



In addition, the Claimant contends that no amount is due and owing by it on the mortgage and sale of the property by auction would result in irreparable damage to the Company.

It was submitted on behalf of the 1<sup>st</sup> Claimant/Applicant, that there was only one loan contract between the parties.

Both parcels of land referred to were mortgaged by the first Claimant to the first defendant by way of successive registered transfers of mortgage No. 786323 from Island Life Merchant Bank Limited (the original mortgagees) to Refin Trust Limited, and then from Refin Trust Limited to the 1<sup>st</sup> Defendant (and these are reflected on the registered titles exhibited by the defendants to the affidavit of Karlene Smith dated 12<sup>th</sup> March 2004).

The Claimants contend that the indebtedness was inflated by the apportionment of payments to interest rather than principal, and this was contrary to a well-established principle that the debtor is entitled to elect. In support of this argument, reference was made to *HALSBURY'S LAWS OF ENGLAND (4<sup>TH</sup> ED.) Vol. 9, paragraphs 505-6.*

The Defendant had requested how the payment should be apportioned and the contention put forward by them is that their accounting systems did not permit the apportionment of the payment – the manner stated by the

paying debtor is no excuse for the Defendant's failing to comply with the directions.

Further, the Claimant asserts that the Court has the power to grant the relief claimed despite the alleged power of sale under a mortgage – *FLOWERS & FOLIAGE AND PLANTS LTD. v WRIGHT ET AL S.C.C.A. NO. 42/97 (September 29, 1997)*

Mrs. Minott-Phillips for the defendants distinguished the case of *FLOWERS FOLIAGE AND PLANTS LTD. v WRIGHT ET AL* from the instant case – in the case cited, the applicant for stay of execution was a guarantor of the debt and not the primary borrower as the first claimant, Global Trust Ltd., is in the instant case and the Court is of the view that the case of Flowers does not assist here.

The reference *HALSBURY'S LAWS OF ENGLAND (4<sup>TH</sup> ED) Vol. 9* paragraph 505-6, deals with the debtors right to appropriate, and section 505 bears the heading "Debtor has first right to appropriate." However, the section deals, not with the debtor's right to appropriate what amounts ought to be applied to interest and principal but to the debtor's right "where there are several distinct debts...owing by a debtor to his creditor" when the debtor makes a payment to appropriate the money to any of the debts he

pleases, and the creditor is bound, "if he takes the money to apply it in the manner directed by the debtor".

There is only one debt in this case and the debtor cannot dictate what amount ought to be apportioned to interest and what ought to be applied to principal.

It is significant and will be an issue to be determined at trial, that the copy letters on the record of Global Trust Ltd. makes apportionments while the copy letters which are purported to be part of the defendant's records indicate no apportionment at all.

Global Trust Ltd. is seeking the injunction on the grounds that there is no amount due and owing by it on the mortgage and that if the property were to be sold by auction it would result in irreparable harm to the company. The court was urged to preserve the status quo because sale of the property would be irreversible while if the injunction were granted, the property could be sold at any time. S121 (1) of the Registration of Titles Act states that mortgaged land only "ceases to be liable for such moneys when the registrar makes an entry in the Register Book at which it was made, that such mortgage is discharged wholly or partially, or that part of the land is discharged as the case may be." No such entry has been made by the Registrar in this case so that the properties in question are, for the purposes

of this application still mortgaged although the 1<sup>st</sup> Claimant contends that the amount due and owing has been paid. S106 of the Registration of Titles Act makes provision that in the case of an unauthorized, improper or irregular exercise of the power of sale, damages are the adequate remedy.

The law relevant to an application to restrain a mortgagee from executing his power of sale in circumstances as those which exist in this case, have been set out by the Court of Appeal in *SSI (CAYMAN) LIMITED DR. STEVE LAUFER, FINANCIAL SERVICES U.S. INC. v INTERNATIONAL & MARBELLA CLUB SA*, that the amount claimed by the mortgagee must be brought into court. This Court cannot assume that payment of the mortgage debt has been made. The Registration of Titles Act makes provisions to have discharge of the mortgage debt recorded in a particular manner and there is no evidence that this was done in this case. The first Claimant contends that debt has been paid, the Defendants deny this and this is one of the issues that have to be determined by the Court at the trial in the absence of any compliance with the provisions of the Registration of Titles Act.

In the circumstances, the Court is of the view that damages would be an adequate remedy if the Claimant were to succeed in this action – the application for injunction is refused.

Costs to the Defendants to be agreed or taxed

Leave to appeal granted