IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016CD00166

BETWEEN	**ALEXANDER HOUSE LIMITED**	**CLAIMANT**
AND	**RELIANCE GROUP OF COMPANIES**	**DEFENDANT**

Interlocutory Injunction – Mortgage - Power of sale- Whether contract illegal - Whether condition for payment into court ought to be imposed.

Mr Abe Dabdoub and Ms Karen Dabdoub instructed by Dabdoub & Dabdoub for the Claimant.

Mr Patrick Foster QC instructed by Mr Donovan Jackson of Nunes Scholefield Deleon & Co for the Defendant.

IN CHAMBERS

Heard: 20th, 25th, 29th July 2016 and 2nd August 2016.

Cor: Batts J

[1] On the 20th July 2016 having heard submissions I adjourned to the 25th July 2016 in order to consider my decision. On the 25th I brought to the attention of counsel the very recently decided case of ***Patel v Mirza [2016] UK SC42*** (unreported judgment delivered on the 20th July 2016).I adjourned for counsel to make submissions on that case. On the 29th July 2016 further submissions were heard. I again adjourned to consider my decision which I gave on the 2nd August

2016. I promised then to put my reasons in writing at a later date. This judgment fulfills that promise.

[2] This is the inter partes hearing of a "Without Notice of application for Court Orders" filed on the 16th June 2016. The Claimant by that application seeks to restrain the Defendant from exercising powers of sale contained in a mortgage. The Defendant is resisting the application.

[3] At the ex parte hearing on the 16th June 2016 an injunctive order was made conditional on a payment being made into court. That condition was not met. There is therefore no interim order in place. The Claimant, having changed attorneys and amended its claim now urges the court to restrain the mortgagee's exercise of its powers of sale and to do so unconditionally.

[4] Each party filed affidavits and written submissions. The latter were supplemented by oral arguments which extended in total for the better part of two days. I am very grateful to both counsel for their assistance and the manner of the presentations. I will not, in the interest of time, restate the details of the respective arguments or the respective factual allegations. I intend to advert only to so much of each as I consider necessary to explain my decision.

[5] It is common ground that at this interlocutory stage I am not required to make any factual findings. The correct approach to applications for an Interlocutory Injunction is well known and well established, see ***American Cyanamid v Ethicon*** *[1975] 1 All ER 504* as restated and applied in ***National Commercial Bank v Olint*** *[2009] UKPC 16.* The parties are *ad idem* on the applicable approach.

[6] The major point of departure in this matter is whether or not, as a condition of the grant of this injunction, the money allegedly due ought to be paid into court. Mr. Foster QC submitted that there really was no arguable case and as such no injunction is to be granted. However, if the court found that there was an arguable case and that the justice of the case favoured the grant of an injunction,

then the principle established in ***SSI(Cayman) Limited v International Marbella Club*** *SA SCCA No. 57/1986 (Judgment delivered 6th February 1987)* "Marbella" ,ought to be applied. That is that, as a condition of the grant of an injunction, the sum due should be paid into court. To do otherwise, he submitted, would render nugatory the value of a mortgage and the power of sale contained therein. Mr. Dabdoub argues that not only is his client's case unanswerable but it falls within established exceptions to the Marbella rule.

[7] The material factual matrix in which these issues fall to be determined can be shortly stated.

a) The Claimant borrowed from the Defendant, and secured by way of mortgage, United States currency.

b) The Claimant failed to repay his loan as agreed or at all.

c) The Claimant was contacted in relation to its obligations but reneged on various promises to repay.

d) The Claimant was given notice of the Defendant's intention to exercise its powers of sale. The Claimant contends this notice was not "formal", but admits being made aware of that intention. [The full details of the correspondence leading up to the fixing of a date for the auction are contained in paragraphs 10 to 21 of the affidavit of Mr. Donovan Jackson filed on the 22nd June, 2016, and are not disputed].

e) The Defendant has on prior occasions given loans in United States dollars to other persons.

f) The Defendant is not a licensed dealer in foreign currency.

[8] Mr. Dabdoub's case is that the Defendant was acting in breach of Section 22A (2) of the Bank of Jamaica Act when it granted the loan to the Claimant. He

argues that the loan is illegal and the mortgage unenforceable and that therefore, the matter falls within a clear exception to Marbella and hence no condition for payment ought to be imposed.

[9] Mr. Foster Queen's Counsel, asserts that the evidence raises no arguable case of illegality and in any event does not fall within the clearly established exceptions. In any event, submitted Mr. Foster, the Claimant remains liable to give restitution of the funds he received and should therefore be ordered to bring the money to account.

[10] Having perused the evidence and the law on the matter I am satisfied that the Claimant has a case with a reasonable or real prospect of success. Section 22A of the Bank of Jamaica Act provides:

> ***"(1) Except as provided in subsections (2) and (3) any person may buy, sell, borrow or lend foreign currency or foreign currency instruments***
>
> ***(2) No person shall carry on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorised dealer.***
>
> ***(3) It shall be unlawful for any person to buy, sell, borrow or lend foreign currency or foreign currency instruments in a transaction involving the payment of Jamaican currency unless the payment is made to or as the case may be by an authorised dealer." [Emphasis added]"***

"Authorised dealer" is defined in Section 2 of the Act. It is common ground that the Defendant is not an authorised dealer. It is common ground also that the Defendant did lend money in foreign currency. The area of factual dispute for determination at trial is whether the Claimant was in the business of lending foreign currency.

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

other. I am however required to assess the relative strength of the case. In this regard the Claimant lead evidence, which is admitted, that the Defendant has also granted foreign currency loans to: C. Clarke, Foreign Options Ltd., J. Reitti, (Fonseca) Pauline Stewart, Ken Sales & Marketing Ltd. and to F. Rowe.

[12] The Defendant's response is to assert that its business is buying, holding, renting, and selling real estate. The Defendant denies that it carried on the business of lending foreign currency. The Defendant says in the affidavit filed by Mr. Gordon Tewani, on its behalf, that "I have infrequently assisted friends and associates with loans over the years." He describes these as isolated and infrequent transactions. He explains some of the alleged loans as follows:

a) C. Clarke is a good and personal friend who needed money urgently in 2015.

b) Foreign Options Ltd. was connected to one of his attorneys Mrs. Jennifer Messado and to whom he loaned moneys on her personal request.

c) J. Reitti was not a money lending transaction but an "advance" made in 2014 on the request of Mrs. Messado.

d) Fonseca and Pauline Stewart were personal friends who needed money following a robbery at their travel agency in 1996.

[13] The Defendant did not, on affidavit, address the alleged loan to Ken Sales or seek to explain it. That loan was evidenced by an unreported judgment of the Court of Appeal: ***Reliance Group of Companies v Ken Sales & Marketing and Clifton Graham*** *[2011] JMCA Civ. 12. In that case* an attempt was also made to prevent the exercise of powers of sale in a mortgage. The allegation of illegality by way of breach of the Bank of Jamaica Act (S. 22A) was similarly made. In the leading judgment of the Court Hibbert JA (Ag) said,

> ***"In this case there is evidence that two loans were made to Ken Sales one in October 1999 and the other in December 1999. There is no evidence of any other loans or even offer of loans to anyone else. It does not require a court to resolve conflicts of evidence as to facts or to decide difficult questions of law to conclude that on the evidence available to the court it could not be held that Reliance was carrying on the business of lending foreign currency. This could not, therefore, be deemed to be a serious question to be tried in determining whether or not a permanent injunction should be granted."***

[14] At this time and on the evidence before me there is not evidence of two but rather evidence of six loans in foreign currency. Furthermore, in relation to the Stuart loan, the Claimant filed an affidavit of Fonseca Jack Stuart on the 20th July 2016. In that affidavit Mr. Stuart denied he was a friend of Mr. Gordon Tewani. He explained the circumstances under which he came to borrow the money and said,

> *'That at all material times we were of the view that Mr. Tewani was in fact involved in the lending of foreign currency..."*

[15] I find that on the evidence before me there is a serious question to be tried as to whether or not the Defendant was in the business of lending foreign currency and therefore in breach of Section 22A of the Bank of Jamaica Act.

[16] Mr. Foster's further submission is that even if that is so the consequence is not an unenforceable loan. There is he said, nothing in the Act making either, the loan or the mortgage securing the loan, illegal. Mr. Dabdoub disagrees. The Act he submitted prohibits anyone, other than an authorised dealer from engaging in the business of inter alia lending foreign exchange. If the Defendant engaged in such a business he would be doing an illegal act. This situation is to be distinguished from that in ***Smith's Trucking Service Ltd. v. Estate Selvyn Seymour Smith and JRF*** *[2012] JMCA Civ 63* **(**unreported judgment 20th December 2012). There the issue concerned breaches of the Customs Act and mortgages granted for the purpose of purchasing articles which were imported in breach of the Act. The decision of the learned judge who refused an injunction

was upheld by the Court of Appeal. That learned judge, Brooks J., decided that the court was less likely to deem unenforceable, a contract which is not expressly forbidden and if the relevant statute is mainly aimed at protecting the revenue as opposed to protecting the public. The Court of Appeal, in the leading judgment of Phillips, JA stated at paragraph 62 of her judgment:

> ***".....In the instant case, in my opinion, the prohibition in the Act was in respect of the protection of the revenue and not in respect of morality or the public interest. It is also true, as stated earlier, that unlike the Weekes v Gibbons case, which related to whether the particular statue expressly or impliedly nullified unregistered building contracts, or expressly or impliedly prohibited the performance or enforcement of such contracts, there is no provision for the subsequent payment of the customs duties in the Act, but it is still not at all clear how any absolute prohibition, if that is what it is in the Act, could be applicable in respect of the equipment leases and the consolidated loan which subsequently incorporated it, I find that the prohibition does not extend to them."***

The court's conclusion is not surprising. Customs Duty payable is two-steps removed from a loan to finance the purchase of uncustomed goods or even to import goods upon which duty was not paid. There was no evidence in that case that the purpose of the loan was to import uncustomed goods or to treat knowingly with breaches of the Custom Duty Act.

[17] In the matter at bar it is the business of lending foreign exchange which is prohibited. The transaction in question was a loan of foreign exchange. If a court finds that the lender was in the business of lending foreign exchange contrary to the Act, then it is certainly arguable that the loan in the course of that business would be illegal. The cases relied on at paragraphs 53 to 57 in the judgment of Justice of Appeal Phillips support that position, See for example Per Megary J in **Spector v Ageda** [1971] 3 WLR 498 at 510 (c-d) (as cited by Phillips JA) –

> ***"It seems to me that where as here, the subsequent transaction is entered into by a person who not only knows of***

> ***the partial illegality of the prior contract but also is in a real degree responsible for it and wishes to avoid the consequences of it (as it think that Mrs. Spector probably did) then unless that partial illegality is shown to relate solely to some defined portion of the subsequent transaction so that only that defined portion is affected, the whole of the subsequent transaction will be affected by the illegality."***

:

[18] The existence of a triable issue does not necessarily mean an injunction to prevent the existence of the power of sale ought to be granted. This is so because if damages are an adequate remedy or if the Defendant will not be adequately protected by the Claimant's undertaking as to damages, then no injunctive relief is to be granted. In this case there is evidence that the Claimant relies on the premises for advertising bill boards. Its sale and their removal will fatally cripple his business. The losses to the Claimant being incalculable, involving as it does business reputation and future prospects, I find that damages will not at the end of the day provide adequate compensation if an injunction were to be refused and the premises sold. On the other hand, although the Claimant has not put before me credible evidence of an ability to honour its undertaking as to damages, the Defendant has a registered mortgage on the Claimant's property. To that extent therefore the Defendant may be considered secure.

[19] The balance of fairness or convenience, is such that it is appropriate to allow the matter to proceed to trial whilst preserving in the interim the parties' respective positions. It is however well established that a condition precedent, to the grant of an injunction prohibiting the exercise of the power of sale by a mortgagee, is that the amount in dispute is to be paid into Court. Mr. Dabdoub submitted that this case falls into an exception to that "Marbella" rule in that the legality of the mortgage instrument itself is being challenged. Mr Foster QC argues that there is in this case no applicable exception to the rule.

[20] The court in these matters is exercising an equitable jurisdiction. The entire circumstances are to be examined before a decision is made as to how that discretion is to be exercised. I am guided in this regard, and bound by, the pronouncement of the Court of Appeal in ***Mosquito Cove Ltd. v Mutual Security Bank Ltd. et al*** [2010] JMCA Civ 32 (unreported judgment 30 July 2010). The leading judgment was delivered by Morrison JA (as he then was).

[21] The learned judge of appeal began his judgment as follows:

> ***"2. These appeals are from the decision of Cole Smith J to order, in three separate actions brought against a mortgagee by mortgagors, as a condition of the grant in each case of an interlocutory injunction restraining the mortgagee from exercising its power of sale, that the mortgagors should bring into court the amount claimed by the mortgagee to be due under the mortgages. All three appeals therefore give rise, yet again, to the question of whether the judge was correct in her application of the well known decision of this court in SS1 (Cayman) Limited v Marbella Club SA (SCCA No. 57/1986 unreported judgment delivered 6 February 1987) (Marbella)."***

The issue that court considered was therefore the same one before me. In that case it was argued among other things that the loans the subject of the mortgage, were for an illegal purpose i.e. a loan by a company for the acquisition of its own shares. On this point, the Court of Appeal concluded that it could not be said at this "preliminary" stage that the company's challenge to the transaction on the ground of illegality was more likely than not to prevail at the end of the day.

[22] At paragraph 48 of his judgment and after having stated the Marbella principle and reviewed the authorities Justice of Appeal Morrison said:

> ***"I have taken the time to retrace some of the ground so admirably covered by this court in Marbella mainly because the exercise demonstrates the provenance of the rule from the standpoint of both precedent and principle. A mortgage is a security for a debt given by the mortgager in consideration of the mortgage loan and taken by the mortgagee as a safeguard***

> ***against default in repayment. It is, as Garner's Dictionary of Modern Legal Usage (2nd ed. P 574) puts it 'a property owner's promise that, if some obligation is not met, the creditor may take the property to satisfy that obligation. It is precisely for this reason, in my view, that the cases all characterise the requirement of a payment into court as a condition of an injunction as the means of ensuring that, if the mortgagee is to be deprived by injunction of his remedy under the mortgage deed, he is provided with an equivalent safeguard or, as Cotton LJ would have it, kept "protectively safe."***

[23] Morrison JA, notwithstanding what he described as the "pedigree" of Marbella, then went on to discuss some authorities which appears to have questioned that pedigree. He concluded that the Marbella principle is "alive and well," and that this also remained the position in England. Morrison JA (now Lord President) said this was confirmed by the following statement in the current edition of Fisher & Lightwoods Law of Mortgage 11th edition para 20 – 34:

> ***"the mortgagee will be restrained from exercising his power of sale if, before there is a contract for the sale of the mortgaged property, the mortgagor tenders to the mortgagee or pays into court the amount claimed to be due. The amount due for that purpose is the amount which the mortgagee claimed to be due to him for principal interest and costs unless on the face of the mortgage, the claim is excessive in which case the amount claimed less such excess must be tendered or paid."***

[24] Morrison JA also considered some exceptional circumstances in which payment into court had not been insisted on as a precondition to the grant of an injunction. He concluded this aspect of his judgment thus :

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

[25] Noteworthy among the exceptional cases referred to by Justice of Appeal Morrison was ***Rupert Brady v JDRF and others*** *SCCA No. 29/2007(Judgment delivered 12th June 2008),* and in particular the dictum of Cooke JA.. Mr. Dabdoub in his submissions placed great reliance on that case in which the mortgagor alleged that he had neither signed the mortgage nor given anyone authority to pledge his property. In setting aside the order for payment in Cooke JA (in a passage quoted without express adverse comment by Morrison JA) stated,

> ***"The correct distinction is between cases where the issue is in respect of the amount of money owed under a valid mortgage and cases where the validity of the mortgage is challenged... in the instant case the appellant is challenging the validity of the mortgage document as it relates to him."***

This passage, to the extent that allegations of breach of fiduciary duty and forgery may be considered to affect the validity of a mortgage, does not conflict with Morrison JA's conclusion.

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

[27] There is a further reason for such a conclusion. The consequence of an illegal contract is not necessarily that the contract is unenforceable and hence someone becomes unjustly enriched. Indeed the court quite often orders restitution. The Claimant even if not liable for the loan may be liable for money had and received

or some such remedy. The Claimant for example may be said to have induced the Defendant to part with his money on a promise to pledge the land. Is it that a court of equity will allow him to resile from that promise? If it does then the court will be allowing the Claimant to use a statue [the Bank of Jamaica Act] as an instrument of fraud. He will be allowed to have taken the Defendant's money on a pledge which he is then allowed to break. In this arena of competing equities the preferable approach at this interlocutory stage may be for the Claimant to be required to pay the amount into court, as a precondition to injunctive relief. He has after all enjoyed the full benefit of the loan.

[28] As indicated earlier I had the opportunity to review the very recent pronouncement on the matter of illegality and its effect on contracts, by the Supreme Court of England and Wales see ***Patel v Mirza*** (para 1 above). I have also had the benefit of written and oral submissions by each party on that decision and its relevance if any to the matter I have to decide. I will not repeat those submissions. The parties are to rest assured they were very carefully considered.

[29] In ***Patel v Mirza*** nine judges of the Supreme Court sat to consider the case. A majority of six favoured a new what I shall term "public policy" approach to the question. Lords Mance, Clarke and Sumption wrote strong judgments in favour of the traditional "reliance test". At the trial of this matter, similar issues and perhaps policy directions may have to be decided. These are not I think for me to resolve now. It suffices to point out that that decision, and all nine judges agreed with this, reaffirms that a civil court will not enforce an illegal contract. The main reason is one of public policy and the incongruity of a court enforcing on the civil side that which is criminal, and for which one may be prosecuted, on the criminal side. All nine judges also reaffirmed that, notwithstanding the illegality of a contract, the court may allow recovery of money paid. The minority was of the opinion that recovery ought only to be allowed where it could be done without reference to the illegality. The majority favoured a more modern approach which involved consideration of three factors:

> *(a)The underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim.*
>
> *(b) any other relevant public policy on which the denial of the claim may have an impact and,*
>
> *(c) whether denial of the claim would be a proportionate response to the illegality bearing in mind that punishment is a matter for the criminal courts.*

[30] It is interesting to observe that although applying differing tests, both the majority and minority came to the same decision on the facts before them. In the matter at bar Mr. Foster QC argues that Section 22A of the Bank of Jamaica Act does not make the loan illegal. It is, he submitted, the intent of Parliament to punish only the person who conducts the business of the sale of foreign currency without a licence. He relies on a case cited without demur, by the judges *in* ***Patel v Mirza: Hughes v Asset Managers plc*** [1994] CLC 556 (1995 3 All ER 609). There the Court of Appeal of England considered a Statute which prohibited a person from carrying or purporting to carry on "the business of dealing in securities" without a licence. The court decided that it did not follow that the transaction entered into was illegal merely because the dealer was prohibited by statute i.e. was unlicensed. In the words of Lord justice Saville ,

> ***"I readily accept that the purpose of the Act was to protect the investing public by imposing criminal sanctions on those who, as principals or agents, engaged in or in the business of dealing in securities without being duly licensed. Parliament clearly intended to provide the investing public with the safeguard of the approval and licensing of professional dealers by the Board of Trade. However, I can see no basis in either the words the legislature has used or the type of prohibition under discussion, or in considerations of public policy (including the mischief against which this part of the Act was directed), for the assertion that Parliament must be taken to have intended that such protection required (over and above criminal sanctions) that any deals effected through the agency of unlicensed persons should automatically be struck down and rendered ineffective. On the contrary, it seems to me that not only is there really no good reason why Parliament***

> ***should have taken up this stance, but good reasons why Parliament should have held the contrary view."***

[31] Mr. Foster's submission is I think, supported by the fact that Section 22A(2) is followed by Section 22A(3) which reads,

> *"It shall be unlawful for any person to buy, sell, borrow, or lend foreign currency or foreign currency instruments in a transaction involving the payment of Jamaican currency unless the payment is made to or, as the case may be, by an authorised dealer."*

It is arguable that Section 22A (2) prohibits unlicensed persons dealing whereas Section 22A (3) only makes unlawful foreign currency transactions with unlicensed dealers which also involves the "payment of Jamaican currency."

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

[33] There were other matters raised in the course of argument. Mr. Foster urged that as the Claimant had failed to make full disclosure at the ex parte hearing I should refuse relief at this inter partes hearing. Mr. Dabdoub argued that there had been no material non-disclosure. I disagreed with Mr Dabdoub. His client's affidavit failed to disclose the many and detailed discussions and promises of payment which preceded the Defendants recourse to exercising the powers of sale. His client also failed to disclose that he had voluntarily not exercised his right to obtain independent legal advice. Furthermore and inasmuch as the Claimant was aware that the Defendant was represented by attorneys there was no excuse for the Claimant not serving the Defendant's attorneys with notice of the application. Mr. Dabdoub, let me hasten to add, was not the Claimant's

counsel at the time of the ex parte proceedings. These breaches notwithstanding, there is now no injunctive Order in place. I will not penalise the Claimant by refusing an interlocutory injunctive Order. It suffices I believe to order that the Defendant's costs in relation to both the ex parte and the inter partes proceedings be for the Claimant's account in any event.

[34] I therefore, for the reasons stated above, made the following Orders on the 2nd day of August, 2016:

a) Upon the payment by the Claimant into Court or into a joint interest bearing account, in the names of the attorneys on the record for the parties to this action, of the sum of US$747,908.51 on or before the 12th day of August 2016, the Defendant by itself, its servants and/or agents is restrained and an injunction granted restraining the exercise or causing to exercise its powers of sale with respect to the mortgage dated the 14th July 2014 registered at Volume 1353 Folio 797 of the Register Book of Titles being all that parcel of land located at 1 Waterloo Road in the parish of St. Andrew, until the trial of this action.

b) The Claimant through its counsel gives the usual undertaking as to damages

c) Costs to the Defendant to be taxed if not agreed.

d) Leave to appeal if necessary

e) Application for Stay refused.

.....
David Batts
Puisne Judge
22nd August 2016