JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2021CV00027

APPLICATION NO COA2021APP00056

BETWEEN	**JMMB BANK (JAMAICA) LIMITED (Formerly JMMB Merchant Bank Limited)**	**APPLICANT**
AND	**WINSTON FINZI**	**1ST RESPONDENT**
AND	**MAHOE BAY COMPANY LIMITED**	**2ND RESPONDENT**

Michael Hylton QC instructed by Hylton Powell for the applicant

Lord Anthony Gifford QC and Terri-Ann Guyah instructed by Guyah Tolan Associates for the respondents

29 October and 12 November 2021

IN CHAMBERS

SIMMONS JA

[1] This is an application for the stay of execution of the decision of Sykes CJ ('the learned judge'), made on 2 February 2021, ordering an account in respect of loans granted by the applicant to the respondents, in respect of which, a claim was filed for sums allegedly outstanding. The findings and orders of the learned judge are as follows:

> "[87] In respect of loan 1 the bank's claim fails. The bank's claim for loans 2 and 3 in the amounts stated fails. Mr Finzi and Mahoe borrowed money but the precise amounts to be repaid are not clear having regard to what has been said in relation [to] the land bonds and the US$2.5m line of credit which may well have been diverted to uses other than for the borrower. When the

accounting is done the loss arising from the misuse of the US$2.5m loan will be determined. An account is to be taken in respect of loans 2 and 3. Further decision is delayed pending the outcome of the accounts.

[88] This case i[s] one in which liability is determined and then the final remedy will be determined after the accounts are taken. This is necessary to do justice between the parties. Money was borrowed. How much is to be repaid, if anything at all? That is unclear. The orders suggested are to bring clarity to this question.

[89] The parties are to agree [to] an independent person to conduct the accounts not later than February 26, 2021 failing which they are to submit a combined list of persons being no less than four along with their résumés to the Registrar of the Supreme Court not later than March 12, 2021. The Registrar will make the selection not later than March 19, 2021.

[90] The independent person shall have the authority to:

(1) order the parties to produce any book, record, record of accounts, papers and writings considered necessary or helpful to arrive at an accurate account;

(2) order the parties to produce any other material that he/she/it in his/her/its discretion thinks may be of assistance in carrying out the taking of accounts;

(3) to make requests in writing to third parties who may have relevant books, records, records of accounts, papers and writings that touch and concern or resolve any matter which is considered necessary or helpful to arrive at an accurate account.

[91] The claimant and the defendants are to produce to the independent person all books, records, record of accounts, papers and writings in their custody or under their control that touch and concern the loans in questions as well as the loans of December 2005.

[92] The parties are to agree [to] a draft order giving effect to these reasons for judgment not later than February 8, 2021 failing which [the] defendants are to submit [a] draft not later than February 10, 2021.

[93] Written submission[s] on costs to be submitted not later that February 21, 2021."

[2] The applicant by way of a notice of application, filed on 24 March 2021, seeks the following orders:

> "1. The judgment and orders made by the Honourable Chief Justice Sykes on February 2, 2021 be stayed pending the hearing of the appeal.
>
> 2. Costs to be costs in the appeal."

[3] The grounds on which the application is based are as follows:

> "1. Rule 2.11(1)(b) of the Court of Appeal Rules provides that a single judge may order a stay of execution of any judgment or order against which an appeal has been made, pending the determination of the appeal.
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> 2. The Appellant has a real prospect of successfully appealing the orders and judgment of the court below, and those orders will be set aside if the Appellant succeeds on its appeal.
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> 3. If the stay is not granted, the respondent will seek to enforce the orders including appointing an accountant with extensive investigatory powers before the court has an opportunity to hear the Appellant's appeal.
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> 4. The Appellant and third parties would be forced to disclose confidential information and if the appeal succeeds that disclosure cannot be undone.
>
> 5. The parties (and third parties) would also expend substantial costs and time in complying with orders that may later be set aside.
>
> 6. It is therefore in the interest of justice for the stay to be granted."

[4] After hearing submissions from counsel for both parties, on 29 October 2021, the court reserved its decision.

Background

[5] In or about 2012, Capital and Credit Merchant Bank ('CCMB'), which was a part of the Capital and Credit Financial Group Limited ('CCFG'), was purchased by Jamaica Money Market Brokers. CCMB was renamed JMMB Merchant Bank Limited. In 2017, JMMB Merchant Bank Limited received its commercial banking license and its name was changed to JMMB Bank (Jamaica) Limited ('JMMB'). CCMB and JMMB, are hereinafter collectively referred to as 'the bank' or by their respective names, where necessary, in the interest of clarity.

[6] The 1st respondent, Winston Finzi ('Mr Finzi') is a businessman, director of and shareholder in the 2nd respondent company, Mahoe Bay Company Limited ('Mahoe'). Mahoe is a company incorporated in Canada and registered to do business in Jamaica.

A. <u>The April 2003 loan</u>

[7] In April 2003 CCMB granted a loan to Mahoe in the sum of JA$60,000,000.00 to finance a residential development. On 26 April 2003, at Mahoe's request, the loan amount was increased to US$2,500,000.00. The security for the loan, was a mortgage over 35 acres of land in Providence Estate, Saint James registered at Volume 649 Folio 68 of the Register Book of Titles ('the land'). The loan was in the form of a line of credit which was only to be utilised on the authority of the respondents or any one of them.

[8] The special conditions for the grant of the loan required written confirmation from the Government of Jamaica ('the GOJ') that it would purchase 21.6 acres of the land; the issuance of an authorization letter by Mahoe to the GOJ to forward directly to CCMB, the Jamaican equivalent of bonds with a face value of US$5,500,000.00, which represented the consideration for the purchase of the 21.6 acres of the land; and the personal unlimited guarantee of Mr Finzi.

[9] By way of a letter, dated 30 April 2003, Mahoe gave instructions to CCMB to utilise the line of credit of US$2,500,000.00 to pay the sum of US$1,307,759.37 to its foreign exchange department for conversion to Jamaican dollars. Instructions were given to pay

the "final proceeds to Veritat Corporation CCMB shares offer". A cheque in the sum of JA$75,000,000.00 was issued by the bank to Veritat Corporation, a company which offered corporate services to several companies to purchase the said shares. The bank has alleged that it received instructions to purchase shares in CCMB for the benefit of, and in the name of Weststar International Limited. Mr Finzi disputes these instructions and asserts that the shares should have been issued in his name or that of his nominee.

[10] In the circumstances, Mr Finzi has asserted that the loan was not disbursed to him, and that he should not, therefore, be compelled to settle the amount said to be owing, as the funds were not used for his benefit. He also challenged whether the other disbursements made pursuant to the loan were paid in accordance with his instructions.

B. The December 2005 loan

[11] On 28 December 2005, a personal demand loan was granted to Mr Finzi by CCMB. The purpose of the loan was to settle outstanding interest owed to CCMB, to cover any interest that would arise for the following six months and to pay monies owing in respect of a legal dispute. The loan was in the sums of US$1,300,000.00 and US$200,000.00. The security for the loan was evidenced by promissory notes executed by Mr Finzi for both sums, a borrowing resolution and a corporate guarantee of Mahoe in the sum of US$1,300,000.00. The borrowing resolution was supported by an additional mortgage to be stamped for US$1,300,000.00 plus interest over 35 acres of the land, a borrowing resolution and a corporate guarantee of Mahoe in the sum of US$200,000.00 supported by mortgage over lands registered at Volume 1259 Folio 534 and Volume 1257 Folio 671 of the Register Book of Titles in the name of Mahoe.

C. The April 2006 loan - loan one

[12] On 28 April 2006, a loan was granted to Mr Finzi by CCMB, in the sum of USD$1,500,000.00, to settle a judgment debt owed to the Jamaica Redevelopment Foundation Incorporated ('JRF') in the sum of US$1,270,650.80 and to cover legal costs and fees associated with the purchase of land in Saint James (US$229,349.20). The loan was to be repaid within three months of the date of disbursement and was guaranteed

by Mahoe. The security for the loan was a mortgage over five parcels of land in Saint James.

[13] By letter dated 9 August 2006, Mr Vincent Auld, a manager at CCMB communicated to Mr Finzi's Attorneys, LGS Broderick & Company ('LGS'), that US$1,554,631.42 was needed to close the April 2006 Loan. LGS, by letter on even date, directed CCMB to transfer that sum from an account at CCMB, which was in the name of Mahoe/LGS. On 4 August 2006, the said account was credited in the sum of US$2,641,811.00, which represented the proceeds of the sale of property which was owned by Mahoe. Upon receiving these funds, the bank used the money to pay off the December 2005 loan and future interest on the April 2006 loan.

[14] JMMB has asserted that the loan sum increased to US$2,974,387.73, as a result of the loan being restructured several times at the request of Mr Finzi in 2008. Mr Finzi disputes the sum owed, on the basis that, the bank had no authority to apply the sums paid by LGS towards the 2005 loan. In the circumstances, he has asserted that the 2006 loan was repaid and was, therefore, no longer in existence in 2008.

D. The January 2008 loan – loan two

[15] On 31 January 2008, CCMB loaned JA$50,000,000.00 to Mr Finzi, for the purpose of settling indebtedness to the JRF. The loan was to be repaid within three months of the date of disbursement. The security for the loan was a promissory note issued by Mr Finzi in the sum of JA$50,000,000.00 and a mortgage over four parcels of land. The loan was disbursed by way of cheque payable to the JRF in February 2008.

E. The October 2009- loan three

[16] In October 2009, a loan in the sum of JA$990,000.00 was granted by CCMB to Mr Finzi. The security for this loan was a promissory note issued by Mr Finzi and a mortgage over property situated in Beverly Hills, Saint Andrew.

The claim

[17] The bank has claimed that the respondents breached the loan agreements for loans one to three by defaulting on their repayment. On 4 November 2013, JMMB commenced a claim seeking to recover the outstanding balances in respect of loans one, two and three. The three loans as set out by the applicant in its particulars of claim filed on 4 November 2013 are as follows:

> "a. Demand Loan in the sum of US$1,500,000.00 for the purpose of settling court order awarded in favour of Jamaica Redevelopment Foundation Inc and purchasing land at Providence Estate, Saint James ('Loan 1')
>
> b. Demand Loan in the sum of $50,000,000.00 for the purpose of settling indebtedness to Jamaica Redevelopment Foundation Inc ('Loan 2'); and
>
> c. Demand Loan in the sum of J$990,000.00 for the purpose of paying professional fees to Carolyn Reid & Company, paying Tavares Finson & Company for valuation report and covering personal expenses ('Loan 3')"

[18] The respondents filed an amended defence and counter claim on 17 April 2015 for an account and damages for breach of contract, as set below:

> " 1. An account of the use and value of the Government of Jamaica Land Bonds deposited with the Claimant for the Defendants' accounts;
>
> 2. An account of all use of the Defendants' US$2,500,000.00 line of credit;
>
> 3. Payment to the Defendants by the Claimant of the amount found due on the taking of the accounts;
>
> 4. Damages for breach of contract of US$14,048,615.12;
>
> 5. Interest on the amounts due at a commercial rate from the date when the said amount became due to the date of payment, compounded at monthly rests;
>
> 6. Costs and Attorneys-at-law Costs;

7. Such further and other relief as to this Honourable Court may seem just."

Proceedings before the learned judge

[19] The matter was tried over a period of six days and on 2 February 2021, the learned judge made the findings and orders as set out at paragraph [1] herein. It is this decision which was the subject of the application before the court.

[20] Four issues arose for consideration before the learned judge. They were:

(1) Whether the bank acted contrary to the respondent's instructions in allowing funds from the 2003 loan to be used to purchase shares for Weststar;

(2) Whether it was permissible for the bank to use monies which it was instructed were to settle the 2006 loan to close the 2005 loan;

(3) Whether the bank has properly accounted for the land bonds; and

(4) Whether there was any outstanding debt in respect of the 2008 and 2009 loans.

[21] At the trial, the sole witness for JMMB was Mrs Trudy-Ann Bartley Thompson. Her employment with the bank commenced in 2008. She was, therefore, not present when either the December 2005 or the April 2006 loans were disbursed. The primary witness for the respondents was Mr Finzi.

Issue 1: Whether the bank acted contrary to the respondent's instructions in allowing funds from the 2003 loan to be used to purchase shares for Weststar?

[22] The respondents asserted that: (i) they did not authorise CCMB to use any part of the loan of US$2,500,000.00 to purchase shares for Weststar and (ii) that the line of

credit was never disbursed to Mr Finzi. The learned judge, in analysing this issue, found that on the face of it, there was the appearance of improper conduct on the part of the bank. This was because monies loaned to Mr Finzi by CCMB were used to purchase shares in CCMB in the name of Weststar which was owned by the chairman of CCMB. It was also unclear who gave the instructions to use the loan proceeds to purchase the shares in Weststar's name.

[23] Counsel for the respondents, at the trial, argued that there was no evidence from the bank that the remainder of the line of credit was used in accordance with the instructions of the respondents. The bank, through its witness, was unable to provide proof through its records of how the monies made available through the line of credit, had been utilized. Counsel argued that it ought to have such records as it is a regulated entity. The learned judge stated, at paragraph [31], that Mrs Bartley Thompson was not on "firm footing" as she was not present when the loan was being issued and could, therefore, only speak to policy and procedures based on an assumption of what should have occurred.

[24] The learned judge, in resolving this issue, considered a letter from KPMG dated 24 March 2015 to Mr Finzi. That letter confirmed that a cheque, dated 30 April 2003, had been received with an application for the purchase of 15,000,000.00 shares in CCMB, which was submitted by Capital & Credit Securities Limited ('CCSL'). The application was not in the name of Mr Finzi or Mahoe. CCMB asserted that it did not deal in the purchase of shares and that it only issued the cheque in accordance with the instructions it had received. It was the bank's position, that it was following its client's instructions. At paragraph [21], the learned judge said:

> " [21] In this case the bank has contented itself with the technical position that the bank does not trade in shares. While this is so, it misses the broader point that part of the debt which it said it used the money raised from sale of Mr Finzi's/Mahoe assets to pay of[f] this particular loan [sic]. Mr Finzi is saying that part or the whole of this particular loan was used by someone within CCFD, CCMB, and/or CCS to

> purchase the shares. **In short, he is saying that he cannot be asked to repay a loan and interest on that loan when some [sic] within the CCFG used the loan to purchase shares for Weststar. Thus for the bank to say it issued the cheque in Mr Finzi's name on his instructions and stop there is not sufficient in this court's view. The evidence is plain that something went awry between Mr Finzi's instructions and the eventual issuing of the shares**. This is, in part, why Mr Finzi says that there has not been proper accounting for this loan in terms of an accounting trail along with explanations showing – step by step – the movement of money from CCMB to purchase including the instructions to purchase in the name of Weststar or Mr Campbell. The court agrees." (Emphasis supplied)

[25] The learned judge noted that in 2011 Mr Finzi brought a claim in the High Court of Saint Lucia against Weststar. The details of the claim were not before the court, however, it resulted in Mr Finzi being declared the owner of 45% of the shareholding of Weststar. That judgment was registered in Jamaica on 13 June 2017.

[26] The learned judge concluded that it was unlikely that JMMB had been instructed by the respondents to use money which they had borrowed to purchase shares for Weststar. It was more likely that someone within CCMB acted contrary to Mr Finzi's and Mahoe's interest. The learned judge found there was no evidence on which the bank could prove that the respondents were liable for the part of the April 2003 loan which was used to purchase the said shares. On this basis the respondents were found to be entitled to an order for an account and damages for breach of contract.

Issue 2: Whether it was permissible for the bank to use monies which it was instructed were to settle the 2006 loan to close the 2005 loan?

[27] At trial, the bank agreed that it was instructed by way of the letter from LGS to apply the monies to settle loan one, but asserted that it had the authority to apply the funds to the 2005 loan. It also admitted that neither Mr Finzi or LGS was informed that the funds received from LGS were being applied to the 2005 and not the 2006 loan as instructed. The bank, however, asserted that it was under no legal obligation to do so.

In this regard, it relied on the following clause of the mortgage instrument dated 24 February 2004, between Mahoe and CCMB:

> "This security shall not be affected by nor affect any other security which the Mortgagee may now or hereafter hold from the Mortgagor and the Mortgagee shall be at liberty to realise its securities in such order and manner and to apply and appropriate any moneys at any time or times paid by or on behalf of the Mortgagor or resulting from a realization of this or any other security or any part thereof to such account or item of indebtedness and in such sequence, priority and order as the Mortgagee may in its absolute discretion from time to time determine any direction from the mortgagor to the contrary notwithstanding."

That instrument related to the loan which was the subject of the letter of commitment dated 8 March 2002.

[28] Counsel for the applicant, at the trial, submitted that as at 9 August 2006 Mr Finzi had not repaid the December 2005 loan which was a six-month loan or the loan one, which was a three-month loan. He was therefore in default in respect of both loans and the bank had the authority to apply the funds as it deemed appropriate. Finally, it was submitted that the respondents suffered no prejudice as the 2005 loan was paid off and the excess applied to loan one. Reliance was placed on the decisions of **Olympic Holdings Pty Ltd v Windslow Corporation Pty Ltd** [2008] WASCA 80, **Financial Institutions Services Ltd v Negril, Negril Holdings Ltd et al** (2004) 65 WIR 227 and **Smith's Trucking Service Ltd et al v Jamaica Redevelopment Foundation Inc** [2012] JMCA Civ 63.

[29] Counsel for the respondent disputed the sums owing on the loan, as being due to any alleged restructuring of the facility. It was submitted that if the loan was not being re-paid for a period of two years, the interest would have been well over US$300,000.00 instead of US$63,000.00, as alleged by the bank. The bank's numbers were not found by the learned judge to be consistent with the bank's explanation.

[30] The learned judge in his analysis, found that Mr Finzi was acting on the representation of CCMB (Mr Auld) and CCMB could not "back track and ignore its representation" that if the monies in that letter were paid, the 2006 loan would have been settled. He also found that it must be within a customers' rights to "organise his affairs as he sees fit. If the customer chooses to settle one loan now and not another that is his business".

[31] Where the liability of the guarantor for the 2006 loan was concerned, the learned judge stated at paragraphs [60] and [61]:

> [60] … The court asked about the liability of the guarantor…. She said, in relation to the April 2006 loan, that when Mr Finzi defaulted, he was notified of his default. This means, on the bank's case, that the guarantor's liability was now activated. She even said she signed the formal notice of default. Assuming this to be true, it is inexplicable for the bank to take the money from the guarantor for this particular loan, apply it to another loan, and then say the primary borrower is still liable. Could it not be said that the guarantor had discharged is [sic] obligation? On Mrs Bartley Thompson's theory, is the guarantor still liable? If not, is it that the loan no longer has a guarantor?
>
> [61] In his written and oral submission Mr Beswick added to this point. **He says that the December 2005 loan and the April 2006 loans were personal loans to Mr Finzi and not to Mahoe**. **The money that Mr Broderick sent to the bank was Mahoe's money and not Mr Finzi's**. The upshot of this is that Mahoe is entitled to spend its money as it sees fit. It was not up to the bank to use Mahoe's money to meet Mr Finzi's liability for another loan. Only Mahoe could do that. Mahoe did do that when LGS gave the instructions to the bank to use some of Mahoe's money to meet Mr Finzi's personal liability. The bank declined to do so and applied it as it saw fit. The bank, in my view, cannot do this. But more fundamental is that the guarantor, Mahoe, paid off the loan." (Emphasis supplied)

[32] The learned judge concluded that the bank had no authority to use the guarantor's (Mahoe's) money contrary to its intentions.

Issue 3: Whether the bank has properly accounted for the land bonds?

Issue 4: Whether there was any outstanding debt in respect of the 2008 and 2009 loans?

[33] The value of the land bonds which were deposited to Mahoe's account in March 2006 was JA$265,855,890.30 or US$4,060,728.43. By letter dated 28 March 2006, from the bank to Mahoe, it was stated that all the funds in that account had been used to settle Mahoe's debt to the bank. Mahoe was left with an outstanding balance of US$76,724.28. There was, however, no statement from the bank as to how those funds were utilised.

[34] The learned judge found that the bank had failed to provide accounting information showing how the funds from the land bonds were used. He also found that there was insufficient evidence before the court, in respect of loans two and three, to determine what if anything was owed to the bank by the respondents. In this regard, the learned judge noted, at paragraph [83] of the judgment, that the respondents were asserting in their defence that it was unclear what was owed by them in respect of loans two and three as the bank's accounting was "opaque" in nature.

[35] On issues three and four, the learned judge found that it was clear that the bank loaned monies to Mahoe and Mr Finzi; it was, however, unclear on the bank's evidence, what sums were outstanding.

[36] Ultimately, the learned judge found that the claim in relation to loan one failed, as the bank could not prove liability; the claim in relation to loans two and three failed "in the amounts stated"; and an accounting exercise was needed in respect of loans two and three to ascertain whether any sums were owed and to whom.

Grounds of appeal

[37] The applicant, which was disgruntled by the decision of the learned judge, filed a notice and grounds of appeal on 15 March 2021. The grounds are that:

" a. The Learned Judge erred when he found that the 1st Respondent was a credible witness.

b. The Learned Judge erred in law and fact when he found that the Appellant failed to disburse the proceeds of the US$2.5M line of credit in accordance with the 1st Respondent's authorization and instructions.

c. The Learned Judge erred in law and fact when he found that the Appellant used the proceeds of the US$2.5M line of credit for the benefit of third parties.

d. The Learned Judge erred in law when he effectively treated the Appellant, Ryland Campbell, 'Capital & Credit Financial Group' and Capital & Credit Securities Limited as one entity, thereby ruling that:

- The Respondents are entitled to the remedy of accounts for the US$2.5M line of credit; and

-The Respondents are entitled to damages for breach of contract.

e. The Learned Judge erred in law when he found in favour of the Respondents on their counterclaim in relation to the use of the proceeds of the US$2.5M line of credit after having earlier ruled that the Respondents' ancillary claim should be tried separately from the main claim.

f. The Learned Judge erred in law when he found that the Appellant was not entitled to apportion the payment it received from Mr Broderick in the manner it did.

g. The Learned Judge erred in law when he found that the April 2006 loan for the principal amount of US$1.5 million and the 2nd Respondent's liability as guarantor of that loan had been discharged when Mr Broderick made the payment to the Appellant."

[38] The applicant seeks the following orders:

" a. The orders made on February 2, 2021 and set out in paragraph 1 above be set aside.

b. Judgment be granted in favour of the Appellant on the claim and on the counterclaim.

c. The Respondents pay the costs in this court and the court below."

The application for the stay of execution

Applicant's submissions

[39] Mr Hylton QC, on behalf of the applicant, submitted that the court in its determination of whether a stay of execution ought to be granted must consider: (i) whether the orders are capable of being subject to a stay of execution, (ii) whether the applicant has an arguable appeal and (iii) whether there is a risk of injustice if the stay is not granted.

[40] Mr Hylton conceded that the finding of the learned judge in relation to loan one was a declaratory order and, as such, was not amenable to an order for a stay of execution. He disagreed with the position of counsel for the respondents who, in their written submissions, asserted that the remaining orders are interlocutory and therefore not amenable to a stay of execution. His position was that they are final orders granted at the conclusion of the trial and are therefore capable of being appealed.

[41] As far as the appeal's prospect of success is concerned, counsel submitted that the court only need to satisfy itself that there is an appeal with some merit. In other words, that the appeal has some prospect and not necessarily a 'strong prospect' of success (see **Calvin Green v Wynlee Trading Limited and Naylor & Turnquest** [2010] JMCA App 3 ('**Calvin Green**') and **Dawkins Brown v Public Accountancy Board** [2020] JMCA App 25).

[42] Mr Hylton submitted that the applicant has an arguable appeal, as firstly, the learned judge erred in his finding that the respondents were entitled to an accounting in respect of the 2003 loan of US$2,500,000.00. It was Queen's Counsel's position, that the letter of 30 April 2003, relied on by Mr Finzi, did not support his assertion that the bank was instructed to purchase shares in either his name or that of a nominee. He stated that the only instruction to the bank was to issue a cheque to Veritat and it complied with that

instruction. Mr Hylton submitted that the learned judge accepted that the bank does not trade or deal in shares and that it was a separate company which issued the shares after the cheque was received. It was submitted further that Mr Finzi has obtained the benefit of the shares by virtue of the order issued by the Saint Lucian court.

[43] Secondly, it was submitted that, the learned judge erred in finding that the bank had no authority to apply the funds from LGS to the 2005 loan instead of loan one, as instructed by LGS on behalf of the respondents. Queen's Counsel submitted that where a debtor who owes multiple debts to the same creditor makes payment to that creditor, the said creditor can in his own discretion, determine to which debt the sums should be applied. This, Mr Hylton said, was in keeping with the appropriation clause in the mortgage granted to Mahoe, which is set out in paragraph [27] of this judgment. The case of **Global Trust Limited and Others v Jamaica Redevelopment Foundation and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 41/2004, judgment delivered 27 July 2007 was relied on by Queen's Counsel.

[44] Mr Hylton submitted further that the learned judge placed too much emphasis on the fact that the payment was made by Mahoe which was the guarantor and that the 2005 loan was a personal loan to Mr Finzi. He argued that, that was an irrelevant consideration, as both loans were guaranteed by Mahoe and were both in default as at the date the bank applied the payment to the 2005 loan. Moreover, it was clear to the parties that the payment would be applied to the 2005 loan as both parties believed that loan one had been discharged.

[45] As far as the risk of injustice is concerned, Queen's Counsel submitted that the risk of injustice would be greater if the stay was refused due to the issues that would arise with the accounting exercise. He stated that JMMB would be forced to disclose confidential information pertaining to persons who are not parties to the proceedings and would incur substantial expenses which could prove to be unnecessary and could not be recovered if the appeal is successful. Queen's Counsel also submitted that if the proceedings are not stayed, a money judgment could be entered, which the respondents

would be entitled to enforce, even before the appeal is determined. It was argued that there is no similar risk to the respondents who in the event that there is delay could seek interest on any sums found to be owed to them.

Respondents' submissions

[46] Lord Anthony Gifford QC, on behalf of the respondents, agreed with Mr Hylton's submissions regarding the principles applicable to the grant of an order for a stay of execution. However, he submitted that there could be no stay of execution of the first order of the learned judge as it is declaratory in nature as it does not compel a party to refrain or to take any action and merely sets out liability in respect of the April 2006 loan. Reliance was placed on the decision of **Norman Washington Manley Bowen v Shahine Robinson and another** [2010] JMCA App 27.

[47] In respect of the remaining orders, it was submitted that they could not properly be subject to a stay of execution. Lord Gifford argued that the said orders are interlocutory in nature and the learned judge is not *functus officio* as he is awaiting the accounting report to make his final determination in the matter at trial. Queen's Counsel relied on paragraphs [87] and [88] of the judgment where the learned judge stated that "[f]urther decision is delayed pending the outcome of the accounts" and "…the final remedy will be determined after the accounts are taken"; and that in the interests of justice, an accounting exercise needed to be undertaken before a final decision can be made in respect of loans two and three and the question of the loan bonds. Queen's Counsel further submitted that any question of a stay of execution should only arise after the learned judge has made his final orders.

[48] In any event, it was the respondents position that there is no appeal with a reasonable prospect of success for the following reasons:

i. At the trial, the applicant was unable to provide any cogent evidence through a reliable witness as to how the US$2,500,000.00 line of credit was utilized.

ii. The applicant at the trial failed to discharge its duty to provide documentary evidence that monies were owing to it by the respondents.

iii. The appropriation clause relied on by the bank allegedly authorizing it to divert money intended for the closure of loan one to the 2005 loan was not contained in any instrument which is the subject of the claim. Further, that instrument was in reference to a debt which was at the time of the filing of the claim statue barred.

iv. Finally, the bank had no authority to apply funds paid to it to close loan number one to instead close the 2005 loan.

[49] Queen's Counsel submitted that the balance of convenience was in favour of the stay not being granted as there is no risk of any injustice to the applicant. He argued that the only action which the applicant is required to comply are those to facilitate the accounting exercise to bring finality to the matter. That exercise, it was stated, will not allow the independent person to have widespread access to confidential information of third parties, as the order of the learned judge was very specific as to the scope of the information that may be requested. It was submitted that the applicant has failed to prove to this court that it would be prejudiced by the costs associated with this exercise.

[50] Lord Gifford stated that the applicant has acknowledged that there is no money judgment in place and that, if the accounting exercise is carried out, damages may be assessed in favour of the respondents. If so, the respondents would be entitled to collect on this judgment prior to the appeal being concluded. He argued that the applicant should not be allowed to use the court's process to delay justice to the respondents. This is so, especially in light of the prejudicial action taken by JMMB to exercise its powers of sale before the claim in the Supreme Court was heard, knowing that the issues therein were

disputed by the respondents. In all the circumstances, it was submitted that the respondents would suffer greater prejudice if the stay was granted.

Analysis

[51] By virtue of rule 2.10(1)(b) of the Court of Appeal Rules ('CAR'), a single judge of appeal has the power to make an order for the stay of execution of any judgment or order against which an appeal has been made, pending the determination of the appeal. This power is a discretionary one.

[52] The applicable principles were set out by Morrison JA (as he then was) in **Calvin Green** at paragraph [12]. He stated as follows:

> "[12] Without either an order from the court below or of this court, an appeal does not operate as a stay of execution (Court of Appeal Rules [CAR), rule 2.1 4). However, rule 2.1 1 (1) (b) permits a single judge of this court to order 'a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal'. **The threshold question on any such application is, of course, whether the material provided by the parties discloses at this stage an appeal with 'some prospect of success'** (per Harrison JA in **Watersports Enterprises**, supra para. 8). **Once that criterion has been met, the next step is for the court to consider whether, as a matter of discretion, the case is a** [sic] **fit one for the granting of a stay.** In this regard, the overriding consideration is well expressed in the judgment of Clarke LJ (as he then was) in **Hammond Suddard** (at para. 22):
>
> > 'Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or the other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in

> the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?'." (Emphasis supplied)

[53] In **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another** [2011] JMCA App 1, Harris JA observed that the court's current approach is to "seek to impose the interests of justice as an essential factor in ordering or refusing a stay". The learned judge of appeal stated at paragraph [24]:

> "[24] In balancing the risks in granting or refusing a stay, the evidentiary material before the court must justify an order for a stay. The risks would not only flow from the merit of a party's appeal but would also revolve around the question as to which party would be more likely to suffer harm."

[54] In that case the learned judge of appeal referred to **Combi (Singapore) Pte Limited v Ramnath Sriram and Another** [1997] EWCA Civ J0723-9, where Phillips LJ stated the principle in the following terms:

> "[12] **In my judgment the proper approach must be to make that order which best accords with the interest of justice**. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. **This assumes of course that the court concludes that there may be some merit in the appeal**. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice." (Emphasis supplied)

[55] This approach was endorsed by the court in **Sagicor Bank Jamaica Limited v YP Seaton and others** [2015] JMCA App 18 ('**Sagicor Bank Jamaica Limited**'), where McDonald-Bishop JA stated:

> "[50]…It is now accepted, on later authorities, that whether the court should exercise its discretion to grant a stay of execution of a

> judgment pending the hearing of an appeal against the judgment depends upon all the circumstances of the case, but the essential factor is the risk of injustice (see **Hammond Suddard Solicitors v Agrichem International Holdings** [2001] All ER (D) 258). The essential question is according to the authorities, whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay." (Emphasis as in the original)

Whether the appeal has some prospect of success

[57] As stated by Morrison JA in **Calvin Green**, this is the "threshold question". It will, therefore, be necessary for me to assess whether the learned judge properly exercised his discretion in awarding an account. In order to determine whether the applicant has crossed this hurdle, the purpose of an order for an account must be considered. I am however, mindful that at this stage, my enquiry into the matter ought not to be as in depth as if was treating with the substantive appeal. In **Sagicor Bank Jamaica Limited**, McDonald-Bishop JA expressed the principle thus:

> "[53] In determining whether the appeal has some prospect of success, or is not 'completely unarguable' (to borrow the words of Morrison JA in **Green v Wynlee Trading**), I have accepted that I ought not to embark upon an enquiry as one would in treating with the substantive appeal. I also endorse the approach of the court in **William Clarke v Gwenetta Clarke** [2012] JMCA App 2, as stated by Phillips JA, that 'I am not required to give any view on the merits of the different positions taken by the parties on the facts or on the law, as the issues between the parties will have to be decided if and when the appeal is heard…'." (Emphasis as in the original)

The purpose of an order for accounting

[58] The authority to make an order for an account is set out in Part 41 of the Civil Procedure Rules, 2002 ('CPR'). Rule 41.1 deals with claims for an account or for relief which necessitates an account to be carried out. More specifically rule 41.2 grants the authority to make an order for an account. This section provides that:

> "41.2 (2) The court may make any one or more of the following orders, namely that-
>
> (a) any preliminary issue of fact be tried;
>
> (b) an account be taken;
>
> (c) inquiries be made…"

[59] There is, however, no indication in the CPR, as to why or in what circumstances a judge may make an accounting order. The decision of Morrison JA in **Capital and Credit Merchant Bank Limited v The Real Estate Board and The Real Estate Board v Jenifer Messado & Co** [2013] JMCA Civ 29 ('**Capital and Credit**') is instructive in this regard. The dispute in that appeal surrounded a development referred to as the Mountain Valley Scheme ('the scheme') on property registered at Volume 1389 Folio 338 and Volume 1389 Folio 436 of the Register Book of Titles. That property was previously owned by Mrs Zoe McHugh and was transferred to KES Development Company Limited ('KES'). The Real Estate Board ('the Board') is a statutory body established under the Real Estate (Dealers and Developers) Act ('the Act')) and is responsible for the regulation and control of the practice of real estate business to involve the construction of developments in Jamaica. The Board also has oversight in respect of development schemes.

[60] Approximately one year prior to that date, Mrs McHugh had applied to the Board for registration as a developer in respect of the Mountain Valley scheme. The application was granted and Mrs McHugh and KES entered into several pre-payment contracts with potential purchasers of units in the scheme. Pursuant to these contracts, monies were paid over by those potential purchasers and collected by Jennifer Messado & Co, attorneys-at-law ('JM & Co'), who were acting for Mrs McHugh and KES.

[61] Capital and Credit Merchant Bank Limited ('CCMBL') loaned monies to KES to assist finance the construction of the scheme. A condition of the loan was that all moneys received from the purchase of lots in the scheme needed to be placed in an escrow account. These sums could be used to facilitate the repayment of the loan. KES executed a debenture and a mortgage collateral to debenture, both dated 8 August 2005, as

security for the amount advanced by CCMBL. On 18 September 2006, a mortgage was registered on the certificates of title for the property, in favour of the Board, "in respect of all moneys received under prepayment contracts pursuant to the provisions of section 31 of the [Act]".

[62] KES was ultimately unable to complete the scheme and the development failed. CCMBL took over the completion of the scheme. Payments made by purchasers in the project were not refunded and KES defaulted on the loan from CCMB. The Board filed a claim in which it sought an order that its charge registered on the property for the scheme ranked in priority to the CCMB mortgage. It also sought an order that CCMB and JM & Co account for all monies received by them in respect of the scheme. Mangatal J granted the order for the taking of the account.

[63] On appeal, Morrison JA (as he then was), in resolving the issue of whether Mangatal J had erred in making the order for an account, examined the scope of such orders. The court acknowledged that there is no exhaustive list of circumstances in which an account can be ordered. An account was described to be an equitable remedy, which provides a means by which the amount owed by one party to another, is ascertained. In paragraphs [51] - [53], Morrison JA, stated:

> "[51] But now, of course, as Snell also points out (at page 621), with the concurrent administration of law and equity, 'an action for an account can be brought in any case in which equity or the common law formerly had jurisdiction to order an account' (and see the Judicature (Supreme Court) Act, section 48). Hence the following passage from Atkin's Encyclopaedia of Court Forms in Civil Proceedings (2nd edn, Vol 1, 1978 issue, page 403), to which we were referred by Dr Barnett:
>
> > '**Accounts are taken, in the course of litigation, to ascertain the ultimate amount which, on consideration of a number of debits and credits, one litigant owes to another**, and arise most frequently in actions for the administration of trusts, or of the estates of deceased persons, for the

> foreclosure of mortgages, for the dissolution of partnerships or for specific performance. Such actions are each of a special character, and the exact form the equitable relief takes in those cases is not considered in this title. There remain many other actions, however, based on varying causes of action, in which the substantial relief sought is an account...'

[52] The learned editors of Bullen, Leake & Jacob's Precedents of Pleadings (13th edn), while also noting that at common law the action of account had fallen into disuse by reason of some of the matters that I have already mentioned, state the position in similar terms (at page 3):

> 'Today however **the seeking of an account is often a valuable and a convenient course for a litigant where there are a series of transactions between the parties and it is desired to ascertain the ultimate amount owed by one party to the other**. It is often the case that the facts necessary to ascertain that ultimate amount are in the knowledge of the defendant alone. It is in such circumstances that the claim for an account is particularly valuable… …It is necessary first to identify the relationship between the plaintiff and the defendant that is said to entitle the plaintiff to an account. Thus, the defendant (the 'accounting party') may for example be a trustee, an agent or a mortgagee in possession.'

[53] It therefore seems to me that, while cases involving agents, mortgages, trusts and the like may be more readily amenable, because of the nature of those relationships, to an action for an account, they are but examples of the operation of a wider principle of accountability in certain circumstances. **There is no suggestion in any of the authorities to which we were referred that the established categories of cases in which an account may be ordered are closed** (see Equity – Doctrines and Remedies, by R P Meagher QC, W M C Gummow and J R F Lehane, 2nd edn, in which the authors make this point at para. 2504)." (Emphasis supplied)

[64] In assessing whether an order for an account was appropriate in that case, the court considered the role of the Board where payments are made by purchasers to the vendor, pursuant to pre-payment contracts. It was noted that those sums were required to be placed in a trust account for the benefit of the purchaser as set out by section 29 of the Act. This was not done, as KES was required by the loan agreement with CCMBL to place those monies in an escrow account which was to be utilised for the purposes of the project and to repay the loan.

[65] At paragraph [60] of the judgment, the court found that it was "eminently sensible", that CCMBL be required to account, notwithstanding its position that it did not receive any monies from purchasers. The court needed to be clear as to whether those monies were ever utilised to pay the CCMBL loan. Finally, in respect of the accounting against JM & Co, Mangatal J, was found to be correct to order the firm to account so as to enable the Board to ascertain whether any monies remained in the firm's hands or under its control, as agent for Mrs McHugh/KES, which ought to have been placed into a trust account.

[66] In this case, at paragraph [87] of the judgment, the learned judge stated that JMMB's claim in respect of loans two and three in the amount stated failed. He then proceeded to indicate that, although it was clear that money had been borrowed by the respondents, the amounts repaid needed to be determined. In this regard the learned judge referred to the evidence regarding the land bonds and the US$2,500,000.00 line of credit. In paragraphs [76] – [78] the learned judge, in reference to the evidence of Mrs Bartley Thompson, stated:

> "[76] Mrs Bartley Thompson said that these amounts were loans that existed before December 2005. She said that what was stated in her witness statement was how the bank accounted for the bond proceeds, that is to say, they were applied to Mahoe's loans. In the counter claim the defendants are [sic] Mr Beswick's response was that that was an assertion and not proof. [sic] He said that the bank had not produced any commitment letters, proposal, accounting records and the like. [sic]

> saying that the bank has failed to account for the value of the bonds. This response of Mr Beswick is understandable given what occurred in respect of the US$2.5m line of credit and the CCMB share purchase.
>
> [77] Mrs Bartley Thompson referred to the April 2003 loan of JA$60m which became the US$2.5m line of credit referred to much earlier in these reasons for judgment. What has been said there need not be repeated here.
>
> [78] One of the amounts of the total indebtedness was the sum of US$2,493,696.01. Mr Beswick pressed Mrs Bartley Thompson on this. In particular, she was asked about the specific figure of US$2,493,696.01. This appears to be the sum arising from the US$2.5m line of credit. Other than the letters referred to above there is no accounting information supporting the assertions in the letter. Respectfully, that is not an accounting for the proceeds of sale by demonstrating the size of the debt as well as the application of the proceeds to the accurately calculated debt. Mrs Bartley Thompson accepted that what she referred to was a letter from the bank stating how the bond money was applied. She accepted that there were no accounting records before the court backing up what she was saying."

[67] The learned judge's statements at paragraph [88] flow from the above. He stated as follows:

> "[88] This case in [sic] one in which liability is determined and then the final remedy will be determined after the accounts are taken. This is necessary to do justice between the parties. **Money was borrowed. How much is to be repaid, if anything at all? That is unclear. The orders suggested are to bring clarity to this question**." (Emphasis supplied)

[68] This line of reasoning is in keeping with the reasoning of this court in **Capital and Credit**. It was unclear to the learned judge, having heard the evidence, what sums, if any were owed by the respondents. The claim for an accounting in the instant case, arose on the counterclaim. The learned judge, although satisfied that money had been

loaned in respect of loans two and three, found JMMB's evidence wanting and in order "to do justice between the parties" made the order.

[69] A similar situation arose in **Bank of Nova Scotia Jamaica Ltd v Sovereign Resources UK Limited and another** [2021] JMCA Civ 27. In that case, it was unchallenged, that the first respondent had obtained demand loans and a credit card facility. Laing J, found that the evidence in relation to the loans was insufficient and judgment was entered for the defendants. On appeal to this court, Sinclair-Haynes JA stated at paragraph [90] that it was "the Bank's responsibility to prove, on a balance of probabilities, that the amount claimed was in fact due and owing". At paragraphs [98] and [99] she stated:

> "[98] The learned judge's concern regarding the absence of any evidence as to the circumstances of the sale of the property and the amount of the net proceeds, was also justified. The fact that the Bank indicated that certain sums from the proceeds of the sale were applied to the principals of the demand loans without indicating the total proceeds of the sale is unacceptable. Even if the Bank's evidence in that regard were to be accepted, the learned judge was also deprived of sufficient information regarding the total number and amounts of the direct debits applied to demand loans #8000021 and #8000022. Such information was crucial to the learned judge's determination of the reliability and accuracy of the Bank's evidence.
>
> [99] Instead, the Bank merely presented the court with figures which it claimed as a debt. The court was, therefore, put in a position where it was unable to confidently accept as accurate, the quantum claimed…"

[70] In this matter, where the respondents' defence was that the sums had been repaid, one would have expected the applicant to provide a breakdown of the sums advanced to the respondents and the sums received from them or on their account, towards the liquidation of the debt. That was not done. The learned judge in those circumstances exercised his discretion to order an account. The basis on which this court will disturb such a decision is well settled. In order to succeed, the applicant will have to

demonstrate that the learned judge, in the exercise of his discretion, erred on a point of law or his interpretation of the facts, or made a decision that no judge "regardful of his duty to act judicially could have reached" (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 ('**Mackay**'), in which Morrison JA (as he then was) summarized the principles in **Hadmor Productions v Hamilton** [1982] 1 All ER 1042 at 1046). Morrison JA at paragraph [20] of **Mackay** stated:

> "[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is 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'."

[71] The basis of the order for the accounting, is that the information is required in order to determine whether it is the respondents who owe the bank or vice versa. That is clearly set out in paragraphs [87] and [88] of the judgment of the learned judge. His reasoning, pertaining to the necessity for such an order, accords with the reasoning of this court in **Capital and Credit** (see paragraphs [64] of this judgment). In the circumstances, it is my view that the applicant has failed to demonstrate that the appeal of order for the accounting has some prospect of success.

[72] In the event that I am wrong in my assessment of this matter, I will now consider where the interests of justice lie.

Risk of injustice

[73] Mrs Bartley Thompson, in her affidavit in support of the application, has asserted that JMMB's appeal has a real prospect of success and that, if the order for the account is not stayed and it succeeds in its appeal, substantial sums would be due to it and the parties would not have to retain an accountant with "extensive investigatory powers to conduct the accounting exercise". She also raised the concern that the accounting

exercise would result in the disclosure of confidential information which cannot be undone if the appeal succeeds. The issue of the costs and time involved in that exercise was also raised as a factor in favour of the grant of a stay of execution.

[74] She also asserted that there is no risk of "significant prejudice" to the respondents if they succeed on the appeal.

[75] Mr Finzi, on the other hand has deposed in his affidavit, that there is no risk of prejudice to the applicant. In response to the concerns regarding the disclosure of confidential information he stated, at paragraph 13, that:

> "13. The confidential information the Appellant alleges they would be forced to disclose and which cannot be undone is information which is relevant to me, the 2nd respondent or [sic] our accounts or relevant accounts of our attorneys-at-law and therefore is equally confidential to me."

[76] He also indicated that it was his understanding that the accountants would be bound not to disclose such information. He asserted that the grant of a stay would be prejudicial to the respondents as there would be continued uncertainty in respect of the amounts owed by them to the applicant or vice versa.

[77] When one examines the orders for the account in this matter, the scope of the power of the independent person is limited to matters which "touch and concern" or are "necessary or helpful" to arrive at an accurate account in relation to loans two and three. It is not at large. In any event, where there are concerns that the information disclosed may prejudice third parties, the court can be asked to make orders to protect those interests.

[78] Where the cost of the accounting is concerned, although it has been asserted that it is likely to be costly, no indication has been given in any affidavit as to the likely cost of such an exercise. Any assessment of that factor at this stage would be speculative at best.

[79] The claim in this matter was commenced in 2013. At the end of the trial, the court was in the difficult position of not being able to accurately assess whether loans two and three had been fully repaid or whether monies were owed to JMMB or are owed by JMMB to the respondents. It is clear from the terms of the order that, that is the objective. The accountant would not be unfettered in his conduct of the exercise. Any issues regarding confidentiality may be addressed under the 'liberty to apply' provision. The applicant has not, in my view, demonstrated that it will suffer a "real risk of injustice" if the stay is not granted.

[80] In the circumstances, it is ordered as follows:

1. The application for a stay of execution of the judgment and orders made by Sykes CJ on 2 February 2021 is refused.

2. Costs of this application to the respondents to be agreed or taxed.