[2022] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL COA2020CV00084

BETWEEN	**GREGORY DUNCAN**	**1st APPELLANT**
AND	**GLOBAL DESIGNS & BUILDERS LIMITED**	**2nd APPELLANT**
AND	**COK SODALITY CO-OPERATIVE CREDIT UNION**	**RESPONDENT**

1st appellant in person and representing the 2nd appellant

Miss Stephanie Williams and Miss Ariana Mills instructed by Henlin Gibson Henlin for the respondent

14 and 18 November 2022

BROOKS P

[1] I have read the draft judgment of my sister V Harris JA. I agree with her reasoning and conclusion and have nothing further to add.

D FRASER JA

[2] I, too, have read in draft the judgment of my sister V Harris JA and agree with her reasoning and conclusion.

V HARRIS JA

[3] The 1st and 2nd appellants, Mr Gregory Duncan and Global Designs & Builders Limited, respectively (referred to collectively as 'the appellants', when necessary), are appealing the decision of Laing J ('the learned judge') given on 9 July 2020, in which he gave judgment in favour of COK Sodality Co-Operative Credit Union ('the respondent'), for the sum of $5,393,828.89, inclusive of the principal amount claimed plus interest, penalty, court fees and attorneys' fixed costs. He also ordered that the judgment sum would attract the statutory interest rate of 6% per annum from the date of judgment until it was satisfied. In addition, costs were awarded to the respondent to be taxed if not agreed.

Background facts

[4] The background facts may be briefly stated. On 23 January 2013, the 1st appellant and the respondent were parties to a loan agreement. Under the terms of that agreement, the respondent agreed to lend the 1st appellant $19,400,000.00 with interest at 12% per annum (on the reducing balance) for 300 months (or 25 years) ('the loan'). It was agreed between the parties that the loan was to be secured by a property located at lot 9B, Sandhurst Place, in the parish of Saint Andrew, registered at Volume 1184 Folio 751 of the Register Book of Titles ('the Sandhurst property') and a corporate guarantee from the 2nd appellant, among other things. The loan was disbursed on 7 March 2013.

[5] By letter dated 9 August 2013, the 1st appellant requested that the respondent discharge the mortgage on the Sandhurst property and increase the loan amount to $45,000,000.00. He proposed that the increased loan amount would be secured by property located at 62 Grants Pen Road, in the parish of Saint Andrew ('the Grants Pen property'). The respondent did not find the Grants Pen property to be a suitable replacement. Consequently, the 1st appellant offered three properties (strata lots 1, 12 and 14) located at Rose Garden Apartments, 1 Hillside Drive, Forest Hills, in the parish of Saint Andrew, to secure the increased loan requested (referred to collectively as 'the Rose Garden Apartments', when necessary). These properties were registered in the name of

the 2nd appellant. The respondent ultimately denied the 1st appellant's request for the increased loan amount. However, it proceeded to register its mortgage for the loan of $19,400,000.00 on the certificates of title for the Rose Garden Apartments and subsequently discharged the mortgage on the Sandhurst property.

[6] In May 2014, the 1st appellant defaulted on the loan. By or about July 2015, the duplicate certificates of title for strata lots 14 and 1 of the Rose Garden Apartments were released (on or about 7 July 2014 and 20 July 2015, respectively, the latter being released in exchange for a payment of $9,000,000.00, which was applied to the 1st appellant's loan account). In June 2017, the respondent exercised its power of sale over strata lot 12 of the Rose Garden Apartments. That property was sold for $15,500,000.00. The net proceeds realised from the sale ($13,040,337.50) were insufficient to liquidate the debt. As a result, the respondent sent letters of demand to the appellants on 9 April 2018 and 12 July 2018 for the outstanding balance. Notwithstanding, the appellants failed to settle their indebtedness.

The proceedings below

[7] On 25 May 2018, the respondent filed its claim in the court below. The claim and particulars of claim were amended on 19 September 2018, given that the original claim concerned a loan of $26,000,000.00 that, as agreed by the parties, was never disbursed to the appellants. The amendment reflected that the subject of the claim was in respect of the loan for $19,400,000.00. On 2 December 2019, the respondent filed a further amended claim to update the amount outstanding on the loan and to correct the interest rate of 14% to 12% per annum as well as the corresponding *per diem* rate that had been previously erroneously pleaded. On 4 December 2019, the learned judge permitted the respondent to further amend its claim after considering the appellants' submissions opposing the amendment.

[8] The claim was heard over several days by the learned judge. The 1st appellant disputed that he owed the sum claimed by the respondent. His defence was that in addition to the incorrect interest rate of 14% that was applied to the principal sum for 17

months, the respondent had "mismanaged" the payments made towards the loan, which led to errors in their calculation of outstanding balances when, in fact, the loan had been completely liquidated.

[9] In his written judgment delivered on 9 July 2020 (see **COK Sodality Co-Operative Credit Union Ltd v Gregory Duncan and Global Designs & Builders Ltd** [2020] JMCC 12), the learned judge made the following orders:

> "1. Judgment in favour of the [respondent] against the [appellants] in the sum of $5,393,828.89 which represents the principal sum claimed of $1,091,506.99, plus a penalty of $790,204.19, court fees of $10,000.00, Attorneys fixed costs of $14,000.00 and contractual interest at the rate of 12 percent per annum from 27th October 2015 to today's date 9th July 2020 in the sum of $3,488,117.71 ($4,329,973.60 minus $841,855.89). This judgment in the sum of $5,393,828.89 will attract statutory interest at the rate of 6 percent per annum from today's date until the judgment is satisfied.
>
> 2. Costs of the claim are awarded in favour of the [respondent] against the [appellants] to be taxed if not agreed."

The appeal

[10] By their amended notice of appeal filed on 18 February 2021, the appellants are challenging the orders made by the learned judge on the following grounds:

> "a. That the learned judge having found that the Appellants were overcharged an inaccurate interest rate of 14 per cent per annum and accordingly breached the January 18, 2013 contract erred by awarding costs to the [respondent], who the Court found wronged the Appellants;
>
> b. That the learned judge erred in the award to the [respondent] and being that their claim was statute barred which was raised at trial, by they having relied upon and sued the Appellants pursuant to a January 18, 2013 Contract by Further Amended Claim filed December 2019;

c. That the learned judge erred in disregarding that the [respondent] relied on a fraudulent Loan Offer Letter which they generated and admitted to producing;

d. That the learned judge erred by not taking judicial notice of all the relevant facts and evidence from the pleadings or materials or materials placed before him, which supports that between January 18, 2013 and October 27, 2013, the [1st appellant] was incorrectly overcharged an interest rate of 14%."

Appellants' submissions

[11] The 1st appellant, Mr Duncan, who appeared in person for the appellants, in his written submissions, contended in summary, that the learned judge erred when he gave judgment in favour of the respondent because the appellants had proved that the loan was redeemed and that the respondent had "fraudulently created overcharges and doctored documents" in presenting their case. In particular, it was contended that the appellants were deprived "of the win" by the learned judge's error because the respondent's case was premised upon:

a. a fraudulent loan offer because the copy of the loan offer letter that was exhibited to their amended particulars of claim did not match the copy of the same document that was shown to him during the trial as the former had only two pages and at the area where the date appeared, "January" was written out in full while the latter had three pages and the month, as written, was abbreviated;
b. an erroneous interest rate of 14% per annum; and
c. a claim that was statute barred (specifically, that the further amended claim and particulars of claim filed two days before the trial were short-served, statute barred, and the appellants were never given the opportunity to respond to it). **Cyrus Reid v JP Tropical Foods Limited** [2018] JMSC Civ 32 was cited in support of this submission.

[12] Before us, further submissions were made on behalf of the appellants. It was argued that the learned judge had given the respondent an unfair advantage when he allowed the further amendments to their claim. The 1st appellant referred to rule 1.1 of the Civil Procedure Rules ('CPR'), which states that the court's overriding objective is to deal with cases expeditiously but fairly, and submitted that no party must be given an unfair advantage. The 1st appellant also challenged the learned judge's finding in relation to the circumstances under which the Rose Garden Apartments became securities for the loan. He contended that those properties were intended to secure an additional loan of $26,000,000.00, which was denied. Subsequently, the respondent, having discharged its mortgage on the Sandhurst property, replaced the security for the loan with the Rose Garden Apartments, which he said, he did not agree to.

[13] The 1st appellant also raised, for the first time in this appeal, his grievance with the application of the $9,000,000.00 that the 2nd appellant paid to the respondent on or about 20 July 2015. That payment of $9,000,000.00 was in exchange for the release of lot 1 of the Rose Garden Apartments. He asserted that certain instructions were given to the respondent for that amount to be used to offset future loan payments, and if the respondent had applied the $9,000,000.00 as requested, he would not have been in any arrears. Instead, the 1st appellant submitted, the respondent allocated the $9,000,000.00 to his account contrary to his request. Subsequently, the respondent exercised its power of sale over the remaining lot 12 of the Rose Garden Apartments, which it held as security for the loan. He argued that the sale was conducted without due notice to the appellants, who were later notified of it in November 2017.

Respondent's submissions

[14] The respondent submitted that the appeal is without merit for the following reasons. On ground a, which raised the issue of costs, learned counsel for the respondent, Miss Stephanie Williams, submitted that the award of costs is discretionary, and the usual order is that costs follow the event. It was further submitted that the respondent, having succeeded at trial, was entitled to its costs which the learned judge correctly ordered.

[15] Addressing ground b, it was contended that the issue of the claim being statute barred was never raised in the court below; therefore, the appellants could not now rely on this as a basis to set aside the learned judge's decision. In any event, it was argued that neither the claim nor the further amended claim was statute barred, and the further amendments were permissible since they were *de minimis* and did not result in a new or substantially different claim from what was before the court. Additionally, the appellants were allowed to respond to the respondent's application to further amend its claim, as the trial was postponed on the first day of the hearing to enable the 1st appellant to file an affidavit (which was done on 4 December 2020) setting out his objection(s) to the respondent's application.

[16] Under ground c, the respondent argued that no allegation of fraud was disclosed on the appellants' pleadings in the court below, and it was not in dispute that the 1st appellant received the loan for $19,400,000.00. Instead, the "alleged fraud" arose when the 1st appellant was being re-examined, and he pointed out inconsistencies between the format of the copy of the loan offer letter that formed part of the pleadings and the copy of the same document that was presented to him during the trial. However, it was further argued that this issue was resolved when the court permitted the respondent to re-open their case, and the original loan agreement was admitted into evidence.

[17] Concerning ground d, it was advanced that the learned judge considered all the evidence and relevant material before the court. This led to his finding that the appellants had been overcharged interest for the period 31 March 2013 to 17 July 2017; consequently, the amount claimed for interest was reduced by $841,855.89.

[18] In response to the 1st appellant's further submissions before us, counsel contended that the parties agreed to replace the security for the loan with the Rose Garden Apartments. Reference was made to an email from an agent of the respondent to the 1st appellant on 9 May 2014 that, it was argued, provided evidence of this agreement. As it relates to the issue of notice of the sale not being given, counsel relied on the following covenant "… the Mortgagee shall be at liberty to give the Mortgagor and Borrower notice

in writing to repay the moneys hereby secured …" contained in clause 2(f) of the "GUARANTORS MORTGAGE UNDER THE REGISTRATION OF TITLES ACT" which was dated 10 October 2013.

Remit of this court

[19] The appellants are challenging both the findings of facts made by the learned judge and the exercise of his discretion to allow further amendments of the claim and awarding costs to the respondent, which was the successful party in the court below. The overarching principles governing the approach of this court to findings of facts and the exercise of a discretion made by a judge at first instance are well known. Firstly, the court will not lightly disturb findings of facts unless it can be shown that they were not supported by the evidence or it is plain that the court did not make use of the benefit of having seen and heard the witnesses (see **Rayon Sinclair v Edward Bromfield** [2016] JMCA Civ 7 per Brooks JA (as he then was) at para. [7] applying the decisions of the Board in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35 and **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21). Secondly, the court will not disturb the exercise of a discretion of a trial judge unless he either misdirected himself on the applicable legal principles or misinterpreted the facts or his decision was "so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it" (see **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 and **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1). The issues raised in the grounds of appeal will now be considered.

Analysis and disposal

Ground a

[20] It is settled that there is no entitlement to costs, and an order for costs remains in the "complete unfettered" discretion of the court with the caveat that the discretion to award or withhold costs must be exercised judicially (see section 28E(1) of the Judicature (Supreme Court) Act; Part 64 of the CPR; **Ivor Walker v Ramsay Hanson** [2018] JMCA

Civ 19 per Phillips JA at para. [42] and **Bardi Limited v McDonald Millingen** [2021] JMCA Civ 25).

[21] Rule 64.6(1) states that "if the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party". In other words, costs follow the event. In the case at bar, although there was a reduction in the amount claimed for interest due to the application of an incorrect interest rate for 17 months, and the appellants may have been "wronged" in this regard, the respondent was substantially successful on their claim. Moreover, in determining the issue of costs, the learned judge would also have been mindful of the 1st appellant's conduct before the proceedings (see rule 64.6(4)(a) of the CPR), including his protracted delinquency and failure to settle the debt despite repeated demands from the respondent to do so. Therefore, in all the circumstances, it was entirely a matter within the learned judge's discretion to make the usual order for costs. Accordingly, this ground is without merit, and it fails.

Ground b

[22] The appellants' submissions under this ground that the claim was statute barred and/or that the further amendment of the claim was made after the relevant limitation period are without merit. The loan agreement (a simple contract) was signed by the parties on 23 January 2013. Subsequently, the loan amount was disbursed on 7 March 2013. The 1st appellant defaulted on the loan in or around May 2014. The original claim was filed on 25 May 2018 (albeit in reference to a loan that was never disbursed) and was amended on 19 September 2018 to reflect the correct loan amount. The limitation period to bring an action for a debt arising from a breach of a simple contract (as distinct from "a contract of specialty" made by deed) is six years (see United Kingdom Statute 21 James 1 Cap 16, which was incorporated into law locally by section 41 of the Interpretation Act, section 46 of the Limitation of Actions Act and **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society** [2010] JMCA Civ 7 per Phillips JA at para. [40] applying **Muir v Morris** (1979) 16 JLR 398).

[23] The approach to calculating the limitation period was discussed in **Reeves v Butcher** [1891] 2 QB 509, where it was said, "it has always been held that [time] runs from the earliest time at which an action would be brought" (see also **Read v Brown** (1888) 22 QBD 128). This principle has been consistently applied in several authorities in this court, such as **Attorney General of Jamaica v Arlene Martin** [2017] JMCA Civ 24 and **Medical and Immuniodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42 ('**Medical and Immuniodiagnostic Laboratory Limited**'). It is pellucid from Harrison JA's judgment in the latter case, when precisely the cause of action would arise, he said:

> "[5] The general rule in contract is that the cause of action accrues not when the damage is suffered but when the breach occurred. Consequently, the limitation period runs from the time the contract is broken and not from the time that the resulting damage is sustained by the plaintiff."

[24] The contract was broken when the appellants first defaulted on the loan. This was in May 2014. Although payments were subsequently made, the loan arrears were not completely satisfied; therefore, the breach/default continued. Applying the principle in **Reeves v Butcher** and **Medical and Immuniodiagnostic Laboratory Limited**, the earliest time that the claim in this matter could have been brought or when the cause of action accrued was in May 2014. As a result, the limitation period would not have expired until, at the latest, early May 2020.

[25] Similarly, the further amended claim filed on 2 December 2019 was not statute barred, and the amendments made would not have been after the relevant limitation period. However, it is acknowledged that since the further amendments to the claim were being made after the case management conference (held on 24 June 2019), the court's permission would be required (see rule 20.4(2) of the CPR). The learned judge granted that permission. I say so because (1) the trial, which should have commenced on 3 December 2019, was adjourned to facilitate the 1st appellant filing an affidavit on 4 December 2020 in response to the respondent's application to further amend the claim; (2) in the notes of evidence of the same date (4 December), the learned judge noted the

following: "Amendments – Court rules not substantiated" (at page 209 of the record), presumably ruling that the objections raised by the 1st appellant to the respondent's application were not substantiated; and (3) the judgment was given on the further amended claim (see para. [1] of the written judgment of Laing J).

[26] It is noted that the appellants were represented by three attorneys-at-law at the trial. The appellants have not alleged incompetence of counsel in their grounds of appeal. All the circumstances, therefore, imply that counsel for the appellants would have advanced, on their behalf, the objections raised by the 1st appellant in his affidavit to the further amendment of the claim. I am, therefore, satisfied that this issue was adequately ventilated before the learned judge. As a result, the 1st appellant's submission that he was not allowed to respond to the further amended claim is entirely baseless. The 1st appellant also orally submitted that he did not have an opportunity to present a defence due to the belated further amendments. It should be borne in mind that despite the particulars of claim being amended and filed on 19 September 2018 to reflect the correct loan amount, the appellants stood on their initial defence, which was filed in response to the original claim. The appellants' lack of an amended defence cannot, therefore, be attributed to the further amendments in circumstances where they could have amended their defence, without permission, within 42 days of being served with the amended particulars of claim (see rule 20.3(1) of the CPR).

[27] Before leaving this issue, I wish to make two observations. Firstly, it is perhaps helpful to indicate that the defence that a limitation period has expired is a procedural defence that should be properly raised and resolved at the trial (see **The Attorney General of Jamaica v Arlene Martin** at para. [36]). However, it is evident that this point was not canvassed (and rightly so) before the learned judge. Secondly, the 1st appellant's reliance on the case of **Cyrus Reid v JP Tropical Foods Limited** is misconceived since the claim, in that case, was found to be statute barred, unlike the claim in the present case. Furthermore, the issue addressed, in that case, concerned amendments made after the limitation period, which does not assist the appellants.

[28] Additionally, under this ground, the appellants complain that the respondent was given an unfair advantage when the learned judge allowed the further amendments to their claim. However, it is indisputable that a judge has a discretion to allow amendments to statements of case even after the relevant limitation period. In the case of **Judith Godmar v Ciboney Group Limited** (unreported) Supreme Court, Jamaica, Claim No 144/2001, judgment delivered 3 July 2003, a decision of this court, it was held that a judge may allow the amendment of a claim, after the relevant limitation period, "1) [w]hen it is necessary to decide the real issues in controversy, however late; 2) [w]hen it will not create any prejudice to the other party and is not presenting a 'new case'; and 3) [w]hen it is fair in all the circumstances of the case" (per Smith JA at pages 24 and 25 of the judgment applying **Gloria Moo Young and Another v Geoffrey Chong et al** (unreported) Supreme Court, Jamaica, Claim No 117/1999, judgment delivered 23 March 2000).

[29] In my judgment, it was fair, in all the circumstances, for the learned judge to have allowed the further amendments. Firstly, it is important to point out that the amendments reduced the amount claimed as the principal sum and the per diem charge for the daily interest rate. In addition, the erroneous interest rate that was previously pleaded was also corrected. Secondly, not only were these further amendments to the appellants' advantage, but they were necessary to decide the real issue in controversy, namely, the quantum that was owed. Lastly, the amendments did not constitute a fresh or new claim. Therefore, it cannot be reasonably advanced that the appellants were prejudiced as a result. This ground is, likewise, without merit and fails.

Ground c

[30] The issue raised under this ground is also without merit and can be addressed briefly. Whether the loan offer letter was fraudulent (and I am not saying that it was) is irrelevant, as there is no dispute that the 1st appellant received the loan of $19,400,000.00 and defaulted in making the agreed monthly instalments (see **Sagicor Bank v Marvalyn Taylor-Wright** [2018] UKPC 12).

[31] The learned judge did not disregard the inconsistencies between the loan offer letter that was shown to the 1st appellant during the trial and those included in the trial bundle. Consequently, he ruled that in the interests of fairness, the respondent should be permitted to re-open its case so that the original loan agreement signed by the parties could be admitted into evidence. This ultimately, in my view, laid any allegation of "fraud" to rest.

[32] Upon examining the copy of the loan offer letter exhibited to the amended particulars of claim and the said document exhibited to the further amended particulars, I observe a difference in how the date is written. On the former document, the word "January" is written beside the 1st appellant's signature, whereas the word is abbreviated to "Jan" in the latter document. Also, a page is missing from the former document. Aside from these differences, the text of both copies are identical. It must be said that the issue of fraud was not raised in the court below. However, as previously stated, any concerns with the differences between the documents would have been cured with the admission of the original loan agreement. This ground also fails.

Ground d

[33] The complaint raised under this ground ignores the learned judge's analysis and findings (found at paras. [38] – [41] of his written judgment), that the respondent applied an incorrect interest rate of 14% instead of 12% from 31 March 2013 to 17 July 2015. He allowed the parties to make further submissions on this issue and eventually accepted the respondent's calculation that the amount that the appellants were overcharged for the period in question was $841,855.89 and not $1,303,279.62 as advanced by the appellants. This finding was made on two bases. The first was that it was unfair for the appellants, at that stage of the proceedings, to resile from their earlier position that the amount that they were overcharged would be "in excess of $800,000.00" (as stated by the 1st appellant during his testimony). Secondly, the figure put forward by the appellants was rejected as being "wholly out of line with the case as presented at trial" (see para. [41] of Laing J's written judgment).

[34] The significant increase in this sum from "in excess of $800,000.00" to $1,303,279.62 appears to be, among other things, an attempt by the 1st appellant to extend the period that the learned judge found that the appellants were overcharged interest (see para. [33] above). However, before us, the 1st appellant submitted that the period was 18 January 2013 to 27 October 2017 (which represents an additional five months). It is noted that during the cross-examination of the respondent's witness, Mrs Patrice Thomas Hinds, it was suggested to her by counsel representing the appellants that the incorrect interest rate was applied from 31 March 2013 to 17 July 2015. Therefore, it was never the 1st appellant's case in the court below that he was overcharged interest for the period now being advanced. As a result, there would have been no dispute concerning this particular issue that required resolution by the learned judge. It is worth reiterating that the loan was not disbursed until 7 March 2013, so it is incomprehensible to me how interest could have started to accrue on the principal sum from 18 January 2013, bearing in mind that the parties did not sign the loan offer letter until 23 January 2013 and there was no mention in it of a previous disbursement.

[35] The learned judge cannot be faulted for arriving at the conclusion he did. It was a matter for him to decide which of the two calculations to accept. In the light of the 1st appellant's evidence that he would have been overcharged in excess of $800,000.00 during the period that the incorrect interest rate was applied, not only was it reasonable, but it was also consistent with the evidence presented at trial for the learned judge to have accepted the figure of $841,855.89 put forward by the respondent. Therefore, the criticism levelled at the learned judge's finding is unmeritorious. This ground also fails.

Additional matters raised in the appeal

[36] The 1st appellant advanced several additional issues before us, that were not foreshadowed in the grounds of appeal, some of which were also not canvassed in the court below. At the outset, it is noted that as a general rule, on an appeal, "no party may rely on a matter not contained in that party's notice of appeal or counter-notice unless it was relied on by the court below …" (see rule 1.16(2)(a) of the Court of Appeal Rules

'CAR')). However, that rule is not absolute as the court has a discretion to permit a party to argue any issue that was not raised in the court below or contained in that party's notice or counter-notice of appeal (see rule 1.16(2)(b) of CAR). Given that the 1st appellant is a self-represented litigant, who also appeared on behalf of the 2nd appellant, we considered his submissions, although some of the issues that emerged were neither ventilated in the court below nor set out in the appellants' notice and grounds of appeal. These issues will now be addressed.

The circumstances under which the Rose Gardens Apartments were held as security

[37] This issue was not mentioned in any of the grounds of appeal. However, the learned judge addressed the matter in this way. He acknowledged that there was a "disagreement between the parties as to how additional properties came to form the security held by the [respondent]". He ultimately made the following findings at paras. [20] and [21] of his judgment:

> "[20] The Claimant's position as expressed in this e-mail was that although it might have been prepared initially to extend an additional loan facility to the Defendants to increase their indebtedness to $45,000,000.00 and had gone so far as to ensure that it had ample security to cover that amount. However, its final position was a *volte-face*. **I find that the endorsement of the mortgage numbered 1848463 on the Rose Garden Properties was not a straightforward substitution of security in respect of the 19.4m loan because it was at all times contemplated by the parties that the Rose Garden Properties would have been in respect of a greater sum. Nevertheless, this does not affect the fact that the mortgage numbered 1848463 would still be valid in respect of the existing indebtedness relating to the $19.4m Loan which had already been disbursed.** This is notwithstanding the fact that the mortgage numbered 1848463 was intended to cover the anticipated additional disbursement of $26,000,000.00 as well.
>
> [21] **The 2nd Defendant by agreeing to the mortgage numbered 1848463 being endorsed on the duplicate certificates of title for the Rose Garden Properties and by handing over of [sic] the three certificates of title to the Claimant, gave them up as security for the $19.5m** [sic] **Loan.**

> I am therefore unable to accept the Defendants [sic] submission that because the Claimant withdrew the offer of the additional loan facility, the Claimant's use of those properties and in particular the exercise of its power of sale over Lot 12 Rose Garden Apartments for $9,000,000.00 [sic] was irregular or improper." (Emphasis supplied)

[38] The learned judge's findings in this regard cannot be impugned. The original security for the loan was the Sandhurst property. On 9 August 2013, the 1st appellant requested that security be discharged and replaced to facilitate his compliance with the Real Estate Board's requirement that properties for development are not to be encumbered and for him to obtain splinter titles for that property. He had proposed the Grants Pen property as the replacement, but the respondent deemed that property to be unsuitable. The respondent's mortgage was registered on the certificates of title for the Rose Gardens Apartments on 10 October 2013. The mortgage for the Sandhurst property was not, however, discharged until the following year, on 15 April 2014. Certainly, if any issue was to be taken with the mortgage for the loan being registered on the certificates of title for the Rose Gardens Apartments, the appellants had ample time to do so before the release and discharge of the Sandhurst property. The respondent was, therefore, at liberty, in circumstances where the 1st appellant did not retract his request for the replacement of the original security and failed to present a more suitable option, to secure their interests with the certificates of title for the Rose Garden Apartments which were delivered to them by the 1st appellant's guarantor (the 2nd appellant). Given the failure of the 1st appellant to honour the terms of the agreement, the respondent's decision to do so was quite prudent. The appellant's submissions on this point are flawed and unmeritorious.

The "misapplication" of the payment of $9,000,000.00

[39] This, too, was an issue that was not put forward as a ground of appeal. According to the 1st appellant's submission, he gave specific instructions to the respondent to apply this sum to future payments (although remarkably, at the time this payment was made, the loan had been in arrears for over a year). However, having examined the record, there is no evidence that any such instructions were given to the respondent regarding

the application of that payment, nor am I convinced that even if those instructions were given, the respondent would have been obligated to honour them considering the prolonged default. The $9,000,000.00 was paid by a cheque which was enclosed with a letter dated 14 July 2015 from Clough, Long & Co, attorneys-at-law and addressed to the respondent on behalf of the 2nd appellant. The only instruction in that letter was for the release and discharge of the duplicate certificate of title for lot 1 of the Rose Garden Apartments, which was done. Based on the letter dated 28 October 2015 from the respondent to the 1st appellant, the $9,000,000.00 was received on 27 July 2015 and applied as follows:

"Collection expenses	$135,853.27
Interest Payment	$2,861,911.18
Principal	$5,602,992.52
Documentation fees	$10,000.00
Default interest payment	$389,243.03"

[40] In response to the suggestion at trial that there was no agreement between the respondent and the 1st appellant as to how the payment was to be applied, Mrs Patrice Thomas Hinds stated, "[i]t doesn't have to be agreed once the accounts were delinquent we have all right to apply to [sic] as we see fit". She continued to explain that "[t]he loan [agreement] says interest, then principal. If delinquent – it is penalty, then interest then principal". However, as the learned judge found, the documentary evidence did not support the latter assertion (see para. [25] of the written judgment). Nevertheless, I am unable to find a basis upon which this submission would warrant our interference with the learned judge's decision.

<u>The respondent failed to give notice to the appellants before exercising its power of sale for lot 12 of the Rose Garden Apartments</u>

[41] Once again, this point was not presented as a ground of appeal. Clause 2(f) of the "GUARANTORS MORTGAGE UNDER THE REGISTRATION OF TITLES ACT", dated 10 October 2013, provides:

> "Upon any default after any demand for payment of the moneys hereby secured or any part thereof or upon any other default in or non-compliance with any of the covenants conditions or obligations on the part of the Mortgagor or Borrower herein contained or hereunder implied and after such default shall have continued for three days the Mortgagee shall be at liberty to give the Mortgagor and Borrower notice in writing to repay the moneys hereby secured and if such default shall continue for three days after the service of such notice the statutory powers of sale and of appointing a receiver and all ancillary powers conferred upon the Mortgagee by the Registration of Titles Act may be exercised by the Mortgagor."

[42] By virtue of the above clause, the respondent was at liberty to give notice once the default period had passed. Even so, it has long been established that a notice of an intention to exercise a power of sale is not mandatory (**Zachariah Sharief v National Commercial Bank Jamaica Limited** (unreported) Supreme Court, Jamaica, Claim No 65/1994, judgment delivered 27 July 1998). While best practice dictates that a notice should be given so as to bring the default to the mortgagor's attention, such irregularities would not provide any remedy other than damages if the sale is to a *bona fide* purchaser for value without notice (**Lloyd Sheckleford v Mount Atlas Estate Limited** (unreported) Supreme Court, Jamaica, Claim No 148/2000, judgment delivered 20 December 2001). Accordingly, this argument is without merit.

Conclusion

[43] For the reasons I have sought to explain, there is no basis for disturbing the learned judge's findings of fact and the exercise of his discretion to allow the respondent to further amend their claim as well as to award them costs. Consequently, I would propose that the appeal be dismissed, and the decision and orders of Laing J made on 9 July 2020 be affirmed with costs to the respondent to be taxed if not agreed.

BROOKS P

ORDER

1. The appeal is dismissed.

2. The decision and orders of Laing J made on 9 July 2020 are affirmed.

3. Costs to the respondent to be taxed if not agreed.