[2010] JMCA App 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 45/2010

APPLICATION NO 121/2010

BEFORE: THE HON MR JUSTICE HARRISON, JA
THE HON MRS JUSTICE HARRIS, JA
THE HON MISS JUSTICE PHILLIPS, JA

BETWEEN	**KINGSTON ARMATURE & DYNAMO WORKS LIMITED**	**APPLICANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC.**	**1ST RESPONDENT**
A N D	**KENNETH TOMLINSON**	**2ND RESPONDENT**

Christopher Dunkley and Miss Jody-Ann Maxwell instructed by Phillipson Partners for the applicant

Maurice Manning and Miss Tavia Dunn instructed by Nunes Scholefield DeLeon & Co for the 1st respondent

27, 28 July and 20 December 2010

HARRISON JA

[1] I have read in draft the judgment of my sister, Phillips JA and agree with the reasoning and conclusions therein. I have nothing further to add.

HARRIS JA

[2] I too have read the judgment of Phillips JA and agree with her reasons and conclusions.

PHILLIPS JA

[3] This application filed by the appellant (the applicant) sought an order that the order made by the single judge of appeal be reviewed by the court. It also sought, on such terms as the court may deem fit, an interim injunction restraining the 1st respondent, whether by its servants and/or agents, from selling or offering for sale by private treaty or otherwise, the applicant's properties, namely 1 Chisholm Avenue, Kingston 13, Saint Andrew, registered at Volume 615 Folio 79 of the Register Book of Titles, and Sterling Castle, Saint Andrew, registered at Volume 1227 Folio 429 of the Register Book of Titles, pending appeal. The 1st respondent holds a registered mortgage on both properties.

[4] The applicant relied on four grounds in support of this application. These were that:

(1) an appeal from the order made by Hibbert J on 25 February 2010 refusing the application for injunction filed on 18 December 2009, was awaiting a date for hearing and determination;

(2) the 1st respondent had held an auction, accepted bids and had failed and/or refused to inform the applicant of the status of any attempts to

sell the properties either by auction, private treaty or otherwise, which left the properties at risk;

(3) the applicant's business operations were conducted at Chisholm Avenue and if the property was sold, there would be severe prejudice and loss to the applicant, which would also render the appeal nugatory; and

(4) the applicant had a strong likelihood of success on appeal.

[5] A similar application had been previously made to the single judge. An affidavit of Franz Fletcher, the managing director of the applicant, was filed in support of that application. This affidavit merely spoke to the fact that an appeal had been filed against the refusal of the grant of the injunction, that the applicant was a going concern, that its principal place of business was located at 1 Chisholm Avenue, and if sold, the applicant would suffer great hardship as it would not "be able to reduce or resolve its indebtedness to its creditors, including the 1st Respondent". The affiant also stated that the applicant had no knowledge of the status of the efforts being made by the 1st respondent to dispose of the properties. The applicant was however aware that information with regard to its indebtedness had been sought by the 1st respondent from Victoria Mutual Building Society, one of the original mortgagees, as a precursor to the disposal of the properties by the 1st respondent, under its powers pursuant to certain deeds in its possession. Mr Fletcher maintained that the applicant would suffer loss if that was effected.

[6] With that scanty information before him, it is no wonder that the learned President made the following order:

> "There is absolutely nothing produced so far that would enable the grant of an injunction in this matter."

[7] When the matter came before this court, however, there was a bundle comprising 173 pages with 15 documents. It contained statements of case, affidavits and submissions in the court below. There was also another affidavit filed by Mr Fletcher, which, although of similar vein as the affidavit that had been before the single judge, contained no additional information. It was counsel's position that he had not produced all the material necessary for an *inter partes* hearing, but only such material as was necessary for an ex parte hearing, because the expectation was that the matter would be set down to be heard *inter partes*. In our view, the rules do not envisage that approach, but as it is not necessary for the disposal of this application, we do not intend to go through the interpretation to be given to the various provisions contained in the Court of Appeal Rules (the CAR). Suffice it to say that if one is pursuing an application before a single judge on a procedural application, all material on which one intends to rely should be filed. It is a paper application first and can be dealt with in the absence of the parties. If the judge considers that the matter should be heard by way of oral submissions from all the parties in chambers, then so be it, but one proceeds at one's own peril if one attempts to submit the evidence in support of one's application in tranches (see rules 2.10 and 11 of the CAR).

Background facts

[8] The claim form in this matter was filed on 18 December 2009 and claimed certain declarations against the respondents, to wit:

(i) that the claimant (applicant) was entitled to a proper accounting in respect of the debt claimed by the 1st respondent, and to receive information on this outstanding balance prior to the appointment of a receiver;

(ii) that the receiver ought to have taken a full account of the indebtedness of the applicant before taking up his appointment or as soon thereafter as possible;

(iii) that the appointment of the receiver was a fetter on the applicant's ability to administer its affairs and to service its debts, if any, owed to the 1st respondent;

(iv) that the applicant was entitled to rely on the agreement entered into with the 1st respondent on 18 September 2008;

(v) that the applicant was entitled to the proceeds of sale of the property located at Lot 37 Banana Walk, Orange Grove, Kingston 8 in the parish of Saint Andrew registered at Volume 1060 Folio 480 ("Banana Walk") and the 1st respondent ought to have ensured that the sale by the applicant's principal of the property to a third party was completed as the applicant was entitled to have the proceeds applied to its outstanding debt to the 1st respondent, if any, after an accounting by the 1st respondent; and

(vi) that the applicant had suffered loss and damages having placed detrimental reliance on the (aforesaid) agreement of 18 September 2008 and not having taken steps earlier to protect its interests.

The applicant also sought a permanent injunction restraining the 1st respondent from taking any steps to dispose of any of the properties and businesses of the applicant and

an accounting of all sums paid by the applicant and all sums collected by the 2nd respondent on behalf of the 1st respondent as well as damages.

[9] The particulars of claim expanded on the material facts stated in the claim form. The applicant stated that it was in July 1991 that it had accessed loan facilities from Century National Bank Limited. It had provided, through its principals, the properties mentioned herein as collateral for the loan. The loan portfolio and the mortgages were eventually assigned to the 1st respondent, and the debenture and the instrument of transfer were exhibited. The applicant maintained that it had made many payments to the various institutions which had held the loan portfolio prior to the 1st respondent and those payments should have been taken into account in calculating any indebtedness to the 1st respondent. It was the contention of the applicant that the 1st respondent had sold the property located at 2 Olivier Meadows, Kingston 8 ("Oliver Mews") and had not given an accounting of the proceeds of sale. Further, it stated it was entitled to the proceeds of sale of 27B Banana Walk, Orange Grove but the 1st respondent would not release the certificate of title in respect of that property in order for the sale to be completed, and was by that posture, preventing the applicant from completing the agreement and reducing its indebtedness to the 1st respondent. The applicant exhibited the agreement for sale and correspondence to the attorney requesting the documents from the 1st respondent to close the transaction, and from the attorneys representing the purchasers' mortgagees indicating that funds to complete the transaction were available. Another action, claim no. 2010 HCV 02660 (***Franz Fletcher & David and Petagaye Morgan v Jamaica Redevelopment***

Foundation), however, has been filed relating to the Banana Walk property and injunctive relief has been claimed therein, and so the issues relative to that action should not detain us here, but are mentioned to the extent that they form a part of the background facts to the application which was before the court.

[10] The applicant pleaded further that on 11 March 2008, the 1st respondent purportedly appointed the 2nd respondent pursuant to the debenture (the notice of appointment was exhibited) and claimed, inter alia, that the 2nd respondent in addition to not giving any accounting of funds received or paid out on the applicant's behalf or of his stewardship, had made several payments to himself in the amount of approximately $300,000.00. The applicant also relied on an alleged agreement between the 1st respondent and itself dated 18 September 2008 in respect of the disposal of the Banana Walk property which included the release of the certificate of title for the property so that the sale could be completed and the proceeds appropriately applied. The two items of correspondence which were supposed to confirm this were attached, namely letters dated 18 September 2008, from the 1st respondent to the applicant and 19 December 2008, from the applicant to the 1st respondent.

[11] The letter of 18 September 2008 appeared to reflect an "agreement" between the applicant and the 1st respondent as it commenced in this way. "JRF is pleased to inform you that it has agreed to conditionally settle the above mentioned debts and liabilities on the following terms and conditions". The conditions were set out. They were:

"(1) JRF will release the property located at Volume 1060 Folio 480 (27 Banana Walk) in exchange for 100% of the net sale proceeds which shall be no less than $J14,500,000.00 on the condition that this amount is received in our office no later than 2:00 PM December 18, 2008.

(2) JRF will accept an additional payment of US$400,000.00 as full and final settlement of the debt provided this payment is received in our office no later than 2:00 PM January 16, 2009.

(3) Payment of any cash surplus to be derived from the trading/receivership account of Kingston Armature & Dynamo Works Limited to be received no later than January 16, 2009.

(4) The Receiver will remain in place until the funds from Items 1,2, and 3 have been received by JRF."

The letter closed with this warning:

> "Please be advised that in the interim the accounts remain in default and interest continues to accrue. Additionally, JRF reserves its rights to pursue all of its legal remedies for the collection of the debt in its entirety should you fail to strictly adhere to the above conditional settlement".

[12] There was no notation on this letter that the terms were agreed by the applicant. The next item of correspondence referred to and exhibited, viz the letter of 19 December 2008 from the applicant's attorneys, although it referred to the letter of 18 September 2008 merely indicated that monies from the sale of the Banana Walk property had been earmarked to settle the indebtedness of the applicant. It also stated that the certificate of title and discharge of mortgage had not yet been received, and requested their production, as the date of completion had long passed, and the deadline for receipt of the funds pursuant to the "agreement" had also expired the day before.

[13] With this impasse, the applicant stated that the 1st respondent advertised the properties for sale at public auction and the applicant pursued the protection of its interests, praying the court's aid in the declarations and injunction mentioned above and for a full accounting. The application filed with the claim form and the particulars of claim, as stated above, sought an injunction restraining the sale and or disposal of the properties at Chisholm Avenue, Sterling Castle and Banana Walk.

[14] The applicant filed an affidavit in support of that application sworn to by the said Franz Fletcher containing more or less the same information as all others referred to herein and filed on his behalf. He did state however that the applicant had made several payments to Century National Bank Limited in the amount of over $14,500,000.00 and in addition thereto the sum of $5,165,048.20, being the proceeds of the Olivier Mews property, which sum should, he said, also have been used to settle any alleged indebtedness. The difficulties which had been experienced with respect to the sale of the Banana Walk property were also recounted and Mr Fletcher stated further that the sale had been entered into with the knowledge of the 1st respondent.

[15] The 1st respondent filed an affidavit by Miss Janet Farrow, who confirmed the assignment of the interest of Century National Bank in the applicant's indebtedness, the mortgages registered on the relative certificates of title, and the transfers of the said mortgages. Miss Farrow also averred that the applicant had acknowledged the aforesaid assignments and had entered into an arrangement to restructure its indebtedness. Indeed, whereas a total sum of $1,086,861.00 had been acknowledged as the original debt, the 1st respondent was prepared to accept $700,000.00 if all terms of the

agreement were strictly complied with. Miss Farrow stated that the applicant failed to do so and notices of default under the agreement were issued as well as statutory notices under the mortgages to the mortgagors. All of these documents were exhibited. Miss Farrow deposed that the applicant had advised the 1st respondent of the sale in respect of the Banana Walk property by letter dated 7 October 2006, which was after the agreement for sale had been executed on 11 September 2006 and, she stated that the agreement had been entered into without the consent of the 1st respondent as required under the terms of the mortgage. She stated that on 7 November 2006, the 1st respondent advised the applicant that it would not be releasing the mortgage held on the property under the conditions mentioned in the earlier letter and suggested that another proposal could be submitted. Miss Farrow further indicated that by letter of 2 June 2008, over the signature of the receiver, who had by then been appointed under the debenture, and having referred to a meeting between the parties a few weeks previously, the applicant set out the proposal with respect to the full and final settlement of the loan account. This included a payment of the net proceeds of sale of the Banana Walk property, a payment of US$400,000.00 over 90-100 days, and payment of any cash surplus to be derived from the trading/receivership account of the applicant in receivership. The letter of 18 September 2008, referred to in paragraph 9 herein was sent in response to that proposal and a qualified acceptance, she stated, of 24 October 2008, was received from the applicant sent in reply. This latter letter however was not exhibited.

[16] Miss Farrow indicated that the letter of 19 December 2008, referred to in paragraph 10 herein, did not contain any financial undertakings with regard to the other sums mentioned in the letter and was submitted after the mutually agreed deadline for compliance of the final settlement between the parties. It was the position of the 1st respondent therefore that the applicant in January 2010 was indebted to it in the amount of $149,678,571.59 with interest at 30% p.a. and US$77,844.74 with interest at 20% p.a. Miss Farrow exhibited a statement of account. She also stated that the 1st respondent had no dealings and/or interaction with the purchasers of the Banana Walk property and that it had not given any consent to their use, possession and or occupation of the property. As a consequence of all of the above, the 1st respondent had therefore advertised the properties for sale and disputed that the applicant could, in the circumstances deposed by Miss Farrow, be entitled to any injunctive relief as the monies were owed, the 1st respondent had not contravened any agreement, as alleged or at all, and the 1st respondent had " exercised patience and forbearance in pursuing its remedies, without prejudice to its right to pursue same". It had also "allowed the applicant time to make a compromise payment on its debt, which time has long lapsed".

[17] On the evidence described above, the matter went before Hibbert J and the application for injunctive relief was refused. Unfortunately, no reasons were given.

The proceedings in the Court of Appeal

[18] The applicant filed its notice and grounds of appeal. Essentially the applicant challenged the finding of the learned trial judge that damages were an adequate

remedy, as well as the findings of law that it was not entitled to an injunction in the circumstances of this case, with the appointment of a receiver whose acts and/or omissions the judge concluded were not inimical to the applicant's interests in settling its obligations to the 1st respondent, inter alia. The four grounds of appeal are set out below:

> "(1) The Applicant is a going concern which puts its ability to discharge its obligations to all its creditors, (to include the 1st Respondent) at risk as a result of the 1st Respondent's actions.
>
> (2) The 1st Respondent has failed to provide a proper accounting to the Applicant prior to its action to sell the Applicant's property.
>
> (3) The 1st Respondent's actions in placing the 2nd Respondent as receiver of the Applicant was intended to constrain its ability to protect its interests.
>
> (4) The 2nd Respondent is obliged to provide a statement of affairs upon which the 1st Respondent and Appellant may rely in respect to the 1st Respondent's actions against the Applicant."

Cumulatively, as can be seen, these grounds of appeal relate to the failure of the respondents to provide proper accounting, complaints about the appointment of the receiver, and his actions being a fetter on the applicant's ability to service its obligations to the 1st respondent and to manage its business affairs. There is no mention (although it was noted in passing in the submissions in the court below) of the clog on the equity of redemption in respect of the Banana Walk property and the claim that recovery under the mortgages may be statute barred.

The application for interim injunction in the Court of Appeal

The applicant's submissions

[19] The submissions of the applicant appeared somewhat confusing as the written submissions both in this court and the court below differed in their focus and content from the oral submissions. Counsel indicated that he was relying on his written submissions before Hibbert J and at the time of filing the same the 1st respondent had only filed an acknowledgment of service.

[20] The applicant relied on rule 1.1 of the Civil Procedure Rules, which is applicable to the Court of Appeal, pursuant to rule 1.1 (10) of the CAR, and submitted that the rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, and the court must seek to give effect to that overriding objective when exercising any discretion given by the rules. Counsel referred to the loans and the fact that the principals of the applicant had given mortgages in their capacity as guarantors of the loan facilities granted to the applicant. Counsel referred to the clog on the equity of redemption submitting that the 1st respondent had frustrated a sale to a bona fide third party and that by proceeding to auction that property, the 1st respondent was seeking to obtain unjust enrichment over the third party's equity which had arisen from their improvements to the said property. This, he said, was known by the 1st respondent. It is important to note that there is no evidence whatsoever of these alleged improvements in any of the affidavits before the court. Counsel also referred to the fact that the applicant had not received any or any comprehensive accounting.

[21] Counsel then submitted that the amounts secured by the mortgages only became due on demand, which had been made on 5 May 2009, by which date the recovery of the indebtedness from the guarantors would be statute barred, as neither Century National Bank Limited, nor its successors or assignees, had instituted any legal proceedings against the registered owners of the properties, and 12 years had passed. Further, even if such a claim could be made, the amount which could be claimed under the mortgage would be limited to the amount stamped on the mortgage and no more, as the guarantee which it secured was limited to its face value. Counsel also submitted that as the guarantors were not the principal debtors, they were unaware of the bank documentation, and as a result, the interest rate regime, and in particular the minimum rate of interest at any given time, was unclear. The instruments of guarantee were also not before the court. It was contended therefore that the interest rate would therefore have failed for uncertainty. If that argument did not succeed, then in any event, whatever rate was chargeable, it was only applicable from the date the demand had been made. Counsel relied on ***Financial Institutions Services Limited v Negril Negril Holdings Limited and Another,*** Privy Council Appeal No. 37 of 2003 delivered 22 July 2004.

[22] Counsel also referred to and relied on **Kerr on the Law and Practice as to Receivers and Administrator** 16th edn by Raymond Walton for the general principles with regard to the appointment of receivers and the fact that on appointment they are agents of the mortgagor. Counsel submitted that similarly a receiver owes a duty to the guarantor in respect of the indebtedness of the mortgagor and in this case

there had been no accounting at all. The applicant had repeatedly requested reports and statements of account from the 2nd respondent without success. It was the contention of the applicant that the 1st respondent ought not to act to dispose of the applicant's assets without having that information in its possession. It was submitted that instead of providing an account of his stewardship and protecting the business of the applicant the 2nd respondent had paid himself substantial sums of money.

[23] The oral submissions of counsel for the applicant are summarized thus

(1) Unless and until the 2nd respondent, appointed by the 1st respondent gives an accounting of the alleged outstanding indebtedness which the 1st respondent is seeking to recover, the 2nd respondent ought to be restrained from disposing of properties which were given as collateral for the original debt of the applicant.

(2) The Agreement to Restructure Existing Debt which allegedly revived the original debt was not executed by anyone on behalf of the estate of Ruby Fletcher and therefore was invalid against her estate and could not be enforced by the 1st respondent. 12 years having passed, the debt would be statute barred, and any transfer of the mortgage would be deemed invalid. The Agreement to Restructure Debt revived the debt against the applicant and was therefore only applicable to any property owned by the applicant, which in this case would be the Sterling Castle property, the disposal of which ought to be restrained due to the refusal to provide the comprehensive accounting as required by law.

[24] Counsel relied on the leading cases dealing with the principles relating to the grant of an injunction both in this court pending appeal, and in the court below, viz, ***National Commercial Bank Jamaica Limited v Olint Corporation Limited*** Privy

Council Appeal No 61 of 2008, delivered 28 April 2009 and ***American Cyanamid Co v Ethicon Limited*** **(No.1)** [1975] AC 396. Counsel also relied on the case of ***Series 5 Software Limited v Clarke*** [1996] CLC 631. He submitted that the court should adopt the course which seemed most likely to cause the least harm. The court should not attempt at this stage to resolve complex issues of either fact or law, and should be flexible in assessing the issues of the adequacy of damages, the balance of convenience and the strengths and weaknesses of each party's case. The court was therefore being urged to exercise its discretion to grant interim relief in favour of the applicant to preserve the properties until the hearing of the appeal, and ultimately, (if the appeal succeeds) until trial in the court below, when the validity of the 1st respondent's claim against the guarantors and its entitlement to exercise its powers of sale contained in its mortgages against the guarantors to the loan would be established, as well as the issue of the limitation of the recovery of the debt from them.

The respondent's submissions

[25] Counsel for the respondent pointed out to the court that only two properties Sterling Castle and Chisholm Avenue, were the subject of the application before Hibbert J. However, he stated that towards the end of the hearing, counsel for the applicant indicated that he was not pursuing the application for injunctive relief in respect of Sterling Castle, which, he submitted, meant that only the Chisholm Avenue property remained the subject of the court's deliberations below. He referred the court to an affidavit of Miss Tavia Dunn, attorney at law, representing the 1st respondent, filed in this court, which attached two letters exchanged between attorneys attempting to

clarify that position. Unfortunately it did not do so and, as we had no notes of the proceedings, or any reasons for judgment from Hibbert J, we decided to proceed with the application as filed before us.

[26] Counsel argued that the determination by the learned President of the Court of Appeal could not be faulted, and this court should proceed on the very limited review of the exercise of a discretion of a single judge of appeal, and only on the basis of the material which had been placed before him. Counsel nonetheless made submissions on the matter generally.

[27] Counsel submitted that the applicant had executed the Agreement to Restructure the Debt and had no *locus standi* to challenge the alleged failure by the estate of Ruby Fletcher, the registered owner of the Banana Walk and Chisholm Avenue properties, to execute the same. The applicant, he stated, was only an occupier of the latter property, and was a stranger for all intents and purposes in respect of the instrument of mortgage, and as a consequence could not claim injunctive relief against the respondents. The applicant, as a tenant in occupation as it were, would have no basis to complain about the sale of the security of the loan granted to it. Hibbert J was seised of the fact that the applicant, the borrower, had acknowledged its indebtedness to the 1st respondent and was endeavouring to liquidate properties, other than the one that it occupied, to settle the debt. The 1st respondent's contention however, was that the borrower could not direct the mortgagee in the manner in which the debt should be liquidated, once the loan was in default, and the proper notices had been served. In

this case, there had not been any challenge in respect of the proper receipt of the relevant notices.

[28] Counsel submitted that there was no evidence in the court below with regard to any prejudice that the applicant would suffer if injunctive relief was not granted and the Chisholm Avenue property was sold. There was also, he said, no challenge in the court below with regard to the statement of account attached to the Janet Farrow affidavit. Further, the issue in relation to the failure to provide accounts was a "red herring" as any matter dealing with accounts was a matter of money, attracting a different remedy, that is damages and not injunctive relief.

[29] Counsel contended that the applicant ought not to be permitted to pursue arguments that any debt was statute barred as there was no such allegation in the claim form or the particulars of claim. Additionally the affidavit in the court below, and the affidavits filed subsequently, did not contain any particulars of any payments made by the applicant or anyone on its behalf, which he said, would be important if the applicant were advancing the assertion that the debt was statute barred. Finally, he submitted that the applicant was the registered owner of the Sterling Castle property only, and its arguments below had focused on the fact that it operated its business at Chisholm Avenue, and so the balance of convenience should be determined in its favour. Damages, he said, would be an adequate remedy in respect of the Sterling Castle property, and all issues in relation to the Banana Walk property were the subject of another suit.

[30] In light of all of the above, counsel submitted that the applicant was unable to show that it had a good arguable appeal, and the application should be refused. He relied on the dicta of Harrison JA in ***Olint Corporation Limited v National Commercial Bank*** Application No 58/2008, delivered 30 April 2008. Counsel also indicated that the applicant had given no undertakings to the court below or to this court, and the evidence before the courts would suggest that perhaps it was unable to do so. Counsel then argued that if the court was minded, in spite of all that had been submitted, to grant an injunction as prayed, then in keeping with the principles of ***SSI (Cayman) Limited and Others v International Marbella Club S.A*** SCCA No 57 of 1986 delivered 6 February 1987, and ***Inglis and Another v Commonwealth Trading Bank of Australia*** [1971-72] Vol 126 CLR 161, there being no special circumstances to depart from the general rule, the court should order that the applicant pay into an interest bearing account the sum of J$149,678,571.59 and US$77,844.74 which the mortgagee had stated in affidavit evidence was due and owing at the time of the application for the interlocutory injunction in the court below.

Analysis

[30] It is important to note that there have been three notices of application for court orders filed so far in relation to the grant of injunctive relief. The first application which was filed in the Supreme Court on 18 December 2009 and heard by Hibbert J related to the restraint on the disposal of three properties, that is, the Banana Walk, Chisholm Avenue and Sterling Castle properties. The affidavits in support and opposition to the application focused on the facts surrounding the unwillingness of the 1st respondent to

release the certificate of title in respect of the Banana Walk property to permit the sale by the mortgagor to third parties. There was very little information in relation to the other two properties, yet all counsel are in agreement and it is clear that the application in respect of that property is the subject of another suit, and therefore excluded from the deliberations generally in these applications. Nonetheless one must be cognizant of all the material which was before Hibbert J, as he would have exercised his discretion based on what was before him, and it is the exercise of that discretion that is the subject of SCCA No. 45/2010. The other two applications filed 12 May and 29 June 2010 sought relief only in relation to the Chisholm Avenue and Sterling Castle properties. This is important as the Chisholm Avenue property is not owned by the applicant although the Sterling Castle property is, and the arguments posited by counsel in some instances have endeavoured to address the different aspects of the law which may be applicable depending on the differing circumstances in each case.

[31] As I understand it, the applicant's main complaint on appeal is that the actions of the 1st respondent, including the appointment of the 2nd respondent as receiver, have placed it in jeopardy, and the failure of the respondents to provide the applicant with a proper accounting and/or a comprehensive statement of affairs, will result in grave loss to the applicant. Additionally, the basis for the application for interim relief pending appeal is that the applicant has no knowledge of the status of the disposal of the properties by way of auction or otherwise, and as the business operations of the applicant are conducted at Chisholm Avenue, severe losses may occur on its disposal. Finally, it was submitted that there is a strong likelihood of success on appeal.

[32] The learned President did make an order as a single judge as set out herein, but as very little material had been placed before him, due to a misunderstanding of the rules, we decided on the review of that order to examine all the materials before us and not only the material which had been placed before him. We wish to make it clear however, that in the future, this approach must not be taken as a precedent as the rules are clear and must be complied with.

[33] The law in this area is quite settled, and I refer to the dicta of Harrison JA and Morrison JA in two cases; namely the ***Olint*** case and ***Michael Levy v Jamaica Re-Development Inc. Fund and Kenneth Tomlinson*** Application No. 47/2008 SCCA No. 26/2008 delivered 11 July 2008. In the ***Olint*** case, Harrison JA put it thus:

> "In deciding whether or not an injunction should be granted, the question is not whether the applicant has a good arguable case but rather, does it have a good arguable appeal? In ***Ketchum International plc v Group Public Relations Holdings Ltd and others*** [1996] 4 All ER 374 Stuart-Smith L.J said at pages 381 and 382:
>
> > 'This is likely to be a more difficult test to satisfy, and, if the case turns upon questions of fact which the judge has resolved against the plaintiff, may well be insuperable. This threshold must be at least as high as that which has to be satisfied when the court considers whether or not to grant leave to appeal, where that is required.
> >
> > …
> >
> > Furthermore, this court will not interfere with relevant findings of fact which the

> trial judge has made based in part on his assessment of the witnesses, and in so far as the grant of injunctive relief is a matter of discretion, is unlikely to differ from the trial judge, save on well-established principles. The only matter on which this court may, as a rule, be in a better position to decide than the trial judge, is whether the plaintiff has a good arguable appeal.'

In ***Erinford Properties Ltd v Cheshire CC*** [1974] 2 All ER 448 at 454, Megarry J said inter alia:

> "There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in ***Wilson v Church* (*No 2*)** (1879) 12 Ch D 454 at 458), where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, "when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory". That was the principle which Pennycuick J applied in the ***Orion*** case ([1962] 3 All ER 466, [1962] 1 WLR 1085); and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. This is not a case in which

> damages seem to me to be a suitable alternative.'

He continues:

> "Although the type of injunction that I have granted is not a stay of execution, it achieves for the application or action which fails the same sort of result as a stay of execution achieves for the application or action which succeeds. In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal."

In the ***Michael Levy*** case, Morrison JA set out the principles guiding the court on the grant of the injunction pending appeal in this way:

> "In my view, the appropriate threshold test to apply on this application is whether the applicant has a reasonable ground of appeal (see ***Polini v Gray*** (1879) 12 Ch.D. 438, per Cotton U at page 446, ***Orion Property Trust Ltd. v Du Cane Court Ltd.*** [1962] 3 All ER 466, per Pennycuick J at pages 470-19 and ***Erinford Properties Ltd v Cheshire*** CC [1914] 2 All ER 448, per Megarry J at page 454).
>
> I prefer this test, which is not dissimilar to the "serious question to be tried" test applicable at first instance (***American Cyanamid v Ethicon*** [1975] 1 All ER 504), to the "good arguable appeal" test applied by the English Court of Appeal in the case of ***Ketchum International plc v Group Public Relations Holdings*** Ltd. [1996] 4 All ER 374, since that was a Mareva Injunction case, in which the test at first instance is also whether the applicant can show a "good arguable case" (see ***Ninemia Maritime Corporation v Trave Schiffartsgessellschaft*** [1983] 1 WLR 1412).

> Thus, if the applicant can show that he has reasonable grounds of appeal in this case, or that there are serious issues to be canvassed on appeal, he will be entitled to an injunction so as not to render his appeal nugatory ***(Polini v Gray,*** supra, per Cotton L.J at page 446)."

[34] The questions one must ask at this stage are: Does the applicant have a good arguable appeal, or are there serious issues to be canvassed on appeal? Is the applicant entitled to an injunction and if so, on what terms, if any?

Is there a good arguable appeal/ are there serious issues to be canvassed on appeal?

[35] It seems apparent from the evidence on affidavit and also the actions by the applicant that sums are owed to the 1st respondent. The issue appears to be the amount of the "true indebtedness", and the manner in which the amount is to be liquidated. On any perusal of the grounds of the application and of the appeal, and of the statements of case, the real issue appears to be one of accounting in respect of monies outstanding and not of a challenge to the validity of the mortgage/debenture.

[36] Based on the foregoing, I am inclined to agree with the submissions of counsel for the 1st respondent that if the claim, as currently framed, is for an accounting of the debt owed, then it could not be successfully argued that Hibbert J erred in refusing to grant an injunction preventing the mortgagee from exercising its powers of sale in circumstances where the sums owed are in dispute, and the propriety of the receiver's actions may be in issue, but the validity of the mortgage instrument is not.

[37] The law in relation to the circumstances warranting the grant of an injunction preventing the mortgagee from exercising its powers of sale is quite clear. The line of authorities on this area starting with ***Inglis and Another v Commonwealth Trading Bank of Australia*** and ***SSI (Cayman) Limited & Others v International Marbella Club*** has established that a mortgagee's exercise of its power of sale to which it has become entitled, should not be fettered by an injunction and if one is granted it should be on the condition, unless special circumstances exist, that there is payment into court by the mortgagor of the amount that the mortgagee claims is owed These principles have been consistently reiterated by this court; see ***Global Trust Limited & Another v Jamaica Redevelopment Foundation & Another*** SCCA No. 41/2004 delivered 27 July 2007 and ***Rupert Brady v Jamaica Redevelopment Foundation & Others*** SCCA No 29/2007 delivered 12 June 2008. In these more recent cases however, the court has also made it clear that the authorities indicate that "it would be proper to grant an injunction to restrain the mortgagee's power of sale if there are triable issues as to the validity of the mortgage document upon which the mortgagee seeks to found his power of sale". At page 11 of the judgment Cooke JA said:

> "Assertions such as that the property and its development potential far exceeded in value the amount being claimed as due by the respondent, or that a sale by auction would inflict irreparable harm to the mortgagor, do not appear to be relevant considerations for determining whether or not to grant an injunction to restrain a mortgagee from exercising the power of sale."

[38] It would appear that no serious challenge can be mounted in this appeal with respect to the receiver applying the sums he received in his management of the property to his remuneration before addressing the payment of the interest and principal. It would seem that such actions, if they in fact occurred, could be considered consistent with powers given him under the debenture. In paragraph 6 of the debenture, after setting out the duties of the receiver, it states that the application of the monies received, (subject to any prior ranking claims and the payment of costs and expenses incurred in the carrying on of the business or the sale or disposal of the whole or any part of the company's property) should be firstly in payment of rents, taxes and other outgoings affecting the mortgaged premises and secondly in payment of all costs, charges and expenses incidental to the appointment of the receiver and the exercise by him of his powers, including his reasonable remuneration. Payment of interest and principal due to the registered debenture holder are third and fourth in line. Additionally, the law is that any failure by the receiver to comply with his duties and responsibilities will result in his being personally liable. However, a challenge to the propriety of the acts of a receiver pursuant to the debenture/mortgage instrument does not appear to be a sufficient basis upon which an injunction may be granted. That cannot amount to a challenge to the validity of the debenture/mortgage by which the 1st respondent seeks to exercise its powers of sale.

[39] The applicant has raised as an issue, in its submissions that the mortgages only became due on demand and that, the demand was made too late, as the recovery of the debt was statute barred. He relied on the ***Negril Negril Holdings*** case for this

submission. This does not appear to be what this case decides. In any event, the applicant is not the owner/mortgagor of the Banana Walk and the Chisholm Avenue properties and, in relation to the Sterling Castle property counsel for the applicant submitted that the debt was revived against the mortgagor (applicant) on 21 May 2003, which appeared to be before the mortgages would have been statute barred, as the dates of the registration of the mortgages on the Sterling Castle property are January 1991, 1995 and 1996. There does not appear therefore to be any special circumstances which could interfere with the mortgagee's entitlement to sell the Sterling Castle property. No prejudice has been pleaded or referred to. The applicant argued that recovery of the debt by the 1st respondent could be barred given the date of the demand, as Century National Bank Limited, its successors or assigns had not commenced any legal proceedings against the applicant for recovery of the claimed indebtedness, even though the debt had been revived in 2003. However, none of these issues, whether the demand for recovery of the debt and/or in respect of the mortgage having been made late and therefore being statute barred, based on the provisions of the Limitation of Actions Act were raised on the pleadings, as are required for reliance on limitation provisions. These issues could not therefore be matters for consideration for the court at this stage.

[40] The issues raised in the submissions that the Agreement to Restructure Existing Debt had not been executed by the estate of Ruby Fletcher and was therefore invalid against her, were also not pleaded, and would not appear to be matters which could

properly be raised by the applicant, an entirely different legal entity, when the applicant did sign the agreement.

[41] In the instant case therefore the applicant had not raised any or any effective challenge to the validity of the mortgages in respect of the Chisholm Avenue and Sterling Castle properties. In my view, there is no arguable case on appeal. The order of the single judge remains undisturbed and the application for injunction is dismissed with costs in the appeal.

HARRISON JA
ORDER

The application for an interim injunction pending the hearing of the appeal is dismissed. The costs of the application are costs in the appeal.