[2026] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE G FRASER JA
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00016

BETWEEN	**RHESHAN CAPITAL MANAGEMENT LIMITED**	**APPELLANT**
AND	**FIRST GLOBAL BANK LIMITED**	**RESPONDENT**

Christopher Dunkley, Neco Pagon and Ms Tiffany Sinclair instructed by Phillipson Partners for the appellant

Mrs Sandra Minott-Phillips KC and Jamaiq Charles instructed by Myers, Fletcher & Gordon for the respondent

18, 19, 22 May and 31 July 2026

Civil Procedure – Summary judgment – *Sua Sponte* Dismissal of appellant's claim by the learned judge – Absence of application for summary judgment by the respondent – Lack of notice to parties – *Inter partes* injunction hearing – Civil Procedure Rules, 2002, Parts 11, 15 and 26

F WILLIAMS JA

[1] I have read, in draft, the reasons for judgment of G Fraser JA and they accord with my own reasons for concurring with the order made by this court as outlined in para. [3].

G FRASER JA

Introduction

[2] Rheshan Capital Management Limited ('the appellant') filed its notice and grounds of appeal on 11 February 2021, challenging the decision of Palmer-Hamilton J ('the learned judge') made on 28 January 2021. The appeal arose from the learned judge's

determination of a notice of application for court orders filed on 2 December 2020 ('the application') in Claim No SU2020CD00423, between the appellant and First Global Bank Limited ('the respondent'). By this appeal, the appellant sought to have this court set aside the following orders made by the learned judge:

> "1. The Notice of Application for Court Orders dated the 1st day of December 2020 and filed the 2nd day of December, 2020 is hereby refused. Interim injunction granted on the 7th day of December, 2020 is discharged.
>
> 2. Notice of Application for Court Orders dated the 22nd day of December 2020 and filed the 23rd day of December 2020 is refused.
>
> 3. Summary judgment is entered against the Claimant.
>
> 4. Costs to the Respondent to be taxed if not agreed.
>
> 5. Leave to appeal is granted.
>
> 6. Respondent's/Defendant's Attorneys-at-Law to prepare, file and serve Orders made herein."

[3] Having heard and duly considered the submissions advanced by counsel for the respective parties, together with the material placed before the court, the following orders were made on 22 May 2026:

> "1. The appeal against the order of Palmer Hamilton J made on 28 January 2021 is allowed in part.
>
> 2. The learned judge's order entering summary judgment for the respondent and dismissing the appellant's claim is set aside.
>
> 3. The appellant's claim is restored and remitted to the Commercial Division of the Supreme Court for case management before a judge other than Palmer-Hamilton J.
>
> 4. The declaration sought that the interim injunction granted on 7 December 2020 was properly granted, is refused, and the order of the learned judge discharging the said injunction is affirmed as having been appropriate.

5. In relation to costs of the appeal, each party is to bear its own costs, and costs of the application in the court below is awarded to the respondent to be agreed or taxed."

[4] Upon pronouncing the orders of the court, the parties were informed that brief reasons would follow in due course. Those reasons are now provided, identifying the principal legal and factual considerations that informed the conclusions reached and explaining the foundation upon which the orders were made, thereby fulfilling the undertaking then given to the parties.

Background

[5] For present purposes, a short chronicle of the background, as articulated by the learned judge, provided the necessary context for the appeal. The appellant is a real estate development company incorporated under the laws of Jamaica. In securing financing for the construction and sale of residential units within a development known as The Riviera, the appellant obtained several mortgage facilities from the respondent, a company duly incorporated to conduct commercial banking in Jamaica. As security for those facilities, the respondent took mortgages over several units within the development. According to the respondent, the cumulative principal indebtedness exceeded $505,000,000.00, together with accruing interest, repayment having fallen due on 31 March 2016. It was undisputed that the appellant defaulted under the loan facilities, thereby entitling the respondent to invoke its contractual and statutory power of sale.

[6] Although the appellant accepted that the respondent's power of sale had arisen, it asserted that, in an effort to reduce the outstanding indebtedness, it had continued marketing units within the development and had procured purchasers for certain units at prices higher than those being pursued by the respondent.

[7] The appellant further contended that it had secured agreements for sale in relation to units 16, 17 and 22 for an aggregate sum of approximately $100,000,000.00. It alleged that, despite having been given notice of those transactions, the respondent withheld its consent to the sales, thereby frustrating their completion and preventing a corresponding

reduction of the outstanding indebtedness. The appellant further alleged that the respondent thereafter proceeded to exercise its power of sale over certain units at an undervalue, causing financial loss and damage to the appellant's commercial reputation, while interest on the indebtedness continued to accrue. It was contended that the respondent exercised that power in bad faith and contrary to its equitable obligations as mortgagee.

[8] It was against that backdrop that the appellant instituted the substantive proceedings and sought interim injunctive relief restraining the respondent from transferring, disposing of, or otherwise dealing with unit 17 pending the trial of its substantive claim. The substantive claim sought, among other things, damages for breach of contract and breach of duty arising from the respondent's alleged improper exercise of its power of sale.

[9] On 7 December 2020, interim *ex parte* relief was granted, and an *inter partes* hearing was scheduled for 4 January 2021.

[10] Following the *inter partes* hearing, the learned judge discharged the interim injunction, refused further interlocutory relief, and ultimately entered summary judgment in favour of the respondent.

[11] The learned judge identified the central issue as whether the appellant was entitled to interlocutory injunctive relief restraining the respondent from exercising its power of sale pending trial. Applying the principles in **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504 ('**American Cyanamid**'), she considered whether there was a serious issue to be tried, whether damages were an adequate remedy, and where the balance of convenience lay.

[12] While the learned judge accepted that allegations of bad faith by a mortgagee are ordinarily matters for trial, she nevertheless concluded, on a preliminary assessment of the evidence, that the respondent's conduct did not disclose *mala fides*. Relying on **Downsview Nominees Ltd and Another v First City Corporation Ltd and Another**

[1993] AC 295, the learned judge found no evidence of improper motive in the respondent's refusal to approve the appellant's proposed sales and held that the allegations of undervaluation in relation to unit 17 were unsupported by cogent evidence.

[13] The learned judge went on to determine that, in any event, damages were an adequate remedy, particularly as the substantive claim included claims for damages, and that section 106 of the Registration of Titles Act ('ROTA') rendered damages the appropriate remedy for any wrongful exercise of the power of sale. She held that the balance of convenience favoured refusal of the injunction. From para. [63] onwards of her written judgment, the learned judge applied rule 15.2(a) of the Civil Procedure Rules, 2002 ('CPR') and the relevant authorities, and concluded that the appellant had no real prospect of success and that no triable issue arose. Accordingly, the application for injunctive relief was refused; the interim injunction granted on 7 December 2020 was discharged; summary judgment was entered for the respondent; and costs were awarded to the respondent to be taxed, if not agreed, with leave to appeal being granted.

[14] Subsequent to the learned judge's decision, the appellant filed a notice and grounds of appeal on 11 February 2021, and an amended notice and grounds of appeal on 9 March 2021.

[15] The appellant has sought from this court the following orders:

> "a) That the Judgment of the Honourable Mrs Justice Lisa Palmer Hamilton made on February 4, 2021 [sic] be varied and/or set aside and the Appellant's Claim be reinstated
>
> b) A declaration that the interim injunction ordered December 7, 2020 was <u>properly granted</u>.
>
> c) …
>
> d) Costs of this Appeal and costs <u>below</u> to the Appellant to be agreed or taxed."

The issues

[16] At the commencement of the hearing of the appeal, Mr Neco Pagon, counsel for the appellant, submitted that the 16 grounds of appeal disclosed three principal issues for determination by this court. Those issues were identified as follows:

1. Whether the learned judge erred in entering summary judgment of her own motion dismissing the appellant's substantive claim in circumstances where:

   (a) no application for summary judgment had been made;

   (b) no notice under CPR Part 11 or rule 15.4 had been given;

   (c) the hearing was at an *inter partes* injunction hearing, rather than a case management conference ('CMC'); and

   (d) the learned judge did not engage with material parts of the pleaded case or with the disclosed evidence produced pursuant to the learned judge's own orders (grounds 1, 2, 4, 6, 7, 10, 11, 14 and 16).

2. Whether the learned judge erred in law and/or fact in refusing the applications for interim relief, including by:

   (a) treating section 106 of the RTA as a deeming provision barring injunctive relief;

   (b) holding the equity of redemption extinguished by an agreement for sale rather than upon registration of transfer;

   (c) failing to recognise that neither unit 17 nor 29 was listed in either of the respondent's two formal section 106 notices; and

   (d) applying the wrong test in relation to the duties of the mortgagee in the exercise of powers of sale (grounds 3 - 15).

3. Whether the order for costs against the appellant ought to be set aside as consequential on the substantive orders, with costs of the appeal and of the proceedings below awarded to the appellant.

[17] Having carefully reviewed the notice and grounds of appeal together with the parties' written and oral submissions, I was satisfied that the issues identified by counsel for the appellant provided a convenient and coherent framework for the determination of this appeal. Although the grounds were numerous and, in some instances, overlapped in substance, they broadly coalesced around the procedural propriety of the entry of summary judgment, the correctness of the learned judge's refusal of interlocutory relief and her treatment of the underlying mortgage law issues, and the consequential question of costs. I therefore accepted those issues as fairly encapsulating the substance of the appeal and have structured the analysis accordingly.

Submissions

[18] Each party filed written submissions and made extensive oral submissions before this court.

The appellant

[19] Mr Pagon submitted that the learned judge erred in converting an *inter partes* hearing of applications for interlocutory relief into a final determination of the substantive claim and entering summary judgment without any application, notice, or proper opportunity for the appellant to respond. It was contended that this course was procedurally unfair and inconsistent with the requirements of the CPR.

[20] Counsel further argued that the learned judge improperly conflated the interlocutory applications concerning units 17 and 29 with the wider substantive claim and failed to recognise that the claim disclosed several substantial triable issues. These included whether the respondent, in exercising its power of sale, acted in good faith; whether it took reasonable precautions to obtain the best price reasonably obtainable; whether it improperly rejected higher offers and redemption proposals; and whether it interfered with the appellant's continuing equity of redemption. The appellant maintained that these were disputed questions of fact and law requiring disclosure, cross-examination, and trial, rendering summary judgment inappropriate.

[21] Counsel also challenged the learned judge's interpretation of section 106 of the ROTA, contending that it did not preclude injunctive relief prior to completion of a sale. It was further submitted that the learned judge applied an unduly narrow approach to the duties owed by a mortgagee exercising a power of sale, and that the evidence concerning units 17 and 29 raised additional questions as to the legality and propriety of the respondent's conduct which could not properly be resolved at the summary stage.

[22] Accordingly, Mr Pagon invited this court to set aside the summary judgment, restore the substantive claim for trial, and make consequential orders as to costs.

The respondent

[23] King's Counsel, Mrs Sandra Minott-Phillips, on behalf of the respondent, submitted that the appeal was devoid of merit and that the learned judge correctly exercised her discretion in refusing interlocutory relief and entering summary judgment. King's Counsel contended that the appellant's claim had no realistic prospect of success, as it was founded on allegations that were either legally unsustainable or wholly unsupported by the evidence. She emphasised that the indebtedness was admitted; that the contractual and statutory power of sale had unquestionably arisen following the appellant's default; and that the appellant had failed to identify any actionable breach of duty capable of restraining the exercise of that power.

[24] King's Counsel further maintained that the learned judge was entitled, in furtherance of the overriding objective and the court's case-management powers, to conclude that the claim had no real prospect of success and to dispose of the proceedings summarily. She submitted that the learned judge possessed ample jurisdiction under the CPR to enter summary judgment of her own motion and that the circumstances of the case warranted the exercise of that power. On the respondent's behalf, King's Counsel argued that the issue of the maintainability of the claim had been clearly raised in the defence and throughout the proceedings, such that the appellant could not credibly claim to have been taken by surprise. In that regard, the respondent submitted that the CPR encourages active judicial case management and that the learned judge was entitled, in

furtherance of the overriding objective, to bring to an end litigation that disclosed no realistic prospect of success rather than permit the parties and the court to incur the expense and delay of a trial.

[25] King's Counsel also placed considerable reliance on what she characterised as material non-disclosure and procedural irregularities by the appellant in obtaining the *ex parte* injunction and disclosure orders. She submitted that the appellant had failed to place before the court material contractual documents, in particular, the actual mortgage documentation, and other relevant information which would have affected the grant of the *ex parte* relief. Accordingly, she said these deficiencies undermined both the credibility of the appellant's allegations and the equitable basis upon which interlocutory relief had been sought.

[26] Finally, King's Counsel submitted that the learned judge correctly concluded that damages constituted an adequate remedy and that the balance of convenience militated against the continuation of any injunction restraining the exercise of the power of sale. Reliance was placed on the principles articulated in **American Cyanamid**, **Downsview Nominees Ltd and Another v First City Corporation Ltd and Another**, and **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12. King's Counsel, therefore, invited this court to dismiss the appeal in its entirety and affirm both the substantive and costs orders made below.

Applicable appellate principles

[27] It is well established that this court, sitting as a court of review, will not lightly interfere with the exercise of judicial discretion. Appellate intervention is warranted only where it is demonstrated that the judge acted upon a misapprehension or misunderstanding of the applicable law; misunderstood or failed properly to evaluate the evidence; took into account matters which ought not to have been considered; failed to take into account relevant considerations; relied upon facts which did not exist; or drew inferences which were not reasonably open on the evidence. The court may also intervene where the exercise of discretion has produced a result that is plainly wrong, manifestly

unjust, or falls outside the range of decisions upon which reasonable judges, properly directing themselves in law and fact, could differ. These principles were articulated in **Hadmor Productions Ltd and Others v Hamilton and Another** [1982] 1 All ER 1042 and have been consistently applied in this jurisdiction: see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1.

[28] The appellate court is, therefore, concerned not merely with whether it would have reached a different conclusion on the merits, but with whether the decision under review was reached in accordance with established legal principles and by a proper exercise of judicial judgment. It was against that standard that each of the issues identified were assessed.

Issue 1: Whether the learned judge erred in entering summary judgment at the interlocutory stage (Grounds 1, 2, 4, 6, 7, 10, 11, 14 and 16).

[29] The appellant's submissions presented a considerably more developed and legally textured challenge to the judgment below than was reflected in the respondent's characterisation of the appeal as wholly unmeritorious. The central complaint advanced was that the learned judge improperly transformed an *inter partes* hearing concerning interlocutory relief into a final adjudication of the substantive claim, and entered summary judgment against the appellant without a formal application, adequate notice, or a meaningful opportunity to be heard on the question of final disposal. In my view, several aspects of the appellant's submissions identified arguable errors in principle, procedure, and the application of equitable mortgage law, which raised substantial appellate questions concerning the propriety of the summary judgment entered at that stage.

[30] A central theme in the appellant's submissions was that the learned judge conflated the limited interlocutory applications concerning units 17 and 29 with the entirety of the substantive claim. The appellant emphasised that the interim applications were directed toward preserving or facilitating the redemption of discrete units in order to reduce indebtedness, whereas the substantive claim sought damages arising from broader alleged misconduct in the respondent's exercise of its power of sale over multiple

units and in its overall conduct as mortgagee. Those were analytically distinct matters, and the resolution of the interlocutory applications did not, without more, determine the outcome of the substantive proceedings.

[31] The starting point for the analysis of issue one was the CPR framework governing summary judgment. Rule 15.2 of the CPR provides that the court may give summary judgment if it considers that a claimant has no real prospect of succeeding on the claim or issue. The question for the court was therefore not whether a claim appears weak or commercially unattractive, but whether it was so lacking in substance that a trial would serve no legitimate forensic purpose. Rule 15.4(3) of the CPR stipulates that notice of an application for summary judgment must ordinarily be served at least 14 days before the hearing of the application. Rule 15.4(5) of CPR permits the court to exercise the summary judgment power without notice, but only at a case management conference. That distinction was of material importance in the present case.

[32] Part 11 of the CPR governs applications generally and prescribes specific procedural requirements. Applications must ordinarily be made in writing, identify the orders sought and the grounds relied upon, be accompanied by the requisite supporting affidavit evidence and draft orders, and be served on the opposing party (see rules 11.3 to 11.9 of the CPR). In the present case, no application for summary judgment was filed with the registry or made orally before the court. No application in Form 7 was filed; no draft order seeking summary judgment was served; and no affidavit evidence was filed specifically in support of such relief. While the defence may fairly be said to have foreshadowed an intention to challenge the claim's maintainability, most plausibly by way of an application to strike out, that pleading cannot be treated as a compliant procedural application under Part 11 of the CPR.

[33] The respondent submitted that, because pleadings had closed by the time of the *inter partes* hearing, the proceedings had effectively progressed to the case management stage, thereby enabling the court to exercise its own-motion summary judgment power without notice. That submission cannot be accepted without significant qualification.

While the close of pleadings is a necessary precursor to case management, it does not, without more, convert a hearing convened for a different purpose into a case management conference. Pursuant to rule 27.3 of the CPR, the fixing of a case management conference remains a matter for the registrar, and the registry was still operating within the prescribed four-to-eight-week period within which such a conference may be scheduled. There was no evidence that a CMC had been fixed, listed, or notified to the parties. The matter, therefore, remained before the court as an *inter partes* hearing of the appellant's interlocutory applications and not as a case management conference at which the court's own-motion summary judgment power could be exercised without notice.

[34] The learned judge's own description of the hearing reinforced that conclusion. At para. [9] of her written reasons, the learned judge stated:

> "[9] This judgment is in respect of the inter partes hearing of the application for injunction against the Respondent, which came on for hearing and was concluded on the 4th day of January 2021. The evidence in support of the application is contained in three (3) Affidavits of Troy Brennan and the evidence in response to the application is contained in the Affidavit of Aleca Green-Miller."

[35] It was, therefore, not merely surprising but, in my view, procedurally irregular that, having characterised the hearing as an *inter partes* injunction hearing, the learned judge proceeded, nearing the conclusion of her written reasons, to summarily determine the substantive claim in its entirety. At paras. [63] and [64] of her reasons, the learned judge stated:

> "[63] Learned Queen's Counsel Mrs. Minott-Phillips urged the Court in her submissions to consider whether the Claim of the Applicant is unmaintainable and as such, warrants the action of striking out the Applicant's statements of case. The Defence of the Respondent also underscores this, and it contained the statement of belief that there was no real prospect of the Applicant succeeding on the Claim. I indicated at the

> conclusion of the submissions that I would be considering and making a determination as to the merits of the case.
>
> [64] As a rule, in the discretionary exercise of his or her case management powers a judge, on his or her own motion, may give summary judgment on the whole claim or on an issue of fact or law in the claim... Rule 15 of the Civil Procedure Rules permits the court to do so. In the instant case, having already determined that there was no serious question to be tried I am mindful of rule 15.2(a) of the CPR."

[36] The jurisdictional basis relied upon by the learned judge, the first-instance decision in **Ocean Chimo Ltd v Royal Bank (Jamaica) Ltd (RBC) et al consolidated with Delory Howell v Royal Bank of Canada et al** [2015] JMCC Comm 22, merits careful scrutiny. That decision correctly acknowledges the court's power to enter summary judgment on its own motion at a case management conference. However, the principle articulated there is expressly conditioned on the context of a case management conference. The learned judge's reliance upon that passage in a hearing that she herself characterised as an *inter partes* injunction application represents, in my view, a material error in the application of the jurisdictional principle. The own-motion power is not at large; it is circumscribed by the procedural context in which it may properly be exercised.

[37] The CPR confers broad case-management powers on judges, including the power to enter summary judgment on the court's own initiative. However, that jurisdiction must be exercised in a manner consistent with the fundamental requirements of procedural fairness and the *audi alteram partem* principle. The procedural framework under Part 15, including the entitlement of a party to file affidavit evidence in response under rule 15.5(2) of the CPR, necessarily contemplates that the party affected is given a fair and adequate opportunity to address the possibility of final determination of its claim before judgment is entered against it. The appellant in the present case only became aware, upon receipt of the written judgment, that the court had considered and determined the merits of the entire action. That is a state of affairs incompatible with a proper exercise of the summary judgment jurisdiction.

[38] The respondent's submissions sought to justify the entry of summary judgment by characterising the appellant's claim as both hopeless and procedurally abusive. In advancing that argument, however, the respondent's submissions tended to conflate the distinct jurisdictions of summary judgment under Part 15 and striking out under Part 26 of the CPR. While the two procedures may in practice produce a similar outcome, the termination of proceedings, they are conceptually and procedurally distinct and are governed by separate legal tests and procedural safeguards. Rule 15.2 of the CPR concerns whether a party has no real prospect of succeeding on or defending the claim, requiring an assessment of the claim's realistic prospects of success based on the available material. Rule 26.3 of the CPR, by contrast, addresses deficiencies apparent from the statement of case itself, including abuse of process, failure to disclose reasonable grounds, or other pleading defects. The two jurisdictions are not interchangeable, and the procedural protections attached to each are not to be diluted merely because the practical outcome may coincide.

[39] The importance of maintaining those distinctions is not merely technical or procedural in a narrow sense. Procedural safeguards exist to ensure fairness, proper notice, and the orderly identification of the issues to be determined. A party against whom summary judgment is sought is entitled to know with clarity that final determination of the claim is being pursued and to respond within the framework specifically prescribed for that purpose. The overriding objective cannot be invoked as a free-standing source of jurisdiction, nor does it authorise the court to dispense with mandatory procedural requirements in the interests of convenience or efficiency. Its function is to guide the interpretation and application of the CPR so as to achieve the just, expeditious, and proportionate resolution of disputes within the framework of the rules themselves. Efficiency cannot be pursued at the expense of procedural regularity, fairness, and the orderly administration of justice. A court cannot circumvent the safeguards governing one jurisdiction by treating it as interchangeable with another merely because the ultimate result may be the same.

[40] The respondent's submission that the issue of the claim's maintainability had been clearly raised in the defence and that the appellant therefore had ample notice that the matter would be considered does not address the procedural difficulty. A general assertion in a defence that a claim was unsustainable was not the procedural equivalent of a formally constituted application for summary judgment or strike out, supported by evidence and directed to clearly identified relief, and served with the notice prescribed by the CPR. The fact that the court may have had jurisdiction to grant summary judgment in appropriate circumstances did not eliminate the requirement that the affected party be afforded a fair opportunity to address the case it had to meet within the framework specifically established for that purpose.

[41] The respondent also submitted that the overriding objective entitled the learned judge to bring to an end litigation that disclosed no realistic prospect of success. That submission, while understandable in the abstract, proceeded on the premise that the claim was indeed hopeless. As I elaborated below, that premise was itself contestable. More fundamentally, the overriding objective, as the authorities consistently affirm, had to operate harmoniously with the rules rather than in derogation from them. It was intended to secure justice through proper case management, not to legitimise procedural improvisation or the fusion of distinct procedural regimes. Permitting the overriding objective to justify the collapse of procedurally distinct jurisdictions whenever the court considers a claim to be weak would undermine the certainty, discipline, and fairness that the CPR is designed to promote.

[42] Turning to the substantive question of whether the claim had a real prospect of success, the jurisprudence governing summary judgment consistently emphasises that the jurisdiction is reserved for cases in which it is plain that a claim has no realistic prospect of success. Courts have repeatedly cautioned against employing the procedure as a substitute for trial where material facts are disputed, competing inferences may reasonably be drawn, or the resolution of the issues depends upon a careful evaluation of the evidence. In **Three Rivers District Council v Governor and Company of the**

Bank of England (No 3) [2003] 2 AC 1, the House of Lords underscored the principle that summary judgment should not be granted where determination of the claim requires detailed factual investigation, the assessment of credibility, the drawing of competing inferences, or the resolution of issues that can properly be evaluated only after disclosure and cross-examination. The authorities consistently warn against permitting summary judgment proceedings to evolve into a mini-trial conducted on affidavit evidence alone.

[43] The respondent's reliance on **Sagicor Bank Jamaica Limited v Taylor-Wright** was readily understandable, as that decision reaffirms the court's obligation to utilise robust case-management powers and to summarily dispose of claims which are plainly unsustainable. However, that authority must be viewed in its proper context. As Lord Briggs made clear, summary judgment is appropriate only where a trial would serve no useful purpose and where there is no realistic prospect that the evidential process could affect the outcome. The present case was materially distinguishable from the type of straightforward debt recovery claim considered in **Sagicor Bank Jamaica Limited v Taylor-Wright**, where the essential indebtedness was uncontested, and the claim against the bank raised no question of disputed duty or equitable obligation. Here, the issues extended beyond the existence of the debt and encompassed allegations concerning the respondent's exercise of its power of sale, the adequacy of the price obtained or proposed, the continuing scope of the appellant's equitable rights, the proper legal consequences of the parties' contractual dealings, and the availability of interlocutory equitable relief. Such issues were inherently fact-sensitive, and their proper resolution called for an application supported by appropriate evidence and full submissions directed to them, rather than being determined incidentally on the material before the court.

[44] While the respondent submitted that the appellant's claim disclosed no triable issue, the parties' submissions themselves reveal substantial areas of factual and legal controversy directly referable to the pleaded claim. Those included: whether the respondent acted in good faith in the exercise of its power of sale; whether it took

reasonable precautions to obtain the best price reasonably obtainable; the circumstances in which the respondent refused the appellant's proposed sales of units 16, 17 and 22; the proper characterisation of the respondent's conduct in relation to the statutory notices served in connection with units 17 and 29; and whether the appellant retained enforceable rights of redemption at the material time. Those matters were not readily amenable to final determination on affidavit evidence alone and raised precisely the type of factual inquiry which the authorities indicated was ordinarily unsuitable for summary disposition.

[45] The appellant also derived some support from the procedural posture of the case itself. The learned judge initially granted *ex parte* injunctive relief and made disclosure orders, suggesting that at the preliminary stage there appeared to be sufficiently serious issues warranting interim intervention. The appellant contended that the material disclosed pursuant to those orders subsequently strengthened rather than weakened its case. In particular, the disclosed material allegedly revealed: a lower subsequent sale price for unit 17 than the price originally proposed by the appellant's buyer; the cancellation of the respondent's own sale agreement; a substantially reduced mortgage balance; and evidence that the appellant's tender may have been sufficient to discharge the indebtedness attributable to unit 17. On the appellant's case, the learned judge failed to reassess the significance of this evidence in light of the disclosures she herself had ordered.

[46] One factual matter raised in the submissions required particular attention. The respondent's submissions suggested that unit 17 was ultimately sold at a price corresponding to or consistent with the price agreed upon by the appellant's proposed purchaser. If that were correct, it would significantly undermine the appellant's contention that the property was sold at an undervalue and could potentially defeat the essential basis of the alleged breach of the mortgagee's equitable duty in relation to that unit specifically. That was, however, a matter that depended upon a careful factual analysis of the agreement terms, the ultimate sale price, and the relationship between the two,

precisely the kind of inquiry that ought to have been conducted at trial rather than resolved on affidavit evidence. The fact that a plausible factual answer may have existed that defeated the claim in relation to unit 17 did not, without more, establish that no triable issue arose in the proceedings as a whole, which encompassed multiple units and a broader range of alleged misconduct.

[47] The submissions also disclosed weaknesses in the appellant's case that this court should acknowledge candidly. Certain arguments, particularly those alleging fiduciary obligations on the part of the respondent as mortgagee, or attributing malice to the respondent's exercise of its statutory powers, may have overstated the legal obligations owed. Jamaican and Commonwealth mortgage jurisprudence affords mortgagees considerable latitude in enforcement, and the imposition of fiduciary obligations on a mortgagee in possession of a power of sale is, save in exceptional circumstances, not supported by the weight of authority. Some submissions also verged on speculation, particularly where improper motives were attributed to the respondent without a direct evidentiary foundation. Those weaknesses were matters that the appellant will need to address at trial.

[48] Nonetheless, even acknowledging those weaknesses, the appellant's claim could not fairly be characterised as wholly devoid of merit. To survive a summary judgment application, a claim does not have to be strong; it only has to disclose a realistic prospect of success. The appellant's strongest point was not that it had to succeed at trial, but that the claim raised sufficiently serious and legally arguable issues, going beyond mere allegations of undervalue to encompass the proper standard of conduct required of a mortgagee in the exercise of its power, the effect of the respondent's refusal to consent to the proposed sales, and the scope of the appellant's continuing equitable rights. For those reasons, it was inappropriate to dispose of the claim summarily before the case management conference.

[49] In all the circumstances, this court was unable to conclude that the learned judge properly exercised the jurisdiction to grant summary judgment in the manner and at the

stage at which she did so. The learned judge entered summary judgment at an *inter partes* hearing convened for the limited purpose of determining interlocutory injunctive applications, without a formal application for summary judgment having been made, without the procedural notice required by the CPR, and without a meaningful opportunity for the appellant to respond to the prospect of final determination of its substantive claim. Those procedural deficiencies, taken together with the existence of factual and legal issues that could not properly be resolved on the material before the court, led this court to conclude that the entry of summary judgment could not stand.

Issue 2: Whether the learned judge erred in refusing interlocutory injunctive relief and in her treatment of section 106, mortgagee duties, and the equity of redemption (Grounds 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15).

[50] Different considerations govern the question of whether the learned judge erred in discharging the *ex parte* injunction and refusing interlocutory relief. These matters fell within the learned judge's discretionary jurisdiction and were subject to a narrower standard of appellate review. This court will not interfere with an exercise of discretion in respect of interlocutory injunctions unless the judge misdirected herself in law, took into account irrelevant matters, disregarded relevant considerations, or reached a conclusion that was plainly wrong.

[51] The appellant mounted a substantial challenge to the learned judge's interpretation and application of section 106 of the ROTA. The provision limits the remedies available to a mortgagor following an improper exercise of a mortgagee's power of sale to damages, precluding other proprietary or possessory relief once the sale has been completed. The appellant contended that section 106 operates prospectively, that is, it restricts the remedies available after completion of a sale, and does not preclude the grant of interlocutory injunctive relief to restrain a sale prior to its completion. That contention was not without legal foundation.

[52] On its proper construction, section 106 addresses the consequences of an improper exercise of the power of sale that has been completed. It is, therefore, directed

at the remedial consequences of a past event, the completed sale, and does not purport to extinguish equitable remedies available to restrain a proposed but as-yet-uncompleted exercise of the power. The learned judge's conclusion that section 106 rendered damages the appropriate remedy and thereby foreclosed interlocutory relief may therefore have conflated the question of what remedies are available after an improper sale has occurred with the anterior question of whether equitable relief is available to prevent an allegedly improper sale from occurring in the first place. Those are materially distinct questions, and the authorities recognise that the court retains jurisdiction to intervene in equity to restrain a proposed exercise of a power of sale in appropriate circumstances (see **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] 1 Ch 949 and the authorities discussed therein).

[53] That said, the availability of section 106 damages as a remedy was plainly a relevant consideration in the assessment of whether damages constitute an adequate remedy for the purposes of the **American Cyanamid** balance of convenience analysis. Where a statutory remedy existed that was capable, in principle, of providing full monetary compensation for any loss suffered as a result of an improper exercise of the power of sale, a court might properly have concluded that the availability of that remedy weighs against the grant of interlocutory injunctive relief. The learned judge's analysis on this point, while open to the criticism that it conflated the prospective and retrospective operation of section 106, was not plainly wrong in its ultimate conclusion that damages provided an adequate remedy in the circumstances of this case.

[54] The appellant's submissions concerning the mortgagee's equitable duties were substantial and supported by authority. The authorities consistently establish that while a mortgagee may exercise its power of sale primarily in its own interests, that freedom remains constrained by equitable obligations to act in good faith and to take reasonable precautions to obtain the best price reasonably obtainable at the time of the sale: see **Cuckmere Brick Co Ltd v Mutual Finance Ltd**; **Tse Kwong Lam v Wong Chit Sen and others** [1983] 1 WLR 1349; and **Downsview Nominees Ltd v First City**

Corporation Ltd. The appellant's criticism of the learned judge's analysis was not merely that the respondent sold at an undervalue, but that the learned judge framed the inquiry exclusively in terms of whether the property was being sold 'at an undervalue' rather than whether the respondent had taken reasonable precautions to secure the best price reasonably obtainable. That distinction was legally significant. The relevant equitable duty was one of reasonable care and good faith in the process of sale, not simply a requirement to achieve a particular price. The appellant therefore had an arguable basis for contending that an incorrect legal standard had been applied.

[55] The submissions regarding units 17 and 29 not appearing in the respondent's statutory notices also potentially raised triable issues that were not adequately addressed below. The appellant's contention was that these omissions undermined the respondent's assertion that it was properly exercising its statutory power of sale over those units in accordance with the prescribed procedure. While the respondent might ultimately have provided a satisfactory explanation for those omissions, the point could not easily be dismissed as fanciful or legally inconsequential without fuller examination.

[56] The appellant's arguments concerning the equitable right of redemption raised a point of orthodox mortgage law that was both legally important and, in my view, insufficiently addressed in the judgment below. The equity of redemption is the mortgagor's fundamental equitable right to reclaim the mortgaged property upon payment of all sums due under the mortgage. It is one of the most ancient and jealously protected rights in equity, and the courts have historically been vigilant to ensure that it is not diminished, curtailed, or rendered illusory by the conduct of the mortgagee or by the terms of the mortgage instrument itself. The equitable maxim that "once a mortgage, always a mortgage and nothing but a mortgage" (see **Noakes v Rice** [1902] AC 24 per Lord Davey), encapsulates the principle that the parties cannot by contract convert what is in substance a security transaction into an outright transfer of property, and that the mortgagor's right of redemption must remain intact until it is extinguished by one of the recognised legal mechanisms.

[57] As a matter of settled mortgage law, the equity of redemption subsists and remains exercisable until one of three events occurs: the completion of a sale by registration of the relevant transfer under the ROTA; the making of an order for foreclosure; or the voluntary release of the equity of redemption by the mortgagor. The mere fact that the mortgagee has decided to exercise its power of sale, has marketed the property, or has even entered into an agreement for sale with a third-party purchaser does not, without more, extinguish the mortgagor's equitable right to redeem. Until the transfer is registered and legal title passes to the purchaser, the mortgagor retains the right to tender the full amount owing and thereby recover the mortgaged property. That principle is deeply embedded in both English and Jamaican mortgage jurisprudence. Notably, in **G and C Kreglinger v New Patagonia Meat and Cold Storage Co Limited** [1914] AC 25, Viscount Haldane LC affirmed that the equity of redemption cannot be clogged or fettered by any collateral stipulation inconsistent with that right; and in **Samuel v Jarrah Timber and Wood Paving Corporation Ltd** [1904] AC 323, the House of Lords reaffirmed the fundamental inalienability of the right of redemption.

[58] The practical significance of this principle in the present case was considerable. The appellant contended that, at the time of the interlocutory applications, the relevant units had not been sold to completion by registration; accordingly, its equity of redemption had not been extinguished and remained a subsisting equitable right capable of protection by the court. The respondent's exercise of its power of sale, on that analysis, remained subject to equitable supervision and, in appropriate circumstances, to restraint by injunction or other equitable relief, not because the mortgagee had no power to sell, but because the equitable obligations attending the exercise of that power, including the obligation of good faith and the duty to take reasonable precautions to obtain the best price reasonably obtainable, were capable of enforcement so long as the equity of redemption survived.

[59] The learned judge's reasoning appeared, at several points, to have treated the respondent's decision to proceed with the exercise of its power of sale as though it had

the effect of displacing the appellant's equitable rights before completion had occurred. That analysis was, with respect, legally imprecise. The power of sale having arisen did not suspend or extinguish the equity of redemption; the two rights co-existed in a state of tension that was resolved only upon completion of the sale by registration. During that intervening period, the mortgagor's equitable rights remain alive, and the court retained jurisdiction to intervene where the proposed exercise of the power of sale would, if completed, constitute a breach of the mortgagee's equitable obligations. The proposition that the mere exercise of the power of sale effectively closed off the mortgagor's equitable remedies prior to completion was not consistent with the weight of authority and represented, in our judgment, a potentially significant error of legal principle in the analysis below.

[60] Furthermore, and of particular relevance to the interlocutory relief analysis, the continuing existence of the equity of redemption at the time of the hearing had a direct bearing on the adequacy of damages as a remedy. Where a mortgagor's subsisting equitable right of redemption is threatened by a proposed sale which, if completed, will permanently and irreversibly extinguish that right, the loss is not readily susceptible to full monetary quantification after the event. The authorities recognise that the extinction of a proprietary or equitable right by an irreversible transaction may, in appropriate circumstances, support the grant of interlocutory relief on the basis that damages would not be an adequate substitute for the preservation of the right itself (see **Polly Peck International plc v Nadir and others (No 2)** [1992] 4 All ER 769). The learned judge's analysis of the adequacy of damages, conducted largely through the lens of section 106 of the ROTA, may not have given sufficient independent weight to this dimension of the equity of redemption argument.

[61] These observations did not, of themselves, compel the conclusion that the interlocutory injunction ought to have been continued. The balance of convenience, the state of the evidence at the time of the *inter partes* hearing, and the concerns arising from the *ex parte* procedure collectively provided adequate grounds for the discharge of

the interim relief, as addressed in the analysis below. However, the equity of redemption analysis was directly relevant to the summary judgment issue; if the appellant retained a subsisting equitable right of redemption at the material time, and if the exercise of the power of sale was allegedly attended by breaches of the mortgagee's equitable duties, then the claim as pleaded engaged principles of established equitable and mortgage law that could not properly be dismissed as incapable of supporting a trial. The existence of those issues reinforced the conclusion that the grant of summary judgment before the case management conference was inappropriate.

[62] The respondent placed considerable emphasis on the appellant's alleged material non-disclosure in obtaining the *ex parte* orders, contending that relevant contractual documents, and particularly the actual mortgage documentation, were withheld notwithstanding their obvious centrality to the dispute. After the respondent's affidavit was filed, disclosing that material, the learned judge determined that the interim injunction should not be extended. Those were legitimate and weighty considerations. However, a significant difficulty arose from the fact that the learned judge did not make any express finding that the appellant had been guilty of material non-disclosure, nor did she determine that the *ex parte* application had been improperly brought or constituted an abuse of the *ex parte* process. While she observed in general terms that judicial decisions are necessarily made on the basis of the material placed before the court at the relevant time, that observation fell short of an affirmative judicial finding that there had been culpable suppression, misrepresentation, or other conduct sufficient to engage the well-established principles governing material non-disclosure on without-notice applications.

[63] That omission assumed particular significance in the context of this appeal. The appellant correctly pointed out that the respondent had not filed a counter-appeal or a notice seeking affirmation of the learned judge's decision on the alternative basis that the *ex parte* injunction ought to have been discharged for material non-disclosure or procedural impropriety. It was, therefore, procedurally difficult for the respondent to

invite this court, in substance, to make findings which the learned judge herself did not make, and which were not embodied in the orders under appeal. Appellate review proceeded on the basis of the decision actually rendered below, rather than upon arguments which might have supported a different or broader determination had they been expressly adopted by the trial judge. Moreover, allegations of material non-disclosure carry serious forensic and equitable consequences. Such findings ordinarily required careful identification of the allegedly undisclosed material, consideration of its relevance and materiality to the *ex parte* determination, and an assessment of whether the omission was deliberate, negligent, or otherwise excusable. None of those matters was conclusively determined by the learned judge, and it would therefore be inappropriate for this court to treat the respondent's allegations as having crystallised into established findings of fact.

[64] Accordingly, while the respondent was entitled to rely on those matters in support of its broader submissions concerning the appellant's conduct, this court should be slow to elevate those assertions into dispositive considerations in the absence of any express findings below and in the absence of a counter-appeal directed to that issue. At the same time, this court noted that the failure to produce the actual mortgage documentation on a without-notice application seeking coercive relief was a matter of genuine concern. That failure, in combination with the overall procedural posture of the *ex parte* application, provided ample justification for the learned judge's decision to discharge the ex parte injunction at the *inter partes* stage, irrespective of whether those matters rose to the level of a formal finding of material non-disclosure.

[65] Even if material non-disclosure justified the discharge of the *ex parte* orders, that conclusion did not automatically resolve the separate and analytically distinct question of whether the entire substantive claim was suitable for summary disposal. Improper conduct in obtaining interim relief may disentitle a party to equitable remedies and justify the discharge of the relief obtained, but it did not, without more, establish that the

underlying claim was hopeless or that the factual and legal issues raised by the pleaded case were incapable of supporting a trial.

[66] Taken as a whole, the respondent's submissions provided cogent justification for the discharge of the *ex parte* injunction and raised substantial concerns regarding the strength and coherence of certain aspects of the appellant's claim. The grant or continuation of interlocutory injunctions lay squarely within the discretion of the judge, and this court was not persuaded that the learned judge exceeded the generous ambit of that discretion in refusing to continue injunctive relief. We were satisfied, in particular, that by the time of the *inter partes* hearing, the factual landscape had substantially changed. The respondent's sale agreement concerning unit 17 had been cancelled, and the production of the mortgage documentation had materially altered the informational basis upon which the *ex parte* relief had been obtained. The learned judge therefore acted within the proper ambit of her discretion in declining to extend interlocutory injunctive relief and in discharging the *ex parte* injunction. That aspect of the appeal accordingly failed.

[67] In summary, the appeal succeeds in part. On the summary judgment ground, the appellant succeeds: for the reasons given above, the entry of summary judgment could not stand, and that order is set aside. On the injunction-related relief, however, the respondent succeeds: the learned judge acted within the proper ambit of her discretion in declining to extend interlocutory injunctive relief and in discharging the ex parte injunction, and that aspect of the appeal accordingly fails. It is against this mixed outcome that the question of costs falls to be considered.

Issue 3: Costs

[68] The question of costs fell to be determined having regard to the outcome of the appeal as a whole and the manner in which the proceedings below were conducted. The general principle that costs follow the event provided the starting point, but it is well established that the court retains a broad discretion to depart from that principle where the overall justice of the case so requires, including where a party has succeeded on

some issues and failed on others, or where the conduct of a party has contributed to the costs incurred. As Morrison JA (as he then was) observed in **Capital & Credit Merchant Bank Limited v The Real Estate Board and The Real Estate Board v Jennifer Messado & Co** [2013] JMCA Civ 29 (paras. [165] – [169] of the judgment), the question of whether to make any order as to costs, and, if so, what order, is a matter entrusted to the discretion of the court, to be exercised having regard to all the circumstances of the case. Undoubtedly, the court is not bound to follow the general rule where the particular circumstances justify a departure from it. Rule 64.6 of the CPR, incorporated into the Court of Appeal Rules by rule 1.18(1), expressly preserves that discretion, permitting the court to order that a successful party receive only a proportion of its costs, to make no order as to costs, or to order each party to bear its own costs, as justice may require.

[69] In the present case, the outcome of the appeal was divided. The appellant succeeded on issue one, in that the order entering summary judgment was set aside and the substantive claim restored for trial. That was a significant and substantial success which vindicated the appellant's core procedural complaint that the learned judge improperly converted an *inter partes* injunction hearing into a final determination of the substantive claim without adequate notice or procedural foundation. It was a success of real consequence, since without it the appellant's claim would have been extinguished entirely.

[70] However, the appellant failed on issue two. The appellant sought a declaration that the interim injunction granted on 7 December 2020 had been properly granted. That declaration was refused. Instead, this court affirmed the learned judge's order discharging the injunction as having been appropriate. That refusal was not merely a technical or peripheral matter. The appellant's application for the declaration occupied a material part of both the written and oral submissions before this court and constituted a distinct and self-contained head of relief. The appellant's failure on that issue was therefore of real significance in the costs calculus.

[71] In those circumstances, this court was satisfied that the just and proportionate order was that each party should bear its own costs of the appeal. The appellant's success on the summary judgment ground and the respondent's success in resisting the injunction-related relief broadly counterbalanced one another in terms of the relative weight of the issues litigated before this court. Neither party had achieved a sufficiently complete or dominant victory on the appeal as a whole to justify an award of costs in its favour, and an order for mutual costs absorption properly reflected the divided outcome.

[72] As to the costs of the application in the court below, a different consideration applied. The proceedings below were initiated by the appellant by way of an application for interlocutory injunctive relief. That application, as this court had found, was attended by procedural concerns, including the failure to produce the actual mortgage documentation on a without-notice basis and the broader irregularities surrounding the *ex parte* procedure. Moreover, the application as pursued below, seeking injunctive relief in circumstances where the appellant's equitable position was, for the reasons given, materially weaker than presented, did not ultimately succeed. The respondent was required to attend, respond to, and contest that application, thereby incurring costs which it ought not fairly to be required to bear. In those circumstances, the appropriate order was that the costs of the application below are awarded to the respondent, to be agreed or taxed. That order reflected the fact that, whatever the procedural errors committed by the learned judge in proceeding to summary judgment, the respondent was the successful party in the application that was actually before the court, having successfully resisted the continuation of interlocutory injunctive relief.

Conclusion and disposition

[73] Having carefully considered the judgment of the learned judge, the grounds of appeal, the submissions advanced by counsel for the respective parties, and the applicable legal principles, this court was unable to conclude that the appellant's claim was so plainly hopeless or fanciful as to justify summary judgment at the interlocutory stage at which the matter stood. The entry of summary judgment at the interlocutory

stage could not be sustained as a proper exercise of the jurisdiction conferred by the CPR. The procedural circumstances attending the entry of that judgment, the existence of factual and legal controversies not amenable to final resolution on the material before the court, and the errors of legal principle identified in the learned judge's treatment of the mortgagee's equitable duties and the appellant's subsisting equity of redemption, collectively provided sufficient grounds for appellate intervention in accordance with the established standard of review. The appeal against the summary judgment succeeded.

[74] This court did not, however, accept the appellant's challenge that the learned judge erred in discharging the *ex parte* injunction or in refusing to continue interlocutory injunctive relief. The *ex parte* application was attended by procedural irregularities, including the failure to produce the actual mortgage documentation, and by the time of the *inter partes* hearing, the factual landscape had materially shifted. The learned judge therefore acted within the proper ambit of her discretion in that regard, and that aspect of the appeal was dismissed. The appeal accordingly succeeded in part only.

[75] As to costs, the divided outcome of the appeal and the respondent's success in resisting the continuation of interlocutory injunctive relief in the proceedings below led this court to the view that each party should bear its own costs of the appeal and that the costs of the application below should be awarded to the respondent.

[76] It was for these reasons, taken together, that we made the orders set out at para. [3] above.

SHELLY-WILLIAMS (AG)

[77] I, too, have read the draft reasons for judgment of G Fraser JA and they accord with my own reasons for concurring with the order made by the court.