[2019] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 88/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**ASPINAL WAYNE NUNES**	**APPELLANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**RESPONDENT**

Keith Bishop and Seyon T Hanson instructed by Seyon T Hanson & Co for the appellant

Mrs Sandra Minott-Phillips QC and Lithrow Hickson instructed by Myers Fletcher & Gordon for the respondent

13, 15 February 2018 and 21 June 2019

MORRISON P

Introduction

[1] This is an appeal against an order made by Laing J ('the judge') on 31 July 2015. By his order, the judge refused an application by the appellant ('Mr Nunes') for an interim injunction, pending the determination of his claim against the respondent ('JRF') in the Supreme Court, restraining JRF as mortgagee from selling his home at 16 Shenstone

Drive, Kingston 6 in the parish of Saint Andrew ('the property'). The property is registered under the Registration of Titles Act ('the RTA').[1]

[2] On the basis of the material placed before the court in support of the application by Mr Nunes, the judge accepted that the threshold test for the grant of an interim injunction laid down by the House of Lords in **American Cyanamid Co v Ethicon Ltd**[2] ('**American Cyanamid**') had been satisfied. In other words, the judge was satisfied that Mr Nunes' claim against the JRF was neither frivolous nor vexatious and that there was indeed a serious issue to be tried.

[3] But the judge declined to grant the interim injunction. He took the view that, in all the circumstances of the case, "[d]amages would plainly be an adequate remedy for [Mr Nunes]"[3]. In arriving at this conclusion, the judge took into account in particular (i) section 106 of the RTA, which provides that "any persons damnified by an unauthorized or improper or irregular exercise of the power [of sale] shall have his remedy only in damages against the person exercising the power"; and (ii) the fact that, unlike in other cases in which the courts have granted injunctions to restrain a mortgagee's exercise of the power of sale, there was no challenge in this case to the validity of JRF's mortgage, whether on the ground of fraud/forgery or otherwise.

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[1] The property is actually comprised in two certificates of title, registered at Volume 1482 Folio 188 and Volume 1480 Folio 858 of the Register Book of Titles
[2] [1975] 2 WLR 316
[3] [2015] JMCD CD. 17, para. [25]

[4] By notice of appeal filed on 3 August 2015, Mr Nunes contends that the judge erred in refusing to grant the interim injunction on the basis of these considerations. For its part, by a counter-notice of appeal filed on 10 August 2015, JRF contends that, in addition to the grounds stated by the judge, the decision should be affirmed on the basis that (i) there are no serious issues to be tried; and (ii) "[t]he refusal of the injunction is the course likely to cause the least irremediable prejudice to one party or the other". I will in due course have to refer to the notice and counter-notice of appeal in greater detail.

[5] The issues on this appeal are therefore (i) whether the judge was correct in his conclusion that there was a serious issue to be tried; (ii) if so, whether the judge was also correct in refusing to grant an interim injunction on the basis that damages would be an adequate remedy, because of (a) section 106 of the RTA, and/or (b) the judge's view that the case did not fall within the usual category of case in which the court would normally restrain a mortgagee from exercising a power of sale; and (iii) whether the judge's refusal to grant the interim injunction can also be justified on the ground that, in this case, the refusal of the application was the course likely to cause the least irremediable prejudice to Mr Nunes.

The background to the application for the interim injunction

[6] The account which follows is generally based on the affidavit evidence which was before the judge[4]. Save where specifically indicated, most of this evidence was not in dispute.

[7] In 1994, Produce Export Enterprises Limited ('the principal debtor') obtained a loan of US$100,000.00 from Mutual Security Bank Limited ('the Bank'). In a Loan Agreement dated 6 May 1994 ('the Loan Agreement'), the principal debtor agreed, among other things, that (i) the rate of interest chargeable on the loan would be 4% "over and above the Bank's Current Minimum Rate of Interest for United States Dollar loans"[5]; (ii) it would repay the loan on demand in United States dollars[6]; and (iii) in the event of a failure on its part to repay the loan on demand being made by the Bank, "the Bank shall be at liberty to convert the United States Dollar loan to a Jamaican Dollar loan"[7], in which case, interest would accrue from the date of conversion to the date of payment at 4% "over and above the Bank's Current Minimum Rate of Interest on Jamaican Dollar loans"[8].

[8] In consideration of the Bank agreeing to make financial and banking facilities to the principal debtor, Mr Nunes and his wife, Mrs Lorna Nunes, entered into separate instruments of guarantee, both also dated 6 May 1994, in favour of the Bank. Insofar as

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[4] First affidavit of Aspinal Wayne Nunes, sworn to on 22 May 2015; Affidavit of Roumelia Pryce, sworn to on 22 May 2015; Affidavit of Karlene Hepburn-Smith, sworn to on 10 June 2015; Second Affidavit of Aspinal Wayne Nunes, sworn to on 29 June 2015.
[5] Item 4 of the Schedule
[6] Clause 2
[7] Clause 6
[8] Clause 7

is presently relevant, the instrument of guarantee ('the Guarantee') signed by Mr Nunes stated the following:

> "… the Guarantor HEREBY GUARANTEES to the Lender the repayment of and HEREBY UNDERTAKES to pay to the Lender all principal, interest and other monies at any time payable by the Borrower to the Lender limited to a maximum of ONE HUNDRED THOUSAND UNITED STATES DOLLARS (US$100,000.00), on principal with interest at such rate or rates as are applicable to the facility or facilities in respect of which a demand is made under this Guarantee from the date of disbursement of the facility to the date of payment by the Guarantor."

[9] In addition, the Guarantee recorded the agreement between the parties that:

> "The liability of the Guarantor is that of a principal debtor as between the Guarantor and the Lender but that of a guarantor as between the Guarantor and the Borrower, and any such sum which may not be recoverable from the Guarantor on the footing of a guarantee shall be recoverable from the Guarantor as sole or principal debtor in respect thereof and shall be paid to the lender on demand with interest and accessories."[9]

[10] And also that:

> "This instrument covers all agreements between the parties hereto relative to this Guarantee and none of the parties shall be bound by any representation or promise made by any person relative thereto which is not embodied herein."[10]

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[9] Clause 2
[10] Clause 10

[11] Finally, so far as formal documentation is concerned, by an instrument of mortgage also dated 6 May 1994 ('the Mortgage')[11], Mr Nunes mortgaged the property to the Bank to support his liability under the Guarantee. The limit of Mr Nunes' liability under the Mortgage was US$100,000.00.

[12] In his first affidavit sworn to in support of his application for an interim injunction, Mr Nunes explained that, in his discussions with officers of the Bank, he had emphasised "that it was of great importance to me that my liability under the mortgage be denominated in US$ because of the great disparity in interest rate between a US$ loan and a J$ loan at the time"[12].

[13] The principal debtor ran into financial difficulties. Accordingly, sometime after March 1995, Mr Nunes started making direct payments to the Bank under the guarantee, in order to ensure, as he put it, "that I did not lose my family's place of residence"[13]. Having become aware at some point that the Bank was seeking to convert the principal debt into a Jamaican dollar debt, Mr Nunes protested that "this was not the original agreement and I would not vary from the original agreement"[14]. Despite his protest, it appeared that, as Mr Nunes had feared it would, the Bank did in fact convert the loan to Jamaican dollars. In 1999, he was moved to complain to an officer of National Commercial

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[11] Mortgage No 816340 under the Registration of Titles Act (To support Guarantor's Foreign Currency Liability), registered on 12 January 1995
[12] First Affidavit of Aspinal Wayne Nunes, para. 3.
[13] Ibid, para. 4
[14] Para. 5

Bank ('NCB'), which had by then acquired the Bank's interest in the principal debt[15], that "you have breached your client's trust and duty by increasing the debt burden by almost trippling [sic] the interest charges"[16].

[14] Mr Nunes' case was that he continued to protest and to meet with officers of NCB to settle the matter of his liability under the mortgage, but to no avail. However, he continued to make periodic payments to NCB and, by his calculations, he had fully settled his liability by the end of November 2000. Indeed, Mr Nunes went so far as to file action against NCB on 29 October 2001[17] ('the 2001 action'), seeking an order discharging the Mortgage. However, after a somewhat laconic defence filed on behalf of NCB on 6 February 2003, the action was deemed struck out by reason of Mr Nunes' then attorneys-at-law's failure to apply for a case management conference to be fixed by 31 December 2003.[18] Apart from serving as an indication, for what it is worth, of Mr Nunes' state of mind when this action was filed in 2001, nothing now turns on this.

[15] By transfer registered on 13 May 2014, the Mortgage was transferred to Refin Trust Limited and then, also on the same day, to JRF.

[16] By registered notice dated 25 August 2014, JRF advised Mr Nunes that he was in default under the Mortgage; and that, should the default continue for a period of one

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[15] By transfer registered on 13 May 2014
[16] Letter dated 10 September 1999, Mr Nunes to Mr Jeff Cobham, Managing Director of NCB
[17] Suit No CLN 120 of 2001
[18] See the transitional provisions under the Civil Procedure Rules 2002; and see a letter from the Registrar (Ag) of the Supreme Court dated 11 March 2010.

month from the date of the notice, it intended to exercise its power of sale under the RTA. The amount claimed to be owing as at the date of the notice was $18,904,634.53, made up of $2,380,938.88 for principal, $16,397,287.56 for interest and $126,408.09 for fees.

[17] Mr Nunes protested that his liability under the Mortgage had been settled from 24 November 2000. JRF nevertheless put up the property for auction on 17 December 2014, but there were no bidders over the reserve price and the property remained unsold. On 29 April 2015 and subsequent dates, despite an exchange of correspondence between attorneys-at-law on Mr Nunes' behalf and JRF, the property was advertised for sale under powers of sale contained in the Mortgage.

Mr Nunes files suit against JRF

[18] On 22 May 2015, Mr Nunes commenced the action out of which this appeal arises. The particulars of claim filed on his behalf rehearsed the background to the matter, much as I have already outlined it. Among other things, Mr Nunes stated that (i) "it was an implied term of the guarantee by way of mortgage based on the clear contemplation and understanding of the parties that the loan would remain a US$ denominated loan unless otherwise agreed by Mr Nunes"[19]; (ii) the liability secured by the mortgage has been discharged[20]; (iii) JRF's exercise of the powers of sale is statute-barred[21]; (iv) JRF is

[19] Para. 5
[20] Para. 12b
[21] Para. 13a

estopped from exercising the powers of sale, "due to the considerable passage of time since Mr Nunes' last payment on 24 November 2000 and such delay would render it unconscionable for [JRF] to now seek to exercise its powers of sale"[22]; and (v) JRF has waived the right to exercise its power of sale due to "the considerable passage of time since Mr Nunes' last payment on 24 November 2000"[23].

[19] On this basis, Mr Nunes sought the following reliefs and remedies:

> "1. A declaration that the Mortgage to Support Guarantor's Foreign Currency Liability issued by Aspinal Wayne Nunes also known as Aspinal W Nunes dated May 6, 1994 bearing mortgage number 816340 to MSB is discharged.
>
> 2.1 A declaration that [JRF] is estopped from exercising its powers of sale over all those parcels of land registered at Volume 1482 Folio 188 and Volume 1480 Folio 858 of the Register Book of Titles ("the relevant parcels of land').
>
> 2.2 Alternatively, a declaration that [JRF] has waived the right to exercise its powers of sale over the relevant parcels of land.
>
> (3) An order that [JRF] execute a Discharge of Mortgage releasing all those parcels of land registered at Volume 1482 Folio 188 and Volume 1480 Folio 858 of the Register Book of Titles.
>
> (4) An order that should [JRF] fail to execute the Instrument of Transfer within fourteen (14) days, the Registrar of the Supreme Court shall execute the Discharge of Mortgage and this shall have the same effect as if it were executed by [JRF].

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[22] Para. 13b
[23] Para. 13c

(5) An injunction restraining [JRF] by itself or its servants, employees, agents, or otherwise howsoever from taking any steps whatsoever to sell the relevant parcels of land including advertising the property for sale pending the determination of this claim.

(6) An injunction restraining [JRF] by itself or its servants, employees, agents, or otherwise howsoever from entering upon the relevant parcels of land or taking any steps to dispossess [Mr Nunes] pending the determination of this claim.

(7) Costs.

(8) Such further and other relief as this Honourable Court may determine."

[20] Also on 22 May 2015, Mr Nunes filed an application for an interim injunction, seeking orders restraining JRF, by itself, its servants and/or agents, from (i) taking any steps to sell the property; or (ii) entering upon the property or taking any steps to dispossess him pending the determination of the claim. The stated grounds of the application were that:

"1. [JRF] is attempting to sell the relevant parcels of land pursuant to the exercise of purported powers of sale.

2. [Mr Nunes'] claim raises very serious issues to be tried and indeed he has a real prospect of successfully pursuing this claim.

3. In any event, damages would not be an adequate remedy if [JRF] is not restrained pending the trial of this claim.

4. The balance of convenience favours the grant of the injunction.

5. In all the circumstances, it would be just and convenient to grant the interim injunction sought.

6. The application is urgent as [JRF] continues to advertise the … property for sale.

7. The application is made pursuant to Parts 1 and 17 of the Civil Procedure Rules, 2002 as well as s49 (h) of the Judicature (Supreme Court) Act."

[21] JRF filed its defence to the action on 3 July 2015. The cardinal points of the defence may be summarised as follows:

(1) The Guarantee to which the Mortgage was collateral limited Mr Nunes' liability under it to US$100,000.00 on principal, together with interest at the applicable rate or rates from the date of disbursement[24].

(2) The Loan Agreement expressly provided that in any one of certain specified events, the Bank was at liberty to convert the United States dollar loan into a Jamaican dollar loan[25].

(3) The Loan Agreement also provided that, in that event, interest would accrue from the date of conversion of the loan to Jamaican

[24] Para. 3c
[25] Para. 5a

dollars at 4% above the rate of interest payable on a Jamaican dollar loan[26].

(4) There was no implied term of the Guarantee[27].

(5) JRF denies that any payment made by Mr Nunes to the Bank/NCB between 1995 and 2000 was made pursuant to the Guarantee. Rather, all such payments were made on account of the debts of at least two "borrower companies" whose debts he had guaranteed[28].

(6) The liability secured by the Mortgage has not been repaid, either in the manner alleged by Mr Nunes, or at all[29].

(7) The Limitation of Actions Act ('LAA') does not bar the exercise of the powers of sale because (a) the exercise of the power does not constitute the bringing of an action; (b) land subject to a registered mortgage only ceases to be liable for the moneys secured upon the entry of a discharge of mortgage in the Register Book of Titles, which has not happened in this case[30]; and (c) alternatively, on

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[26] Para. 8
[27] Para. 5b
[28] Para. 9
[29] Para. 17
[30] Para. 18

other grounds having to do with the date on which the power of sale first arose[31].

(8) JRF denies that it is either estopped from exercising or has waived its powers of sale under the Mortgage[32].

[22] In a nineteen paragraph reply to JRF's defence filed on 16 July 2015, Mr Nunes traversed several of the averments contained in it. In particular, Mr Nunes stated that he was unaware of the contents of the Loan Agreement between the Bank and the principal debtor.

The judge's decision

[23] Approaching the matter on the basis of the principles established in **American Cyanamid**, the judge considered three questions: First, was there a serious issue to be tried? Second, if so, would damages be an adequate remedy for Mr Nunes in the event that he were to prevail at trial? And third, did the balance of convenience favour the granting of the injunction?

[24] As regards the first question, it was submitted to the judge that Mr Nunes had amply demonstrated that there was a serious issue to be tried, in particular with regard to whether he had in fact discharged the debt, whether the Bank had the authority to convert the United States dollar loan into Jamaican dollars, and whether JRF's purported

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[31] Paras 19 and 20
[32] Para. 21

exercise of the powers of sale under the Mortgage was statute-barred. Counsel for Mr Nunes also raised a subsidiary point relating to the reference in an affidavit filed on behalf of JRF to certain letters which were marked 'without prejudice'.

[25] Despite strenuous opposition from counsel for JRF on all four points, the judge concluded that Mr Nunes had indeed shown that there was a serious issue to be tried. He explained his conclusion in this way[33]:

> "[24] It is settled law based on the now established **American Cyanamid** principles that the Court is not required to conduct a detailed revision of the case and that [Mr Nunes] must show that there is a serious issue to be tried. This is a relatively low threshold in that [Mr Nunes] is required to only show that his claim is neither frivolous nor vexatious. I find that [Mr Nunes] has satisfied this threshold. Learned Queen's Counsel has made forceful submissions to the contrary, but the Court is of the view that there is a serious issue to be tried in relation to, *inter alia*, whether the debt has been discharged, whether the conversion was allowed under the Loan Agreement and/or the Mortgage; the importance of the conversion to US$ (if any) to the quantum of the debt being claimed and whether [Mr Nunes] can rely on the Limitation of Actions Act. The Court will also need to grapple with the applicability of the without prejudice rule in cases of this sort. These are all matters which need to be resolved in the forum of a trial."

[26] Then, turning to the question of whether damages would be an adequate remedy, the judge considered, as I have already indicated, that damages would "plainly" be an adequate remedy. The judge referred to the decision at first instance in **Cabot Paul v**

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[33] At para. [24] of his judgment

Victoria Mutual Building Society[34] (‘**Paul v VMBS’**), in which Brooks J (as he then was) observed that, despite the general presumption that damages would not be an adequate remedy in a case concerning land, section 106 of the RTA might compel a different result in an appropriate case. The judge then added this[35]:

> "Although this is not a case in which the Mortgagee has already exercised the power of sale that does not appear to weaken the argument that if the injunction is not granted and such a sale is permitted, which turns out to be wrongful exercise of the power of sale, damages would be an adequate remedy for the successful Claimant in this case, by virtue of the operation of section 106 of the Registration of Titles Act."

[27] The judge next went on to point out[36] that –

> "Despite the existence of section 106 of the Registration of Titles Act, there have been a number of cases in which our Courts have nevertheless granted injunctions to restrain mortgagees from exercising their power of sale and the common thread running through those cases such as **Franz Fletcher**, **Brady v Jamaica Redevelopment Foundation** … and **Marbella**, appears to me to be that in those cases the validity of the Mortgage was being challenged on the ground of fraud/forgery. As a consequence there was a question raised as to whether there was a mortgagee exercising its power of sale for the purposes of section 106 of the Registration of Titles Act. …"

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[34] (unreported), Supreme Court, Jamaica, Claim No 2007 HCV 05120, judgment delivered 29 February 2008
[35] At para [27]
[36] At para. [29]

[28] And finally, with regard to other discretionary considerations governing the grant of an interlocutory injunction, the judge observed as follows[37]:

> "[32] The Court recognises that [Mr Nunes] has been living at [the property] for over 20 years and it is the home of his family. If the injunction is not granted there is a real risk that [the property] will be sold and in the event that [Mr Nunes] succeeds, he and his family will be forced to acquire another home elsewhere. Nevertheless, in all the circumstances and being convinced that section 106 of the [R]egistration of Titles Act applies, I am of the view that damages would be an adequate remedy for [Mr Nunes] in this case."

[29] In the result, the judge dismissed the application, with costs to JRF to be taxed if not agreed. The judge also refused the oral application made on behalf of Mr Nunes for an injunction pending the filing of a notice of appeal.

The appeal

[30] By notice of appeal filed on 3 August 2015, Mr Nunes challenged the judge's decision on the following grounds:

> "(a) The Learned Judge applied incorrect legal principles in refusing the application for interim injunction on the basis that damages would be an adequate remedy based on the provisions of section 106 of the Registration of Titles Act as there was no evidence before him as to the Respondent's financial position to pay damages to the Appellant in the event that he succeeded at trial.
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> (b) The Learned Judge incorrectly relied on the decision of **Paul Cabot v Victoria Mutual Building Society**

[37] At para. [32]

which was based on different factual and legal considerations.

(c) While accepting that there are circumstances in which damages would not be an adequate remedy for a mortgagor who is seeking to restrain the exercise of powers of sale, the Learned Judge incorrectly found that this case was one such case where damages would be an adequate remedy. In so doing, the Learned Judge incorrectly analysed the decision of **Fletcher** in which one of the issues considered was whether the power of sale could be barred by virtue of section 33 of the Limitation of Actions Act.

(d) The Learned Judge incorrectly concluded that the common thread running through cases such as **Franz Fletcher and another v Jamaica Redevelopment Foundation, Inc Brady v Jamaica Redevelopment Foundation, Inc and others and SSI Cayman Limited et al v International Marbella Club SA** in which injunctions had been granted to restrain a mortgagee's power of sale was the presence of fraud/forgery.

(e) The Learned Judge failed to give weight, or adequate weight, to the uncontradicted evidence of the Appellant that the principal debt he had guaranteed had been converted from a US$ debt into a J$ debt without his consent."

[31] And, in its counter-notice of appeal filed on 10 August 2015, JRF contended that the judge's decision should be affirmed, either on the ground that there was no serious issue to be tried, or that the refusal of the injunction was the course likely to cause the least irremediable prejudice to one party or the other.

[32] It will be convenient to deal firstly with the principal issue raised by the counter-notice of appeal, that is, whether the judge was correct to find that there was a serious issue to be tried.

Was the judge right to conclude that there is a serious issue to be tried?

[33] On this issue, both sides take as their starting point Lord Diplock's canonical statement of the law in **American Cyanamid**. In his judgment in that case, as will be recalled, Lord Diplock revisited and ultimately rejected the notion that an applicant for an interlocutory injunction was obliged to show a *prima facie* case on the substantive claim as a necessary pre-condition to the grant of relief. He restated the true rule in this way[38]:

> "… The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
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> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ... So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

[38] At page 323

[34] Mrs Minott-Phillips QC contended strongly that the material relied on by Mr Nunes at the hearing of the application for the interim injunction did not reach the threshold of a serious issue to be tried. And accordingly, the judge ought on that basis alone to have dismissed the application.

[35] In her skeleton arguments,[39] Mrs Minott-Phillips identified the four issues put forward by Mr Nunes as serious triable issues as (a) the existence of an alleged oral agreement not to convert the principal debtor's loan from a United States dollar facility to a Jamaican dollar debt without his consent; (b) the allegation that Mr Nunes had already paid in excess of US$100,000.00 in satisfaction of the mortgage debt; (c) the allegation that JRF had no lawful right to exercise or attempt to exercise the power of sale; and (d) the assertion that the exercise of the power of sale was in any event barred by the operation of section 33 of the 'the LAA'.

[36] On item (a), Mrs Minott-Phillips submitted that Mr Nunes was bound by the parol evidence rule, the express terms of the Loan Agreement, clause 10 of the Guarantee and his own pleading that the principal debtor was in default of its obligations to the Bank. On point (b), the submission was that the evidence put forward by JRF based on the internal records of the Bank, as well as the allegations put forward in the 2001 action, did not support the conclusion that the mortgage debt had been satisfied. On point (c), reference was made to the certified copies of the certificates of title which were in

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[39] Respondent's skeleton arguments opposing the appeal and in support of its counter-notice of appeal filed on 20 June 2017, para.10

evidence showing JRF as the registered mortgagee of the property. On point (d), reliance was placed on the decision in **Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited**[40] (**'Dagor v MSB'**), which was decided after the judge had given judgment in this matter. Mrs Minott-Phillips also submitted on this point that 12 years had not in fact elapsed between the date of the Mortgage and JRF's attempt to exercise the power of sale.

[37] Mr Hanson made no mention at all of item (c) in either his written or oral submissions on this point, so I will therefore proceed on the basis that it is no longer being put forward as a serious issue to be tried. But I would in any event have considered the point to be unsustainable, given the clear evidence of JRF's status as the ultimate successor in title to the Mortgage which Mr Nunes originally gave to the Bank.

[38] As regards Mrs Minott-Phillips' other submissions, Mr Hanson strongly supported the judge's conclusion that there was a serious issue to be tried as regards items (a), (b) and (d). In relation to item (d), that is, the applicability of the LAA in the mortgage context, Mr Hanson pointedly observed that **Dagor v MSB** was a decision at first instance.

[39] On item (a), it seems to me that Mr Nunes will have some difficulty at trial relying successfully on the contents of an oral agreement which is in no way reflected in the formal documentation subsequently subscribed to by the parties. The well-known parol

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[40] [2015] JMSC Civ 242

evidence rule is that "evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument"[41]. And, in **Goss v Chilcott**[42], one of the cases to which Mr Hanson referred us, the Privy Council took it as given that an oral agreement to lend money would have been superseded by the contract subsequently embodied in the mortgage instrument.

[40] However, Mr Hanson made a further point with reference to clause 6 of the Loan Agreement. As will be recalled, JRF relied on that clause to show that, the principal debtor not having satisfied the demand for repayment, the Bank was entitled at its option to convert the United States dollar loan to a Jamaican dollar loan. Characterising clause 6 as a term which was clearly disadvantageous to Mr Nunes as a guarantor of the principal debt, Mr Hanson submitted that it ought to have been brought to Mr Nunes' attention when he signed the guarantee.

[41] For this point, Mr Hanson referred us to **Levett and others v Barclays Bank plc**[43]. In that case, after examining a number of authorities on the point, Michael Burton QC[44] summarised the legal position as follows[45]:

> "… the creditor is under a duty to the surety to disclose to the surety contractual arrangements made between the principal debtor and the creditor, which make the terms of the principal contract something materially different in a potentially

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[41] Treitel's Law of Contract, 12th edn, by Edwin Peel, para. 6-012
[42] [1996] 3 WLR 180, 187
[43] [1995] 2 All ER 615
[44] Sitting as a Deputy Judge of the High Court
[45] At page 630

> disadvantageous respect from those which the surety might naturally expect."

[42] Mr Hanson's submission on the point obviously proceeds on the basis that the words 'surety' and 'guarantee' are synonymous and it may be that, at any rate for present purposes, he is correct in this. But I would observe in passing that a distinction is sometimes made between the two terms, as one leading authority on modern legal usage explains it[46]:

> "In the broad sense, a *guarantor* is a type of surety … but some authorities distinguish between the two terms, giving *surety* a narrow sense: a *surety* joins in the same promise as the principal and becomes primarily liable, while a *guarantor* makes a separate promise and is only secondarily liable – i.e. liable only if the principal defaults."

[43] However this may be, and I express no view on whether the distinction can have any significance in the context of this case, I do not think it would be right for this court to second-guess the judge's view that the whole question of the Bank's right to convert the loan to a Jamaican dollar loan gave rise to a serious question to be determined at a trial.

[44] Nor, in my view, would it be right do so in relation to item (b), which is whether the payments made by Mr Nunes to the Bank/NCB up to 2000 had discharged the debt. It seems to me that JRF's response to this contention, which was that some of the

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[46] Bryan Garner, A Dictionary of Modern Legal Usage, 2nd edn, page 859

payments made by Mr Nunes related to other debts guaranteed by him, plainly gave rise to an issue of fact which also required to be resolved at trial.

[45] Item (d), which is the limitation point, is more problematic. Section 7 of the LAA allows "any person entitled to or claiming under any mortgage of land to make an entry, or bring an action or suit to recover such land, at any time within twelve years next after the last payment of any part of the principal money or interest secured by such mortgage …". Section 30 provides that, upon the expiration of the period limited to any person for making an entry or bringing any action or suit, "the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished". And section 33 bars any "action or suit or other proceeding … to recover any sum of money secured by any mortgage, judgment or lien … but within twelve years next after a present right to receive the same shall have accrued …"

[46] In **Franz Fletcher v David and Petagaye Morgan and Jamaica Redevelopment Foundation**[47] ('**Franz Fletcher**'), on an application in chambers for an injunction pending appeal, Phillips JA took the view[48] that the question whether, in the light of these provisions, the mortgagee's exercise of the statutory power of sale was

[47] [2010] JMCA App 31
[48] At para. [38]

affected by the LAA was among the serious questions to be considered in the substantive appeal. The application for an injunction pending appeal was therefore granted.[49]

[47] However, in **Dagor v MSB**, a case at first instance, Batts J held that the LAA does not apply to the exercise by a mortgagee of the statutory power of sale. Having examined the relevant sections of the LAA, Batts J considered that, while actions to recover possession of the mortgaged land by the mortgagee or a purchaser from the mortgagee might appropriately be met "with any applicable limitation defence", there was no time limit on the exercise by the mortgagee of the statutory power of sale given by section 106 of the RTA. Accordingly, Batts J's conclusion was that[50], "the Limitation of Actions Act does not apply to the exercise of the mortgagee's statutory power of sale".

[48] I find Batts J's view highly persuasive. Sections 7, 30 and 33 of the LAA all speak to the barring of the right to make entry or file suit after the expiration of the relevant limitation periods. However, section 106 of the RTA empowers the mortgagee to sell the mortgaged land, upon default in payment or performance or observance of covenants for a period of one month, without more. In other words, the exercise of the power of sale does not require any prior entry or commencement of court action by the mortgagee. Further, and in any event, as Mrs Minott-Phillips pointed out, the relevant limitation period had not elapsed in this case.

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[49] As it turned out, the substantive appeal was never heard, as the appeal was withdrawn, with the consent of the respondent, by notice of withdrawal of appeal filed on 1 September 2014.
[50] At para. [14]

[49] On the other hand, I cannot lose sight of Phillips JA's view in **Franz Fletcher**, albeit preliminary in the circumstances, that the applicability of the LAA to the mortgagee's exercise of the power of sale was a serious question to be considered by this court. As far as I am aware, Batts J's judgment in **Dagor v MSB** notwithstanding, this court is yet to consider the issue. On this basis, therefore, I am not inclined to go against the judge's view that the limitation point was among the serious issues to be tried in this case. In so far as **Dagor v MSB** is concerned, I will therefore content myself with saying that, whenever the matter does come up for consideration in this court, I would expect Batts J's notable judgment to demand careful attention.

[50] All things considered, therefore, and not by a long way, I would decline to interfere with the judge's decision that Mr Nunes had done enough to demonstrate that there were serious issues to be tried.

Was the judge's conclusion that damages would be an adequate remedy correct?

[51] I will consider this issue under two heads. First, section 106 of the RTA incorporates a bar to the grant of an interim injunction to restrain a mortgagee's exercise of the power of sale which is given by the section. And second, whether, leaving section 106 on one side, the judge was right to consider that this case did not fall within the usual category of case in which the courts have, exceptionally, granted an injunction to restrain a mortgagee's exercise of the power of sale.

The section 106 point

[52] Section 106 is, I think, best understood in its immediate context. So I will first mention sections 103-105 of the RTA. Sections 103 and 104 provide as follows:

> "103. The proprietor of any land under the operation of this Act may mortgage the same by signing a mortgage thereof in the form in the Eighth Schedule, and may charge the same with the payment of an annuity by signing a charge thereof in the form in the Ninth Schedule.
>
> 104. The proprietor of any land under the operation of this Act may mortgage the same to any building society by signing a mortgage thereof in the form in the Tenth Schedule."

[53] These sections describe the manner and form in which the proprietor of registered land may mortgage or charge the land with the payment of an annuity. Save as background, nothing at all turns on them for present purposes.

[54] Section 105 sets out the effect of registering a mortgage or charge under the RTA:

> "105. A mortgage and charge under this Act shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged or charged; and in case default be made in payment of the principal sum, interest or annuity secured, or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage or charge, or hereby declared to be implied in any mortgage, and such default to be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee or annuitant, or his transferees, may give to the mortgagor or grantor or his transferees notice in writing to pay the money owing on such mortgage or charge, or to perform and observe the aforesaid covenants (as the case may be) by giving such notice to him or them, or by leaving the same on some conspicuous place

> on the mortgaged or charged land, or by sending the same through the post office by a registered letter directed to the then proprietor of the land at his address appearing in the Register Book."

[55] It is against this background that section 106 gives the mortgagee of mortgaged property a power of sale over the property in the event of default by the mortgagor in payment, or in performance or observance of covenants under the mortgage, for a period of one month or such other period as may be fixed by the mortgage.[51] The full text of the section is as follows:

> "106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the

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[51] For present purposes, nothing turns on the decision of the Privy Council in **Jobson v Capital and Credit Merchant Bank and Others** [2007] UKPC 8, in which it was held that it was open to the parties to modify the provisions of sections 105 and 106 by dispensing with the need for notice and by providing that simple non-payment for 30 days or any breach of covenant was to be an event of default which made the power of sale exercisable.

> mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; **and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power**." (Emphasis mine)

[56] In addition to giving the mortgagee the power of selling the mortgaged property in the stated circumstances, section 106 expressly relieves a purchaser from the mortgagee of the necessity to enquire into the antecedents of the exercise of the power of sale. One effect of this is that the purchaser from the mortgagee in these circumstances cannot be fixed with constructive notice of anything amiss in the run-up to the exercise of the power of sale by the mortgagee. Which is not to say, however, that the mortgagee is himself relieved from liability to the mortgagor in the case of an unauthorised or improper or irregular exercise of the power of sale. But in any such case, as can be seen from the highlighted portion of section 106, any person suffering loss as a result of such an exercise of the power of sale "shall have his remedy only in damages against the person exercising the power". In other words, the injured mortgagor's recourse against the mortgagee will be limited to a claim in damages only.

[57] In this case, Mr Bishop pointed out, no contract of sale has yet been entered into between JRF and any purchaser pursuant to the statutory power of sale. Accordingly, he submitted that the protection given by section 106 to the purchaser under such a contract has not yet been triggered and that there was therefore no reason for Mr Nunes to be limited to his remedy in damages only. On this basis, he submitted that **Paul v VMBS** was clearly distinguishable since, in that case, the power of sale had already been invoked

and a contract for sale entered into in favour of the purchaser from the mortgagee. In this case, therefore, the judge ought to have approached the matter on the basis of the common law principle that damages are not normally an adequate remedy in cases in which the right to land is in issue, and to have considered whether the grant of the interim injunction in this case was justified in accordance with the established principles governing the grant of such injunctions.

[58] For her part, Mrs Minott-Phillips submitted that the judge's application of section 106 was correct in the circumstances of this case and that his finding that, if Mr Nunes were to succeed in his claim against JRF, damages would be an adequate remedy ought not to be disturbed. In this regard, based on the portion of section 106 that I have highlighted above, Mrs Minott-Phillips submitted that "damages must be an adequate remedy because section 106 says it is the only remedy".

[59] Before considering **Paul v VMBS**, I will mention **Lloyd Sheckleford v Mount Atlas Estate Ltd**[52] ('**Sheckleford**') and **Global Trust Limited and Donald Glanville v Jamaica Redevelopment Foundation Inc and Dennis Joslin Jamaica Inc**[53] ('**Global Trust**'), both earlier decisions of this court in which the effect of section 106 was also canvassed.

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[52] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 148/2000, judgment delivered 20 December 2001

[53] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 41/2004, judgment delivered 27 June 2007

[60] In **Sheckleford**, in exercise of a power of sale under a mortgage of registered land, the mortgagee entered into an agreement for sale of the property to a bona fide purchaser. However, the actual transfer of the property to the purchaser had not yet been registered. The mortgagor sought an injunction to prevent the completion of the sale and the question was whether section 106 precluded the court from granting an injunction in these circumstances. The judge at first instance held that it did not, but this court held that it did. Delivering the leading judgment, Forte P conducted a detailed review of relevant English and Australian authority, before stating his conclusion as follows[54]:

> "I am of the view … that in our jurisdiction by virtue of section 106 of the [RTA], the purchaser is protected when he enters into contract with the mortgagee and consequently the only remedy available to the mortgagor is in damages.
>
> In any event in my judgment, on a simple reading of section 106, it is clear and unambiguous that the legislature intended to give the purchaser the protection as soon as the mortgagee, in the exercise of his power of sale, enters into a contract with a bona fide purchaser for the sale of the mortgaged property."

[61] In brief concurring judgments, P Harrison JA (as he then was) and Walker JA both agreed. Harrison JA indicated[55] that the protection afforded to the purchaser from the mortgagee by section 106 "exists from the time when the contract is entered into"; while

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[54] At page 14
[55] At page 19

Walker JA observed[56] that "[t]he provisions of section 106 … effectively oust the jurisdiction of the Court to grant injunctive relief in a situation such as this".

[62] This view of the reach of section 106 was emphatically confirmed in **Global Trust**. In that case, an injunction was sought to restrain the mortgagee's exercise of the power of sale after statutory notices were sent out, but before any sale under the power had been entered into. Despite her acceptance that the mortgagor had shown that there was a serious issue to be tried, the judge in the court nevertheless took the view that damages would therefore be an adequate remedy and that no injunction should therefore be granted. Among other things, the judge below considered that section 106 applied to the case.

[63] On appeal, this court was divided as to whether to disturb the decision to refuse the injunction. But, in the end, the majority[57] concluded that the judge's conclusion that damages would be an adequate remedy should not be disturbed. However, the court was unanimous in saying that the judge below had erred in thinking that section 106 had any applicability on the facts of the case. Panton P, who dissented in the result, said this[58]:

> "That section is of no relevance to the instant situation as it is aimed at giving protection to a *bone fide* [sic] purchaser, where there has been a sale by a mortgagee."

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[56] At page 21
[57] Cooke and Harris JJA, Panton P dissenting.
[58] At page 3

[64] After quoting the last few lines of section 106, Cooke JA was somewhat more expansive on the point[59]:

> "This part concerns the remedy of a mortgagor when the mortgagee embarked on an 'unauthorised or improper or irregular exercise' of the power of sale. Accordingly the excerpted portion (supra) is not relevant as to whether or not an injunction should be granted to restrain the mortgagee from exercising the power of sale. It is relevant after the power of sale has been exercised."

[65] And finally, Harris JA, after considering the decision in **Sheckleford**, explained the true basis of the relevant part of section 106[60]:

> "It is clear that the provisions of section 106 seek ultimately to protect a bona fide purchaser for value. Where a mortgagee enters into a contract of sale with the purchaser, wrongly exercising his powers of sale, a right to damages is reserved to the purchaser against the mortgagee. The statutory provision would therefore, be inapplicable in the circumstances of the present case."

[66] And so I come to **Paul v VMBS**. In that case, the mortgagors having defaulted, the mortgagee sold the property to a third party purchaser at a public auction and both parties executed the transfer document to have the property transferred to the purchaser. One of the mortgagors filed an action against the mortgagee for the sale to be set aside and, pending the outcome of the action, sought an injunction restraining the mortgagee

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[59] At page 14
[60] At page 25

from completing the sale to the purchaser. The mortgagee resisted the application for an injunction on the basis that the contract of sale made at the auction had deprived the mortgagors of any right to redeem the mortgage or restrain the sale.

[67] In his analysis of the case, Brooks J first referred to what he described as "a well established line of reasoning that, where land is concerned, it is presumed that damages are not an adequate remedy, and no enquiry is ever made in that regard"[61]. Brooks J went on to explain the rationale for this presumption:

> "The reason behind this principle is that each parcel of land is said to be 'unique' and have 'a peculiar and special value'. (See p.32 of Specific Performance 2nd Ed. by Gareth Jones and William Goodhart) As a result of that reasoning, a money payment could never secure a parcel with all the attributes of that which was originally lost."

[68] However, this principle notwithstanding, Brooks J felt it necessary to consider section 106, stating that, if applicable, this provision "would override the usual common law considerations". Having done so, and applying the decision in **Sheckleford**, Brooks J refused to grant the interim injunction. His conclusion was that, on the basis of the clear provision in section 106 that "any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person

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[61] At page 5

exercising the power", no injunction could be granted to restrain completion of the transfer to the purchaser from the mortgagee.

[69] Given the facts of **Paul v VMBS**, I entirely agree with Brooks J's conclusion, which was entirely consistent with the decision of this court in **Sheckleford**. However, I do have a small – though not insignificant - reservation with regard to his characterisation of the effect of section 106 on the case, which was that "[d]amages being deemed an adequate remedy, [the mortgagor] is not entitled to have the [mortgagee] restrained from completing the sale to the purchaser"[62]. In my respectful view, the relevant portion of section 106 is not a deeming provision: far from deeming damages to be an adequate provision in a case in which it applies, all that the section says is that the disgruntled mortgagor's remedy will lie in damages only.

[70] Accordingly, section 106 will not necessarily foreclose the grant of an interim injunction in every case in which there is a dispute between mortgagor and mortgagee. To the contrary, as the language of the section itself and both **Sheckleford** and **Global Trust** make clear, the limitation in section 106 only applies to cases in which the mortgagee has in fact exercised the power of sale by entering into an agreement for sale of the mortgaged property to a bona fide purchaser.

[71] The distinction is important in a case such as this. For, while the property was more than once advertised for sale, there was no evidence that, at the time of his

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[62] At page 8

application for an interim injunction, JRF had in fact exercised the power of sale by entering into an agreement to sell the property. On this basis, this case is therefore readily distinguishable on its facts from **Sheckleford** and **Paul v VMBS** and more closely aligned with **Global Trust**.

[72] In his application for an interim injunction, Mr Nunes sought an order preventing what he alleged to be an unauthorised or improper or irregular exercise of the power of sale. In these circumstances, the power not yet having been exercised, there was in my view therefore nothing in the language of section 106 to prevent the court (subject always to the "serious issue to be tried" threshold) from considering the application as a matter of discretion on the basis that, if JRF's exercise of the power of sale was not restrained, damages would not have been an adequate remedy. Indeed, it seems to me that, in an appropriate case, the grant of an interim injunction to preserve the status quo pending trial may well be indicated precisely because, once the power of sale is exercised, section 106 will exclude the mortgagor from any other remedy than damages.

[73] I therefore think that, on the particular facts of this case, the judge was wrong to treat section 106 as an absolute bar to the grant of the interim injunction. What he was therefore required to do, in my respectful view, was to give unfettered consideration to the question whether damages would be an adequate remedy for Mr Nunes, bearing in mind the common law presumption that damages are not usually regarded as an adequate remedy in cases involving land.

Was the judge nonetheless justified in thinking that this was not a fit case for the grant of an interim injunction to restrain a mortgagee's exercise of the power of sale?

[74] But, of course, the outcome of the section 106 issue is not necessarily conclusive of the question whether the judge ought to have granted an interim injunction in this case. For, as the judge recognised (section 106 apart), an application by a mortgagor for an injunction restraining the mortgagee from exercising the power of sale in cases of default in payment has come to be governed by special rules. I think it is fair to say that those rules reflect the court's general reluctance to deprive a mortgagee of the benefit of his security, without providing him with an appropriate safeguard, save in exceptional circumstances.[63]

[75] On this question, Mr Nunes' ground of appeal (d) takes particular issue with the judge's conclusion[64] that "the common thread running through … cases such as **Franz Fletcher, Brady v Jamaica Redevelopment Foundation** … and **Marbella**, appears to me to be that in those cases the validity of the Mortgage was being challenged on the ground of fraud/forgery".

[76] Mr Bishop challenged the judge's conclusion on two bases. Firstly, that the cases referred to by the judge did not support his categorisation of the cases in which injunctions had been granted to restrain the exercise of the power of sale as cases

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[63] See generally **SSI (Cayman) Ltd and Others v International Marbella Club SA** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 57/1986, judgment delivered 6 February 1987 and **Mosquito Cove Ltd v Mutual Security Bank Ltd and Others** [2010] JMCA Civ 32.
[64] At para. [29]

involving "fraud/forgery". Secondly, that this was, in any event, a case in which the validity of the Mortgage was being challenged, since it had arguably been rendered unenforceable against Mr Nunes as a result of prior breaches on the part of the Bank, such as, for instance, failing to make the principal debtor's loan obligation known to him.

[77] Mrs Minott-Phillips submitted that, for the reasons which the judge gave, the decision to refuse the application for the interim injunction was correct and ought not to be disturbed. And further, "[e]ven if the court is of the view that there is a serious issue to be tried, and that damages is [sic] not an adequate remedy, the balance of convenience favours the refusal of the imposition of judicial restraint on the exercise by a registered mortgagee of his statutory power of sale"[65]. Mrs Minott-Phillips also submitted that, in any event, the evidence before the judge would have created doubts as to Mr Nunes' ability to satisfy the undertaking in damages proffered by him in his affidavit in support of the application for the interim injunction[66].

[78] I will first consider briefly the cases specifically referred to by the judge, **SSI (Cayman) Ltd and Others v International Marbella Club SA**[67] ('**Marbella**'),

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[65] Respondent's skeleton arguments opposing the appeal and in support of its counter-notice of appeal, filed on 20 June 2017, para. 16

[66] Affidavit of Aspinal Wayne Nunes sworn to on 22 May 2015, para. 17

[67] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal, No 57/1986, judgment delivered 6 February 1987

Rupert Brady v Jamaica Redevelopment Foundation Inc and Others[68] ('**Rupert Brady**') and **Franz Fletcher**.

[79] In the well-known **Marbella** case, it was held that, although the court has the power to restrain a mortgagee from exercising his powers of sale, the only basis on which it will ordinarily do so is upon payment into court by the mortgagor of the amount claimed under the mortgage by the mortgagee. Accordingly, an unconditional interlocutory injunction granted in the court below in that case was varied to impose a condition that the mortgagee pay into court within a specified time the substantial amount claimed by the mortgagee.

[80] **Marbella** was distinguished by this court in **Rupert Brady**, on the basis of the mortgagee's allegation that he had not signed the relevant mortgage documents, nor had he given authority to anyone to pledge his property as security, and that the alleged mortgage was therefore null and void. In the result, the court allowed an appeal from that part of the decision at first instance in which the court had ordered, as a condition of the grant of an interlocutory injunction to restrain the exercise of the power of sale, the payment into court of the amount claimed by the mortgagee. In his judgment in that case, Cooke JA explained the court's decision in this way[69]:

> "The correct distinction is between cases where the issue is in respect of the amount of money owed under a valid mortgage

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[68] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 29/2007, judgment delivered 12 June 2008

[69] At para. 7

> and cases where the validity of the mortgage is challenged … In the instant case the appellant is challenging the validity of the mortgage document as it pertains to him."

[81] I have already mentioned **Franz Fletcher**. In that case, the applicant for an injunction pending appeal was the executor of the estate of the original mortgagor. He made no allegation of fraud, forgery or anything of the like in relation to the creation of the mortgages. He nevertheless challenged the enforceability of the power of sale on the basis, among others, that its exercise was statute-barred in the circumstances of the case. I have already commented on Philips JA's acceptance of the submission that that challenge, among other things, gave rise to a serious issue to be considered in the appeal to this court. But Phillips JA next went on to treat the claim that the exercise of the power of sale was statute-barred as a challenge to the validity of the mortgage itself, thus bringing the case within the **Rupert Brady** formulation. This is how Phillips JA put it[70]:

> "In the instant case the validity of the mortgages are challenged and indeed the learned trial judge has indicated a prima facie view that they are statute barred but were revived by acknowledgment which is vigorously challenged also."

[82] Although **Rupert Brady** was indeed a case in which the mortgagor alleged that the mortgage deed bearing his signature was a forgery, no such allegation was made in either **Marbella** or **Franz Fletcher**. To that extent, therefore, Mr Bishop is clearly right

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[70] At para. [43]

in saying that the cases referred to by the judge do not support the view that the "common thread" running through those cases was a challenge to the validity of the mortgage on the ground of fraud or forgery. So, to that extent only, I think it can be said that the judge's summary of the basis upon which injunctions were granted in those cases was not entirely accurate.

[83] However, it seems to me that the essential – and perfectly accurate - point which the judge was making was that the grant of an injunction to restrain the mortgagee's exercise of the power of sale is highly exceptional; accordingly, it can usually only be justified without the requirement of a payment into court of the amount claimed by the mortgagee by the existence of special circumstances, of which fraud or forgery are established examples. The point is borne out by the decision in **Leicester Green v Jamaica Redevelopment Foundation Inc**[71], for instance, in which Harris JA observed[72] that "[i]t appears … that the court will also grant an injunction without ordering the payment into court of the money said to be due and owing in circumstances where fraud is raised as it had done in **Rupert Brady**". And further, in **Mosquito Cove Ltd v Mutual Security Bank Ltd and Others**[73] ('**Mosquito Cove**'), I ventured to suggest[74], after considering **Marbella**, **Rupert Brady** and other cases, that –

> "… the court will only sanction departures from the general rule in highly exceptional cases, based on very special facts,

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[71] [2010] JMCA Civ 21
[72] At para. [38]
[73] [2010] JMCA Civ 32
[74] At para. [64]

> such as the existence of a fiduciary relationship between mortgagor and mortgagee or, perhaps, in cases of forgery."

[84] On its facts, **Franz Fletcher** appears at first blush to be something of an outlier in this regard. But I think it is clear that what Phillips JA found it possible to do in that case was to characterise the applicant's resistance to the mortgagee's exercise of the power of sale on the limitation ground as a challenge to "the validity of the mortgage document as it pertained to him", within the meaning of Cooke JA's dictum in **Rupert Brady**. In other words, Phillips JA treated **Franz Fletcher** as a case falling within the **Rupert Brady** exception.

[85] So the question is whether, in similar vein, Mr Nunes' challenge to JRF's exercise of the power of sale can be said to be a challenge to the validity of the Mortgage. I regret that, despite the contrary – albeit preliminary - view expressed by Phillips JA in **Franz Fletcher**, I do not think it can. It is clear that there was absolutely no allegation of fraud or forgery in relation to the Mortgage itself in this case. This distinguishes the case from **Rupert Brady**, in which, as Panton P observed[75], "[t]he challenge [was] based on the [mortgagor's] undisputed evidence that he did not sign the relevant mortgage documents …". The question of the validity of the mortgage was therefore directly raised in that case.

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[75] At para. 4

[86] In this case, as the judge himself stated[76], "[Mr Nunes] is not challenging the validity of the Loan Agreement the Guarantee or the Mortgage but he is asserting that the debt has been extinguished and he is claiming the protection of the Limitation of Actions Act". I have no doubt that, in so saying, the judge was right to distinguish between a challenge to the enforceability of the Mortgage on the basis of the applicability of the LAA and a challenge to the validity of the Mortgage itself in the **Rupert Brady** sense. In my respectful view, it would have been impossible to do otherwise in this case without ignoring the known facts.

[87] It seems to me that a mortgage which is perfectly valid in the formal sense may yet prove to be unenforceable by reason of the operation of law, such as where the LAA applies, or some other extraneous circumstance. I therefore think, naturally with the greatest of respect, that by treating the challenge to the enforceability of the mortgages in **Franz Fletcher** on the basis of the LAA as a challenge to their validity, Phillips JA conflated these two distinctly different ideas. As the judge clearly recognised in the passage from his judgment, which I have quoted in the foregoing paragraph, such an approach ran counter to the very case which Mr Nunes himself put forward in this case.

[88] I should however make it clear that Phillips JA's views in **Franz Fletcher** were purely preliminary, based on the arguments put before her on the application for an injunction pending appeal. As a pre-condition to the grant of such an injunction, the court

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[76] At para. [30]

was therefore only required to satisfy itself that there was an arguable case for consideration on appeal. In these circumstances, it may be, as Mrs Minott-Phillips quite properly pointed out, that the matter was not as fully argued before Phillips JA as it might have been on a full hearing of the appeal.

[89] I accordingly think that the judge's conclusion that the facts of this case did not meet the exceptional criteria required to be established for the grant of an unconditional interim injunction cannot be faulted.

Resolving the case

[90] All other things being equal, in considering whether or not to grant an interim injunction, "[t]he basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other"[77].

[91] In this case, despite thinking that there was a serious issue to be tried, the judge declined to grant the interim injunction on the ground that damages would be an adequate remedy for Mr Nunes if he succeeded in the litigation. It is clear that the judge's principal reason for this conclusion was his conviction that section 106 of the RTA, in effect, deemed damages to be an adequate remedy in a challenge by mortgagor against mortgagee. For the reasons which I have attempted to state, I think that the judge erred in thinking that section 106 applied to the circumstances of this case.

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[77] Per Lord Hoffmann, in **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16, at para. 17

[92] Putting section 106 aside therefore, the judge was obliged to consider whether damages would be an adequate remedy. Had he done so, it seems to me to be quite possible that, bearing in mind, among other things, the well-established presumption relating to the inadequacy of damages in cases involving land, the judge might well have considered granting an interim injunction to preserve the status quo pending trial. As has been seen, Mr Nunes' attempt to bring the case within the exceptional category of cases in which this court will grant an unconditional injunction to restrain a mortgagee's exercise of the statutory power of sale did not succeed. But, in such circumstances, it was clearly open to the judge to grant application for an interim injunction on the standard **Marbella** basis, that is, on condition that Mr Nunes pay the monies claimed by JRF into court.

[93] I therefore think that, taking into account (i) this court's power to "give any judgment or make any order which, in its opinion, ought to have been made by the court below"[78]; and (ii) all the circumstances of the case, this court should now make that order.

[94] When the possibility that the court might grant of an interim injunction upon condition that there be a payment into court was put to Mr Hanson during his reply, he submitted that, if any such payment were to be ordered, it should be limited to the extent of Mr Nunes' liability under the Mortgage. For this submission, Mr Hanson relied on

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[78] Court of Appeal Rules, 2002, rule 2.15(b)(a)

Mosquito Cove, in which it was conceded by counsel for the mortgagee[79] that the judge in the court below in that case had erred in ordering payments into court in excess of the limits of the mortgagors' liability under the respective mortgages in issue.

[95] In this regard, there was some debate in argument as to whether the limit of Mr Nunes' liability under Mortgage, when read in conjunction with the Guarantee, was capped at US$100,000.00, or included interest in addition to that. However, for present purposes, I do not think it is necessary to resolve this question and I would therefore propose that the payment into court required of Mr Nunes as a condition of the grant of the interim injunction which he seeks should be US$100,000.00, which is the limit of the mortgagor's liability stated in the Mortgage.

Disposal of the appeal

[96] I therefore propose that the court should make the following order:

1. Appeal allowed and the order made by Laing J on 31 July 2015 is set aside.

2. Counter-notice of appeal dismissed.

3. Upon condition that the appellant pay US$100,000.00 into court within 60 days of the date of this judgment, interim injunction granted

[79] See para. [77]

to restrain the respondent, by itself or its servants, employees, agents, or otherwise howsoever from -

(i) taking any steps whatsoever to sell all those parcels of land registered at Volume 1482 Folio 188 and Volume 1480 Folio 858 of the Register Book of Titles ('the relevant parcels of land') pending the determination of Claim No 2015 CD 00059; and

(ii) entering upon the relevant parcels of land or taking any steps to dispossess the appellant of the relevant parcels of land pending the determination of Claim No 2015 CD 00059.

4. Costs in the court below to be costs in the claim.

5. The parties are to file written submissions on the costs of the appeal within 21 days of the date of this order, whereupon the court will give its decision on the costs of the appeal within a further 21 days of the date of filing of the last of the parties' submissions.

Postscript

[97] This judgment has been too long delayed. While the reasons for some of these delays are well known, they in no way lessen the inconvenience to all concerned. On

behalf of the court, I therefore wish to tender an apology to counsel and to the parties for the delay in the delivery of this judgment.

F WILLIAMS JA

[98] I have had the advantage of reading in draft the judgment of Morrison P. I especially endorse the very helpful discussion of and guidance given on the application of section 106 of the Registration of Titles Act (RTA). This guidance should (it is to be hoped) have the salutary effect of curing any mistaken notion of the circumstances in which the section might apply.

P WILLIAMS JA

[99] I too have read the judgment of the learned President. I agree with his reasoning and conclusion and have nothing further to add.

MORRISON P

ORDER

1. Appeal allowed and the order made by Laing J on 31 July 2015 is set aside.

2. Counter-notice of appeal dismissed.

3. Upon condition that the appellant pay US$100,000.00 into court within 60 days of the date of this judgment, interim injunction granted to restrain the respondent, by itself or its servants, employees, agents, or otherwise howsoever from -

    (i) taking any steps whatsoever to sell all those parcels of land registered at Volume 1482 Folio 188 and Volume 1480 Folio 858 of the Register Book of Titles ('the relevant parcels of land') pending the determination of Claim No 2015 CD 00059; and

    (ii) entering upon the relevant parcels of land or taking any steps to dispossess the appellant of the relevant parcels of land pending the determination of Claim No 2015 CD 00059.

4. Costs in the court below to be costs in the claim.

5. The parties are to file written submissions on the costs of the appeal within 21 days of the date of this order, whereupon the court will give its decision on the costs of the appeal within a further 21 days of the date of filing of the last of the parties' submissions.