(NO 3)

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 for the 1st and 2nd Defendants

February 12, 13, and March 20, 2025

Mortage – Enforcement of power of sale without factual or legal predicate – Absence of proper documentation proving sums allegedly owed – Proceeds from bonds issued in Jamaican currency converted to United States currency – Money used to by mortgagee to pay loans – No proof that loans existed – Money to be repaid – Whether should be repaid in Jamaican or United States currency– Interest claimed as debt – Interim payment – Stay of proceedings

SYKES CJ

[1] This judgement deals with six issues. The first is whether the affidavit of Mrs Trudy-Ann Bartley Thompson filed on behalf of the bank on September 30, 2024 should be admitted into evidence. The second is whether the Mr Finzi's indebtedness can be established with reasonable certainty at the time the properties used as security for loans 1, 2, and 3 were disposed of. The third issue is whether the proceeds of sale of land bonds should be reconstituted in United States or Jamaican currency. The fourth is whether interest can be claimed as part of the loss. The fifth is whether there should be an interim payment by the claimant to the defendants. The sixth is whether there should be a stay of proceedings pending the outcome of appeals in the Court of Appeal.

[2] This judgment should be read along with the two earlier ones: **JMMB Merchant Bank v Finzi and another** [2021] JMCC Comm 3; and (NO 2) [2024] JMCC Comm 33.

Whether the objection to the affidavit of Mrs Trudy Ann Bartley Thompson should be upheld

[3] The background to this issue is necessary. The bank sued the defendants to recover money that it says was lent to Mr Finzi and was not repaid. In 2015, the bank exercised its power of sale over 10 properties and used the money to pay off the loans. The bank also used over US$4,060,728.00 from the land bonds to clear loans it said were owed by Mahoe. In fact, the bank used JA$358,926,500.00 (money from the proceeds of sale of the 10 lots) and still claimed that sums were still outstanding. The defendants found this assertion by the bank preposterous. In

their defence and counterclaim, the defendants said (a) at least one loan (loan 1) was repaid in full; (b) there must be an accounting for the moneys from the land bonds which the bank used to pay off loans; (c) the bank needs to demonstrate, by reliable documentation, what it did with the money raised from the sale of the 10 properties.

[4] The nagging problem here is that the bank (until Mrs Bartley Thompson's affidavit which was filed after liability was determined and a clear picture began to emerge that the bank may well owe money to the defendants) did not have reliable documentation to prove the claim properly. It is hoped that this case is an aberration notwithstanding **Bank of Nova Scotia Jamaica Limited v Sovereign Resources UK Limited and another** [2021] JMCA Civ 21.

[5] The case of **Bank of Nova Scotia Jamaica Limited v Sovereign Resources UK Limited and another** [2021] JMCA Civ 21 disclosed the problem of a bank's (in that case the Bank of Nova Scotia) lack of proper documentation showing the amount owed and the subsequent enforcement of security. In that case **Sovereign** borrowed money that was guaranteed by a Mr Williams. The bank alleged default and sued to recover the money. It then exercised the power of sale of property that was used to secure the loan. The bank was challenged. It turned out that the bank, very very late in the trial, sought to tender what it claimed were relevant documents. Laing J, at first instance, refused to admit them into evidence. The bank did not have the original documents, did not explain what became of them, could not say what became of the makers of the documents. The bank's witness said that he derived the total sum owed from the computer system but he himself did not do the calculations. In effect, the bank's witness could not demonstrate by a process of calculation how the total indebtedness was determined. Laing J's assessment of the bank's position was summarised by Sinclair-Haynes JA at **[98] and [99]** of the Court of Appeal's decision. Laing J found that the bank simply stated that sums from the proceeds of sale were applied to the loans without stating the amount of

the total proceeds of sale. The effect of this and other findings was that the reliability and accuracy of the bank's evidence could not be established. The approach of the bank was to put forward figures that could not be verified.

[6] The bank in that case, as in the instant, could not demonstrate its conclusion regarding the indebtedness of the borrower. In the instant case, it is even worse. Mrs Bartley Thompson, who was the sole witness for the bank during the trial, was not even at the bank when the transactions in question took place and until now there was no documentation that showed the details surrounding the exercise of the power of sale.

[7] Once again this court says that the regulators and/or the legislature must examine this area of law which permits lenders to exercise the nuclear option of selling borrower's property, then claiming substantial parts of the debt are still owed, fail to provide proper evidence concerning the total indebtedness, fail to provide adequate documentation regarding the exercise of the power of sale. In the absence of legislative action or regulatory corrective action, then the duty falls on the courts to examine with great care the evidence presented by lenders claiming a debt. The greater the sum, the greater and more careful must the scrutiny be.

[8] It is understood that those who allege must prove. It is quite clear from the outset of this matter that the bank never had good and sufficient records to substantiate its case. This was one of the issues plaguing the bank as the litigation progressed. The absence of records was one of the main bases upon which the defendants were claiming, in at least one instance, that one of the loans was repaid, which turned out to be the case. The defendants have said, and have always been saying, that the bank has simply made assertions without giving a detailed account, supported by appropriate documentation, of its claim. In this regard, the defendants' position is understandable. After all, a bank is supposed to be properly regulated by the supervisor and part of that regulation would, one would think,

require an appropriate level of documentation of loan. If that is not the case how would the regulator know whether there is the appropriate ratio between deposits, loans, and the capital base?

[9] It is clear law that whenever a mortgagee has exercised the power of sale, the mortgagee, if called upon must demonstrate, depending on how the challenged is framed, that the power of sale was properly exercisable and lawfully exercised, and show what it did with the proceeds of sale. One of the main purposes of this built-in-accountability is satisfy the scrutiny that equity brought to bear on the exercise of powers generally. Equity has always had a concern with possible fraudulent or misuse of powers. The mortgagee is vested with a power which equity would scrutinise to ensure that it was properly exercisable and lawfully exercised. In addition, equity imposed a constructive trust on the mortgagee if there was a surplus after the debt and reasonable expenses associated with the exercise of the power of sale were cleared. The best way for a mortgagee to meet these challenges is to keep a proper contemporaneous record showing clearly the full extent of the indebtedness and how it conducted the exercise of the power of sale.

[10] The defendants' complaint in this case has been that the bank has failed to keep proper accounting records and therefore the claim for the stated sums should fail. In the first judgment, the court found that money was borrowed but the full extent of the indebtedness, if any, could not be determined. This led to the appointment of the independent accountant who was to utilize best efforts, with assistance from the parties, to determine the precise amount of the loans, the sums repaid, and whether any money was left over after the power of sale was exercised. The bank, in this case, unsuccessfully challenged that order on an application for stay of execution in **JMMB Bank (Jamaica) Ltd v Finzi and Mahoe Bay Company Limited** [2021] JMCA App 36.

[11] In this case the accountant did the job asked and produced a report. This court permitted the parties to make submissions on the report. In the end, there was no serious challenge to the competence, fairness, professionalism, and proficiency of the accountant. After years of litigation including an opportunity for the bank to present documents to the accountant that it did not present during the main trial, the bank has now produced an affidavit with exhibits attached saying that the information therein was not produced because of 'inadvertence.'

[12] The appointment of the accountant provided the bank with a second chance to get its act together and provide evidence to back up its claim. The bank failed to do this. The constant refrain from the accountant was that he did not have the necessary documents that would enable him to know all the necessary details of the loans and the full circumstances of the exercise of the power of sale.

[13] The above is the context for the vigorous opposition to the affidavit of Mrs Trudy Ann Bartley Thompson.

[14] The defendants object strongly to the affidavit. They say:

[15] during the trial there was an agreed bundle of documents which indicated that the sale price for the Mahoe Bay lands was US$2,750,000.00;

[16] the bank had 'another opportunity to present evidence to the court-appointed accountant concerning the sale of the land and the only document [on] which the accountant could rely was documentation from the National Land Agency which it obtained on its own investigation concerning the transfer of the land' and further the court noted in judgment (NO 2) that the 'agreed evidence is that from the sale of lands, the gross figure was J$317,625,000.00'; and

[17] the bank's affidavit is simply too late and 'suspicious in every regard.'

[18] While the court has a discretion to admit evidence of this type at this late stage, that discretion is not at large. All judicial discretion must be exercised judicially, considering all case circumstances.

[19] Mrs. Bartley Thompson's affidavit is dated September 30, 2024. In that affidavit, she says that she is legal counsel employed by the bank and authorized to swear the affidavit. She says that she had responsibility for the sale of properties by the bank on the exercise of its power of sale over the relevant properties. She is now referring to documents which are exhibited which she says were 'not previously produced due to *inadvertence* which occurred during the search but are a part of the bank's records' (italics added)

[20] It is now common ground that the power of sale was exercised in 2015. The evidence in this case was heard over several days in 2017 approximately two years after the power of sale was exercised. Judgment was delivered, in 2021. Mrs. Bartley Thompson, during the trial, even accepted that there was a paucity of accounting records before the court.

[21] Mrs Guyah Tolan pointed out that these documents have only now come to light because the court has found that the land bonds are to be reconstituted. The second judgment in this matter finding liability in the bank was delivered on August 14, 2024. By September 30, 2024, the bank found the documents that it could not find when it began litigation in 2013.

[22] Mr Powell submitted that the documents exhibited to Mrs Bartley Thompson's affidavit are relevant and should be taken into account by the court. Mr. Powell submitted that Mrs. Bartley Thompson's affidavit is now supplying the missing information that the court noted in **[64]** of judgment (NO 2).

[23] He accepted that the documents were produced late but they are now here. Mr Powell also submitted that the affidavit provides documentary evidence of the

proceeds of sale. The documents, he submitted, provided evidence of the cost of exercise of the power of sale.

[24] During the trial Mrs Bartley Thompson gave no indication that there was any likelihood of the documents being found or that there was an ongoing search for them. Additionally, since part of this case involved the exercise of the power of sale, it would seem to this court that the bank could have attempted to reconstruct the evidence by attempting to get copies of the sale agreement and other documents from the eventual purchaser(s). It could have attempted to get copies of receipts relating to the sale of the land from the stamp office and work backwards since stamp duty and transfer tax are a percentage of the sale price. Stamp duty and transfer tax are a fixed percentage of the sale price and it would have been a simple arithmetical exercise to determine the whole.

[25] The nature of real estate transactions involving registered land in Jamaica, especially in the context of the exercise of a power of sale, generates documents, letters, emails between vendor and purchaser. Often the sales are conducted by way of an auction. There are usually advertisements. The correspondence between counsel could address things such as land taxes, water bills, electricity bills and the like. It is not clear what were the steps leading up to the exercise of the power sale in this case. That is not before the court.

[26] The transaction usually generates two copies of the agreement for sale: one in the possession of the vendor and one in the possession of the purchaser. The sale price is usually transferred, in 2015 either by cheque or electronic transfer between accounts. The point being made is that the fact that documents could not be found, as suggested by the bank, did not mean that the transaction could not be put together by other means such as getting copies of documents, letters, and correspondence from various sources. What the bank was being asked to do, in this case, was simply say how it went about the sale of the properties; how much

money it got; what were the costs associated with exercise of the power of sale; what it did with the balance left, if any, after deducting reasonable costs. The information is certainly not subject to legal professional privilege and with some thought and a little creativity, the transaction could have been reconstructed from various sources. There is no evidence that the bank attempted to do this.

[27] The bank is attempting, through the affidavit, to place before the court cheques payable to the Tax Administration Division, copies of receipts of payment of taxes, letter to the National Land Agency, even email correspondence between the bank and the purchaser under the power of sale as well as a letter from who appears to be a valuator for the properties sold under the power of sale. The court notes that these documents are correspondence with third parties which could have been obtained either for trial or produced to the accountant. The bank could have made effort to get them or at least indicate that it did but was unsuccessful. In short, the court is not convinced that the bank made any serious effort to find or get copies of some of these documents from the relevant third parties (and to date the bank has not said it tried) so that information could be placed before the court during the trial to indicate what happened when the power of sale was exercised. It seems to this court that the bank made a strategic decision regarding how it would pursue the litigation with full knowledge of the risks and is now producing the records and advances as its explanation: 'inadvertence.'

[28] The bank produces these records eight years after the trial began and four years after the first judgment. This means that the defendants did not have a fair and reasonable opportunity to test the veracity and accuracy of those records. The defendants have been deprived of the opportunity to cross examine the witness who is now saying – and this is completely new information – that she was the human being who sold the properties for the bank. Her reliability and credibility cannot now be tested against the documents and in the context of the strategy adopted by the defendants.

[29] The explanation that it was simply due to 'inadvertence' in this court's view is not sufficient. It has not been explained how and why these documents were not unearthed before liability was determined. The impression that the court formed during the trial is that the bank did not know where the documents were and had no way of reconstructing the transaction so that it could explain how much the proceeds of sale were and what it did with them. The unstated premise being that it searched for the documents and did not find them.

[30] Inadvertence means unintentional action arising from inattention; accidental oversight. The non-production of the documents before now does not suggest it was the consequence of inattention or accidental oversight. If the documents were lost and could not be found, as seemed to have been suggested, then that is not 'inadvertence' but is an assertion that the documents were lost.

[31] There is nothing in Mrs Bartley Thompson's affidavit that explains what was done with the documents before, during, and after the exercise of the power of sale. She says nothing about how and where they were stored. She says nothing about any search for them. She says nothing indicating how this 'inadvertence' came about.

[32] The affidavit states a conclusion but not the facts upon which the conclusion rests so that the court could make its own independent judgment on the issue. To say that evidence was not placed before the court because of 'inadvertence' is a conclusion. What is needed are the facts indicating how this 'inadvertence' came about.

[33] In an adversarial system, the strong general rule is that a litigant adduces the evidence on which he/she intends to rely either during its case or, if possible, adduce evidence on the opponent's case, or uses the evidence adduced by the opponent to establish its case. This material was not put before the court by the bank at any stage of the proceedings prior to now. Having regard to the nature of the challenge made to the bank's enforcement action, it would distort the case in

a fundamental way to admit evidence that is untested by cross examination during the main trial. The defendants were deprived of the opportunity to examine the documents in the context of all the other evidence and had the documents been placed in evidence, Mrs Bartley Thompson may have been cross examined differently or more intensively. Admitting the evidence would reshape how the contest evolved during the trial.

[34] In addition, as Mrs Guyah Tolan pointed out that until now the accepted sale price was US$2,675,000.00. This is the figure in appendix 3 of the independent accountant's report. The bank now wishes that this figure be reduced by US$300,000.00 claiming that the lands were sold for less, namely, US$2,375,000.00.

[35] The court, at this point, provides a necessary explanation. In the accountant's report there is reference to lots 13 & 14 Providence, St James and does not refer to the 7 lots that were security for loan 1. The court, however, understood this reference by the accountant to be for entire number of lots in Providence since all the land in the agreement for sale in the agreed bundle and agreement for sale in the Bartley Thompson affidavit refer to land in Providence, St James. All were originally part of land at volume 649 folio 68 but there was subdivision and hence 9 parcels of land. The accountant was simply using the reference to lot 13 and 14 as shorthand for all 9 lots which were sold.

[36] The court therefore does not accept into evidence the Bartley Thompson affidavit. It is not consistent with other evidence in the case and the assertion concerning the number of lots sold and the sale price are not supported by reliable documentation.

Whether the indebtedness of Mr Finzi can be established with reasonable certainty at the time the security for loans 1, 2 and 3 were disposed of.

[37] The entirety of the evidence, including agreed bundles and agreements arrived at during the case indicate (and the court concludes) that 10 parcels of land were sold. These were:

[38] the 7 lots that were security for loan 1;

[39] the 2 lots that were security for loan 2; and

[40] he Beverly Drive lot that was security for loans 2 and 3.

[41] The court concludes that it was in error at paragraph 81 of judgment No 2 that the gross figure for the sale of the ten lots was JA$317,625,000.00. The sum that the court will use for the sale of 9 lots is US$2,675,000.00. At an exchange rate of JA$115.50:US$1.00 this gives JA$308,926,500.00 and not JA$317,625,000.00.

[42] The court will add the JA$50,000,000.00 that the accountant indicated that the Beverly Drive home was sold. The total sum available to the bank was JA$358,926,500.00 as at July 2015.

[43] All three loans in question were personal ones to Mr Finzi. The first loan the court found was paid off and therefore the power of sale was wrongly exercised.

[44] Loans 2 and 3 were outstanding when the power of sale was exercised. The security for these loans was sold except, it appears, land registered at volume 963 folio 176 which was security for loan 2. It is not clear what has happened to this parcel of land. There is no evidence or agreement that it was sold and so the court will conclude that it was not sold.

[45] We now know that on or about July 7, 2015, the bank had JA$358,962,500.00 from which it could deduct the total sums owed under both loans as well as reasonable costs associated with the exercise of the power of sale. We now know that the total sums owed as of that date, adjusted by the accountant by doing the calculations

without compound interest and without varying the rate of interest, were less than the total amount realised from the exercise of the proceeds of sale.

[46] In respect of the security sold under loan 1 the court states that the bank cannot deduct the cost associated with this sale. This must follow from the conclusion that these lands were improperly sold.

[47] For loans 2 and 3, the land registered at volume 1259 folio 937 was offered as security and was sold for JA$50,000,000.00. This lot was apparently sold in a separate transaction and not part of the 9 lots sold. The parties are to do the calculations based on this sale price to determine the cost of executing the power of sale.

[48] For the 9 parcels of land sold by the bank there is no evidence that the lots were valued individually. They were sold as a block. Since the court has determined that lands registered at volume 936 folios 167 and 168 (security for loan 2) were properly sold then only the costs associated with those two lots are recoverable by the bank.

[49] At this stage, the best way forward is to divide the sale price for the 9 lots by 9 to arrive at the average price per lot. That average price is to be multiplied by 2 to get the sale price for two lots. That price is the basis for determining the reasonable costs of selling those two lots.

[50] From the total arrived at based on what has been said at **[39]**, the total indebtedness under loans 2 and 3 as of July 7, 2015, is to be deducted and what is left is what the bank holds on trust for Mahoe. This sum attracts simple interest at a commercial rate from July 7, 2015, to date of payment of the sum.

Whether the land bonds money should be reconstituted in United States or Jamaican currency

[51] The court now addresses the question of the currency in which the land bonds should be reconstituted. It is important to keep in mind the pleaded case and the evidence. The defendants' pleaded case is that land bonds were payment for land acquired from Mahoe by the Government of Jamaica (GOJ). The defendants pleaded that it caused the GOJ to pay the bonds to the bank to be held for the defendants. The pleaded case alleged that the bonds were to be used to settle debts owed to the bank. The pleaded case is that the bank has failed to account for proceeds of the bonds. The bonds were denominated in Jamaican currency.

[52] The evidence showed that the bonds were disposed of and the money received was converted to United States currency (US$4,060,728.43). It was this sum that the bank said was applied to Mahoe's loans. The entire bond amount was used and, according to the bank, money is still owed by Mahoe. The bank has not been able, even now, to produce the necessary relevant documentation supporting its claim to be able to demonstrate that it used the land bond proceeds in the manner it claimed that it did. The issue regarding the bonds is that the bank cannot demonstrate how it arrived at the debt it claimed Mahoe owed. Such documentation that was produced by the bank, during the trial, fell apart on the application of arithmetic to figures which the late Mr Beswick, then counsel for the defendants, did to telling effect.

[53] What was used to pay off the debt was United States currency. The full amount realised from the bonds was converted to United States currency and then that currency used to pay the debt. Until the money was applied, the proceeds from the bonds belonged to Mahoe.

[54] Mrs Bartley Thompson said that the money – now being spoken of in United States currency – was used to pay off loans incurred by Mahoe.

[55] It seems to this court that the interest should be payable on this sum. The defendants have asked for 'interest on the amounts due at a commercial rate from

the date when the said amount became due to the date of payment' (as required by **British Caribbean Insurance Company Limited v Delbert Perrier** 33 JLR 119). This is a commercial case. Carey JA said that it cannot 'be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld.' His Lordship stated that 'the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant.'

[56] The court's understanding is that the interest spoken of by Carey JA is not the same thing as claiming interest as damages. The **Perrier** case was not a claim for interest as damages. It arose out of a claim under an insurance contract. The judgments of Carey and Patterson JJA indicate that it was a claim under the contract of insurance along with interest, that is to say, interest was claimed under the normal statutory power of the courts to award interest on sums found owed to the successful party and not a claim for interest as damages The principle on which interest is awarded is that a person who has been kept of money which he/she/it should have had should receive interest because (by Carey JA) it is only right that interest be paid.

[57] Also, the judgment of Patterson JA makes it plain that sum awarded by the judge on which interested was calculated was the total sum the insured was to be paid under the contract of insurance. There is no difference in principle between **Perrier's** case and the present one. The factual circumstances clearly are different but those difference are not such that they warrant the non-application of the **Perrier** case.

[58] In the present case simple interest is therefore awarded at a commercial rate from the date of the misapplication of the funds to the date of the second judgment. The precise date when the funds were used is not clear but the court will use the Bolton

letter of March 28, 2006, as the best date of use of the money from the bonds. The date of judgment is August 14. 2024, the date of the second judgment in this matter. Thereafter the interest applicable to judgment debt accrues until payment.

[59] The court relies on the average commercial rate of interest on foreign currency loans which appears as appendix 1 to the submissions of Mrs Guyah Tolan dated February 4, 2024.

Whether the interest can be claimed as part of the loss

[60] The Judicial Committee of the Privy Council (**Sagicor Bank Jamaica Ltd v YP Seaton and others** [2022] UKPC 48), following the House of Lords (**Sempra Metals Ltd v IRC** [2008] 1 AC 561) determined that anyone claiming interest as damages must plead and prove actual interest loss.

[61] Mrs Guyah Tolan made the point that given that the defendants operate in the business world then it is to be taken as axiomatic that they would have suffered loss of the kind entitling them to compound interest.

[62] Learned counsel relied on two passages: the first is from Lord Nicholls from **Sempra** cited by Lord Hodge in Sagicor Bank and the second from Lord Hodge in **Sagicor.** These are the passages from Lord Nicholls in **Sempra** at **[94]** - **[97]**. Lord Nichols stated that a claimant can plead and prove actual interest losses caused by late payment of a debt. The requirement to plead and prove this kind of loss is imposed because the law does not presume that delay in payment of debit in and of itself will cause loss.

[63] Lord Hodge said at **[31]** in **Sagicor** that to claim compound interest as damages for a breach of contract the claimant must plead and prove the relevant loss. At **[33]**, Lord Hodge's explanation does not restrict the type of evidence that may be placed before the court.

[64] The court understands that the nature of the business may be such that it would not be too remote for interest (simple or compound) to be claimed as an actual loss. For example, the business may be engaged in money lending that depends on receiving its revenue from moneys owed to it or contracted to be paid to it under certain conditions. These payments may include principal and interest. In these circumstances, any late payment or non-payment, may necessitate the money lender borrowing money to carry out its business. Thus, while it may not be necessary to 'require a detailed examination of a plaintiff's financial affairs and that an extensive process of disclosure by the plaintiff' but there must be evidence either direct or inferential that the loss included interest loss. The point is that there must be some evidence from which 'the inference that the claimant had suffered financial loss in the form of incurring borrowing costs to replace the withheld money' because 'the common law has [not] gone so far as to recognise that a claimant or plaintiff kept out of his or her money in a commercial context is as a norm entitled to claim and receive as damages for breach of contract interest on the withheld sums that is calculated by reference to the cost of borrowing such sums at a conventional rate without evidence from which such a loss can be inferred.'

[65] In this case, there is no evidence of the kind, either direct or indirect, from which it can be said that interest losses arising from misuse of the proceeds from the land bonds occurred. The fact that the arrangement was a commercial one is not sufficient, without more, to conclude that the claimant is entitled to recover interest as part of any loss based on the cost of borrowing sums at a conventional rate. To put the point beyond doubt Lord Hodge reinforced the principle at **[37]** of in **Sagicor** by stating that '[i]f a plaintiff pleads that it has incurred loss by having to borrow replacement funds, what it must prove are facts and circumstances from which a court may properly infer on the balance of probability that it has borrowed funds to replace that which has been withheld from it. What evidence will suffice

to enable such an inference to be made will depend upon the facts of the particular case.'

[66] Lord Hodge went on to give an example of how inferences can be drawn from the nature of the business but proof there must be. The reference to loss of opportunity – taking the most generous view of the defendants' evidence in this case – is the closest the defendants may have come to proving interest loss. In the present case, the loss of opportunity was more theoretical than realistic. However, as Lord Hodge pointed out, even if reliance is placed on the nature of the claimant's business there must be something in the way that the business was conducted so that it could be said on balance of probabilities that any late payment or non-payment would necessarily cause the claimant to incur interest costs by borrowing money to fill the gap. That is not the case here.

[67] The defendants in this case are in the same position as Mr Seaton was in **Sagicor**: to say that there was late or non-payment says nothing about whether funds were borrowed to meet the deficit created by the late or non-payment of money.

[68] The counterclaim by the defendants is based on a failure to account for the land bond moneys but the pleaded case did not attempt to say that because of this failure it incurred interest losses by having to borrow money from some other source to meet their obligations and incurred interest charges as a result of the failure to account for the land bond moneys or money from the proceeds of sale. Non-accounting for or even non-payment of a sum contractually owed to the defendants does not in and of itself constitute a claim for interest losses calculated on the cost of borrowing. In this case, there is no evidence that the defendants borrowed money or lost earnings from any business venture they were pursuing or might have pursued. However, that does not mean that interest cannot be awarded at commercial rate on the balance left after reasonable expenses for the legitimate exercise of the power of sale are deducted.

[69] What may have happened here is that because the Civil Procedure Rules (CPR) have introduced witness statements that stand as examination in chief, it is sometimes forgotten that the present mode of litigation has been shaped by the past. Before the CPR, in the days of the Writ of Summons which was the originating document for contested claims, the pleading would set out the case and the evidence came when the witness was in the witness box. If the witness began to give evidence about matters not pleaded – that is to say proof without pleading – an objection could be taken to the evidence. At times if the evidence came in and allowed to stand the pleading would be amended to align it with the evidence.

[70] The core principle of tying evidence to pleading still applies and therefore the requirement to plead (giving notice to opposing party of one's intended case) relevant allegations followed by proof is still the approved method of litigation.

[71] The court concludes that the defendants in their counterclaim cannot succeed in their claim for interest as damages. The pleading did not set out the basis for claiming interest as damages. Merely to say that interest should be compounded is not sufficient. The fact that this was a commercial arrangement is not sufficient. As the law presently stands, there is nothing inherent in a commercial relationship that automatically triggers the right to claim interest **as** damages (distinct from interest **on** damages).

[72] This was a commercial transaction. Interest is payable but it is simple interest at the commercial rate of interest. The interest is payable from July 7, 2015 to August 14, 2024 on the amount owed to Mahoe arrived at using the calculation indicated in these reasons for judgment.

Whether there should be an interim payment

[73] The defendants have applied for an interim payment to be made. They apply under rule 17.6 (1) (c) of the Civil Procedure Code. That provision says that a court may

make an order for interim payment only if (other conditions in the rule are not necessary for this application) 'the claimant has obtained an order for an account to be taken as between the claimant and the defendant and for any amount found due to be paid.'

[74] Mr Powell submitted that conditions for making an interim payment do not exist in this case. The court does not agree. The court did order that an independent accountant be appointed so that an account could be taken between mortgagee (bank) and mortgagor (Mr Finzi) to determine whether any money was owed either way.

[75] Rule 17.5 (1) states that the term claimant in rules 17.6 to 17.10 'includes a defendant who counterclaims.' The defendants in this case did counterclaim and were successful. Where we are now is that the independent accountant has enabled us to determine that it was the bank that owed money and not the defendants as of July 7, 2015, the date chosen by the court as the one on which the indebtedness is to be determined.

[76] The restriction on making the order is found in rule 17.6 (4) and (5). Rule 17.6 (4) states that the court 'must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.' Rule 17.6 (5) requires the court to take 'into account (a) contributory negligence (where applicable); and (b) any relevant set-off or counterclaim.' There is no question of contributory negligence arising in this claim and the relevant adjustment would be made by deducting the cost of the lots found to be properly disposed under the exercise of the power of sale.

[77] Mrs Guyah Tolan has asked for an interim payment of US$4,060,728.00 This is the sum of the land bonds in United States currency. The sum asked for by learned counsel is a reasonable proportion of the total sum owing to Mahoe if interest

payments are taken into account. The court so orders. This sum is to be paid to Mahoe.

[78] In respect of Mr Finzi it is the case that all three loans were personal loans to him, two (loans 1 and 2) of which were guaranteed by Mahoe using land for which it was the registered proprietor. In respect of loan 3, the land offered as security was registered in Mr Finzi's name.

[79] This distinction between Mahoe and Mr Finzi is necessary. All the property sold under the power of sale except the Beverly Hill's home belonged to Mahoe in its capacity as a guarantor of the loans.

[80] There is no evidence that the bank is unable to pay the interim sum ordered. Reputational harm is not a basis for not ordering an interim payment.

Whether there should be a stay of execution

[81] Mr Powell has applied for a stay of execution of judgment on the basis that there is an appeal filed in the Court of Appeal in respect of the two previous judgments. The primary grounds for the application are that (a) there is a real prospect of success in both appeals; (b) reputational harm to the bank if it becomes known that the steps are being taken to enforce the sums estimated by Mrs Bartley-Thompson ; and (c) in the event of a successful appeal and the moneys were paid before there is unlikely to be recovery of any amounts paid.

[82] Mrs Guyah Tolan opposed the application and submitted that prima facie a successful litigant should get the fruits of judgment at once unless there is some reason not to do so. She was also asking for an interim payment.

[83] The case of **United General Insurance Company v Marilyn Hamilton** [2018] JMCA App 5 was cited. In that case Brooks JA (later President of the Court of Appeal) stated (adopting the formulation of Lawrence-Beswick JA (Ag) in

Caribbean Cement Company Ltd v Freight Management Limited [2013] JMCA App 29 at **[16]**) that the guiding principles when considering a stay of execution are: (a) the applicant's prospect of success in the pending appeal; (b) where does the greater risk of injustice lie; and (c) financial hardship to be suffered by the applicant if judgment is enforced.

[84] Brooks JA stated that a judgment in one's favour is of inherent value and the recipient of it should not be lightly deprived of it. The learned Judge of Appeal noted, in that case, that a significant point of law had arisen which could go either way was itself an indication of a real prospect of success. The court also noted that there was some risk that Ms Hamilton may not repay the damages. In the end, Brooks JA ordered that there should be partial payment of the judgment as a condition in granting the stay.

[85] There are also cases that say that the application must be considered in all the circumstances of the case. This case has been before the court for over a decade. Finality, in the Supreme Court, is in sight. Two judgments are on appeal in the Court of Appeal. The evidence in this matter is available. There is no other case pending between the parties in the Supreme Court. No useful purpose would be served by granting a stay in the Supreme Court to await the outcome of the appeals with the risk that the case may return to the Supreme Court for final remedies to be decided. It is better for this matter to be completed and placed before the Court of Appeal which may make such orders as it sees fit at the conclusion of the appeals. That court is well-placed to consider any application for stay of execution. It is likely that the Court of Appeal will finalise the matter and the risk of return to the Supreme Court is low. The stay is refused.

[86] Costs of the applications to strike out the Affidavit of Trudy-Ann Bartlett Thompson, stay of execution and interim payment are awarded to the defendants to be taxed if not agreed.

[87] Counsel are to prepare and submit order to give effect to these reasons for judgment.