[2018] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 77/2016

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

BETWEEN	**ALEXANDER HOUSE LIMITED**	**APPELLANT**
AND	**RELIANCE GROUP OF COMPANIES LIMITED**	**RESPONDENT**

Abraham Dabdoub and Mrs Karen Dabdoub-Harris instructed by Dabdoub Dabdoub and Company for the appellant

Patrick Foster QC and Mark-Paul Cowan instructed by Nunes, Scholefield, DeLeon & Co for the respondent

20, 21 July, 3 October 2017 and 6 July 2018

MCDONALD-BISHOP JA

The procedural history

[1] This is an appeal brought by Alexander House Limited ('the appellant') from an order of Batts J, which was made in the Commercial Division of the Supreme Court on 2 August 2016. By that order, Batts J acceded to the appellant's application for an injunction, pending the trial of the claim, which was brought by it to restrain Reliance

Group of Companies Limited ("the respondent") from exercising its power of sale contained in a mortgage. However, in granting the injunction, Batts J made an order, in keeping with the principle enunciated in **SSI (Cayman) Limited, Dr Steve Laufer and FSI Financial Services US Inc v International Marbella Club SA ("Marbella**") (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 57/1986, judgment delivered 6 February 1987 ("the **Marbella** principle"), that the appellant should pay into court the sum of US$747,908.51, as a condition for the grant of the injunction.

[2] The appellant, being aggrieved by that order, filed a notice and grounds of appeal as well as a notice of application for court orders on 5 August 2016. By way of the notice and grounds of appeal, the appellant sought orders, inter alia, that there be a stay of the order of Batts J, pending the determination of the appeal; an interim injunction pending the determination of the appeal; discharge of the order of Batts J; and the grant of an injunction pending the determination of the claim in the Supreme Court.

[3] By way of the notice of application of the same date, the appellant also sought, inter alia, an interim injunction restraining the exercise of the power of sale, as well as a stay of execution of the order of Batts J, pending the determination of the appeal.

[4] Given the almost identical issues which arose for determination on the appeal and on the application, this court, with the concurrence of counsel on both sides, proceeded to hear the substantive appeal.

[5] The appeal raises a number of issues, but the core issue is whether Batts J erred in applying the **Marbella** principle in granting the injunction to restrain the respondent in the exercise of its power of sale given the challenge to the legality, validity and enforceability of the mortgage raised by the appellant.

[6] At the close of oral arguments on 21 July 2017, the court invited counsel to make further written submissions by 15 August 2017, in light of some relevant authorities brought to counsel's attention by the court. At the adjournment of the hearing, pending the filing of those submissions, the court granted an interim stay of execution of the impugned portion of the order of Batts J, until the determination of the appeal.

[7] On 3 October 2017, after a consideration of all the arguments advanced by counsel for the parties, the court dismissed the appeal; discharged the interim stay of execution that was granted on 21 July 2017; and awarded costs to the respondent to be agreed or taxed. We promised then to produce our written reasons for the decision at a later date. This is in fulfilment of that promise.

The factual background

[8] In or around July 2014, the respondent loaned the appellant the sum of US$600,000.00, which was secured by an instrument of mortgage executed in relation to property located at 1 Waterloo Road in the parish of Saint Andrew and registered at Volume 1353 Folio 797 of the Register Book of Titles ("the property"). The loan was also secured by a guarantee given by the appellant's principal, Mr Christopher Moore.

The particulars of the loan agreement were that the appellant would pay interest at a rate of 25% per annum, which was to be paid at a monthly instalment of US$12,000.00. The loan would be repayable at the end of 12 months.

[9] The appellant fell in arrears with the repayment of the loan and despite the issuance to Mr Christopher Moore of the requisite statutory notices, it failed to make good its default. As a result, on 16 June 2016, the respondent sought to exercise its power of sale under the mortgage by way of public auction.

Proceedings in the Supreme Court

[10] On the day that the auction for the sale of the property was to take place, the appellant successfully obtained from Batts J an '*ex parte* injunction' on a without notice application for court orders, restraining the respondent from exercising its power of sale with respect to the property until the *inter partes* hearing, which was scheduled for 22 June 2016. The interim injunction was granted on condition that the appellant paid into court on or before 24 June 2016, "or as any further order", the amount of US$747,990.00.

[11] On the same date of the application for the injunction, the appellant also filed a fixed date claim form, in which it sought, among other things, the following orders:

> "1. That the [respondent] be restrained from exercising, or causing to be exercised, its power of sale with respect [sic] all that parcel of land known as No. 1 Waterloo Road ('the Property'), in the parish of Saint Andrew being registered at Volume 1353 Folio 797 of the Register Book of Titles.

> 2. A declaration that the interest rate imposed by the [respondent] with respect to the loan for which the Property has been provided as security is unconscionable;
>
> 3. The costs of and incidental to this Claim to the [appellant] to be agreed or taxed."

[12] The appellant's contention in its application for injunction and in its claim was that the respondent is not an authorized dealer pursuant to the Bank of Jamaica Act 1960 ("the Act"), and that in contravention of the Act, it carried on the business of lending foreign currency to several persons over the years. Included among those persons and legal entities named by the appellant were: Ken's Sales & Marketing Limited (evidenced by the decision in **Reliance Group of Companies Limited v Ken's Sales and Marketing Limited and another; Christopher Graham v Ken's Sales and Marketing Limited and another** [2011] JMCA Civ 12); J Reitti; Foreign Options Limited; and Jack Fonseca Stuart and Pauline Stuart.

[13] The argument of the appellant is that the mortgage is rendered void from the beginning and unenforceable as a result of illegality. The illegality, according to the appellant, is the granting of the loan to the appellant in the course of the respondent's dealing in foreign exchange in contravention of the Act. The appellant contended that the granting of these loans has been admitted by the respondent's affiant, Gordon Tewani, in his affidavit filed on 19 July 2016. In that affidavit, Mr Tewani deponed that he is a director of the respondent and that he "infrequently assisted friends and associates with loans over the years in emergency situations or as a personal courtesy". His evidence is also that the "isolated and infrequent transactions do not

form a part of the respondent's real estate business" and the respondent does not engage in the business of money lending.

[14] The *inter partes* hearing came before Batts J on 2 August 2016, and after considering the evidence and the submissions of counsel for the parties, he made the following order:

> "a) Upon the payment by [the appellant] into Court or into a joint interest bearing account, in the names of the attorneys on the record for the parties to this action, of the sum of US$ 747,908.51 on or before the 12th day of August 2016, [the respondent] by itself, its servants and/or agents is restrained and an injunction granted restraining the exercise or causing to exercise its powers of sale with respect to the mortgage dated the 14th July 2014 registered at Volume 1353 Folio 797 of the Register Book of Titles being all that parcel of land located 1 Waterloo Road in the parish of Saint Andrew, until the trial of this action.
>
> b) [The appellant] through its counsel to give the usual undertaking as to damages.
>
> c) Costs to [the respondent] to be taxed if not agreed.
>
> d) Leave to appeal if necessary.
>
> e) Application for Stay refused."

The grounds of appeal

[15] The appellant challenged the decision of Batts J to apply the **Marbella** principle on four grounds. The grounds were as follows:

> "(A) The Learned Judge having determined that (1) there were serious triable issues in respect of the legality and enforceability of the loan and in respect to the Mortgage entered into as security for the said loan (2) that damages

were not an adequate remedy and that (3) the balance of convenience lay in favour of the Claimant, erred in law by failing to appreciate that as a matter of law the facts of the application were of such that they gave rise to an exception to the Marbella principle which did not and should not apply in this claim where, as a matter of law, the [appellant] was challenging the legality, validity, and enforceability of the loan and of the Mortgage Instrument entered into as security.

(B) That the Learned Judge misdirected himself by giving consideration and making a determination to matters which ought properly to be determined by the trial Judge and not on the hearing of an application for injunctive relief.

(C) That the Learned Judge erred in law in failing to appreciate that the Affidavit evidence was prima facie evidence that the [respondent] was in breach of Section 22A(2) of the Bank of Jamaica Act by carrying on the business of lending foreign currency without being an authorised dealer as a result whereby the loan to the [appellant] was unlawful, illegal and unenforceable and consequently the Learned Judge further erred by failing to recognise that the Mortgage given as security for an unlawful and illegal loan was also unlawful, illegal and unenforceable.

(D) The Learned Judge failed to follow the principle of law as announced by the Court of Appeal in the case of **Rupert Brady v. Jamaica Redevelopment Foundation Inc. et al,** SCCA No. 29/2007.

(E) The Appellant will, if necessary, seek leave to add further grounds of appeal and to add additional grounds of appeal on receipt of the Learned Judge's reasons for his Order made on the 2nd of August, 2016."

[16] These grounds were developed in the comprehensive submissions, written and oral, which were ably advanced on the appellant's behalf by counsel, Mr Dabdoub and Mrs Dabdoub-Harris.

[17] For convenience and expediency, the grounds of appeal may be merged, analysed and disposed of by this court, under broad headings. Accordingly, grounds (A), (C) and (D) were examined together, while ground (B) was treated separately, even though it overlapped the other grounds.

[18] Grounds (A) (C) and (D) gave rise to one single question, which was whether Batts J erred in holding that the underlying facts of the case do not give rise to an exception to the **Marbella** principle in circumstances where there is a challenge to the legality, validity and enforceability of the mortgage.

[19] In relation to ground (B), the issue was whether Batts J misdirected himself by making a determination on matters which ought properly to be determined by the judge at the trial of the claim.

Issue (1)

Did Batts J err in concluding that the underlying facts of the case do not give rise to an exception to the Marbella principle in circumstances where the legality, validity and enforceability of the mortgage is being challenged (grounds (A), (C) and (D))?

The appellant's submissions (in summary)

[20] Mr Dabdoub, relying on **American Cyanamid v Ethicon Limited** [1975] 1 All ER 504, submitted that there were two serious issues to be tried in the case, being: (a) whether the mortgage is illegal, void, and therefore invalid and unenforceable; and (b) whether the interest rate imposed by the respondent with respect to the loan, secured by the said mortgage, is harsh and unconscionable. He accepted that the learned judge was correct in holding that there were serious issues to be tried in the claim.

[21] Counsel maintained, however, that as the legality, validity and enforceability of the mortgage was being challenged on the basis of section 22A(2) of the Act, this is a prime case for the application of an exception to the **Marbella** principle.

[22] Section 22A(2) of the Act provides that:

> "No person shall carry on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorized dealer."

[23] An "authorized dealer" is defined by the Act as:

> "...[I]n relation to any foreign currency, a person for the time being authorized by an order of the Minister to act for the purposes of this Act as an authorized dealer in relation to that foreign currency or foreign currency instruments."

[24] On the basis of those provisions, Mr Dabdoub contended that the evidence that the respondent has loaned foreign currency to several persons over the years in contravention of the Act, when he is not an authorized dealer, is undisputable. He pointed to the fact that the respondent's affiant, Mr Tewani, had stated that loans were only made to friends but that his assertion is disputed by Mr Christopher Moore as well as Jack Fonseca Stuart and Pauline Stuart, on whom the appellant relies as witnesses.

[25] Within this context, the appellant's complaint in ground (C) is that the learned judge erred in failing to appreciate that the affidavit evidence was prima facie evidence that the respondent was in breach of the Act by carrying on the business of lending foreign currency without being an authorised dealer and, as a result, the loan to the appellant was unlawful, illegal and unenforceable. Although counsel for the appellants

in their written submissions had posited that Batts J was correct to find that there was a serious issue to be tried in relation to the enforceability of the mortgage for granting the injunction, Mr Dabdoub in oral submissions, nevertheless, contended that the learned judge misled himself by concluding that the issue of whether or not the respondent was lending money in contravention of the Act is a triable one, based on the affidavit of Mr Gordon Tewani that the respondent only gave loans to friends. According to Mr Dabdoub, the fact that the company lends money to friends does not mean that it was not carrying on business.

[26] Relying on dicta of Phillips JA in **Smith's Trucking Service Limited and another v Jamaica Redevelopment Foundation Inc** [2012] JMCA Civ 63, Mr Dabdoub argued that it is trite law that a contract which is illegal is unenforceable and that in the circumstances, this court "is bound not to render assistance in enforcing [the] illegal contract[s]" entered into by the respondent.

[27] In advancing the contention that the court should not assist the respondent to enforce the contract because it is illegal as being in contravention of the Act, counsel also drew support from the dicta of the Privy Council in the Nigerian case, **Patience Kasumu and others v Gbadamosi Baba-Egbe** [1956] AC 539. In that case, it was held by their Lordships that the breach of section 19 of the Moneylenders Ordinance of Nigeria ("the Ordinance") by the lender had rendered the mortgage transactions in question unenforceable. Section 19 of the Ordinance, which was in issue, expressly provided, inter alia, that any moneylender who failed to comply with the requirements of the section "shall not be entitled to enforce any claim in respect of any transaction

in relation to which the default shall have been made". The section also imposed criminal sanctions for the breach of the provision. Their Lordships opined that it was wrong for the lender in default to be allowed to defend himself in court by calling for the imposition of terms of repayment because, by so doing, he would have been enforcing directly or indirectly, "a claim in respect of the transaction". Their Lordships refused to impose terms of repayment as that would have been in direct conflict with the policy of the statute in question.

[28] In seeking to firmly ground the argument that the **Marbella** principle is not inflexible and should be departed from in this case where there is an illegality, Mr Dabdoub placed much emphasis on the decision of this court in **Rupert Brady v Jamaica Redevelopment Foundation Inc ("JRF") and others** and the dissenting judgment of Phillips JA in the case of **John Ledgister and Sunnycrest Enterprises Limited v Jamaica Redevelopment Foundation Inc ("John Ledgister")** [2013] JMCA App 10 (which was subsequently endorsed by the Privy Council in an unreported opinion). Mr Dabdoub noted, that Phillips JA, in acknowledging that there were exceptions to the **Marbella** principle, cited with approval the Australian case of **Bayblu Holdings Pty Ltd v Capital Finance Australia Limited** [2011] NSWCA 39, where the court, citing other authorities, outlined exceptions to the **Marbella** principle as:

> (a) where there is an issue as to whether the power of sale has arisen at all (see **Harvey v McWatters** (1948) 49 SR (NSW) 173);

(b) where the validity of the mortgage was in issue (see **Allfox Building Pty Ltd v Bank of Melbourne Ltd** (1992) NSW Conv R 55); and

(c) where the amount being claimed by the mortgagee was clearly wrong (see **Clarke v Japan Machines (Australia) Pty Ltd (No 2)** [1984] 1Qd R 421).

[29] Counsel maintained that in the instant case, it is clear that the legality of the mortgage is being challenged and therefore its validity is in issue. This, counsel contended, demonstrates that the case in question falls squarely within one of the well known and accepted exceptions to the **Marbella** principle as was adopted by this court in the case of **Rupert Brady v JRF**. This case, he contended, is of the second class of cases described by Sugerman J in **Harvey v McWatters** and therefore should be determined on more flexible principles and reasoning.

[30] By pointing to various aspects of Batt J's reasoning, against the background of the facts of the case, counsel argued that Batts J would have erred as: (a) his decision was based on a misunderstanding of the law; (b) he took into consideration matters that he should not have considered; and (c) he erred by failing to take into consideration matters that should have been considered. In the light of these failings, according to counsel, this court would be justified in interfering with his decision. Reliance was placed on the principles enunciated in **Royden Riettie v National Commercial Bank Jamaica Limited "(NCB") and others** [2014] JMCA App 36, in

treating with the approach of an appellate court in considering the exercise of the discretion of a judge at first instance, in granting or refusing an injunction to a mortgagor to restrain the mortgagee from exercising his power of sale**.**

The respondent's submissions (in summary)

[31] Mr Foster QC in his equally forceful response on behalf of the respondents, and ably assisted by Mr Cowan, submitted that contrary to the arguments proffered by counsel for the appellant, the appeal should be dismissed for the reasons as outlined below.

(a) The underlying facts of the instant case do not give rise to an exception to the **Marbella** principle. The applicable rules to the determination of an application for injunctive relief against a mortgagee in general, are "special rules" developed over time to protect the mortgagee from a reluctant mortgagor. See **Mosquito Cove Ltd v Mutual Security Bank Ltd and others; Grange Hill Farms Ltd and another v Mutual Security Bank Ltd and others ("Mosquito Cove")** [2010] JMCA Civ 32.

(b) **Mosquito Cove** confirms that the **Marbella** principle is still applicable although not absolute. That case identified and discussed the exceptional circumstances in which the payment of money into court would not be required (see paragraphs [57] to [63] of that judgment). On a thorough review of the exceptions, it

is clear that the appellant does not qualify to be subsumed under the "exceptions category" as the agreement in the instant case was an ordinary arm's length transaction and as such the **Marbella** principle ought to be followed as a matter of course.

(c) The decision in **Rupert Brady v JRF** is not authority for the broad proposition that once a mortgagee raises an issue as to the validity/legality of a mortgage, the **Marbella** principle ought not to be applied as a matter of law. **Rupert Brady v JRF** was based on special and unusual facts and therefore its jurisprudential reach ought not to be overstated. The decision is intended to cover only a narrow class of cases where the provenance or authenticity of the mortgage document is in question. The learned judge was correct to doubt whether the raising of an issue of illegality simpliciter came within the exception to the **Marbella** principle**.**

(d) In considering the decision of **John Ledgister**, the threshold to be considered when a departure from the **Marbella** principle is contemplated arises in situations where there is an exceptional case based on special facts or in circumstances where there is manifest injustice.

(e) The factual underpinning as to whether the respondent acted in breach of section 22A(2) of the Act is being challenged which, as highlighted by the learned judge, is a triable issue.

(f) A breach of section 22A(2) of the Act does not, without more, render a mortgage invalid, illegal and/or unenforceable. There is no absolute rule in law, as suggested by the appellant, that a transaction which involves conduct prohibited by statute renders the underlying contract illegal, void and/or unenforceable. The correct approach that ought to be taken is for an examination of the statutory provision and a determination of whether the underlying contract between the parties is deemed illegal, void and/or unenforceable by express words or by necessary implication. See **Patience Kasumu v Gbadamosi Baba-Egbe** and **Yango Pastoral Company Pty and others v First Chicago Australia Limited and others** [1978] 139 CLR 410.

(g) **Patience Kasumu v Gbadamosi Baba-Egbe** was a case relating to an express prohibition of not only the criminal conduct but also the underlying contract between the parties. It is not an authority for the proposition that all conduct touching and concerning illegality will automatically render a contract void where the statute is silent in that regard.

(h) The learned judge was correct in his analysis of the authorities and in concluding that the **Marbella** principle should apply.

Discussion

[32] The starting point in treating with the issues raised on the appeal was the recognition of the principles authoritatively stated by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 and repeated consistently by authorities from this court which have delineated the ambit of the power of an appellate court in reviewing cases involving the exercise of the discretion of a judge at first instance. The principles are well settled and need not be repeated for present purposes. See **Royden Riettie v NCB** and the cases cited therein (**The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 and **Roache v News Group Newspapers Limited and others** [1998] EMLR 161).

[33] It is also recognised that the claim for a permanent injunction is yet to be tried and so this court should avoid descending into any particularity during the course of the analysis that could be taken as disclosing a provisional view on the outcome of the case. For that reason, no comprehensive analysis of issues that are material to the resolution of the substantive claim is undertaken.

[34] It is therefore considered sufficient to broadly state that having considered all the submissions of counsel on both sides (albeit not reproduced in their entirety), the reasons given by Batts J for his decision, the relevant law and the prevailing circumstances of the case, I found it difficult to accept the contention of the appellant

that on the basis of grounds (A), (C) and (D), this court should interfere with the exercise of the discretion of the learned judge and discharge his order. In my view, the learned judge's invocation of the **Marbella** principle on the facts before him is defensible. The reasons for this conclusion will now be outlined.

[35] The **Marbella** principle is so well entrenched in our jurisprudence to the extent that it could now be considered as being trite. That notwithstanding, however, it seems useful for the purpose of present analysis to restate the principle as succinctly captured by Carey JA thus:

> "There is no question but that the Court has an undoubted power to restrain a mortgagee from exercising his powers of sale, but if it is so orders, the term invariably imposed is that the amount claimed must be brought into Court. The idea of the mortgagee paying sums to maintain his property while the restraining order is effective, is altogether novel, and in my judgment, has no warrant in point of law."

[36] After referring to dicta from **MacLeod v Jones** [1884] 24 Ch D 289 and **Inglis & anor v Commonwealth Trading Bank of Australia** (1972) 126 CLR 161, two seminal authorities in which the principle had been enunciated, Carey JA went on to say:

> "The rule is therefore well settled and indeed, despite Mr. George's valid efforts, nothing has been said, which in any way permits a Court of Equity to order restraint without providing an equivalent safeguard, which is, the payment into Court of the amount due or claimed in dispute."

[37] In **Inglis & anor**, Walsh J stated at pages 164-165 of the Report:

> "In my opinion, the authorities which I have been able to examine establish that for the purposes of the application of

> the general rule to which I have referred, nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due."
>
> "The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed."

[38] In dismissing the appeal from the decision of Walsh J, Chief Justice Barwick said:

> "The case falls fairly, in my opinion, within the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into court of the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage."

[39] In **Mosquito Cove**, Morrison JA, as he then was, after a review of a line of authorities treating with the issue of restraining a mortgagee in the exercise of his power of sale, including **Marbella**, observed:

> "[67]...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 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 the 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."

[40] There are therefore special rules that have evolved to protect the mortgagee from a recalcitrant mortgagor and so, the **Marbella** principle, as Morrison JA said in **Mosquito Cove**, is "alive and well", albeit that that there may be a departure from it, if justice demands it in special circumstances. Morrison JA, himself, pointed to some of those exceptional circumstances in which the **Marbella** principle may be departed from as follows (paragraphs [57]-[63]):

i. where the terms of the mortgage deed are peculiar or unusual (see **Gill v Newton** (1866) 14 WR 490);

ii. where the issue of fiduciary relationship between the mortgagor and the mortgagee arises; or in the case of forgery (see **MacLeod v Jones**);

iii. where questions arise as to the validity of the mortgage document. For example, where a person asserts that they did not sign or give authority for the mortgage document to be signed (see **Rupert Brady v JRF**); and

iv. where on the face of the mortgage, the mortgagee's claim is excessive (see **Fisher & Lightwood's, Law of Mortgage**).

[41] Then, at paragraph [64], Morrison JA opined:

> "While other or further exceptions to the rule are no doubt to be found in the books and will also emerge in the future, it seems to me that the kinds of instances discussed in the foregoing paragraphs suggest that the court will only sanction departures from the general rule in highly exceptional cases, based on very special facts, such as the existence of a fiduciary relationship between mortgagor and mortgagee or, perhaps, in cases of forgery. I naturally intend these as examples only, which are by no means exhaustive."

[42] Mr Dabdoub vigorously argued that in the instant case, where the validity of the mortgage is being challenged, the circumstances fall squarely within one of the recognised exceptions to **Marbella**. Heavy reliance was placed by him on **Rupert Brady v JRF**. In that case, Mr Rupert Brady filed a claim in the Supreme Court, asking the court to determine whether a mortgage registered in respect of a property owned by him and his brother was valid and enforceable against him. He also sought a declaration that the mortgage was null and void and that it be discharged from the certificate of title. The basis for his claim was the, prima facie, undisputed evidence that he did not sign the relevant mortgage documents and had not given his brother authorization to pledge the property or to use his name to secure money from the bank or to guarantee repayment. He contended that his signature was forged. JRF, the mortgagee and one of the defendants, counterclaimed for a declaration that they were entitled to exercise all rights as mortgagee by assignment.

[43] The judge at first instance granted an injunction to restrain JRF from disposing of the property until the determination of the trial on condition that Mr Rupert Brady pay into court, one-half of the total mortgage indebtedness. Although the judge had expressed the view that justice demands a "flexible approach", where the allegation is that the guarantor's signature had been forged, she nevertheless applied the **Marbella** principle.

[44] On Mr Rupert Brady's appeal to this court, the appeal was allowed on the basis that he was challenging the validity of the mortgage document as it pertained to him and so it warranted the application of an exception to **Marbella**. Cooke JA stated:

> "[7]...The correct distinction is between cases where the issue is in respect of the amount of money owed under a valid mortgage and cases where the validity of the mortgage is challenged."

[45] It is from this dictum that counsel for the appellant derived even greater strength to advance the argument that the instant case warrants a departure from **Marbella** because, like in **Rupert Brady v JRF**, there is a challenge to the validity of the mortgage.

[46] The learned trial judge, however, had that authority before him for consideration as well as **Mosquito Cove**, the case relied on by the respondent, which is a more recent decision from this court. The latter case, more particularly, treats with an issue similar to the issue in this case, which is the alleged invalidity and unenforceability of a mortgage due to the alleged contravention of a statute.

[47] In **Mosquito Cove**, the issue was one which related to the alleged illegality of the mortgage as being in contravention of section 54 of the then Companies Act, which was in force at the time of the contract in question (now repealed). It was contended that the loan which was the subject of the mortgage was for an illegal purpose, that is, a loan by a company for the acquisition of its own shares which breached the Companies Act. The learned judge in the Supreme Court applied **Marbella**, despite the contention that the validity of the mortgage was being challenged.

[48] On appeal, this court, speaking through Morrison JA, reviewed several authorities on the issue of the illegality and enforceability of the contract in question and the resultant effect on the mortgage. Morrison JA observed, after a consideration of section 54 of the Companies Act:

> "[31]...But while a breach of the section clearly gave rise to criminal liability on the part of not only the company but its officers, even a cursory consideration of the authorities over the years reveals that, in civil proceedings, the question of the validity or otherwise of transactions in breach of the section has not attracted a uniform judicial response."

[49] Morrison JA concluded, after a detailed review of conflicting authorities on the effect of illegality on the enforceability of a mortgage, that the illegality issue could not have been determined with any certainty given the unsettled state of the law and the very preliminary stage of litigation. On that basis, he opined that no exception to **Marbella** could have been employed to assist the mortgagor.

[50] Mr Foster, in adopting that line of reasoning employed by Morrison JA in **Mosquito Cove**, correctly submitted that the question whether there is contravention

of the Act, is a disputed matter of fact. The factual basis on which the appellant is challenging the mortgage is still disputed and is one for resolution at a trial. The presence of this disputed factual basis in this case, renders the circumstances distinguishable from those that obtained in **Rupert Brady v JRF**, in which there was strong undisputed prima facie evidence to suggest that Mr Rupert Brady's signature was forged on the mortgage instrument. It could not be said then, with certainty and finality at the interlocutory stage, that the mortgage is unenforceable for illegality. The dicta of the Privy Council in **Patience Kasumu v Gbadamosi Baba-Egbe**, concerning a statute with express prohibition of a contract in contravention of a statutory provision, cannot avail the appellant in these proceedings, without further investigation at a trial.

[51] Batts J, having properly found that the question of the illegality of the mortgage raises a serious issue to be tried on which the appellant has a reasonable prospect of success, stated at paragraph [20] of his judgment:

> "The court in these matters is exercising an equitable jurisdiction. The entire circumstances are to be examined before a decision is made as to how that discretion is to be exercised. I am guided in this regard, and bound by, the pronouncement of the Court of Appeal in **Mosquito Cove Ltd. v Mutual Security Bank Ltd**. et al..."

[52] He then continued at paragraph [21], after citing a dictum from Morrison JA in **Mosquito Cove** (at paragraph [2]):

> "...The issue that court considered was therefore the same one before me. In that case it was argued among other things that the loans the subject of the mortgage, were for

> an illegal purpose i.e. a loan by a company for the acquisition of its own shares. On this point, the Court of Appeal concluded that it could not be said at this "preliminary" stage that the company's challenge to the transaction on the ground of illegality was more likely than not to prevail at the end of the day."

[53] The learned judge also recognised that **Rupert Brady v JRF** was considered by the court in **Mosquito Cove** and in particular the dictum of Cooke JA, "without any adverse comment by Morrison JA". So, Batts J did give consideration to the fact that the appellant is alleging that the loan is tainted by illegality and so is unenforceable as well as their reliance on the reasoning of the court in **Rupert Brady v JRF**. Having done so, he found it better to follow the **Mosquito Cove** line of reasoning as it was more in line with the circumstances of the case that confronted him for determination.

[54] This court cannot fault the learned judge on his finding that in the circumstances of the case he had for consideration (which raises similar question as that in **Mosquito Cove**) he was bound by the pronouncements of this court in **Mosquito Cove**. The learned judge cannot be said to have been palpably wrong or unreasonable in applying the *ratio decidendi* of the case that was more applicable to the facts of the case before him. This was the operation of the principle of *stare decisis* and the doctrine of judicial precedent which Batts J employed in coming to his decision. He having done so, it would be wrong for this court to disturb his decision, without a proper basis in law to do so. Accordingly, the learned judge's decision to follow **Mosquito Cove** rather than **Rupert Brady v JRF** cannot be said to be wrong or aberrant as to warrant interference by this court.

[55] Mr Dabdoub had also submitted that the appeal ought to be allowed on the basis that the judge demonstrated a misunderstanding of the law, by considering things at the interlocutory hearing that he ought not to have considered. Principles enunciated in **Royden Riettie v NCB** and the cases cited therein, were prayed in aid by counsel, in seeking to convince this court that interference with the decision of Batts J would be justified.

[56] One of counsel's arguments in advancing this contention was that Batts J's reasoning at paragraph [26] of his judgment failed to appreciate that the mortgage, which was given as security for the repayment of an illegal loan, was also tainted with illegality, and as such, the validity of the mortgage instrument was in issue and being challenged. Another argument advanced by both Mr Dabdoub and Mrs Dabdoub-Harris (in her oral arguments) was that the learned judge erred in taking principles of restitution into account, particularly, as restitution was not pleaded and as such was not in issue before him.

[57] This contention of Mr Dabdoub and Mrs Dabdoub-Harris could not be accepted as a proper basis on which to assail the decision of the learned judge. It is considered useful to direct attention to the salient aspects of the reasoning of the learned judge that have evoked the complaint from the appellant that he failed to take relevant matters into account and also took irrelevant matters into account.

[58] At paragraphs [26] and [27], Batts J reasoned:

"[26] How then does one apply those principles to this case? The Claimant's case is that the mortgage is an illegal contract and therefore void and unenforceable. The Claimant however admits receiving the loan. He knew, when signing the mortgage, that he was pledging his property for that loan. The loan, if he is correct, may be unenforceable in a court for reasons of public policy, however does that necessarily mean the mortgage supporting the loan is void? In Jamaica the exercise of a power of sale does not require a judicial act or intervention. Mortgage companies routinely sell under that statutory power and there is no need to obtain judicial sanction. This case may not therefore fall within a recognised exception to **Marbella**.

[27] There is a further reason for such a conclusion. The consequence of an illegal contract is not necessarily that the contract is unenforceable and hence someone becomes unjustly enriched. Indeed the court quite often orders restitution. The Claimant even if not liable for the loan may be liable for money had and received or some such remedy. The Claimant for example may be said to have induced the Defendant to part with his money on a promise to pledge the land. Is it that a court of equity will allow him to resile from the promise? If it does then the court will be allowing the Claimant to use a statue [sic] [the Bank of Jamaica Act] as an instrument of fraud. He will be allowed to have taken the Defendant's money on a pledge which he is then allowed to break. In this arena of competing equities the preferable approach at this interlocutory stage may be for the Claimant to be required to pay the amount into court, as a precondition to injunctive relief. He has after all enjoyed the full benefit of the loan."

[59] The learned judge's reasoning on restitution and that the contract may not necessarily be found to be illegal, even if the respondent acted in contravention of the Act, must be viewed against the backdrop of the arguments and the case which were

advanced by the respondent before him. Before Batts J, counsel for the respondent (the same counsel before this court) relied on the cases of **Hughes and others v Asset Managers plc** [1995] 3 ALL ER 669 and **Patel v Mirza** [2016] UKSC 42 (to which the learned judge had referred the parties) to make the point that there is no absolute rule in law that a transaction which involves conduct prohibited by statute renders the underlying contract illegal, void and/or unenforceable.

[60] In **Hughes v Asset Managers plc**, the English Court of Appeal considered a statute which prohibited a person from carrying or purporting to carry on the business of dealing in securities without a licence. The court opined that it did not necessarily follow that the transaction entered into was illegal merely because the dealer was prohibited by statute from engaging in the transaction. The ultimate resolution of the issue will turn on the construction of the particular statute, the court held.

[61] In **Patel v Mirza**, the issue related to a claim for the return of money paid by the claimant to the defendant, pursuant to a contract to carry out an illegal activity, which was not carried out due to circumstances beyond the parties' control. The Supreme Court of England reaffirmed the position that a civil court will not enforce an illegal contract, but the majority of the court adopted a more modern approach and held that the claimant was not precluded from recovering the moneys that he paid to the defendant. The majority ordered restitution despite the tainted contract.

[62] Lord Toulson, speaking for the majority, noted:

> "The question whether a statute has the implied effect of nullifying any contract which infringes it requires a purposive construction of the statute, as illustrated by the decision of the Court of Appeal in **Hughes v Asset Managers plc** ... which the Commission commended."

[63] Batts J, having considered the circumstances of the instant case, the submissions of both parties and the dicta from the authorities concerning the issue of illegality based on alleged contravention of a statute, noted:

> "[32] I make no decision on this point of construction of the statute and its implications for the illegality and/or enforceability of the transaction. Mr Dabdoub has urged strongly that the section and consequently the intent of Parliament is clear. It suffices at this stage for me to indicate that the matter is not free of difficulty. However, on the recent authorities, and in particular the authority of Hughes case, it does seem that the [respondent's] prospect of ultimate success is fair. In the context of this matter therefore I decided not, in all the circumstances, to depart from the Marbella principle."

[64] **Hughes v Asset Managers plc** and **Patel v Mirza** have made it abundantly clear that the question whether a statute has the effect of nullifying any contract which infringes it requires a purposive construction of the statute. Mr Foster, with the aid of Mr Cowan in their written submissions, also submitted that the challenge to the validity of a mortgage based on a silent statutory prohibition does not make the underlying contract between the parties void and unenforceable.

[65] **Patel v Mirza** also demonstrates that a mere finding of illegality does not necessarily lay the matter of recoverability under the contract finally and conclusively to rest. This decision stands as strong persuasive authority which could influence a trial judge to make an order for restitution for unjust enrichment or to adopt the reasoning

of the minority and make no such award. These are all matters to be resolved at a trial and will depend on the construction of the statute and the views of the trial judge. So, as Batts J duly noted, the issue concerning illegality was not free from difficulty.

[66] The unsettled area of the law, and the difficulty it consequently poses for summary resolution of such an issue at an interlocutory stage, is made even clearer by the principle relied on by the respondent from the Australian case of **Yango Pastoral Company Pty and others v First Chicago Australia Limited and others**. The principle is that where the validity of the mortgage is questioned on the basis of a "silent statutory prohibition", the presumption is that the formation of the contract remains valid, unless a contrary conclusion can clearly be reached by necessary implication without controversy. This had informed counsel for the respondent to argue that a challenge to the validity of the mortgage based on a "silent statutory prohibition" ought not to deprive the mortgagee or "apparent mortgagee" of his substantive protection under the general rule.

[67] In terms of the remedy of restitution discussed by the learned judge, Mr Foster, in his response, compared the learned judge's approach in making his decision with that of the Privy Council in **National Commercial Bank (Jamaica) Ltd ("NCB") v Hew and Others** [2003] UKPC 51, a case on which the respondent relied. Queen's Counsel argued that the learned judge's reasoning at paragraph [27] was proper. He submitted that that the "broad restitutionary principles" gleaned from **NCB v Hew** are applicable to the instant case and, accordingly, the learned trial judge was entitled to consider them in his application of the **Marbella** principle.

[68] In **NCB v Hew**, Lord Millett, who delivered the advice on behalf of the Board, made the important point at paragraph [43] that where a transaction is obtained by undue influence, it must be set aside *ab initio* and that this requires a mutual accounting with mutual restitution by both parties. Even more relevant for present purposes, his Lordship made it abundantly clear that where the transaction is a loan, as distinct from a guarantee, "it would not be just simply to set aside the loan; this would leave the borrower unjustly enriched". The proper course, he opined, is to "set aside the contract of the loan and require the borrower to account for the moneys received with interest at a rate fixed by the court".

[69] It follows then that a finding of illegality of the transaction in this case may not end the issue of recoverability of the sum owed by the appellant. It owes the outstanding mortgage sum to the respondent under the contract and this is what the learned judge recognised in paragraph [27] of his judgment, when he gave consideration to restitutionary principles. The learned judge was exercising an equitable jurisdiction. It was open to him, in the administration of the concurrent jurisdiction of law and equity pursuant to section 48 of the Judicature (Supreme Court) Act, to take account of all matters properly placed before him which could assist him in determining what was just and convenient in all the circumstances of the case. For this reason, the fact that the respondent, up to then, had not pleaded unjust enrichment and claimed restitution was not a bar to him giving consideration to restitutionary principles. The respondent was at a stage in the proceedings when it was still open to it to amend its statement of case.

[70] Furthermore, even if there was no **Marbella** principle, it would have been open to the learned judge to grant the injunction on terms that the money, said to be owed, is paid into court or on such other terms as he thought fit. He was empowered to do so by law.

[71] It was for all the foregoing reasons that I could discern no merit in the appellant's contention that the learned judge failed to recognise that the loan was tainted by illegality and that, as a result, there was no need for the issue of illegality to be investigated at a trial. Grounds (A), (C) and (D) failed.

Issue (2)

Whether the learned judge misdirected himself by giving consideration to and making a determination on matters which ought properly to be determined by a trial judge (ground (B))

[72] Counsel for the appellant, Mrs Dabdoub-Harris, in arguing ground (B) further submitted that the appeal ought to be allowed on the basis that Batts J demonstrated a misunderstanding of the law by considering things at the interlocutory hearing that he ought not to have considered and which should have been left for the judge at trial. Within this context, counsel argued that restitution, being an equitable remedy, was a matter solely to be dealt with by the trial judge, after hearing all the evidence and, furthermore, it was not pleaded and so by taking the issue of restitution into consideration, Batts J fell into error and exercised his discretion wrongly. This, however, has already been discussed within the context of a consideration of the other grounds at paragraphs [67] - [70] above and rejected as being devoid of merit.

[73] I will simply say that a close examination of the reasoning of Batts J has led to the conclusion that the appellant's complaint that he made findings on matters that ought properly to be made by the judge at trial is not justified. The learned judge had to determine whether there were arguable issues raising serious questions of fact and/or law, coming from both sides in determining whether or not he should grant the injunction and abide by the general rule established by **Marbella**. At paragraph [10] of the judgment, he clearly stated:

> "The area of factual dispute for determination at trial is whether the claimant was in the business of lending foreign currency".

[74] He then continued at paragraph [11]:

> "I am not required to resolve, at this interlocutory stage, that or any factual dispute. Nothing I say is to be taken to imply a point of view one way or the other".

[75] It is clearly seen that the learned judge expressly stated and unequivocally demonstrated that he was not looking at the case as the trial judge, in so far as the resolution of the facts in dispute was concerned.

[76] On the disputed question of law of whether the alleged illegality of the mortgage was sufficient to justify a departure from **Marbella**, he indicated that that issue involved a construction of the Act and was not free of difficulty. He refrained from expressing any view on whether the transaction is illegal or not by virtue of the Act.

[77] In applying **Marbella**, Batts J evidently arrived at his decision, partly by two routes as detailed in paragraphs [26] and [27] of the judgment. The first route he took was based on his view that even though the appellant is contending that the mortgage is an illegal contract and is void and unenforceable in a court for reasons of public policy, the exercise of the power in Jamaica does not require judicial intervention or act and so "the mortgage company" can sell without obtaining judicial sanction. For that reason, he said, the case "may not fall within a recognised exception to Marbella".

[78] Admittedly, the reasoning of the learned judge in paragraph [26] is not easy to comprehend within the context of the court making a determination as to whether or not **Marbella** should apply. The fact that the mortgagee's power of sale may be exercised without judicial act or intervention, cannot be seen as a relevant consideration on an application by a mortgagor to the court for an injunction to restrain the mortgagee from exercising it. It is in the context of court proceedings that the application of the **Marbella** principle would arise. The fact that the exercise of the power of sale in Jamaica does not require judicial intervention has no bearing on the question with which the learned judge was concerned of whether the **Marbella** principle should be applied or not, he having already considered it proper to grant an injunction to restrain the respondent from exercising the power of sale.

[79] It follows then, that the appellant's complaint that he may have taken into account irrelevant consideration is a justifiable one only in relation to this aspect of his dictum in paragraph [26]. This consideration relating to the right of the mortgagee to

exercise the power of sale without judicial intervention, even though irrelevant to the question he had to determine, is not fatal because he considered other matters which cannot be said to be irrelevant or wrong in law and in principle.

[80] The second route was his consideration and application of the principles in **Mirza v Patel, Hughes v Asset Managers plc** and **NCB v Hew** that led him to conclude that the consequence of an illegal contract is not necessarily that the contract is unenforceable and hence someone becomes unjustly enriched. As he, put it "...the court quite often orders restitution" and so, "the [appellant] even if not liable for the loan may be liable for money had and received or some such other remedy".

[81] He made no definitive finding of fact or law, one way or the other, on any issue arising for determination on the claim to be tried. He only posited that it was not a case where the defence had no real prospect of success in arguing that the mortgage is valid and that at the end of the day, the court may order restitution, which would mean payment of the mortgage sum by the appellant.

[82] The learned judge's consideration of the principles of law treating with the question of illegality, arising from contravention of a statutory instrument, did not place him in the position of a trial judge and he clearly did not consider the matter as a trial judge. He took into account matters that he considered were relevant to the exercise of his discretion at the interlocutory stage of the proceedings, in all the circumstances. In taking guidance from the cases on which he relied in coming to his decision, he took nothing into account, as a matter of fact or law, that is so irrelevant

or so outlandish that would have the effect of rendering his decision palpably wrong, unreasonable or aberrant.

[83] The issue as to whether the interest rate was harsh and oppressive was, admittedly, not demonstrably examined by the learned judge. So, there can be no complaint that he assumed the position of a trial judge on this issue. The question is whether his failure to take it into account in arriving at his decision to apply **Marbella** was such as to justify the interference of this court. Having considered the question, I found that it was not weighty or material enough to warrant or justify this court's interference. I say this for the following reasons.

[84] This is not a case where the sum claimed to be due by the appellant is claimed to be excessive, on the face of the mortgage, which would have invoked the application of one of the recognised exceptions to **Marbella**. The issue is taken with the contractual interest rate, which is now being alleged to be exorbitant. This is a clear question of fact or, at minimum, a mixed one of fact and law, to be investigated at trial. It was not proper for that question to be resolved at the interlocutory stage by the learned judge. In any event, I formed the view that even if the learned judge had considered that aspect of the claim, it would have made no difference to his decision to apply the **Marbella** principle, he having considered, among other things, the restitutionary principles enunciated in the authorities he considered. Accordingly, his failure to demonstrate that he had taken that aspect of the appellant's claim into account, in coming to his decision to apply the **Marbella** principle, does not render his decision plainly wrong.

Conclusion

[85] In all the circumstances, the learned judge held himself bound by **Mosquito Cove**, which was more in line with the circumstances of the case before him, rather than by **Rupert Brady v JRF**, which is clearly distinguishable. He could not be faulted for so holding.

[86] There was no basis found on which it could properly be said that the learned judge erred, in fact and/or in law, in the exercise of his discretion when he ordered that the appellant pay the sum said to be due under the mortgage as a condition for the grant of the interim injunction. It is for this reason that I concurred in the decision of the court that the appeal be dismissed, with the consequential orders detailed in paragraph [7] above.

F WILLIAMS JA

[87] I have read in draft the reasons for judgment of McDonald-Bishop JA. Her reasons fully accord with my views. I endorse them, and there is nothing I could usefully add.

STRAW JA (AG)

[88] I too have read in draft the reasons for judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and I have nothing further to add.