

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

Judgment book

CLAIM No. 2006 HCV 03485

BETWEEN JAMAICA TRANSFORMER CO.
LIMITED. 1ST CLAIMANT

AND LEWSTAN CORPORATION LIMITED. 2ND CLAIMANT

AND JAMAICAN REDEVELOPMENT
FOUNDATION INC. DEFENDANT

Mr. Crafton S. Miller and Miss Suzette Wolfe
instructed by Crafton S. Miller and Co. for the Claimants.

Mrs. Michelle Champagnie and Miss Ky-Ann Lee
instructed by Myers Fletcher and Gordon for the Defendant.

HEARD: 1ST, 2ND, 22ND March and 17TH May 2007.

IN CHAMBERS

Mangatal J:

1. In March I heard an application by the 1st and 2nd Claimants "Jamaica Transformer" and "Lewstan" respectively for interlocutory injunctions restraining the Defendant "Jamaican Redevelopment" from selling, transferring or otherwise disposing of three properties belonging to Lewstan. Those properties are situated in Caledonia, Manchester. The application is concerned with restraining Jamaican Redevelopment from exercising powers of sale which it has by virtue of mortgages held over these three of Lewstan's properties. It also concerns an application to restrain Jamaican Redevelopment its servants and/or agents from entering

- another property belonging to Lewstan and from removing transformers therefrom which Lewstan claims belong to it.
2. The matter has been vigorously contested and argued comprehensively and I wish at the outset to express my appreciation of the clear and concise manner in which the Attorneys-at-Law for the parties made their submissions.
 3. Jamaica Transformer is a limited liability company registered under the laws of Jamaica with registered offices at 68 Caledonia Road , Mandeville, Manchester.
 4. Lewstan is a limited liability company registered under the laws of Jamaica with registered offices in Mandeville, Manchester, and is the registered proprietor of the following properties:
 - a) All that parcel of land situate at Caledonia, Mandeville, Manchester, containing by survey Three Roods Twenty-five perches and eight-tenths of a perch , being the land comprised in Certificate of Title registered at Volume 1373 Folio 104 of the Register Book of Titles.
 - b) All that parcel of land known as Number Sixty-Eight Caledonia Road situate at Mandeville, Manchester, being the land comprised in Certificate of Title registered at Volume 1369 Folio 174 of the Register Book of Titles.
 - c) All that parcel of land part of Caledonia known as Number Seventy Caledonia Road, situate at Mandeville, Manchester, being the land comprised in Certificate of Title registered at Volume 1123 Folio 809 of the Register Book of Titles.
 5. Jamaica Transformer and Lewstan carry on the business of repairing, designing, redesigning and manufacturing power and

distribution transformers. This business is carried on at 68-72 Caledonia Road, Mandeville, Manchester.

6. In addition Lewstan also says that it carries on business at 73 Caledonia Road, Mandeville, Manchester on the land comprised in Certificate of Title registered at Volume 132 Folio 24 of the Register Book of Titles of which Lewstan is the registered proprietor.
- 6a. Jamaica Transformer and Lewstan have common directors and Leslie Lewis Senior has a controlling shareholder interest in both companies.
7. Jamaica Transformer obtained loan facilities with the then Workers Savings and Loan Bank "Workers" and in or about May 1996 this facility amounted to a total debt exposure of \$7,710,737.00.
8. In or about 1997 Jamaica Transformer made further arrangements with Workers and then obtained loan facilities which Workers indicated totalled \$24,600,625.00 at simple interest of 45% per annum.
9. Lewstan guaranteed the repayment of these loans and facilities made available to Jamaica Transformer and to that end provided Workers with security for repayment in the form of mortgages over the properties referred to at paragraph 4 above by way of Instrument of Mortgage No. 1005477.
10. Workers eventually merged with Citizens Bank Limited, Island Victoria Bank Limited and Eagle Commercial Bank Limited to form Union Bank. Subsequently Union Bank's debt portfolio, including the indebtedness of the Claimants, was transferred to Finsac, then Refin Trust, and finally to Jamaican Redevelopment.
11. Debts originally owed to Workers were transferred to Jamaican Redevelopment by way of Deed of Assignment dated January 30,

2002. The mortgages in favour of Workers which were endorsed on Lewstan's titles referred to at paragraph 4 above were transferred to Jamaican Redevelopment.

12. By correspondence dated October 22, 2005, Jamaican Redevelopment issued formal Letters of demand to Jamaica Transformer and Lewstan. Further Letters of demand dated January 19, 2006 were issued. There was originally some dispute as to whether Jamaica Transformer or Lewstan actually got these letters which Jamaican Redevelopment say that they sent by registered mail. However that really is not an issue in the case before me since it is not disputed that the Receiver appointed by the Defendant delivered copies of the letters dated January 19, 2006 to Leslie Lewis Senior which Mr. Lewis says he received sometime in August/September 2006. There is therefore no need to examine the provisions in the mortgage dealing with deemed service as the Claimants received actual notice of the demand and lack of notice has neither been pleaded nor argued as an issue.
13. On the 27th June 2006 Jamaican Redevelopment appointed Kenneth Tomlinson of Business Recovery Services Limited, as Receiver and Manager of Jamaica Transformer pursuant to powers contained in a Debenture dated 8th September 1997. Mr. Tomlinson was also appointed Receiver over Lewstan's properties referred to at paragraph 4 above pursuant to Mortgage No. 1005477. Jamaica Transformer was notified of the appointment of the Receiver.
14. Jamaican Redevelopment states that Jamaica Transformer & Lewstan remained in default in repaying the growing debt, and so it exercised the powers of sale granted to it by virtue of the Mortgage Instrument. The properties referred to at paragraph 4 above were put up for auction, and the auction which was fixed for the 3rd October, 2006 was advertised in the Gleaner newspaper.

15. The Claimants aver that in purported exercise of his Receivership the Receiver illegally and wrongfully trespassed on Lewstan's property registered at Volume 132 Folio 24 of the Register Book of Titles and removed therefrom transformers belonging to Lewstan when neither that property nor Lewstan's assets were mortgaged or charged to Jamaican Redevelopment. The Claimants also say that since the appointment of the Receiver Lewstan's properties which were used as security for the loans have been vandalized and materials or items thereon stolen, destroyed and/or sold far below the market price.
16. By notice of application dated 2nd October 2006, Jamaica Transformer and Lewstan applied to the court for interim injunctions in the following terms:-
- (1) An injunction to restrain Jamaican Redevelopment whether by its servants and or agents from selling, transferring or otherwise disposing of Lewstan's properties to wit:-
- (a) ALL THAT PARCEL OF LAND situate at Caledonia in the Parish of Manchester containing by survey Three Roods Twenty-five Perches and Eight Tenths of a Perch of the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being the land comprised in the Certificate of Title registered at Volume 1373 Folio 104 of the Register Book of Titles.
- (b) ALL THAT PARCEL OF LAND known as Number Sixty-eight Caledonia Road situate at Mandeville in the Parish of Manchester containing by survey Three Roods Thirty-one Perches and Three Tenths of a Perch of the shape and dimensions and butting as appears by the plan thereof hereunto

annexed and being the land registered at Volume 1369 Folio 174 of the Register Book of Titles.

(c) ALL THAT PARCEL OF LAND part of Caledonia known as Number Seventy Caledonia Road Mandeville in the Parish of Manchester registered at Volume 1123 Folio 809 of the Register Book of Titles.

(2) An injunction to restrain Jamaican Redevelopment whether by its servants and or agents from entering onto Lewstan's property registered to wit ALL THAT PARCEL OF LAND part of Caledonia in the Parish of Manchester containing by estimation two Acres be the same more or less and butting westerly on land in the possession of Alexander Hall and on the other side on public roads and being the whole of the land registered at Volume 132 Folio 24 of the Register Book of Titles and from removing therefrom transformers owned by Lewstan which are not the subject of any mortgage.

17. An interim injunction which was sought ex parte was first granted on the 2nd October 2006 and this injunction has subsequently been extended on dates when the matter has been before the court and the hearing adjourned.
18. There have been a number of Affidavits filed herein on both sides. Mr. Crafton Miller on behalf of the Claimants has argued that the injunctions ought to be granted until trial. He submitted that the principles which ought to guide the court in determining whether or not to grant injunctive relief are those laid down by Lord Diplock in the well-known decision of the House of Lords in **American Cyanamid Co. Ltd. v. Ethicon** [1975] 1 All E.R. 504 at 510 (c) - 511(f).
19. I summarize the guidelines set out in **American Cyanamid** as follows: -

- (a) Firstly the court must consider whether there is a serious issue to be tried. All that needs to be shown is that the Claim is not frivolous or vexatious. Unless the material available on the hearing of the application for interlocutory injunction fails to disclose that the Claimant has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
- (b) Once there is a serious issue to be tried, the court should then go on to consider the balance of convenience, including the respective adequacy of damages in compensating either party and the ability of the other party to pay such damages.
- (c) Where there is doubt as to the adequacy of the parties respective remedy in damages the court must go on to consider whether other aspects of the balance of convenience lie in favour of granting or refusing the injunction.
- (d) If the other factors are equally balanced then it is prudent to preserve the status quo.
- (e) If the extent of the uncompensatable disadvantages to each party would not differ widely, it may not be improper to take into account the relative strength of each party's case in tipping the balance of convenience. This should only be done where the evidence as to which there is no credible dispute demonstrates that the strength of each party's case is disproportionate to that of the other.

- (f) In addition there may be other special factors to be taken into consideration in the circumstances of particular cases.
20. Mr. Miller submits that there are serious issues to be tried and he submits that the claim is neither frivolous nor vexatious. He submits that damages are not an adequate remedy for the Claimants. On the other hand, he continues, damages would be an adequate remedy for Jamaican Redevelopment and that the Claimants would be in a position to pay damages, if any damages were to be found due to Jamaican Redevelopment in the event that the interlocutory injunction should prove to have been wrongly granted. Mr. Miller submits that the balance of convenience is in favour of the Claimants for a number of reasons and he submits that the preservation of the status quo by restraining the mortgagee Jamaican Redevelopment from exercising powers of sale pending the resolution of the issues arising would best suit the interest of justice.
21. Mrs. Champagne on behalf of Jamaican Redevelopment has raised the issue of the Claimants not having clean hands. She submits that when the Claimants made their ex parte application they were guilty of material non-disclosure. In particular, it is submitted that the Claimants attempted to mislead the court to believe that they were likely to be able to settle the debt by a substantial award which they expected to receive shortly from the Jamaica Public Service "J.P.S.". Mrs. Champagne submits that this is not so on the facts and evidence and, at its highest, a settlement with the J.P.S. is something that Jamaica Transformer has been pursuing for years and there is no real deadline for these negotiations, such as they are. Further, Jamaican Redevelopment alleges that Jamaica Transformer dishonestly removed \$500,000.00 from Jamaica Transformer's account at the Jamaica National Building

Society after it became aware of the appointment of the Receiver. The Claimants have denied these allegations.

22. Mrs. Champagne has argued that there is no serious issue to be tried. She goes on to submit that if however the court were to find that there is a serious issue to be tried, damages would be an adequate remedy for the Claimants. She submits that Jamaican Redevelopment would be in a position to pay any such damages. If the court does not take the view that damages would be an adequate remedy for the Claimants, then Mrs. Champagne goes on to concede that damages would be an adequate remedy for Jamaican Redevelopment. However, she submits that the Claimants would not be in a position to pay such damages. This she says is amply demonstrated by the fact that they have been in default and delinquent in repaying their indebtedness over many years.
23. Jamaican Redevelopment's Attorneys submit that in the event that there is doubt as to the adequacy of damages, the balance of convenience lies in favour of not restraining Jamaican Redevelopment in the exercise of its power of sale. Jamaican Redevelopment is entitled to be repaid the sums outstanding and the Claimants do not have the means to repay. It should therefore be allowed to sell the property at public auction as it was about to do when the Claimants obtained the first interim injunction. If the property is sold, Jamaican Redevelopment would then account to the Claimants for any sums over and above the debt owed to it.
24. If the court finds that the injunction should be granted restraining the exercise of the power of sale, Mrs. Champagne submits that the restraint must be on the terms that the Claimants pay into court forthwith the sum of \$92,953,113.38. In that regard, Jamaican Redevelopment relies upon a number of cases, including the well -

known Jamaican Court of Appeal decision **S.S.I. (Cayman) Ltd. et al v. International Marbella Club S.A.** decided February 6, 1987.

25. Other than seeking permanent injunctive relief in respect of the same matters covered in the injunctive relief sought until trial in the instant application, the Fixed Date Claim Form filed on behalf of the Claimants seeks the following:-
- a. A declaration that the sum of Ninety – Two Million Nine Hundred and Fifty-three Thousand One Hundred and Thirteen dollars and thirty eight cents (\$92,952,113.38) claimed by the Defendant as being owed under mortgage #1005477 is comprised of excessive and exorbitant interest charges and penalties never agreed upon between the Claimants and Workers and are therefore illegal.
 - b. An accounting of all monies paid by the 1st and 2nd claimants on account of the debt.
 - c. A detailed statement of account showing the principal and interest due if any.
26. At paragraph 20 of the Claimant's submissions, they contend that there are a number of issues which arise for determination which cannot be resolved at this stage, in particular:-
- (i) What is the extent of the 1st Claimant's indebtedness to the Defendant?
 - (ii) Has the Defendant applied illegal, excessive or exorbitant interest rates to the 1st Claimant's account?
 - (iii) Are the penalties charged excessive and exorbitant?
 - (iv) Was the Defendant entitled to compound or otherwise capitalize interest as of January 19, 2006 under the mortgage?

- (v) Whether the Receiver has removed and or destroyed the 2nd Claimant's property from the mortgaged premises at 68 - 72 Caledonia Road and the 2nd Claimant's property at 73 Caledonia Road.
- (vi) If so to what extent is the Defendant responsible for the actions of the Receiver.
- (vii) If the items allegedly removed or destroyed by the Receiver have been so removed or destroyed has the Defendant Debenture holder's debt been satisfied.
- (viii) Whether and/or to what extent the Receiver acting on behalf of the Defendant is responsible for the spillage of oil on 73 Caledonia Road.

The application to restrain Jamaican Redevelopment from exercising Powers of Sale under the Mortgage

Issues (i) to (iv)

27. I now turn to examine the matters raised. Are there serious issues to be tried? In other words are the issues not frivolous or vexatious.

In the first place, there is the question whether the Claimant's are substantially indebted to Jamaican Redevelopment. In 1997, the amount of the Jamaica Transformer indebtedness to Workers was stated to be \$24,600,625.00 at simple interest of 45% per annum.

28. I have examined the Affidavits and the letters and documents exhibited thereto. I should indicate here that I am fully appreciative and cognizant of Lord Diplock's stricture set out in **American Cyanamid** that it is no part of the court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult points of law which call for detailed argument and

in-depth consideration. However, this obviously does not mean (and I hardly think that Lord Diplock intended) that the court is not to attempt to understand or examine the parties' respective cases or what is set out in their affidavits in order to say whether there are in fact credible disputes or serious issues to be tried. In **Neville Smith v. Donald Fitz-Ritzon et al** C.L.S 420/1986, delivered February 17, 1987 an unreported decision of Wolfe J., as he then was, upon which the Claimants rely, the type of Affidavit evidence and the issues before the court appear to have been considered by the court to be of a different nature than those which I am about to examine. Similarly, although in **Cayne v. Global Natural Resources plc** [1984] 1 All E.R. 225, at 230 c, cited by the Claimant's Attorneys, Eveleigh L.J. stated that "the mere fact that it is deposed to does not make it incontrovertible," the court went on to look at the Affidavit evidence and to see whether there was supporting material demonstrating serious issues to be tried.

29. Mr. Lewis in his First Affidavit at paragraphs 8 and 11 states that in the letter of January 26 1997 "LL2", the amount due was reflected as \$24,600,625.00 as the Bank had consolidated the principal and interest. However, when one looks at the letter LL2 one sees that the amount stated comes about not because of consolidation, but because to the previous outstanding amount (\$11,320,000.00) was to be added (a) a second guarantee of \$5,190,000.00, (b) a third demand loan of \$6,990,625.00 and (c) the overdraft limit was being increased by \$1,100,000.00 (from \$400,000.00 to \$1,500,000.00). These added facilities exactly account for the difference between \$24,600,625.00 and \$11,320,000.00 which is \$13,280,625.00. Jamaican Redevelopment's lawyers make the point that when the second guarantee of \$5,190,000.00 was eventually called, only

\$4,533,602.40 was required and this is reflected elsewhere. The point here is that although the Claimants have attempted to raise a discrepancy as to what was said to be owed by the Bank, the letter of June 26 1997 does not say that the Bank had consolidated principal and interest and itself sets out how the sum of \$24,600,625.00 is comprised.

30. Further, Mr. Lewis says that by letter dated March 17 1998, LL7, the Bank advised that the sum due, including principal and overdraft facilities was \$12,212,899.86. However, when one reads the plain language of LL7 one sees that the letter refers to total arrears and not total amount due.
31. In addition, there are letters exhibited to para. 26 of Miss Farrow's Affidavit where the Claimants acknowledge their indebtedness, for e.g. letter of May 22, 2000 JF 14 in which the claimant's acknowledge indebtedness of \$44,660,425.73. On the 2nd page of that letter Jamaica Transformer wrote to Finsac stating "Our total indebtedness to the bank stands at Forty-four Million Six Hundred and Sixty Thousand Four Hundred and Twenty-five Dollars and Seventy-three Cents (\$44,660,425.73)." This sum was the sum claimed by Finsac to be outstanding as at 1st May 2000 "JF 9". Jamaica Transformer also made a settlement proposal for settling the outstanding indebtedness by periodic payments.
32. The Claimants really have not said that any payments have been made since that acknowledgment. In paragraphs 6 and 12 of the Third Lewis Affidavit, a challenge to the amount due is being attempted on the basis that payments were made directly by J.P.S. to Workers by arrangement, and that these payments may not have been recorded in establishing the amounts due. As Jamaican Redevelopment's Attorneys submit, that is a new allegation and is not the basis on which the claim was brought. In any event, the acknowledgement by the Claimants of owing in excess of

\$44,660,000.00 by the letters dated May 22 2000, JF13 and JF14, took place at a time when Finsac had taken over the loans and therefore after the alleged payments would have been made to Workers.

33. When one examines the summary sent to the Claimants' Attorneys which is at Exhibit JF9 of Miss Farrow's Affidavit, one sees the breakdown of the Claimant's indebtedness across 5 loan facilities and shows how the sum of \$44,660,425.73 is made up. One can also see in that summary sheet that Jamaican Redevelopment did not start to capitalize interest until January 19, 2006, which is the date of the Notices issued pursuant to the Mortgages. Without capitalizing the sum due as at January 19, 2006 is stated to be \$71,977,697.77. The amount stated to be due as at August 17, 2006 was \$92,953,113.38 which indicates capitalizing of interest as of January 19, 2006.
34. When the statements of account part of exhibit JF9 are examined, it is clear that the interest rate applicable and which has been utilized is that set out in the letter dated June 26, 1997, exhibit L L 2 to the First Lewis Affidavit. That letter is a letter of committment from Workers which was signed by Jamaica Transformer and Lewstan signifying their acceptance of the terms. That interest rate is 45% as agreed to by the Claimants.
35. As I indicated in my judgment in **Karlene Henry and another v. Naviency Burns-Gayle and Another**, 2005 HCV 1971, delivered September 15, 2006, (unreported) and as McDonald-Bishop J (Ag.) indicated in her judgment **Patvad Holdings et al v. Jamaican Redevelopment Foundation Inc. 2006 HCV 01377** delivered March 9, 2007,(unreported) in cases where the issues wholly or partially concern the construction of written instruments or matters of law, the relative strength of each party's case and their prospects of success in the matter is a factor which the court

should not readily ignore when deciding whether it is just to grant interlocutory relief. In this case there are some issues which concern the construction of written documents. I find the views expressed by Sir John Pennicooke in Fellowes & Another v. Fisher [1975] 2 All E.R. 829, at pages 843- 844, provide useful guidance. He stated:

".....the principles laid down by Lord Diplock in (American Cyanamid) do seem to me to present certain difficulties. By far the most serious difficulty, to my mind, lies in the requirement that the prospects of success in the action have apparently to be disregarded except as a last resort when the balance of convenience is otherwise even. In many classes of cases, in particular those depending in whole or in great part on the construction of a written instrument, the prospect of success is a matter within the competence of the judge who hears the interlocutory application and represents a factor which can hardly be disregarded in determining whether or not it is just to give interlocutory relief..... I venture to think that the House of Lords may not have had this class of case in mind in the patent action before them."

36. It is clear that at page 8 of the letter LL2 the defendant is entitled to charge late fees as agreed. At page 8 – the following Clause is set out under the head "Late Payment/Charge Fee:
- "In the event of default by the Borrower in the payment of any sum pursuant to this letter on the date due for payment, the Borrower shall pay a late payment charge/fee for the period from the due date of such payment (after consideration of a grace period of 5 days) at the rate in force at such time by the bank."

37. The Claimants are disputing Jamaican Redevelopment's right to capitalize interest. It is necessary to look at the mortgage instrument #1005477 to see the terms of the mortgage granted and accepted by Lewstan.
38. In the schedule to the Mortgage dated September 8 1997 the mortgagor is stated to be Lewstan, the Borrower is stated to be Jamaica Transformer, and the sum for stamp purposes is stated to be \$24,600,625.00. Original rate of interest is stated to be 45% per annum subject to change from time to time. The rests at which interest is payable is stated to be monthly. Clause 1(a) of the mortgage is in the following terms: -

1. IN CONSIDERATION of the premises and of an initial advance by the Bank to the Borrower at the request of the Mortgagor (the receipt of which is hereby acknowledged) the Mortgagor covenants with the Bank.

(a) To pay to the Bank ON DEMAND all such sums of money as are or shall from time to time hereafter become owing to the Bank from the Mortgagor and/or the Borrower whether in respect of overdraft, monies advanced or paid to or for the use of the Mortgagor and/or Borrower or charges incurred on their account in respect of negotiable instruments drawn, accepted or endorsed by or on behalf of the Mortgagor and/or the Borrower and discounted or paid or held by the Bank either at the Mortgagor's request or in the course of business or otherwise and all moneys which the Mortgagor and/or the Borrower shall become liable to pay to the Bank in any manner or on any account whatsoever and whether any such moneys shall be paid to or incurred by or on behalf of the Mortgagor and/or the Borrower alone or jointly with any person firm or company and whether as principal or surety together with interest at the rate per annum stated as

the Original Rate of Interest in the said Schedule with such rests as are stated in the said Schedule as Rests at which Interest Payable or at such other times as the Bank shall from time to time specify or at such other rates of interest as the Bank shall from time to time charge together also with all usual and accustomed Bank charges. (my emphasis)

39. Jamaican Redevelopment's Attorneys submit that the mortgage allows them to compound interest and that the reference to "rests" at which interest stands to be calculated demonstrates and confirms this, since interest has to be calculated at particular intervals in relation to compound interest, in contrast to simple interest.
40. In my judgment, this is a situation where the court must look at the written Instrument and the law and can hardly ignore the relative strength of each party's case in making a proper assessment whether it is just to grant interim injunctive relief.
41. It appears to me that Jamaican Redevelopment have a strong case for arguing that they are entitled to compound interest pursuant to the mortgage. They also appear to have a strong case for arguing that the interest charged was as agreed and that they are entitled to charge late fees. I am of the view that the strength of Jamaican Redevelopment's case on these issues is disproportionate to that of the Claimants.
42. The Claimants allege that excessive and exorbitant penalties were charged. Jamaican Redevelopment have denied that any penalties were charged (paragraph 24 of Miss Farrow's Affidavit). If by penalties the Claimants mean late fees, then as already discussed, under the agreement between the parties Jamaican Redevelopment through its predecessor Workers is entitled to charge late fees. If by penalties the Claimants mean that the interest rates are

exorbitant, it must be remembered that these are the rates agreed between the parties and that Jamaican Redevelopment is exempt from the Moneylending Act. No question of penalty as opposed to liquidated damages can arise here since what is under consideration is a debt and not a situation of damages for breach of contract.

Questions to do with the Receiver-Issues (v) to (viii)

43. The Claimants filed a 2nd Affidavit by Leslie Lewis on October 19, 2006. In that Affidavit it is being alleged that the Receiver damaged Lewstan's land after the injunction dated October 2, 2006 was served on Jamaican Redevelopment and that Lewstan and another related party have filed suit as a result. i.e. HCV 0369 of 2006. Lewstan now claims damages for approximately \$874,376,089.00 and US\$1,485,634.80 against Jamaican Redevelopment due to the actions of the Receiver.
44. The Receiver Mr. Tomlinson has stated in his Affidavit that he has done nothing wrong, he denies causing damage to Lewstan's property and states that the assets that he has gathered belong to Jamaica Transformer and not Lewstan. He claims to have been so advised by the Claimants' Financial Controller Anthony Lewis, who is also a director and shareholder in Jamaica Transformer. In addition the Receiver states at paragraph 10 of his Second Affidavit that he was granted access to No. 73 Caledonia Road by Anthony Lewis.
45. In their written submissions, the Claimants' Attorneys submit that it would be appropriate to consolidate the claims so that the allegations by both Claimants against Jamaican Redevelopment and the Receiver can be fully ventilated. The Claimants would therefore be seeking to set-off these claims for damages against their indebtedness to Jamaican Redevelopment.

46. Lord Diplock in **American Cyanamid** referred to special features that may have to be taken into account in a particular case before the court. There are in the instant case special features and factors which have to be taken into account because this case concerns an application to restrain the exercise by a mortgagee of powers of sale under a mortgage. A similar point is made by McDonald - Bishop(Ag.) in her judgment in **Patvad Holdings Ltd. et al v. Jamaican Redevelopment.**
47. Many authorities, including **Inglis v. Commonwealth Trading Bank of Australia** (1972) 126 C.L.R. 161, **McLeod v. Jones**[1884] 24 Ch. D. 289, and **S.S.I. (Cayman) Ltd. v. International Marbella Club S.A.** S.C.C.A. no. 57 of 1986, establish the following parameters:
- (a) An injunction will not generally be granted to restrain the exercise by a mortgagee of powers of sale under a mortgage unless the amount of the mortgage debt, if this is not in dispute be paid into court, or unless if the amount is disputed, the amount claimed by the mortgagee to be due is paid into court.
 - (b) The fact that the amount due may be in dispute, or that the mortgagor claims that the mortgagee has not provided proper accounting, are not in themselves grounds for restraining the mortgagee in the exercise of the power of sale.
 - (c) Even where a mortgagor claims to be entitled to set-off against the mortgage debt amounts which he claims as damages against the mortgagee, the rule set out at (a) above, will not generally be departed from.
 - (d) The principles applied in this area gain their characteristics because of the nature of a mortgage as security for a debt.

48. I find the **Inglis** decision most instructive and well-reasoned. Walsh J.'s judgment goes a far way in analyzing the underlying principles and providing a rationale for their existence. An appeal from this judgment was dismissed.
49. In the case before him Walsh J. was considering an application for an interim injunction restraining a mortgagee from exercising its powers of sale until the trial of the action. In the Statement of Claim, the Claimant sought damages against the Defendant mortgagee Bank for breach of contract, defamation, for fraud and for conspiracy. The Claim included a prayer for an order for accounts on the basis of willful default, and a prayer for a declaration that any debt which is claimed by the Defendant to be due for payment by the Claimants to the Defendant is more than counter-balanced by the damages which the Claimants claim from the Defendant. There was also a prayer for a permanent injunction to restrain the Defendant from taking any action on a demand notice issued pursuant to the mortgage. At pages 163-165 Walsh J. states:

It is proved that since that date (the date at which the amount claimed to be due to the Bank is calculated) no payment has been made in respect of that indebtedness. The plaintiffs have not made any offer to pay off the amount which the Defendant claimed to be due under the mortgage or any of it or to pay any sum into court, whether that sum be the amount so claimed or any other amount.... In my opinion, the authorities which I have been able to examine establish that for the purposes of the application of the general rule to which I have referred (see paragraph 47 (a) above), nothing short of actual payment is regarded as sufficient to extinguish the mortgage debt. If the debt

has not been actually paid , the Court will not at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due. The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed.

50. In **Inglis** Walsh J. refused the interlocutory injunction even though the Claimants claimed a set-off of damages and claimed that the Defendant Bank had failed to provide proper accounting to them. He did not exercise his discretion in such a way as to grant the injunction on terms of payment of the sum which the mortgagee claimed to be due into court.
51. At pages 165-166 of the judgment Walsh J. makes the point which is very important when the court is exercising its discretion at the interlocutory stage, that a mortgagee properly exercising its power of sale (and proper exercise includes when the amount due is disputed by the mortgagor), does not by the exercise of the power of sale as such infringe or contravene the mortgagor's proprietary rights. The rights which the mortgagee has are rights which the mortgagor has agreed to accord pursuant to the terms of the mortgage. That is plainly a different factual situation than one where on an interlocutory application a Claimant alleges that its proprietary or other rights have been breached and it may call for the exercise of the discretion in a quite different manner.

52. The decision of Megarry J., which was confirmed by the Court of Appeal in **Samuel Keller (Holdings) Ltd v. Martins Bank Limited** [1970] 3 All E.R. 950, is also of interest on the question of set-off. Walsh J in **Inglis** (p. 165) referred to the passage from Megarry J's judgment where he stated [p. 953)

"Certainly the concept that the appropriation of an unliquidated claim to a mortgage debt by the mortgagor will effect a discharge nisi of that debt seems both novel and awkward. Unless and until the mortgage in this case is discharged in the appropriate way upon actual payment and acceptance of the sum due, I think that the mortgage remains a mortgage, and that the mortgagee is entitled to any surplus proceeds of sale in the hands of the bank up to the amount properly due under the mortgage. A doctrine of the discharge of a mortgage debt by the existence or unilateral appropriation of an unliquidated claim is one to which I give no countenance. I regard it as neither convenient nor just."

53. Having set out the principles which I consider relevant, I will now deal with the matters to be considered. As regards Jamaican Redevelopment's submission that the Claimants have been guilty of material non-disclosure and have not acted with clean hands, the evidence on this aspect of the matter is to my mind ambiguous when I feel that it ought to point plainly in one direction. I am not satisfied on a balance of probability that there was any intentional breach of the Claimants' duties to make full and frank disclosure on the hearing of the ex parte application. I am also not satisfied that there was any bad faith in removing money from the Jamaica National Bank account. This is not a consideration which I am

therefore prepared to take into account in deciding whether to grant the interim injunction until trial.

54. As regards the question whether there are serious issues to be tried, I find as follows:-

(a) There does not seem on the evidence to be any credible dispute as to whether the Claimants are indebted to Jamaican Redevelopment in substantial sums in excess of \$71 million.

As regards the question of compound interest, having looked at the Mortgage Instrument, Jamaican Redevelopment appear to have a strong case for arguing that they are entitled to compound interest from the point when the rights under the mortgage were exercised and the demand letters issued. There is also a sound basis for arguing that Jamaican Redevelopment are entitled to charge late fees. Even if one removes the compound interest from the equation, it does not seem to me that there can be any serious or genuine contest that the Claimants are indebted to Jamaican Redevelopment in substantial sums in excess of \$71 million. In any event, the Claimants cannot with any credibility, particularly having regard to several admissions made by them in correspondence, deny that substantial sums are owed by them to Jamaican Redevelopment.

55. However, if there are serious issues to be tried, in my view, based on the nature of the properties concerned and of the operation carried out by the Claimants, damages would not be an adequate remedy to the Claimants, though I am satisfied that Jamaican Redevelopment would be in a position to pay damages.

56. I am of the view that these parcels of land have special value to the Claimants and damages would not be an adequate remedy even though Lewstan mortgaged the properties, with all the attendant powers of sale. (see pages 59-60 of Spry on "The Principles of

Equitable Remedies," 3rd edition). On the other hand, as Jamaican Redevelopment's attorneys-at-law have conceded, damages would be an adequate remedy for the Defendant. However, I agree with Mrs. Champagne's submission that the Claimants have not by their past management of their loan account or in the present affidavit evidence put forward material to support their assertion that they would be in a position to pay damages.

57. Whilst when one looks at the balance of convenience generally, preservation of the *status quo* would operate in favour of the Claimants in restraining Jamaican Redevelopment from selling the properties, other matters are not evenly poised here. Further, there are special factors in this case which would point in the opposite direction i.e. towards refusal of the interim injunctive relief sought. Even if -

- (a) there are serious disputes as to the amounts owed; or
- (b) Jamaican Redevelopment has not properly accounted to the Claimants and provided proper and detailed statements of account and the Claimants are not therefore sure exactly how much is due, it cannot credibly be disputed that there is a substantial indebtedness under the mortgage, that is to say, that there were advances of money which have not been repaid.

58. Further, the fact that Lewstan may have a claim against Jamaican Redevelopment for damages which it would wish to set-off and claim that it exceeds or at any rate counter-balances Jamaican Redevelopment's claim, is not in and of itself a ground for preventing the mortgagee Jamaican Redevelopment from exercising its rights under the Mortgage Instrument. To rule otherwise would be to greatly reduce and undermine the benefit which Jamaican

Redevelopment has at hand in the form of security for Jamaica Transformer's indebtedness.

59. Though the Claimants have indicated what I think is best described as a hope that resolution of settlement discussions with JPS would likely yield sums from which it would satisfy any debt found to be due and owing to Jamaican Redevelopment, they have not in fact paid any sums to Jamaican Redevelopment since the demand was made, nor have they paid into court or evinced any intention to pay into Court the sum which Jamaican Redevelopment say is outstanding or any sum at all.
60. On the other hand, as Ms Farrow points out at paragraph 32 of her Affidavit, with the Claimants not servicing the debt, while interest continues to accrue (whether simple or compound interest) each day, Jamaican Redevelopment's ability to recover the amount due may well be reduced. This she says is because unless there is a very significant increase in the value of the properties the subject of the mortgage, dependent entirely on fluctuations in the real estate market, it is quite probable that the amount owing may increase at a rate greater than changes that might occur in the expected net proceeds of sale.
61. In all the circumstances, it appears to me to be neither just nor convenient for me to exercise my discretion in favour of the Claimants. I am of the view that it is appropriate to dismiss the application for injunctive relief restraining Jamaican Redevelopment from exercising its power of sale.
62. Even if I am wrong in deciding to exercise my discretion in favour of refusing the injunction, it is clear that the only basis upon which the Claimants could restrain Jamaican Redevelopment from exercising its powers of sale under the mortgage would be on terms that the Claimants pay into court what Jamaican Redevelopment say is due. There is nothing in the circumstances of this case that

would cause it to fall outside the operation of the general principles as summarized in Marbella.

The second Injunction in relation to No. 73 Caledonia Road

63. The Claimants have said that the Receiver has wrongly entered on No. 73 and committed trespass and damaged Lewstan's land and property, including transformers belonging to Lewstan. The Receiver says that he was given permission to enter No. 73 by Anthony Lewis and that Anthony Lewis told him that the transformers belong to Jamaica Transformer. The Receiver claims that he has done nothing wrong and that as Receiver, his responsibility includes securing and protecting all the property and assets of the debenture holder Jamaican Redevelopment.
64. It is the Claimants case that only Mr. Lewis Senior had keys to the premises of 73 Caledonia Road. The Claimants have not produced any proof that Lewstan owns the transformers and not Jamaica Transformer. It is also clear that there is a close connection and relationship between Jamaica Transformer and Lewstan and that Mr. Lewis Senior is the principal and controlling shareholder of both companies. However, in my judgment there are issues to be tried which are neither frivolous nor vexatious.
65. When I look at the acts which the Claimants complain of and the adequacy of damages, I take the view that damages would be an adequate remedy for each party. However, whereas Jamaican Redevelopment would be in a position to pay any damages found due, I do not think that the same can justifiably be said of the Claimants.
66. In accordance with the principles set out in American Cynamid the adequacy of damages for the Claimants having been determined in the affirmative, that should be the end of the matter. However, if I am wrong about the question of the adequacy of damages, I would go on to look at the balance of convenience. I

find that the balance of convenience does not favour the grant of the injunctive relief sought and that it is neither just nor convenient in all the circumstances to restrain Jamaican Redevelopment in the manner set out at Paragraph 2 of the Application for Court Orders.

67. The Application for Court Orders dated 2nd October 2006 is therefore dismissed in its entirety.
68. Costs to be Costs in the Claim. Certificate for 1 Counsel granted.