JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 41/2004

BEFORE: **THE HON. MR. JUSTICE PANTON, J.A.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN:	**GLOBAL TRUST LIMITED**	**1ST APPELLANT**
AND:	**DONALD GLANVILLE**	**2ND APPELLANT**
AND:	**JAMAICA RE-DEVELOPMENT FOUNDATION INC.**	**1ST RESPONDENT**
AND:	**DENNIS JOSLIN JAMAICA, INC.**	**2ND RESPONDENT**

Dr. Lloyd Barnett and Miss Gillian Burgess, instructed by Mr. Michael Thomas for the Appellants.

Mrs. Sandra Minott-Phillips and Mr. Emile Leiba, instructed by Myers, Fletcher and Gordon for the Respondents.

July 10, 12, 13, 2006 and July 27, 2007

PANTON, P.

1. At the conclusion of the hearing of this appeal, I found myself unable to agree with the result arrived at by my learned brother and sister. The relevant facts having been adequately stated in their reasons for judgment, I set out hereunder my brief reasons for the position that I found inescapable.

2. The appellants say that they have overpaid on their account by over three quarters of a million dollars and are not indebted to the first respondent.

Consequently, they filed a claim form seeking a declaration to that effect and also that the second appellant is not liable to the first respondent with respect to the instrument of guarantee dated 1st November, 1993. The appellants are also seeking an injunction to restrain both respondents from selling the relevant properties and they also seek an order for the taking of an account.

3. By a "notice of application for interim order" dated 10th February, 2004, the first appellant sought an order to restrain the respondents from selling the properties "until the trial of this action or further Order of this Court". The learned judge refused the application. In arriving at that decision, she said:

(a) there was a serious issue to be tried in respect of whether there had been an overpayment of the debt;

(b) the case **SSI (Cayman) Ltd. and Others v. International Marbella Club S.A.** (SCCA 57/86 – delivered on February 6, 1987) mandated that the amount claimed by the respondent "must be brought into court";

(c) Section 106 of the Registration of Titles Act provides that in the case of an unauthorized, improper or irregular exercise of the power of sale, damages are the adequate remedy; and

(d) in the circumstances, damages would be an adequate remedy if the appellant were to succeed in the action.

4. A judge who hears an application for an injunction is not concerned with resolving difficult issues of fact or law. In the instant case, the learned judge

concluded that there was a serious issue to be tried in respect of whether the debt has been overpaid. In spite of that she refused to grant an injunction. To my mind, this is an inconsistent position. If there is a serious issue to be tried, why should there not be an injunction to preserve the rights of the appellants? The appropriate course would have been for them to have been asked to give an undertaking in damages in the event they were to lose at the trial. I cannot see how in such a situation the balance of convenience was not seen to be in their favour. Persons ought not to be deprived of their property before a trial in a situation where there is a serious dispute as to the status of their account with the mortgagee. Refusal to grant an injunction in cases of this nature may result in mortgagees reaping unjust benefits.

5. The learned judge relied on Section 106 of the Registration of Titles Act. In my view, she was in error in so doing. That section is of no relevance to the instant situation as it is aimed at giving protection to a *bone fide* purchaser, where there has been a sale by a mortgagee. The learned judge has apparently jumped well ahead of the determination of the serious issue she found to be in dispute. Reliance on a foundation that is weak is sufficient, in my view, to disturb the conclusion she has arrived at. The injunction ought to have been granted with an undertaking being given as to damages, followed by a speedy trial of what ought to have been an easy matter to determine. The decision of the majority would, it seems, dispose of the need for a trial, as the mortgagee

would be free to dispose of the properties without giving an account in a timely manner.

COOKE, J.A.

1. The first appellant obtained mortgage financing from Island Life Merchant Bank in the sum of Three Million, Four Hundred Thousand Dollars ($3,400,000.00). This loan was secured by a legal mortgage over property registered at Vol. 651, Folio 59 and Vol. 1319, Folio 145. The Instrument of Mortgage is dated October 12, 1993. This instrument provided for:

> "ORIGINAL RATE OF INTEREST: (COMPOUND) FIFTY EIGHT ....per centum (%) per Annum calculated as Compound Interest with monthly rests.
> RESTS AT WHICH INTEREST PAYABLE Monthly."

The second appellant by an Instrument of Guarantee dated November 1, 1993 gave a personal guarantee of the said loan.

2. Refin Trust Ltd. became entitled to the rights of the mortgagee, Island Life Merchant Bank, and those rights were assigned to the first respondent. The second respondent is the agent of the first respondent and as such is duly authorised to stand in the shoes of the original mortgagee.

3. By registered letter dated July 31, 2003 the first appellant was given notice that:

> "if default in payment shall continue for **ONE MONTH** after the service of this notice the Mortgagee will sell the mortgaged premises in exercise of the Power of Sale contained in the Registration of Titles Act."

The reference to the Registration of Titles Act is to section 106 of that Act which gives the mortgagee power to sell the mortgaged land if there is a default in payment and such default continues, after notice in the prescribed manner has been given and one month (the stated period) has elapsed without the mortgagor making good the sum in default. In this case the registered letter is one of the prescribed modes of giving notice – see section 105 of the Registration of Titles Act.

4. By Claim Form dated January 28, 2004, the appellants averred that the first appellant had "not only repaid the said loan but has overpaid in the amount of Seven Hundred and Seventy-five Thousand, Three Hundred and Forty-four Dollars Eighty-four Cents ($775,344.84)." The appellants sought the following orders:

> "(1) A Declaration that the Claimant is not indebted to the first Defendant for any amount.
>
> (2) A Declaration that the second Claimant is not liable to the first Defendant with respect to an instrument of guarantee dated November 1, 1993.

(3) An injunction to restrain the Defendants, whether by themselves, their agents or servants or otherwise howsoever, from doing the following acts or any of them, selling the lots numbered 9, 10 and 10c at 59 Old Harbour Road, St. Catherine registered at Volume 651, Folio 59 and Volume 1319, Folio 145 at a public auction advertised for January 29, 2004 at 11 a.m. or at any other time selling or disposing of the said lots or any of them by private treaty or otherwise.

(4) An account of what is due from the first Defendant to the first Claimant with respect to the loan account which it had established with Island Life Merchant Bank Limited and an order for payment by the first Defendant to the first Claimant of any sum due from the first Defendant to the first Claimant upon taking such account."

5. The appellants next filed a Notice of Application for Interim Order dated January 28, 2004 where the relief sought is identical to that sought in para. 3 of the Particulars of Claim (supra). There was an ex parte application and on that same date the requested interim injunction was granted until the 16th day of February, 2004 "or until further order of this Court". There was a further application for an injunction by a Notice of Application filed on February 10, 2004 whereby the appellants sought to restrain the mortgagee from selling the mortgaged land until the trial of this action or "further order of the Court". The concluding paragraph of this Application was in these terms:

"The grounds on which the Applicant is seeking the Order is that there is no amount due and owing by the first Claimant on the mortgage as claimed by the Defendants and as the property and its development

> potential far exceed in value the amount being claimed as due by the Defendant, a sale by auction of the said property would inflict irreparable harm on the first Claimant. Further Particulars are set out in the Claim Form and the affidavit sworn to by the second Claimant on the 28th day of January 2004 which are filed herein and served herewith."

The essence of the contention of the first appellant is that in making payments on the loan, it instructed the mortgagee how the loan payments should be apportioned as between principal and interest, and the mortgagee ignored the stipulated apportionment. If these instructions had been followed, the argument ran, then it was the mortgagee who should pay to the first appellant the surplus payment of $775,344.84. The respondents resisted the contentions of the appellants at a hearing which took place on April 21, 2004. The Court below refused the application. That court determined that the issue of whether or not the debt had been paid was to be decided at the trial of the action. Further it was held that damages would be an adequate remedy if the appellant were successful at the trial. In the judgment the Court also stated as follows:

> "The law relevant to an application to restrain a mortgagee from executing his power of sale in circumstances as those which exist in this case, have been set out by the Court of Appeal in SSI (CAYMAN) LIMITED DR. STEVE LAUFER FINANCIAL SERVICES U.S. INC. v. INTERNATIONAL & MARBELLA CLUB SA, [SCCA. No. 57/86 (unreported) delivered February 6, 1987] that the amount claimed by the mortgagee trust (sic) be brought into court."

The learned Judge in her judgment appears to be applying two lines of authority. Firstly there was what I shall refer to as the **Marbella** line which speaks to

restraining the mortgagee's power of sale and secondly the principles enunciated in **American Cyanamid Co. v. Ethicon Ltd**. [1975] A.C. 397.

6. The Appellants have now appealed from the decision of the court below. The grounds of appeal are now set out hereunder. They are:

"(3) ...

(a) The learned Judge exercised her discretion wrongly and took into account erroneous opinions as to the law and the facts, in particular by stating:-

(i) that there is only one debt and the debtor cannot dictate what amount ought to be applied to [sic] principal; and

(ii) the copy letters on the record of Global Trust Ltd. make apportionments while the copy letters which are part of the Defendants' records indicate no apportionment at all.

(b) The learned Judge erred in law in holding that "section 106 of the Registration of Titles Act which makes provision that in the case of an unauthorized," improper or irregular exercise of the power of sale, damages are the adequate remedy, applied to the circumstances of the instant case.

(c) The learned Judge erred in law and on the facts in treating the issue raised by the Claimant/Appellant as amounting to a question as to whether the Court can or cannot assume that payment of the mortgage debt had been made, since the Claimant/Appellant adduced

credible evidence that the mortgage debt has been paid off.

(d) The learned Judge erred in law and on the facts in holding that damages would be an adequate remedy, in view of the fact that the property and its developmental potential far exceeded in value the amount alleged to be due and a forced sale is unlikely to procure its true value.

(e) The learned Judge erred in the exercise of her discretion in failing to consider or to hold that, in the circumstances, the Claimant had put forward an arguable case and the balance of convenience was in favour of delaying the sale of its property until the issues were determined at the trial."

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".

Rowe, P. and Downer, J.A. (acting) were of the same view. All three appellate judges referred with approval to **Inglis and Another v. Commonwealth Trading Bank of Australia** [1971-2] Vol. 126 C.L.R. 161, a decision of the High

Court of Australia which was affirmed on appeal. In **Inglis**, the headnote which accurately reflects the ratio decidendi stated:

> "As a general rule an injunction will not be granted restraining a mortgagee from exercising powers conferred by a mortgage and, in particular, a power of sale unless the amount of the mortgage debt, if this is not in dispute, is paid or unless, if the amount is disputed, the amount claimed by the mortgagee is paid into court; and this rule will not be departed from merely because the mortgagor claims to be entitled to set off the amount of damages claimed against the mortgagee."

In **Gill v. Newton** [1866] The Weekly Reporter Vol. XIV. 490 at page 491 Turner, L.J. in a short judgment expressed himself thus:

> "With great respect to the Master of the Rolls, I also think that the injunction is due. In saying this I wish it to be clearly understood that I do not at all proceed upon the ground that the amount due upon the mortgage is in dispute. <u>If that were so, a mortgagor would have but to raise a dispute about the sum due, in order to deprive his mortgagee of his remedies under the mortgage deed</u>. Nor should I be inclined to interfere upon the facts as they stand with regard to the mortgage deed. That deed has provided a particular mode in which notice of the intention to exercise the power of sale must be given, and the notice has been so given. The party who has entered into such a contract cannot complain of its consequences. But, with regard to the second deed, there is a substantial ground upon which the Court is bound to interfere. It is not, as has been argued, a simple receivership deed. It contains an express clause that, upon a particular act being done, the mortgagee shall be at liberty to exercise his powers and rights under the mortgage deed. I think it a serious question whether the true construction of this deed is not, that the reservation to the mortgagee, in the former part of the deed, of all his powers under the mortgage deed, is to be taken as made by the

> latter part of the deed, to be subject to this exception – that they are not to be exercised except upon the delivery of the notice mentioned in the latter part of the deed. This seems to be a reasonable and fair construction, and at any rate it is so open to argument, that I think the injunction must be granted". (Emphasis mine)

In **Flowers, Foliage and Plants of Jamaica Ltd. and Others v. Jamaica Citizens Bank Limited** [1997] 34 J.L.R. 447 Rattray, P. delivered the judgment of the Court of Appeal which held that :

> "...the general rule that the Court will not interfere to deprive the mortgagee of the benefit of his security, except where the sum stated to be due is paid into court, is distinguishable in this case as there are triable issues of fact and of law concerning the validity of the guarantee and the legality of the upstamping of the mortgage."

The cases of **Newton** and **Flowers** (supra) 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. This was not so in this case. Assertions such as that the property and its development potential far exceeded in value the amount being claimed as due by the defendant, 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.

8. The discussion in the previous paragraph points to a dismissal of this appeal. However, in the Court below, as in this Court, much attention was directed to the principles pertaining to the granting of interlocutory injunctions as set out in **America Cyanamid** (supra). At this hearing, in exchanges between the Bench and the Bar, I raised this query as to the applicability of those principles to the instant case. In **Marbella** there was no consideration of **American Cyanamid**. In **Flowers** there was no reference to that authority. **Lloyd Sheckleford v. Mount Atlas Estate** S.C.C.A. No. 148/2000 is a decision of this Court. In this case the issue pertained to whether or not an agreement for sale between a mortgagee acting in the exercise of his power of sale and a purchaser was valid and enforceable. Here again the principles in **American Cyanamid** do not appear to have been canvassed. In **Shades Limited v. Redevelopment Foundation Inc.** SCCA No. 55/05 delivered December 20, 2006, a decision of this Court of which I was a member, the issue pertained to the exercise of the mortgagee's power of sale. In this case the submissions were concerned solely with the application of the **American Cyanamid** principles and the appeal was resolved accordingly. There was no consideration of the **Marbella** line of authorities. I have not encountered any authority in which there has been any discussion as to the inter-relationship between the **Marbella** principles and **American Cyanamid** considerations. Is it that the principles pertinent to the granting of injunctions to restrain a mortgagee's power of sale are *sui generis*? If so, is the issue of the balance of convenience a relevant

factor in the consideration of whether or not to restrain a mortgagee who rightfully wishes to exercise his power of sale? In due course these concerns may be addressed by the Court. However, it is unnecessary to now so do for the resolution of this appeal.

9. I now return to the appellants' grounds of appeal. The Court below in applying the **American Cyanamid** principles determined that in respect of whether the mortgaged debt had been discharged there was a serious issue to be tried. Therefore the only issue remaining was as to the adequacy of damages as a remedy if the appellants were to succeed at the trial. As such, it is my view that it is only grounds 3 (d) and (e) which would be germane to this appeal. Nonetheless I wish to say that in respect of ground 3 (a) (i) the Court below was in error in stating that:

> "There is only one debt in this case and the debtor cannot dictate what amount ought to be ... applied to principal."

This statement was a definitive pronouncement in respect of the serious issue as identified by the learned trial judge to be tried and thus was for the trial court to determine. Therefore the court below ought not to have made any such pronouncement. See **American Cyanamid** p. 407H. In respect of ground 3(a)(ii) it is true that the learned Judge did not accurately represent the evidence as there was at least one copy letter in the respondents' record which indicated that there should have been apportionment. As regards ground 3(b) I agree

that section 106 of the Registration of Titles Act was inapplicable to "the circumstances of the instant case". The part of section 106 which the learned Judge must have had in mind reads:

> "...and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

This part concerns the remedy of a mortgagor when the mortgagee embarked on an "unauthorised or improper or irregular exercise" of the power of sale. Accordingly the excerpted portion (supra) is not relevant as to whether or not an injunction should be granted to restrain the mortgagee from exercising the power of sale. It is relevant after the power of sale has been exercised. There is also merit in ground 3(c) which speaks for itself. However, despite the views just expressed the fact is that despite the errors, the Court below held that there was a serious issue to be tried. Consequently the appellants were successful in this regard.

10. I now address grounds 3(d) and (e) which contend that the court below was wrong in ruling that damages was an adequate remedy if the appellants succeeded at the trial. The mortgage loan was to go towards the financing of the building of a hotel on the mortgaged lands. In March, 2004 this structure was still incomplete (see para. 17 of affidavit of Karlene Smith). It is uncertain as to the state of incompleteness or the projected date for completion. Presumably, that unfinished building is not yet ready for the reception of guests.

Therefore it cannot be said that the first appellant was utilizing the mortgaged property in an active business venture in the hotel industry. In his affidavit dated January 28, 2004 the second appellant who described himself as "chairman, shareholder and Director" of the first appellant endeavoured in para. 17 to persuade the court to restrain the sale of the mortgaged property on these grounds:

> "That I further content [sic] that the Lots put up for sale is [sic] of far greater value than the amount claimed by the Defendant as the balance owing on the mortgage loan account and it would therefore be grossly inequitable for the Defendants to be allowed to proceed with an auction sale which may not realize their true value when the existence of any debt whatsoever is clearly in dispute."

I would not characterize these grounds as being substantial. As said earlier, the incomplete hotel was not a going concern. There was no particular, or at all, any intrinsic value attributable to the mortgaged property which would defy ready monetary conversion. As between the mortgagor and the mortgagee it was a financial business transaction. It was all about money. Parties are deemed to be aware of the inherent risks involved in business transactions. It is entirely speculative to say that an auction sale may not realize the true value of mortgaged property. Further if indeed the lots put for sale "is of far greater value that the amount claimed by the Defendant as the balance owing on the mortgage loan account" then the mortgagor stands to benefit. In exercising the power of sale the mortgagee has to honour its responsibilities in respect of the

selling price. I would not say that the view of the court below, that damages is an adequate remedy should be disturbed. I note that the appellants did not give any undertaking as to damages.

11. In conclusion I would dismiss the appeal. The **Marbella** line of authorities leads me in that direction. So too does the **American Cyanamid** principles. It is only left to be said that the respondents should have their costs to be agreed or taxed.

HARRIS, J.A:

This is an appeal from an order of the Honourable Mrs. Justice Marva McIntosh refusing an application by the Appellants for an interlocutory injunction.

In July 1993, the appellant obtained a loan of JA $3.4 million from Island Life Merchant Bank which was secured by a mortgage over three (3) lots of land situate at Old Harbour, St. Catherine, registered at Volume 1319, Folio 145 and Volume 651 Folio 59. By an instrument of guarantee dated November 1, 1993 the second appellant gave a personal guarantee of the loan.

In November 1988 Island Life Merchant Bank was taken over by Refin Trust Limited. They acquired the first appellant's loan account. The account was thereafter assigned to the first respondent. The second respondent is the agent of the first respondent.

On January 17, 2003 a letter of demand was sent to the first appellant by the second respondent. A notice of demand dated July 31, 2003 from the second respondent for the payment of $9,979,423.16 was received by the first appellant.

The respondents, on January 15, 2004, acting under the power of sale in the mortgage, published a notice for the sale of the lots, by public auction.

On January 28, 2004, the appellants commenced action claiming that the loan had been overpaid by $775,344.84. They also sought, on that date, among other things, an injunction to restrain the sale of the lands. An order restraining the respondents from selling the lands, until February 16, 2004 or "until further ordered", was obtained. A further application for an injunctive order was made on February 10, 2004 on the ground that there was nothing due and owing to the respondents.

This application was heard on April 21, 2004 by the Honourable Mrs. Justice Marva McIntosh at which time she refused to grant an injunction.

Under Rule 17.1(a) of the Civil Procedure Rules 2002, a court may grant an interim injunction.

A court, in determining whether or not an injunction should be granted, is guided by the principles enunciated by Lord Diplock in **American Cyanamid Company v Ethicon Ltd.** [1975] A.C. 397. At page 407, he said:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

He continued at page 408 by saying:

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

The court must first satisfy itself that, on examination of the material before it, a strong arguable case is evident. If the evidence discloses that there is a serious question to be tried, the court should then consider whether on the balance of convenience damages would be an adequate remedy, that is, whether the applicant's loss would sound in damages. If the applicant would be adequately compensated in damages, an injunction ought not to be granted.

However, in cases of uncertainty as to the adequacy of damages, then the question of the balance of convenience should be weighed in considering whether injunctive relief should be allowed. See **American Cyanamid Company v Ethicon Ltd.** (supra)

As a general rule, a mortgagee will not be restrained from exercising his powers of sale on the ground that the amount due is disputed. He, however, may be restrained if the mortgagor pays into court the sum which is claimed to be due. See **Inglis & Anor v Commonwealth Trading Bank of Australia** [1971 – 72] Vol. 126 CLR 161: **Mac-Leod v Jones** [1884] 24 Ch. D 289 and **SSI (Cayman) & Others v International Marbella Club S.A.** (1987) 24 J.L.R. 33.

Five (5) grounds of appeal were filed, namely, a,b,c,d and e. Grounds a and c, will first be considered. They are stated hereunder:

"(a) The learned Judge exercised her discretion wrongly and took into account erroneous opinions as to the law and the facts, in particular by stating:-

(i) that there is only one debt and the debtor cannot dictate what amount ought to be applied to principal; and

(ii) the copy letters on the record of Global Trust Ltd. make apportionments while the copy letters which are part of the Defendants' records indicate no apportionment at all.

(c) The learned Judge erred in law and on the facts in treating the issue raised by the Claimant/Appellant as amounting to a question as to whether the Court can or cannot assume that payment of the mortgage debt had been made, since the Claimant/Appellant adduced credible evidence that the mortgage debt has been paid off".

Dr. Barnett argued that the learned judge misdirected herself in concluding that a debtor cannot elect apportionment of a single debt. The general statement in the extract from Halsbury's on which she relied, he submitted, does not support her conclusions, as, in the absence of contractual provisions, a debtor may choose an apportionment of a debt which is most advantageous to him.

In dealing with the question of apportionment, with reference to a debtor's right in relation thereto, the learned judge said:

> "The reference HALSBURY'S LAWS OF ENGLAND (4TH ED) Vol. 9 paragraph 505-6, deals with the debtor's right to appropriate, and section 505 bears the heading "Debtor has first right to appropriate." However, the section deals, not

> with the debtor's right to appropriate what amounts ought to be applied to interest and principal but to the debtor's right "where there are several distinct debts... owing by a debtor to his creditor" when the debtor makes a payment to appropriate the money to any of the debts he pleases, and the creditor is bound, "if he takes the money to apply it in the manner directed by the debtor.
>
> There is only one debt in this case and the debtor cannot dictate what amount ought to be apportioned to interest and what ought to be applied to principal".

There is no doubt that the learned judge had made a finding, which, in the proceedings before her, she was not entitled to make. She ought not, as she had done, to have embarked on a resolution of any issue arising on the pleadings by determining the factual conflicts arising on the affidavits or deciding difficult issues of law. See **American Cyanamid Company v Ethicon** (supra).

The statement in Halsbury's Law is with reference to a debtor's privilege to direct the mode of payment in circumstances involving two or more debts. This, in itself, in my view, is not conclusive in determining a debtor's right of apportioning one debt. The question as to whether a single debt operates to exclude a debtor from exercising election of apportionment appears to be open to debate. The Halsbury's statement, as urged by Dr. Barnett, seems to be addressing the question of a debtor's general right to apportionment, provided he is not barred by any restrictive contractual stipulations.

The cases of **Nash v Hodgson** – (1855) 6 De GM & G 474 and **Lowther v Heaver** (1889) 41 Ch. D. 284 were cited by Dr. Barnett in support of his submissions. The facts of these cases are dissimilar to the present case as they were concerned with the question of apportionment of more than one debt. However, they involve a debtor/creditor relationship. They show that a debtor may have a primary right of appropriation. If it is possible that a first right of appropriation could devolve on a debtor, it maybe that, he would be able to elect to appropriate payments of principal and interest, notwithstanding that only one debt exists.

In paragraph 6 of the affidavit of the second appellant, the chairman and director of the first appellant, sworn on January 28, 2004, as well as in paragraph 7 of the particulars of claim, it is stated that the first appellant made various payments to the loan specifying the manner in which those payments should be apportioned as between principal and interest. There is in evidence a letter dated January 24, 1995 from the first appellant to Island Life Merchant Bank in which they specified how the repayments should be apportioned.

The foregoing gives rise to two (2) questions. Firstly, whether the first appellant being the debtor of a single debt, could select the manner as to how the debt should be apportioned. Secondly, whether there was

apportionment. Both issues being indubitably debatable, must be resolved at a trial.

It was Dr. Barnett's further submission that the learned judge, by holding that copy letters from the first appellant refer to apportionment while copy letters forming part of the respondent's record do not so indicate, arrived at a conclusion of fact inconsistent with the evidence.

The learned judge wrongly concluded that the letters from one party demonstrate apportionment while letters from the other, did not. Notwithstanding the error, she found that the letters created an arguable issue to be determined at trial. The correspondence, does in fact give rise to contestable issues which must be resolved at a trial.

Grounds (b), (d) and (e)

"(b) The learned Judge erred in law in holding that "section 106 of the Registration of Titles Act which makes provision that in the case of an unauthorized, improper or irregular exercise of the power of sale, damages are the adequate remedy", applied to the circumstances of the instant case.

(d) The learned Judge erred in law and on the facts in holding that damages would be an adequate remedy, in view of the fact that the property and its developmental potential far exceeded in value the amount alleged to be due and a forced sale is unlikely to procure its true value.

(e) The learned Judge erred in the exercise of her discretion in failing to consider or to hold that, in the circumstances, the Claimant had put forward an arguable case and the balance of convenience was in favour of delaying the sale of its property until the issues were determined at the trial".

Dr. Barnett also contended that the learned judge incorrectly placed reliance on section 106 of the Registration of Titles Act. It was his submission that the section is intended to protect a bona fide purchaser for value once he enters into a contract of sale with the mortgagee, on the mortgagee's exercise of his power of sale. In support of his submission he cited the case of **Sheckleford v Mount Atlas** S.C.C.A. 148/2000. – delivered on December 20, 2001.

The case of **Sheckleford** concerns the validity of an agreement for sale of property between a purchaser and a mortgagee exercising his power of sale. In dealing with the effect of section 106, Harrison J.A. as he then was, said:

> "Clearly, in section 106, the protection provided to both the purchaser from enquiry and the Registrar "... upon production of a transfer made in professed exercise of the power of sale ..." exists before any registration of transfer has been effected. The "immunity" therefore exists from the time when the contract is entered into."

He went on to say:

> "The statute must be read as a whole. The words and tenor of section 106 provide protection to a bona fide purchaser for value innocent of any wrongdoing of a mortgagee in the exercise of the power initiating a sale of mortgaged property."

In continuing he said:

> "The mortgagee however, like any mortgagee who exercises a power of sale under section 106

> of the Registration of Titles Act is subject to the scrutiny of a court, to ensure that there is no "... unauthorized or improper or irregular exercise of the power." This sanction for any misbehaviour found, is for the protection of a wronged mortgagor, although the liability is in damages only."

It is clear that the provisions of section 106 seek ultimately to protect a bona fide purchaser for value. Where a mortgagee enters into a contract of sale with the purchaser, wrongly exercising his powers of sale, a right to damages is reserved to the purchaser against the mortgagee. The statutory provision would, therefore, be inapplicable in the circumstances of the present case.

The decisive question is whether, on the balance of convenience, damages would be adequate compensation for the first appellant, should they succeed at the trial. The object of the loan was for the development of the land, namely, to construct a 20 room hotel. The reason proffered by the appellants which they aver would cause irreparable mischief, if the property is sold, is contained in paragraph 17 of the affidavit of the second appellant sworn on January 28, 2004, as follows:

> "That I further content (sic) that the Lots put up for sale is (sic) of far greater value than the amount claimed by the Defendant as the balance owing on the mortgage loan account and it would therefore be grossly inequitable for the Defendants to be allowed to proceed with an auction sale which may not realize their true

> value when the existence of any debt whatsoever is clearly in dispute."

There is evidence that the building is incomplete. There is no evidence that the building, although unfinished, was at a stage at which the first appellant had begun operation of a hotel, thus establishing that the venture was a growing concern. There is nothing to show that there would be loss of profit from the operation of a hotel, which, in the event of a sale, may be perceived as unquantifiable loss sustained by the appellants and thus, uncompensatable in damages.

Should the mortgaged property be sold at an undervalue, as contemplated by the first appellant, any damages sustained by them would be ascertainable. Such damages would be the difference between the sum realized by the mortgagee, on sale, and the true market value. An award of damages would be adequate compensation for any loss suffered by the first appellant. There being no doubt as to the adequacy of damages available to them, it follows that the first respondent ought not to be fettered in exercising its power of sale and therefore, an injunction would not lie.

I would dismiss the appeal with costs to the respondents to be agreed or taxed.

PANTON, P.

ORDER:

By a majority, (Panton, P. dissenting), the appeal is dismissed. Order of the Honourable Mrs. Justice McIntosh, J is affirmed. Costs to the respondent to be agreed or taxed.