



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2019CD0048

BETWEEN	STEWART BROWN INVESTMENTS LTD.	CLAIMANT
AND	NATIONAL EXPORT - IMPORT BANK OF JAMAICA LTD.	DEFENDANT

**Application to vary or stay Order – Judgment delivered in December 2019-
Injunction of Mortgagee with Marbella condition imposed - Whether Covid 19
pandemic a reason to vary or stay- Whether improper conduct of mortgagee a
reason- Marbella principles- Whether conduct subsequent to date of order
material.**

**Conrad George, A. Sheckleford instructed by Hart Muirhead & Fatta for the
Claimant**

Nigel Jones, K. Moore instructed by Nigel Jones & Co. for Defendant.

Heard: 21st May 2020

IN CHAMBERS: By ZOOM

Cor: Batts J.

[1] On the 21st day of May 2020, having considered the affidavits as well as written and oral submissions, I made the following orders:

1. Notice of Application filed on the 15th May 2020 is dismissed.
2. Application for leave to appeal is refused.
3. Costs to the Defendant to be taxed if not agreed.

I promised then that I would put my reasons in writing at a later date. This judgment is the fulfilment of that promise.

[2] By Notice of Application, filed on the 15th May 2020, the Claimant sought the following orders:

- “1. *The condition in Order no. 2 of the Orders of Batts herein of 20th December 2019 be removed;*
2. *Alternatively that time be extended in Order No. 2 of the orders of Batts J herein of 20th December 2019 until 30th December 2020.*
3. *There be a speedy trial of this matter.*
4. *Such further or other relief as the Court deems fit.*
5. *Costs reserved.”*

[3] The Application is supported by affidavits, of Mr. Gordon Langford and the 10th affidavit of Alton Brown, both filed on the 15th May 2020. Mr. Langford, a professional appraiser, and member of the Royal Institute of Chartered Surveyors, gave an overview of the property market in Jamaica. He did this in the context of the current Covid 19 global pandemic. He states that it has caused a slowdown in the global and local economy with respect to real estate. He conducted a “*preliminary appraisal,*” of the relevant property, and concluded in paragraph 9: “*...it is highly unlikely that there is a readily available market for the purchase of those types of assets in the present, deflated market and forced sale values are likely to be far less than they would normally be, resulted (sic) in a drastically reduced recoupment in (sic) such assets are to be sold.*” At paragraph 8 he estimates that buyers would expect to buy at under 50% of market value.

[4] The 10th affidavit of Alton Brown, relied on by the Claimant in support of this application, refers to advisory notes issued by the Bank of Jamaica. These he quotes and exhibits. Mr Brown asserts that the central bank thereby gave payment accommodation advisories in light of the Covid 19 pandemic. At

paragraph 11, of his affidavit, he alleges that the Defendant has only given such relief and/or accommodation to tourism interests. He suggests that this is because: “[the Defendant’s chairman] Gary ‘Butch’ Hendrickson and ‘the Hendrickson family and the Stewart family command together the heights of the tourism industry in Jamaica...”

[5] Mr. Alton Brown referenced the fact, previously indicated in earlier applications, that due to the present local and global economy the Claimant is constrained in its ability to earn or seek financing. He explains that efforts, to arrange a meeting with the Defendant, have not been entertained. He alleges that police officers, identifying themselves as members of the Counter Terrorism and Organised Crime (C-TOC) arm of the Jamaican Constabulary Force, attended at Noranda bauxite to seize the Claimant’s trucks.

[6] The Defendant’s response was by an affidavit of Maria Burke filed on the 20th May, 2020. It reads in part as an argument rather than as evidence of material facts. Insofar as factual averments are concerned she states that the Claimant’s debt is among the largest on the Defendant’s books, and that, its non-payment has affected the Defendant’s liquidity, ability to relend to others and creditworthiness. The affidavit states that the Claimant defaulted on its obligations, long before the Covid 19 pandemic, and continues to do so even with respect to the obligation to insure its assets. She says also that the Defendant is not an institution regulated by the Bank of Jamaica. There was no specific response to the allegation concerning Mr. Gary “Butch” Hendrickson, save to say, it was scandalous, irrelevant and speculative. As regards the alleged attempt, of the police, to seize the Claimant’s vehicles the affiant stated, (Para 22),

“... the Defendant is taking steps to enforce its Bill of Sale dated November 28th 2017 ...”

Finally, insofar as the failure to respond to the Claimant’s request for a meeting is concerned, she said : (Para 24)

“... the Defendant is aware of all the difficulties the Claimant says it is experiencing however any meeting to negotiate must see the Claimant saying more than it wants time to refinance the debt as currently it has not indicated how much time it requires and how much it proposes to pay the Defendant has fixed the basis on which any further meetings or discussions would be held.”

[7] In written and oral submissions Mr. George urged me to exercise my discretion because it would be just so to do. He argued that the “Marbella principle” was a flexible one and that the conditions it dictates are not always to be imposed. They should not be imposed, he submitted, where the mortgagee acts improperly. He says that the Defendant has acted, and is acting improperly. He relied on ***Paragon Finance Limited v Stanton [2002]2 All ER 248*** in support of a submission that a bank is not to discriminate unfairly between customers. The submission is that by giving tourism interests, but not other borrowers, a moratorium the Defendant has acted improperly. Mr George contends also that, by putting forward an amortization schedule which the Defendant accepted, the Claimant had offered to redeem the mortgage. This offer, to redeem by refinancing, also obviated the requirement to impose Marbella conditions. Mr. George, in written submissions filed on the 17th May 2020, cited several authorities in support of these submissions. The submissions, both written and oral, also underscored the financial constraints faced by the Claimant. He asserts that this has been contributed to by negative credit reports made by the Defendant. To support this excerpt, from Mr. Brown’s 5th affidavit, were relied upon. Paragraph 35, of the Claimant’s written submission, summarises the contention:

“For the learned authors of Fisher and Lightwood “...it seems that the mortgagor need not offer to redeem where the mortgagee is not exercising his powers in good faith, nor otherwise acting improperly”. From

this it would appear that the company need not provide any security in seeking to restrain the Bank's exercise of its powers of mortgagee, in light of the bad faith evident in the Bank's conduct. However, the bank does have such security. The Bank will continue to receive the sum of \$3.5 million monthly. Additionally, the company is prepared to undertake to seek refinancing of the loan within another five months."

In summary counsel is urging that the Marbella condition, imposed by paragraph 2 of my order made on the 20th December 2019, be removed or further postponed due to the exceptional circumstances of this case as well as the alleged inequitable unfair and improper conduct of the Defendant bank.

- [8] The Defendant's counsel endeavoured, at the commencement of the hearing, to urge a preliminary point. This was that I had, on the 9th April, 2020, ruled that no further extension would be considered "*on the grounds advanced in the Application.*" I dismissed this point in limine because on the 9th April 2020 I was considering an application in relation to paragraph 1 of my Order of the 20th December 2020. The prohibition did not therefore apply to the instant application to vary or stay paragraph 2.
- [9] However, after hearing the Claimant's submissions, I did not see it necessary to call on the Defendant's counsel to reply in a substantive way. This is because firstly, my judgment of the 20th December 2020, already considered the legal point Mr George advanced. I considered the question, whether and in what circumstances Marbella conditions were to be imposed, and decided that this case did not fall within any relevant exception. If the Defendant mortgagee is to be restrained the Marbella conditions are to be applied, see ***Stewart Brown Investments Limited v National Export Import Bank of Jamaica Limited (T/A Exim Bank Jamaica) [2019] JMCC Comm 39*** (unreported judgment dated 20th December 2019) at paragraphs 17,18 and 19.
- [10] The second reason, the application fails, is that I do not consider it would be fair to the Defendant to grant the variation or to further postpone the condition. As at

the 20th December 2020 the Defendant was entitled, if an injunction were to be granted, to have the amount in dispute paid into court. It was, and still is, the Defendant's case that the Claimant's mortgage payments are in arrears. I allowed the Claimant three months in which to satisfy the Marbella condition. The Claimant has not done so. Is it right that I should grant a further extension and/or vacate the order because of adverse economic circumstances, or things done, since the 20th December 2019? I do not think so. As to the matter of unfair discrimination I fail to see how, and in what manner, a court can intervene in the decision of a financial institution as to which category of borrower is to be given an accommodation. The *Paragon Finance case*, relied upon by the Claimant, is not very helpful. The English court of appeal was there prepared to imply a term that a contractual power, to vary interest rates, would not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily or unreasonably in the Wednesbury sense. The case is concerned with construction of a contractual power to vary interest rates and whether limitations on the power are to be implied. It has no bearing on a lender's decision whether, and/or to whom, a moratorium on loans is to be granted.

[11] Thirdly, the Claimant is as yet unable to put forward a credible scenario which will see it discharge the mortgage or honour the condition imposed. The Defendant has a mortgage over assets which, on the Claimant's evidence, are now likely to fetch a lower price than if they had been sold in December 2019 when I injuncted the sale. The Claimant, on the other hand, still has his cause of action. If he is correct, that there is no breach giving rise to a power of sale under the mortgage (because the amortization schedule of payments was agreed or for whatever other reason contended for), then the Claimant will succeed at trial. The fixed assets affected can be, and have been, valued. Therefore any loss incurred, as a result of the sale of these assets, can be recovered in damages. In these circumstances paragraph 2 of my order, of the 20th December 2020, will stand.

[12] Upon my indicating the decision, to refuse the application, Mr. George applied for a stay pending an appeal. This I refused. I did this because it does not appear,

given the decision of the Jamaican Court of Appeal referred to in my judgment of the 20th December 2020, that the Claimant's appeal has a real prospect of success. If there is to be a change to Jamaican law and practice, as it relates to the application of the Marbella principles, it will have to be by higher authority or the Jamaican Parliament.

[13] For all the reasons stated above, therefore, I made the orders in paragraph 1 of this judgment.

David Batts
Puisne Judge