

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
(CIVIL DIVISION)**

SAINT LUCIA

SLUHCMAP2023/0003

BETWEEN:

**[1] EMTI LTD
[2] EMAD WARD
[3] NADIA WARD**

Appellants

and

**REPUBLIC BANK (EC) LIMITED
(QUA SUCCESSOR TO THE BANK OF NOVA SCOTIA)**

Respondent

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mr. Trevor M. Ward
The Hon. Mde. Esco Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Eghan Modeste for the Appellants
Mrs. Sardia Cenac-Prospere and Mr. Arthur Compass for the Respondent

2024: October 14;
2025: September 17.

Civil Appeal - Power of Attorney – Hypothecary Obligation – Personal Credit Agreement - Whether a Power of Attorney is ineffective to confer authority on an agent to make an agreement for loan facilities or pledge immoveable property on behalf of his principal – Articles 1603 and 1604 of the Civil Code of Saint Lucia – Ratification by principal of the acts of an agent - Whether the Power of Attorney is incapable of ratification – Whether judge erred in dismissing the no case submission

EMTI Ltd. is a company registered in Saint Lucia by Registration No. C287/2016 by its directors Mr. Emad Ward and Mrs. Nadia Ward (“the Wards”). By Claim Form dated 7th August 2020 and Amended Claim Form dated 21st January 2021 the respondent, Republic Bank (EC) Limited (“the Bank”) (Successor to the Bank of Nova Scotia (“BNS’)) filed a claim

against EMTI Ltd. and the Wards who they alleged negotiated and secured loan facilities through their agent Mr. Zayad Ward, for the recovery of the principal balance of EC\$1,135,156.96 that BNS loaned to the company and to Mr. Ward on Residential Mortgage Loan No. 91700, the repayment of which was allegedly guaranteed by Mrs. Ward. The Bank relied on Applications for Credit signed by Zayad Ward on 17th January 2017, a Personal Credit Agreement ("PCA") signed by Zayad Ward on 28th February 2017 and a Hypothecary Obligation registered at the Land Registry on 25th August as Instrument No. 3337 of 2017. These were said to be executed by Zayad Ward pursuant to two Powers of Attorney ("PA") executed on 23rd January 2017 and respectively registered on 8th and 10th February 2017 and ascribed registration numbers PA75/2017 and PA89/2017 respectively. The loan was granted to the company and Mr. Ward and was secured by a Hypothecary Obligation registered on 25th August 2017 at the Land Registry against a residential property registered in the name of EMTI Ltd. in favour of BNS. BNS disbursed the loan funds of EC\$1,620,000.00 to a law firm that was acting for the company and the Wards at that time. The law firm acknowledged receipt of the monies by written receipt dated 3rd March 2017.

By Banking Business Vesting Order in 2019, the assets and liabilities of BNS were transferred to Republic Bank (EC) Limited which effectively conveyed to the Bank all of BNS' interests, right and title arising from the transactions between the company, the Wards and BNS.

The respondent sought to recover a total sum of EC\$1,342,800.57 including interest, add-on charges, accrued interest on the principal, interest on add-on charges and late fees. The company and the Wards filed a joint Defence and an Amended Defence in which they denied that EMTI Ltd. and Mr. Ward were co-borrowers of the residential mortgage loan or that Mrs. Ward was a guarantor of the loan facility. They asserted that the company was the only party to the Hypothecary Obligation and denied that the Bank is entitled to the sums claimed or any sum.

The matter proceeded to trial and at the close of the Bank's evidence, the appellants made a submission of no case to answer. They argued that the PAs were: (a) general in nature and contained no express power authorising Zayad Ward to obtain loans or hypothecate property and such power cannot be implied; and therefore, (b) non-compliant with Articles 1603 and 1604 of the Civil Code and void. When the trial resumed the following day, they were placed on their election whereupon they signified through their legal practitioner that they intended to adduce no evidence at the trial and wished to stand on their no case submission. By judgment dated 4th October 2023, the trial judge dismissed the no case submission and entered judgment for the Bank against the company and the Wards and awarded costs to the Bank.

Dissatisfied with the learned trial judge's decision, the appellants, on 14th November 2023, filed a notice of appeal on a multiplicity of grounds all of which attack the learned judge's reasons for dismissing the no case submission. The grounds of appeal reveal that the singular issue for consideration is whether the learned judge erred in law or in fact in dismissing the no case submission and thereby rejecting the appellants' contention that the PAs under which Zayad Ward purported to negotiate and secure a loan on behalf of the

company and Emad Ward with Nadia Ward as guarantor, were ineffective and void in view of Articles 1603 and 1604 of the Civil Code.

Held: dismissing the appeal, affirming the orders of the learned trial judge and ordering costs to the respondent to be assessed if not agreed within 21 days of the date of this judgment, that:

1. It is well settled that when a defendant makes a no case submission in civil proceedings, the trial judge is only required to decide whether the claimant has made out his, her or its case on a balance of probabilities based on the evidence adduced, before the defendant is put to his election and opts to call no evidence. In determining this question, the trial judge must be satisfied that the evidence establishes a prima facie case, even if it is a weak one. In making such a determination, the judge is entitled to draw adverse inferences from the defendant's decision to rest on his election.

Elena Collongues v Andrew Lych and Olga Mirinskaya BVIHCVAP2007/0001 (delivered 14th July 2008, unreported) followed.

2. At the appellate level, the appellate court's function when reviewing a judge's ruling on a no case submission is to evaluate the evidence to determine whether there was evidence on which the judge could find on a balance of probabilities that a prima facie case had been made out for the defendant to answer.
3. Acquiring title by alienation does not encompass applying for, obtaining or guaranteeing a loan or other advances from a financial institution. It follows that the action of borrowing is not caught by Article 1603 or 1604 of the **Civil Code**. Neither is guaranteeing such a facility. A hypothec is defined by Article 1908 as a charge on real estate. This would mean that the Hypothecary Obligation signed by Zayad Ward fits within the description of alienation and the definition of hypothec. However, the PCA does not. There is nothing on the PCA that creates a charge on any immoveable property of EMTI Ltd., Emad Ward or Nadia Ward. Therefore, the stipulation in Article 1603 that a relevant agency must be express, would not apply to the PCA by which the appellants respectively applied for and secured loan facilities from BNS and guaranteed the repayment of those sums. Accordingly, their contentions that the PCA is a nullity and void for non-compliance with Articles 1603 and 1604 are not borne out. Additionally, the learned judge was and the Court is entitled to have regard and recourse to the contents of the PCA for the purposes of determining whether the Bank has established a prima facie case against EMTI Ltd. and Emad Ward that they authorised Zayad Ward to obtain the subject loan on their behalf and in Nadia Ward's case that she authorised him to guarantee the loan and that Zayad Ward did act on those instructions.

Articles 1603, 1604 and 1908 of the **Civil Code of Saint Lucia** Cap. 4:01 of the Laws of Saint Lucia applied.

4. Article 1603 of the **Civil Code** clearly provides that a power of attorney may be special by reason that it is given for and expressed to be for a specific business or

purpose or it may be general in which case it applies to all the principal's affairs and is limited to administration. As a qualifier, it is explained that where a power of attorney is given for the purpose of acts of ownership including alienation and hypothecation, this must be express. No specific form of words is prescribed to effect the express hypothecation and alienation objectives. It follows that if the power of attorney captures the essential features or elements of alienation or hypothecation as the case may be, that would suffice for the purpose of such expression.

5. In the case at bar, while the PAs contained a number of broad powers, the entire document, when read as a whole, contains specific powers to facilitate the conducting of banking business, acquiring real estate by purchase, disposing of interests in such real estate and dealing with banks as necessary to accomplish those specific objectives. It appears to be geared primarily towards empowering Zayad Ward to buy real estate and if necessary, dispose of interests in such real estate and deal with banks as necessary to achieve those aims. The PAs therefore seem to have been conceived for that specific purpose. Accordingly, the initial question of whether Zayad Ward was empowered by the PAs to a) apply for, b) secure debt obligations, or c) charge the subject property to the bank on behalf of EMTI Ltd. and Emad Ward is answered in the affirmative. Similarly, for the same reasons, he was likewise authorised by PA 89 to guarantee any such loan repayment obligations on Nadia Ward's behalf.
6. Article 1627 of the **Civil Code** makes it pellucid that the principal is bound even in relation to acts of an agent that exceed the power conferred by a PA, if the principal has ratified them. Applying that provision to the facts of this case, this means that to the extent that Zayad Ward may have exceeded the authority conferred on him expressly or implicitly by the PAs, he is recognised by law under the express wording of Article 1627 to have validly performed such acts on behalf of EMTI Ltd. and the Wards if they subsequently ratified those acts.

Article 1627 of the **Civil Code** of Saint Lucia Cap. 4:01 of the Laws of Saint Lucia applied.

7. On the evidence led by the Bank, the appellants' conduct after the loan sums were disbursed point indubitably and stridently towards unequivocal ratification of Zayad Ward's acts by EMTI Ltd., Emad Ward and Nadia Ward respectively. For instance, i) EMTI Ltd. and the Wards' lawyer received the loan funds on their behalf without objection; ii) the subject property was acquired and a Hypothecary Obligation executed by Zayad Ward on behalf of EMTI Ltd. and Emad Ward as borrowers without protest by the company or Emad Ward and is presumably being enjoyed by the appellants and/or their agents and guests without protestation from any of them; iii) without complaint, dissent or challenge, Emad Ward and Nadia Ward serviced the loan obligations from their bank account- at the Bank for almost a year after the loans sums were disbursed; and iv) the subject property has remained registered to EMTI Ltd. with the impugned Hypothecary Obligation registered against it likewise without argument or complaint from EMTI Ltd. through either director Emad Ward

or Nadia Ward. Additionally, the court is entitled to draw adverse inferences from any one and all of those circumstances that, together with the evidence led by the Bank, support a finding that a prima facie case has been made out as alleged in the statement of claim, and that the appellants have a case to answer. In the absence of evidence from them, the learned judge was entitled to find that EMTI Ltd., and Emad Ward are liable to the Bank to repay the sums advanced to them pursuant to the PCA. Equally, Nadia Ward is liable to the Bank as guarantor of the said loan facility. For the foregoing reasons, the appeal is dismissed.

JUDGMENT

Introduction

- [1] **HENRY JA:** The principal question raised by this appeal is whether a Power of Attorney (“PA”) is ineffective to confer authority on an agent to make an agreement for loan facilities or pledge immoveable property on behalf of his principal and whether if deployed for such purpose is void, unless the PA expressly employs the terminology ‘alienation and hypothecation’ or similar phraseology, to satisfy the requirement of Articles 1603 and 1604 of the **Civil Code of Saint Lucia** (the “**Civil Code**”).¹ A secondary and related concern is whether such a PA is incapable of ratification.

- [2] The dispute in this case pits a corporate body and its two directors against a licensed financial institution. The corporation and its principals deny liability for repayment of monies advanced by the financial institution in their names to purchase a residential property, on the strength of PAs granted to the named agent who signed the agreement for the loan and Hypothecary Obligation.

Background

- [3] This appeal was filed on 14th November 2023 by EMTI Ltd., (or “the company”) and its directors, husband and wife Mr. Emad Ward and Mrs. Nadia Ward (collectively, “the Wards”) against the judgment and orders of the learned judge dated 4th October 2023 in which she entered judgment against them on a claim brought by Republic

¹ Cap. 4.01 of the Laws of Saint Lucia.

Bank (EC) Limited (“the Bank”) on 7th August 2020. An Amended Claim Form² was filed on 21st January 2021. The Bank is the successor to the Bank of Nova Scotia (“BNS”)³ from whom it is alleged that the company and Mr. and Mrs. Ward negotiated and secured the loan facilities through their agent, Zayad Ward. EMTI Ltd., is a company registered in Saint Lucia by Registration No. C287/2016 by Mr. and Mrs. Emad Ward.

- [4] By its claim, the Bank sought to recover the principal balance of EC\$1,135,156.96 that it claimed to have loaned to the company and to Mr. Ward on residential mortgage Loan No. 91700, repayment of which was allegedly guaranteed by Mrs. Ward. The Bank claimed a total sum of EC\$1,342,800.57 with interest on the principal from 8th July 2020 at the rate of 7.25% per annum or EC\$225.47 per day, together with add-On charges, accrued interest on principal of EC\$196,106.51, interest on add-On charges of EC\$441.19 and late fees of EC\$65.00. The Bank relied on Applications of Credit signed by Zayad Ward on 17th January 2017, a Personal Credit Agreement (“PCA”) signed by Zayad Ward on 28th February 2017, and a Hypothecary Obligation registered at the Land Registry on 25th August 2017 as Instrument No. 3337 of 2017.
- [5] The company and the Wards filed a joint Defence and an Amended Defence⁴ in which they denied that EMTI and Mr. Ward were co-borrowers of the residential mortgage or that Mrs. Ward was a guarantor of the loan facility. They asserted that the company was the only party to the Hypothecary Obligation⁵ and denied that the Bank is entitled to the sums claimed or any sum.
- [6] The case went to trial on 7th November 2022. The Bank adduced evidence that Zayad Ward signed the Applications for Credit on behalf of EMTI Ltd., and Emad

² Record of Appeal Vol. 1, pg. 167.

³ By virtue of Banking Business Vesting Order dated 4th October 2019, transferring BNS’ banking business to the Bank.

⁴ On 25th January 2021.

⁵ Para. 6 of the Amended Defence.

Ward⁶ on 17th January 2017, and a PCA⁷ on behalf of EMTI Ltd. and Emad Ward as the borrowers and Nadia Ward as the guarantor of the loan on 28th February 2017, pursuant to two PAs executed on 23rd January 2017 respectively by the company and the Wards. The PA from the Wards (signed in their personal capacities) to Zayad Ward was assigned Instrument Number PA75/2017 ("PA75"). The PA from EMTI Ltd. to Zayad Ward was signed by the Wards as Directors and assigned Instrument number PA89/2017 ("PA89"). The PAs were registered at the Land Registry on 8th and 10th February 2017 respectively⁸.

- [7] The Bank led evidence from two witnesses – Ms. Beverly Gideon and Ms. Yasmin Joseph. Ms. Gideon's testimony related simply to attesting to the transfer of the banking records from BNS to the Bank when BNS' banking business was transferred to the latter pursuant to a Banking Business Vesting Order dated 4th October 2019 which effectively conveyed to the Bank all of BNS' interests, right and title arising from the transactions between the company, the Wards and BNS . Through its witness, Ms. Yasmin Joseph, the Bank averred that the loan was granted to the company and Mr. Ward and was secured by a Hypothecary Obligation registered at the Land Registry as Instrument Number 3337/2017⁹ against a residential property – Block No. 0649D Parcel 16 - registered in the name of EMTI Ltd in favour of BNS. Zayad Ward executed the Hypothec purportedly pursuant to PA75 and PA89.
- [8] BNS disbursed the loan funds of EC\$1,620,000.00 to McNamara & Co., a law firm that was acting for the company and the Wards at that time. McNamara & Co. acknowledged receipt of the monies by written receipt¹⁰ dated 3rd March 2017. The receipt was admitted into evidence at the trial. On its face, the receipt recorded receipt of 'Loan proceeds for EMTI Ltd to purchase property for Zayad and Marissa Ward. Block 0649A Parcel 16 situated at Vigie'.

⁶ Record of Appeal, Vol. 1 pgs. 239 – 242.

⁷ Record of Appeal, Vol. 1 pg. 254.

⁸ Record of Appeal, Vol. 1 pgs. 246 – 253.

⁹ On 25th August 2017. See Record of Appeal Vol. 1, pg. 324.

¹⁰ Receipt No. 7998. See Record of Appeal Vol.1, pg. 332.

- [9] At the close of the Bank's case, the company and the Wards made a submission that they had no case to answer. They argued that the PAs were: (a) general in nature and contained no express power authorising Zayad Ward to obtain loans or hypothecate property and such power cannot be implied; and therefore, (b) non-compliant with Articles 1603 and 1604 of the **Civil Code** and void. When the trial resumed the following day, they were placed on their election whereupon they signified through their legal practitioner that they intended to adduce no evidence at the trial and wished to stand on their no case submission. Directions were given for the filing of written submissions and the trial was adjourned.
- [10] On 4th October 2023 the learned trial judge dismissed the no case submission and entered judgment for the Bank against the company and the Wards and awarded costs to the Bank. The learned judge held that Zayad Ward had signed the PCAs and Hypothecary Obligation pursuant to the authority of the PAs. She held further that the legality of Zayad Ward's acts in obtaining the loan and hypothecating EMTI Ltd.'s property cannot be examined solely in the context of Article 1603 of the **Civil Code** to void the transactions and the supporting documents.
- [11] Being dissatisfied with the learned judge's decision, the company and the Wards appealed and advanced twenty-two grounds of appeal. They contend, among other things, that in light of Articles 1603 and 1604 of the **Civil Code**, the learned judge erred in law when she: (a) found that the PAs authorised Zayad Ward to obtain the residential loan on behalf of his principals; (b) relied on implied authority from **Halsbury's Laws of England** to contradict Article 1603 of the **Civil Code**; and, (c) stated that the no case submission had the appearance of a trial by ambush.
- [12] The Bank submitted that the learned judge correctly applied the law and found quite properly that the evidence adduced by the Bank established its case on a balance of probabilities against the appellants/defendants. Accordingly, she did not err in fact or in law in dismissing the no case submission.

- [13] For the reasons outlined in this judgment, the appeal is dismissed, and the learned judge's orders are affirmed. The respondent bank shall have its costs of the appeal to be assessed if not agreed within 21 days.

Issue

- [14] The several grounds of appeal all attack the learned judge's reasons for dismissing the no case submission. They reveal that the singular issue for consideration is whether the learned judge erred in law or in fact in dismissing the no case submission and thereby rejecting the appellants' contention that the PAs under which Zayad Ward purported to negotiate and secure a loan on behalf of the company and Emad Ward with Nadia Ward as guarantor, were ineffective and void in view of Articles 1603 and 1604 of the **Civil Code**.

Statutory framework

- [15] Determination of this appeal turns largely on the construction of Articles 1603 and 1604 of the **Civil Code**. It is therefore useful to set them out at the outset. They provide respectively:

"1603. The agency may be either special, for a particular business, or general, for all the affairs of the principal.

When general it includes only acts of administration.

For the purpose of alienation and hypothecation, and for all acts of ownership other than acts of administration, the agency must be express.

1604. The agent can do nothing beyond the authority given or implied by the agency. He may do all acts which are incidental to such authority and necessary for the execution of the agency."

- [16] Although no other provisions of the **Civil Code** were addressed by the parties in their submissions, it appears that Articles 1601, 1602, 1608A, 1627, 1630 and 1631 also touch and concern the subject matter of agency relationships and are relevant to a proper consideration of the issues that arise in this appeal. They state respectively:

"CHAPTER FIRST

GENERAL PROVISIONS

1601. Agency is a contract by which a person, called the principal, commits a lawful business to the management of another, called the agent, who by his or her acceptance binds himself to perform it.

The acceptance may be implied from the acts of the agent, and in some cases form (sic) his or her silence.

1602. Agency is gratuitous unless there is an agreement or an established usage to the contrary.

1608A. Subject to the provisions of this Code or of any other statute the law of England for the time being relating to the contract of agency shall extend to and apply in Saint Lucia, and articles 1601 to 1661 shall as far as practicable be construed accordingly. (*Added by Act 34 of 1956*)

SECTION II The obligations of the principal toward third persons

1627. The principal is bound in favour of third persons for all the acts of his or her agent, done in execution and within the powers of the agency, except in the case provided for in article 1638 of this Book, and the cases wherein by agreement or the usage of trade the latter alone is bound.

The principal is also answerable for acts which exceed such power, if he has ratified them either expressly or tacitly.

1630. The principal is liable to third parties who in good faith contract with a person not his or her agent, under the belief that he or she is so, when the principal has given reasonable cause for such belief.

1631. He or she is liable for damages caused by the fault of the agent, according to the rules declared in article 986." (**Emphasis added**)

- [17] The material parts of PAs 89 and 75 are expressed in identical terms. They occupy a pivotal role in this case. It is therefore critical to set out the relevant clauses of the PAs. PA 75 chronicled that Emad Ward, Physician and Nadia Ward, Business Owner appeared before Jonathan Craig McNamara on 23rd January 2017, identified themselves by their respective US passports and individually and jointly appointed Zayad Ward, businessman of Vigie, Castries, Saint Lucia as their lawful attorney to perform certain acts on their behalf. PA 89 rehearsed that EMTI Ltd. incorporated under the Companies Act as Number C287/2017 with registered office at Castries acting and represented by its directors Emad Ward and Nadia Ward presented

themselves to the same Jonathan McNamara and appointed Zayad Ward as its true and lawful attorney to carry out certain acts.

[18] Among the acts that Zayad Ward was authorised by the PAs to carry out are:

- “1. **To take charge of, manage, transact and administer all and singular THE CONSTITUENTS affairs, business and property in Saint Lucia** in such manner as THE ATTORNEY shall think fit.
2. **To acquire by purchase or otherwise in THE CONSTITUENTS name and [on] THE CONSTITUENTS behalf any real estate or immovable property in Saint Lucia** from any person, persons, corporation or body and for such price or prices and subject to any covenant or covenants, servitude or servitudes and such other conditions as THE ATTORNEY shall think fit. ...
3. To sell, convey or otherwise dispose of to all or any person or persons all or any part of THE CONSTITUTENTS movable or immovable property in Saint Lucia for such price and upon such terms and conditions as THE ATTORNEY shall deem fit.
...
10. **To ask, demand, recover and receive of and from all and every person, persons, corporation or body whom the same doth shall or may concern all and every such sum or sums of money, debts, rents, goods ... and demands whatsoever as now are or hereafter shall become due, owing, belonging or payable to the CONSTITUENTS ...** and upon payment or delivery of the said sum of money, debts, rents, ... to make and give proper receipts, acquittances and discharges for the same respectively.
...
16. To draw and sign all cheques, drafts and orders for the payment of money on all or any bank on which THE CONSTITUENTS now has or may hereafter have any money **and to deal with said banks in relation to any and all transactions for and on behalf of THE CONSTITUENTS.**
17. **To make, sign, execute and deliver all documents or instruments in writing requisite or necessary in the premises.**
...
19. Generally to do all other acts, deeds, matters and things whatsoever in or about the premises for and on THE CONSTITUENTS behalf as fully and effectually in all respects as THE CONSTITUENTS could do if personally present.

20. AND THE CONSTITUENTS hereby ratify and confirm and agrees to ratify and confirm all and whatever THE ATTORNEY in or about the premises shall lawfully do or cause to be done by virtue of these presents.”¹¹ (Emphasis added)

Appellants’ submissions

- [19] Much of the appellants’ challenge to the learned trial judge’s decision turn on the question of whether the PAs were general as opposed to being specific, express and effective for the purposes of alienation and hypothecation. The appellants submitted that Article 1603 of the **Civil Code** is expressed in obligatory and not discretionary terms and applies only to general PAs. They contended that general PAs are limited to acts of administration and that specific PAs deal with specific subject matters and confer express authority to undertake such acts. They submitted that an agent is not authorised to perform any acts of alienation or hypothecation that are merely implied by the PA.
- [20] The appellants submitted that pursuant to the PAs, Zayad Ward purported to hypothecate on behalf of EMTI Ltd. and Emad Ward in circumstances where the PAs gave him no express authority to do so. They maintained that neither PA 75 nor PA 89 contains express language permitting hypothecation. They noted that the learned judge relied on clauses 2 and 19 of the PAs to find that such power was implicitly granted. They reasoned however, that in the absence of such authority the Hypothecary Obligation is not valid.
- [21] It was their further contention that clause 1 of the PAs is a general clause; while clauses 2 and 3 deal with purchasing property but does not extend to hypothecation (which involves taking on debt by way of a loan on a promise to repay) and is therefore not the same thing as hypothecating property. It was argued that Zayad Ward was not expressly authorised by clauses 1, 2 and 3 of the PAs or any of their other clauses to obtain loans on behalf of the appellants or any of them as matters

¹¹ Clauses 1, 2, 8, 10, 16, 17, 19 and 20 of the PAs.

incidental to purchasing the residential property and he acted beyond his authority by executing the PCAs and Hypothecary Obligation. Further, clauses 1, 2 and 3 did not satisfy the requirements of Articles 1603 and 1604 of the **Civil Code**. The learned trial judge therefore erred when she found that he signed them in keeping with the authority given to him under the PAs.

[22] The appellants submitted further that all acts by Zayad Ward including the execution of the PCAs and Hypothecation Obligation that are referable to hypothecating the subject property having been predicated on the validity of the PAs, are corrupted by the invalidity of the PAs and are therefore invalid and void. Therefore, the learned judge erred in finding that the PCAs were signed by the appellants and when she concluded that the legality of Zayad Ward's acts in obtaining the loan and the hypothecation of the subject property cannot be examined solely in the context of Article 1603 of the **Civil Code** to void the transactions and the supporting documents. It was strenuously contended that Article 1603 leaves no room for implied application. Further, the learned judge erred by relying on and applying principles of implied authority as described in **Halsbury's Laws of England** because such principles contradict Article 1603 which allows for no interpretation that permits implied authority. It was submitted that where a contrary authority contradicts the **Civil Code**, the latter prevails.

[23] Citing **Arthur Alban Richards v Jennifer Richards**,¹² the appellants submitted that it is a matter of trite law that a general clause in a PA does not grant any power not specified in it. Furthermore, it was not open to the learned trial judge in the absence of an express clause in the PA, to reasonably infer or presume that, in the circumstances, the appellants intended that Zayad Ward could exercise all necessary and incidental authority to purchase property on their behalf including the power to hypothecate the property because Article 1603 leaves no room for such inference or presumption.

¹² SVGHCV2018/0053 (delivered 30th April 2019, unreported).

[24] As to the wording of an express clause that would confer authority on an agent to hypothecate property, the appellants repeated a submission they advanced in the High Court, that is, that the usual language and the only clause which confers such authority is as follows:

“To obtain advances or loans from any person or bank either alone or jointly with others and as security therefore to pledge, hypothecate or mortgage all or part of THE CONSTITUENTS real or personal, movable or immovable property, upon such terms and conditions as THE ATTORNEY shall deem fit.”

They submitted that PAs 75 and 89 did not contain such language and therefore did not and could not empower Zayad Ward to take a mortgage loan on the subject property. Accordingly, the learned judge erred in finding otherwise.

[25] Regarding the respondent’s argument that the appellants did not plead lack of authority in their Amended Defence, the appellants accepted that their contention that Zayad Ward did not have express legal authority to execute the Hypothecary Obligation embodies both a factual and legal contention and the factual element ought to have been pleaded but was not. They maintained, nonetheless, that the bank did not present an answerable case and therefore their no case submission should have been upheld.

Respondent’s submissions

[26] It was submitted on the Bank’s behalf, that on the evidence adduced, the loan to EMTI Ltd and Emad Ward was proved. It was submitted further that clauses 1, 2 and 3 of the PAs when construed together empowered Zayad Ward to dispose of property and those clauses collectively bestowed on him the express authority to hypothecate the subject property. Therefore, the no case submission was properly and correctly dismissed by the learned judge. The loan activity statement, the existence of Mrs. Ward’s savings account and the receipt issued by Mr. McNamara on disbursement of the loan amounts were held up as cogent evidence in support of the claim. It was argued that during the cross-examination of the Bank’s witness who tendered those documents, there was no challenge to their production or the averments contained in them.

- [27] Relying on **Nelson and others v First Caribbean International Bank (Barbados) Limited**¹³ it was argued that a hypothec is a right and charge on property. It was submitted that the learning from that case is that hypothecation comprises two significant parts: (1) the personal obligations of the borrower and; (2) the security. Learned counsel Mrs. Cenac-Prospere stated that the hypothec was not merely a charge but comprised the obligations assumed by the debtors in favour of the creditor. Accordingly, when the learned judge found that each of the instruments was validly signed by the appellants, she was right to do so since there was no requirement for any personal obligation to be express.
- [28] It was submitted that the Bank was not proceeding necessarily on the hypothec but rather was suing for the balance due and owing to it on a loan. It was highlighted that not one ground of appeal challenged the fact that the monies were disbursed to the appellants or that the accounts of the respondents were being used for purposes of servicing the loan for roughly a year.
- [29] As to the evaluation of the evidence by the learned judge, it was submitted that having meticulously examined the pleaded case and the evidence led, she correctly found that the evidence established, on a balance of probabilities, that the Bank granted and disbursed a loan to EMTI Ltd. and Mr. Ward which was being serviced by Mr. and Mrs. Ward for several months from their joint savings account and that they stopped making the payments. The Bank contended further that the learned judge drew adverse inferences from the appellants' conduct as she was entitled to do and, as a result, properly ruled that there was a case for the appellants to answer. The case of **Elena Collongues v Andrew Lych and Olga Mirimskaya et al**¹⁴ was cited as authority for how a court deals with a no case submission.

¹³ [2014] UKPC 30.

¹⁴ BVIHC VAP2007/0001 (delivered 14th July 2008, unreported).

- [30] The respondent contended further that in any event the issue of lack of authority should have been set out in the appellants' defence and was not. They are therefore not entitled to introduce such contentions through a no case submission in their bid to defeat the claim.

Discussion

- [31] It is well settled that when a defendant makes a no case submission in civil proceedings, the trial judge is only required to decide whether the claimant has made out his, her or its case on a balance of probabilities based on the evidence adduced, before the defendant is put to his election and opts to call no evidence. In determining this question, the trial judge must be satisfied that the evidence establishes a prima facie case, even if it is a weak one. In making such a determination, the judge is entitled to draw adverse inferences from the defendant's decision to rest on his election.

- [32] In **Elena Collongues v Andrew Lych and Olga Mirinskaya** Edwards JA [Ag.], writing the opinion for this Court stated:

"Benham (at paragraphs 20 and 30) establishes that "...once a defendant has elected to call no evidence... the only issue then becomes whether in the light of the evidence already adduced the claimant has made out his case on the balance of probabilities... But it must be recognised that he may have done so by establishing no more than a weak prima facie case which has been strengthened to the necessary standard of proof by the adverse inferences to be drawn from the defendant's election. Such adverse inferences can in other words tip the balance of probability in the claimant's favour".¹⁵

- [33] As to adverse inferences that may inform the judge's findings, she added:

"At paragraphs 25 and 26 in Benham Brooke L.J.'s crystallization of the relevant principles in **Wisniewski v Central Manchester Health Authority** [[1987] PIQR P324; [1998] Lloyds Rep. Med 223] are stated in the following manner by Lord Justice Simon Brown:

"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might

¹⁵ Ibid at para. [81]. See also *Matadai Roopnarine v AG of Trinidad and Tobago* [2023] UKPC 30.

be expected to have material evidence to give on an issue in an action.

- (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
- (3) There must, however have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
- (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.”¹⁶

[34] In this case, the learned trial judge had before her the testimony of Ms. Joseph and documentary evidence comprising an application signed by Emad Ward and Nadia Ward for a savings account¹⁷ dated 5th January 2017 in respect of account number 1031199; Applications for Credit executed by Zayad Ward on behalf of EMTI Ltd. and Emad Ward with Nadia Ward as guarantor (before the PAs were signed); printouts of the customer account information in respect of that savings account confirming ownership by Emad and Nadia Ward; the PAs, the PCA signed by Zayad Ward on behalf of EMTI Ltd. and Emad Ward as borrowers and Nadia Ward as guarantor, the Personal Credit Agreement Companion Booklet setting out additional terms of the loan and guarantee; the Hypothecary Obligation signed by Zayad Ward on authority of PA 89 on behalf of the appellant EMTI Ltd. in favour of BNS; the McNamara receipt; loan activity statements outlining the loan history and payout inquiry; the application for savings account by Nadia Ward and the demand letters. She had to rely on this evidence and any adverse inferences from the appellants' election if she were to find that there was a case to answer.

¹⁶ BVIHCVAP2007/0001 (delivered 14th July 2008, unreported) at para. [82].

¹⁷ Record of Appeal Vol. 1, pg. 236.

[35] It is a matter of record that the appellants did not object to the admission of Yasmin Joseph's witness statement or any of the exhibits produced at the trial.¹⁸ During the cross-examination of Ms. Joseph, she accepted that the Applications for Credit executed by Zayad Ward on behalf of EMTI Ltd. and Emad Ward with Nadia Ward as guarantor were done before the PAs were signed and registered. The appellants' contended that in those circumstances the Applications for Credit could not have been validly given by Zayad Ward under the PAs neither of which had yet been executed and for this reason the Applications for Credit were void.

[36] On that issue, the learned trial judge accepted and properly so, that Zayad Ward was not competent to sign the Applications for Credit on behalf of the appellants and therefore the applications were invalid. She found further that the applications did not constitute contractual arrangements between the parties and could not invalidate any agreement between them. She stated:

“[57] The application on behalf of each defendant was signed on 17th January 2017, prior to execution and registration of the PA's. They are therefore invalid, and may not be relied upon by the Bank, as Zayad would have lacked the necessary capacity for signing on behalf of the defendants, at that time.

[58] I accept however, that these applications do not constitute the contractual obligations between the parties, and even if they were invalidated by the premature execution, that would not be a basis for invalidating the transactions and the other contractual documents which the defendants seek to impugn.”¹⁹

[37] I am satisfied that the learned judge applied her mind to the applicable principles of law in arriving at that conclusion. For the reasons articulated by her, she made the correct decision regarding the validity of the Applications for Credit. This finding effectively removes the Applications for Credit from consideration in deciding whether the appellants had a case to answer.

¹⁸ Record of Appeal, Vol. 2, pg. 259, lines 12 – 17.

¹⁹ Paragraphs [57] and [58] of the judgment.

- [38] It is trite law that an appellate court's function when reviewing a judge's ruling on a no case submission is to evaluate the evidence to determine whether there was evidence on which the judge could find on a balance of probabilities that a prima facie case had been made out for the defendant to answer. I bear this in mind when considering the evidence and assessing it against the applicable legal principles.
- [39] The question that looms large is whether Zayad Ward had the requisite authority under the PAs to: (a) apply for; (b) secure debt obligations; or (c) charge the subject property to the Bank on behalf of EMTI Ltd. and Emad Ward; (d) whether he was authorised to guarantee any loan repayment obligations on behalf of Nadia Ward; and (e) whether he did any of these things by executing the PCAs and/or the Hypothecary Obligation. I will address (a), (b) and (c) together, then (d) and finally consider (e).

Loan and Hypothec

- [40] The obvious starting point is an examination of the language of the PAs. By clause 1, Zayad Ward was authorised to among other things, transact each and every aspect of the appellants' affairs and business in Saint Lucia. By virtue of clause 2, this includes buying real estate or other immovable property in Saint Lucia as he thinks fit. Clause 3 empowered him specifically to dispose of any part of the appellants' immovable property in Saint Lucia on such terms and conditions as he deems fit. Clause 10 authorised Zayad Ward to ask for and receive from any person(s) money or debts payable to the appellants while clause 16 empowered him to deal with any banks with which the appellants held money or accounts, not only for the purpose of drawing and signing cheques, drafts and orders but also in relation to any and all transactions for and on their behalf. Importantly, clause 17 embodied the power for him to make, sign, execute and deliver all documents and instruments in writing for the purpose of accomplishing and effectuating any of the powers conferred by the PAs.
- [41] At the outset it is necessary to point out that while the appellant Nadia Ward contended that PA 75 did not empower Zayad Ward to guarantee a loan on her

behalf it appears that she conflated the terms ‘borrowing’ and ‘obtaining loans and advances’ with the terms ‘alienation and hypothecation’. EMTI Ltd. and Emad Ward took a similar line on this sub-issue. This is a short point and may be disposed of by reference to clause 16 of the PA by which Nadia Ward and indeed Emad Ward authorised Zayad Ward to ‘to deal with said banks in relation to any and all transactions for and on [their] behalf’. I am satisfied that dealing with any and all transactions with a bank would include guaranteeing a loan by a bank.

- [42] Neither the **Civil Code** nor the **Interpretation Act** of Saint Lucia includes a definition of ‘alienation’. Words and Phrases Legally Defined ascribes the following description to the term:

“The most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense: under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another; whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties. (2 Bl Com 287) (Emphasis added)

‘Alienation implies a transaction by which property is given to another person.’ Re Gaskell & Walters’ Contract [1906] 2 Ch 1 at 10.”²⁰

- [43] This description makes it abundantly clear that alienation does not encompass applying for, obtaining or guaranteeing a loan or other advances from a financial institution. It follows that the action of borrowing is not caught by Article 1603 or 1604 of the **Civil Code**. Neither is guaranteeing such a facility.

- [44] As to hypothecation, Article 1908 of the **Civil Code** defines a hypothec thus:

“Hypothec is a real right, and is a charge upon immoveables specially pledged by it for the fulfilment of an obligation, in virtue of which charge the creditor may cause the immoveables to be sold in the hands of whomsoever they may be, and has a preference upon the proceeds as fixed by this Code.” (Emphasis added)

²⁰ Lexis Nexis Edition.

[45] This definition demonstrates that a hypothec is essentially a charge on real estate. It is accomplished by registration of the hypothec at the Land Registry pursuant to section 51 of the **Land Registration Act**²¹ of Saint Lucia which provides:

“51. (1) A proprietor, may, by an instrument in notarial form, hypothecate his or her land or lease to secure the payment of an existing or a future or a contingent debt or any other money or the fulfilment of a condition.

(2) The hypothec shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.”

[46] While the Hypothecary Obligation signed by Zayad Ward fits within the description of alienation and the definition of hypothec, the PCA does not. There is nothing on the PCA that creates a charge on any immoveable property of EMTI Ltd., Emad Ward or Nadia Ward. Therefore, the stipulation in Article 1603 that a relevant agency must be express, would not apply to the PCA by which the appellants respectively applied for and secured loan facilities from BNS and guaranteed the repayment of those sums. Accordingly, their contentions that the PCA is a nullity and void for non-compliance with Articles 1603 and 1604 are not borne out.

[47] The learned judge was and this Court is entitled to have regard and recourse to the contents of the PCA for the purposes of determining whether the Bank has established a prima facie case against the appellants, EMTI Ltd. and Emad Ward that they authorised Zayad Ward to obtain the subject loan on their behalf and in Nadia Ward’s case that she authorised him to guarantee the loan and that Zayad Ward did act on those instructions. I am satisfied that even excluding the Hypothecary Obligation, the evidence led by the Bank supports a finding that the Bank did make out a prima facie case that the appellants EMTI Ltd. and Emad Ward had, through their agent Zayad Ward, legally borrowed and obtained over one million dollars from the Bank through the subject loan; that Nadia Ward had guaranteed the repayment of the loan; that the proceeds of the loan were received on the appellants EMTI Ltd. and Emad Ward’s behalf by their legal counsel Mr.

²¹ Cap. 5:01 of the Revised Laws of Saint Lucia.

McNamara for the purposes of purchasing the subject property and that the appellants have all defaulted in repaying the loan, although initial payments were made by the Wards. In the premises, the learned trial judge was entitled to dismiss the no case submission with respect to that aspect of the case by which the bank seeks repayment of the loan.

[48] What then of the Hypothecary Obligation? Article 1603 of the **Civil Code** clearly provides that a power of attorney may be special by reason that it is given for and expressed to be for a specific business or purpose or it may be general in which case it applies to all the principal's affairs and is limited to administration. As a qualifier, it is explained that where a power of attorney is given for the purpose of acts of ownership including alienation and hypothecation, this must be express. No specific form of words is prescribed to effect the express hypothecation and alienation objectives. It follows that if the power of attorney captures the essential features or elements of alienation or hypothecation as the case may be, that would suffice for the purpose of such expression.

[49] I do not interpret Article 1603 to mandate that any special or customary form of words be utilised as long as the PA expressly authorises the essential features of hypothecation. I reject the appellants' contention that it was necessary for the drafter to import into the PA the customary formulation recited to Ms. Joseph in cross-examination being:

"To obtain advances or loans from any person or bank and as security therefore to pledge, hypothecate or mortgage all or any part of the constituents' real or personal property upon such terms as the attorney shall think fit."²²

[50] When examined in light of Article 1603 of the **Civil Code**, it seems to me that while the PAs contained a number of broad powers, the entire document, when read as a whole, contains specific powers to facilitate the conducting of banking business, acquiring real estate by purchase, disposing of interests in such real estate and dealing with banks as necessary to accomplish those specific objectives. It appears

²² Record of Appeal Vol. 2, pg. 297, lines 6 -9 and 21 – 25.

to be geared primarily towards empowering Zayad Ward to buy real estate and if necessary dispose of interests in such real estate and dealing with banks as necessary to achieve those aims. To my mind, the PAs seem to have been conceived for that specific purpose. I would therefore answer in the affirmative the initial question of whether Zayad Ward was empowered by the PAs to a) apply for, b) secure debt obligations, or c) charge the subject property to the bank on behalf of EMTI Ltd. and Emad Ward. Similarly, for the same reasons, I would hold that he was likewise authorised by PA 89 to guarantee any such loan repayment obligations on Nadia Ward's behalf.

[51] The learned judge zeroed in on clauses 1, 2 and 3 and explained:

[61] While I agree that the wording of the clause advanced by the defendants would have expressly stated that Zayad was authorized to obtain loans and hypothecate property, to conform to the dictates of article 1603, the matter does not end there. The absence of such clause does not mean that Zayad was not authorized to do as he did.

[62] Clauses 1, 2, and 3 of the PA's must be read together to gain a clear understanding of what he was required to do in relation to acts of ownership. ...

[63] There (sic) principle of incidental acts, would of necessity, have to examined (sic) to arrive at a determination on the scope of authority which Zayad had in relation to clause 2 which empowered him to purchase property on behalf of the defendants. There are also principles of law which may defeat such allegations, such as ratification, acquiescence and estoppel, based on the actions of the defendants, or lack thereof, in relation to these transactions.

[64] **Halsbury's Laws of England** [Halsbury's Laws of England Agency (Volume 1 (2022)) at paragraphs 37, 58 and 69] explains some of these precepts. Concerning implied authority it states:

"(3) IMPLIED AUTHORITY

37. Necessary and incidental acts...."²³

²³ At paragraphs [61] to [64] of the judgment.

[52] The learned trial judge also took into consideration the common law principles of ratification of an agent's acts and the absence of pleading by the appellants of lack of authority by Zayad Ward. She held ultimately:

“[71] Based on the foregoing, it can be reasonably inferred that in all of the circumstance, the defendants by their very conduct intended that Zayad exercise all authority which would have been necessary and incidental to the purchase of property on their behalf, and appear to have ratified these transactions, in the absence of an express clause which Counsel for the defendants now say ought to have been included in the PA's.”

[53] It is important to note that the common law in relation to ratification that the learned judge adopted from **Halsbury's Laws of England** to bolster her decision, finds expression in the **Civil Code** at Article 1627. Article 1627 makes it pellucid that the principal is bound even in relation to acts of an agent that exceed the power conferred by a PA, if the principal has ratified them. Applying that provision to the facts of this case, this means that to the extent that Zayad Ward may have exceeded the authority conferred on him expressly or implicitly by the PAs, he is recognised by law under the express wording of Article 1627 to have validly performed such acts on behalf of EMTI Ltd. and the Wards if they subsequently ratified those acts.

[54] On the evidence led by the Bank, the appellants' conduct after the loan sums were disbursed point indubitably and stridently towards unequivocal ratification of Zayad Ward's acts by EMTI Ltd., Emad Ward and Nadia Ward respectively. In this regard, EMTI Ltd. and the Wards' lawyer received the loan funds on their behalf without objection. The subject property was acquired and a Hypothecary Obligation executed by Zayad Ward on behalf of EMTI Ltd. and Emad Ward as borrowers without protest by the company or Emad Ward and is presumably being enjoyed by the appellants and/or their agents and guests without protestation from any of them. In addition, without complaint, dissent or challenge, Emad Ward and Nadia Ward serviced the loan obligations from their bank accounts at the Bank for almost a year after the loans sums were disbursed. The subject property has remained registered to EMTI Ltd. with the impugned Hypothecary Obligation registered against it likewise

without argument or complaint from EMTI Ltd. through either director Emad Ward or Nadia Ward.

[55] It is very striking and telling that no such objection, protest or challenge was made by EMTI Ltd. and the Wards in response to the demand letters from the Bank or in their joint defence. Just as remarkable is that none of them have sought to surrender or return to the Bank or its predecessor the over one million dollars received to their benefit from the Bank. Those circumstances stand as a compelling testament that EMTI Ltd., and the Wards have ratified Zayad Ward's acts of securing the loan and applying the funds to the purchase of the subject property and hypothecate EMTI's interest in the subject property.

[56] Additionally, as noted by the learned trial judge, Zayad Ward has represented EMTI Ltd., and the Wards throughout these proceedings. The learned trial judge was and this Court is entitled to draw adverse inferences from any one and all of those circumstances that, together with the evidence led by the Bank, support a finding that a prima facie case has been made out as alleged in the statement of claim, and that the appellants have a case to answer. In the absence of evidence from them the learned judge was entitled to find that EMTI Ltd., and Emad Ward are liable to the Bank to repay the sums advanced to them pursuant to the PCA. Equally, Nadia Ward is liable to the Bank as guarantor of the said loan facility. For the foregoing reasons, I would dismiss the appeal and affirm the learned judge's orders.

[57] Having arrived at the foregoing conclusion it disposes of the central issue and it is therefore unnecessary to engage with the other arguments advanced in support of the appellant's appeal such as the assertion that the learned judge erred by finding that there could be a presumption that the appellants authorised Zayad Ward to execute the Hypothecary Obligation. They are all overtaken and forcefully rebutted by the express ratification provision in the **Civil Code**.

Costs

[58] Having prevailed in this appeal, the Bank is entitled to recover its costs of the appeal from the appellants. The costs are to be assessed in accordance with CPR 65.20.

Disposition

[59] For all of the foregoing reasons I would dismiss the appeal, and affirm the orders of the learned trial judge. The respondent bank shall have its costs of the appeal to be assessed if not agreed within 21 days from the date of this judgment.

[60] The assistance of counsel is gratefully acknowledged.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar