In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016: Nos 158, 159, 160

2016: No 158. In the matter of a mortgage dated 15th February 2006 made between Dr Jewel Landy and Shyvonne Helaine Robinson and Arthur Samuel Winfield Ebbin as Trustees of the JEM Trust of the first part (the Mortgagor) and Dr Jewel Landy of the second part (the Guarantor) and Clarien Bank Limited (formerly Capital G Bank Limited) of the third part (the Mortgagee)

2016: No 159. In the matter of a collateral charge dated 20th June 2014 made between Shyvonne Helaine Robinson and Arthur Samuel Winfield Ebbin as Trustees of the JEM Trust of the first part (the Mortgagor) and Clarien Bank Limited (formerly Capital G Bank Limited) of the second part (the Mortgagee) and Dr Jewel Landy of the third part (the Borrower)

2016: No 160. In the matter of a mortgage dated 4th June 2010 between Westport Trust Company Limited as Trustees of the JEM Trust and Grape Bay Beach Hotel Limited of the first part (the Mortgagor) and Clarien Bank Limited (formerly Capital G Bank Limited) of the second part (the Mortgagee) and Dr Jewel Landy of the third part (the Guarantor)

BETWEEN:-

CLARIEN BANK LIMITED
(formerly Capital G Bank Limited)

Plaintiff

-and-

(1) SHYVONNE HELAINE ROBINSON
(as Trustee of the JEM Trust)
(2) ARTHUR SAMUEL WINFIELD EBBIN
(as Trustee of the JEM Trust)
(3) DR JEWEL LANDY
(as former Trustee of the JEM Trust)
(4) WESTPORT TRUST COMPANY LIMITED
(as former Trustee of the JEM Trust)
(5) JEWEL HOTEL AND SPA LIMITED
(formerly Grape Bay Beach Hotel Limited)
(6) DR JEWEL LANDY

Defendants

JUDGMENT

(In Court)

Mortgage possession action – Order 88 of the Rules of the Supreme Court 1985 – whether the guarantor should have conduct of the sale of a mortgaged property – whether there was a loan made pursuant to an enforceable contract – if so, whether the lender had contracted itself out of its right to demand repayment of the loan –whether the lender had established an event of default – whether there was an enforceable guarantee – whether the mortgage lender breached the terms of a cash hold agreement supporting the loan guarantee – whether the Court had jurisdiction to grant relief from forfeiture

Date of hearing: 28th August 2017
Date of judgment: 16th October 2017

Mr Kevin Taylor and Mr Kai Musson, Taylors, for the Plaintiff
Mr Michael Smith for the First and Second Defendants
Mr Delroy Duncan for the Fourth Defendant
Mr Martin Johnson for the Third and Sixth Defendants
The Fifth Defendant did not appear and was not represented

Introduction

1. This is the judgment on the combined hearing of three related actions in which the Plaintiff, Clarien Bank Limited ("the Bank"), sought money judgments, possession orders and other relief in relation to monies which it had loaned to the Trustees of the JEM Trust ("the Trust") on the security of various mortgages. Although there was no order for the consolidation of these actions, for purposes of this judgment I have numbered the Defendants one through six although not every Defendant appeared in each action.

2. The Trustees from time to time were the First through Fourth Defendants. The Fifth Defendant, Jewel Hotel and Spa Limited (formerly Grape Bay

Beach Hotel Limited), was a joint mortgagor for one of the loans. Dr Jewel Landy ("Dr Landy"), the Sixth Defendant, who is a beneficiary of the Trust, provided guarantees for all the loans. Save where the context indicates otherwise, references in this judgment to Dr Landy by name are references to her in her personal capacity and not as a Trustee of the Trust.

3. The Trust was established by a Trust Deed dated 8th March 2004 between Dr Landy as settlor and Dr Landy and the First and Second Defendants as Trustees. Schedule A of the Trust Deed gave the Trustees powers to invest and manage, including in relation to land and buildings; borrow; charge assets; and guarantee and discharge debts and other liabilities.

4. The initial Trustees were the First through Third Defendants. By a Deed of Retirement and Appointment of a New Trustee made on 26th May 2010 they retired and the Fourth Defendant was appointed in their stead. By a Deed of Appointment and Retirement of Trustees made on 16th December 2013, the Fourth Defendant retired and the First and Second Defendants were reappointed as Trustees. They continue to hold that position.

5. Dr Landy, besides being the settlor and a beneficiary of the Trust, is also the protector. In her capacity as guarantor she has joined issue with the Bank on a number of issues and is the only Defendant to contest any of its claims. The present and former Trustees take a neutral position and will abide by whatever orders the Court makes. The Fifth Defendant did not appear and was not represented.

2016: No 158

6. By a credit facility letter dated 26th October 2005 ("CFL/158"), the Bank offered to lend the First and Second Defendants $1.5 million. The purpose of the loan was to purchase the property known as "Wilcote", 5 Sunny Lane, St George's. On 4th November 2005, the First and Second Defendants as borrowers and Dr Landy as guarantor signed CFL/158 stating in writing that they accepted its terms. Although Dr Landy was also a Trustee she was not named in the facility letter as a borrower. The Trustees' liabilities were

expressly limited to the value of the assets of the Trust. Pursuant to the terms of CFL/158, the First and Second Defendants drew down the money on 15th February 2006 and "Wilcote" was conveyed to them on the same date.

7. The loan was secured by: (i) a registered first legal mortgage, guaranteed by Dr Landy, over "Wilcote", stamped to a value of $1.5 million; and (ii) a guarantee from Dr Landy for $431,250.00, supported by an equitable mortgage over her property at 8 Lusher Lane, Warwick. The legal mortgage and the guarantee were both dated 15th February 2006. The legal mortgage was signed by the parties to the deed including Dr Landy, who signed as both a Trustee and the guarantor.

8. Clause 2(a) of the mortgage deed provided that the mortgage was repayable on demand. Clause 4(a) gave the Bank the power to sell the mortgaged property in the event that the mortgagor failed to comply with any of the terms and conditions in the mortgage deed. By clause 7(a) Dr Landy agreed that if the mortgagor defaulted on any payment of principal or interest due under the mortgage deed then as guarantor she would pay the outstanding amount upon demand by the Bank.

9. The loan was repayable in monthly instalments over 25 years at a variable rate of interest. As of 15th February 2006 the interest rate was 8 per cent per annum and the amount of the monthly instalments was $11,578.00.

10. The loan fell into arrears. The Bank's case is that as of 24th August 2017 the amount outstanding was $1,269.292.41. This comprised principal of $1,059,269.84; interest of $206,177.07; late fees of $2,100.00; and loan fees of $1,745.50. Interest of 6.5 per cent per annum continued to accrue at a daily rate of $203.15.

11. The Bank sent demand letters dated 22nd February 2016 to the First through Third Defendants as Trustees and Dr Landy as guarantor seeking repayment of the loan in full. It commenced proceedings to recover the mortgage debt by way of an Originating Summons dated 28th April 2016.

12. The Bank seeks money judgments against the First through Third Defendants as mortgagors and Dr Landy in her personal capacity as guarantor, and an order for possession of the mortgaged property. The Bank also seeks an order for liberty to enforce the mortgage by sale, although in light of the terms of the mortgage deed such an order is not strictly necessary, as for similar reasons it is also not strictly necessary in 2016: No 159 and 2016: No 160.

2016: No 159

13. By a credit facility letter dated 3rd February 2014 ("CFL/159"), the Bank offered to lend Dr Landy $200,000.00. She is a dentist, and the purpose of the loan was to fund the acquisition of dentistry equipment and provide up to $50,000.00 for office outfitting, with the remainder of up to $30,000.00 to be used as working capital. On 18th February 2014, Dr Landy signed CFL/159, stating in writing that she accepted its terms. So did the Second Defendant on 19th February 2014 and the First Defendant on 26th February 2014. Pursuant to the terms of CFL/159, Dr Landy drew down loan monies in the aggregate sum of $91,724.91.

14. The loan was secured by: (i) a promissory note from Dr Landy in the amount of the loan; and (ii) a guarantee from the First and Second Defendants, limited to the value of the assets of the Trust, for any default on the part of Dr Landy, supported by a collateral charge over the property known as Unit A, 14 Dundonald Street, Hamilton, stamped to a value of $200,000.00. The guarantee and the collateral charge were both dated 20th June 2014. The collateral charge was signed by the parties to the charge including Dr Landy as borrower.

15. Clause 2(a) of the collateral charge provided that the mortgage was repayable on demand. Clause 4(a) gave the mortgagee the power to sell the mortgaged property in the event that the mortgagor failed to comply with any of the terms and conditions in the collateral charge.

16. The loan was repayable in monthly instalments over 12 months, commencing from the date of first draw down. The first two payments were interest only, at a variable rate which as of 20th June 2014 was 6.5 per cent per annum. They were to be followed by nine monthly payments of $4,050, comprising both principal and interest, with a final balloon payment for the outstanding balance on the first anniversary of the loan. Renewal of the loan was subject to renegotiation.

17. The loan fell into arrears. The Bank's case is that as of 24th August 2017 the amount outstanding was $96,462.35. This comprised principal of $81,034.70; interest of $14,902.65; and late fees of $525.00. Interest of 6.5 per cent per annum continued to accrue at a daily rate of $15.54.

18. The Bank sent demand letters dated 22nd February 2016 to the First and Second Defendants as Trustees and Dr Landy as borrower seeking repayment of the principal and interest due under CFL/159 in full. It commenced proceedings to recover the mortgage debt by way of an Originating Summons dated 28th April 2016.

19. The Bank seeks money judgments against Dr Landy as borrower and the First and Second Defendants as guarantors, and orders for the possession and sale of the mortgaged property.

2016: No 160

20. By a credit facility letter dated 25th May 2010 ("CFL/160"), the Bank offered to lend the Fourth and Fifth Defendants $3.675 million. The purpose of the loan was to fund the purchase of 100 per cent of the shares in the Fifth Defendant, which owned the property known as Grape Bay Hotel ("the Hotel") at 55 White Sands Road, Paget. On 26th May 2010 CFL/160 was signed for and on behalf of the Fourth and Fifth Defendants as borrowers and by Dr Landy as guarantor. The Trustee's liabilities were expressly limited to the value of the assets of the Trust. The signatories to CFL/160 on behalf of the Fifth Defendant included Dr Landy. I am satisfied that pursuant to the terms of CFL/160 the loan monies were in fact drawn down.

21. The loan was secured by: (i) a registered first legal mortgage, guaranteed by Dr Landy, over the Hotel, stamped to a value of $3.675 million; (ii) 100 per cent of the shares in the Fifth Defendant, which were owned by the Fourth Defendant, to be assigned to the Bank as nominee; and (iii) a cash deposit of $955,000.00 held in the name of Dr Landy in a restricted account with the Bank and supported by a cash hold agreement. The mortgage deed was dated 4th June 2010 and signed by the parties to the deed including Dr Landy as guarantor. There was no evidence before the Court that the Fifth Defendant holds any asset other than the Hotel.

22. Clause 2(a) of the mortgage deed provided that the mortgage was repayable on demand. Clause 4(a) gave the mortgagee the power to sell the mortgaged property in the event that the mortgagor failed to comply with any of the terms and conditions in the mortgage deed. By clause 7 Dr Landy agreed that if the mortgagor failed to carry out any of its obligations under the mortgage deed then as guarantor she would carry them out.

23. The mortgage term was two years, subject to renegotiation. Interest on the loan was charged at a variable rate, which as of 4th June 2010 was 6 per cent per annum. It was payable in monthly instalments of 24 months, commencing one month after the date of draw-down. After that the payments were subject to renegotiation.

24. The loan fell into arrears. The Bank's case is that as of 24th August 2017 the amount outstanding was $3,372,745.71. This comprised principal of $2,870,097.69; interest of $470,130.31; and loan fees of $32,517.71. Interest continued to accrue at a daily rate of $550.43.

25. The Bank sent demand letters dated 22nd February 2016 to the Fourth and Fifth Defendants and to Dr Landy seeking repayment of the principal and interest due under CFL/160 in full.

26. The Bank seeks money judgments against the Fourth and Fifth Defendants as mortgagors and Dr Landy in her personal capacity as guarantor, and orders for the possession and sale of the mortgaged property.

27. On the face of it, and subject to the defences raised by Dr Landy, the Bank is contractually entitled to the relief which it seeks in all three actions.

Defences

28. Dr Landy swore affidavits in which she accepted that she was personally responsible for repayment of the loans in 2016: No 158 and 2016: No 160, and admitted that she had borrowed the loan monies in 2016: No 159. However a number of matters remained in contention. Martin Johnson, who appeared for Dr Landy, appeared not to accept that in 2016: No 160 the Bank was entitled to any relief at all.

Preliminary points

29. Mr Johnson raised several points in his written submissions which were said to be common to all three actions but which he sensibly chose not to pursue at the hearing: (i) that the instrument ostensibly establishing the Trust was not known to law; (ii) that the Bank did not issue written demands prior to commencing proceedings; and that (iii) in breach of Order 88(4) of the Rules of the Supreme Court 1985 ("RSC") the affidavits in support of the originating summonses failed to give particulars of every person who, to the best of the Plaintiff's knowledge, was in possession of the mortgaged properties.

30. To deal with each point briefly: (i) The Court was not given any reason to doubt the validity of the Trust; (ii) the Bank did issue written demands prior to commencing proceedings – they are mentioned above and were exhibited to an affidavit sworn by Timothy Secord, a Senior Credit and Restructuring Manager at the Bank; and (iii) in each action the originating summons was supported by an affidavit of Paul Thompson, a Consultant at the Bank, which expressly addressed who was in possession of each of the mortgaged properties: the First through Third Defendants in the case of "Wilcote"; the First and Second Defendants in the case of Unit A, 14 Dundonald Street; and the Fourth and Fifth Defendants in the case of the Hotel. Subsequently Mr

Secord stated in his said affidavit that the Fifth Defendant had leased the Hotel to Ernst & Young and that they had been notified of these proceedings.

31. Dr Landy filed affidavit evidence on an interlocutory application alleging that she had suffered loss due to the Bank, in breach of contract, blocking two accounts to which she was a signatory. The Bank filed evidence in reply asserting that it was entitled to block the accounts under the terms of the relevant CFLs. Mr Johnson indicated that as the accounts have now been unblocked he is instructed not to pursue these allegations further. Therefore I need not rule upon them.

2016: No 158

Should Dr Landy have conduct of the sale of "Wilcote"?

32. Dr Landy accepted that "Wilcote" would have to be sold. However Mr Johnson submitted that the Bank had agreed that Dr Landy should have conduct of the sale, and that in reliance upon that agreement Dr Landy had spent money doing up the property. Mr Johnson relied upon an email exchange between Dr Landy and Mr Thompson which took place on 6th and 8th October 2016.

33. By an email dated 6th October 2015, Mr Thompson wrote:

"*Do you have any news for us about listing the Sunny Lane property?*"

34. By an email dated 8th October 2015, Dr Landy replied:

"*When Crystal [a realtor] came to view the house in St George I asked her to be the agent. She told me that she would come back when Mr. Brown [a member of the Bank's staff] returns to discuss the required repairs that are required. I will contact Mr Brown today (and copy you and Martin) and organize for him to come look at the property with both me and Chrystal. Chrystal understands that I too am showing the property.*"

35. By an email dated 8th October 2015, Mr Thompson responded:

"*With respect to the St. George's property, I think there might be a misunderstanding of Shawn's role with the bank. When he was going to come by a couple of months ago, it was on the basis that he was going to be in the area anyway, and he would be willing to offer his opinion on what repairs/upgrades might help in terms of getting the best return for your money. But that is not his job, and you should not be holding doing whatever work you feel is required and getting the property listed. I know Shawn is a very busy guy these days and I can't predict when he will next be out to the east end.*"

36. This email exchange does not contain any representation that if Dr Landy, who in her personal capacity was not a party to the mortgage deed, did up the Hotel and got it listed then the Bank would not seek a possession order. She spent money doing up the Hotel not on the faith of any representation by the Bank but to facilitate its sale. That purpose will be served irrespective of whether conduct of the sale lies with her or alternatively with the Bank.

2016 No: 159

Provision of further information

37. Dr Landy did not raise any further defences in relation to 2016 No: 159 but she did seek certain information from the Bank about the loan which I understand the Bank is willing to provide. I need not address this action further.

2016 No: 160

Was there a loan made pursuant to an enforceable contract?

38. Mr Johnson submitted that if the Bank did pay $3,372,745.71 to the Fourth and Fifth Defendants then the money was irrecoverable (subject, no doubt, to a possible claim for unjust enrichment) because it was not a loan made pursuant to an enforceable contract. This submission was founded upon a provision in CFL/160 which read:

"*NOTICE OF DRAWDOWN*

All documentation, see Addendum, supporting this borrowing must be completed prior to disbursement of funds and be in form and substance satisfactory to the Bank."

39. Mr Johnson submitted that not all the documentation identified in the Addendum was completed prior to the disbursement of funds. He argued that: (i) there was therefore no evidence of the debt; and (ii) there was no completion and therefore no contract. This was notwithstanding that, as noted above, his client had sworn an affidavit in which she admitted that there was a loan:

"*I accept that I am personally responsible for the repayment of the loan as per the terms of the Facility Letter dated 25th may, 2010 and the Mortgage Deed dated the 4th June 2010.*"

40. The missing documentation was said to comprise:

(1) A registered first legal mortgage. Mr Johnson did not dispute the existence of a legal mortgage, which would have been difficult, given that the mortgage deed was exhibited by Mr Thompson. Rather, he disputed that the mortgage had been registered. However the Bank produced a copy of the mortgage deed stamped:

"*RECORDED AND REGISTERED IN THE OFFICE OF THE REGISTRAR-GENERAL (RECORDING OF DOCUMENTS) ACT, 1955*

THE 18 DAY OF JUNE 2010

IN THE BOOK OF MORTGAGES

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[SIGNED] REGISTRAR GENERAL"

On the strength of this evidence I am satisfied that the mortgage deed was in fact registered.

(2) A guarantee. This was not a free standing document but was contained in paragraph 7 of the mortgage deed.

(3) A cash hold agreement. This was exhibited by Mr Secord. It was signed by Dr Landy on 8th March 2011, although by that time the loan monies were probably already drawn down.

(4) Share certificate and a signed share transfer form assigning the shares in the Fifth Defendant to the Bank to hold as nominee. The Bank has not produced these documents. By a letter dated 18th February 2016 its current attorneys, Taylors, wrote to Trott & Duncan, the law firm which had acted for the Bank in relation to the loan granted to the Fourth and Fifth Defendants, requesting copies of the documents. Trott & Duncan replied that they had been unable to locate them. However, by a letter dated 28th May 2010, Trott and Duncan had advised the Bank that the loan facility was supported by the assignment to the Bank of 100 per cent of the shares of the Fifth Defendant, supported by the share certificate and a duly signed transfer form, and that they had examined an executed copy of the share transfer form. In light of that letter, I am satisfied that the share certificate and a signed share transfer form were lodged with Trott & Duncan prior to the disbursement of funds.

41. I am therefore satisfied that all the documentation in the Addendum was completed prior to or, in the case of the cash hold agreement, most likely shortly after, the disbursement of funds. It was evidently all completed to the Bank's satisfaction. But even if it had not been completed, that would not have availed Dr Landy.

42. The requirement to complete the documentation listed in the Addendum was for the benefit of the Bank. On Dr Landy's case the Bank waived the requirement that it be completed. The waiver was by mutual agreement, as evidenced by the fact that the borrowers, or one or other of them, drew down the loan monies. Mr Thompson stated on affidavit that the loan monies were drawn down and Mr Johnson did not apply for leave to cross-examine him to challenge this assertion. Moreover, Dr Landy in her affidavit evidence did not dispute that the loan monies had been drawn down. Indeed, as stated above, she accepted that she was personally responsible for repayment of the

loan although she took issue with the amount of interest claimed by the Bank. As Lord Toulson, with whom a plurality agreed, stated in AIB Group v Mark Redler & Co [2015] UKSC 58 at para 74, when considering whether the Court of Appeal had correctly applied the reasoning of an earlier House of Lords decision to the facts of the mortgage transaction before the UK Supreme Court:

> "*...as a commercial matter the transaction was executed or 'completed' when the loan moneys were released to the borrowers. At that moment the relationship between the borrowers and the bank became one of contractual borrower and lender, and that was a fait accompli.*"

43. In any event, CFL/160 contained an agreement by the Fourth and Fifth Defendants and Dr Landy to provide security for the loan. That security was in fact provided by way of separate agreements – the mortgage deed, including the guarantee, and the cash hold agreement – upon which the Bank could sue without having to rely upon CFL/160.

44. In the premises I am satisfied that the Fourth and Fifth Defendants entered into a contract with the Bank under which they borrowed $3.675 million and that they are contractually liable to the Bank for the repayment of the principal sum together with interest.

If there was an enforceable loan contract, had the Bank contracted itself out of its right to demand repayment?

45. Mr Johnson submitted that the Bank, by entering into negotiations to restructure the mortgage loan rather than demanding repayment immediately upon termination of the fixed two year term, had somehow contracted itself out of its right to demand payment and realise its security when the negotiations broke down.

46. He relied first upon the principle of "holdover" in the law of landlord and tenant, which he submitted was applicable by analogy, and referred me to Abbeyfield Newcastle Upon Tyne Society Limited v Newcastle City Council [2014] EWHC 2437 (Ch). The case concerned a "pre-placement

agreement" ("PPA") between a local council and a care provider for the provision of accommodation in residential care homes. The issue was the rate per patient payable under the PPA by the council once the PPA expired. The council relied upon the principle of "holdover" to argue that pending the negotiation of a new PPA the rate payable under the old one should remain in force. Rejecting this argument, at para 31 Norris J explained the principle thus:

"*I do not agree that the principle of 'holdover' applies. It is a body of law developed in a particular context. Mr Holland referred to Halsbury's Laws 5th ed Vol 62 Landlord and Tenant para 212 (cited by Mr Smithers in his argument) which sets out the basis upon which a tenancy arises by implication in favour of a tenant who holds over after the expiration of his lease, paying rent that is accepted by his landlord. But as that paragraph points out:–*

> *'…where there have been negotiations after the expiration of the old lease with regard to the terms of the tenancy, it is a question of fact whether there has been a consent by both parties to a continuance of the old tenancy and, if so, upon what terms…'*

Here there certainly was negotiation: and it is not possible to read the facts as demonstrating any objective agreement between the parties that the PPA would continue according to its old terms and at its old rate. …."

47. As stated earlier in this judgment, in the present case there was negotiation, but no agreement that the mortgage would be renewed for a further two years. Even if it had been renewed on its old terms, under those terms the Bank would have been entitled to repayment on demand, with or without the borrowers' default. So the principle of "holdover", assuming, for the sake of argument, that it is in principle applicable, does not assist Mr Johnson.

48. Further or alternatively, Mr Johnson submitted that the Bank had acquiesced to any breaches of the mortgage and waived its rights under the mortgage deed to demand repayment. He referred me to Millar v Dickson [2002] 1 WLR 1515 PC, which concerned the right under article 6(1) of the European Convention on Human Rights in criminal proceedings to be tried before an independent tribunal. Lord Bingham stated at para 31:

"*In most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise.*"

49. On the facts of the present case there was no such election by the Bank. The fact that it did not insist upon repayment in full immediately the two year fixed term came to an end, but instead entered into negotiations with Dr Landy to extend the mortgage term, did not amount to a waiver or acquiescence as alleged by Mr Johnson.

50. There is therefore no doubt whatsoever that the Bank is entitled to demand repayment of the mortgage loan.

Has the Bank established an event of default?

51. Mr Johnson submitted that the Bank had failed to establish an event of default on the part of the Fourth and Fifth Defendants. He relied for this submission upon Cukorova Finance Ltd v Alfa Telecom Ltd (Nos 3 – 5) [2016] AC 923 PC. The case concerned a US $1.352 billion loan. The borrowers granted the lender a charge by way of equitable mortgage over their shares in a company. The lender alleged default and purported to appropriate the shares. The borrowers tendered repayment of the loan together with interest and claimed the right to redeem the shares. The lender rejected the tender on the grounds that it had been made too late. The Board held that an event of default had occurred but that they had jurisdiction to, and would, grant relief from forfeiture.

52. The event of default in question arose under clause 17.16 of the loan agreement, namely that there had been an:

"*event or circumstance which in the opinion of [ATT] [ie the lender] has had or is reasonably likely to have a material adverse effect on the financial condition, assets or business of [CFI] [ie the appellant borrower]*".

53. The central issue was whether the lender had established that it had formed the requisite opinion. In Cukorova (No 3) The Board approached the

question thus, in a judgment which was not attributed to a single judge but to which all its members made substantial contributions:

"*54 Turning now to the central issue, namely whether ATT established that it had formed the requisite opinion, it might at first sight seem surprising that ATT be required to prove that it had formed the opinion that the award had had a "material adverse effect on the financial condition, assets or business" of ÇH. This could be said to be a fairly obvious conclusion. After all, it had been expressed and explained in a letter written on behalf of ATT and signed by its sole director, and seems really self-evident on the facts.*

55 While those points undoubtedly would have made it very difficult indeed to challenge the rationality or honesty of the opinion, they do not meet the point that there must be some admissible evidence at the trial to show that the Board of ATT had formed the opinion described in clause 17.16. The clause virtually entitles one contractual party, ATT, to be judge in its own cause on the issue of whether the clause is satisfied, and, if it is so satisfied, has a potentially drastic effect on the economic position of the other contractual parties, ÇH and ÇFI. Accordingly, it is only right that the court has to be convinced by admissible evidence that ATT did in fact form the requisite opinion, as well as being convinced that that opinion was honest and rational."

54. Mr Johnson submitted that, by parity of reasoning, the Bank had not established an event of default because it had failed to adduce evidence that its Board had formed the opinion that there had been one. But this is a flawed analogy. In Cukorova a Board resolution was necessary because the lender's opinion formed an essential ingredient of an event of default. It was not sufficient for the lender to establish at trial that objectively speaking there was an event or circumstance which had had or was reasonably likely to have a material adverse effect etc: the lender had to establish that there was an event or circumstance which *in its opinion* had had or was reasonably likely to have such an effect.

55. In the present case, by comparison, clause 4(a) of the mortgage deed provides that in order to establish an event of default the Bank need only show that, viewed objectively: "*the Mortgagor fail[ed] to comply with all or any of the terms and conditions contained in this Deed*": it need not show that *in its opinion* the Mortgagor failed to comply. This is without prejudice

to the provision in clause 2(a) of the mortgage deed that the mortgage loan is repayable on demand even in the absence of any default.

56. I am therefore satisfied that, for the reasons given earlier in this judgment, the Bank has established an event of default, and that even if it hadn't, it is entitled to demand repayment of the mortgage loan in any event.

Was there an enforceable guarantee?

57. Mr Johnson boldly submitted that Dr Landy had not made any agreement with the Bank to guarantee anything. This was notwithstanding; (i) that, as noted above, his client had sworn an affidavit in which she admitted that she was personally responsible for repayment of the loan; and (ii) the fact of the guarantee at para 7 of the mortgage deed. The guarantee was in the following terms:

"*THE Guarantor hereby covenants with the Mortgagee Company [ie the Bank] that she the Guarantor hereby guarantees the Mortgagee Company that the Mortgagor will carry out fulfil and or perform each and all the said obligations requirements and payments of the Mortgagor as expressly contained in this Mortgage Document AND THAT should for any reason or cause whatsoever the Mortgagor from time to time fail or neglect to carry out fulfil and or perform each and all the said obligations requirements and payments of the Mortgagor under this First Mortgage (including but not limited to any and all moneys whatsoever due hereunder from the Mortgagor to the Mortgage Company) THEN and in any such case she the Guarantor will carry out fulfil and/or perform and be liable to the Mortgage Company for all those said obligations requirements and payments of the Mortgagor under this First Mortgage which the Mortgagor from time to time may have failed or have neglected to carry out fulfil and/or perform.*"

58. Mr Johnson invited the Court to consider the guarantee in the context of a passage from Chitty on Contracts, Twenty Fifth Edition (1983) ("Chitty/25th Ed"). The passage was relied upon by HH Judge Wrightson at first instance in James Graham Ltd v Southgate-Sands [1985] WLR 1044 EWCA at 1047H – 1048 A in a section of the judgment that was criticised by the Court of Appeal. However the Court did not criticise the passage in Chitty/25th Ed and I accept it as an accurate statement of the law. It read:

"*Despite some contradictory dicta in the cases the general approach seems to be that contracts of this kind must be strictly construed in favour of the surety and that no liability is to be imposed on him which is not clearly and distinctly covered by the contract. The reasons for this strict construction are that in general the surety receives no benefit from the contract.*"

59. In the present case, and by way of context, I find that as a beneficiary of the Fourth Defendant, and the person in charge of the Fifth Defendant, Dr Landy did receive a benefit from the loan that she guaranteed. Karen Brown, the Head of Lending at the Bank, gave affidavit evidence that it was Dr Landy who approached the Bank and who negotiated the terms of the loan on behalf of the Fourth Defendant. She signed the loan and mortgage application as the "*main applicant*".

60. An internal email dated 19th May 2010 and memorandum dated 21st May 2010, both generated by the Bank, refer to Dr Landy's plans for the Hotel. Dr Landy gave affidavit evidence that she was the sole signatory for the account set up by the Fifth Defendant to service the loan; complained that when the Bank blocked her from making withdrawals from the account: "*I am being prevented from operating my business*" and stated that she had possession of the Hotel. She stated that in 2012 she renamed the Fifth Defendant as "*Jewel Hotel and Spa Limited*", "*Jewel*" being her first name. I draw the reasonable inference that, whatever the ownership structure, as a matter of practical reality the Hotel was run by Dr Landy as her business.

61. Mr Johnson made a number of points about the guarantee. He complained that the guarantor was not a party to the loan. But Dr Landy did not have to be a party in order to give a guarantee. She was bound by the guarantee because she was a party to the mortgage deed in which the guarantee which she gave was contained. Mr Johnson also complained that the terms of the guarantee were too wide and vague. But in my judgment the terms were perfectly clear. He submitted that the mortgage deed was not executed by anyone whereas it is plain on the face of the document that it was executed under seal by or on behalf of the parties to the deed.

62. Mr Johnson further submitted that Dr Landy gave no consideration for the mortgage. Assuming that were true, it would not be relevant to the question of whether the Bank can enforce the guarantee. The general rule is that a person seeking to enforce a promise must provide consideration for it. See Chitty on Contracts, Thirty Second Edition (2015) ("Chitty/32nd Ed") at para 4-037. The consideration provided by the Bank was the loan monies: a promisee may provide consideration by conferring a benefit on a third party at the promisor's request, even though this does not directly benefit the promisor. See Chitty/32nd Ed at para 4-040. In the present case, as explained above, although Dr Landy was not the borrower she was through "her" business the real beneficiary of the loan.

63. Mr Johnson complained that the consideration was not stated in the guarantee. But as I am satisfied that the Bank provided consideration for the guarantee the fact that the consideration was not expressly acknowledged in the guarantee was immaterial. Although the Bank did provide consideration for the guarantee, it could have enforced the guarantee even if it had not done so. The guarantee formed part of a deed and, so far as common law remedies are concerned, a contract contained in a deed is good even against a party standing to derive no advantage from it. See Chitty/32nd Ed at para 1-136.

64. Mr Johnson's next submission was that Dr Landy only guaranteed the mortgage for the initial two year mortgage term. Once the two year fixed term expired, he submitted, then so too did the guarantee, with the result that Dr Landy was discharged from any subsequent liability. The applicable principle was stated by Lord Porter, giving the judgment of the Privy Council, in Mahant Singh v U Ba Yi [1939] AC 601 at 606 – 607:

> "*A surety is discharged if the creditor, without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time. In each case the ground of the discharge is that the surety's right to pay the debt at any time and after paying it to sue the principal in the name of the creditor is interfered with.*
>
> . . . . .
>
> *Where, however, the debt has not been actually released, the creditor may reserve his rights by notifying the debtor that he does so, and this reservation is effective not only*

where the time of payment is postponed but even where the creditor has entered into an agreement not to sue the debtor. In neither case is there any deception of the debtor, since he knows that he is still exposed to a suit at the will of the surety."

65. Applied to the facts of the present case, the rationale given by the Privy Council for discharging a surety in the event of a binding agreement between the creditor and the debtor to give the debtor time to pay would be somewhat artificial. Dr Landy would derive no benefit from repaying the loan then suing the Fourth and Fifth Defendants in the name of the Bank to recover the debt. Nonetheless that is the law.

66. There was no suggestion that the Bank notified the Fourth and Fifth Defendants that after the two year mortgage term expired it was reserving its rights against Dr Landy. However on 7th September 2012, Dr Landy emailed Anne Burchall, who was at the time a relationship manager for business banking with the Bank: "*asking Cap G to allow the interest only to be continued for another year as the hotel establishes itself*". Ms Burchall emailed a reply later that day to say that as to Dr Landy's request for the interest only period for the loan to be extended, the Bank would need to see the business plan and cash flow projections for the proposed hotel facility.

67. On 13th September 2012, Ms Burchall emailed Theresa Brentano, who was employed by the Fourth Defendant, and copied in Dr Landy, to say that the Bank would extend the credit facility to allow them time to receive the financials and business proposal. She stated that the loan would continue on interest only, and noted that Dr Landy had been advised. Negotiations continued until November 2015, when the Bank proposed an agreement that was not acceptable to Dr Landy. On 27th November 2017, she emailed Mr Thompson to inform him that she would not, under any circumstances, be signing the agreement as it stood. That brought negotiations to restructure the debt to an end.

68. Dr Landy, by her email of 7th September 2012, not only consented to the debtor being given more time to pay but requested more time. But the consent was not given until after the term had expired and therefore, on Mr

Johnson's case, it was given too late. For Dr Landy's right to use the name of the creditor to sue the principal debtor was suspended prior to her consent:

"*... and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefitting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether.*"

See Polak v Everett (1876) 1 QBD 669 *per* Blackburn J at 674, approved by the Court of Appeal of England and Wales at 678.

69. I was not addressed as to whether the surety's consent can be retrospective. (In the context of the present case, the terms "*surety*" and "*guarantor*" can be used interchangeably.) However, I need not rule on the point because for the surety to be discharged the arrangement to give the debtor more time to pay must be binding. In the present case there was no binding arrangement as no further mortgage term was agreed. Even absent default, the Bank could have sued to recover the debt at any time once the original mortgage term had expired. It chose not to do so. That is sufficient to dispose of Mr Johnson's submission.

70. The principle stated by the Privy Council in Mahant Singh v U Ba Yi applies to any agreement between the creditor and the debtor with reference to the contract guaranteed, not only to an agreement to give the debtor more time to pay. See the judgment of the majority given by Cotton LJ in Holme v Brunskill (1877) 3 QBD 495 EWCA at 505. But, although Mr Johnson sought to persuade me otherwise, it would not apply to a breach by the creditor of the contract of guarantee or indeed, in the present case, the cash hold agreement. I shall deal with the principle applicable in that situation later in this judgment.

71. Subject only to one point relating to the cash hold agreement, which I shall deal with below, I am therefore satisfied that the Bank can enforce the guarantee against Dr Landy.

Did the Bank breach the terms of the cash hold agreement?

72. On 28th December 2012 the Bank broke the cash deposit, which comprised $955,000.00 plus accrued interest. It used $108,426.05 to clear the arrears of interest and applied the remaining $859,182.56 towards the principal. The monies applied by the Bank included the interest which had accrued on the cash deposit, although no point was taken on this.

73. Mr Johnson submitted that the Bank breached the terms of the cash hold agreement by applying the cash deposit towards both principal and interest rather than just interest. The resolution of this point depends upon the correct construction of the cash hold agreement, which contained the instructions upon which the deposit was held. They were as follows:

> "*Please accept this as your written authorization to place a hold/lien on above, as marked, Account A/c Id. (9010945386) i/a/o ($955,000.00) to be pledged as security in support of my Guarantee for the loan facility in the name of the above Borrower [The JEM Trust] until written notice of release is given. In the event of default and upon receiving written notice, the account holder hereby agrees that the pledged funds will be used to repay the outstanding obligation.*"

The cash hold agreement stated that the account holder was Dr Landy and that the maturity date was 3rd March 2012. However the monies remained on deposit after that date.

74. The cash hold agreement falls to be construed in its commercial context. This context included CFL/160, which contained a clause dealing with events of default:

> "*Without prejudice to the Bank's rights to repayment on demand … on the occurrence of any Event of Default … the obligations of the Bank to permit draw downs under this Agreement shall cease and if monies have been drawn down, the Bank may at any time thereafter, demand additional security or immediate payment in full of all monies outstanding under this Agreement.*
>
> *The following constitutes an Event of Default:*
>
> *1. any breach of the terms and conditions of this Agreement;*".

75. It will be recalled that the cash deposit was security for an interest only mortgage repayable after two years and that the two year term was subject to renegotiation. As no further term was negotiated, once the two years had expired the mortgage continued on an interest only basis, ie with an interest payment falling due each month but with payment of the principal sum postponed until the mortgage came to an end or the mortgagor and mortgagee agreed otherwise. This was subject to the Bank's right to repayment of the mortgage on demand in the case of an event of default or, absent default, in any event.

76. Mr Johnson submitted that the Bank was not entitled to repayment of any part of the principal until it demanded repayment of the mortgage in full. Consequently it was not entitled to apply the cash deposit towards the principal debt unless and until it had made such a demand or had obtained Dr Landy's consent.

77. Mr Taylor, on the other hand, submitted that in the event of default the Bank could apply the cash deposit towards both principal and interest, even though it had not demanded repayment of the mortgage in full and was content that, save for the application of the balance of the cash deposit to the principal debt, the mortgage should for the time being continue on an interest only basis. In effect, he submitted that the right to demand payment in full included the right to demand payment in part.

78. In approaching this question, I am (not for the first time) guided by the approach of Lord Clarke JSC, giving the judgment of the Court, in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 UKSC at para 21:

> "*The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled*

to prefer the construction which is consistent with business common sense and to reject the other."

79. The wording of the cash hold agreement construed in the context of CFL/160 is in my judgment consistent with both parties' interpretations. However the flexibility of Mr Taylor's interpretation makes better commercial sense than the "all or nothing" construction advocated by Mr Johnson. I am satisfied that it is correct. I therefore find that the Bank did not breach the terms of the cash hold agreement by applying the cash deposit to both principal and interest.

80. Dr Landy complained that the Bank did not give her prior notice of its intention to break the cash deposit as required by the cash hold agreement. The Bank emailed Ms Brentano on 19th December 2012 and again on 24th December 2012 to advise the Fourth Defendant of its intentions but it did not inform Dr Landy. The Bank may have assumed that Ms Brentano would inform Dr Landy as on 29th October 2012 Dr Landy emailed the Bank to state: "*All financial transactions from now going forward will be handled by the trust at my request*". But in my judgment that email was too broad and vague to constitute a waiver of the requirement under the cash hold agreement that the Bank notify the account holder directly.

81. It is not clear when Dr Landy became aware that the cash deposit had been broken and part of it applied towards payment of principal, or who informed her. She knew by 17th April 2013, because on that date she emailed Ms Brentano to say that the person she had been talking with overseas to structure a deal to invest in the Hotel recognised that the Bank had used the cash deposit to reduce the principal. Dr Landy forwarded this email to Ms Burchall on 19th April 2013. Her covering email to Ms Burchall did not suggest that the Bank had acted improperly.

82. Be that as it may, in my judgment the Bank's notification to one of the borrowers of its intention to break the cash deposit did not satisfy the requirement in the cash hold agreement that the Bank notify the account holder, ie Dr Landy. I therefore find that the Bank breached the contractual

notice requirement in that document. However that does not provide a defence to any of the Bank's claims in the present case.

83. The cash hold agreement was separate and distinct from the guarantee. The breach by the Bank of the former did not amount to a breach by the Bank of the latter. Even if it had done, neither the breach of the cash hold agreement by the Bank in failing to give Dr Landy notice, nor the Bank's using the cash deposit to reduce the principal debt, had that in fact been a breach, would have discharged Dr Landy as surety. That is because neither the actual nor the alleged breach went to the root of the contract of guarantee or showed that the Bank intended to repudiate it. See Chitty/32nd Ed at para 45-116 and Skipton Building Society v Stott [2001] QB 261 *per* Evans LJ at para 22.

Does the Court have jurisdiction to grant relief from forfeiture?

84. Mr Johnson submitted that the Court has jurisdiction to grant the Fourth and Fifth Defendants relief from forfeiture and that it should exercise this jurisdiction in their favour. He relied upon minority judgment of Lord Neuberger PSC in Cukorova (No 4) at para 97:

> "*First, … the intervention of equity in a case such as this is simply to extend the mortgagor's time for repayment in order to enable it to redeem the security. The right to redeem may have gone as a matter of common law contract, but it has survived in equity, and equity prevails over the common law, and therefore the time for repayment is extended. It is inherent in that extension that the rest of the contractual arrangements must be treated as continuing during that period. The notion that, every time that the equitable right to redeem is successfully invoked after the mortgagee has appropriated or foreclosed on the charged property, the court can simply do whatever it thinks just, seems to me to demonstrate a fundamental misunderstanding of the role of equity in the context of commercial arrangements. While equity developed principles to mitigate some of the harsher effects, and to remedy some of the deficiencies, of the common law in connection with contracts, it did not provide some sort of cure-all whereby a judge could simply do what seemed just to him in the particular case.*"

85. Lord Mance JSC, giving the judgment of the majority in Cukorova (No 4), did not agree that the power to relieve against forfeiture depended on

treating the contractual obligation to repay the debt as running continuously despite the satisfaction of the debt, stating at para 12: "*It did not continue to run in a parallel equitable world despite its discharge.*" In the present case, however, the debt has yet to be discharged, so Lord Neuberger's analysis is applicable.

86. Mr Johnson submitted that as relief from forfeiture is an equitable remedy the Court always a discretion to make such orders as it thinks fit. But as Lord Neuberger observed, that is precisely what it cannot do. The discretion of the Court to grant relief in mortgage possession cases is narrowly circumscribed. As Russell J stated in Birmingham Citizens Permanent Building Society v Caunt [1962] 1 Ch 883 Ch D at 912, in a passage which was approved in Cheltenham and Gloucester v Krausz [1997] WLR 1558 EWCA at 1564 F – H:

> "*… where (as here) the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend, and so forth.*"

87. In HSBC v White [2017] SC (Bda) 49 Civ, I qualified this passage when applied to Bermuda:

> "*Notwithstanding this powerful authority, where a mortgage is secured against the mortgagor's home, courts in Bermuda typically allow the mortgagor a grace period of up to three months in which to find alternative accommodation. This is an example of the common law adapting to the local needs and circumstances of Bermudian society.*"

88. The Hotel is a commercial property. There is no evidence before me that a short adjournment would give the mortgagors or Dr Landy any reasonable prospect of paying off the Bank in full or otherwise satisfying it. On the

facts of the present case I therefore have no jurisdiction to grant relief from forfeiture.

Conclusion

89. In 2016: No 158 I give judgment for the Bank against the First through Third Defendants as mortgagors and Dr Landy as guarantor in the principal sum of $1,059,269.84, late fees of $2,100.00, plus loan fees of $1,745.50, together with interest to the date of judgment calculated pursuant to the interest rate provisions in CFL/158, to be assessed. I make an order in favour of the Bank for the possession of "Wilcote".

90. In 2016: No 159 I give judgment for the Bank against Dr Landy as borrower and the First and Second Defendants as guarantors in the principal sum of $81,034.70 plus late fees of $525.00, together with interest to the date of judgment calculated pursuant to the interest rate provisions in CFL/159, to be assessed. I make an order in favour of the Bank for the possession of Unit A, 14 Dundonald Street.

91. In 2016: No 160 I give judgment for the Bank against the Fourth and Fifth Defendants as mortgagors and Dr Landy as guarantor in the principal sum of $2,870,097.69 plus loan fees of $32,517.71, together with interest to the date of judgment calculated pursuant to the interest rate provisions in CFL/160, to be assessed. I make an order in favour of the bank for the possession of the Hotel.

92. In so holding, I have considered both the case advanced by the Bank and all the defences raised by Dr Landy.

93. The money judgments against the First through Fourth Defendants are only enforceable against trust assets. They are not enforceable against those Defendants personally.

94. There is no need for me to make an order for sale of any of the properties which are the subject of the possession orders as the Bank already has a

contractual right of sale under the mortgage deeds (2016: No 158 and 2016: No 160) and collateral charge (2016: No 159).

95. I shall hear the parties as to costs.

Dated this 16th day of October, 2017

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Hellman J