

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Appeal under Article
128(2) of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

Srija Ceramics (Pvt) Ltd,
No. 90/3, Nawala Road
Nugegoda.

SC / APPEAL / 181 / 2018

SC / HC / LA / 116 / 2017

CHC / 272 / 2017 / MR

PLAINTIFF

-Vs-

Commercial Bank of Ceylon PLC
No.21, Razik Fareed Mawatha,
Colombo 01.

DEFENDANT

AND NOW BETWEEN

Commercial Bank of Ceylon PLC
No.21, Razik Fareed Mawatha,

Colombo 01.

DEFENDANT - APPELLANT

-Vs-

Srija Ceramics (Pvt) Ltd,

No. 90/3, Nawala Road

Nugegoda.

PLAINTIFF - RESPONDENT

BEFORE : Jayantha Jayasuriya, PC, CJ,
A.H.M.D. Nawaz, J,
Janak De Silva, J

COUNSEL : Shivan Coorey for the Defendant –
Appellant instructed by Julius and
Creasy.

Rohan Sahabandu, PC with Chathurika
Elvitigala and Sachini Senanayake for the
Plaintiff – Respondent.

ARGUED ON : 02.05.2023

WRITTEN SUBMISSIONS : 20th December 2018 by the Defendant –
TENDERED ON Appellant.

1st February 2019 by the Plaintiff –
Respondent.

DECIDED ON : 27.11.2024

A.H.M.D. Nawaz, J.

1. The pithy question for determination in this case is whether a prior mortgage bond can extend its ambit to secure the repayment of a loan granted by a bank subsequent to its execution. It is a well-established principle that a security, such as a mortgage, typically secures both past and present liabilities. However, the inquiry is whether such a security can validly encompass a contingent liability. Given the facts in the instant appeal, can a mortgage bond executed in 2015 serve as security for a loan advanced by the same bank in 2016?
2. This issue draws attention to the intricate and often labyrinthine clauses embedded in standard form mortgage bonds. The ingenuity of their construction serves as a testament to the protective mechanisms that favor financial institutions. Indeed, one might be inclined to echo Lord

Macnaghten's observation that "no one...by the light of nature ever understood an English mortgage of real estate."¹

3. The Defendant-Appellant (hereinafter referred to as the "Defendant" or the "Commercial Bank") extended banking facilities to the Plaintiff-Respondent (hereinafter referred to as the "Plaintiff"). To secure the resulting indebtedness, the Plaintiff executed two mortgage bonds, numbered 2710 and 2711, on 25th August, 2010.
4. The mortgage bond bearing No.2710 hypothecated the properties known as *Heeressagala and Richmond Hill*, while the mortgage bond No.2711 pledged the property known as *Averihena* to the bank.
5. A common feature of both mortgage bonds is the Plaintiff's promise—an undertaking universally included in security documents. Specifically, the Plaintiff expressly covenanted, agreed, and bound itself to the Defendant Bank to repay, on demand, all sums that may become due, owing, or payable at any time or from time to time in connection with any banking facilities extended by the Defendant. This obligation encompassed the repayment of interest at such rates as may be determined by the Defendant Bank in the ordinary course of its business. This is the pith and substance of the covenants in the two mortgage bonds that demand consideration.
6. Due to a failure to repay the periodic dues owed to the bank, the Board of Directors of the Commercial Bank passed a resolution authorizing the

¹ *Samuel v Jarrah Timber and Wood Paving Corporation* (1904) AC 323, at p.326.

sale of the mortgaged properties described in the schedules to the plaint and the schedules to the mortgage bonds. The sale was to be conducted pursuant to the provisions of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (as amended) (the "Act") to recover the monies outstanding on the banking facilities extended to the Plaintiff from time to time.

7. It appears that the Commercial Bank (the Defendant) complied with the procedure outlined in the Act, including the issuance of notice regarding the board resolution. A quick examination of paragraphs [7] to [9] of the plaint and the response in paragraphs [3(s)] to [3(z)] of the statement of objections makes it clear that, despite receiving notice of the board resolution, the Plaintiff failed to take any action to settle the outstanding amounts under the specified banking facilities.
8. Some facts germane to the case warrant recapitulation. It remains undisputed that the Plaintiff has failed to liquidate the amounts owed under the terms of the aforesaid board resolution.
9. Against this backdrop, the Plaintiff instituted the present action, seeking, *inter alia*, an enjoining order and an interim injunction to restrain the sale of the mortgaged properties in question.
10. As is typical in cases of this nature, the Defendant Bank filed its statement of objections on 21st September 2017, opposing the issuance of the interim injunction sought in the Plaintiff's prayer to the plaint. The inquiry into the interim injunction was resolved through written

submissions. By an order dated 15th November 2017, the learned Judge of the Commercial High Court granted the interim injunction. It is this order that is now challenged before this Court.

11. The progression of the case in this Court has given rise to the following questions of law on which leave was granted.

1. Has the learned judge of the High Court erred in overlooking the fact that, by the mortgage bonds admittedly executed by the Respondent in favour of the Petitioner Bank, the Respondent has expressly agreed and undertook to repay to the Petitioner Bank, on demand, all monies which are due and owing upon all and any banking facility granted by the Petitioner Bank to the Respondents;
2. Has the Learned High Court judge failed to appreciate the fact that the aforesaid mortgage bonds annexed to the statement of objections marked as "D1" and "D2" were common securities for all the banking facilities granted by the Petitioner in terms of the letter of offer marked as "A1";
3. Furthermore, has the learned High Court judge failed to appreciate the fact that the rate of interest charged in the final letter of demand marked "A8" by which the Petitioner Bank demanded payment upon the aforesaid mortgage bonds and the notices marked "A10" to "A13" is the same rate of interest. (14.52% per centum per annum and 15.52% per centum per annum) and the said interests are charged from 20th January 2017 on the respective capital balances of the respective Loans (Rs. 10,000,000/- and Rs.8,200,000/-).

Order by the Commercial High Court Judge dated 15th November 2017

12. The learned judge of the Commercial High Court granted the interim injunction principally on the following premises:

a) By looking at D1 and D2 (mortgage bonds) and E1 and E2 (S.47A declarations of waiver), it is clear that the mortgage bonds have not been executed to secure payment of the term loan facilities referred to in the board resolution (Rs. 8,200,000/- and Rs. 10,000,000/-) but regarding two different loan facilities in a sum of Rs. 5,500,000/- and Rs.8,200,000/- respectively;

b) In terms of the last three lines of the second paragraph (sic) of the first page of E1 (the declaration of waiver for mortgage bond No. 2710) which says that the property was mortgaged "*to secure the repayment of the sum of Rupees Five Million Five Hundred Thousand Only (Rs. 5,500.000/-) lent and advanced to us by the said Bank*" and the last three lines of the second paragraph (sic) of the first page of E2 (the declaration of waiver for mortgage bond No. 2711) which says that the property was mortgaged "*to secure the repayment of the sum of Rupees Eight Million Two Hundred Thousand Only (Rs. 8,200,000/-) lent and advanced to us by the said Bank*"

13. Essentially, the Commercial Bank has preferred this appeal to challenge the issuance of the interim injunction granted by the learned High Court judge, which has effectively halted the *parate* execution of the properties mortgaged to the bank.

14. The crux of the learned High Court judge's reasoning is that the two mortgage bonds executed in favor of the Commercial Bank, namely Nos. 2710 and 2711, do not extend to secure the repayment of the restructured advances amounting to Rs. 10,000,000/- (Rupees Ten Million), which were subsequently granted in the year 2016.
15. To evaluate and determine the correctness of the proposition advanced by the learned Commercial High Court judge, it is imperative to examine the original loans granted by the Commercial Bank to the Defendant in 2015 in relation to the subsequent loan granted in 2016, and to assess whether the latter falls within the scope of the security provided by the earlier mortgage bonds.

Original loans advanced in 2015

16. As regards the mortgages referred to above, the letter of offer dated 24th August 2015 extended to the Plaintiff, a customer of the Commercial Bank, a financial facility amounting to Rs. 5,500,000/- (Rupees Five Million and Five Hundred Thousand). The Plaintiff accepted this offer and executed a floating primary mortgage bond, No. 2710, to secure repayment of this sum. Additionally, a second loan facility of Rs. 8,200,000/- (Rupees Eight Million and Two Hundred Thousand) was granted and secured by a separate floating primary mortgage bond, No. 2711. Both mortgage bonds were executed on 25th August 2015.

17. The relationship between these two loans and the respective mortgage bonds securing their repayment is illustrated for clarity in the diagrams given below.

Loan and Mortgage Bond Relationships

Loan 1

- **Amount:** Rs. 5,500,000/- (Rupees Five Million and Five Hundred Thousand)
- **Date of Loan:** 24th August 2015
- **Secured by:** Floating Primary Mortgage Bond No. 2710
- **Date of Execution of the above mortgage bond:** 25th August 2015

Loan 2

- **Amount:** Rs. 8,200,000/- (Rupees Eight Million and Two Hundred Thousand)
- **Date of Loan:** 24th August 2015
- **Secured by:** Floating Primary Mortgage Bond No. 2711
- **Date of Execution of the above mortgage bond:** 25th August 2015.

18. The loans, designated as *Loan 1 and Loan 2* above, are best illustrated by the following diagrams Figure I and Figure II, which depict the relationship between the loans and the corresponding mortgage arrangements.

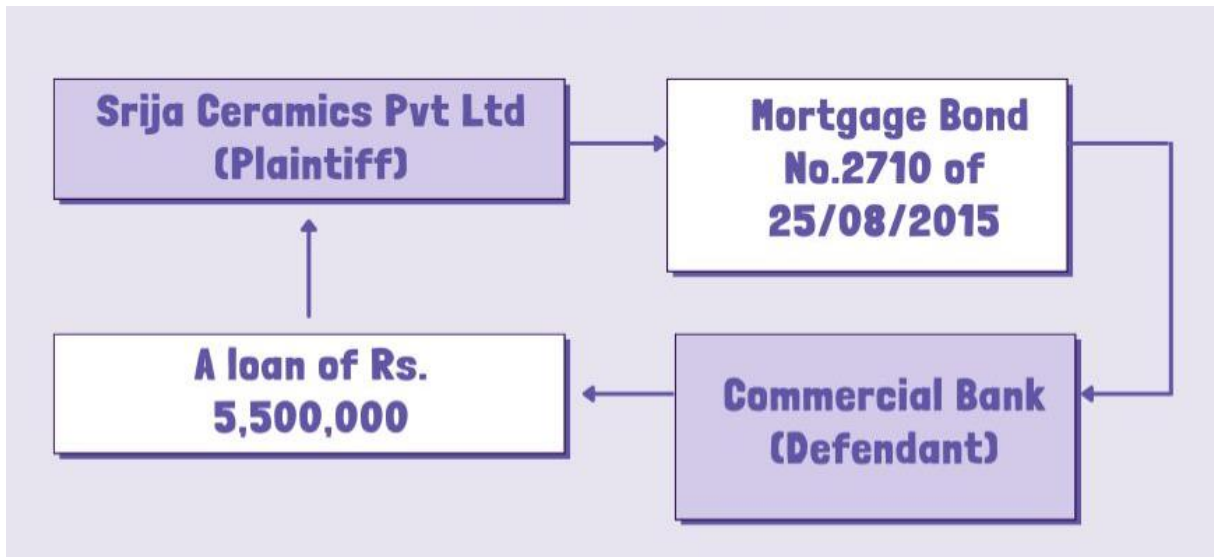


Figure I

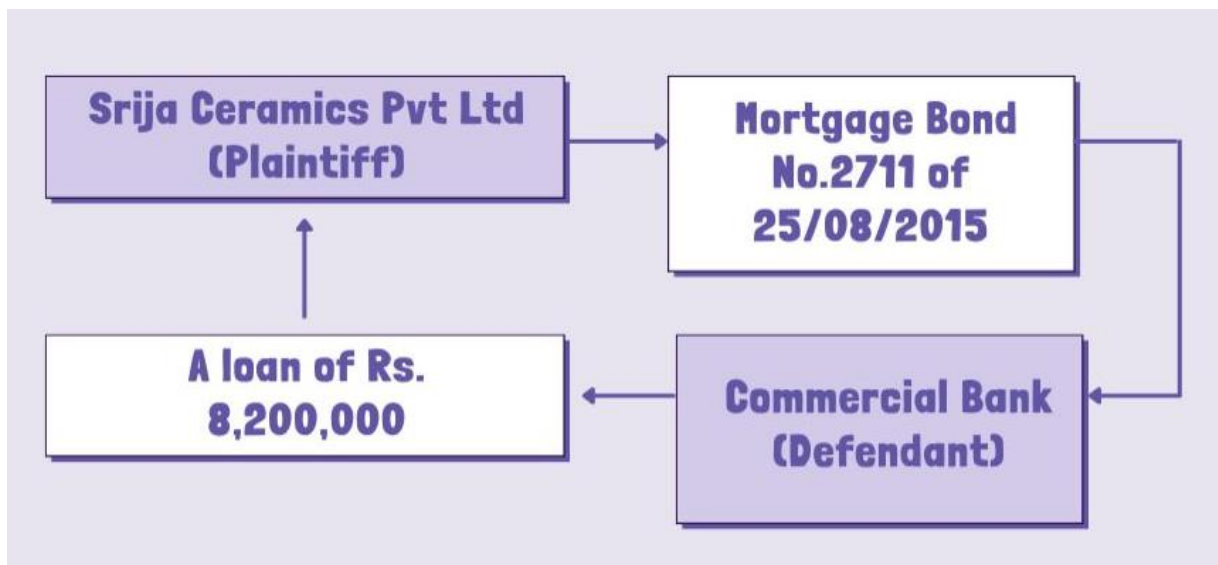


Figure II

Restructuring of loans in 2016

19. In the year 2016, another letter of offer dated 22nd September 2016 proposed to restructure the previously granted loans in the following manner

- **An overdraft facility**

Rs. 4,750,000/- (Rupees Four Million Seven Hundred and Fifty Thousand only)

- **A Structured term loan facility**

Rs. 10,000,000/- (Rupees Ten Million only)

- **A Term loan facility**

Rs. 8,200,000/- (Rupees Eight Million and Two Hundred Thousand only)

20. It should be noted that when the rescheduled term loan of Rs. 10,000,000/- was established in 2016, the overdraft facility of Rs. 4,750,000/- and the term loan facility of Rs. 8,200,000/-, both originating in 2015, remained *in esse*. This conclusion is reached upon reviewing the offer letters in the case.

21. The Commercial Bank offered the borrower company the aforesaid sum of Rs. 10,000,000/- in 2016 to settle the outstanding dues on the revolving short-term loans previously obtained by the Plaintiff. This appears to be a new financial advance, while the liabilities under the overdraft facility of Rs. 4,750,000/- and the term loan facility of Rs. 8,200,000/- continued to grow by 2016.

22. It is important to note that the loan of Rs. 10,000,000/- (Rupees Ten Million), offered to the Plaintiff in 2016 as a restructured loan, does not specify any particular mortgage bond securing its repayment. Furthermore, it must be emphasized that this restructured loan, advanced in 2016, was granted well after the mortgage bonds were executed in 2015.
23. The quintessential question before this Court is *whether the restructured loan of Rs. 10,000,000/- (Rupees Ten Million) which came into existence in 2016 would be secured by the previous mortgage bonds executed in the 2015.*
24. The learned Commercial High Court judge holds that the amount of Rs. 10,000,000/- (Rupees Ten Million), not being specifically mentioned in the prior mortgage bonds of 2015, is not secured by either of these bonds. Therefore, the immovable properties mortgaged under the prior mortgage bonds (Nos.2710 and 2711) of 2015 cannot be subjected to *parate* execution to recover the restructured loan granted in 2016 - so holds the learned Commercial High Court judge.
25. Thus, the question before us is whether the above mortgage bonds Nos. 2710 and 2711 would serve as security for the latter loan of Rs. 10,000,000/- (Rupees Ten Million).
26. The learned judge of the Commercial High Court has held otherwise because the restructured loan of Rs. 10,000,000/- (Rupees Ten Million) is nowhere specified in the previous bonds nor is it mentioned in the

declarations of waiver executed under S.47A in relation to these mortgage bonds.

27. It must be emphasized that the restructured loan of 2016 cannot be reflected in the mortgage bonds of 2015 or the associated declarations of waiver, as the loan was advanced at a later point in time. The appropriate question is not whether the mortgage bonds explicitly reference the exact amount of the subsequent loan, but whether their terms encompass the borrower's liability for future advances. This critical question was overlooked by the Commercial High Court judge. Had it been addressed; the answer would have been evident from several clauses consistently included in both mortgage bonds.

28. Both mortgage bonds, Nos. 2710 and 2711, include similarly drafted clauses that the learned Commercial High Court judge overlooked before issuing the interim injunction. Specifically, Clauses (e) and (g)(3) of mortgage bond No. 2711 represent the standard practice of financial institutions to safeguard their interests. The earlier bond, No. 2710, contains identical language to the clauses detailed below.

Clause (e) of Bond No.2711

*“All and every the sums and sum of money which now are or is or which shall or may at any time from time to time and **at all times hereafter** be or become due owing and payable to the Bank by obligor/s upon or in respect of all loans advances or payments whatsoever which may at any time from time to time and **at all times hereafter** be made by the Bank to or for the use or accommodation*

benefit or on account of the obligor/s and upon or in respect of any account or accounts transaction/transactions whatsoever between the obligor/s and the Bank”.

Clause (g)(3) of Bond No.2711

*“That these presents shall be a **continuing security** to the Bank for all and every the **sums and sum of money** which now are or is or which shall or may at any time and from time to time and at all times **hereafter** be or become due owing and payable by the obligor/s to the Bank under by virtue or in respect of or secured by these present notwithstanding that the amount of such sums or sum of money may from time to time vary or be reduced or fluctuate or be repaid in full and that fresh liabilities shall be incurred after the obligor/s he ceased to be indebted to the Bank it being intended that the total amount of moneys hereby secured shall not exceed Rupees Eight Million Two Hundred Thousand Only (Rs.8,200,000/-) of lawful money of Sri Lanka the security hereby created being intended to cover the final balance of accounts between the obligor/s of the one part and the Bank other part in respect of all transactions and dealings such **final balance not to exceed in whole the sum of Rupees Eight Million Two Hundred Thousand Only (Rs.8,200,000/-)** and interest thereon at Average Weighted Prime Lending Rate Plus Three (AWPLR+3%) p.a. per centum per annum”.*

29. The above clauses clearly indicate the possibility of banks advancing funds in the future, even long after the execution of the mortgage bond. Specifically, the two clauses in mortgage bond No. 2711 establish that the

security provided (in this case, the *Averihena* property mortgaged under bond No. 2711) is liable to be bound and sold in execution to recover not only the outstanding dues and interest on the original loan of Rs. 8,200,000/- but also any future and contingent advances currently due and payable to the bank. Notably, the clauses impose a deliberate cap on the amount recoverable by the bank, namely Rs. 8,200,000/- along with interest at the specified rate.

Whole Monies or Debt Clauses

30. **Paget's Law of Banking (Fifteenth Edition, 2018)** highlights the efficacy of such clauses as follows:²

A common situation would be where a bank allows a customer to increase his overdraft on a current account. This is usually referred to as lending on a fluctuating account because the balance on the account is going to be changing constantly as money flows in and out. Another common situation would be where a borrower draws down on an existing facility within the limit of that facility.

A preliminary point to be addressed is a simple one of construction. This applies whether or not the land is registered. It is necessary to decide exactly what the original mortgage secures. It is not uncommon to have in a mortgage a definition of the 'secured sums' and to find that they are defined as the amounts due to the lender on a particular account or under a particular loan agreement.

² page 479.

Clearly, such a mortgage is not going to secure amounts advanced on an entirely different account or under a different loan agreement. Equally clearly, there are going to be difficulties if the identified account is closed or the original loan agreement is amended.

The security which a lender takes from a corporate customer will usually address the issue by defining the secured sums very widely so as to include all monies due from the customer to the lender on any account, whatsoever, whether as principal or as surety and will include all costs, charges and commission. This is commonly known as an 'all-monies charge'.

31. Both the clauses I have culled out from the mortgage bonds can be properly called 'all-monies charge' or 'all debts' clauses which are common in contracts of both guarantee and mortgage.
32. These clauses, which are also known as 'all accounts', 'all obligations', 'all monies', 'all moneys', and (particularly in the United States) dragnet' clauses, are intended to ensure that the party providing the mortgage or guarantee will be liable for all sums owed by the debtor or other nominated party to the creditor. To ensure adequate coverage of all eventualities, clauses of this nature are generally drawn comprehensively.

Continuing Security

33. Clause (g) (3) also classifies the security as a continuing security and the significance of such a classification is unmistakably evident. If a mortgage is not expressed to be a continuing security, it may be construed as covering only a specific transaction where the liability of the mortgagor may reduce by payments in. Where there is a facility under which the principal debtor's liability fluctuates because sums are credited and debited to an account from time to time (subject usually to a given limit), such as an overdraft facility on a current account, or sums advanced under a factoring or invoice discounting facility, provision must be made in the security to ensure that the mortgagor's liability does not come to an end when the balance of the account is repaid, or else sums which the mortgagor later draws down may not be covered. A continuing security clause achieves this by providing that the mortgage shall remain a continuing security for the mortgagor's obligations to the creditor at any time and that it shall not be satisfied or otherwise affected by any repayment from time to time of the whole or part of the sums due and owing,

34. Thus, the mortgage bonds executed in 2015 would secure not only moneys owing upon the security but also money due upon future advances that become payable on demand. *En passant*, I would pinpoint Section 64 (1) of the Mortgage Act that renders a mortgage given to secure future advance valid and effective.

35. I further hold that the mortgage bonds in this case are not explicitly limited to covering payments under or pursuant to the 2015 offer letter. The mortgagor's liability is not confined to the initial tranche of financial advances. The scope of the mortgage bonds of 2015 is broad enough to encompass contingent and future liabilities. Consequently, the loan—or the restructured term loan issued in 2016—falls within the ambit of the 'all monies' clauses of the two mortgage bonds, even without specific reference to any individual mortgage bond.

36. The Commercial High Court judge overlooked the key features of the mortgage bonds and erred in restraining the *parate* execution of the properties securing repayment of the subsequent loan of Rs. 10,000,000/- despite the bonds explicitly and unequivocally permitting such a course of action. Accordingly, this Court will set aside the order of the Commercial High Court dated 15.11.2017, as it is based on the incorrect premise that the loan of Rs. 10,000,000/- (Rupees Ten Million) granted in 2016 is not covered by the mortgage bonds.

37. Before I part with the judgment, a caveat requires to be sounded in permitting any *parate* execution based on the resolution before Court. It is important to note that while the mortgage bonds serve as continuing securities, securing past, present, and future advances that are due and owing, their enforceability is subject to the condition that the total debts sought to be enforced do not exceed Rs. 5,500,000/- and Rs. 8,200,000/- respectively, as stipulated in the individual mortgage bonds.

38. There was a clear mutual intention at the time of executing the individual mortgage bonds that the total debt (whole debt) enforceable by the bank by virtue of the mortgage bonds would be capped at Rs. 5,500,000/- and Rs. 8,200,000/- respectively, even though the liabilities of the Plaintiff – Respondent owed to the bank may be higher. Clause (e) of bond No. 2711, as cited above, exemplifies this intention, stating that ‘.....*such final balance not to exceed in whole the sum of Rupees Eight Million Two Hundred Thousand Only (Rs. 8,200,000/-) and interest thereon.....*’. In the context of guarantees which contained whole debt clauses but with a cap on total liability, English case law illustrate the intention of parties not to cover certain types of liabilities - see ***Investec Bank (UK) Ltd v Zulman***³ and ***Barclays Bank v Caldwell***.⁴

39. In the latter case, Barclays Bank issued a side letter confirming that, despite the guarantee's "all monies" scope, it would apply only to the "top £70,000" of the debtor's overdraft facility. The Court held the guarantee unenforceable because it was executed in terms that did not evidence this agreement, thereby failing to comply with Section 4 of the Statute of Frauds 1677, which requires that the terms of a guarantee be evidenced in a note or memorandum signed by the guarantor.

40. In the end, I must emphasize the importance of mortgage bonds that guarantee the repayment of all monies currently or at any time owed to the bank in respect of advances and accommodations granted to the borrower (mortgagor), provided that the liability of the mortgaged

³ (2009) EWHC 1590 (Comm).

⁴ Unreported, 25 July 1986 (Harman J)

property is capped at a specified amount. This critical feature cannot be overlooked. The upshot of all this is that a board resolution of a bank seeking to enforce a liability exceeding the capped limit specified in the mortgage bond would render such enforcement actionable, as the excess liability beyond the cap has to be enforced by other appropriate means of recovery.

41. This principle must be kept in mind as the Commercial High Court resumes the trial following the remand of the case to its jurisdiction.

42. The Court proceeds to answer the questions of law formulated in this Court as follows;

1. Yes, but all moneys which are due and owing upon all and any banking facility can be enforced subject to the limitation imposed by the mortgage bonds on liability.
2. Insofar as the two mortgage bonds were continuing securities, they would encompass the banking facilities granted by the Commercial Bank in terms of the letter of offer dated 22.09.2016.
3. As the learned Commercial High Court judge has left the question of interest to be examined and determined at the trial, it is premature to answer this question of law.

43. Accordingly, this Court sets aside the order of the Commercial High Court dated 15th November 2017 as regards the issuance of the interim injunction and allows the appeal of the Defendant – Appellant. I reiterate that this judgement only sets aside the interim injunction issued by the Commercial High Court. Thus, this Court directs that the trial of this action be continued and concluded as expeditiously as possible.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ

I agree

Chief Justice

Janak De Silva, J

I agree

Judge of the Supreme Court