

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CIVIL APPEAL NO COA2020CV00057

APPLICATION NOS COA2020APP00178 & COA2020APP00183

BETWEEN JMMB MERCHANT BANK LIMITED APPELLANT
(NOW JMMB BANK (JAMAICA) LIMITED)

AND UNIVERSAL LEASING & FINANCIAL LIMITED 1ST RESPONDENT

AND MAHOE BAY COMPANY LIMITED 2ND RESPONDENT

AND SANDALS ROYAL CARIBBEAN LIMITED 3RD RESPONDENT

Mr Michael Hylton QC and Miss Shanique Scott instructed by Hylton Powell for the appellant

Miss Gina Chang instructed by Ballantyne, Beswick and Company for the 1st and 2nd respondents

Mr Andre Moulton instructed by Patterson Mair Hamilton for the 3rd respondent

2 February 2021 and 30 June 2023

Court of Appeal Rules (CAR) rule 1.8(1) – Leave to appeal – Whether grant of leave to appeal limited only to party who applied for leave – Status to appeal – Whether appeal amounts to an abuse of process – Rule 1.7(2)(a) of the CAR – Rule 26.1(2)(b) of the Civil Procedure Rules (CPR) – Consolidation of appeals – Principles applicable to the consolidation of cases

BROOKS P

[1] I have read, in draft, the judgment of my learned brother, D Fraser JA. I agree with his reasoning and conclusion and have nothing to add.

STRAW JA

[2] I too have read the draft judgment of my brother D Fraser JA and agree with his reasoning and conclusion.

D FRASER JA

Background

[3] In October 2006, Mr Winston Finzi a director and shareholder of both the 1st respondent, Universal Leasing and Financial Limited ('ULF') and the 2nd respondent, Mahoe Bay Company Limited ('MBC'), borrowed US\$1,500,000.00 from the appellant, JMMB Merchant Bank Limited (now JMMB Bank (Jamaica) Limited) ('JMMB Bank'). As security for the loan, Mr Finzi offered a guarantee by MBC and a mortgage of 7 properties owned by MBC at Providence in the parish of Saint James. The loan was granted by JMMB Bank and mortgage #1633589 registered on the titles for these properties, which included lots 18 and 19 of a subdivision of land part of Providence. Lots 18 and 19 are registered at volume 1257 folio 659 and volume 1257 folio 660 in the Register Book of Titles, respectively.

[4] Mr Finzi defaulted on the loan. JMMB Bank sold the mortgaged properties to Asset Securitization Limited, which indicated that they were to be transferred to its nominee, the 3rd respondent, Sandals Royal Caribbean Limited ('SRC'). Mr Finzi then applied to the Supreme Court and subsequently this court to stop the sale and transfer but was unsuccessful. He later asserted that some of the land in the titles for lots 18 and 19 was dually registered in the titles for lots 2a and lot 3 in the same subdivision, which are owned by ULF.

[5] Lot 18 has been already transferred to SRC. Lot 19 has not yet been transferred due to the Registrar of Titles lodging a caveat against the title until the issue of the dual registration has been resolved.

[6] On 6 February 2017, SRC filed a claim against ULF claiming to be the beneficial owner of lot 19. ULF and MBC then filed an ancillary claim against SRC for the cancellation of the certificates of titles for lots 18 and 19 and that the certificates of titles for lots 2a and 3 should take precedence. On 4 October 2017, the Supreme Court made an order adding JMMB Bank as an interested party to the claim and ancillary claim. The court also directed JMMB Bank to file and serve a defence to the ancillary claim. There was no appeal from that order. On 11 June 2018, JMMB Bank filed a defence (supported by two witness statements), to the ancillary claim, in which it denied that ULF and MBC were entitled to the relief sought in their ancillary claim.

[7] On 17 July 2020, after hearing counsel for all parties, an order was made by Simmons J (as she then was) granting ULF summary judgment (in part) on its ancillary claim. She declared that ULF was the beneficial owner of lots 2A and 3 and ordered SRC to deliver up the certificates of title for lots 18 and 19 to be cancelled for new certificates of titles, reflecting adjustments, to be issued in their stead. Then counsel for the SRC, Ransford Braham QC, made an oral application for leave to appeal which was opposed by counsel for ULF and MBC. No application for leave to appeal was made by JMMB Bank. Simmons J in her order at para. 6 stated, "Leave to Appeal granted".

[8] On 31 July 2020 both JMMB Bank and SRC filed appeals against the decision of Simmons J in Supreme Court Civil Appeal Nos COA2020CV00057 and SCCA COA2020CV00059 respectively.

[9] On 23 August 2020 JMMB Bank filed an application seeking orders that:

- i) This appeal be consolidated with Supreme Court Civil Appeal No COA2020CV00059; and

- ii) The record of appeal (volumes 1 and 2) filed on 21 August 2020 in Supreme Court Civil Appeal No COA2020CV00059 stand as the record of appeal in the consolidated appeal.

[10] On 5 October 2020 ULF and MBC filed an application (COA2020APP000178) seeking orders that the notice of appeal in Supreme Court Civil Appeal No COA2020CV00057, filed by JMMB Bank, be struck out or dismissed as it was improperly before the court and/or because it was an abuse of the process of the court.

[11] JMMB Bank's application for consolidation was heard on 7 October 2020 before Sinclair-Haynes JA, the learned single judge ('LSJ') and was refused. On 14 October 2020 JMMB Bank filed an application (COA2020APP000183) seeking to have the order of the LSJ discharged and varied to grant the orders sought on its application for consolidation.

Application No COA2020APP00178 filed by JMMB Bank (to strike out or dismiss notice of appeal filed in Supreme Court Civil Appeal No COA2020CV00057)

The application

[12] In their notice of application ULF and MBC sought the following orders:

- "i) The Notice of Appeal No. COA2020CV00057 filed July 31, 2020 be struck out as not being properly before the Court of Appeal.
- ii) The Notice of Appeal No. COA2020CV00057 filed July 31, 2020 be dismissed for non-compliance with the Court of Appeal Rules, 2002 and/or alternatively that the said appeal be struck out as being an abuse of the process of the Court.
- iii) Costs of this application and of the appeal to the 1st and 2nd Respondents/Applicants with a special costs certificate.
- iv) Such further order/s as this Honourable Court deems fit."

The submissions

ULF and MBC

[13] Counsel for ULF and MBC submitted that only counsel for SRC sought leave to appeal the judgment of Simmons J and that, being an appeal from an interlocutory application (summary judgment), leave would be necessary pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act ('JAJA').

[14] Counsel further submitted that under rule 1.8(1) of the Court of Appeal Rules ('CAR') each party must secure permission to appeal on its own. Therefore, JMMB Bank not having sought leave independently of SRC, could not have received permission to appeal and thus its notice of appeal was completely null and ineffective: **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** Consolidated Appeals (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, Application No 166/2007, judgment delivered 26 September 2008.

[15] It was also advanced by counsel that the judgment of Simmons J granted orders between ULF and SRC regarding the land dispute between those parties, but that no orders were made for or against JMMB Bank or MBC. Further counsel maintained that the allowance of JMMB Bank's appeal would be an irrelevant pursuit as there was never any liability to be determined on its behalf or against it. This was so given that:

- a) JMMB Bank was added as an "Interested Party" a concept unknown to the Civil Procedure Rules ('CPR');
- b) JMMB Bank filed no claim;
- c) There is no liability to JMMB Bank on either SRC's claim or ULF and MBC's ancillary claim; and
- d) If JMMB Bank is successful on its appeal there is no claim by or against it to return to, whereas if SRC is successful on its appeal the claim by SRC or counter-claim against it would return to trial.

[16] Counsel also argued that the grounds of appeal detailed in JMMB Bank's notice of appeal amount to an abuse of process through an attempt to re-litigate issues arising from the disputed mortgage between JMMB Bank and MBC which were addressed in this court in the matter of **Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank Limited** [2015] JMCA App 32. See **Henderson v Henderson** (1843) 3 Hare 100, 67 ER 313.

[17] Accordingly, counsel contended that the notice of appeal of JMMB Bank should be struck out.

JMMB Bank

[18] Queen's Counsel for JMMB Bank submitted that the grounds of the application could be summarised under three headings: 1) JMMB Bank did not obtain leave to appeal; 2) JMMB has no status to pursue an appeal; and 3) The appeal is an abuse of process.

[19] Concerning heading 1, Queen's Counsel accepted that leave to appeal was required but submitted that the grant of leave by Simmons J was not limited to one party. Queen's Counsel argued that, if the rules required that a prospective appellant had to apply and not just be granted leave, it would mean that if a judge granted leave without being expressly asked, any appeal filed pursuant to that leave would be liable to be struck out. Queen's Counsel also advanced that there was no reason to think Simmons J granted leave to SRC but not JMMB, as their counsel adopted each other's submissions and sought the same outcome on the same basis.

[20] Concerning heading 2, Queen's Counsel indicated that similar arguments were advanced when the application was made for JMMB Bank to be added as a party pursuant to Part 19 of the CPR, and ULF and MBC did not appeal the grant of that order. Queen's Counsel argued that there was "no magic in the term 'interested party'". He maintained that JMMB Bank obviously had an interest, as JMMB Bank sold the properties to SRC under powers of sale pursuant to its mortgage, and the orders sought by ULF and MBC, which were granted by Simmons J, also affect JMMB Bank. Queen's Counsel further

submitted that this court has recognised that a mortgagee should be added as a party to a claim where it will be affected by a decision of the court. He relied on **Pelican Securities Limited v Neil Shaw** [2020] JMCA Civ 11.

[21] Regarding heading 3, Queen's Counsel contended that there was no factual basis to support it. He submitted that the claim JMMB Bank brought which was tried, did not relate to the dually registered land or the circumstances in which Mr Finzi and MBC negotiated the mortgage. The claim related to whether JMMB Bank could recover sums owed to it under loans it had granted to Mr Finzi. This in a context, Queen's Counsel continued, where ULF and MBC had not disclosed that they held other titles for the same land until after JMMB Bank had exercised its power of sale.

[22] Accordingly, Queen's Counsel submitted that the application should be dismissed.

Discussion and analysis

[23] It is convenient to deal with this application under three issues based on the headings identified by Queen's Counsel for JMMB Bank.

Leave to appeal

[24] It is common ground that any appeal from the judgment of Simmons J, being an appeal from an interlocutory application (summary judgment), required leave to be granted, pursuant to section 11(1)(f) of the JAJA. Otherwise any notice of appeal would be of no effect: **Leymon Strachan v The Gleaner Company Limited** (unreported) Court of Appeal, Jamaica Motion No 12/1999, judgment delivered on 6 December 1999 at page 11 and **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** at pages 5 and 9.

[25] The difference between the parties' positions arises from the contention of counsel for ULF and MBC that i) rule 1.8(1) of the CAR requires each party who desires to appeal, to separately obtain leave to appeal and therefore ii) the appeal of JMMB Bank was not

authorised under the leave to appeal granted by Simmons J, on the application of counsel for SRC.

[26] Rule 1.8(1) of the CAR provides:

“Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within (14) days of the order against which permission to appeal is sought.”

[27] There was one case before Simmons J. As pointed out by Queen’s Counsel for JMMB Bank it would be inconceivable in the circumstances before her, that the learned trial judge granted leave to SRC but not JMMB, given that, throughout the hearing, their counsel adopted each other’s submissions and sought the same outcome on the same basis. The logic of this position is evident when the purpose for which the requirement to obtain leave to appeal is considered. This is clearly stated in rule 1.8(9) of the CAR which provides that:

“The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success.”

[28] The explanation by Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91 that “real chance of success” means a “realistic” as opposed to a “fanciful” prospect of success, was adopted in **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** and has since been followed by a plethora of authorities in this court. The purpose of the test in rule 1.8(9) is, therefore, to avoid the court having to consider appeals that are obviously devoid of merit and to protect respondents from incurring costs defending such appeals. Accordingly, given the close connection in the cases of SRC and JMMB Bank, there is much force in the reasoning that, if the appeal of SRC satisfied the test of “real chance of success”, so would the appeal of JMMB Bank.

[29] More generally, I agree with the submission of learned Queen’s Counsel for JMMB that the key consideration is the grant of leave and not the application therefor. The grant of leave to appeal, though applied for by one party, having not been specifically limited

to any point or party, the decision of Simmons J which affected all parties that were before her, was subject to challenge by appeal or cross-appeal by any party that felt aggrieved thereby.

[30] I, therefore, hold that there was no need for JMMB Bank to separately apply for leave to appeal. The leave to appeal granted by Simmons J was general and applied to any party that wished to avail itself of the permission obtained.

Status to appeal

[31] The contention, advanced on behalf of ULF and MBC, is that there is no proper basis on which JMMB Bank is before this court. The reason? It is said that allowance of JMMB Bank's appeal would be an irrelevant pursuit, as there was no claim or ancillary claim by or against it and, therefore, there was never any liability to be determined either on its behalf or against it.

[32] The status of a party which makes it eligible to appeal, is obviously directly related to its status before the court, tribunal or body from which the appeal emanates. As detailed in the background, by order of the Supreme Court on 4 October 2017, JMMB Bank was added as an interested party to the claim and ancillary claim, and, as directed by the court, filed a defence to the ancillary claim. The defence (supported by two witness statements), denied that ULF and MBC were entitled to the relief sought in their ancillary claim. The order adding JMMB Bank was not appealed. From 4 October 2017 JMMB Bank has been an active participant in this matter and made written and oral submissions in the summary judgment hearing before Simmons J, from whose decision it has appealed.

[33] The absence of an appeal from the order adding JMMB Bank as an interested party is unsurprising. I agree with Queen's Counsel for JMMB Bank that there is "no magic in the term 'interested party'". JMMB Bank's interest in this matter in the court below and on appeal is neither perfunctory nor merely nominal, as for example, when the Registrar of Titles is added to a matter to watch proceedings in which orders made in the hearing may require the Registrar to take certain steps. As pointed out by Queen's Counsel for

JMMB Bank i) the effect of the summary judgment of Simmons J was that JMMB Bank sold to SRC what it did not have a right to sell (i.e. land included in lots 18 and 19 sold to SRC were encompassed in lots 2a and 3 owned by ULF the titles to which took precedence over the titles to lots 18 and 19) and hence SRC would lose what they bought and may have a claim against JMMB and ii) technically, to date, JMMB Bank was still the mortgagee of lot 19 as it was not yet transferred. Because of its exposure to liability to SRC, JMMB Bank clearly has a substantive interest in the determination of the issues joined between the parties and status to participate in the appeal.

[34] This conclusion is supported by the case of **Pelican Securities Limited v Neil Shaw**. In that matter, a third party, Neil Shaw, claimed by adverse possession, ownership of lands mortgaged by the registered owner Jamaica North Coast Limited ('JNCL') to Pelican Securities Limited. He, however, only brought the claim against JNCL. Unsuccessful before the Supreme Court in an application to be joined as a defendant to the claim, Pelican Securities Limited succeeded on appeal. This was on the basis that it had a legitimate interest in the outcome of the claim because (as noted at para. [79]) if the claimant was successful there was "clear legal authority that a title acquired by adverse possession can defeat the interest of a mortgagee."

[35] I agree with Queen's Counsel, for JMMB Bank, that the fact that in **Pelican Securities Limited v Neil Shaw** Pelican was joined as a defendant and in the instant matter JMMB Bank was joined as an interested party is of no moment. At the core, in both matters, is the concern of the party related to the security of their financial interest in relation to a mortgage; in the case of **Pelican Securities Limited v Neil Shaw** a mortgage that was extant and in the case of JMMB Bank, a mortgage where the size of the land forming the security being in question.

[36] Accordingly, the challenge to the status of JMMB Bank to prosecute its appeal fails.

Is the appeal an abuse of process?

[37] The assertion under this head is that the notice of appeal filed by JMMB Bank is an attempt to re-litigate issues decided or which should have been raised in the matter for which judgment **Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank Limited** [2015] JMCA App 32 was delivered.

[38] In **Henderson v Henderson** the Vice-Chancellor's Court held that:

“[I]n any given dispute the parties had to present their whole case from the beginning. A court would not, except in special circumstances, permit the same parties to open the same litigation in respect of a matter which should have been, but was not, presented as part of the original contest, because of negligence, inadvertence, or even accident. The plea of res judicata applied, except in special cases, not only to points which the court was actually required to decide, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

[39] The sequential outline of the events and issues addressed in this ongoing litigation, by Queen's Counsel for JMMB Bank, has not been refuted by counsel for ULF and MBC and, in my view, provides a complete answer to the contention advanced by counsel for ULF and MBC.

[40] Queen's Counsel pointed out that Mr Finzi, the borrower of the funds from JMMB Bank is the principal of both ULF and MBC. MBC put up seven properties including lots 18 and 19 as security for the loan over which mortgage #1633589 was granted to JMMB Bank. ULF was not a party to that transaction and hence not a party to the claim brought by JMMB Bank against Mr Finzi and MBC, when there was an alleged default on the loan. That claim was not to enforce the mortgage but a claim for debt owed by Mr Finzi. In those proceedings MBC sought injunctions to prevent JMMB Bank exercising its powers of sale.

[41] Queen's Counsel further outlined that it was after MBC's failed applications in the Supreme Court and this court to prevent the sale of lots 18 and 19, that it was first contended by ULF that there was dual registration of some of the land in lots 18 and 19, in lots 2a and 3, which it owned. Though the point at which the issue of the dual registration was disclosed was before the trial conducted by Sykes J (as he then was), it was long after the pleadings had been closed and witness statements filed. It is significant also that ULF was not a party to that litigation.

[42] Accordingly, Queen's Counsel's argument that it is not an abuse of process for JMMB Bank to raise the defence below and now in their appeal, that the dual registration claim being raised by Mr Finzi and ULF should not be allowed to defeat the mortgage granted to JMMB Bank by MBC to secure Mr Finzi's debt, is correct. Para. (1) of the finding in the head note in the case of **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1 supports this conclusion. It reads:

"...[T]here was a public interest in the finality of litigation and in a defendant not being vexed twice in the same matter; but that whether an action was an abuse of process as offending against that public interest should be judged broadly on the merits taking account of all the public and private interests involved and all the facts of the case, the crucial question being whether the plaintiff was in all the circumstances misusing or abusing the process of the court..."

[43] The orders sought by ULF and MBC on their application should, therefore, be refused and the application dismissed.

Application No COA2020APP00183 (for the order of single judge to be discharged and varied to grant the orders sought on the application for consolidation of Supreme Court Civil Appeal No COA2020CV00057 with SCCA No COA2020CV00059)

The application

[44] In its notice of application JMMB Bank sought the following orders:

- "i) The order made by the Honourable Mrs Justice Sinclair-Haynes, JA on October 7, 2020 refusing the Appellant's Application to Consolidate Appeals filed on August 28, 2020 be discharged.
- ii) The said order be varied to read as follows:
 - (a) Appeal SCCA# COA2020CV000057 is consolidated with SCCA# COA2020CV000059 – Sandals Royal Caribbean Limited v Universal Leasing Financing Limited and Others.
 - (b) The Record of Appeal (Volumes 1 and 2) filed on August 21, 2020 in SCCA# COA2020CV000059 – Sandals Royal Caribbean Limited v Universal Leasing Financing Limited and Others is to stand as the Record of Appeal in the consolidated appeal.
- iii) There be such further or other relief as the court deems just.
- iv) Costs to be costs in the consolidated appeal."

[45] In support of its application JMMB Bank relied on the affidavit of Trudy-Ann Bartley Thompson, General Legal Counsel of JMMB Bank, filed 28 August 2020.

[46] The details of the order appealed are that:

- "a) Summary judgment granted in part, in favour of [ULF]. It is declared that:
 - i) [ULF] is the sole beneficial owner of Lot 2A, originally registered on 23rd June 1966 at Volume 1027 Folio 366 and re-registered at Volume 1359 Folio 480 of the Register Book of Titles; and
 - ii) [ULF] is the sole beneficial owner of Lot 3, originally registered on 23rd June 1966 at Volume 1023 Folio 694 and re-registered at Volume 1359 Folio 481 of the Register Book of Titles.
- b) [SRC] is to deliver up to the Registrar of Titles the duplicate Certificate of Title for Lot 18 registered at Volume 1257 Folio 659 and for Lot 19 registered at Volume 1257 and Folio 660 for cancellation.
- c) The Registrar of Titles is directed to cancel Certificate of Title registered at Volume 1257 Folio 659 and re-issue same in keeping with the Sketch Plan of Commissioned Land Surveyor, Grantley

Kindness dated September 8, 2015 distinguishing the lands for Lot 18 from that of Lot 2A.

- d) The Registrar of Titles is directed to cancel Certificate of Title registered at Volume 1257 Folio 660 and re-issue same in keeping with the Composite Plan prepared by Commissioned Land Surveyors, Leslie B. Mae & Associates dated September 2008 distinguishing the lands for Lot 19 from that of Lot 3."

[47] The grounds of appeal in appeal number COA2020CV000057 are that:

- "(a) The Learned Judge erred when she failed to find that the following factual issues were in dispute and could not be determined on a summary judgment application without a trial and cross examination:
 - i. Whether the parts of the lands identified at paragraphs 8 and 9 of the Affidavit in Support of the Application for Summary Judgment filed on January 23, 2019 were the parts "that were always intended as the titles vested with [JMMB Bank] by [MBC]" to secure mortgage #1633589.
 - ii. Whether Mr Winston Finzi acting as the principal and controlling mind of [ULF] and [MBC] knew and/or ought to have known that [ULF] purported to have separate certificates of title evidencing ownership over parts of the land in Lots 18 and 19 when he caused [MBC] to grant mortgage # 1633589 to [JMMB Bank].
 - iii. Whether [JMMB Bank] acted dishonestly, or whether Mr Finzi and [ULF] and [MBC] acted dishonestly.
- (b) The Learned Judge erred in law when she failed to find that the certificates of title for Lot 18 and Lot 19 should take precedence over the certificates of title for Lot 2A and Lot 3.
- (c) The Learned Judge erred in law when she failed to find that Mr Finzi, [ULF] and [MBC] should be estopped from contending that mortgage #1633589 does not cover all the land described in the titles for Lots 18 and 19.
- (d) The Learned Judge erred in law when she failed to find that mortgage #1633589 covers all the land described in

the titles for Lots 18 and 19, and [ULF] is bound by the said mortgage.”

[48] The grounds of appeal in appeal number COA2020CV00059 are that:

- “1. The Learned Judge was wrong in granting summary judgement and failed to appreciate that, on the material placed before her, there are disputed factual issues incapable of resolution without cross-examination and a full trial and on which [SRC] had a realistic prospect of succeeding and defending.
2. The Learned Judge failed to appreciate that, even if there were issues of law capable of consideration and resolution by a court which is denied, she ought not to have embarked on the summary judgment process on the dates fixed for trial having regard to the following considerations:
 - i. The matter was ready for trial, having gone through all pre-trial processes of witness statements, disclosure and production of expert witness reports;
 - ii. There were issues, particularly as it relates to fraud and/or issues having to do with the requisite knowledge of [ULF’S] and [MBC’S] principals;
 - iii. There are issues worthy of ventilation at a full trial arising from [SRC’S] claim to an equitable interest in the land and whether indefeasibility of title vitiates [sic] against [SRC’S] right to bring such a claim.
3. The Learned Judge failed to appreciate that with respect to the claim [SRC] had real prospect of succeeding on the claim and with respect to the Ancillary Claim that [SRC] had real prospects of successfully defending the Ancillary Claim, and failed to consider or sufficiently consider that:
 - i. Certificates of Title for Lot 18 (Volume 1257 Folio 659) and Lot 19 (Volume 1257 Folio 660) ("the 1993 land") were prior to or were prior in date of registration to Certificates of Title for Lot 2A (Volume 1359 Folio 480) and Lot 3 (Volume 1359 Folio 481) ("the 2003 land"); and

- ii. notwithstanding any dual registration the Certificates of Title for the 1993 land ought therefore to be given priority over the Certificates of Title for the 2003 land.
4. The Learned Judge failed to appreciate that there was a triable issue as to whether the Certificates of Title for the 1993 land and the 2003 lands are not related to or applicable to the same land but relate to land bearing different size, shape and dimension; and that even if the Certificates of Title for the 2003 lands were to be treated as prior in time those Certificates of Title would not automatically take precedence over the Certificates of Title for the 1993 land.
5. The Learned Judge therefore erred by failing to properly interpret and apply the provisions of the Registration of Titles Act particularly section 70 and 161(f) to disputed facts not tested by cross-examination and the full investigation afforded by a trial; and therefore wrongly held that the Certificates of Title for the 1993 land are defeated, ought to be cancelled or delivered up for cancellation.
6. The Learned Judge failed to consider or sufficiently consider that issues of fraud were raised on the Statements of Case and other material that was placed before her particularly as it relates to [ULF'S] and [MBC'S] knowledge of the dual registration, through their common principal and controlling mind Winston Finzi, and that notwithstanding this knowledge [ULF] [sic] obtained a mortgage from The Interested Party, JMMB Bank, that sold the 1993 land to [SRC] under Power of Sale contained in this mortgage.
7. The Learned Judge failed to appreciate or take into account that [SRC] purchased the 1993 land under power of sale from a mortgagee and [SRC] is therefore entitled to the protection provided under Section 106 of the Registration of Titles Act and to the extent that [ULF] and [MBC] suffered loss their remedy rests in damages only against the mortgagee.
8. The Learned Judge failed to consider or sufficiently consider that in view of:

- i. the protections afforded to [SRC] under Section 106 of the Registration of Titles Act;
- ii. [ULF'S] and [MBC'S] unconscionable conduct of having knowledge of [MBC's] alleged inability to give title to the Interested Party Bank, and engaging in conduct that undermined the rights of the Interested Party Bank and the rights ultimately afforded to SRC under the Registration of Titles Act

the claim was one unfit for determination on a summary judgment application.

9. The Learned Judge failed to appreciate that the issue of dual registration and the equitable relief sought, in the factual circumstances of the claim and ancillary claim before her, could not be determined and granted on the summary judgment application by the [ULF] and [MBC] having particular regard to the knowledge attributed to and false representations alleged to be made by the shared principal of [ULF] and [MBC]."

The submissions

JMMB Bank

[49] Queen's Counsel for JMMB Bank submitted that, while rule 2.10(3) of the CAR provides that, "any order made by a single judge may be varied or discharged by the court...", (the submission actually stated rule 2.11(2) which it was formerly before the 2015 amendments to the CAR), it does not set out the factors to be considered in the exercise of that power. He advanced that, consequently, what this court should have regard to, was, whether the evidence supported the single judge's findings and whether those findings were reasonable in all the circumstances.

[50] Queen's Counsel contended that the learned single judge erred in finding that the two appeals related to two different claims and dealt with different issues. On the contrary, Queen's Counsel argued that an examination of the two notices of grounds of

appeal, reveals that both appeals relate to the same claim and deal with the same issues as they are both challenging Simmons J's decision to grant summary judgment to ULF.

[51] Queen's Counsel maintained that ULF and MBC provided no evidence to support their assertion that the appeals related to different claims and dealt with different issues. Rather the evidence from Mrs Bartley Thompson showed that the two appeals: a) involve the same parties; b) challenge the same decision; c) arise from the same facts; and d) are at the same stage.

[52] Queen's Counsel submitted that under rule 1.7(2)(a) of the CAR the court may consolidate appeals. He argued that, as that rule does not indicate the factors to be considered, this court should consider the same factors that the Supreme Court considers when determining whether to consolidate claims pursuant to rule 26.1 of the CPR: **Dr Sandra Williams-Phillips v University Hospital Board of Management** [2014] JMSC Civ 117; **Kevin Simmonds v Minister of Labour & Social Security and Others** [2020] JMSC Civ 173; and **Insurance Corporation of British Columbia v Inderjit Singh and Anor** [2017] BCSC 111.

[53] Queen's Counsel, therefore, submitted that the LSJ erred in not finding that:

- i) It is desirable for the two appeals to be consolidated as they both relate to the same claim and the same decision of the court below;
- ii) There is a risk that there could be inconsistent decisions if the two appeals are not consolidated;
- iii) It will save time and costs if the two appeals are consolidated. It will also save costs and avoid duplication of documents if the record of appeal in Supreme Court Civil Appeal No COA2020CV00059 stands as the record of appeal in the consolidated appeal, pursuant to the power granted by rule 1.7(2)(n) of the CAR; and

- iv) None of the parties will be prejudiced if the appeals are consolidated, especially in circumstances where ULF and MBC have not put forward any evidence to show that they will be prejudiced if the order for consolidation is granted.

[54] Accordingly, Queen's Counsel invited the court to grant the orders sought in JMMB Bank's application.

ULF and MBC

[55] Counsel for ULF and MBC agreed that under rule 2.10(3) (formerly rule 2.11(2) before the 2015 amendment of the CAR) of the CAR the court may vary any decision of a single judge. Counsel also advanced that rule 1.7(2) of the CAR gave the court the power to consolidate appeals or to hear two or more appeals on the same occasion. Counsel additionally pointed out that rule 2.14 of the CAR (the submission actually stated rule 2.15 which it was formerly, before the 2015 amendments to the CAR), incorporated Part 26 of the CPR under which the claims may be consolidated in the Supreme Court. Counsel argued that rule 26.1(2)(b) of the CPR is substantially similar to rule 1.7(2) of the CAR and, therefore, relied on the same three cases as Queen's Counsel which have emanated from the CPR or similar rules as the CPR: **Dr Sandra Williams-Phillips v University Hospital Board of Management; Insurance Corporation of British Columbia v Inderjit Singh and Anor**; and **Kevin Simmonds v Minister of Labour & Social Security and Others**.

[56] Counsel contended that, as the power to consolidate involves an exercise of discretion by a single judge of the court and no material has been put before the court to show that the LSJ committed any error of fact or law in her decision, this court cannot disturb the ruling of the LSJ: **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 and **Anthony Powell v The Attorney General For Jamaica** [2014] JMCA App 33.

[57] Counsel submitted that given the factors which the cases showed should be considered, the following reasons mitigated against the consolidation of the appeals:

- i) A merger of the appeals would require the appellants to redraft their respective notices into one document which would unnecessarily increase costs for the ULF and MBC should costs be awarded against them;
- ii) If both Queen's Counsel were to present on the appeal ULF and MBC would be exposed to the risk of expense from them having to sit through an appeal which may be unrelated to their relevant issues;
- iii) The issues and facts in the claims are for the most part separate and distinct and hence neither costs nor judicial time would be saved by the consolidation, as separate arguments would still be required on the different grounds;
- iv) There is no risk of irreconcilable judgments as the appeals filed are sufficiently distinct, despite arising from the same judgment of the Supreme Court; and
- v) If ULF and MBC succeed on the appeal they may be prejudiced in the recovery of their costs as either appellant could contend that parts of the costs were incurred in the unrelated part of the appeal.

[58] Counsel argued that JMMB Bank had provided no evidence that the LSJ erred in the exercise of her discretion by refusing the application for consolidation. Accordingly, counsel maintained that, there was no basis for the court to interfere with the LSJ's decision.

Discussion and analysis

[59] The decision whether or not to consolidate appeals under rule 1.7(2) of the CAR involves an exercise of discretion by a single judge of appeal. Consequently, the court

may only disturb the ruling of the LSJ if it is demonstrated that she made an error of fact or law or failed to act judicially: **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 and **Anthony Powell v The Attorney General For Jamaica** [2014] JMCA App 33. As the LSJ provided no reasons for her decision, bearing in mind the standard for review of the exercise of a discretion, this court has to assess whether her decision may successfully be challenged based on what was presented to her: **Sean Greaves v Calvin Chung** [2019] JMCA Civ 45 at paras. [26] – [27].

[60] Under rule 1.7(2) the court may at (a) “consolidate appeals” and at (f) “hear two or more appeals on the same occasion”. Queen’s Counsel for JMMB Bank and counsel for ULF and MBC both agreed that, in the exercise of the power to consolidate appeals under rule 1.7(2) of the CAR, the principles applicable to the consolidation of cases under rule 26.1(2)(b) of the CPR should be referenced, as rule 1.7(2) while granting the power does not outline the criteria for its exercise.

[61] In the case of **Dr Sandra Williams-Phillips v University Hospital Board of Management**, K Anderson J at para. [15] quoted from the White Book which interpreted rule 3.1(2)(g) of the civil procedure rules in England that is worded in exactly the same way as rule 26.1(2)(b) of the CPR. At para. 3.1.10 the White Book states:

“Under the former rules, consolidation of proceedings could be ordered where it appeared to the court (a) that some common question of law or fact arose in both or all of them, (b) that the rights to relief claimed were in respect of, or arose out of the same transactions or series of transactions, or (c) that for some other reason it was desirable to make an order for consolidation. These conditions reflected the fact that the main object of the consolidating power was to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. Rule 3.1 (2) (g) contains no such confining conditions. But as the court, in exercising this power, must seek to give effect to the over-riding objective, the conditions stated in the former rules, are bound to remain important considerations...Aspects of the overriding objective other than those concerned with cost and delay may also be engaged in the question, whether consolidation should be ordered (e.g.

ensuring that the parties are on an equal footing and dealing with the case in ways which are proportionate). Upon investigation it may be recognized that the advantages sought to be achieved by an application for consolidation may be achieved by an order under rule 3.1 (2) (h) for the several claims to be tried on the same occasion and that an order for consolidation is neither desirable nor necessary.”

[62] Thus the overriding objective must be foremost in the court’s mind when balancing the various factors such as cost, delay, equality of arms and proportionate orders, in determining whether actions (in this case appeals) should be heard separately, be consolidated, or, remain separate but be heard on the same occasion.

[63] The case of **Insurance Corporation of British Columbia v Inderjit Singh and Anor** was cited in **Kevin Simmonds v Minister of Labour & Social Security and Others**. At para. [34] of the former case, a series of considerations were proposed and examined to determine whether consolidation was appropriate. Those factors may usefully be considered in the instant matter, adjusted for the appellate level, to determine the appropriateness of the current application. It should be noted that, while counsel for ULF and MBC used these questions for analysis, Queen’s Counsel for JMMB Bank did not.

Will consolidation create a saving in pre-appeal procedures?

[64] There is no dispute that there would need to be only one case management conference and that the already filed record of appeal could be used in both matters with an additional volume if necessary. However, while JMMB Bank asserts that the issues are largely joint, ULF and MBC maintain they are not, hence their view that substantial time would be expended preparing to respond to varying issues. For the reasons discussed under the heading “Is there a common issue of fact or law that makes it desirable to dispose of all appeals at the same time?” below, which show that indeed the issues are largely joint, the submissions of JMMB Bank are preferred on this point.

Will there be a real reduction in the number of hearing days taken up by appeals being heard together?

[65] As each appellant is a different party, the submission from ULF and MBC was that each appellant would likely separately argue their individual issues on appeal and there would be no time savings. That is, however, unlikely. The positions of JMMB and SRC, on the one hand, and ULF and MBC, on the other hand, are compatible and in some cases mutually reinforcing. There is every expectation therefore that if the cases were consolidated parties where appropriate would adopt each other's submissions thereby affording some time savings.

What is the potential for a party to be seriously inconvenienced by being required to attend an appeal in which they have only marginal interest?

[66] ULF and MBC concede that they would not be inconvenienced as they are the respondents in both appeals. They however suggest that JMMB Bank and SRC are not joined on many issues but would still need to be present for the arguments or to seek relief against each other and incur costs. As JMMB Bank is the one seeking the consolidation and the arguments of JMMB Bank are not prejudicial to SRC, it seems clear that none of the parties would be seriously inconvenienced by a consolidation.

Is there a common issue of fact or law that makes it desirable to dispose of all appeals at the same time?

[67] ULF and MBC assert that apart from a common factual background, the appeals are based on different arguments of fact and law with only one similar ground of appeal. However, a close examination of both appeals reveals that, as submitted on behalf of JMMB Bank, they involve the same parties; challenge the same decision; and arise from the same facts. Lots 18 and 19 which are the subject of the mortgage and dual registration are the subject matter of both appeals. In both appeals the critical finding of Simmons J that ULF is the sole beneficial owner of Lots 2A and 3 is being challenged. The effect of her ruling is that Lots 2A and 3 take precedence over Lots 18 and 19 respectively. If Simmons J is found to have been correct on appeal, it would confirm that JMMB Bank did not pass good title to all the lands in Lots 18 and 19 to SRC and could be liable to

SRC in damages, for SRC's loss of portions of the land in these lots they purchased. JMMB Bank would then be left with less security to cover the loan it extended to Mr Finzi which it alleges went into default. If Simmons J is found to have erred on this critical issue, then the matter would then be able to be tried to determine the issues between the parties.

[68] Both appeals therefore emanate from one case and one decision involving common facts and legal issues which affect all parties to both appeals.

Will consolidation avoid a multiplicity of proceedings?

[69] ULF and MBC maintain that consolidation would avoid a multiplicity of proceedings only in form but not substance, as both JMMB Bank and SRC would still make respective arguments and that they would have to respond to them in turn, thus there would be no real savings in costs for them. That argument complemented their earlier submission that merger of the claims would require JMMB Bank and SRC to redraft their respective notices of appeal into one document which would increase their exposure to costs, should costs be ultimately awarded against them.

[70] Those submissions, however, do not make allowance for the fact that the parties could adopt each other's submissions where appropriate as happened in the court below, which would save time and thus costs. Further, costs associated with the merger of the claims would be offset by the ability to rely on a record of appeal already filed in Supreme Court Civil Appeal No COA2020CV00059 for both claims and the reduced hearing time.

What are the relative stages of the appeals?

[71] Both appeals are at the same stage.

Would consolidation delay the appeal and prejudice one or some of the parties?

[72] No. Both appeals are at the same stage.

Would there be a risk of inconsistent results?

[73] ULF and MBC maintain that there would be no risk of inconsistent results as they submit each appeal is asking for a decision on a different basis. This, however, ignores the fact that, as both appeals essentially turn on which certificates of title take precedence, there is a real risk of inconsistent results if the matters remain separate or are not at least tried together. Two different panels could come to opposing conclusions on that vital point.

[74] The above analysis of the relevant factors has disclosed that all support consolidation. In countering the application ULF and MBC proposed a middle ground. That the appeals should be heard on the same occasion. On one level that appears to be an attractive option as the necessary redrafting that would be attendant on consolidation would be avoided. That, however, appears to be the only benefit of hearing the cases on the same occasion rather than consolidation. There would have to be separate bundles filed in Supreme Court Civil Appeal No COA2020CV00057 duplicating the bundles already filed in Supreme Court Civil Appeal No COA2020CV00059. It would also not be as easy for the parties to seamlessly adopt each other's submissions where appropriate. At the heart of the matter, however, is the fact that the appeals have the same factual background, emanate from one case below, involve the same parties, challenge the same decision and might produce inconsistent results if they are not at least heard together. In these circumstances, in the absence of reasons from the LSJ, I am constrained to find that the threshold has been reached for the court to hold that in refusing the application for consolidation her exercise of discretion was incorrect and should be set aside.

Conclusion

[75] In the premises, the application of ULF and MBC should be refused and the application of JMMB Bank should be granted. Costs of Application No COA2020APP00178 should be awarded to JMMB Bank and the costs of Application No COA2020APP00183 should be costs in the consolidated appeal, unless some other costs order is subsequently

deemed appropriate. It remains for me to sincerely apologise to the parties, Queen's Counsel and counsel, for the delay in the delivery of this judgment.

BROOKS P

ORDER

1. Application No COA2020APP00178, that the notice of appeal in Supreme Court Civil Appeal No COA2020CV00057 filed by JMMB Bank (Jamaica) Limited should be struck out or dismissed, is refused.
2. Application No COA2020APP00183, that the order of Sinclair-Haynes JA made on 7 October 2020 refusing JMMB (Jamaica) Limited's application to consolidate Supreme Court Civil Appeals Nos COA2020CV00057 and COA2020CV00059 be discharged, is granted.
3. Supreme Court Civil Appeal No COA2020CV00057 is consolidated with Supreme Court Civil Appeal No COA2020CV00059 – Sandals Royal Caribbean Limited v Universal Leasing Financing and Others.
4. The record of appeal (volumes 1 and 2) filed on 21 August 2020 in Supreme Court Civil Appeal No COA2020CV00059 – Sandals Royal Caribbean Limited v Universal Leasing Financing and Others - is to stand as the record of appeal in the consolidated appeal.
5. Costs of Application No COA2020APP00178 to JMMB (Jamaica) Limited to be agreed or taxed.
6. Costs of Application No COA2020APP00183 to be costs in the consolidated appeal.
7. Should any party disagree with any order(s) as to costs, that party is entitled to file and serve written submissions in that regard within 14 days

of the date of this judgment, failing which the order(s) as to costs shall stand.

8. Should submissions in opposition to the order(s) as to costs, be filed and served in accordance with order 7 hereof, the parties served with the submissions in opposition are entitled, within 14 days of being served with those submissions, to file and serve submissions in response.
9. The court will, thereafter, consider and rule on the written submissions.