[2010]JMCA App 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 18/2010

APPLICATION NO. 54 OF 2010

BETWEEN	**AUBURN COURT LTD**	**1ST APPLICANT**
A N D	**DELBERT RHODE PERRIER**	**2ND APPLICANT**
A N D	**JAMAICA REDEVELOPMENT FOUNDATION INC.**	**RESPONDENT**

Miss Carol Davis and Mrs M. Georgia Gibson-Henlin for the applicants

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

23 and 31 March 2010

IN CHAMBERS

MORRISON JA:

Introduction

[1] On 5 February 2010, Campbell J refused an application by the applicants (who are the claimants in the court below) for an interlocutory injunction to restrain the respondent ("JRF") from exercising its powers of sale under mortgages registered in JRF's favour on two properties owned by the first named applicant ("Auburn Court") and another owned by the second named applicant ("Mr Perrier"), until trial of the action in this

matter. The learned judge considered that, on the basis of the material before him, the application did not disclose that there was a serious question to be tried and that, in any event, damages would be an adequate remedy should the applicants ultimately succeed at trial. Although there are no written reasons from the judge himself, I did have the benefit of a note of his oral judgment taken by Mrs Robinson, but not yet approved by the judge.

[2] In the Supreme Court proceedings, Auburn Court's claim against JRF is for declarations with regard to the true meaning and effect of an Agreement to Restructure Existing Debt dated 30 August 2004 between Auburn Court and JRF ("the agreement") and for injunctions in the following terms:

> "4. An injunction restraining the Defendant from advertising, selling or otherwise dealing with the 1st Claimant's property registered at Volume 965 Folio 108 and known as 3 Padua Avenue, Patrick City, Kingston 20 in the parish of St. Andrew, pursuant to mortgage no. 695288 first registered on the said title on 10th December, 1991, or otherwise.
>
> 5. An injunction restraining the Defendant from advertising, selling or otherwise dealing with the 1st Claimant's property registered at Volume 955 Folio 565 and Volume 955 Folio 566 in the parish of St. Andrew pursuant to mortgage no. 691296 or otherwise."

[3] By notice of appeal filed on 18 February 2010, the applicants appealed to this court against Campbell J's refusal to grant the injunctions until trial, on the following grounds:

> "(i) The Learned Judge in Chambers erred in refusing to grant the interlocutory injunctions sought.
>
> (ii) That the Learned Judge in Chambers erred in concluding that damages were an adequate remedy.
>
> (iii) The Learned Judge erred in finding that there was no serious question to be tried.
>
> (iv) The Learned Judge erred in failing to consider that the balance of convenience lay in granting the injunction sought.
>
> (v) The Learned Trial Judge erred in failing to take into consideration that although the injunction sought was for purpose of restraining the exercise of powers of sale by a mortgagee, the Appellant was questioning the validity of the mortgage and/or whether the powers of sale in the mortgage were exercisable."

[4] By an amended notice of appeal filed on 15 March 2010, the applicants added an additional ground, as follows:

> "(vi) The Learned Judge in Chambers erred in that he failed to take into consideration that there was an issue as to whether the loan agreement was not independent of the mortgage and that Item 8 (e) of the Schedule to Agreement Existing Debt was a collateral advantage to the Mortgagee and/or was in the nature of a clog on the equity of redemption and/or was

> oppressive and/or was unfair and unconscionable. In the circumstances the said item 8(e) was void and/or unenforceable, and an injunction ought to have been granted to determine the issue as to whether the Defendant was to release the title registered at Volume 965 Folio 108 and the Appellant given a reasonable opportunity to redeem the mortgage prior to the exercise of any power of sale by the mortgagee."

[5] Before me is an application for injunctions pending the hearing of the appeal in identical terms to those which had been refused by the judge below. The application is supported by an affidavit sworn to by Mr Perrier on 15 March 2010 and opposed by an affidavit sworn to by Ms Merlene Patterson on 22 March 2010.

The facts in outline

[6] The facts leading up to the execution of the agreement in 2004 are largely undisputed. Auburn Court is the registered proprietor of property registered at Volume 955 Folio 565 and Volume 955 Folio 566 of the Register Book of Titles and Mr Perrier is the registered proprietor of property registered at Volume 965 Folio 108 of the Register Book of Titles. The matter has its origins in a debt owed by Auburn Court to National Commercial Bank Jamaica Ltd ("the original debt"), which was guaranteed by Mr Perrier and two others. By Deed of Assignment dated 30 January 2002, the debt was assigned to JRF and a number of

mortgages in connection with the debt were transferred to JRF, which remains the registered proprietors of those mortgages.

[7] By the year 2004, the original debt stood at US$3,999,244 and the agreement was entered into between JRF (as assignee of the debt), Auburn Court (as borrower), Mr Perrier and Ms Myrna Euleston Kedroe (as guarantors). The agreement itself recited that the security for the original debt had become enforceable, the borrower having defaulted on the terms of the loan, and that the original debt was "now due and payable" (recital (5)). Under the terms of the agreement, the original debt was restructured conditionally to a principal amount of US$600,000, subject to "(i) strict compliance with all the terms of this Agreement; and (ii) the Borrower and/or Guarantor making payments in the amounts and the manner set out in Item 8 of the Schedule hereto" (cl.3(1)).

[8] Cl. 5 of the agreement stipulated for payment of a 'late charge' upon Auburn Court making any payment due pursuant to Item 8 of the Schedule later than five days after its due date (to a maximum of 5% of the amount of the late payment) and cl. 6(1) set out the parties' agreement that the existing security should remain in force to secure the original and the restructured debt. In cl. 7 Auburn Court confirmed that JRF did not by virtue of the agreement "release, forgive, discharge, impair, waive or relinquish any rights, titles, interest, and liens, security

interests, collateral, parties, remedies or power with respect to the Security but rather JRF is expressly retaining and reserving the same to the fullest extent". Cl. 17 provided that no part of the agreement could be waived, modified or amended except by an instrument in writing signed by the parties.

[9] Much turns for present purposes on the provisions of item 8 of the Schedule to the agreement, which I therefore set out in full:

> "Item 8: Payment Terms for Restructured Debt
>
> (a) $20,000.00 upon execution and delivery of this Agreement to be made no later than April 30th 2004.
>
> (b) A further payment of $100,000.00 will be made no Later than August 31, 2004, at which time the balance on the account will be amortized in accordance with the terms and conditions listed below.
>
> (c) The balance S480,000.00 will be amortized over a 20 year period with a 5 year balloon and repaid by 59 equal consecutive monthly payments of $5,285.51 each inclusive of interest at the rate of 12% per annum calculated on the reducing balance of the Restructured Debt. This first payment shall be become due on the 25th day of September and the 25th day of each and every month thereafter.
>
> (d) A final payment of all unpaid principal, accrued interest and fees shall be paid no later than the 25th day of August 2009.
>
> (e) At anytime upon receipt of a total principal payment of S250,000.00 together with

> interest due and owing at the date of payment, to be applied to the restructured amount, JRF will release their lien over property located at Lot 609 on the Plan of Patrick City registered at Volume 965 Folio 108. Or alternatively, release the said Duplicate Certificate of Title for splintering upon receipt of an acceptable Letter of Undertaking."

[10] JRF contends that the applicants are in default of the terms of the agreement (in particular item 8) and that by 25 August 2009 the total amount due to it under the agreement was US$480,903.95 in principal and interest payments, together with US$3,397.72 for General Consumption Tax on late charges. Further, that as a consequence of this default the original debt has been reinstated in accordance with the terms of the agreement. As a result, on 7 December 2009, JRF issued statutory notices of its intention to exercise its powers of sale under the mortgages at the end of one month from the date of the notices, unless suitable arrangements were made to cure the default within that period. JRF's position is that, as at 19 January 2010, the applicants are indebted to JRF in the sum of J$279,990,165.71 and that the debt continues to accrue interest at the rate of 30% per annum or J$36,627 per day. It is the issue of the statutory notices that has given rise to the litigation in this matter, the fixed date claim form having been filed on 8 January 2010.

[11] Auburn Court, on the other hand, points out that it made the lump sum payments (US$20,000 and US$100,000) required by the agreement and made two monthly payments of US$2,024.02 each until it was advised by JRF's predecessor, Dennis Joslin Jamaica, Inc. ("Joslin"), by letter dated 26 January 2005, that the monthly payment was in fact US$5,490.72, whereupon it commenced paying US$5,500.00 monthly and continued to do so faithfully right up to February 2010. As a result, Auburn Court's account is fully up to date. Further, the applicants complain that, despite the fact that JRF was always aware that it was their intention to liquidate the debt by selling off strata lots from one of the mortgaged properties, JRF has, in breach of the agreement, refused to release the title to the property to enable Auburn Court to obtain splinter titles to facilitate such sales, despite JRF having been furnished by the company's attorneys at law with suitable letters of undertaking in this regard, as required by the agreement, on more than one occasion.

[12] The true meaning and effect of Item 8 lies at the heart of the dispute between the parties, as on the applicants' interpretation of the agreement, they have complied fully with its terms, and JRF has not, while, on JRF's interpretation, the applicants are in breach of the agreement and as a result its powers of sale under the mortgages have been revived. The applicants' interpretation is stated by Mr Perrier in his affidavit as follows:

> "11. I refer to Item 8 of the Agreement. It is to be noted that at item 8 (c) the parties agreed that the remaining loan of $480,000 would be amortized over a period of 20 years. This was confirmed in the letter dated 26th January, 2005 and referred to in exhibit "DP5" above.
>
> 12. However the agreement at Item 8 (c) refers to a 5 year balloon. I did not fully understand what that meant, so I asked Mr. Joslin, (who was the Defendant's representative who negotiated the agreement with me on their behalf). He told me that it meant that I could pay off the restructured amount at the end of 5 years if I wanted to, but if I chose not to pay off at the end of five years I could continue for the full period of 20 years as set out in the agreement. In the event that I chose to pay off the restructured amount, then Item 8 (d) (which provides for a final payment of all unpaid balance etc) would come into effect. I relied on this representation, and continued to make the monthly payments. It was never my understanding of our agreement that I would be required to pay off the restructured loan at the end of 5 years, whether I chose to or not."

[13] On the other hand, JRF's understanding of the agreement is as set out in Ms Patterson's affidavit as follows:

> "6. Item 8 of the Schedule to the Restructure Agreement sets out the Payment Terms for the Restructured Debt. Item 8 indicates that the balance of the Restructured Debt after an initial payment (US$480,000) was to be amortized over a 20 year period with a 5 year balloon and repaid by 59 equal consecutive monthly payments of US$5,285.51 due on the 25th of each month,

with a final payment of all unpaid principal, accrued interest and fees to be paid no later than August 25, 2009.

7. The period of amortization, in this case 20 years, was determined by the amount the Appellants indicated they were able to pay monthly (approximately US$5,000). Paying that sum per month the debt would ordinarily take 20 years to repay. However, in this case the agreement was for repayment in full in 5 years. In the event repayment was being effected for US$5,285.51 monthly, there would be a difference between the total debt due and the amount paid within the 5 year period (referred to as a "balloon payment"), which was payable no later than August 25, 2009. The "5 year balloon" indicates that the total debt was to be paid in full in 5 years. This was not an option, a fact made clear by the words 'repaid by 59 equal consecutive payments" and "a final payment of all unpaid principal… shall be paid no later than the 25th day of August 2009". Exhibited and marked **"JF-4"** is a copy of the Restructure Statement of Account showing the total amount due and owing on August 25, 2009, namely $480,903.95 in principal and interest payments, together with $3,397.72 for GCT on late charges."

The submissions

[14] Miss Davis and Mrs Gibson-Henlin shared the burden of the submissions on behalf of the applicants. It was submitted that Mr Perrier's understanding of the agreement, as well as the question of whether Auburn Court could be said to have been in default at all for the period September to November 2004, gave rise to arguable issues, which it was

not for the judge at the interlocutory stage to determine. Further, that the refusal by JRF to accept the various undertakings proffered on Auburn Court's behalf was in breach of contract and a clog on the equity of redemption. And further, counsel posed a rhetorical question for my consideration:

> "9. Did Item 8(e) in its application by itself or together with the term of the restructured debt that the Original debt would be reinstated secure for the Respondent a collateral advantage such as would prevent the Appellants from redeeming in so far as it lay in the sole discretion of the Respondent to comply with the item 8(e) of the agreement to restructure? This should be considered against a background where the inability to splinter the titles was likely to place the Appellants in default and it is the Respondent who stood to benefit from noncompliance with the term. This is because of their prior knowledge that the splintering was a means by which the Appellants intended to redeem the mortgage."

[15] Counsel for the applicants referred me to ***American Cyanamid Co v Ethicon Ltd*** [1975] 1 All ER 504 (only to say that Lord Diplock's well known test for the grant of an interlocutory injunction was not applicable to an injunction pending appeal); ***Erinford Properties Ltd v Cheshire County Council*** [1974] Ch 261, 267-268, (to make the point that when a party is "exercising his undoubted right of appeal, [the] court ought to see that the appeal, if successful, is not nugatory"); ***Olint Corp. Ltd v National***

Commercial Bank Jamaica Ltd, (Supreme Court Civil Appeal No. 40/2008, Application No. 58 of 2008, judgment delivered 30 April 2008, in which Harrison JA, sitting as a single judge of this court, applied the ***Erinford*** test on an application for an injunction pending appeal); and to Fisher and Lightwood's Law of Mortgage, 11th edn, paras. 20.34 - 20.38 (on the effect of a mortgagee seeking to exercise the powers of sale in bad faith).

[16] Mrs Robinson, who made the submissions in reply on behalf of JRF, submitted that the appropriate threshold test to be applied on an application for an injunction pending appeal is whether the applicants have a reasonable ground of appeal (in reliance on ***Michael Levy v JRF***, Supreme Court Civil Appeal No. 26/2008, judgment delivered 11 July 2008, at paras. 15-17). In the instant case, Mrs Robinson submitted further, there are in fact no reasonable grounds of appeal, Campbell J having correctly applied ***American Cyanamid*** principles, which were applicable to this case, both in relation to the proper interpretation of the agreement and the question of whether JRF had wrongfully refused to release the title for the purpose of enabling the obtaining of splinter titles. With regard to grounds of appeal (v) and (vi), Mrs Robinson submitted that Campbell J had also taken these matters into account, despite the fact that some of them had not been pleaded and that the judge had been correct to hold that, even if he was wrong on the question of whether there was a serious issue to be tried (contrary to JRF's position that the judge's decision

was correct), damages would in any event be an adequate remedy in the circumstances of the case. On this point, in addition to ***American Cyanamid***, Mrs Robinson referred me to the recent decision of the Privy Council in ***National Commercial Bank Ltd v Olint Corp. Ltd*** [2009] UKPC 16.

[17] Finally, Mrs Robinson submitted that what was being sought in this case was an injunction restraining JRF, as mortgagee, from exercising its powers of sale, in which case the established principle is that such an order should only be made on condition that Auburn Court, the mortgagor, pay into court the amount stated to be owing, that is, as at 19 January 2010, J$279,990,165.71 (in reliance on, among other cases, ***SSI (Cayman) Ltd v International Marbella Club SA*** (1987) 34 JLR 33, ***Paulette Hamilton v Gregory Hamilton and Others*** (Supreme Court Civil Appeal No. 77/07, judgment delivered 31 July 2008) and ***Michael Levy v JRF***, supra). In any event, Mrs Robinson submitted, section 106 of the Registration of Titles Act limited the remedy of a mortgagor for an improper exercise of a mortgagee's powers of sale to damages alone.

The approach to an application for an injunction pending appeal

[18] The authority of a single judge of appeal to grant an injunction pending appeal, which is not in controversy, is to be found in rule 2.11(i)(c) of the Court of Appeal Rules 2002. I propose on this application to adopt the threshold test applied by the court in ***Michael Levy v JRF*** (supra, paras.

15-17, based on ***Polini v Gray*** (1879) 12 Ch. D. 438, per Cotton LJ at page 446), which is whether the applicants have shown that they have reasonable grounds of appeal. In ***Michael Levy v JRF***, I had expressed the view, which I repeat here, that this test is not dissimilar to the 'serious question to be tried' test applicable at first instance (the ***American Cyanamid*** test), which is also the test which Campbell J applied in this case. If that threshold is in fact achieved, then, as at the interlocutory stage, the court must thereafter assess whether granting or withholding an injunction is more likely to produce a just result at the end of the day, so that if damages would in fact be an adequate remedy then no injunction ought ordinarily to be granted (see the Privy Council's most recent authoritative statement of the applicable principles in relation to the grant of an interlocutory injunction in ***National Commercial Bank Jamaica Ltd v Olint Corp. Ltd***: "The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial", per Lord Hoffman at para. 16).

[19] The other question of law which arises is whether there are any special rules applicable on this application, given that the injunction sought is to prevent a mortgagee from exercising powers of sale granted in the mortgage documents. That is, does the ***Marbella*** principle apply in the circumstances of this case? (This description of the principle naturally derives from the modern decision of this court which brought it into full

focus, but, as the extract from ***Fisher v Lightwood*** to which I was referred by the applicants' counsel demonstrates, it is in fact a principle of some aniquity: see, for instance, ***Gill v Newton*** (1866) 14 WR 490, a case also cited by Mrs Robinson.)

[20] In my judgment in ***Michael Levy v JRF***, I reviewed some of the decisions of this court in recent years in which the true parameters of that principle have been explored (see paras. 24-32), and identified a clear distinction which had emerged in the cases between those in which the mortgagor's challenge amounted to a challenge to the validity of the mortgage itself and those in which the mortgagor challenged the quantum claimed to be due by the mortgagee under a valid mortgage (see ***Brady v JRF and others,*** Supreme Court Civil Appeal No. 29/2007, judgment delivered 12 June 2008, esp. per Cooke JA at para. 7).

[21] In cases falling within the first category, the courts have shown a willingness to relax the full rigour of the ***Marbella*** principle in an appropriate case by granting an injunction restraining the mortgagee unconditionally (for example in ***Brady v JRF*** itself, where the mortgagor's position was that he had not signed the relevant mortgage documents at all, nor had he given authority to anyone to pledge his property as security). But in cases falling within the second category, that is, challenges essentially to quantum, the ***Marbella*** principle has been

applied, thus requiring that, as an invariable condition of the grant of an injunction to restrain the mortgagee, the amount claimed by the mortgagee "must be brought into Court" (per Carey JA in ***Marbella*** at page 14; see also ***Paulette Hamilton v Gregory Hamilton and others,*** Supreme Court Civil Appeal No. 77/07, judgment delivered 31 July 2008, per Harris JA at para. 10).

What does Item 8 mean?

[22] Campbell J appears to have agreed with JRF's interpretation of Item 8, and so do I. In the first place, I think that in order to appreciate the obligations undertaken by both parties to the agreement, it is necessary to bear in mind what appears to have been its primary objective, that is, to reduce the debt owed by Auburn Court from US$3,999,244 (in respect of which, by the date of the agreement, Auburn Court was in default) to US$600,000 (that is, 15% of the actual debt). As in all commercial settings, one would ordinarily expect that this level of debt forgiveness, which is what this amounts to in fact, would impose a concomitant obligation on the borrower. It appears to me to be clear, from the plain language of Item 8, that the obligation undertaken in return by Auburn Court under the agreement was that the restructured debt would be paid off within a reasonable time, which was fixed at five years.

[23] Thus Item 8(a) calls for an immediate payment of US$20,000 no later than 30 April 2004 (which was paid), Item 8(b) for a further payment of US$100,000 within four months of the first payment (which was also paid, albeit a couple months late) and Item 8(c) provides thereafter for the balance of US$480,000 to be paid by equal monthly payments of US$5,285.51 (inclusive of interest) for 59 months, followed by Item 8(d), which provides for "A final payment of all unpaid principal, accrued interest and fees…", to be paid no later than 25 August 2009. There is, it seems to me, absolutely no lack of clarity or ambiguity in the language of the agreement with regard to the obligation to pay off the restructured debt in full by the end of the five year period.

[24] Further, I also think that the documentary evidence produced by both parties confirms that this is how the applicants themselves interpreted the agreement (at any rate initially). Firstly, there is correspondence from Joslin dating back to 2004, in which reference is made to monthly payments to be made by Auburn Court for five years and "a final payment of all unpaid principal and interest…no later than the 1st day of November 2009" (see letter dated 19 November 2004 from Joslin to Auburn Court; see also letters dated 14 July 2009 and 22 July 2009 from JRF to Auburn Court, both of which refer to the agreement maturing in 2009, and a further letter dated 11 August 2009 attaching a statement of the restructured account showing the outstanding balance of

US$481,899 as at 22 July 2009). There is no evidence of any kind that Auburn Court challenged JRF's understanding of the agreement as stated in the correspondence at any point over the five year period 2004-2009.

[25] But further confirmation that Auburn Court was operating on the basis of the same understanding appears clearly from, for example, Auburn Court's letter dated 9 September 2009 to JRF (in response to JRF's letter dated 24 August 2009 indicating its willingness to accept a payment of US$459,914.07 in full and final settlement of the loan and stating that the offer would expire "at 4.00 p.m. on September 30, 2009"), as follows:

> "We are in receipt of your letter dated August 24, 2009. We appreciate the offer therein for a final payment amount of $459,914.07. As it might be an oversight in the referenced JRF correspondence, the November date for final payment is not mentioned, for the sake of clarity, as outlined in the referenced letter from Auburn Court Ltd. to JRF, we must make it known that the date for final payment is November 2009.
>
> Not withstanding the offer for early repayment of the final balance, we will continue towards the November 1, 2009 due date for final repayment in accordance to the requirements of Item 8 of the restructured agreement.
>
> We desire nothing more than to conclude the Restructured Agreement in the spirit it was entered into. To that end, we endeavour to work in harmony with JRF to provide for amicable conclusion to our relationship, as we are sure that JRF also desires to do the same."

[26] What is also clear from the agreement is that, though faithful compliance with its terms by Auburn Court could bring closure to the entire matter in five years, the mortgages were only in abeyance and would only remain so if and so long as Auburn Court kept its part of the bargain. Thus, for instance, cl. 13 of the agreement provides that, in the event of any breach of the agreement (specifically stated to include the failure to make any payments required by Item 8), JRF reserves the right to (i) enforce all terms, provisions and conditions of the security provided for the original loan by Auburn Court and the guarantors, (ii) exercise all its rights, remedies and powers under the security, and (iii) sue to recover the entire amount of the original debt plus fees and interest.

[27] I have not lost sight of Mr Perrier's contention that he did not understand the meaning of the words "balloon payment" in the agreement and that he had consulted Mr Joslin, then Joslin's representative, who had advised him that that meant that Auburn Court had an option to pay off the full amount of the loan at the end of five years if it wanted to, but that, if not, the repayment period would continue for the full period of 20 years (see a letter dated 12 December 2009, written by an attorney-at-law on behalf of Auburn Court and Mr Perrier, in which this point is raised, apparently for the first time, in response to JRF's letter dated 12 November 2009 advising that the applicants were in breach of the agreement). But quite apart from the fact that JRF

denies that Mr Joslin ever had any such conversation with Mr Perrier (which I am prepared to put on one side for present purposes, since, if relevant, this would obviously be a matter for evidence at trial), I am not sure how it affects or improves the applicants' position in the absence of any issue in the case as to misrepresentation or the like. What the case is about is whether the applicants are entitled to the declarations which they seek as to the true meaning and legal effect of the agreement itself.

Applying the agreement to the facts

[28] JRF has produced a number of statements of account showing how payments made by Auburn Court over the period were applied and how the balances due were calculated. As I understand it, Auburn Court's challenge to the reliability of JRF's calculations is based primarily on the assertion that, because of JRF's failure to execute and deliver the agreement on a timely basis in 2004, additional (and unjustified) charges for late fees and interest were added to the account, which then produced a total debt at the beginning of 2005 which was incorrect and excessive (see paras. 4 – 9 of Mr Perrier's affidavit). In this regard, the applicants point out that there was a delay between the date shown in the agreement (31 August 2004) and the actual date of signing (November 2004). Thereafter Auburn Court's monthly payments under the agreement were always made on a timely basis and the amount actually paid was US$5,500 per month, that is, a sum in excess of the required

monthly payment of US$5,285. As a result of all of this, Mr Perrier contends, far from being in default of its payment obligations under the agreement, Auburn Court is in fact in a credit position and JRF currently "holds US$12,869 in excess of the amount due pursuant to the agreement to restructure" (para. 9).

[29] The applicants accordingly submit that these matters give rise to issues of fact which can only be resolved at trial. There are in my view at least two problems with this analysis of the position. The first is that it obviously invites a conclusion that some provision of the signed agreement between the parties was either varied or amended in some way, something which, as Mrs Robinson points out, is only permitted under the agreement if done by an instrument in writing signed by both parties, which is not the case here (see cl. 17).

[30] Secondly, and perhaps more fundamentally, there does not appear to be any answer at all to JRF's contention that, even when the account is reconfigured on the basis of the applicants' position (including a substantial reduction of late fees from a total in excess of US$20,000 to US$3,568.97 – see para. 12 of Ms Patterson's affidavit and compare the statements exhibited as "JF-9" and "JF-10"), there would have been a balance of US$465,798.50 due on 1 November 2009. So that at the end of the day the applicants have failed, as Ms Patterson observes in her

affidavit (at para. 12), "to pay either the amount they claim is due or the amount actually due".

[31] But the applicants submit further that JRF was always aware that Auburn Court's intention was to raise the money to pay off the debt "by way of splintering and selling off lots from its Padua Avenue property", and that JRF's failure to release the relevant title for this purpose was a breach of Item 8(c) of the Schedule to the agreement which prevented the company from paying back the loan. This raises for consideration the meaning of the second sentence in Item 8(e), which provides, as an alternative to Auburn Court securing the release of the title to the land registered at Volume 965 Folio 108 in exchange for "a total principal payment of $250,000" to facilitate the obtaining of splinter titles, JRF will release the title "upon receipt of an acceptable Letter of Undertaking".

[32] In support of this contention, the applicants point to three letters written on behalf of Auburn Court to JRF. The first is a letter written to Joslin by Messrs Gaynair & Fraser dated 14 April 2004, in which reference is made to the mortgage registered in its favour on the title in question, which is accordingly requested for the purpose of an application to the Registrar of Titles for it to be "splintered into 13 strata titles", in exchange for the firm's "unequivocal undertaking not to part with or deal with the [title] in any manner prejudicial to your interest and to return to you the

splintered Duplicate Certificates of Title upon demand." This letter was followed by a second letter from Messrs Gaynair & Fraser dated 10 June 2004, in which complaint was made on behalf of Auburn Court that the title "which you said you would let us have" had not yet been received and that Auburn Court was being prejudiced by the delay in that it was thereby unable to proceed to fulfil its agreement with JRF, which the company fully intended to do. The third letter, dated 12 November 2009, was written by Mesdames Jennifer Messado & Co, enclosing a valuation report on the property in question (showing a value of $86,000,000) and stating that "the property is now ready to have individual Duplicate Certificates of Title duly issued…which will enable early settlement of this indebtedness". The letter ended with a request for an urgent meeting "to work out how we can amicably satisfy the repayment of [US$461,000] or the Jamaican equivalent by the 31st January 2010".

[33] The first point to be noted about this correspondence is that only the first of Gaynair & Fraser's two letters can properly be called a letter of undertaking: the second letter is in essence a reminder that the request made in the first (for the title) had not been responded to and the third does no more than enclose the valuation report and request an urgent meeting, apparently with a view to arriving at a settlement of Auburn Court's entire indebtedness to JRF.

[34 So the question remains, was Gaynair & Fraser's first letter an acceptable letter of undertaking in the context of this transaction? This must mean, it seems to me, that the undertaking must be acceptable to JRF, which is the party entitled under the mortgage to retain the title and which is being asked to part with it on loan for a specified purpose. Despite JRF's apparent silence in response to Gaynair & Fraser's letter of 14 April 2004, there is no evidence that JRF considered the undertaking it gave, not to part or deal with the title in any manner prejudicial to JRF's interests and to send it the splinter titles on demand, to be acceptable. In this regard, I do not think that the assertion in Gaynair & Fraser's second letter that JRF had "said" that it would let them have the title can take the matter any further, in the absence of any subsequent correspondence by either party on the subject for the next five years.

[35] But in any event, and perhaps of greater significance, it also seems to me, for the requirement of an acceptable undertaking in Item 8(e) to have any real meaning (as something intended to take the place of an actual cash payment), it must also relate to the payment of the sum of money that it is intended to replace, that is the US$250,000. In other words, it must have been intended by the parties to have been an undertaking given by or on behalf of Auburn Court to pay the US$250,000, either unconditionally, or on specified conditions (which would themselves have to be acceptable to the creditor which was being asked to part

with an important component of its security on the strength of that undertaking).

Conclusion

[36] For all of these reasons, I do not think that the applicants have shown that they have a reasonable ground of appeal from Campbell J's finding that, on the material before him, no serious issue had been shown to exist with respect to the claim by the applicants for the declarations sought, viz., (i) that, pursuant to Item 8 of the schedule to the agreement, the balance of the debt in the sum of US$480,000 was to be amortized over a 20 year period, and as such Auburn Court is entitled to a period of 20 years from 30 August 2004 to repay this amount, provided that the monthly sum set out in the agreement are duly paid; (ii)that, pursuant to the agreement, JRF is not entitled to revert to the original debt provided that Auburn Court pays the monthly sums set out in Item 8(c) of the schedule; and (iii) that JRF is to release to Auburn Court's attorney-at-law the Duplicate Certificate of Title registered at Volume 965 Folio 108, for the purpose of splintering the title. If there was, as the judge found, no serious issue to be tried, then it would follow that the applicants had not made good their entitlement to an interlocutory injunction.

[37] Campbell J also considered that, even if, contrary to his primary conclusion, there was a serious issue to be tried, damages would be an

adequate remedy and that there was therefore no basis for the grant of an injunction. On this point, Mrs Robinson's note of Campbell J's oral judgment indicates that he regarded it as significant that the mortgaged properties were commercial properties (as opposed to properties with some unique, intrinsic value), the value of which had already been assessed. Further, that JRF appeared likely to be in a better position to pay damages to the applicants, in the event of their succeeding at trial, than would the applicants, who had been unable to meet their obligations under the agreement, be able to satisfy their undertaking as to damages, in the event that JRF succeeded at trial. Nothing has been shown to me on this application to suggest a reasonable ground of appeal from the judge's clear and cogent reasoning on this aspect of the matter.

[38] In all of this, I think that it must always be borne in mind that, in refusing the injunction prayed for, Campbell J was exercising a discretion to which, on general principles, an appellate court will ordinarily defer, unless the judge can be shown to have exercised that discretion upon a misunderstanding of the law or of the evidence before him (***Hadmor Productions Ltd v Hamilton*** [1983] 1 AC 191). In this case, I do not think that the applicants have shown a reasonable ground of appeal against the learned judge's exercise of his discretion, with the result that the

application for an injunction pending the hearing of the appeal must also fail.

[39] But I also think that it is right to say that, even if the applicants had established a right to an injunction in this matter, this is clearly a case of a challenge to the quantum claimed by the mortgagee under the mortgages, and not a challenge to their validity, with the result that an injunction to restrain JRF from exercising its powers of sale could only be granted on condition that Auburn Court bring into court the full amount claimed by JRF to be due under the mortgages, that is, J$279,990,165.71 (the ***Marbella*** principle – as to which, see the discussion at paras. [19]–[21] above).

[40] Finally, I should indicate that I do not consider that the applicant's ground of appeal (vi), which was added by amendment and which raises matters that were not before the judge, adds anything of substance to the question which primarily arises on this application, that is, what is the true nature of the obligations undertaken by the parties in the agreement.

[41] The application for an injunction pending appeal is accordingly refused. The costs of the application are to be costs in the appeal.