IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2008 HCV 05873

BETWEEN	CARMEN FARRELL	FIRST CLAIMANT
AND	DESMOND FARRELL	SECOND CLAIMANT
AND	WADE FARRELL	THIRD CLAIMANT
AND	CURTIS FARRELL	FOURTH CLAIMANT
AND	CARL FARRELL	FIFTH CLAIMANT
AND	LASCELLE REID	FIRST DEFENDANT
AND	INTERNATIONAL AIRLINK LTD.	SECOND DEFENDANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	THIRD DEFENDANT

IN CHAMBERS

Arlean Beckford instructed by Arlean D M Beckford and Company for the claimants

Sandra Minott-Phillips and Alexia Robinson instructed by Myers Fletcher and Gordon for the third defendant

April 2, 14 and May 5, 2009

MORTGAGEE RESTRAINED FROM EXERCISING POWER OF SALE ON EX PARTE APPLICATION - WHETHER INJUNCTION SHOULD REMAIN UNTIL TRIAL - CONDITION OF GRANTING INJUNCION - BORROWER DEFAULTING - LEGAL OWNERS OF PROPERTY USED TO SECURE LOAN NOT THE BORROWER - ALLEGATION THAT LEGAL

OWNERS' SIGNATURES FORGED ON DOCUMENTS AUTHORISING USE OF PROPERTY AS SECURITY

SYKES J.

1. This is an inter partes hearing to decide whether an injunction granted, ex parte by McDonald J. on December 16, 2008, should continue until trial. The injunction restrained National Commercial Bank Jamaica Limited ("NCB" or "the bank"), the third defendant and mortgagee, from exercising its power of sale in respect of land that was used to secure a loan which NCB gave to International AirLink Limited ("IALL"), the second defendant. There was no condition to pay money into court.

2. I decided, in an oral judgment, delivered April 14, 2009, that the injunction should continue until trial, subject to conditions. These are my written reasons.

3. I wish to emphasise that none of what is alleged has been proved in a trial. What I am about to relate comes from what has been alleged in the claimants' particulars of claim, the defence of NCB as well as the various affidavits filed either supporting, or resisting, the application for, first, the interim injunction which was granted ex parte, and second, the application for the injunction to remain until trial.

4. The saga began in 2006 when Mrs. Carmen Farrell decided to construct apartments on a lot of land which she intended, on completion, to rent to tourists and Jamaicans. This lot of land was mortgaged to NCB in the sum of $20,000,000.00. This is the first mortgage.

5. In January 2007, Mrs. Farrell came to the conclusion that she needed additional financing. She decided to mortgage another lot of land which is the subject matter of this application. She and the other claimants are all registered proprietors of the second lot which is now the disputed property. This land is registered at volume 1319 folio 810 at the Register Book of Titles. Her pleaded case, in the particulars of claim, is that she needed US$400,000.00 to complete the

development. She decided to raise this money with assistance from a Mr. Reid, the first defendant, who told her that he was a mortgage broker. According to Mrs. Farrell, Mr. Reid assured her that he could raise private financing for her. She stated that he claimed that he "would arrange financing from alternative sources such as, private individuals and private companies on more reasonable terms than that which would be offered by banks and other established financial institutions" (see para. 3 of affidavit dated December 9, 2008).

6. In reliance on this, she, perhaps unwisely, handed the registered title to Mr. Lascelle Reid with the instruction that he was to go and find mortgage financing but not from any of the established mortgage or lending institutions. His remit, according to her, was to secure financing from private citizens who would be willing to lend her money on terms more favourable than the established loan and mortgage institutions. To use her own words, "I have gave (sic) him the Duplicate Certificate of Title (sic) in respect of the said property in the expectation that he would obtain a loan from this private sources (sic), who would hold the title until I complete repayment" (see para. 6 of affidavit dated December 9, 2008).

7. After Mr. Reid got the title, the sequence of unfortunate events is not precisely known. What, however, can be said with absolute certainty is that the property was used to secure a loan of US$600,000.00 to IALL. This is the second mortgage.

8. Mrs. Farrell further states in her affidavit, that on January 31, 2007, Mr. Reid told her that he had obtained the loan for her. He gave her US$100,000.00 and then a further US$130,000.00. She was not told the source of the loan. Thus by February 21, 2007, she had received US$230,000.00. At this stage, there is no allegation that the US$230,000.00 were from the load to IALL.

9. On February 23, 2007, she received an additional JA$16,640,710.00 by way of cheque drawn on an account held by IALL. This cheque was not negotiated and subsequently cancelled. She did not receive any further sums from Mr. Reid.

10. Mrs. Farrell swears in her affidavit that in March 2007, she asked Mr. Reid about the terms of the loan. She wanted to know the rate of interest, the precise amount to be repaid, the period of repayment and the monthly payment. None of this information was forthcoming. Mr. Reid assured her that the rate of interest was lower than the lending and mortgage institutions. She actually began repaying this loan by handing over various sums to Mr. Reid.

11. The mortgage to IALL was supported by the personal guarantee of a Mr. Howard Levy, a director of IALL. The loan was also backed up by a guarantee executed by Mr. Lascelle Reid purportedly on behalf of all the claimants. The claimants say that they did not authorise Mr. Reid to execute this guarantee.

12. How was Mr. Reid able to do what is alleged against him? He not only had the title which was given to him voluntarily by Mrs. Farrell, but he presented a power of attorney purportedly executed by Mrs. Farrell and the other claimants in this claim authorising him to mortgage the property.

13. The bank was satisfied with the legitimacy of the power of attorney. The bank approved the loan to IALL subject to the legal owners of the property giving actual approval for the property to be used as security for the loan. To this end, the bank was presented with a letter dated February 22, 2007, which purports to have been signed by the claimants. The letter states that "[w]e are also aware and in agreement to US$600,000.00 ... being charged to the property, under Power of Attorney granted to Mr. Lascelle Reid for the property registered, Vol. 1319 Folio 810 of the Register Book of Titles under the Registration of Titles Act." The claimants deny signing this letter.

14. The power of attorney recited that all five claimants appointed Mr. Lascelle Reid to act specifically in relation to "lot numbered one hundred and twenty one and being the whole of the land comprised in Certificate of Title registered at volume 1319 folio 810 of the Register Book of Titles" (see recital of power of attorney). He was empowered to do and perform and execute all acts, deeds which they (the claimants) could do, perform and execute in relation to the land.

Specifically, he was empowered to mortgage the property at any rate of interest and to charge the land with any annuity of any amount. He could "sign all such transfers and other instruments, and do all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given" (see para. 2 of power of attorney). It closes by saying that they undertook "to ratify everything, which our attorney or any substitute or substitutes or agent or agents appointed by him under the power in that behalf hereinbefore contained, shall do or purport to do in virtue of this power of attorney" (see last paragraph of operative section of power of attorney). The document is dated January 19, 2007 and was registered at the Island Record Office on January 24, 2007. It purports to be signed by all the claimants in front of a Justice of the Peace for the parish of St. James. The name of the Justice of the Peace is not readily visible on the documents placed before the court.

15. The claimants say that the power of attorney is a forgery. The signatures purporting to be theirs were not affixed by them. The claimants also say that Messieurs Wade, Desmond and Curtis Farrell were not in Jamaica at the time the power of attorney was executed. Mrs. Farrell was in Jamaica. It is not clear where Mr. Carl Farrell was.

16. It was submitted, on behalf of the claimants, that the bank acted unwisely in this matter because, Mrs. Farrell was, to the certain knowledge of the bank, a delinquent borrower. In fact, the first mortgage has not been repaid. The other four claimants are guarantors on that first mortgage. Therefore, the argument ran, the bank ought to have been put on guard. Miss Beckford boldly suggested that the bank should have contacted the Farrells to find out whether they really were consenting to use the property as security for this second mortgage. Counsel went further to submit that the bank should have advised the Farrells against using the property to support the loan. Miss Beckford even went as far as suggesting, from this unpromising material, that a case of negligence could be established.

17. These arguments are not very strong ones. The bank is in the business of providing banking services and making loans. It is no part of the bank's obligation to advise on the wisdom or otherwise of what a

customer wishes to do. The primary concern of a lender is whether he will get back his money. The bank did what all prudent lenders do: seek to get the best security for a loan having regard to all the circumstances of the case. It is for the bank to make an assessment of the risk and act accordingly. There is no pleaded case of any fiduciary relationship between the bank and the Farrells that would give rise to any obligation to advise the Farrells on the wisdom of borrowing the money. As far as the submission in negligence is concerned, it is not the pleaded case, and it was not without some difficulty that counsel tried to state precisely what this duty was and to whom it was owed. Unsurprisingly, no authority was cited which was either directly on point or provided a sound basis to proceed by way of analogy.

18. The significance of the registration of the power of attorney at the record office is that under section 23 of the Record Office Act, every record made and certified under the Act "shall be deemed to be valid, authentic and effectual record within the meaning of the Act." By section 36, the copy of a record duly certified to be a true copy "shall be received in evidence in all courts of justice without further proof or other proof thereof in every case in which the original Record (sic) would have been received in evidence." These provisions are supported by section 22 of the Evidence Act which provides that where "by any enactment now in force or hereafter to be in force any ... official or public document ... shall be receivable in evidence of any particular in any court of justice ... the same shall respectively be admitted in evidence provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed ... as directed by the respective enactments made or to be hereafter made ..." without proof of the official character of the seal or signature or official character of person appearing to have signed the same.

19. Mrs. Minott-Phillips took the view that once the bank checked the record office and the power of attorney was duly registered within 90 days of execution, then they had fulfilled their due diligence obligation. The bank, said counsel, need not have done anything more.

20. The tenor of Mrs. Minot-Phillips' submissions tended to suggest that these provisions have the effect of the law of the Medes and the Persians: conclusive and irrebuttable. These statutory provisions are good for what they purport to do, which is aid admissibility into evidence of certain kinds of documents, but none of the statutes actually say that any evidence admitted pursuant to the statutes is conclusive and cannot be rebutted. The statutes do not prevent a litigant from establishing that the document is a forgery. If that were the case, Mrs. Farrell's case would have imploded.

21. The position of the claimants, then, is that the whole process culminating with the loan to IALL is tainted by Mr. Reid's large scale forgery and fraud. He forged the signatures on the power of attorney as well as the signatures on the letter of February 22, 2007. He signed the guarantee on behalf of the claimants using the forged power of attorney as legal authority.

22. It is common ground that Mrs. Farrell defaulted on the first mortgage. This default on the first mortgage led her to meet with the bank, at the Atrium, the head office of the bank. She went to the bank to make arrangements for the liquidation of the first mortgage. This was in August of 2008 and it was when she went to the bank that she first heard of this loan to IALL. Needless to say, she was appropriately shocked, distressed and discombobulated.

23. The bank has what it says is a record of this meeting prepared by a Mr. David Barnes, a credit officer. This meeting was held on August 19, 2008. The crucial part of the minutes from the bank's standpoint is what it alleges is an admission by Mrs. Farrell. The minutes have Mrs. Farrell as saying, "[T]hat she had given Mr. Lascelle Reid permission to pledge the property for the procurement of a loan for International Air Link." This admission is vehemently denied by Mrs. Farrell.

24. Another meeting was held subsequently at the Montego Bay division of the bank. The vital event emerging from this meeting was that Mrs. Farrell sent a letter dated August 27, 2008, signed by her, to NCB saying that she and Mr. Levy of IALL agreed to pay US$12,000.00 per

month to discharge the loan to IALL. The letter states that this is a proposal put forward by her and Mr. Levy to NCB which they hoped it would accept.

25. According to Mrs. Farrell, even though her signature is genuine she did not willingly agree the contents of the letter. She swore in her affidavit that at the Montego Bay meeting, Mr. Purcell, one of NCB's managers, told her that he and Mr. Levy were friends and that he (Purcell) was going to help Mr. Levy straighten out his business. During this meeting, Mr Purcell dictated the August 27 letter and told her to have it done up in the exact terms as dictated and delivered to him. This she did because she felt that since he was the manager he knew what he was doing and so she wrote the letter and delivered it to the bank. I must say, that if this is a plea of undue influence it is woefully inadequate. If it is a plea of duress, much more is needed than this. In any event, the particulars of claim do not allege undue influence or duress.

The submissions

26. Miss Beckford relied heavily on ***American Cyanamid Co. v Ethicon*** [1975] A.C. 397 while Mrs. Minott-Phillips relied exclusively on ***SSI (Cayman) Ltd v International Marbella Club S.A.*** S.C.C.A No. 57/86 (delivered February 6, 1987). The submissions of both counsel proceeded on the assumption that there are two lines of cases: the ***American Cyanamid*** line of cases and the ***Marbella*** line of cases. The submissions presupposed that they are mutually exclusive and no synthesis can be achieved; it was thesis and anti-thesis without synthesis. I therefore need to examine the law to see if there are, in fact, two lines of authority as implied by counsel, or whether there is just one stream of authority with specific principles applying to mortgagee/mortgagor disputes.

27. I now look at what has been called the ***Marbella*** line of cases, beginning with ***Marbella*** itself. In that case, money was lent to the defendants. The defendants never challenged the fact of the loan or the amount owed. The defendants defaulted, and the claimant/ mortgagee sought to enforce his security against the property. The defendant resisted and filed suit seeking to rescind the mortgage

agreement on the ground of fraudulent misrepresentation, that is to say, the mortgage was unenforceable. The trial commenced and during the trial, counsel for the defendant invited the court to make an order preserving the property. The background to this application was that the claimant's counsel said that his clients regarded themselves as free to dispose of the mortgaged property at any time. The defendant's were alarmed at this stance and sought to forestall any such possibility. The trial judge, relying on sections 459 and 461 of the Civil Procedure Code, granted an order restraining the claimant from disposing of the property subject to conditions which included an order that the defendant pay the claimants US$23,000.00 per month. The order was not called an injunction but its effect was as if an injunction had been granted. The parties were dissatisfied with the order. The defendant argued that the order should not be subject to conditions. The claimant submitted that the entire order be set aside, or in the alternative, the condition should be payment into court of, or provision of security for the entire amount owed.

28. The court upheld the submission of the claimant's counsel and decided that the general rule is that a mortgagor had to pay the disputed sum into court before the court would restrain the mortgagee from exercising his power of sale. This has become known as the ***Marbella*** principle. It is noteworthy that none of the three Justices of Appeal referred to ***American Cyanamid***, although it was well known in Jamaica, and had been applied innumerable times before ***Marbella*** came before the court. It seems, from the submissions of counsel recorded in the judgments, neither side adverted to ***American Cyanamid***.

29. I shall cite a few passages to highlight the stringency of the very strong general rule. Rowe P. said at page 12:

> *That led me to conclude that if Harrison J. had had before him the authorities cited by Mr. Muirhead to this court and if he had been minded to give a conditional restraint, he would have imposed the **only** restraint permissible in law in these circumstances and what would have been the*

payment into court of the sum claimed by the mortgagee ...(my emphasis)

30. Carey J.A. was equally clear at page 14:

> *There is no question but that the Court has an undoubted power to restrain a mortgagee from exercising his powers of sale, but if it so orders, the term* ***invariably*** *imposed is that the amount claimed must be brought into court.* (my emphasis)

31. His Lordship continued at page 15:

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

32. Downer J.A., the third member of the court, said at page 27:

> *On review therefore I find that the restraining order was permitted, but that the conditions imposed did not follow the precedents of compelling the defendant to pay the amount claimed into court.*

33. There can be no doubt of the very strong rule. To call it a very strong rule is an understatement having regard to the language of the court. We see expressions such as "the only restraint permissible in law"; "the term invariably imposed"; "nothing ... permits a Court of Equity to order restraint without providing an equivalent safeguard". With language like this, it is not easy to resist the conclusion that the Court of Appeal was in fact saying that the discretion to restrain the mortgagee must be exercised in one way and one way only. The rigidity of the language has, unquestionably, created difficulty of application in later cases, especially those cases where there is an allegation of

forgery but the lender is not complicit in any way. Despite the difficulty, the Court of Appeal has insisted that the instances in which mortgagees have in fact been restrained without the "equivalent safeguard", are not at variance with ***Marbella***. Mrs. Minott-Phillips actually submitted that later cases (which will be examined later) cannot coexist with ***Marbella***, either at the level of principle or outcome.

34. The next significant case is that of ***Flowers, Foliage & Plants v Jamaica Citizens Bank Limited*** (1997) 34 J.L.R. 447. The Court of Appeal declined to follow the strong rule in ***Marbella***. In that case, the bank sued the first claimant, and two other persons, the second and third claimant respectively, who gave personal guarantees in support of the loan to the first claimant. There was also a second mortgage on the second claimant's property. When the claim was filed, no defence was forthcoming so, summary judgment was entered after the judge dismissed applications to file a defence.

35. The appellants applied to a single judge of the Court of Appeal and received an unconditional stay of execution, that is to say, the appellants were not required to pay any money into court. What this meant in practical terms was that the rule described in ***Marbella*** as "the only restraint permissible in law" and "nothing .. permits a Court of Equity to order restraint without providing an equivalent safeguard" was departed from. This decision by the single Justice of Appeal, precipitated an appeal to the full court of the Court of Appeal. Rattray P. disposed of ***Marbella***, by saying that what was stated there was a general rule. I must confess that the language of ***Marbella*** does suggest that the judges who decided that case thought that it was more than just a general rule; it was a very strong rule. So strong that the theme of the judgments does suggest that departing from it (assuming that that was permissible) should only occur in rare cases.

36. Rattray P. sought to distinguish ***Marbella*** on two bases. The first one being that ***Marbella*** "[concerned] borrowing of money secured by debentures" (see page 452D) whereas in ***Flowers, Foliage*** "the

applicant was not a primary borrower but a guarantor and the mortgage was a collateral security" (see page 452D).

37. It is not immediately obvious why ***Marbella*** should not apply merely because the applicant was a guarantor. The bank was prudent enough to secure the guarantee with a mortgage. As is well known, the purpose of the guarantor from the mortgagee's standpoint, is that the mortgagee can look to the guarantor for payment if the primary borrower defaults. In the event that the guarantor is unwilling or unable to pay, the mortgagee has property against which he can enforce his security. In ***Flowers, Foliage***, no one disputed that the primary borrower had defaulted. No one suggested that guarantor's liability had not crystallized. In short, the condition precedent to enforcement of the mortgage had been met.

38. Rattray P. identified another consideration. The President appeared to have accepted the submission of the claimant's counsel that since the claimant alleged that the guarantee was void for uncertainty and/or past consideration and that there were issues of whether the bank acted legally in upstamping the mortgage, ***Marbella*** should not apply. Counsel for the claimant eventually submitted that for these reasons "the ***Marbella*** principle would be inapplicable in this case" (see page 452F). The court did not say expressly whether it approved or disapproved of those submissions but the result of the case clearly suggest that they were of significance in the disposition of the appeal.

39. The guarantor in ***Flowers, Foliage*** and the mortgagor in ***Marbella*** raised enforceability issues and not disputes over the existence or size of the debt. If this is so, it is not easy to see why the "only restraint permissible in law" was not required in ***Flowers, Foliage***.

40. Then there is the case of ***Global Trust Limited v Jamaica Re-development Foundation Inc*** S.C.C.A. No. 41/2004 (delivered July 27, 2007), where Cooke J.A. was clearly of the view that there are two lines of authority: the ***Marbella*** line and the ***American Cyanamid*** line (see para. 5 and 11). This point was never resolved in the case.

41. ***Global Trust*** is also important for another reason. It appears that for the first time a further distinction, other than the ones made by Rattray P, is being made in mortgagor/mortgagee disputes. To put this distinction in perspective more of the facts is needed. The mortgagor sought an injunction on the basis that he did not owe any money. The majority of the Court of Appeal declined to grant the injunction.

42. Cooke J.A. in refusing the injunction explained in paragraph 7 that :

> *The cases of **Newton** and **Flowers** (supra) indicate that it would be proper to grant an injunction to restrain the mortgagee's power of sale if there are triable issues as to the validity of the mortgage document upon which the mortgagee seeks to found his power of sale.*

43. This dictum suggests that the true distinction between ***Flowers***, ***Foliage*** and ***Marbella*** is that if the dispute is one of quantum only then ***Marbella*** applies in full rigour, that is, an injunction may be granted on condition of payment of full amount owed. If, however, the dispute is about validity of the instrument, then, possibly, ***Flowers***, ***Foliage*** applies, that is to say, an injunction without any conditions. Cooke J.A. repeats this view in ***Rupert Brady v Jamaica Redevelopment Foundation Inc*** S.C.C.A. No. 29/2007 (delivered June 12, 2008) which will be examined later.

44. There are two observations to make about this dictum of Cooke J.A. First, the way in which Cooke J.A. states the distinction excludes a situation in which the instrument is valid but it is being said that the debt has been repaid and therefore the power of sale is not exercisable. In effect, it appears that Cooke J.A. does not accept that a mortgagor can properly suggest that the mortgage is valid and enforceable but in the particular case it is not exercisable because the trigger event, that of non-payment of the debt, has not occurred. In fact, that was the very point being made by the mortgagor in ***Global Trust***. He alleged that he did not owe any money at all. To put the matter another way, the mortgagor was saying that the power of sale cannot be used to recover a debt that has been repaid. It seems

that in ***Global Trust***, the mortgagor's challenge to the mortgagee was interpreted only as a one of quantum owed, and therefore was within the full rigour of ***Marbella***. It is not entirely clear why a mortgagor should be subject to the full rigour of ***Marbella*** when he is saying, "I have repaid you and so you have no legal basis to rely on your power of sale. The contract has been performed." It would seem to me that one possible way to control implausible cases of this nature is by requiring that he puts forward some evidence other than a naked assertion. He ought to be able to produce evidence of payment.

45. The second observation is this. If the distinction was being made for the purpose of explaining the difference in outcome in ***Marbella*** and ***Flowers, Foliage***, then as already pointed out, not only was there no dispute in ***Marbella*** over the existence and size of the debt, in both cases the mortgagor raised enforceability issues.

46. It should be noted as well that the distinction made by Cooke J.A. is not one that was made in ***Marbella***. In fact, Rowe P., in ***Marbella***, went as far as noting that not even an allegation of fraud, which in the context in which Rowe P. spoke, could only mean actual dishonesty (as distinct from equitable fraud), is not sufficient to displace the the strong general rule. An allegation of fraud usually raises the issue of validity and consequently, enforceability. Also, Rattray P. in ***Flowers, Foliage*** did not distinguish ***Marbella*** on the basis stated by Cooke J.A.

47. There is the recent case of ***Michael Levy v Jamaica Re-development*** S.C.C.A. No 26/2008 (delivered July 11, 2008). This was heard by Morrison J.A. in chambers. It was an application for an injunction pending leave to appeal from a refusal of Jones J. to restrain the mortgagee from exercising his power of sale. His Lordship referred to ***American Cyanamid*** but concluded that the ***Marbella*** principle is "alive and well" (see para. 32).

48. Finally, there is the case of ***Rupert Brady v Jamaica Redevelopment Foundation Inc***. In that case, the judge, Sinclair-Haynes J., granted an injunction restraining the mortgagee from exercising his power of sale on condition that the appellant paid the full sum owed into court. The Court of Appeal set aside the payment condition but upheld the

injunction. Here, again, "the only restraint" doctrine was not applied in full measure. The allegations were that one Mr. Harold Brady had used Mr. Rupert Brady's property to secure a mortgage without his (Rupert's) knowledge or permission. Mr. Rupert Brady alleged that he did not sign any of the relevant mortgage documents or document which purported to bear his signature. To put it bluntly, Mr. Rupert Brady was saying that his signature was forged. It seems that the allegation was that all the documents purporting to show that Mr. Rupert Brady had guaranteed the loan and used his property as security were forgeries.

49. Another fact of considerable importance, which weighed heavily with the Court of Appeal, was that before the issue of the exercise of the mortgagee's power of sale came before Sinclair-Haynes J. a consent judgment was entered against Mr. Harold Brady in the sum of $28,452,092.70 with interest at 30% per annum compounded monthly from May 12, 2005. A term of the consent judgment was that should Mr. Harold Brady pay US$178,000.00 by December 10, 2006, Jamaica Redevelopment Foundation Inc., the holder of the mortgage, would accept that sum as full and final settlement of the debt.

50. Two judgments were delivered in ***Rupert Brady***. One by Panton P. and the other by Cooke J.A. Smith J.A. agreed with both judgments. I begin by looking at the judgment of the learned President. He was of the view that there were serious issues to be tried. One of those issues being whether the signatures were forged. In that regard, Panton P. appeared to have relied on ***Flowers, Foliage***. Counsel for the mortgagee sought to persuade the court that ***Flowers, Foliage*** was a departure from long standing principle in that the injunction was granted without the usual condition of paying the sum said to be owed into court. The President was clearly of the view that ***Marbella*** and ***Flowers, Foliage*** could exist together. This comes out at paragraph 8:

> *Mr. Piper for the first respondent has contended that Flowers Foliage & Plants (supra) was a departure from the principle stated in SSI (Cayman) et al v Internation (sic) Marbella Club S.A. and referred to in the Flowers Foliage &*

Plants (supra). I do not agree. The fact of the matter is that the nature of the issues to be determined in the instant case is such that were the Court to permit a sale to take place before the determination of those issues, there would be the risk of serious injustice being done to the appellant. In the circumstances, it would be unjust to demand that he deposit such a huge sum of money in order to protect his rights. The appropriate course at this time is for the matter in the Supreme Court to be tried as early as possible.

51. This paragraph of Panton P. reflects an acceptance of the very submissions that were rejected in ***Marbella***. It would appear that Panton P. agreed with the judge that having regard to the allegations of forgery, a more flexible approach was required. Where, she went awry, in the opinion of the President, was not to apply the flexible approach exemplified by ***Flowers, Foliage***. The President did not refer to ***American Cyanamid***.

52. For his part, Cooke J.A. began his analysis of the imposition of the condition by noting in paragraph 5 of his judgment that the appellant was urging that he was under no legal obligation to repay the loan borrowed by his brother. The learned Justice of Appeal, accepted that Carey J.A. in ***Marbella*** had correctly stated the law when Carey J.A. said that Courts of Equity do not restrain the mortgagee without providing an equivalent safeguard which is that the mortgagor pays into court the amount in dispute. Cooke J.A. next referred to ***Flowers, Foliage***.

53. Cooke J.A. then stated at paragraph 7 of his judgment:

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 pertains to him.

54. Here we see Cooke J.A. restating that position he held in ***Global Trust***. In the final analysis, Cooke J.A. disturbed the condition imposed because the trial judge did not apply the flexible approach indicated in ***Flowers, Foliage*** and she failed to consider the effect of the consent judgment.

55. From these cases, it is not entirely clear when the flexible approach is more appropriate, and even as important, why the flexible approach does not require the payment into court of any money. While one possible point of distinction between ***Flowers, Foliage*** and ***Rupert Brady*** might be that in the former, there was some question over the conduct of the bank in upstamping the mortgage, the same cannot be said about the mortgagee in the latter case where it appears that the bank was deceived by the forgery. If this is a satisfactory distinction then why did it not lead to a condition being imposed in the latter case?

56. In none of the cases reviewed did the Court of Appeal rely on ***American Cyanamid*** in resolving mortgagor/mortgagee disputes. On one view, it could be said that there is now special law applying to these disputes which excludes ***American Cyanamid*** which means that there are two lines of authority as predicated by the submissions in the case before me.

57. I now turn to ***American Cyanamid***. In that case, the claimant sought an injunction to restrain the defendant from selling sutures which the claimant alleged infringed its patent. The High Court granted the injunction. The Court of Appeal discharged it on the basis that the claimant ~~had~~ not established a prima facie case of infringement. The court was following a school of thought which held that a claimant had to establish a prima facie case before he would be granted an injunction. In the House of Lords, the view of the Court of Appeal came up for scrutiny. The House, speaking through Lord Diplock, who delivered the only judgment, rejected this approach on the basis that this was tantamount to conducting a mini trial. He held that at the

early stages of a claim, when all the proposed evidence is not before the court, a court should not attempt to resolve issues of fact. His Lordship then went on to set out what he thought was the correct approach.

58. The position of Lord Diplock has a virtue and a latent vice which I do not think he intended but which, unfortunately, has been treated as a new inflexible rule. The virtue of ***American Cyanamid*** is that it corrected an error that had developed in equity, namely, that in order to have an injunction, the claimant had to establish a prima facie case. This led to a departure from the desired flexibility of equitable remedies. The latent vice of ***American Cyanamid*** is highlighted that Lord Diplock's criteria threaten to emasculate the flexibility of deciding whether an injunction should be granted at all.

59. This leads me to the important judgment of Laddie J. in ***Series 5 Software Ltd v Clarke and others*** [1996] F.S.R. 273. Here we see the latent vice highlighted at pages 285 - 286:

> *The supposed problem with American Cyanamid centres on the statement:*
>
> *[Assessing the relative strength of the parties' cases], however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. ([1975] A.C. 409C)*
>
> *If this means that the court cannot take into account its view of the strength of each party's case if there is any dispute on the evidence, as suggested by the use of the words "only" and "no credible dispute", then a new inflexible rule has been introduced to replace that applied by the Court of Appeal. For example, all a defendant would have to do is raise a non-demurrable dispute as to relevant facts in his affidavit evidence and then he could invite the court to ignore the*

apparent strength of the plaintiff's case. This would be inconsistent with the flexible approach suggested in Hubbard v. Vosper which was cited with approval earlier in the American Cyanamid decision. Furthermore it would be somewhat strange since American Cyanamid directs courts to assess the adequacy of damages and the balance of convenience yet these too are topics which will almost always be the subject of unresolved conflicts in the affidavit evidence.

60. If, at the application for the interim injunction, it is fairly clear that one party has a weak case, it is difficult to see how a court applying equitable principles could ignore that factor. The strength or otherwise of the case may not be decisive but must have significant weight.

61. His Lordship concluded his very erudite analysis by stating further at page 286:

In my view Lord Diplock did not intend by the last quoted passage to exclude consideration of the strength of the cases in most applications for interlocutory relief. It appears to me that what is intended is that the court should not attempt to resolve difficult issues of fact or law on an application for interlocutory relief. If, on the other hand, the court is able to come to a view as to the strength of the parties' cases on the credible evidence then it can do so. In fact, as any lawyer who has experience of interlocutory proceedings will know, it is frequently the case that it is easy to determine who is most likely to win the trial on the basis of the affidavit evidence and any exhibited contemporaneous documents. If it is apparent from that material that one party's case is much stronger than the other's then that is a matter the court should not ignore. To suggest

otherwise would be to exclude from consideration an important factor and such exclusion would fly in the face of the flexibility advocated earlier in American Cyanamid. As Lord Diplock pointed out in Roche, one of the purposes of the cross undertaking in damages is to safeguard the defendant if this preliminary view of the strength of the plaintiff's case proves to be wrong.

It follows that it appears to me that in deciding whether to grant interlocutory relief, the court should bear the following matters in mind:

1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.

2. There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible.

3. Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt to resolve complex issues of disputed fact or law.

4. Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay; (b) the balance of convenience; (c) the maintenance of the status quo; (d) any clear view the court may reach as to the relative strength of the parties' cases.

62. From this examination of ***American Cyanamid*** it may be said that Lord Diplock was speaking generally, and he did not intend to shut out the possibility that some disputes, by their very nature, raise additional factors to be considered that did not arise in ***American Cyanamid***. Lord Diplock did say that "in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases" (see page 409). If this is so, then it is legitimate to say that

mortgagor/mortgagee disputes introduce special factors that have led to sub rules that apply only or primarily to these disputes. On this view, there is no incompatibility between ***Marbella*** and ***American Cyanamid***.

63. It would seem, then, that in synthesising ***American Cyanamid*** and ***Marbella***, the following propositions can be stated with a fair degree of confidence:

1. An application for an injunction always engages the equitable jurisdiction of the court and therefore is a matter of discretion having regard to all the circumstances of the case.

2. The court first has to determine whether there is a serious issue to be tried.

3. In the case of mortgagor/mortgagee disputes, the serious issue may be whether the mortgage is valid.

4. The issue may also be that the mortgage is valid but the power of sale is not presently exercisable because some condition precedent, such as notice or non-payment of the debit, has not been met.

5. Mortgagor/mortgagee disputes have, over time, thrown up additional factors to be considered that would not arise in other types of cases in which an injunction is sought.

6. These additional factors are the precise nature of the issue between the parties. If the dispute is about the amount owed, then there is a strong general rule which is that where the dispute between the parties is over the actual amount owed, in the absence of significant countervailing considerations, an injunction restraining the mortgagee from exercising his power of sale without the condition of paying all that is said by the mortgagee to be owing by the mortgagee, will not usually be granted.

7. If the dispute is over the validity of the mortgage contract then the claimant may find it easier to secure an injunction restraining the mortgagee without any condition.

64. ***American Cyanamid*** is quite right when it insists on there being a serious triable issue, thereafter ***Marbella*** guides the analytical process. Once the nature of the dispute is identified, then the court acts in accordance with either the dicta in ***Marbella*** on the one hand, or dicta in ***Flowers, Foliage*** and ***Rupert Brady*** on the other.

65. Before leaving this area, it is important to note that the Australians have retained flexibility in mortgagee/mortgagor relationship whenever the grant of an injunction to restrain the mortgagee arises which I believe does address the interests of both sides in a satisfactory manner. Barker J. in ***Linnpark Investments Pty Ltd v Macquarie Property Development Finance Company Ltd*** [2002] WASC 272 (delivered October 18, 2002), stated at paragraphs 13 and 14:

> *In **Harvey v McWatters** (1949) 49 SR (NSW) 173 at 178, Sugerman J recognised that there are circumstances where the general rule does not apply[which is that a mortgagor cannot get injunctive relief unless he pays the principal and interest into court or the equivalent into court]. His Honour said this:*
>
> *"There is a distinction between what I have called the ordinary case and the case in which the existence of the power of sale or the question whether it is exercisable at all is in question. The present case is of the second class. What is called the ordinary rule applies to cases of the first class, and to those cases only. This flows from the principles and reasoning on which that rule depends. Cases of the second class are, as regards interlocutory applications, governed by a rule of similar type. But it is a rule resting on different principles and reasoning. These permit of a greater flexibility. They do not require that in every*

case the whole amount claimed or sworn to by the mortgagee or seen from the terms of the instrument to be the greatest amount that could be due should be paid in. The terms may be moulded so as to require payment in of so much only as suffices to give adequate protection to the mortgagee."

Thus, it appears that the only exceptions to the general rule stated by Walsh J are

(a) where the amount claimed by the mortgagee is obviously wrong and (b) possibly, when there is a question as to whether the mortgagee's power has become exercisable at all.

66. This passage suggests that in Australia, a mortgagor challenging the enforceability of the mortgage is unlikely to secure an injunction without paying some money into court. He may not be required to pay the entire disputed sum. The rationale seems to be that, like the mortgage in ***Marbella***, the mortgage document is valid and effectual until set aside (see submissions of Mr. David Muirhead Q.C.) and unless there is some impropriety on the part of the mortgagee, the mortgagee may feel hard done by if there is no payment into court.

Application

67. In this particular case these are the factors I have considered in deciding whether the injunction should be granted until trial. First, Mrs. Farrell armed Mr. Reid with the means to go into all the world and use her title documents to secure a mortgage. However, that does not necessarily mean that she is to be deprived of a remedy without taking into account the other factors. Second, there is the allegation of forgery which, if established, goes to the root of the entire mortgage transaction. The allegation of forgery is not just a bald assertion. There is evidence to suggest that three of the claimants were outside of Jamaica when they purportedly signed the power of attorney and the letter of February 22, 2007. Third, there is the allegation by NCB that Mrs. Farrell on two separate occasions accepted the liability on the loan made to IALL. This allegation, like the forgery allegation, cannot be fully explored at this interim stage

and must await a trial. No doubt a finding that she accepted liability would be very damaging to her case. Fourth, I have to consider whether the harm to the claimant would be greater than the harm to the defendant if the injunction is not granted, or put another way, whether the harm to the defendant is much less than the harm to the claimant, if the injunction is granted. Fifth, while it is true as Mrs. Minott-Phillips pointed out that in this area of law, by virtue of section 106 of the Registration of Titles Act damages is the only remedy for a wrongful exercise of the power of sale, it could not have been the intention of the provision to authorise or connive at an unlawful, or possibly dishonest, use of the power of sale. If the claimant establishes that the whole transaction was based on forgery, then clearly, the guarantee in this case may be unenforceable. Sixth, the consequence of filing the power of attorney at the Island Record Office meant that NCB was entitled to rely on it and to that extent no blame can be laid at the feet of the bank.

68. In my opinion, Mrs. Farrell has put forward sufficient evidence to justify the grant of an injunction. The evidence is that she and her sons were out of the island when the power of attorney was allegedly executed before Justice of the Peace. If this is so, then this is a clear case of forgery. At this stage, in light of the prima facie evidence, it is not possible to regard this assertion as baseless. A trial would definitely be needed to resolve the issue.

69. The remaining issue is whether there should be any conditions imposed on the claimants. I revisit ***Marbella, Flowers, Foliage*** and ***Rupert Brady*** in order to discern the principles applicable in determining whether any condition should be imposed.

70. Mrs. Minott-Phillips developed the following submission with a view to saying that the full rigour of ***Marbella*** should apply here. Mrs. Minott-Phillips has made the formidable submission that ***Marbella***, which subsequent decisions of the Court of Appeal have unreservedly accepted as correct, does not provide the basis for the distinction between cases in which the dispute is over the sum owed or the validity of the mortgage is challenged. Her point, like that of Mr. Muirhead Q.C. in ***Marbella*** is that the mortgage is valid and

enforceable until set aside. Thus, at this interlocutory stage what the court has is a valid mortgage which no court has yet impugned and until such time it must be treated as valid and enforceable. Mrs. Minott-Phillips' conclusion was that Mrs. Farrell should pay the full sum.

71. She pointed to the undeniable fact that three recent decisions of the Court of Appeal have all stated that ***Marbella*** is alive and well and has all the vitality it had when it first arrived on the legal land scape of Jamaica. She cited ***Global Trust Limited v Jamaican Redevelopment Foundation; Paulette Hamilton v Gregory Hamilton*** S.C.C.A. 77/07 (delivered July 31, 2008) and ***Michael Levy v Jamaican Redevelopment Foundation.***

72. Mrs. Minott-Phillips was particularly concerned about the distinction drawn by Cooke J.A. in ***Global Trust*** which she said would not lead to fair outcome in this case, because, to date, no allegation or hint of impropriety has been levelled against the bank. This lack of impropriety on the part of the bank should be contrasted with Mrs. Farrell who gave Mr. Reid the title to raise money for her thus facilitating the apparent deception of the bank.

73. I must admit that there is great merit in this analysis. I would simply add that in ***Rupert Brady***, by contrast, although there was no impropriety on the part of the initial mortgagee or the subsequent holder of the mortgage, there was nothing to suggest that Mr. Brady facilitated the fraud by giving his brother the title to raise funds for him (Rupert). This distinction must lead to different outcome from that in ***Rupert Brady***. This is the essence of equity: adhering to well established principle but sufficiently flexible to take account of the circumstances of each case.

74. In the case before me there are a number of factors to be taken into account, in addition to those mentioned when I decided that the injunction should be extended. First, the underlying policy reason behind requiring the payment into court. It is said that the mortgagor and the mortgagee contracted on the basis that the mortgagee could exercise the extra curial remedy should the stipulated trigger event

occur. Second, the utility of taking security for the loan would be greatly diminished if the mortgagor could erect barriers to the exercise of the power of sale. Third, where the mortgagee has in fact advanced the loan and is out of pocket, he should not be prevented from exercising his power of sale unless there is some good reason. Fourth, an appropriate balance has to be struck if the mortgagee is to be prevented from doing that which, on the face of it, he has a contractual right to do. Fifth, in this particular, I cannot overlook that it was Mrs. Farrell who facilitated this apparent fraud by giving Mr. Reid her registered title. Sixth, Mrs. Farrell's conduct in giving the title to Mr. Reid allowed him to misrepresent the extent of his authority to the mortgagee. Seventh, no fraud or impropriety, as far as the pleaded case goes, has been alleged against NCB. Eighth, I take into account that there does not seem to be any clearly stated principles in the decided cases of the Court of Appeal that indicate when it is appropriate not to impose the usual condition. Ninth, this is a case which seems to involve two honest parties, but one party has clearly created a state of affairs for the apparent fraud to take place. Tenth, I take into account the Australian cases that have held that where there is an issue of whether the mortgage is enforceable (which subsumes issues of validity) then greater flexibility is required. Eleventh, greater flexibility on the part of the Australian courts suggest that a part of the money owed is paid. Twelfth, where the court decides that a more flexible approach is required, then an appropriate order is moulded to meet the justice of the case.

75. I am not of the view that this case requires the usual condition of paying the full amount owed but some has to be paid. It is one thing to give a title to someone to seek a mortgage; it is quite another thing, when the mortgage is secured by forgery.

76. Having decided to grant the injunction on condition I also elected to conduct a case management conference. The orders that I am about to make concern the injunction as well as case management.

77. I therefore make the following order:

1. The injunction granted December 16, 2008, is to continue until trial on condition that the claimants pay into court the sum of US$300,000.00, to be held in an interests bearing account at the Bank of Nova Scotia, ScotiaCentre at the corner of Duke and Port Royal Streets, in the names attorneys at law on record for the claimants and of National Commercial Bank Jamaica Ltd on account of Claim No. 2008 HCV 05873;

2. Claimants to pay into court in the manner specified in paragraph 1 the sum stated paragraph 1 of this order not later than 12:00 mid day July 10, 2009 failing which the injunction dissolves and National Commercial Bank Jamaica Limited is at liberty to exercise its power of sale and dispose of the property;

3. If the claimants comply with paragraph 2 of this order the costs of this application to be costs in the claim but if the claimants fail to comply with paragraph 2 then costs to National Commercial Bank Jamaica Limited in the sum of JA$60,000.00 payable within ten days of the failure to comply with paragraph 2 and in the event such costs are not paid, the claimants are not permitted to rely, at trial, on statement of case.

4. Trail by judge alone on February 1 and 2, 2010.

5. Pre-trial review on December 8, 2009, at 10:00 a.m. for half an hour.

6. Standard disclosure of documents to take place not later than September 16, 2009 but limited to documents not already exhibited to affidavits filed.

7. Inspection to take place on or before October 2, 2009.

8. Claimants limited to five witnesses and National Commercial Bank Jamaica Limited to one witness.

9. Witness statements to be filed and exchanged not later than November 30, 2009;

10. The listing questionnaire to be filed and served not later than December 2, 2009;

11. Claimants at liberty to file and serve amended claim form and particulars of claim not later than May 29, 2009;

12. National Commercial Bank Jamaica Limited to file and serve amended defence, if so advised, not later than July 3, 2009.

13. Cost of case management, that is, paragraphs 4 onwards to be costs in the claim.

14. Claimants' attorney to prepare, file, and serve this order.