IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2019CD00482

BETWEEN	**STEWART BROWN INVESTMENTS LIMITED**	**CLAIMANT**
AND	**NATIONAL EXPORT IMPORT BANK OF JAMAICA LIMITED (T/A EXIM BANK JAMAICA)**	**DEFENDANT**

Application for Injunction to restrain recovery of debt - Letters of Commitment – Loan Facility secured by Bills of Sale and Mortgages – Whether real issues for trial- Whether damages an adequate remedy – Application of Marbella principles.

Conrad George and Andre Scheckleford instructed by Hart Muirhead and Fatta for the Claimant

Nigel Jones and Kashima Moore instructed by Nigel Jones & Co. for the Defendant

Heard: 11th & 20th December, 2019

IN CHAMBERS

COR: BATTS J.

[1] The Claimant, by Notice of Application filed on the 5th December, 2019, seeks the following relief:

a. an interim injunction restraining the Defendant from taking any steps pursuant to its purported calling of the loan with respect to the loan facility provided to the Claimant by the

Defendant and initially governed by the Claimants commitment letter of the 14th November 2017 and subsequently amended ("the Loan Facility") until the determination of proceedings.

b. *An interim injunction restraining the Defendant from enforcing any security with respect to the Loan Facility until the determination of the proceedings herein*

c. *any further relief as this Honourable Court may deem fit.*

[2] The "Loan Facility", to which the Claimant refers, was originally provided in or about the year 2017 and was subsequently amended on various occasions. Its purpose was to enable the Claimant to embark upon a contract with Noranda Jamaica Bauxite Partners II (the Noranda contract). The Claimant, at the time of entry into the loan facility, executed an assignment of the proceeds of the Noranda contract to the Defendant. The loan facility also included the provision by the Defendant to the Claimant of certain amounts as working capital. The loan facility was secured by, among other things, mortgages and guarantees secured by mortgages.

[3] The approach of the court, when considering applications for an interim injunction, is now well established. The court must first be satisfied that there is a serious or real issue to be tried. Thereafter the court considers whether or not the applicant for the injunction can be adequately compensated in damages and whether the Respondent, to the application, is adequately protected by an undertaking as to damages. If damages are an adequate remedy, or if the respondent to the application is not adequately protected by an undertaking as to damages, an injunction is unlikely to be granted. This is because injunctive relief, at this interim stage, essentially means that a party is being precluded from

doing what he would otherwise legally be entitled to do. He is being restrained prior to a judicial determination on the merits. There is really no justification for doing so if damages, at the end of the day, will adequately compensate the applicant for the injunction. If however there is doubt, as to the adequacy of damages, the court will consider whether the balance of convenience is in favour of the grant or refusal of the injunction. This phrase, "balance of convenience" used in ***American Cyanamid v Ethicon [1975] AC 396,*** was explained by the Judicial Committee of the Privy Council in ***National Commercial Bank v Olint [2009] UKPC 16 (28th April 2009).***

[4] The injunction is an equitable remedy and, although discretionary, must be applied in accordance with established principles. One such principle has to do with the injuncting of a mortgagee's exercise of its powers of sale. The popularly termed "Marbella" principle is that, save in exceptional circumstances, the amount due is to be paid into court as a condition of the grant of an injunction preventing a mortgagee exercising powers of sale. The "exceptional circumstances", and whether this case falls into any of them, will be a subject for consideration later on in this judgment. In this case, and this is common ground, the injunctive relief claimed will have the effect, inter alia, of preventing the Defendant's exercise of powers of sale as mortgagee.

[5] It is the Claimant's case, as revealed in the Particulars of Claim and the several affidavits filed, that the Defendant has acted in breach of the loan facility. The Defendant, asserts the Claimant, wrongfully applied the proceeds of the Noranda contract to interest instead of to capital. This has resulted in an inaccurate statement of the account. Late fees and penalty interest have also been wrongly charged. The Claimant says further that the Defendant has wrongly alleged that it is delinquent. The Claimant contends that the Defendant agreed to new repayment terms contained in, "the amortization schedule" .The Claimant says payments have been made and accepted in accordance with the new terms.. The Defendant is in consequence estopped, or otherwise precluded, from asserting that the Claimant is in breach of the facility. The Claimant says further

that Marbella principles have no application in this case as the Defendant's claim is manifestly in excess of anything that could be due. The Claimant asserts that it will suffer loss of goodwill and business reputation if the injunction is refused. This is because, the necessary consequence of the Defendant exercising its power of sale will be that, it will be unable to fulfil the Noranda contract.

[6] The Defendant, on the other hand, asserts that it applied the Noranda proceeds to both principal and interest. However the earnings for that contract were less than anticipated and hence penal interest and charges accumulated. The facility has been amended several times and each time an amended letter of commitment was issued. They say there was no agreement to the proposed amortization schedule and that the Claimant at all times knew it had not been agreed. The Defendant contends further that, in breach of contract, the Claimant revoked the assignment of the Noranda contract. This resulted in the Defendant not accepting the proposed amortization schedule. The Defendant says this case does not fall within any exception to the Marbella principle.

[7] I will state my decision with reference only to such of the evidence or the law as is necessary to explain my conclusion. I am grateful for the written and oral submissions provided. My failure to make detailed reference to them is reflective only of a desire to be concise. It bears emphasis that, at this interlocutory stage, I make no findings of fact nor am I required to. This is not a trial or an application for summary disposal of the matter.

[8] The court's assessment, of whether or not there is a real issue to be tried, is based on an assessment of the evidence placed before it and the law on the matter. In this case the Claimant asserts that the terms of the contract required an application of the payments made to principal before interest. Reliance is placed on the words "*interest will be calculated on the reducing balance*" contained in the letter of commitment. The words quoted are to be found in the first letter of commitment dated 14th November 2017 (Exhibit AB 1 to the affidavit of Alton Brown filed on the 5th December 2019).They are also to be

found in the amended terms, related to interest, in the most recent amended letter of commitment dated 19th March 2019 and signed by the Claimant :

> "**Interest Rate**
>
> *Interest will be charged at a rate of twelve percent (12%) per annum ("the principal rate") under the Modernization Fund for Exporters loan facility and is calculated on the reducing balance. Unpaid principal interest instalments shall attract interest at a rate of nineteen percent (19%) per annum, commencing immediately after the date for payment until such time as payment is received by EXIM Bank.*
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> *Interest will be charged at a rate of twelve percent (12%) per annum ("the principal rate") for loans disbursed up to J$30 million under the Short-Term Working Capital loan facility.* ***All loans disbursed in excess of J$30 million line will attract interest at a rate of fifteen percent (15%) per annum.*** *Interest will be calculated on the reducing balance. Unpaid principal shall attract interest at a rate of nineteen percent (19%) per annum, "*
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> [Exhibit LC1 to the Affidavit of Liane Chung, filed on the 11th December 2019, in response to the affidavit of Alton Brown filed 6th of December, 2019.The document appears to have pages missing]

[9] It is a question of mixed law and fact whether the contract specified, or is to be interpreted as specifying, that payments were to be applied to principal first. The Defendant, in paragraph of the affidavit of Liane Chung filed on the 11th December 2019 (replacing the one filed on the 6th December, 2019), states:

> *"11. In response to paragraph 9 of the affidavit the payments received by the Bank were applied in keeping with its banking practice to clear interest and then principal. I am advised by Mr. Alan Thomas and verily believe that the Defendant was not receiving sufficient payments which would clear the interest completely and significantly reduce the principal. I am further advised by Mr. Thomas and verily believe that it is the Claimant's failure to generate sufficient earnings under its contract to service the facilities properly which accounts for the size of the debt which as at November 27, 2011 stands at $188,654,801.48. The Defendant denies that it breached any of its obligations."*

[10] There is no express denial of the existence of a term that interest is to be charged on the reducing balance. The Defendant is saying that, in accordance with their normal practice, they applied payments to interest before applying them to principal. It is therefore a matter to be determined at trial whether the words of the contract mean, or imply, that payments would be first applied to principal.

[11] It will also be a factual matter whether the payments received were inadequate for the purpose. The Defendant relies on a schedule they provided to the Claimant's attorneys, see exhibit LC 2 to the affidavit of Lianne Chung filed on the 11th December 2019. This schedule is also exhibited by the Claimant, see exhibit AB13 to the third affidavit of Alton Brown filed on the 6th of December, 2019. Each attorney invited me to analyse the schedule. Each alleges that the schedule demonstrated their case was correct. Having reviewed the various columns and figures it does appear to me that without clear labelling, or evidence

to explain the schedule, I cannot come to a definitive conclusion. The Claimant's attorneys assert:

> *"Considering the following assumptions:*
>
> *a. The entirety of the $195,000,000 was disbursed on the date of the first disbursement, namely 15th December, 2017*
>
> *b. There is no moratorium*
>
> *c. That the penalty rate of interest of 19% has been applicable from the date of disbursement,*
>
> *then the interest accrued on the loan after two years i.e. 15th December 2019, will amount to $195,000,000 x 19% x 2=$74,100,000. Adding this to the principal results in a figure of $269,100,000. If the company's repayments are applied to this patently inflated figure, the resulting figure is $170,262,983.90. Even with assumptions which are very removed from reality, the outstanding sum would be less than that claimed by the bank."* (See skeleton submissions on behalf of the Claimant at para 11).

The submission demonstrates that, on the material available, factual issues arise even assuming the Defendant's construction of the contract is correct. A court at trial will benefit from an expert analysis of payments made and interest applied and to be applied.

[12] I therefore find that there is a serious question to be tried, as to the true meaning of the contract and, as to whether and how payments were to be applied to principal and interest. Secondly, and whatever construction is put on the contract, it will also be a matter for determination at trial whether the payments were so applied and interest correctly calculated.

[13] As regards the alleged amended terms of repayment, it is a question of fact, whether the Defendant agreed the terms and whether this was orally

communicated to the Claimant by the Defendant's agent. There is no doubt that the Claimant instructed Noranda to cease remitting payments to the Defendant, see paragraph 8 of the affidavit of Alton Brown filed on the 5th December 2019. Their reason for doing so is outlined in a letter dated 10th October, 2019 ,see exhibit LC1 of second affidavit of Liane Chung filed on the 10th December 2019. This appears to have been based on the assumption that, as the two year facility was at an end, the assignment also ended. Whether or not that is correct it provided a motivation for the Defendant's rejection of the proposed amended repayment schedule, see paragraph 27 of the affidavit of Liane Chung, filed on the 11th December, 2019.

> *"27. In response to paragraphs 21 and 22 of the affidavit I am advised by Mr. Thomas and verily believe that when the Defendant did not receive the payment from Noranda and learnt that the Claimant had put a stop to the payment it informed the Defendant that it was in breach by letter dated October 2nd 2019. I am further advised by Mr. Thomas that the Claimant took no steps to rectify same and in the circumstances the Defendant would not consider the restructure."*

[14] It is a question of fact whether the new repayment schedule was agreed prior to the Defendant becoming aware of the change of instructions to Noranda. It is also a factual question whether it was agreed notwithstanding such instructions to Noranda. The question of the instructions to Noranda may be connected to the issue of allocation of payments as between principal and interest. It is the Noranda payments which the Claimant alleges have been misapplied. The consequence, he asserts, is that the working capital aspect of the loan was terminated. Without that working capital the Claimant was unable to properly service the Noranda contract. It seems the Claimant no longer trusts the Defendant to apply the proceeds of the Noranda contract. Therefore, whether or not there is some justification for the revocation of the Noranda assignment, may

be related to the other factual issue of whether the Defendant's treatment, of the payments made, was correct .All these issues, I think, are best resolved at a trial.

[15] There being real issues for trial, the question arises, whether the Claimant ought to be left to any remedy he may have in damages. I think not. The Claimant is a going concern. It has a real prospect of a renewed and improved Noranda contract, see exhibit AB16 to the fourth affidavit of Alton Brown filed on the 11th December, 2019. Allowing the Defendant, to foreclose on the loan facility and liquidate all the Claimant's assets, will cause severe and incalculable loss. Incalculable because, although the Noranda contract has a calculable value, the reputation of the Defendant in the market and the consequences of the loss of that reputation do not. The Defendant, on the other hand, is protected because the assets available and held as security are, on the unchallenged evidence, quite adequate to secure the amounts outstanding, see paragraph 35 (c) of the affidavit of Alton Brown dated 5th December 2019 .

[16] I remind myself that a "box ticking" approach, in these matters, is to be eschewed, see ***Algix Jamaica Ltd v J. Wray and Nephew Ltd [2016] JMCC Comm. 2*** at paragraph 4. In this matter one must consider that the Defendant is very well secured, see paragraph 3 of the affidavit of Alton Brown filed on 5th December 2019. The consequence to the Defendant, of a postponement of the realization of that security, is nowhere near as detrimental as the consequence to the Claimant if it is not postponed. The justice of the case suggests that it is best that the realization of assets be postponed until there is a determination of: the payments received, of how they ought to have been allocated, whether they were appropriately applied and whether interest penalty and other charges were correctly imposed. Also to be determined after trial is whether there was a binding agreement on new repayment terms.

[17] If the Defendant is to be restrained the terms or conditions of restraint call for consideration. The Jamaican Court of Appeal has reaffirmed, in recent times, the relevance and applicability of Marbella principles, see ***Mosquito Cove Ltd v***

Mutual Society Bank Ltd et all [2010] JMCA Civ 32. If a mortgagee is to be restrained, in the exercise of its powers of sale as mortgagee, the amount allegedly due and owing is to be paid into court. If the claimed amount is, on its face, excessive then the amount less the excess must be tendered or paid. Only in exceptional circumstances, such as where there existed a fiduciary relationship between mortgagor and mortgagee or in a case of fraud or forgery, will the principle be departed from. That is the law as I understand it.

[18] In this case however the Defendant is not only being restrained as mortgagee. Under threat of enforcement are other things, such as debentures over fixed and floating assets and bills of sale over industrial and other equipment, being the working assets of the Claimant, see generally exhibit AB1 to the affidavit of Alton Brown filed on the 5th December, 2019. It would be inappropriate to apply Marbella conditions to the restraint of those securities. A fair result, and one which is consistent with established legal principles, is an order which will allow the Claimant to honour its Noranda contract, and make payments in accordance with the alleged new payment terms, until the trial of the action. I therefore propose to restrain the Defendant unconditionally in respect of the non-real estate assets, that is, those not the subject of a mortgage.

[19] The principle in Marbella is designed to dissuade persons restraining the mortgagee's exercise of his power of sale as this would reduce the value of the mortgage as a security. Persons therefore are required to demonstrate the good faith of their claim by paying the amount due into court. This is so even where there is a genuine dispute as to the amount due and owing. In this case the Claimant contends that, in a worst case scenario, the amount due ought not to exceed $170,262,983.90. The Claimant does not admit owing that amount. It is however, in all the circumstances, a fair amount to be paid into court as a precondition to the grant of the injunction against the mortgagee. It does seem, at this interlocutory stage, that the mortgage's claim is on its face excessive. Given the quantum involved, and the fact that the security is adequate, I will give the Claimant some time to raise the amount to be paid into court.

[20] My orders therefore are as follows:

1. Upon the Claimant, through its counsel, giving the usual undertaking as to damages the Defendant is restrained until the trial of this action, or further order of the Court, whether by itself its servants and/or agents or otherwise howsoever from taking any steps, other than the exercise of its powers of sale as mortgagee, to recover any amounts due or allegedly due with respect to the loan facility governed by the commitment letter of 14th November 2017 and subsequently amended.

2. Upon the Claimant, through its counsel, giving the usual undertaking as to damages the Defendant is restrained, until the trial of this action or further order of the Court, whether by itself its servants and/or agents or otherwise howsoever from exercising its powers of sale as mortgagee, on condition that the Claimant pays into court the amount of $170,262,983.90 on or before the 31st day of March, 2020.

3. Paragraph 1 of this Order is conditional on, and shall remain effective only so long as, the Claimant pays to the Defendant $3,500,000 on or before the 30th day of each month commencing on the 30th day of December 2019 and continuing monthly thereafter until the trial of this matter or further order of the Court.

4. Liberty to apply.

5. Costs to be costs in the Claim.

David Batts
Puisne Judge