to him he had covenanted with the 1st respondent to pay the amounts owing on the loan, to allow persons authorized by the 1st respondent to enter premises where the motor vehicle was kept for inspection, and for the 1st respondent to seize the motor vehicle assigned by way of entry upon the premises by breaking open doors, windows, gates and fences, if necessary, to gain possession of the same. The terms of the bill of sale are set out in paragraph [7] herein. Additionally, the principles enunciated in **National Commercial Bank v Toushane Green** have already been dealt with in paragraphs [47]-[48] of this judgment and are equally applicable to this ground.

[99] The power of attorney, also signed by the appellant on the same date, gave the 1st respondent the power to, *inter alia*, carry into effect and perform all agreements entered into, and to carry out any act in respect of the said motor vehicle. As a consequence, all the documentation executed by the appellant in respect of the loan together permitted the seizure of the appellant's motor vehicle by the 1st respondent, through its agents, if the loan was in default. There was ample evidence, as has already been indicated to support that situation. The right of the respondents to enter the

premises and to break open doors, and gates to obtain possession of the motor vehicle was clear and the learned judge's findings in that regard cannot be faulted. Furthermore, the respondents had produced evidence, namely photographs, to show that no damage had been caused to the gate which was not refuted by the appellant by producing evidence before Batts J. So at the end of the enquiry by the learned judge there would have been no issue fit for trial.

Issue (iv): Was the learned judge in error in his treatment of the affidavit evidence? (ground (d))

[100] The appellant did not seriously advance any submissions on this ground and so I will not deal with the same in any great detail save to say that he appeared to be challenging the learned judge's right to exercise his discretion to permit clarification by way of submissions by counsel, in respect of information contained in an affidavit and documentary evidence placed before him. The complaint in relation to this issue relates to the affidavit evidence of Taniesha Rowe and the exhibits attached thereto. I have already dealt with the information contained therein when dealing with issue (i) and indicated that in my view there was no merit in this ground whatsoever.

Conclusion on appeal SCCA No 43/2015

[101] In my view, the appellant had failed to show that Batts J in exercising his discretion was palpably or demonstrably wrong and so this appeal was dismissed.

Counter Notice of Appeal

[102] On 1 October 2015, the respondents filed a counter notice of appeal seeking to affirm Batts J's decision on separate grounds which, in the main, were that: (i) the 2nd

and 3rd respondents were at all material times the servants and/or agents of the 1st respondent acting in the course of their employment, therefore, no separate cause of action existed against them; and (ii) the appellant was wrong to sue the 2nd and 3rd respondents since he was not entitled to sue the principal and the agent in respect of the same wrong.

[103] In support of this counter notice of appeal, Mrs Gibson-Henlin submitted, in reliance on **Said v Butt** [1920] 3 KB 497, **G Scammell and Nephew Limited v Hurley and Others** [1929] 1 KB 419 and **Belvedere Fish Guano Company Limited v Rainham Chemical Works Limited and Others** [1920] 2 KB 487, that the 2nd and 3rd respondents were excused from liability since they were acting within the scope of their employment which deprived their actions of a tortuous character. Consequently, Mrs Gibson Henlin posited that Batts J ought to have granted the order sought in the summary judgment to remove the 2nd and 3rd respondents from the claim and urged this court to affirm the judgment recognizing that they were not proper parties to the claim.

[104] The appellant contended that the respondents had not proved that the appellant had no separate cause of action against the 2nd and 3rd respondents. In reliance on **Hamlet Bryan v George Lindo** (1986) 23 JLR 127, he submitted that the authority of an agent to act does not relieve him of the responsibility of acting with propriety because though the conduct may be authorized, the manner of the execution of that conduct may not be so authorized. The appellant further posited that this counter notice was seeking to release the 2nd and 3rd respondents from liability, which would

deprive him of the benefit of a judgment against the 1st respondent, and as such, the notice itself was highly prejudicial and ought to be refused.

[105] As indicated, there is no basis upon which Batt's J's decision could be set aside, and as a result the status quo in the case at bar is that summary judgment has been granted in the respondents' favour which means that the appellant no longer has a case against the respondents. In my view, in the absence of any claim against the respondents, it is unnecessary for this court to make any order in relation to the counter notice of appeal.

Conclusion

[106] In fine, on the basis of the above, it was clear that the learned judges were correct in the exercise of their discretion to refuse the interim relief prayed for, and to grant the summary judgment application. In my opinion, the appellant failed to show that the learned judges had misapplied the facts or misconstrued any of the evidence or the law applicable thereto and so was unable to show that either judge had been plainly or demonstrably wrong in any way whatsoever. These are the reasons therefore why I agreed with the other members of the court to grant the orders set out in paragraph [1] herein.

MCDONALD-BISHOP JA

[107] I agree with the reasons of my learned sister Phillips JA which accord with my own and there is nothing more that I can usefully add.

F WILLIAMS JA (AG)

[108] I have read in draft the reasons for judgment of my sister Phillips JA and I agree with her reasoning and conclusion.