[2024] JMCC COMM 33

# (NO 4)

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. CLAIM NO 2013CD00146**

| | | |
|---|---|---|
| **BETWEEN** | **JMMB MERCHANT BANK LIMITED** | **CLAIMANT** |
| **AND** | **WINSTON FINZI** | **FIRST DEFENDANT** |
| **AND** | **MAHOE BAY COMPANY LIMITED** | **SECOND DEFENDANT** |

**IN OPEN COURT**

Kevin Powell and Timera Mason instructed by Hylton Powell for claimant

Terri-Ann Guyah Tolan and Aisha Thomas instructed by Guyah Tolan and Associates

December 11, 2023, January 15, August 13 and 14, 2024

**MORTGAGEE/MORTGAGOR DISPUTE – WHETHER LOAN DISBURSED – MORTGAGOR EXERCISING POWER OF SALE – ABSENCE PROPER OF RECORDS PROVING APPLICATION OF NET PROCEEDS OF SALE – WHETHER COSTS SHOULD BE AWARDED ON AN INDEMNITY BASIS AGAINST MORTGAGOR**

**SYKES CJ**

**[1]** In the reasons for judgment in **JMMB Merchant Bank v Winston Finzi and another** [2021] JMCC Comm 3 (delivered February 2, 2021) the court had indicated that an account needed to be taken. Both judgments are to be read together. The account was to determine whether Mr Winston Finzi and Mahoe Bay Company Ltd (Mahoe) (collectively, the defendants) are indebted to JMMB Merchant Bank Ltd (JMMB), and if so, what the amount of the debt is. JMMB is the successor institution to Capital & Credit Merchant Bank (CCMB) which granted loans to the defendants. The court uses the noun bank to refer to both JMMB and CCMB because there is no need to make any distinction having regard to the legal and factual issues.

**[2]** The parties were to agree on an independent person to conduct the account. The accounting firm of HLB Mair and Russell (HLB) were engaged to conduct the examination and to produce a report. HLB were given wide powers to order the parties to produce any book, record, record of accounts, papers and writings considered necessary or helpful to arrive at an accurate account. The wide powers were to enable HLB to determine level of indebtedness, if any, between the bank and the defendants.

**[3]** HLB was authorised to request, from third parties, any relevant books, records, records of accounts, papers and writings that touch and concern or resolve any matter considered necessary or helpful to arrive at an accurate account. The expectation was that the defendants and the bank would produce all information in their possession so that an accurate understanding of the loan, repayments if any, the context and terms of the exercise of the power of sale, the net amount after deduction for administrative expenses involved in the exercise of the power of sale, how the net proceeds were applied, and whether there was a surplus.

**[4]** Mr Finzi was not able to assist very much with record keeping which did not seem to be his strong suit. The bank, alarmingly, could not or did not produce sufficient records to bring significant clarity to the matter.

**[5]** HLB produced the report. HLB noted that its report '*is solely for the purpose of conducting a full and complete accounting exercise which should give an account of:*

> *a) the monies JMMB received from the land bonds and determine how the monies were applied;*
>
> *b) the status of loan 2* [the January 2008 loan] *and determine whether any sum is still payable to JMMB under the loan;*
>
> *c) the status of loan 3* [the October 2009 loan] *and determine whether any sum is still payable to JMMB under the loan;*
>
> *d) the particulars of a December 2005 loan and*
>
> *e) The proceeds of sale from JMBB's exercise of its power of sale and determine how the said proceeds were applied*.'

**[6]** HLB's report noted that the law firms representing the bank and Mr Finzi/Mahoe Bay indicated that HLB's procedures were appropriate for the engagement.

**A core proposition**

**[7]** Mortgagor/mortgagee disputes revolve around a sore proposition which is that when a mortgagee exercises the power of sale, the legitimate costs of enforcement may be deducted from the proceeds of sale and the net proceeds applied to the loan. It is also indisputable that where there is an excess after the loan has been cleared, it is held on trust for the person entitled to the equity of redemption. This approach was developed by the Courts of Equity. The Registration of Titles Act (RTA) simply codified this position in cases of registered land.

**[8]** Section 107 of the Registration of Titles Act (RTA) states that the '*payment of the expenses of and incidental to such sale*' is made out of the '*purchase money arising from the sale of the mortgaged or charged land*.' After these deductions then '*moneys which may be due or owing on the mortgage*' are paid. The section provides for the payment of subsequent mortgages out the sale price. Finally, it says that '*the surplus (if any) shall be*

*paid to the mortgagor*.' Of course, if there is surplus the mortgagee holds the money under a constructive trust. The statute does not say so explicitly but there is no other rational basis on which the liability of mortgagee could rest if there is a failure to hand over any surplus.

**[9]** The practical way of giving effect to section 107 of the RTA is for the mortgagee to provide an accounting if called upon to do so. In any event, common sense would suggest that a sensible mortgagee would keep records of loans, payments, defaults, and realization of any security. The RTA did not do away with this aspect of common law.

**[10]** What has been said so far is uncontroversial. The question is whether the bank, in this case, has the records to prove that it properly utilised the proceeds of sale in accordance with section 107 since all the properties sold in this case were registered under the RTA. Do note the use of the adverb 'properly.' The mortgagee is not at large to do as he/she/it wishes. The subsidiary question is what is an appropriate solution if the bank cannot demonstrate the existence of the debt or if the debt existed, that it acted in accordance with section 107, that is to say, properly applied the net proceeds to the debt.

**[11]** While it is true that the borrower ought to maintain records of his/her financial life, there can be no question that a bank/creditor must keep proper records of its dealings with customers, especially when it has chosen to exercise the most draconian remedy available to lenders, namely, selling the property of the debtor in circumstances where there is no independent oversight. Where the creditor decides to exercise the power of sale, the debtor either intervenes before the sale or seeks an accounting after the sale. The debtor may attempt to demonstrate in a suitable claim that the creditor did not lawfully exercise the power of sale or if lawful, did not conduct the process properly. In this latter case the debtor is attempting to show that creditor did not do all that could have been done to get the best price. The intervention before the sale is limited to an injunction and usually the price of the injunction is either actual payment of the debt alleged by the creditor to be owed or pay what the creditor said is owed. It is the rare case, if ever that has happened, that the price of the injunction is what the debtor says is owed, assuming the debtor accepts that there is a debt. The law as it presently stands leaves the debtor

not even holding the blade; the debtor has nothing to rely on but the mercy of the court. All the more reason why the law insists that the creditor show what was done with money after the exercise of the power of sale. To simply say, 'I don't have the records and I an unable to produce any witness who can speak to matter' is not helpful. Without strong accountability insisted upon by the court, the corrupt, dishonest creditor would be free to act in the most despicable way secure in the knowledge that no witnesses or documents need be produced and the court would endorse the action; a court exercising the jurisdiction of the former courts of equity.

**[12]** The defence to the exercise of the power sale is either (a) no debt is owed; (b) the sum claimed is incorrect or (c) a fraud of some kind. When the intervention comes post sale, the debtor can only seek compensation on the basis that the property was sold at an undervalue or that the property should not have been sold at all.

**[13]** The law's response to the creditor exercising the power of sale is to require the creditor to account for the proceeds and if it is found that there was an excess after all legitimate expenses and accurately calculated debt is deducted, the creditor holds the excess as a constructive trustee. It necessarily follows that where the creditor is going to exercise the power of sale, then it is only prudent that such a step is documented very carefully and the records kept.

**[14]** The court now examines the land bond transaction against the backdrop of HLB's report and the evidence in the case.

**Land Bonds**

**[15]** The resolution of what became of the land bonds and the proceeds from this is vital to this case. The bank is asserting that it used the funds to pay off debts indicated in the Bolton letter of March 28, 2006. This letter purports to list the loans (whether some or all of the loans is not very clear) to which the land bonds were said to be applied. The defendants say that the bank has not proven satisfactorily that the loans actually existed and further, based on HLB's report there is no evidence that the funds from the land bonds were properly applied.

**[16]** The bonds were the means by which the Government of Jamaica had paid for lands it bought from Mahoe. There are letters dated March 10, 2006, which indicate that the bank received the bonds (exhibit 1, pages 153/154). It is common ground that the value of the bonds was converted to United States of America currency (US$4,060,728.43). HLB noted the discrepancy in the figures for the bonds, but for this case, the agreed upon figure is what has just been stated. Please keep this figure in mind as we proceed.

**[17]** The court will refer to other evidence so that the HLB report on this aspect of the case has proper context. It is important to trace the steps leading up to the conversion of the bonds to United States currency. One of March 10, 2006 letters is from the bank to Mahoe. It is headed: *Re: Acquisition of Land - Mahoe Bay Commissioner of Lands from Mahoe Bay Company Limited Land Bands - Part settlement of indebtedness.*

**[18]** The letter indicated that the bank had received the land bonds. The letter went on to say that the bonds could not be applied to settle Mahoe's debts '*until such time as they are sold/transferred or redeemed*.' The letter has this sentence: *We are now seeking your immediate written confirmation that upon the sale of bonds, the said amount ... which the bank receives, will be the amount applied to your loan account, upon conversion to United States currency at today's prevailing exchange rate of J$65.47 in the US dollar.'*

**[19]** Messrs Curtis Martin and Richard Dyche signed this letter on behalf of the bank. Mahoe signed indicating agreement and acceptance of the terms. Implicit in this acceptance by Mahoe is an acknowledgement that (a) it had debt(s) with the bank and (b) the land bonds would eventually be converted to United States currency. The debt was not specified in this letter.

**[20]** The other March 10 letter is headed: *Acquisition of property by the National Land Agency/Commissioner of Lands Land Bonds in the amount of $260,000,000.00: bonds received on 2006 Feb 22*. This letter stated that since Mahoe's debt was denominated in United States currency, '*the net cash proceeds of J$265,855,890.30 will be converted to United States dollars at today's selling exchange rate of J$65.47 to the US dollar. This will result in a US dollar equivalent of $4,060,728.43, which amount, will be applied to the*

*company's debt today in reduction of same*.' Messrs Curtis Martin and Richard Dyche also signed this letter on behalf of the bank. Below these signatures is this sentence: *We have read the above and are in agreement with same.* There is a signature for Mahoe. The today's rate would be referring to the exchange rate on March 10, 2006.

**[21]** Eighteen days later, the bank sent another letter to Mahoe dated March 28, 2006, signed by Ms Dianne Bolton (the Bolton letter), purporting to particularise the debt. That letter has this caption: *RE: LOANS – MAHOE BAY CO LTD – US$4,199,406.52*. The letter says this:

> *Please be advised that the sale of land bonds of $260M to [CCMB] was effected on March 10, 2006. The proceeds of the sale amount to $265,855,890.41 which was converted at US$1=J$65.47 to give US$4,060,728.43. The resultant US proceeds was (sic) applied to loans outstanding for Mahoe Bay Co Ltd as follows:*

**[22]** This letter confirms that the date of exchange was March 10, 2006, and the exchange rate was J$65.47 to US$1.00. The loans were particularised but there were no supporting documents or records. Inferentially, these loans existed before the Bolton letter and before the March 10 letters from Messrs Martin and Dyche.

**[23]** HLB produced its report dated June 19, 2023. Importantly, the report states, '*[w]e have performed the procedures described below, which were agreed upon with Hylton Powell and Guyah Tolan and Associates in the terms of engagement dated June 9, 2022, in respect of the claim CD000146 – JMMB Merchant Bank v Winston Finzi and Mahoe Bay Company Limited.'*

**[24]** HLB noted that it *'[w]e inspected correspondence between the National Land Agency and Capital & Credit Merchant Bank Limited dated February 22, 2006, confirming the award of land bond certificates valuing $$260,000,000.00 to Capital Credit Merchant Bank (sic)*.'

**[25]** The report stated that *[w]e requested loan statements and agreement in relation to the land bonds to determine how these proceeds were applied.'* In response to this request, the report observed that *'[w]e were provided with correspondence dated March*

*28, 2006, signed by Dianne Bolton, Snr. Manager – Credit and addressed to Mahoe Bay Company Limited for the attention of Mr Winston Finzi.'*

**[26]** The table below is an extract from HLB's report.

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**See below an extract included in the correspondence, with our comments:**

**Table 2**

Extract from Letter to Winston Finzi (March 28, 2006)

| Principal before payment | Interest Accrued as at 10.03.06 | Total | Payment Applied | Balance after payment |
|---|---|---|---|---|
| US$ | US$ | US$ | US$ | US$ |
| 2,493,696.01 | 9,564.86 | 2,503,260.87 | 2,426,536.59 | 76,724.28 |
| 277,558.27 | 912.52 | 278,470.79 | 278,470.79 | 0.00 |
| 191,152.24 | 733.19 | 191,885.43 | 191,885.43 | 0.00 |
| 160,000.00 | 547.95 | 160,547.95 | 160,547.95 | 0.00 |
| 1,000,000.00 | 3,287.67 | 1,003,287.67 | 1,003,287.67 | 0.00 |
| **4,122,406.52** | **15,046.19** | **4,137,452.71** | **4,060,728.43** | **76,724.28** |

**[27]** Based upon the Bolton letter the entire land bond sum was consumed repaying the loans stated in this letter. It is these loans which HLB said that '*[w]e were not able to verify the loans, as no loan agreements, statements or any other documents were provided supporting the loans in the table above. We were however provided with a letter from Winston Finzi to Capital & Credit Merchant Bank regarding a line of credit for US$2.5 Million (sic) and how it should be disbursed. The letter was dated April 30, 2003.'* To put it bluntly, the accountants saw no evidence supporting the figures indicated in the Bolton letter and, importantly, saw nothing to verify the interest said to be owed on each loan.

**[28]** The Bolton letter indicated that four of the five loans were paid off. It did not indicate the date of the loans, the sums borrowed, the interest on each loan, if any, or any accompanying documents to verify the loans. HLB noted that there was a difference between letter from Mr Finzi and the Bolton letter of US$77,000.00. Regarding the interest on each loan HLB noted that '*[w]e were not able to verify the calculation of the interest*

*accrued'* and concluded that '*[w]e were unable to determine whether the proceeds were properly applied, as we were not provided with loan agreements, statements or any other correspondence relating to the loans to which the proceeds were applied as per table in the above extract'* (see table at paragraph 22).

**[29]** There was one loan that had a principal amount of US$2,493,696.01 before payment. The final column indicated that there was a balance of US$76,724.28. This loan will be the focus of analysis shortly. The court has isolated this loan because the evidence shows on a balance of probability that Mahoe never received this loan. Approximately fifty percent was used to purchase shares in the name of Weststar, a company controlled by the then chairman of CCMB, Mr Ryland Campbell, without any evidence proving that Mahoe or Mr Finzi had authorised the use of funds to purchase shares in Weststar's name.

**The April 2003 line of credit (the J$60,000,000.00 which became US$2,500,000.00 line of credit)**

**[30]** There is a particular loan that has become the subject of controversy between the bank and the defendants. On the totality of the evidence, the court concludes, on a balance of probabilities, that the JA$60,000,000.00 to Mahoe became the US$2,500,000.00 loan created between April 26 and April 30, 2003 (exhibit 1 pages 107 - 116). The security was a mortgage over 35 acres of land and a personal unlimited guarantee of Mr Finzi. The Bolton letter was purporting to refer to all outstanding debts of Mahoe as of the date of the letter and on that premise this loan would be one of those covered by the letter. Also having regard to the principal sums stated in the letter this loan is the only one that is near to the US$2,500,000.00 mark.

**[31]** The defendants' primary case is that this loan was never disbursed. The defendant's say that Mahoe thought it was but that was never the case. It appears that this loan was negotiated before December 2005, quite likely April 2003.

**[32]** The court will examine the evidence on two premises: (a) that the line of credit was disbursed and (b) that it was not disbursed.

*a) Assumption number one – the line of credit was properly disbursed*

**[33]** In the previous decision, the evidence showed that the bank or someone within the bank or a connected institution diverted JA$75,000,000.00 to purchase 15,000,000 CCMB shares for Mr Ryland Campbell's company Weststar. A cheque numbered 009715 in the sum of JA$75,000,000.00, dated April 30, 2003, was made payable to Veritat Corporation. The face of the cheque, in the line labelled 'pay to the order of' has these words, '*Veritat Corporation/CCMB Share Offer*.' On the back of this cheque are the words, '*For deposit to Capital & Credit Share issue a/c no 101000893*.' To date, the bank has not indicated that what was stated in the cheque was an error.

**[34]** To round off this narrative, there is a letter dated March 24, 2015, to Mr Finzi from KPMG, signed by Ms Elizabeth Henry Pottinger. The letter said that it (KPMG) received the cheque dated April 30, 2003 '*attached to an application form for the purchase of 15,000,000 shares in [CCMB's] initial public officer.* ***This application was not in the name of Winston Finzi or Mahoe Bay Limited***.' (emphasis added). The letter closed by saying that the '*application was submitted by the broker Capital & Credit Securities Limited*.' (exhibit 1, page 311). Ms Pottinger's letter was clearly in response to a query.

**[35]** Do note that at this point in the narrative, there is nothing to indicate that Mahoe authorised the purchase of the shares in the name of Weststar, the company owned by Mr Ryland Campbell. The evidence is that the CCMB's shares ended up in the name of Weststar, a company owned by the bank's chairman Mr Ryland Campbell. Even if it is said that CCMB or Veritat was an agent of Mahoe and either one bought the shares as nominees there would still be the need for an explanation indicating how Weststar became the owner of the shares. The bank has not explained how this happened. The evidential burden would be on the bank once it was not proven that Mahoe/Finzi authorised any transaction with the JA$75,000,000.00 or shares that could have led to this result. Added to this, it took court action in St Lucia for the shares to be prised out of the firm grip of Mr Campbell and Weststar. The very fact that court action became necessary tends to show that Weststar took the view that it lawfully owned the shares in CCMB but there is no explanation for Weststar becoming the owner of the shares.

**[36]** The consequence of this line of reasoning is that Mahoe cannot be treated as having the full benefit of this US$2,500,000.00 loan. To put it bluntly, Mahoe thought it had the full benefit of the loan but that was not the case and what we have here is the bank treating Mahoe as borrowing the full amount and wanting to recover that amount when the bank either knew or ought to have known of the irregularity which produced the inexplicable result of part of the loan being used to acquire CCMB's shares for Weststar. In effect then, the bank either used or enabled someone to use part of the proceeds of the loan to buy shares for the bank's chairman's company but continued to treat the entire sum as a loan to Mahoe and charged interest on it and apparently used the proceeds from the land bonds to pay off the loan. With this out of the way, there is still the balance of the loan to be accounted for.

**[37]** The defence is saying – presumably, with the benefit of hindsight – that it did not get the benefit of the balance of the funds being turned over to the foreign exchange department. There is this additional context. There is a letter dated April 30, 2003 from Mr Finzi to Mr Curtis Martin of CCMB. It reads:

> *Pursuant to our meeting today, please allow this medium to be your instructions to debit Mahoe Bay's line of credit for US$2.5M and pay the sum of …. (J$1,307,759.37) and turn over these funds to your foreign exchange department. These funds are to be converted to the Jamaican equivalent at today's exchange rate of J$57.35 to its US counterpart.*
>
> *Please be kind enough to pay the final proceeds to Veritat Corporation CCMB shares offer.*

**[38]** What is happening here is that Mr Finzi – the human face of Mahoe – is telling the bank to convert part of the proceeds of the loan to foreign exchange and the rest payable to Veritat Corporation in respect of CCMB's share offer. This indicates that Mr Finzi was willing to purchase shares in CCMB. However, this is not evidence that he authorised the purchase of shares in Weststar's name.

**[39]** If this is a reference to the US$2,500,000.00 then it would mean that roughly half of this money – if converted at the rate of JA$57.35 in April 2003 – would have been used

to pay for the shares. The cheque drawn payable to Veritat was for JA$75,000,000.00. The conversion of the US$2,500,000.00 loan at JA$57.35 would yield JA$143,375,000.00. If JA$75,000,000.00 are taken from this sum the balance is JA$68,375,000.00 (US$1,192,240.63 @ JA57.35).

**[40]** Based on the totality of the evidence there is no other loan other than the JA$60,000,000.00 which became the US$2,500,000.00 to which the Bolton letter could refer. This court concludes that the Bolton reference to a principal of US$2,493,696.01 was a reference to the JA$60,000,000.00 which became the US$2,500,000.00. The Bolton letter had an error in that regard.

**[41]** This would mean that the principal sum stated in the Bolton letter should have been US$1,192,240.63 which represents what is left after the JA$75,000,000.00 is removed from being contemplated as part of the loan. The idea here is that a grave irregularity took place on such scale that nearly half of this line of credit was not used for Mahoe's benefit and so should not be attributed to it as a debt. On this premise, this would also mean that if the land bond proceeds were applied to the other loans as stated in the Bolton letter, then all those loans would be paid off, and a surplus from the land bonds would be available for Mahoe. The surplus would be US$1,307,759. 32 (JA$75,000,000.00 converted to United States currency). This would mean that US$1,307,759.32 would be available to Mahoe to repay any other loan it took. It would also mean that Mr Finzi's guarantee could not be called on.

*b) Assumption number two – the line of credit was properly utilised*

**[42]** However, the defendants' case goes further. They are saying that the Bolton letter does not establish that the US$2,500,000.00 loan was used in the manner contemplated by Mahoe. The ultimate conclusion being that no part of the US$2,500,000.00 loan was used for Mahoe's benefit. The court will now examine the evidence a bit more closely to see whether Mrs Guyah Tolan's proposition is acceptable. Mrs Guyah Tolan's proposition is that when one does the mathematics of the loan, the interest stated to be owed on that loan could not be just US$9,564.84; it had to have been more.

**[43]** The letter of April 26, 2003 from the bank to Mahoe states that CCMB '*is pleased to advise that your application for an increase in your loan facility from sixty million Jamaican dollars ($60m) to two million five hundred thousand United States Dollars (US$2,500,000.00) has been approved*.' The letter is intituled *'Re: Application for Increase in Loan Facility from $60m to US$2.5m*'. This letter is signed by Mr Andrew Cocking and Mr Curtis Martin for the bank and Mr Finzi for Mahoe. The company seal is also present on Mr Finzi's signature. Above Mr Finzi's signature are these words: *Accepted this 26th day of April 2003.* This means that Mahoe and CCMB agreed on the terms of the US$2,500,000.00 line of credit. The court has already referred to Mr Finzi's April 30, 2003 letter to Mr Curtis Martin about the use of the line of credit.

**[44]** The bank's April 30, 2003 letter says that subject to a few changes referred to in the April 26, 2003 letter all other terms remain the same as they were in the original commitment letter dated April 9, 2003. The April 9, 2003 letter has an interest rate of 40% per annum which was subject to change.

**[45]** This would mean that from April 26, 2003 the US$2,500,000.00 loan attracted an interest rate of 40%. At this rate, the interest would be US$1m per annum. The April 9, 2003 commitment letter also said that this loan was a three (3) month loan. The interest for three months would be US$250,000.00. If this loan remained unpaid since July 2003 then in addition to US$250,000.00 for the three-month period (April 26 – June 26, 2003) interest would be US$83,333.33 per month from July 26, 2003. The loan period was not altered by the April 26, 2003 letter. If Mahoe had not been servicing this loan since 2003, and if US$2,493,696.01 is the principal sum and this principal sum is indeed a reference to the US$2.5m loan, then the interest could not possibly be just US$9,564.84. This prompts the question, which loan is Ms Bolton referring to in her letter of March 28, 2006? Other than the US$2.5m, no other loan is a candidate for any sum in the range indicated by Ms Bolton. Also why is the principal US$2,493,696.01 and not US$2,500,000.00? These questions have not been resolved completely by the evidence but the court is prepared to hold fast to its conclusion that the sum referred to in the Bolton letter is the US$2,500,000.00 loan.

**[46]** The counterclaim is that the US$2.5 was not used for the benefit of Mahoe. The ultimate conclusion being that no principal or interest is payable because there is no proof that the loan was disbursed in accordance with the directions of Mahoe.

**[47]** The counterclaim also pleads that it '*was an expressed and implied term and condition of the line of credit that the same would only be utilised on the authorization of the defendants or either of time*.' The defence to the counterclaim accepts this pleading but says that it disbursed the line of credit to Mahoe. The support for this assertion according to the bank is Mahoe's April 30, 2003 letter.

**[48]** The problem for the bank is that while it is true that there was cheque in the sum of JA$75,000,000.00 payable to Veritat Corporation, that sum was not the total sum of the loan and also the shares were purchased for Weststar and not Mahoe or Mr Finzi or a nominee of either. There is no evidence of what became of the balance of the loan and such evidence can only come from the bank. How do we know that the balance of the loan was used to purchase the foreign exchange as Mr Finzi requested? If the bank was unfaithful in the purchase of the shares, is there any good reason to conclude that they would be faithful in purchasing the foreign exchange? Remember that HLB has not been able to determine how the land bond money was utilised.

**[49]** It must be noticed that the bank's claim for loans 2 and 3 was in respect of loans made in 2008 and 2009. This means that Ms Bolton's letter could only have been referring to loans, if they really existed, made before March 28, 2006.

**[50]** Mr Powell considers the Bolton letter authentic. He suggested that its contents should be accepted because the letter is genuine—not a forgery. But that approach assumes the very thing in issue: whether the Bolton letter has accurate calculations and accurate factual assertions. Authenticity of a letter is one thing; accuracy is another.

**[51]** During oral delivery of the decision on August 13, 2024, the court heard further from Mrs Guyah Tolan and Mr Powell. Mahoe through Mr Finzi signed the March 10, 2006 letter acknowledging the debt but that letter did not indicate which debt was in view. It was the Bolton letter some eighteen days later that particularised the debt but Mahoe did

not sign that letter. It seems to this court that when Mahoe signed the March 10 letter, at the very least, it had in mind the US$2,500,000.00.

**[52]** The other debts stated in the Bolton letter have not been proven by the bank to exist and therefore should not have been paid off using the land bonds. The fact that Mr Finzi on behalf of Mahoe signed the letter acknowledging the debt indicates that Mahoe was saying that a debtor/creditor relationship existed between CCMB and Mahoe. Had there not been that kind of relationship it is virtually impossible to explain why the bank would have been writing to Mahoe and Mahoe responding affirming the existence of some debt. Now it is true to say that the record keeping of the bank has been very poor but it is equally true to say that the record keeping of Mahoe was equally poor. The court therefore has to make a decision in the context of poor records or more accurately, non-existent records, on this aspect of the case. The enduring question is w which debts.

**[53]** The court concludes that none of land bonds should have been used to settle the debts stated in the Bolton letter. Unfortunately, the evidence is that the bank enabled or facilitated a line of credit which was ostensibly for Mahoe's benefit to be used to purchase shares for a company of the then chairman of the bank why should the court have any confidence that the other loans listed in the Bolton letter actually exist or if they exist that the sum stated are accurate?

**[54]** This court takes the position that there is no proof that US$2,500,000.00 was used for the purpose for which the line of credit was made available. The court does not accept that the balance of the foreign exchange was dealt with in the manner requested by Mahoe. This means that the bank had no legal or factual basis to apply any part of the land bonds money to the US$2,500,000.00. Mahoe thought it had the US$2,500,000.00 for its use but that was not the case. This court concludes that the US$2,500,000.00 was not a debt for which Mahoe or Mr Finzi could be liable to which the land bond money could be applied.

**[55]** This means that the US$2,500,000.00 line of credit allegedly utilised by Mahoe was not recoverable from Mahoe or Mr Finzi. It follows that such portion of the proceeds

of sale from the land bonds that were applied to this US$2,500,000.00 loan should not have been so applied and that amount is held on a constructive trust for Mahoe.

**[56]** The other debts listed in the Bolton letter have not been proven to exist and therefore no money from the land bonds should have been used to pay off these loans. The loans particularised in the Bolton letter were not particularised in the March 10, 2006 letter and while it is true that Mahoe signed the March 10 2006 letter the only likely debt proven that may have been in existence is the line of credit. However, the evidence has shown that the line of credit was not used for Mahoe's benefit but rather for the benefit of the then chairman of the bank.

**[57]** In effect then, the entire land bond sum is to be restored to Mahoe with interest. The parties are to make submissions on this aspect of the matter.

**April 2006 loan (US$1,500,000.00 or loan 1)**

**[58]** To recap quite quickly, this was a US$1,500,000.00 demand loan to Mr Finzi for three months at 12.75% interest per annum. It was agreed and accepted by Mr Finzi. This loan was to be used as follows: (a) US$1,270,650.80 to settle a judgment debt in favour of Jamaican Redevelopment Foundation (JRF); and (b) US$229,349.20 to cover legal costs and fees associated with the purchase of land at Providence Estate, St James. It is common ground that this loan was disbursed. This is evidenced by cheques in the respective sums made payable to the firm of Livingston Alexander and Levy, which represented the JRF.

**[59]** Having paid the judgment debt, Mr Finzi set about repaying the loan. It is agreed that Mr Vincent Auld wrote to Mr Finzi's lawyers (letter dated August 9, 2006) telling them that payment of US$1,554,631.42 would settle the loan. This court concluded in the previous reasons for judgment that this loan was paid off on August 9, 2006.

**[60]** The loan was secured by Mahoe's corporate guarantee which itself was supported by mortgage over lands registered at volume 1257 folio 656, 657, 658, 659, 660, 714, 715. Mr Finzi also executed a promissory note in the sum of US$1,500,000.00.

**[61]** Further details are in the first judgment on this matter. The court decided in the previous judgment that there was no factual or legal foundation to sell the seven parcels of land used as security for the April 2006 (loan 1).

**[62]** On August 13, 2024, during oral delivery of the written reasons, the court received further clarification in respect of the land used as collateral for this loan. The court was advised that these lands were sold along with lots 13 and 14 (collateral for loan 2) for a total sum of US$2,500,000.00 or J$317,625,000.00 at an exchange rate of JA$115.50. Also Mr Finzi's Beverly Hills home was also sold. In effect, ten parcels of land were sold by the bank in its attempt to recover all these loans which it alleges were still outstanding. These lots (other than Mr Finzi's home) were sold as a whole and not as individual lots. It is common ground that when this sale was effected, the bank sought to recover the debt owed under loans 1, 2, and 3. This sale under the exercise of the power of sale was done in 2015. In other words, the bank was seeking to recover in 2015 the April 2006 loan which Mr Finzi thought he had paid off, hence the sale of all the lands used as collateral for the April 2006 loan.

**[63]** As was the case with the US$2,500,000.00 line of credit so it was with this US$1,500,000.00 loan. In the case of the line of credit, Mahoe was regarded as owing money when part of the money was used to benefit the chairman of the bank. In the case of this specific loan Mr Finzi was thought of as owing the money when it was in fact paid off. In both instances the bank was charging interest on non-existent loans.

**[64]** HLB's report shows that the proceeds from the sale of the properties were applied to loans 2 and 3 on July 7, 2015. There is no evidence indicating how much money was deducted for the cost of exercising the power of sale. The parties are to gather information from practising conveyancers at the time in order to determine a reasonable deduction from the sale price for the cost of enforcing the power of sale. Until this information comes the court will proceed using the gross figure. The court will detail its reasons with respect to loans 2 and 3 further on.

**[65]** Before moving on there is the December 2005 loan to Mr Finzi. It was a personal loan. This was another loan of US$1,500,000.00 for six months at 12% per annum. The

loan was disbursed by cheques payable to RBTT Securities Jamaica Ltd and to Oswald James & Co, attorneys at law.

**[66]** Do recall that the bank had received the money from Mr Finzi's lawyers to pay off the April 2006 (loan 1).[1] The bank is saying that it used the money (the US$1,554,631.42 received from Mr Finzi's lawyers) to pay off this December 2005 loan. Based on the evidence this money to pay off the April 2006 loan would not have been received until August 2006. The bank is asserting that it used part of the land bond proceeds (Mahoe's money) to pay down the April 2006 loan (Mr Finzi's personal loan) and also to pay off some part of the December 2005 loan (Mr Finzi's personal loan). However, this does not appear to be the case.

**[67]** This explanation from the bank strains credulity for these reasons. The interest payable on the December 2005 of US$1,500,000.00 loan at 12% per annum for twelve months would be US$180,000.00. This would be US$15,000.00 per month. If the loan had been paid back in six months, the interest would be US$90,000.00. If repaid in August 2006 (eight months later) the interest would be US$120,000.00. Thus, by August, the total sum (principal and interest) payable on the December 2005 loan would be US$1,620,000.00. Thus, if the US$1,554,631.42 received to pay off the April 2006 loan (loan 1) were applied to that December 2005 loan, then the difference, on the bank's reasoning, would be US$65,368.58 as of August 2006, which would be paid from the land bonds. But the land bonds were converted earlier in 2006 and according to the Bolton letter the entire sum was consumed paying off debts alleged to have been owed by Mahoe. Thus there would not have been any money from the land bonds to apply to the December 2005 loan. In addition, there is no sum in the Bolton letter referable to the December 2005 loan by the principal amount because there was no principal sum of US$1,500,000.00 in her letter which could suggest that the December 2005 was in view when she wrote her letter. Also the interest payable by March 2006 on this December 2005 loan would be US$45,000.00 and there is no sum for interest amounting to

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[1] See earlier judgment of **JMMB Merchant Bank v Winston Finzi and another** [2021] JMCC Comm 3

US$45,000.00. Reference is made to March 2006 because that is the month in which the land bonds money was applied to loans listed in the Bolton letter. Even if the interest due on the December 2005 loan were compounded and added back to the principal there is no figure in Ms Bolton's letter which would indicate a principal based on compounding the interest. It seems to this court that this explanation by the bank was not grounded in reality. On a balance of probabilities, this court, therefore, concludes that no money from the proceeds of the land bonds was used to pay off the December 2005 loan.

**[68]** It seems to this court that the bank's explanations are not in keeping with the court's understanding of the evidence and this further undermines confidence in the bank's version of events. This is another basis for the court to doubt whether the loans other than the line of credit of US$2,500,000.00 actually existed or if they existed, whether sums stated are accurate.

**[69]** Therefore, from the bank's view, the April 2006 loan was not discharged, interest was accruing and this state of affair justified the sale of the lands in 2015. On the bank's case theory after August 2006, the outstanding loans would have been the April 2006 loan and the US$76,724.28. Interest and late charges would be accruing.

**January 2008 loan (J$50,000,000.00 or loan 2)**

**[70]** In respect of this loan and loan 3 the previous judgment did not get into great detail. The more detailed forensic work of HLB was awaited. It is now here. The court rejects the observation made by Mr Powell that an aspect of the report went beyond HLB's remit. Specifically, it was said that HLB's assertion that two parcels of land were used as collateral for loan 2 and not loan 3 went beyond its remit. The court need not dwell on that and assuming, without deciding, that the observation is correct, the quality of the report and its accuracy has not been impugned in the slightest. The court unhesitatingly relies on it in full without reservation.

**[71]** The report states that this was a three-month demand loan (January 31, 2008 or loan 2) of J$50,000,000.00 at 19.75% variable interest per annum from CCMB to Mr Finzi. There is a document dated January 31, 2008 headed: *Re Application for loan* –

*J$50,000,000.00.* It sets out the term of the loan. The purpose of the loan was to pay the debts of Universal Holdings Limited which owed money to the JRF. Ms Moya Leiba Barnes and Mr Curtis Martin for the bank signed it. Under those signatures is this sentence: *Agreed to and accepted the 1st day of February 2008.* Below is Mr Winston Finzi's signature. The security for the loan was a legal mortgage for JA$50,000,000.00 over lots 13 (volume 936 folio 167) and 14 (volume 936 folio 168) and lands registered at volume 963 folio 176 and volume 1259 folio 937. The loan was disbursed by way of a cheque payable to JRF.

**[72]** Interestingly, HLB noted that while the agreement stated that the bank had the right to vary interest rates such variation was subject to notification being given to the borrower. The report notes that interest rates were varied, but there is no evidence of any correspondence from the bank to the borrower indicating this. This court now finds that any such variation was unlawful and contrary to the loan agreement. HLB also found that interest payments were being capitalized and charged to the borrower. There is no documentary evidence that this was permissible. This court now declares that capitalization of the interest was unlawful.

**[73]** Mr Finzi admits the loan but says that it was repaid. There is no evidence of this from him. Since it is known that Mr Finzi did receive the full value of this loan and in the absence of evidence that it was repaid, the conclusion must be, on a balance of probabilities, that the loan is still outstanding. There is no evidence from Mr Finzi that he was servicing the loan since its disbursement.

**[74]** There is a May 14, 2008 letter signed by Mr Finzi addressed to Mr Vincent Auld (CCMB) that must be considered (exhibit 1 page 208/209). In that letter, Mr Finzi asked the bank to extend two loans, including the JA$50,000,000.000 loan. This means that the loan was not repaid in the three months for which it was borrowed. It accrued interest. This is further evidence that the loan has not been repaid.

**[75]** On the premise that the loan was still outstanding, the bank was entitled to enforce the security. This it did. But the bank is also obligated to prove what it did with the proceeds of sale. The bank has contended that because there was an all-monies

mortgage clause it was entitled to apply the proceeds as it saw fit. Assuming this to be the case, the presence of an all-monies clause cannot logically and rationally lead to the conclusion that the bank, can behave like Sir Henry Morgan and ransack the debtor's property via the power of sale, and there is no accountability with the ultimate logic being that it need not account for the proceeds of sale. The exercise of a legal right is not a vaccination against accountability for the consequences of the exercise of that right.

**[76]** In determining the amount owed in this loan the court will rely on the calculations done by HLB in appendix 1. HLB noted that '*[w]e calculated the interest accrued on the loan based on the terms of the agreement at a rate of 19.75%. We did not capitalise interest in arriving at the amounts included in our computation.*

**[77]** HLB have found that lots 13 and 14 were collateral for this loan and not loan 3. Based on the additional information, the court has now come to appreciate that all collateral parcels of land for loans 1 and 2 were sold as blocks for US$2,675,000.00 (J$317,625,000.00). Thus any cost of enforcement which the bank was entitled to deduct from the gross proceeds covered both sets of land used for collateral. The bank also sold Mr Finzi's family home. It is common ground now that the sum of J$42,366,092.00 was applied to loans 2 and 3. The family home was security for loan 3.

**[78]** So let us be clear there. For loan 1 the lands used as security were sold by the bank. For loan 2, the lands used as security for that loan were sold by the bank. For loan 3 the land used as security for that loan was sold by the bank. Thus, the bank sold three distinct blocks of land. Add to this the land bonds of US$4,060,728.43. The bank was awash with money. Now that there is resistance to its claim, then the bank must show (a) the sum realized from the sale(s) (gross proceeds); (b) deduction of legitimate expenses incurred in enforcing the security; (c) how the net proceeds were applied; and (d) critically, what was the surplus, if any.

**[79]** HLB's report states in relation to the sale of the lands for loans 2 and 3: *[w]e were unable to determine the net proceeds available to be applied after deduction of fees and charges related to the sale of properties.* This is not surprising since HLB also said that '*[w]e were not provided with sales agreements, receipts, or any other document to*

*determine (sic) proceeds of sale. We, however, obtained and inspected copies of the title from the Titles Office for the properties that were used as securities and subsequently sold.'* Thus HLB also said '*had we been able to verify the proceeds of sale of the properties and determine the application of the same'*

**[80]** HLB found that the bank was compounding interest and varying the interest in its calculations regarding this loan. The report noted that the condition precedent for varying the interest rate was not followed and there was no correspondence with the borrower to advise of the compounding of the interest. This court says that in relation to this loan both practices were unlawful and not permissible. The court accepts HLB's calculations as reliable. They were done without compounding and at the original rate of interest for this loan.

**[81]** The agreed evidence is that from the sale of lands, the gross figure was J$317,625,000.00. HLB says that $90,934,977.00 was the total sum owed as of September 23, 2015.

**[82]** The court will use the month of July 2015 as the last month for which this loan was outstanding. The reason is that the evidence suggests that the parcels of land were sold in June/July 2015 which meant that the bank had over J$300m from which to collect the debt but apparent it failed to do so because it was labouring under the view that loan 1 was still owed.

**The October 2009 loan (J$990,000.00 or loan 3)**

**[83]** This was a loan of J$990,000.00 to Mr Finzi from CCMB at 25% interest. It was disbursed on October 2, 2009. This loan was to settle three bills for professional services received. The loan was for twelve months. The collateral for this loan was a promissory note signed by Mr Finzi and mortgage over land registered at volume 1249 folio 937. This land was part of the collateral for loan 2.

**[84]** As was the case with loan 2 so it is with loan 3: HLB cannot determine what the net proceeds of sale were after deduction for costs incurred in exercising the power of sale because it '*was not provided with sales agreements, receipts, or any other supporting*

*documents to determine the proceeds from the sale of the properties.'* HLB says that based on its calculations there is a balance owing of J$2,603,409.00.

**[85]** Even though the agreement made provision for variation of interest rate there is no evidence that the required notification was given to the borrower. Interest was capitalized without any lawful foundation.

**[86]** The court uses July 2015 as the last month that this loan should have been regarded as outstanding. The reasons are the same advanced under loan 2.

**[87]** The court is saying that on HLB's calculations both loans could have and should have been deducted from the proceeds of sale.

**Observations**

**[88]** However, it must be of concern to the Bank of Jamaica and if it is not then it ought to be of concern that a regulated institution can sell property under the exercise of its power of sale (the most powerful unregulated power – except by ex post facto court action or by injunction if the debtor finds out in time that the property is being sole and in such cases the debtor may be required to pay the sum asserted by the creditor as the price of the injunction – exercisable by a creditor) and when asked to account, the best that it can do, through its lawyers is to say, it has produced what it has and, by implication, since there is no fraud then its assertions must be true. This is not acceptable in the twenty firsts century especially in an economy that is seeking to attract investors. What confidence can an investor have in a bank that does not keep records, compounds the interest without any notification to the customer, varies the interest rate, sells the security and cannot prove how it applied the net proceeds of sale because it cannot even prove what the net proceeds of sale were?

**[89]** The record-keeping of the bank, in this case, has been nothing short of appalling and leaves a great deal to be desired. How does a regulated institution fail to produce even a contract for sale the land, any appraisal of the land, any document indicating the administrative expenses to be deducted from the gross proceeds of sale, any details in respect of some of the loans it claimed money was applied to and ask the court to accept

its assertion that what it has produced is true? The persistent statement in the report of HLB was the inadequacy of records from the bank.

**[90]** This court believes that the time has come for legislative intervention to reign in the egregious conduct of lenders and special focus should be placed on the exercise of the power of sale. There must now be minimum information provided by the lender to the borrower before the power of sale is exercised. There must be proper accounting during the process so that at the end of the process the gross sale price is known, the cost of enforcement is known, the net proceeds are known, how the money was applied is clearly stated, and there must be a statutory obligation to keep records for a minimum period of time. Further, in the event that the institution is acquired by another then the successor institution must be obliged to secure and keep these records. In light of current technology this is not an onerous obligation. All this needs to be supported by accurate, reliable and trustworthy information.

**[91]** There should be close examination of this 'all monies' clause because it seems to this court that the bank's interpretation of these clauses is that it is free to do what it want, when it wants, and when asked to account the response, 'Oh my, we don't have the records but take our word for it.'

**[92]** It may be said that this case is an outlier and assuming that to be the case, it should not have occurred at all. This type of case has no place in a modern financial system.

**Mr Powell's propositions and Mrs Guyah Tolan's responses**

**[93]** Mr Powell's submissions for the claimant are that HLB has found that money is still owed under loans 2 and 3. That is correct. What we now know is the bank's claim was greatly inflated by two occurrences which were unearthed by HLB. First, the bank was capitalising interest. Second, the bank was varying the interest rate. These two practices were not proven to be lawful either in themselves or meeting the condition precedent in the documents offering the loan. The result was a greatly inflated debt.

**[94]** Mrs Guyah Tolan submitted that the bank not only sold lots 13 and 14 as well as consuming the proceeds from the land bonds but it also sold seven other parcels of land

exercising its power of sale. The court has counted ten parcels of land comprising these two parcels, the seven parcels used to secure loan 1, and the family home of Mr Finzi.

**Summary of conclusions**

**[95]** The court will now summarise the bank's lack of reliability and lack of credibility which was spoken of above. This is where we are now in this case:

(1) approximately 50% percent of the US$2,500,000 line of credit was used to purchase shares in Weststar's name without any proof of authorization so to do and despite this, the full amount of the loan was credited to Mahoe which was being charged interest on the complete sum;

(2) the April 2006 loan (loan 1) was paid off completely but was still being treated (even by Mr Finzi) by the bank as if it was not paid off notwithstanding the clear and unequivocal written communication between the ban and Mr Finzi's lawyers;

(3) the security (seven parcels of land) for the April 2006 loan (loan 1) was disposed of in 2015 and applied to the December 2005 loan and some applied to April 2006 loan (loan 1) which was already paid off. Thus there was double recovery in respect of the April 2006 (loan 1);

**[96]** It cannot be overlooked that the bank brought the claim. It is well established that when a claim is filed, there ought, at the very least, some evidence capable of belief that is relevant or admissible to support the claim. As noted earlier, the bank must have known that should Mr Finzi and Mahoe resist the claim, there was no solid proof to come regarding the US$2,500,0000.00 line of credit, the loans listed in the Bolton letter, the inability to establish satisfactorily what it did with the net proceeds of sale of the various parcels of land.

**The resolution**

**[97]** It is clear that a debtor/creditor relationship existed between Mr Finzi and Mahoe on the one hand and the bank on the other. There does not seem to be proper records on both sides. Nonetheless the court must make do with what is presented.

**[98]** The court concludes the following:

a) On a balance of probabilities, the US$2,500,000.00 (April 2003) line of credit was not disbursed to Mahoe. The court lacks evidence to conclude that this loan was disbursed to Mahoe or used in accordance with Mahoe's instructions. Therefore, the court concludes that this loan is not owed by Mahoe to the bank. It is also evident that none of the money from the land bonds or money from the sale of land should have been used to pay off this line of credit. This loan was not among those sued for by the bank but having regard to use of the land bonds money and the defence to the claim, this loan came in to focus. If the loan was not disbursed, then there was nothing to pay back, and it necessarily follows that any money used by the bank to pay off the non-existent loan must necessarily be that of the owner of the money. The bank would now be a constructive trustee for these sums and the court so finds. The land bond sums so applied are now declared to be held by the bank as a constructive trustee for Mahoe;

b) the court goes further to say that there is no proof of the existence, accuracy and reliability of the loans listed in the Bolton letter. Mr Finzi signed the letter of March 10, 2006 indicating the existence of loans but that letter did not particularise which loans were in view. The particularization awaited the Bolton letter. That letter simply referred to loans stating interest and principal but without any supporting document and crucially this Bolton letter was never signed by Mr Finzi on behalf of Mahoe. The land bonds were used to pay off these loans. The court declares that this should not have been done.

c) the consequence of (a) and (b) is that the bank holds the entire sum of the land bonds is to be reconstituted and held on trust for Mahoe. The court will hear further submissions on (a) should the bonds be reconstituted in United States or Jamaican

currency; (b) should it attract interest and if yes, at commercial rate, and should the interest be compounded?

d) The December 2005 loan was not the subject of a claim or counter claim. It was addressed because it was said to be the loan to which the money for the April 2006 loan was applied. The court makes no pronouncement on the question of whether it is still in existence.

**April 2006 loan (US$1,500,00.00 or loan 1)**

e) In respect of the April 2006 loan (loan1 – personal loan to Mr Finzi), the court concludes that this loan was, in fact, paid off, and therefore, there was no legal or factual foundation for the sale of the land used to secure the loan. During oral judgment I had said that the proceeds of sale of lands registered at volume 1257 folio 656, 657, 658, 659, 660, 714, and 715, all registered in Mahoe's name, are now declared to be held on a constructive trust by the bank for Mahoe. However, on further thought, there is no proof that the price for which the properties were sold was the best price available or the market price. I think that what should be restored to Mahoe is the market value of the land which may or may not be the price for which they were sold.

**January 2008 loan (JA$50,000,000.00 or loan 2) and October 2009 loan (J$990,000.00 or loan 2)**

f) Both loans will be dealt with together at this point because what follows applies to both. Mr Finzi agrees that he received the loan but says it was repaid. There is no evidence of this and so the court treats the January loan as outstanding. The bank apparently sold lands registered at volume 936 folio 167 (lot 13) and 168 (lot 14), volume 963 folio 176 and volume 1259 folio 937 and realised the gross sum of J$317,625,000.00. The last parcel of land was the family home. This family home was sold separately for J$50,000,000.00.

g) According to counsel the sale of all parcels took place on or around April 2015. Thus by April 2015 the bank had a total of pool of funds of J$367,625,000.00.

h) The evidence suggests that the application of the proceeds of sale to loans began on or around July 7, 2015. The combined indebtedness under both loans was under $130,000,000.00. The court is using HLB's reports which rests on the original rate of interest for the loan (no variation) and no capitalization of interest payments. Had the bank paid off the loans in full, that would have left over J$200,000,000.00.

i) What has become of the money? Where did it go? How was it used?

j) Since both loans 2 and 3 are still outstanding. By July 7, 2015 the bank had more than sufficient funds in place to pay off the loans then the full indebtedness. The order of the court is that the full indebtedness on both loans is to be determined as at July 7, 2015 using HLB's appendices to its report dated June 30, 2023 and filed in the Supreme Court on July 3, 2023. When that is determined that indebtedness is to be deducted from the J$367,625,000.00. There should also be a deduction of a reasonable cost of executing the power of sale. The court emphasises reasonable. The bank has not produced any evidence of this cost. The parties are to produce evidence on this aspect of the matter.

k) The reason for establishing July 7, 2015 as the cut-off date on which interest accrued is that on that date the bank started to apply some of the proceeds of sale. It is not clear why it did not take the total indebtedness but chose to allow the debt to grow. It cannot be right and just that a creditor realises the security, has the money to clear the debt but delays paying off the debt, allows it to grow and thereby consuming the entire sum from the sale of the securities.

l) The balance of the money after the deductions spoken off is then held under a constructive trust for either Mahoe or Mr Finzi. The question of whether interest is payable on this balance is to be addressed by counsel in future submissions. If there is to be interest, then is it at a commercial rate and should the interest be compounded? These are issue on which the court invites submissions on a date to be agreed with the registrar.

**Costs**

**[99]** Mrs Guyah Tolan has asked for costs on an indemnity basis. Costs are not punishment but are intended to prevent depletion of the successful party's asset to contest a claim brought by the unsuccessful party. Whether costs are assessed on a standard or indemnity basis, the party who receives costs cannot receive more than the actual costs incurred between that party and his/her/its counsel. The advantage of indemnity costs is that the receiving party is more likely to recover closer to actual costs than costs on a standard basis. The reason is that on an indemnity basis the receiving party is given the benefit of the doubt on any disputed item of cost whereas on a standard basis the paying party is given the benefit of the doubt.

**[100]** The court has regard to parts 64 and 65 of the Civil Procedure Rules (CPR). The expressions indemnity and standard costs do not appear in the CPR but this court has acted as if those words are present. An indemnity costs order is not based on a finding of conduct deserving of moral condemnation but rather unreasonableness. The critical finding necessary before an indemnity costs order is made is that there must be some conduct or circumstances that take the case out of the norm.

**[101]** Mrs Guyah Tolan submitted that the bank knew even before it launched its claim that it did not have the records to support the claim or prove that it applied the net proceeds of sale properly. Given this state of affairs, she submitted, the bank should pay the costs and on an indemnity basis.

**[102]** The basis of claiming costs on an indemnity basis is this: she said that given all that the bank knew it was unreasonable to pursue this claim. She pointed out that the bank consumed all the moneys from the land bonds, all the moneys from the sale of nine parcels of land, and are still pursuing the debt when it cannot prove what it did with the net proceeds of sale from the land sale.

**[103]** She added that this bank is part of the regulated financial sector and therefore must be taken to know the importance of accurate record keeping not just for themselves but when exercising the most powerful weapon available to a creditor. The court will not

adopt counsel's adjectives of 'reprehensible', 'indefensible' and 'beyond description.' According to counsel the bank not only '*clandestinely use the defendants' money to purchase assets for its personal use and benefit, it is also initiated legal proceeding against him in an effort to recover that it claimed was owing from a loan that he had already discharged and failed to account to him for the use of his money*.'

**[104]** Mrs Guyah Tolan has used strong language to describe the bank's pursuit of this litigation. The court will not adopt her language, but nonetheless, it is a matter of concern that approximately 50% of a line of credit was used to purchase shares in the name of Weststar without any evidence that the defendants or any of them authorised the use of the money in that way. In stark and plain language what happened under the line of credit was this: the bank used the money to finance the purchase of shares in the name of the chairman and charged the purchase price to a customer taking advantage of the circumstances in which the customer was a friend of the chairman who knew that the customer was using the line of credit to purchase shares for the customer's benefit. The bank has simply glossed over this matter and did not make any effort to address this matter other than to say that the bank does not deal in shares. The court has made findings in respect of this matter and thus has concluded that this loan was not in fact disbursed or used according to Mahoe's instructions and therefore no money from land bonds or indeed from any other source should have been used to discharge the loan.

**[105]** It is the case that the alleged loans to which the land bonds were applied were never proven to exist. But for the Bolton letter which made the assertion there would have been no basis to make such an allegation. The Bolton letter included the line of credit which Mahoe thought it had utilised for its own benefit.

**[106]** The bank would have known from extensive and detailed correspondence between itself and Mr Finzi's lawyers concerning the April 2006 loan. The details are in the earlier judgment. The bank was told in a letter dated April 25, 2006, among many things, he would give any security needed for the loan along with a letter of commitment from Mahoe's lawyers to repay the full balance of the facility within the next 45 days. Thus there was no doubt that Mahoe was highly specific on the repayment. The loan was made

with seven parcels of land as security. Some the loan became US$2,974,387.73. The bank's witness said that the loan was restructured several times at the request of Mr Finzi. The bank wrote to Mahoe's lawyers and stated the exact sum needed to repay the loan. The letter stated (a) principal, (b) interest accrued; (c) interest arrears; and (d) the full total to pay off the loan. The letter even closed with these words '*[w]e look forward to receiving your cheque in settlement of the outstanding amount of …(US$1,554,641.42).'* This loan even had an undertaking given by Mahoe's lawyers which was to repay the US$1,500,000.00 once Mahoe sold the land to RIU. Even the bank's witness agreed that all the correspondence on this loan showed that Mahoe was intent and had in fact repaid the loan. Yet the bank allocated the money to another loan (and even this is doubtful) and then sought to explain at trial that Mr Finzi had asked that loan was restructured. So loose was Mr Finzi in the management of his financial affairs that it appears that he forgot that the loan was in fact repaid in full. Given all that has been said it was not only unreasonable for the bank to pursue litigation in respect of this loan but unconscionable because such documents and letters that were available clearly and unambiguously pointed to the fact that the loan was in fact repaid from 2006 but the bank was still pursuing it at trial.

**[107]** Mr Powell says that the accountant has shown that sums are still outstanding on loans 2 and 3. That is factually correct. What HLB's report revealed was that in respect of loans 2 and 3 the bank was capitalizing the interest and varying the interest rate. The court did not know this when the first reasons for judgment was delivered but it was reasonably clear at that time that the court could not say with any conviction the precise amounts owed on both loans. The court had then noted the absence of details regarding both loans. The bank would have known that it was varying the interest rates and capitalizing the interest at the time of trial.

**[108]** Mr Powell advanced the proposition that this was a normal mortgagor/mortgagee dispute. He also noted that in spite of the lack of full records HLB still found that moneys were owed under loans 2 and 3. Therefore costs should be awarded in the regular way, that is to say, costs follow the event and where the honours are split then the costs order should reflect that reality. All of what Mr Powell said is true except that what started out as a normal mortgagor/mortgagee dispute became something more. This was not just a

dispute about numbers. It was about how the numbers were calculated (loans 2 and 3); it was about treating a loan as still existing when to the bank's certain knowledge it was paid off; it is about the use part of line of credit made available to Mahoe to purchase shares for a company without any explanation of how this came about; it is about selling seven parcels of land to meet a debt that no longer existed because the bank applied the money it had received to another loan without any notice of any kind to the borrower; and it is about failing to meet even the basic obligation to explain what the net proceeds of sale were and then showing how the net proceeds were applied.

**[109]** Counsel are to prepare and submit order that gives effect to these reasons for judgment