[2014] JMCA App 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 86/2014

APPLICATION NO 197/2014

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

BETWEEN	**ROYDEN RIETTIE**	**APPLICANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**FITZ JACKSON**	**2ND RESPONDENT**
AND	**CEMENT JAMAICA LIMITED**	**3RD RESPONDENT**

Vincent Chen, Leonard Green and Miss Sylvan Edwards instructed by Chen, Green & Company for the applicant

Jerome Spencer instructed by Patterson Hamilton Mair for the 1st respondent

Hugh Wilson instructed by Wilson Franklyn Barnes for the 2nd and 3rd respondents

27, 28 November and 5 December 2014

DUKHARAN JA

[1] I have read, in draft, the judgment of my learned sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and there is nothing that I could usefully add.

MCINTOSH JA

[2] I too have read the draft judgment of McDonald-Bishop JA (Ag). I also agree with her reasoning and conclusion and have nothing useful to add.

MCDONALD-BISHOP JA (AG)

[3] This is an application that has emanated from an order of Brooks JA, sitting in chambers on 7 November 2014, by which he refused to grant an interim injunction pending appeal upon a notice of application filed by Mr Riettie, the applicant, on 5 November 2014. Mr Riettie sought an order to, among other things, restrain National Commercial Bank Jamaica Limited ("NCB"), the 1st respondent, from holding an auction advertised on 4 November 2014 in the exercise of its power of sale under a mortgage.

[4] Mr Riettie sought to move this court for, in his words, "a variation of the decision of the single judge in chambers" pursuant to rule 2.11(2) of the Court of Appeal Rules ("CAR"). I would highlight the use of the phrase, "*in his words*", because the application was, in substance, not one for a variation of the order made by Brooks JA but a discharge (or setting aside of that order) and for a completely new order to be made in its stead. The application, in actuality, is one for an interim injunction pending the determination of the appeal.

[5] It is considered useful, against this background, to set out in full the orders made by the learned judge in chambers and those that Mr Reittie is now seeking from this court.

The order of the single judge

[6] The impugned order of Brooks JA reads:

> "The application for injunction pending the determination of the appeal is refused.
>
> On what has been presented to the single judge there is every indication that damages would be an adequate remedy in the event of a wrongful sale by the 1st respondent and no indication that it would be unable to pay the damages."

The orders being sought on the application

[7] The orders being sought by Mr Riettie from this court reads:

> **"The application for injunction pending the determination of the appeal is granted. The 1st Respondent is hereby restrained until the hearing of the appeal from scheduling or conducting a sale of the mortgaged land.**
>
> **On what has been presented to the single judge there is every indication that a wrong is being perpetrated against the Appellant in the persistence of the 1st Respondent to attempt to sell the mortgaged property at a gross undervalue to the 3rd Respondent by describing it as 'Agricultural Land'. The court does not condone the deceit of the 1st Respondent its' servants or agents in putting off a potential buyer by misrepresenting the truth to her in furtherance of its action to sell the Appellant's property to the 3rd Respondent at a gross undervalue nor will it stand idly by and permit the Appellant to be cheated."** (Emphasis as in original)

The factual background

[8] These proceedings have their genesis in a claim filed by Mr Riettie against the respondents in the Supreme Court on 10 June 2014. Mr Riettie has been a mortgagor of NCB from 2003 when he guaranteed a loan to Tafjam Limited ("Tafjam"), a company

incorporated in Jamaica and owned by his daughter, Mrs Julie Riettie-Atherton. The security for the loan was approximately 196 acres of registered property that Mr Riettie owns at Lodge in the parish of Saint Catherine ("the property"). Tafjam and Mr Riettie have been in default since around 2006 and, despite numerous demands from NCB for them to repay the loan, they continue to be in default up to the date of the hearing of this application.

[9] In the face of his default, Mr Riettie, through his daughter Mrs Riettie-Atherton, to whom he gave a power of attorney to act on his behalf, entered into negotiations with the 2nd and 3rd respondents for sale of the property to the 3rd respondent. The negotiations had reached the stage where a price was agreed and a memorandum recording the intended purchase was signed by the parties. The 3rd respondent was unable to complete the purchase and the contracts were cancelled on 30 September 2012.

[10] There was, however, continued interest of the 2nd and 3rd respondents in purchasing the land. NCB was aware of those negotiations between Mr Riettie and the 2nd and 3rd respondents. The 2nd respondent had himself entered into discussions with NCB to seek to bring about a settlement of the matter concerning the outstanding debt with a view to having Mr Riettie sell the land to the 3rd respondent.

[11] The 2nd and 3rd respondents, during the course of those negotiations, obtained some regulatory approvals to change the use of the land from agricultural to industrial.

The National Environment and Planning Agency ("NEPA") and the Saint Catherine Parish Council were two entities that granted their approval for reclassification of the land.

[12] Despite these negotiations between Mr Riettie and the 2nd and 3rd respondents, NCB, between 20 November and 11 December 2013, advertised the sale of the land by public auction to be held on 12 December 2013. Those advertisements did not describe the land as having been approved for use for industrial purposes, despite the fact that the 3rd respondent had obtained some form of regulatory approval for industrial use of the land. In fact, there was no specific classification as to user but, suffice it to say, it was described, among other things, as being unoccupied land with "ruinates" on it.

[13] The auction was unsuccessful as the sole bid from Mrs Jennifer Messado, attorney-at-law, acting on behalf of Gordon Tewani, the caveator, was too low. Following the auction, in January 2014, Mrs Jennifer Messado offered to purchase the land on Mr Tewani's behalf for $70,000,000.00. The offer was rejected on the basis that NCB had decided to give Mr Riettie the opportunity to redeem.

[14] In or around April 2013, being roughly three to four months later, NCB accepted an offer of $75,000,000.00 from the 3rd respondent and they entered into an agreement on 23 April 2014 for sale of the land. Mr Riettie was aggrieved by this arrangement.

Proceedings in the Supreme Court

[15] On 10 June 2014, Mr Riettie initiated proceedings in the Supreme Court alleging, among other things:

(i) Conspiracy on the part of NCB and the 1st and 2nd respondents "to dispose of the property in a clandestine manner to achieve the improper and unlawful purpose of selling it at a gross undervalue to the 3rd respondent";

(ii) Bad faith in the conduct of NCB in the exercise of its power of sale by "proceeding to sell the land without exposing the intended sale to the general public in a fair and reasonable way to obtain a fair price and causing the land to be sold at a gross undervalue which is improper and unlawful"; and

(iii) The willful and improper withholding of information by NCB as to its dealings with the land and its refusal to give information to him despite his repeated requests.

[16] It is not necessary, based on the application before us, to consider the claim against the 2nd and 3rd respondents, as they were not the subject of the application for interim injunction, albeit that they are parties to the proceedings and are implicated in the case against NCB. For present purposes, it will just be stated that against NCB (the

relevant party against whom the interim injunction is being sought), Mr Riettie claims 14 different reliefs. He is seeking, among other things, the following:

(i) a declaration that he has a right to redeem the property;

(ii) an account;

(iii) damages;

(iv) disclosure;

(v) perpetual injunction restraining NCB from (a) evicting him from the property and (b) from selling the property by way of any contract of sale; and

(vi) for the court to make an order for sale of the property under its supervision, if he should fail to redeem within 60 days.

[17] At the same time he filed the claim, Mr Riettie also filed a notice of application for an interim injunction in the same terms as paragraphs 11 and 12 of the claim form, which, as reflected in sub paragraph (v) above, was to restrain NCB from selling the property and from evicting him. On 23 June 2014, he filed another application for an order for disclosure and search in relation to NCB. The application for injunction was eventually set down to be heard on 24 October 2014.

[18] Before the hearing of that application for interim injunction, NCB cancelled the sale to the 3rd respondent due to the inability of the 3rd respondent to secure the requisite financing to purchase the property. There would have been, then, no pending

sale by private treaty by the time of the scheduled hearing of the application. The relationship between the respondents would, prima facie, have been determined.

[19] On 9 September 2014, however, notwithstanding the aborted contract of sale by private treaty between NCB and the 3rd respondent, which was the subject matter of the claim filed, Mr Riettie filed another notice of application for court orders for an interim injunction until the hearing of the application scheduled for 24 October 2014. This was, again, in an effort to restrain NCB from selling the property by public auction, which it had advertised to be held on 29 September 2014, or from taking any other step towards sale of the property.

[20] The ground for that application for interim injunction, as set out in the notice of application, was that NCB was advertising the property as agricultural land, and not as industrial land. This advertisement, Mr Riettie maintained, would result in the property being offered for sale at a gross undervalue. This allegation of a sale at a gross undervalue came against the background of a valuation obtained by Mr Riettie that had put the market value of the property at US$10,000,000.00. According to the complaint, NCB had acted precipitously in scheduling an auction sale for 30 September 2014.

[21] This application was heard and refused by Campbell J. He concluded, after a review of the various authorities dealing with the mortgagee's exercise of his power of sale and those relating to the grant of an interim injunction, that damages would have been an adequate remedy. He also granted Mr Riettie leave to appeal.

The proceedings before the single judge

[22] On 4 November 2014, NCB again advertised the property for sale by public auction and on 5 November 2014, a day later, Mr Riettie applied for an interim injunction pending appeal. The application was heard and refused by Brooks JA on 7 November 2014. It is that order that resulted in the proceedings before this court.

The application for variation of the single judge's order

[23] Mr Riettie set out eight grounds, which form the basis of his application for the variation of the single judge's order and which were developed in the comprehensive submissions, written and oral, which were advanced quite vociferously by counsel, Mr Chen, on his behalf.

[24] The material grounds on which the application is based are stated as follows:

> "(A) The application relates to compliance with the Rules of Court in a just manner;
>
> (B) The learned judge has misunderstood the application before him. There was no claim to restrain [NCB] from exercising its power of sale of the Mortgaged Land;
>
> (C) The claim was, and has always been from the prayer contained in the Claim Form to date of this appeal, that [NCB] was acting in bad faith in the exercise of it power of sale;
>
> (D) The learned judge of Appeal in Chambers having identified the wrongful act, which is being attempted, has failed to exercise his powers to prevent a wrong from being committed;
>
> (E) No injunction to restrain [NCB] from exercising its powers of sale was ever claimed or sought by [Mr Riettie] but what is

sought is an order that the sale should be under the supervision of the court;

(F) The need for an injunction arises not from the application of Mr Riettie but from the wrongful act of [NCB] to schedule a sale of the Mortgaged land which we say is in furtherance of its prevailing wrongful intention, so as to render the application of [Mr Riettie] nugatory;

(G) The reason that the Court should supervise the sale is that [NCB] has manifested an intention to cheat [Mr Riettie]. No issue of damages arises as it is a question of the prevention by the court of wrong-doing and the court's duty in that regard;

(H) The question of an injunction arises as a corollary of the court's duty to prevent a wrong;

…"

[25] In advancing his case before this court on those grounds, Mr Riettie relied on the affidavit of Mrs Riettie-Atherton along with material that was placed before the learned single judge.

[26] The respondents opposed the application and advanced helpful and illuminating arguments through their counsel, Mr Spencer and Mr Wilson, in support of their stance that this application should be dismissed. All these submissions, like those of counsel for Mr Riettie, were duly noted and considered. Both sides have also relied on numerous authorities, which have all been examined and duly considered in the determination of the issue at hand.

What was the application before the single judge (**grounds (A), (B), (C) & (E))?**

[27] It is recognised that the separate grounds advanced by Mr Riettie may be compressed and disposed of under some broad headings for convenience and expediency. Accordingly, grounds (A), (B), (C) and (E) have been dealt with together. These grounds do give rise to one single question and that is: what was the claim before the single judge?

[28] The nature and substance of the entire proceedings leading to the application before Brooks JA can be gleaned from Mr Riettie's statement of case that is included in the record of appeal. When paragraphs 2, 4, 6, 7, 11 and 12 of the claim form and the prayer contained therein are examined, it is indeed clear that there is a claim for an injunction, among other remedies, to not only restrain NCB in exercising its power of sale, but to deprive it of its power altogether. This is so because Mr Riettie is seeking an order from the court to give him 60 days to redeem, as well as for the court to make an order for sale of the property and to supervise the sale, if he is not in a position to redeem.

[29] If such orders were to be granted, it would mean that NCB would be barred from exercising one of its powers as a mortgagee, and it would be, in effect, the court exercising the power over the mortgaged property, with NCB merely acting as a conduit of its orders. This shows clearly, from the substance of the claim, that Mr Riettie wants to restrain NCB in exercising its power of sale, although its right to do so has lawfully arisen.

[30] A court ordered and supervised sale, as proposed by Mr Riettie, would run contrary to all the settled authorities dealing with the mortgagee's power of sale and the exercise of that power. The orders being sought in the claim form are clearly inconsistent with NCB's right to realise its security through the exercise of the power of sale. Contrary to what is alleged in the application, it is not correct to say that the claim is, and has always been, that NCB was acting in bad faith in the exercise of it power of sale. The claim has gone beyond that to seek the court's intervention in relation to the exercise of the power of sale.

[31] Furthermore, quite apart from the claim in the Supreme Court being one to restrain the exercise of the power of sale, the application before Brooks JA for an interim injunction was, as stated:

> "…to restrain the 1st Respondent [NCB] from proceeding with a sale of the lands… or otherwise dealing with or disposing of the Mortgaged Land until this Honourable Court has made a determination of the procedural appeal filed herein…"

[32] This application before Brooks JA, by its very terms, and also having been made as an immediate reaction to a proposed auction of the property, was, in substance, a move to stop NCB from exercising its power of sale as a mortgagee. Indeed, that was the sole purpose of the application before Brooks JA.

[33] In all the circumstances, Brooks JA would not have misunderstood the application that was before him as being one for an injunction to restrain the

mortgagee (NCB) from exercising its power of sale. There is thus no merit in grounds (B), (C) and (E) on which the application is based.

[34] This leads to the consideration of the remaining aspect of these combined grounds, and that is whether the application related to the compliance with the rules of court to deal with the case justly, as is contended in ground (A) of the application. The issues that arose for consideration before Brooks JA would have warranted the application of substantive law as it relates to the exercise of the NCB's power of sale and the grant of an interim injunction. The application of the overriding objective and other procedural rules under the CAR (or the Civil Procedure Rules ("CPR") would not override those special rules and principles of law governing the court's treatment of a mortgagee in the exercise of the powers of sale and the grant of an interim injunction.

[35] Morrison JA in **Mosquito Cove Ltd v Mutual Security Bank Ltd** [2010] JMCA Civ 32, after a thorough review of numerous authorities on the issue of restraining the mortgagee in the exercise of his power of sale, helpfully noted at paragraph [67]:

> "I do not think that anyone can fairly doubt the good sense of the principle which this decision confirms in the normal run of case, particularly in the era of the Civil Procedure Rules and the overriding objective of dealing with cases justly, including 'ensuring, as far as practicable, that the parties are on equal footing', as well as dealing with cases in ways that are proportionate to the 'financial position of each party' (CPR Part 1.1(1) and (2)(a) and (c)(iv)). However, notwithstanding this obviously important consideration, I do not think that the principle can avail the appellants in the instant case. In the light of the virtually unbroken chain of authority to which I have referred which establishes the ordinary rule in cases in which a mortgagor seeks to restrain the exercise of the mortgagee of the powers of sale under a

> mortgage. What these cases demonstrate, it seems to me, is that the relationship between mortgagor and mortgagee is *sui generis* and is governed by special rules that have been developed over many years to protect a mortgagee, as the condition of making an order restraining the exercise of his powers of sale, by affording him the 'equivalent safeguard' that an order for payment into court provides."

[36] The foregoing analysis, combined with the dictum of Morrison JA, does go a far way in disposing of this aspect of the argument advanced by Mr Riettie, that the matter is based on the application of the rules of court to deal with the case justly. The applicable rules to the determination of the application and the claim, in general, are the special rules developed over time to protect a mortgagee from a recalcitrant mortgagor.

[37] It should be stated too that quite apart from the special legal regime applicable to the exercise of a mortgagee's power of sale, there is also the law pertaining to the grant of an interim injunction. The special principles of substantive law applicable to the grant of an interim injunction would have also governed the question before the learned trial judge. Those special principles emanate from substantive law and are also independent of the CPR and the CAR. They are now well established. See for instance: **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504; [1975] 2 WLR 316 and **National Commercial Bank Jamaica v Olint Corporation Ltd (Jamaica)** [2009] UKPC 16.

[38] The application, therefore, necessitates a consideration of special substantive principles of law and not merely procedural rules embodied in the CPR and the CAR. Accordingly, it was not correct for Mr Riettie to say that the application relates to compliance with the rules of court in a just manner. There was thus no merit in the argument as set out in ground (A) of the application.

[39] Upon a close examination of Mr Riettie's statement of case in the Supreme Court, and the terms of the application that was before the learned single judge, it is evident that there is no merit in grounds (A), (B), (C) and (E) on which his application to vary the single judge's order was based. Those grounds, therefore, do not constitute any proper basis on which to interfere with the learned judge's decision in refusing the interim injunction.

Whether the learned single judge wrongly exercised his discretion in refusing the injunction (grounds (D), (F) and (H))

[40] In grounds (D), (F) and (H), Mr Riettie contended that:

(i) the learned single judge, having identified the wrongful act being attempted, failed to exercise his powers to prevent a wrong from being committed;

(ii) the need for an injunction arises from the wrongful act of NCB to schedule a sale of the land which is in furtherance of its prevailing wrongful intention to render the application nugatory; and

(iii) the question of an injunction arose as a corollary of the court's duty to prevent a wrong.

These grounds, cumulatively considered, do touch and concern the exercise of the learned judge's discretion in refusing the injunction. They have given rise to the broad question as to whether Brooks JA had properly exercised his discretion in all the circumstances.

[41] Mr Spencer submitted that an apt starting point for treating with the application to vary (discharge or set aside) the single judge's order is the dictum of Lord Diplock in **Hadmor Productions Ltd v Hamilton** [1983] 1 AC 191 at page 220. The well-known admonition in **Hadmor** is that the appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of appellate court would have exercised the discretion differently".

[42] This court has expressly endorsed and has consistently adhered to this principle in numerous authorities. Morrison JA, in speaking on behalf of the court in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, and having paid due regard to the admonition of Lord Diplock in **Hadmor**, stated at paragraph [20] of the judgment:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that particular facts existed or did exist-which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[43] In **Roache v News Group Ltd and Others** [1998] EMLR 161, 172, it was also stated:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

[44] It is accepted that the grant of an injunction is a discretionary remedy, and so for this court to interfere with the learned single judge's discretion and to substitute its own, it must be guided by the established principles of law pertaining to the interference by a court with a judge's discretion, whether one of coordinate or subordinate jurisdiction.

[45] It is noted, in treating with the decision of Brooks JA, that he had given no findings of fact or law in making the order refusing the injunction, except to say that damages would have been an adequate remedy and that NCB has the ability to pay them. The fundamental question is, whether in the circumstances of the case before him, which concerned, specifically, the exercise of a mortgagee's power of sale, such a conclusion was open to him.

[46] In considering that question, it is borne in mind that a consideration of such an application, as was before the learned judge in chambers, would have had to fuse the peculiar principles governing the restraint of a mortgagee in the exercise of his power of sale and the principles applicable to the grant of interim injunctions. It is necessary,

therefore, to briefly consider the special principles applicable to the exercise of a mortgagee's power of sale.

[47] It is accepted that the court can restrain a mortgagee but the general rule that is well-established in our jurisprudence is that first stated by this court in the well-known **SSI (Cayman) Limited v International Marbella Club SA Marbella** SCCA No 57/1986, delivered 6 February 1987. The 'Marbella Principle' is that the court should not restrain the mortgagee from exercising the power of sale unless the sum that he has sworn as being due and owing to him is paid into court.

[48] It is also accepted that this general rule has admitted to certain recognised exceptions as illustrated by Morrison JA in **Mosquito Cove**. He declared that notwithstanding the recognised exceptions (and others that may well be identified in the future), the 'Marbella Principle' is still "alive and well". Morrison JA further noted that where a court grants an injunction restraining a mortgagee from exercising his power of sale, this is a special rule flowing from the peculiar nature of a mortgage. However, as he stated, because an injunction is discretionary, **Marbella** may not apply.

[49] In the instant case, Brooks JA did not apply **Marbella**, in that, he did not make an order for the payment to be made into court by Mr Riettie in order to restrain NCB. He refused to grant the injunction out of hand. The question is: was he wrong in so doing? In determining that question, it is necessary to consider where NCB's effort to exercise the power of sale had reached on 7 November 2014 and other circumstances prevailing at the time when Brooks JA considered the application.

[50] These are some of the established facts that were before the learned judge:

(i) Mr Riettie was in default and had been for almost 10 years.

(ii) There was no agreement for sale in existence between NCB and the 1st and 2nd respondents. So, any complaint about impropriety of that initial sale would have been rendered academic, albeit that the claim against NCB would still be subsisting based on the various remedies being sought.

(iii) NCB had merely advertised the property for sale by public auction.

(iv) The latest advertisement of 4 November 2014 gave a more detailed description of the land than the previous advertisements. It did not describe the land as being agricultural land; it disclosed its potential use, which included for industrial purposes. It also pointed out that approval had been obtained by an entity for its use as a cement factory. The topography, location, size and access to it were all given. No mention was made, as was previously done, that the land had "ruinates".

(v) NCB had indicated no value of the land.

(vi) The concerns of Mr Riettie that were previously expressed in relation to the earlier advertisements were all remedied.

(vii) The date for which the auction was advertised to be held was erroneous.

(viii) There was no evidence that the 2nd and 3rd respondents had any interest in purchasing the land.

[51] It is against the background of these facts that the evidence of Mrs Riettie-Atherton, which was placed before Brooks JA, has been examined. She stated that the single advertisement, describing the land as industrial land situated near to "Goat Island", "is wholly inadequate and consistent with the 1st Respondent's action in this matter to obscure and limit the exposure of any propose [sic] auction sale of the mortgage land" and that it is a part of "the scheme between all of the respondents to cheat [Mr Riettie] out of the Mortgage Land".

[52] She maintained that the advertisement continued to misrepresent the true nature of the land being advertised. According to her, it "conveyed the impression that the land is primarily agricultural land, and downplayed the fact that it is now approved for use as industrial property". This, she said, "was consistent with the prior advertisements and the course of action by [NCB] to minimize the exposure of the sale of the property and its value to bring about a state of affairs whereby it can be sold to the 3rd Respondent at a gross undervalue".

[53] She also stated that the respondents knew she was in negotiations with interested parties for the sale of the land as industrial land, and that on each occasion NCB placed an advertisement in the newspaper, interested parties became reluctant to negotiate with her for purchase of the land.

[54] It is found that the advertisement complained about, when examined, does not bear out the allegations of Mrs Riettie-Atherton as to inadequacy of the description of the property, or otherwise. The advertisement gave a full and comprehensive description of the land. It indicated that approval had been obtained for its use as industrial land. The advertisement showed no price at which NCB was selling. So the learned judge would have had no evidence, *prima facie*, or otherwise, of the property being sold as agricultural land at a gross undervalue. Even more importantly, there was no evidence to support as Mrs Riettie-Atherton's bald assertion, that there was an effort on the part of NCB to sell to the 1st and 2nd respondents, or that the advertisement, prima facie, shows that NCB intended to deal unfairly with Mr Riettie. In short, there was no evidence to buttress or substantiate the mere assertions or speculation of Mrs Riettie-Atherton. It was open to the learned judge to so find.

[55] It is also recognised that all the issues raised by Mr Riettie, concerning the conduct of NCB leading up to the aborted sale to the 3rd respondent, was of no relevance to the application for an interim injunction. The property had still not been sold at the time of the application and the 1st and 2nd respondents were not shown, on any evidence, to have been interested parties in the sale of the property.

[56] Mrs Riettie-Atherton's evidence that was before Brooks JA pointed, fundamentally, to Mr Riettie's primary interest being to sell the property himself and the fear on his part that NCB may sell the property for far less than the value he believes it should be sold for. So, the case presented before Brooks JA, as it stood before us, was

one that was, at its core, a clash between the personal self-interest of the mortgagor to sell the property at a certain value that he sees as a fair market value, on the one hand, and the power, rights and interests of the mortgagee to realise its security by way of public auction, while the mortgagor continues in default, on the other.

[57] What was before Brooks JA, then, was simply an application that emanated from a concern about how much money would be obtained for the property if sold by the mortgagee. There was nothing to show that NCB, at that time, was acting in a manner that would have been adverse to the interest of Mr Riettie. The only thing wrong on the advertisement was a date erroneously stated. That was something inconsequential as the notice was eventually withdrawn and the auction that was advertised in that notice did not proceed.

[58] This is a normal case and so is one with no exceptional features that was presented before Brooks JA for the grant of an interim injunction. The learned judge, evidently, applied his mind to the principles applicable to the grant of an interim injunction to the facts before him and found that damages would be adequate and that there was no evidence that NCB could not pay. The mortgagor, Mr Riettie, was himself seeking to negotiate a sale of the mortgaged property. So, in actuality, his complaint was all about money. There was no need for the learned judge to go any further, having found that damages would be an adequate remedy, and that NCB is in a position to pay because those were findings that he could have legitimately made on the evidence that was before him.

[59] There are no facts presented before this court where it can be said that Brooks JA misunderstood the case before him and exercised his discretion wrongly in law, so as to provide a basis to disturb his order and for this court to grant an interim injunction. It means that Mr Riettie has failed to provide any meritorious argument on grounds (D), (F) and (H) that would justify this court interfering with the order of the learned judge.

Ground G

[60] Mr Riettie contended that the reason the court should supervise the sale is that NCB has manifested an intention to cheat him. According to this argument, no issue as to damages would have arisen "as it is a question of the prevention by the court of wrongdoing and the court's duty in that regard". This contention also lacks merit. There is no evidence presented that shows a manifest intention on the part of NCB to cheat Mr Riettie, or to otherwise act in bad faith in respect of any future sale, which is the relevant consideration.

[61] The authorities are clear that a mortgagee, in the exercise of the power of sale, owes a duty to take reasonable precaution to obtain the true market value of the property at the date on which he decides to sell. See **Cuckmere Brick Company Limited et al v Mutual Finance Limited** [1971] 2 WLR 1207; **Moses Dreckett v Rapid Vulcanizing Co Ltd** (1988) 25 JLR 130 (CA) and **Dian Jobson v Capital and Credit Merchant Bank Limited** SCCA No 113/2002, delivered 29 July 2005.

[62] It is also demonstrated on the authorities that where there is clear evidence that would point to the probability or the possibility that the mortgagee might not so act on

the date he decides to sell, then the court could seek to protect the interest of the mortgagor by making such orders as it sees fit, even granting a restraining order outside of the 'Marbella Principle', to ensure that the mortgagee acts in good faith in exercising the power. See **Ellison v Alliance Acceptance Ltd** (1984) NSW Conv R 55-217. This was also illustrated by the unreported decision of the Privy Council in **John Ledgister and Another v Jamaica Redevelopment Foundation Inc** JCPC 2013/0108, delivered 16 July 2014 (**Ledgister v JRF**) in which their Lordships, evidently, accepted the views expressed by Phillips JA in her dissenting judgment in **John Ledgister and Another v Jamaica Redevelopment Foundation Inc** [2013] JMCA App 10.

[63] There is no written opinion from the Privy Council, but the decision is of importance to the questions raised on this application before us, as well as for the future treatment of similar applications. It is, therefore, considered fitting to provide an insight into the circumstances of that case, in so far as is relevant, so that the decision of the Privy Council may be better understood.

[64] John Ledgister and his company, Sunnycrest Enterprises (the applicants) were mortgagors under a mortgage held by JRF. They defaulted and JRF eventually sought to exercise its power of sale. The applicants brought a claim against JRF in the Supreme Court claiming several remedies, to include a perpetual injunction to restrain the sale of the property. After an *inter partes* hearing conducted before D McIntosh J, the application for an interim injunction pending trial was refused. The applicants appealed

and sought to obtain an interim injunction pending the hearing of the appeal. Panton P, sitting as single judge in chambers, refused the application on the basis that the application was without merit. The applicants applied to the court for the order of the learned President to be varied or discharged on the ground that it was unjust.

[65] The applicants based their application for variation or discharge of the order of the learned President on several grounds, one of which, in so far as is immediately relevant, was that JRF was unlawfully advertising the property for sale. The primary argument was that although the property was originally zoned as agricultural land, it was re-zoned in 1995 as residential land and a subdivision approval for its subdivision in residential lots was obtained in 2010. Following the subdivision approval, an appraisal report was prepared placing the value of the property at US$25,000,000.00. JRF, in 2011, had secured a valuation of the land describing it as farmland, despite being informed by Mr Ledgister, the 1st applicant, that subdivision approval had been obtained for its use as residential land. The case for the applicants was that JRF had advertised the property for sale at US$900,000.00, which was a gross undervalue.

[66] At the hearing before the court, the applicants produced documents to substantiate the facts asserted by them in order to show that JRF was acting unfairly in the advertisement of the property. These documents were never produced before the leaned President or in the Supreme Court. Harris and Brooks JJA concluded that the court could not take them into account, they having not formed a part of the evidence before the President and the judge of the Supreme Court. By a majority decision

(Phillips JA dissenting), the interim injunction was refused as the majority found no serious issue to be tried to warrant an injunction.

[67] Phillips JA, in agreeing that most of the grounds raised were without merit, formed the view, in dissenting, that although the documents produced were not before the single judge or the Supreme Court, the court should examine them. She stated at paragraph [33]:

> "However, in light of the fact that it is not an appeal of the single judge's order, it is my view that although the court will ordinarily not do so, it nevertheless has a residual power, in special circumstances, to consider information that was not before the single judge, in accordance with the overriding objective in dealing with cases justly. In this case, the information to be considered is crucial to the application, the applicants are unrepresented and the 1st applicant did attempt to attach those documents to the affidavit in support of the application. These circumstances make this an appropriate case for the documents in question to be examined notwithstanding that they were not before the single judge. The issues then are whether these documents demonstrate some "unlawful" advertising or irregularity in advertising and whether this is a serious question to be tried in the context of the respondent's duty as a mortgagee in the exercise of the power of sale."

[68] Phillips JA, then noted in paragraph [34] that irregularities in advertising the sale of a mortgaged property by a mortgagee, in pursuance of the power of sale, may give rise to a breach of the mortgagee's duty to act in good faith. She found that, in relation to the advertisement by JRF, there was a serious issue to be tried in light of the documents produced by Mr Ledgister. This is what she said, in part, at paragraph [41]:

> "In answering the question posed in the preceding paragraph, I consider that the issues raised in the claim do not appear to be meritorious (See paragraph [32]).

> Therefore, an injunction could not be granted to subsist until the trial of the appeal. I am, however, satisfied that the respondent in the exercise of its powers intends to pursue the sale as advertised presently in circumstances where the proceeds would be at a gross undervalue, this gives rise to the serious issue of whether in exercising its power of sale, it is acting in breach of its duty to the mortgagor to act in good faith, which anticipated breach can be prevented by an injunction of limited scope relating solely to this serious issue. I would therefore grant an injunction to prevent the respondent from proceeding to sell the property pursuant to the current advertisement, which does not reflect any subdivision approval granted and any investigation into the increased value of the property in the light of the sub-division. In granting this injunction, I consider that the respondent would not be prejudiced since if the property is found to have the value suggested by the applicant's valuator or a sum that is close to that amount and is sold for a value that is approximate to that as can be obtained on the day of sale, the respondent would be able to recover the entire amount owed… It is my view that these circumstances would not require the payment into court of the amount claimed as owing, as the sale would not be restrained altogether or until trial but merely postponed until the steps can be taken to ensure that the proper market value is obtained."

[69] At paragraph [42], she then concluded:

> "I would therefore vary the order of the single judge to restrain the sale of the property valued and advertised as agricultural property. I would also order that the respondent, in the exercise of its powers of sale, should take steps to verify the subdivision approval and to ensure that once confirmed, any sale is pursued with advertisements making specific reference to the contents of the approval. …"

[70] Evidently, the Privy Council accepted Phillips JA's dissenting position as the preferred one when their Lordships opined, in so far as is immediately relevant:

> "[A]nd having considered written submissions from the parties, we have agreed to report to your Majesty as our opinion that

(1)…

(2) **until the Appellants' appeal to the Court of Appeal in Jamaica against the refusal of an interlocutory injunction has been determined an interim injunction should be GRANTED restraining the sale of the property as agricultural property or without full disclosure of the grant of approval for its re-zoning for residential development and of the relevant JAM$2.150 billion or US$25 million valuation put on it in December 2010**." (Emphasis added)

[71] The Privy Council's ruling in **Ledgister v JRF** has served to reinforce the principle extracted from the several authorities cited and endorsed by Phillips JA, that despite **Marbella**, the court can act to restrain a mortgagee from exercising its power of sale where irregularity or inadequacy in advertisement exists, thereby giving rise to the real possibility that the mortgagee may fail to act in good faith at the time he decides to sell.

[72] The circumstances of this case and the grouses of Mr Riettie have been considered against the background of the approach of the Privy Council in treating with the issues that arose for consideration in **Ledgister v JRF**. The circumstances in that case are, however, distinguishable from the instant case. This is so because at the time of the hearing before Brooks JA, and, certainly, up to the time of the hearing before this court, there was no longer any irregularity or inadequacy in the advertisements that could have led this court to find that there was a real risk of the property being advertised for sale at a gross undervalue. Furthermore, there was no apparent deficiency in the advertisement complained of that could establish a prima facie case that NCB is acting, or is likely to act, in bad faith in the exercise of its power of sale.

[73] It is recognised too, in light of the opinion of the Privy Council in **Ledgister v JRF**, that NCB would still have ample opportunity and time to arrange another advertisement and sale in a manner that would avoid the issues that have arisen thus far and any other pitfall in the future. The attorneys-at-law for NCB are mindful of the approach taken by the Privy Council in **Ledgister v JRF** (it having been brought to their attention by this court during the course of the hearing) and so they are expected to appreciate, even more than ever before, the legal duty that is imposed on NCB to act in good faith in the exercise of its power of sale. There is thus no basis on which even a limited form of injunction, as ordered by the Privy Council in **Ledgister v JRF**, would be warranted in this case.

The application

[74] Mr Riettie on his application before this court is, in effect, seeking an interim injunction from this court. There is no evidence presented or any legal basis established for us to discharge or set aside the order of the learned single judge and to grant an interim injunction pending the appeal as sought in the application. The application is, simply, without merit and shall be refused with costs to the respondents.

DUKHARAN JA

ORDER

(1) Application to vary order of single judge filed on 14 November 2014 is refused.

(2) Costs to the respondents to be taxed, if not agreed.