

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2022CV00084

APPLICATION NO COA2023APP00043

BETWEEN	BRILLIANT INVESTMENTS LIMITED	1ST APPLICANT
AND	SHURNETTE DAVIS (Representative of the Estate of Allan Davis)	2ND APPLICANT
AND	KARIN MURRAY	RESPONDENT
AND	JENNIFER MESSADO	RESPONDENT TO THE ANCILLARY CLAIM

Ms Zara Lewis for the applicant

Mrs Symone Mayhew KC instructed by Ms Carol Davis for the respondent

9 May, 1 November and 15 December 2023

Equitable mortgage - Whether an equitable mortgage was created - Whether a director had actual or ostensible authority to bind the company - Application for an injunction to restrain the exercise of the mortgagee's power of sale

IN CHAMBERS

SIMMONS JA

[1] This is an application for an injunction to restrain the respondent, Mrs Karin Murray, from exercising her power of sale consequent on the ruling of the court below that an equitable mortgage was created in her favour over all that parcel of land situated at Bengal in the parish of Saint Ann, registered at Volume 105 Folio 48 of the Register Book of Titles ('the land'). An injunction was also sought against the respondents to restrain them from entering upon the land or taking steps to dispossess the applicants.

[2] The first applicant, Brilliant Investments Limited ('Brilliant') and Mr Allan Davis (now deceased) are the registered proprietors of the land as tenants in common. The deceased's estate is represented by Mrs Shurnette Davis, the 2nd applicant.

[3] The application, which was filed on 9 February 2023, is supported by the affidavit of Mr Paul Morrison filed on the same date. Mr Morrison, in that affidavit, indicates that he is the sole beneficial shareholder of Brilliant and is duly authorised to make the affidavit on its behalf. He also states that his attorneys-at-law were served with a statutory notice demanding payment of US\$250,000.00 within 30 days failing which the land would be sold pursuant to Mrs Murray's exercise of her power of sale. It was asserted that damages would not be an adequate remedy if the land was sold and that Brilliant is willing and able to give an undertaking as to damages.

[4] Mrs Murray, who is opposed to the application, relied on her affidavit sworn to on 24 February 2023. She stated that she had been advised that a power of sale had arisen concerning Brilliant's share of the land as a result of the court's finding that an equitable mortgage had been created in her favour. It was also stated that no undertaking as to damages has been given by Mrs Davis. In addition, it has not been demonstrated that Brilliant has sufficient assets to honour that undertaking. In any event, in order to restrain the exercise of her power of sale the amount owed is required to be paid into court.

[5] The grounds on which the application is based are:

- "1. It would be just, equitable and in keeping with the overriding objective.
2. The Applicants are joint registered proprietors of [the land].
3. The appellants fear that [Mrs Murray] will take steps to sell [the land].
4. The Respondents would be adequately compensated in damages in the event that the injunction [is] held to have been wrongly granted."

[6] On 14 April 2023, a single judge of this court granted an interim injunction restraining Mrs Murray from exercising her power of sale and the matter was set down for an *inter partes* hearing on 9 May 2023. The application was heard on that date and judgment was reserved. The applicants were ordered to file and serve the authorities on which they had relied on or before 11 May 2023. Mrs Murray was permitted to file and serve her response to those authorities on or before 15 May 2023.

Background

[7] This matter has its genesis in a claim filed by Mrs Murray in the Supreme Court against the applicants for a declaration that she holds an equitable mortgage as security for a debt owed by Mrs Jennifer Messado who was Mr Morrison's attorney-at-law at the relevant time. The court finds it sufficient to adopt the background as has been conveniently set out by the learned judge at paras. [10] to [13] of her judgment, the details of which are recounted below:

"[10] In or around February 2018. Mrs Messado acknowledged in writing, the debt owed by her to Mrs Murray, in the sum of Five Hundred Thousand United States Dollars (USD\$500,000.00). As security for that debt, Mrs Messado delivered her Jamaican passport to Mrs Murray's Attorney-at-law, Ms Carol Davis.

[11] In or around February 2018. Mrs Messado requested the return of her passport in order that she might travel from the Island. Subsequent to that, on 23 February 2018, Ms Davis received a letter from [the 1st applicant] that was written on its letter head, duly signed by its Directors and which bore its seal. That letter authorized Ms Davis to sell [the land]. The proposal was further, that, from the proceeds of sale of [the land], Mrs Murray would be paid the sum of Two Hundred and Fifty Thousand United States Dollars (USD\$250,000.00).

[12] As security for the payment of that sum, [the 1st applicant] also provided Ms Davis with the Duplicate Certificate of Title [for the land].

[13] The Duplicate Certificate of Title was delivered to Ms Davis by Ms Jennifer Braham, a Director of [the 1st applicant] and who was an employee of the firm Jennifer Messado & Company, Attorneys-at-Law, of which Mrs Messado was a Partner.”

[8] The learned judge concluded that Mrs Jennifer Braham had “apparent or ostensible authority to act for and on behalf of [Brilliant] and to bind the company by her actions”. The learned judge also concluded that an equitable mortgage was created in respect of the land based on the following:

1. The deposit of the duplicate certificate of title for the land;
2. The letter dated 23 February 2018, on Brilliant’s letterhead, authorizing the payment of US\$250,000.00 to Mrs Murray from the proceeds of the sale of the land; and
3. Mrs Braham’s acknowledgment of a letter from Ms Davis returning Mrs Messado’s passport in consideration of Brilliant’s agreement to pay Mrs Murray the US\$250,000.00 from the proceeds of sale of the land.

The notice and grounds of appeal

[9] By notice of appeal, filed on 27 July 2022, the applicants seek to challenge the learned judge’s ruling on a number of grounds. They are:

- “a. The learned judge erred on the facts and in law when she found that an equitable mortgage was created:
 - i) The learned judge erred in finding that the letter received by Carol Davis on February 23, 2018 was from [Brilliant] on its letterhead and duly signed by its directors
 - ii) The learned judge erred in finding that [Brilliant] secured with [‘the land’] the repayment of USD \$250,000.00 to Karin Murray

- iii) The learned judge failed to appreciate the entire body of evidence and authorities before arriving at her decision.
- iv) The learned judge erred in not placing greater weight on the relationship between Mrs. Messado and Ms. Davis.
- v) The learned judge erred in failing to give weight to the nature of the relationship between Jenifer Messado and Mrs. Jennifer Braham.
- vi) The learned judge erred in not placing greater weight [on] the expert evidence of Diane Flores.
- vii) The learned judge erred in law and in fact when she failed to dismiss the claim against the 2nd Appellant although [Mrs Murray] conceded that her claim was not against the 2nd Appellant (2nd Defendant).
- viii) The learned judge erred in law and misdirected herself when she failed to make an Order for costs in favour of the 2nd Appellant to be paid by [Mrs Murray].

b. The learned judge erred as a matter of law in relation to her application of the **Royal British Bank v Turquand**. [sic] As the evidence before the court is consistent with the argument that Ms. Carol Davis had knowledge of in respect of [sic] an irregularity with regards to the action of Jenifer Braham.

- i) Ms. Carol Davis did a company search on February 23, 2018
- ii) Based on the search the directors were Jennifer Braham and Chanel Morrison
- ii) When Mrs. Davis did the company search, the only document she had from Brilliant was the letter dated February 23, 2018.
- iv) The letter Ms. Davis received from Brilliant on February 23, 2018 had J. Braham and J. Morrison.

- v) Mrs. Messado told Ms. Davis that she had an interest in Brilliant.
- c. The learned judge failed to properly assess the entire body of evidence before [sic].
 - i. The learned judge did not address the evidence of Chanel Morrison
 - ii. The learned judge did not address the evidence of Shurnette Davis
 - iii. The learned judge erred when she dismissed the Ancillary Claim Form.”

Applicants’ submissions

[10] Miss Zara Lewis, counsel for the applicant, submitted that in order to grant an injunction pending appeal the applicants must demonstrate that they have a good arguable appeal. In this regard reference was made to the affidavit of Paul Morrison filed 9 February 2023. Therein it was stated that the statutory notice was issued without any legal basis as the learned judge indicated that there was no agreement on the rate of interest that was to be applied to the debt.

[11] Ms Lewis submitted that the following three issues are relevant to this application:

- (i) Whether there is a risk of injustice to one or other or both parties if the court grants or refuses a stay of execution. In particular, if a stay is refused what are the risks of the appeal being stifled?
- (ii) Whether there are serious issues to be tried?
- (iii) Whether the balance of convenience (interests of justice) lies in favour of granting or refusing the injunction?

[12] Pertaining to the first issue counsel relied on the decision of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] All ER (D) 258. In this regard, counsel argued that there is a greater risk of injustice to the applicants who are the registered proprietors of the land, if the order is not granted and the land is sold. This is especially so as Mrs Murray does not have a cause of action against the second applicant. Counsel stated that in circumstances such as this where the joint owner of the land did not know about the mortgage, difficulty would arise concerning its enforcement. In this regard, it was pointed out that in the court below, Mrs Murray had sought an order for sale of the land which was refused.

[13] In respect of the second issue reliance was placed on **American Cynamid v Ethicon** [1975] 1 AC 396 in which the court stated that the first matter to be considered is whether there is a serious issue to be tried. In other words, it must be demonstrated that the applicant's case is neither "frivolous or vexatious". Counsel argued that to clear this hurdle, the applicant's claim for a permanent injunction must have a good prospect of success. In this regard, she identified the following issues as being relevant in the appeal:

- i. Whether an equitable mortgage was created by the letter dated 23 February 2018.
- ii. Whether one co-owner's interest can be mortgaged where that co-owner's consent has not been sought and/or obtained.
- iii. Whether the learned judge erred when she found that the letter dated 23 February 2018 purportedly signed by J Morrison and J Braham was in fact signed by them.

[14] On the final issue, counsel submitted that the applicants would be prejudiced by the sale of the land as they did not consent to the mortgage. She stated that Mrs Murray had a duty to obtain the deceased's consent before accepting the land as security in circumstances where it was known that the land was jointly owned. In the circumstances,

the mortgage should be rendered to be invalid. Moreover, Mrs Murray's failure to exercise due diligence as was required amounts to fraud and where this is proved equity will not come to her aid. It was submitted that based on the totality of the evidence, the application for the injunction should be granted to prevent Mrs Murray from selling the land.

Respondent's submissions

[15] Mrs Mayhew KC, on behalf of Mrs Murray, submitted that the appeal has no prospect of success. Reference was made to **Brilliant Investments Limited v Rory Chinn** [2020] JMCA App 6. She stated that there are three remaining questions. Ground A relates to evidential matters, that is findings of fact. In respect of ground A(i) to (viii), it was submitted that the learned judge correctly identified and applied the law pertaining to the creation of an equitable mortgage. In this regard, she referred to para. [21] of the judgment. King's Counsel also submitted that the learned judge considered and accepted the documentary evidence which was in the form of (a) a letter to Mrs Murray's attorney-at-law on the company's letterhead and bearing the company's seal, that was signed by J Braham and J Morrison instructing her to pay Mrs Messado's debt of US\$250,000.00 from the net proceeds of sale of the property and (b) the delivery of the certificates of title by Mrs Jennifer Braham.

[16] Regarding ground A(iv) King's Counsel submitted that the consideration of the relationship between Mrs Messado and Ms Davis was irrelevant as no issue of undue influence was raised in the proceedings. Additionally, the complaint that the learned judge did not place sufficient weight on the expert evidence of Dianne Flores, the forensic document examiner, has no merit as Ms Flores' report was inconclusive.

[17] The delivery of the certificate of title, it was submitted, was the most compelling evidence as it was delivered to Ms Davis' office by Mrs Braham. King's Counsel indicated that Ms Davis gave evidence in the matter and the court determined that the delivery of the certificate of title and the intention to create a charge, which was evidenced by the instructions to Ms Davis were sufficient to create an equitable mortgage. In this regard,

it was submitted that the internal management rule was applicable as Mrs Braham as a director of the company had both actual and ostensible authority to do those acts.

[18] Where the ability of a tenant in common to grant a mortgage is concerned, Mrs Mayhew submitted that there is no unity of title. As such the order was only made in respect of the company's interest in the land.

[19] In relation to ground B it was submitted that there was no evidence before the learned judge that Mrs Murray, through her attorney-at-law, had knowledge of any irregularity and would therefore have acted in good faith. The evidence she said was that Ms Davis carried out a company search which revealed that Mrs Braham was a director and the letter from the company bore the signature of 'J Braham'. In addition, the certificate of title was delivered to her by Mrs Braham. In the circumstances, ground B (i) to (v) has no merit as there was no evidence of any irregularity.

[20] Pertaining to ground C, Mrs Mayhew submitted that the only dispute was whether the letter was signed by Ms Morrison and Mrs Braham. In this regard, it was submitted that Ms Morrison's evidence that she did not sign the letter was irrelevant as no evidence was presented that it had not been signed by Jennifer Braham who as a director of the company. Therefore, based on the internal management rule, this ground has no prospect of success.

[21] Pertaining to damages, King's Counsel submitted that damages would be an adequate remedy as the land was owned by two independent parties and has no special characteristics.

[22] In respect of the undertaking as to damages, it was submitted that there was no evidence to support the applicants' assertion that they were in a position to satisfy that undertaking. She stated that the property was purchased for US\$300,000.00 and the company's share would only be US\$150,000.00.

[23] In concluding, Mrs Mayhew pointed out that the applicants are seeking to restrain the mortgagee from exercising her power of sale contingent on the court's declaration that an equitable mortgage had been created. She stated that where such an order is sought the mortgagor is required to pay the sum owed into court.

[24] In the circumstances, counsel submitted that the application should be refused and costs awarded to Mrs Murray as the grounds of appeal have no prospect of success.

Analysis

Principles relevant to the grant of an injunction pending appeal

[25] By virtue of rule 2.11(1)(c) of the Court of Appeal Rules 2002, a single judge of this court is empowered to make orders "for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal". The principles which guide this court in the determination of such applications were restated by Brooks JA (as he then was) in **Rona Thompson v City of Kingston Sodality Co-Operative Credit Union Limited** [2015] JMCA App 12, para. [14], who stated thus:

"A single judge of appeal is permitted, by rule 2.11(c) [sic] of the Court of Appeal Rules (CAR), to consider and grant applications for injunctions pending the determination of an appeal. In determining whether an injunction ought to be granted pending appeal, the single judge must find that the applicant has a good arguable appeal (see **Olint Corp Ltd v National Commercial Bank Jamaica Ltd** SCCA No 40/2008 Application No 58/2008 (delivered 30 April 2008)). As a part of that analysis, the single judge must bear in mind the fact that this court, when considering the appeal, will only disturb the decision of the learned judge below, if it finds that the judge exercised his or her discretion on an incorrect basis (see **The Attorney General v John Mackay** [2012] JMCA App 1)."

(See also **Brilliant Investments Limited v Rory Chin** [2020] JMCA App 6.)

[26] Similarly, in **Kingston Armature & Dynamo Works Limited v Jamaica Redevelopment Foundation Inc and anor** [2010] JMCA App 34, Phillips JA stated:

"[33] The law in this area is quite settled, and I refer to the dicta of Harrison JA and Morrison JA in two cases; namely the Olint case and **Michael Levy v Jamaica ReDevelopment Inc. Fund and Kenneth Tomlinson** Application No. 47/2008 SCCA No. 26/2008 delivered 11 July 2008. In the Olint case, Harrison JA put it thus:

'In deciding whether or not an injunction should be granted, the question is not whether the applicant has a good arguable case but rather, does it have a good arguable appeal? In **Ketchum International plc v Group Public Relations Holdings Ltd and others** [1996] 4 All ER 374 Stuart-Smith L.J said at pages 381 and 382:

'This is likely to be a more difficult test to satisfy, and, if the case turns upon questions of fact which the judge has resolved against the plaintiff, may well be insuperable. This threshold must be at least as high as that which has to be satisfied when the court considers whether or not to grant leave to appeal, where that is required. ...

Furthermore, this court will not interfere with relevant findings of fact which the trial judge has made based in part on his assessment of the witnesses, and in so far as the grant of injunctive relief is a matter of discretion, is unlikely to differ from the trial judge, save on well-established principles. The only matter on which this court may, as a rule, be in a better position to decide than the trial judge, is whether the plaintiff has a good arguable appeal.'

In **Erinford Properties Ltd v Cheshire CC** [1974] 2 All ER 448 at 454, Megarry J said inter alia:

'There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it

would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in **Wilson v Church (No 2)** (1879) 12 Ch D 454 at 458), where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, 'when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory'. That was the principle which Pennycuik J applied in the **Orion** case ([1962] 3 All ER 466, [1962] 1 WLR 1085); and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.'

He continues:

'Although the type of injunction that I have granted is not a stay of execution, it achieves for the application or action which fails the same sort of result as a stay of execution achieves for the application or action which succeeds. In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal.'

In the **Michael Levy** case, Morrison JA set out the principles guiding the court on the grant of the injunction pending appeal in this way:

'In my view, the appropriate threshold test to apply on this application is whether the applicant has a reasonable ground of appeal (see **Polini v Gray** (1879) 12 Ch.D. 438, per Cotton U at page 446, **Orion Property Trust Ltd. v Du Cane Court Ltd.** [1962] 3 All ER 466, per Pennycuik J at pages 470-19 and **Erinford Properties Ltd v Cheshire CC** [1914] 2 All ER 448, per Megarry J at page 454). I prefer this test, which is not dissimilar to the "serious question to be tried" test applicable at first instance (**American Cyanamid v Ethicon** [1975] 1 All ER 504), to the 'good arguable appeal' test applied by

the English Court of Appeal in the case of **Ketchum International plc v Group Public Relations Holdings Ltd.** [1996] 4 All ER 374, since that was a Mareva Injunction case, in which the test at first instance is also whether the applicant can show a 'good arguable case' (see **Ninemia Maritime Corporation v Trave Schiffartsgesellschaft** [1983] 1 WLR 1412). Thus, if the applicant can show that he has reasonable grounds of appeal in this case, or that there are serious issues to be canvassed on appeal, he will be entitled to an injunction so as not to render his appeal nugatory (**Polini v Gray**, supra, per Cotton L.J at page 446)."

Is there a good arguable appeal?

[27] In this matter, there does not appear to be any dispute that the sum of US\$250,000.00 was owed to Mrs Murray. The issues that arose for the learned judge's consideration surrounded (i) the deposit of the certificate of title for the land with Ms Davis, (ii) whether the letter of 23 February 2018 was in fact issued by Brilliant, and (iii) whether Mrs Braham acknowledged receipt of Ms Davis' letter of 23 February 2018. Those issues are to be examined in the context of the established guidelines dealing with injunctions and in particular injunctions restraining mortgagees from exercising their power of sale.

[28] In determining whether the applicants have a good arguable appeal, it must be borne in mind that this court, when considering the appeal, will only disturb the decision of the learned judge below, if it finds that the judge exercised his or her discretion on an incorrect basis (see **The Attorney General v John Mackay** [2012] JMCA App 1, **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 and **Watt v Thomas** [1947] 1 All ER 582).

[29] The applicants seek to challenge the learned judge's decision on the following bases:

- (i) Her use of the evidence of the deposit of the certificate of title for the land, the letter of 23 February 2018 and Mrs Braham's acknowledgment of the letter from Ms Davis (ground a. i-iii).
- (ii) Her treatment of the evidence of Diane Flores and the weight attached to the relationship between Mrs Messado and Mrs Braham (ground a. iii – vi).
- (iii) Her non-dismissal of the claim against the 2nd applicant in circumstances where Mrs Murray conceded that there was no claim against her (ground a. vii).
- (iv) Her failure to award costs in favour of the 2nd applicant to be paid by Mrs Murray (ground a. vii).
- (v) Her application of the internal management rule as stated in **Royal British Bank v Turquand** (ground b).
- (vi) Her failure to assess all of the evidence presented (ground c).

Equitable mortgage

[30] The learned judge found that an equitable mortgage was created based on the deposit of the certificates of title and the letters of 23 February 2018. In the 4th edition of the text Commonwealth Caribbean Property Law the author, Gilbert Kodilinye, on page 195, states that an equitable mortgage may be created in the following ways:

“(a) by deposit of title deeds (or deposit of a duplicate certificate of title to registered land), usually with a bank to secure an overdraft or loan;

(b) under the Walsh v Lonsdale principle, where there is an agreement to grant a legal mortgage; or

(c) where the mortgagor has only an equitable interest in property, by assignment of the interest to the mortgagee.”

[31] The learned judge, in reliance on the decision of the court in **Fitzritson v Administrator General** (1969) 15 WIR 94, found that an equitable mortgage had been created in favour of Mrs Murray. In that case Graham-Perkins J stated at pages 98-99:

“It is beyond argument that, although a mortgage is an interest in land, and therefore not enforceable in the absence of a written memorandum of an act of part performance, an equitable mortgage is created by the delivery to the lender of the title deeds relating to the borrower's land, accompanied by a demonstrably clear intention to treat the land as security for the monies advanced. This result of a deposit of title deeds brought about a somewhat drastic change in the state of things existing up to the middle of the second half of the 17th century, when a bare deposit of deeds, unaccompanied by a memorandum, offered a creditor no security other than that which might accrue from his right to detain the deeds as chattels against his debtor. (See **Russel v Russel** ((1783), 1 Bro CC 269).)”

[32] Where the deposit of the certificate of title is accompanied by a written document, reference must be made to that document to determine the exact nature of the charge. In **Shaw (Official Liquidator of the Birmingham Banking Company) v Sir W Foster, Bart, and Another** (1872) LR 5 HL 321 at 340, Lord Cairns stated the principle in the following terms:

“It is a well-established rule of Equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in Equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed.”

[33] In this matter, the certificate of title for the land was delivered to Ms Davis by Mrs Braham who was a director of the company at the relevant time. In addition, the letter of 23 February 2018, that was written on the company's letterhead, instructed Ms Davis

to pay US\$250,000.00 to Mrs Murray out of the proceeds of the sale of the land. Ms Davis' letter to Mrs Messado is also relevant. That letter indicates that Mrs Messado's passport was being returned in consideration of the company's agreement to pay the above-mentioned sum to Mrs Murray from the proceeds of the sale of the land. It was also stated that Ms Davis had been provided with the certificate of title for the land to facilitate "the completion of the sale and/or for proper arrangements to be in place for the payment of the said sum of US\$250,000.00 agreed to be paid to Mrs. Murray". The letter also confirmed that the sum of US\$250,000.00 was part payment of the debt owed to Mrs Murray by Mrs Messado. The learned judge, at para. [45] of her judgment, indicated that the said letter was signed by Mrs Braham in acknowledgment of its receipt.

[34] Based on the above, grounds a. (i) to (iii) have no reasonable prospect of success.

The learned judge's treatment of the evidence of Diane Flores

[35] The learned judge dealt with this evidence at paras. [47] and [48] of the judgment, where she stated:

"[47] Brilliant Investments has challenged the authenticity of the letter dated 23 February 2018. To that end, it relies on the expert evidence of Mrs Dianne C. Flores, Forensic Document Examiner, Hart & Flores Questioned Document Laboratory, Inc. Her findings, in respect of Ms Braham's signature, were that Ms Braham very probably did no[t] sign the name 'J Braham' where it appears on the letter dated 23 February 2018. What she does say however, is that there is no way to determine whether Ms Braham printed her name on the said letter.

[47] The evidence of Mrs Flores in this regard, bears repeating: -

'I was only able to examine printed writing for Jennifer Braham but it was very limited and **the opinion is inconclusive**. I did not receive any printed writing for Ms Morrison. If it was meant to be signatures they very

probably did not sign the document. If it was meant to be printed name, then it is inconclusive because I did not have sufficient samples of their writing’.”
(Emphasis supplied)

[36] The learned judge also considered the evidence that it was Mrs Braham who collected Mrs Messado’s passport. In the circumstances, the complaint that she did not properly treat with Mrs Flores’ evidence is unlikely to fall on fertile ground.

The internal management rule

[37] The learned judge found that based on the rule in **Turquand’s** case, the company was bound by the actions of Mrs Braham. At para. [52] she stated that having considered the evidence of Mr Morrison, who had asserted that Mrs Braham had no authority to deliver the certificate of title to Ms Davis as security for the sums owed by Mrs Messado, she was of the view that Mrs Braham would have breached her duty to the company to act in its best interests. At para. [54] she stated:

“[54] The indoor management rule, as laid down in **Royal British Bank v Turquand** would apply in these circumstances. The rule is one which permits a party who acts in good faith and without any knowledge of any irregularity in respect of the internal management of a company, to assume that there is compliance with the internal procedures of the company.”

[38] It was on that basis that she concluded that Mrs Braham had either actual or ostensible authority to act for and on behalf of the company. Based on the authorities, ground b has no realistic prospect of success.

Whether the consent of Mr Allan Davis as a tenant in common was required for the creation of an equitable mortgage?

[39] The learned judge correctly stated that where property is held as tenants in common there is no unity of title. In such circumstances, each co-owner can deal with their share of the property. Therefore, Brilliant could properly, create a charge in respect

of its share of the land. In the circumstances, ground b has no realistic prospect of success.

Principles applicable to the restraint of a mortgagee's power of sale

[40] In **Global Trust Limited & another v Jamaica Redevelopment Foundation Inc & another** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 41/2004, judgment delivered 27 July 2007, Cooke JA stated at para. 7:

"The first comment I make in respect to the grounds of appeal is that there is no challenge to the correctness of the legal criteria established in the Marbella line of authorities-nor any question as to whether the guidance given therein has been flouted or indeed misapplied. In **Marbella**, Carey J.A said at page 15:

'The rule is therefore well settled and indeed, despite Mr George's valid efforts, nothing has been said, which in any way permits a Court of Equity to order restraint (of the mortgagee's power of sale) without providing an equivalent safeguard, which is the payment into Court of the amount due or claimed in dispute'."

[41] In **Kingston Armature Dynamo Works Limited v Jamaica Redevelopment Foundation Inc & anor** [2010] JMCA App 34, Phillips JA stated thus:

"[37] The law in relation to the circumstances warranting the grant of an injunction preventing the mortgagee from exercising its powers of sale is quite clear. The line of authorities on this area starting with **Inglis and Another v Commonwealth Trading Bank of Australia and SSI (Cayman) Limited & Others v International Marbella Club** has established that a mortgagee's exercise of its power of sale to which it has become entitled, should not be fettered by an injunction and if one is granted it should be on the condition, unless special circumstances exist, that there is payment into court by the mortgagor of the amount that the mortgagee claims is owed. These principles have been consistently reiterated by this court; see **Global Trust Limited & Another v Jamaica Redevelopment Foundation & Another** SCCA No. 41/2004 delivered 27 July

2007 and **Rupert Brady v Jamaica Redevelopment Foundation & Others** SCCA No 29/2007 delivered 12 June 2008. In these more recent cases however, the court has also made it clear that the authorities indicate that 'it would be proper to grant an injunction to restrain the mortgagee's power of sale if there are triable issues as to the validity of the mortgage document upon which the mortgagee seeks to found his power of sale'. At page 11 of the judgment Cooke JA said:

'Assertions such as that the property and its development potential far exceeded in value the amount being claimed as due by the respondent, or that a sale by auction would inflict irreparable harm to the mortgagor, do not appear to be relevant considerations for determining whether or not to grant an injunction to restrain a mortgagee from exercising the power of sale'."

[42] Having found that there are no arguable grounds of appeal there is no basis to restrain Mrs Murray from exercising her power of sale.

Risk of injustice

[43] As stated above, I am not satisfied that the applicants have a good arguable appeal. Consequently, there is no need to consider the risk of injustice to the parties.

Orders

- (1) The amended application for an injunction pending appeal filed is refused.
- (2) Costs of the application to the respondent to be agreed or taxed.