[2018] JMCC Comm 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016CD00058

BETWEEN	**MILLARD DUNBAR**	**CLAIMANT**
AND	**ST CATHERINE CO-OPERATIVE CREDIT UNION LTD**	**DEFENDANT**

IN OPEN COURT

Mr Carlton Williams and Mr Mark Williams instructed by Williams, McKoy & Palmer, Attorneys-at-Law for the Claimant

Mr Dennis Richards and Mrs Sherene Richards instructed by Richards & Richards, Attorneys-at-Law for the Defendant.

Mortgage- Foreclosure - Whether notice of foreclosure sent by registered letter must actually be received by the addressee for the service to be valid

Contract - Formation - Agreement to negotiate - Whether binding contract

Unjust enrichment - Whether proper exercise of right to foreclose can amount to unjust enrichment

Heard: November 6th, 7th, 8th, 2017 and January 18th, 2018

LAING, J

The Claim

[1] The Claimant, Millard Dunbar was the proprietor of property located at Lot 19 Twickenham Park, in the parish of St. Catherine, registered at Volume 1197, Folio 364 of the Register Book of Titles ('the Property"). The Defendant, St. Catherine Co-operative Credit Union Limited is a registered company incorporated under the laws of Jamaica with registered offices at 13 White Church Street, Spanish Town in the parish of Saint Catherine. The Defendant has exercised its rights of foreclosure in respect of the Property and as a consequence of that action the Claimant has filed this Claim.

[2] The Claimant is seeking, *inter alia*, the following relief in respect of the Property (referred to in the pleadings as the premises):

> *"An order that the Claimant is entitled to possession of the premises and that the notice to quit served upon the Claimant is null and void.*
>
> *An order that upon the payment of the sum of Four Million, Seven Hundred and Thirty-five Thousand One Hundred and Seventy-three Dollars and Three Cents ($4,735,173.03) the Defendant shall discharge the mortgage and return the Certificate of Title registered at Volume 1197 Folio 364 to the Claimant, for that:*
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> *i. The Defendant was in breach of its fiduciary duties and/or statutory duties for that proper and/or adequate relevant notices were not duly served upon the Claimant inter alia;*
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> *ii. The Defendant was in breach of contract by invoking foreclosure proceedings in the circumstances and/or;*
>
> *iii. The retention or ownership and possession of the premises by the Defendant in the circumstances is inequitable and an act of unjust enrichment at the expense of the Claimant.*
>
> *And/or alternatively, an order that the Defendant's action was tantamount to fraud in obtaining by deception to the benefit of a foreclosure by falsely claiming to have complied with section 119 of the Registration of Titles Act, and that the original title be reissued."*

The background

[3] The Claimant on the 29th day of May 2009 mortgaged the Property to the Defendant, pursuant to an instrument of mortgage, bearing mortgage No. 1593770 ("the Mortgage") as security for a loan in the sum of Three Million Dollars ($3,000,000.00). Under the terms of the Mortgage, the Claimant was required to pay the sum of Eighty Thousand Dollars ($80,000.00) on a monthly basis. The Claimant subsequently defaulted on his payments to the Defendant.

[4] The Defendant thereafter caused two notices of sale to be issued to the Claimant and the Property was put up for public auction by Douglas Property Rentals & Auctioneering Services Ltd. The Certificate of Auctioneer dated 1st May 2014 confirms that on the day of the auction, no offer was made. A notice of foreclosure was subsequently issued by Richards & Richards, the Defendant's Attorneys-at-Law, dated the 9th day of September 2014, (the "Notice of Foreclosure") and sent by registered post, addressed to the Claimant at Keith Hall District, Bog Walk Post Office, St Catherine.

[5] The Claimant stated that he could not recall receiving a notice of sale and asserted that the Notice of Foreclosure was never received by him at Keith Hall District. As a consequence he said that he was unaware of the Defendant's intention to proceed by way of foreclosure. The Defendant did not successfully refute the evidence of the Claimant that he did not receive the Notice of Foreclosure. Most importantly, there was no challenge to the contents of the letter of the Postmistress of Bog Walk Post Office, addressed to Counsel for the Claimant, in which it was confirmed that the registered article for the Claimant which was received by the Post Office on the 15th September 2014 was in fact returned from the Post Office to the offices of Richards & Richards on the 22nd day of October 2014.

[6] The Claimant proceeded to file an application for foreclosure of mortgage dated 6th May 2015 with the Registrar of Titles pursuant to section 119 of the

Registration of Titles Act ("RTA"). The Application was supported by a Statutory Declaration by Janice Green, the Secretary of the Board of Directors of the Defendant, in which she declared that notice had been given to the Claimant (the Mortgagor) of the Defendant's intention to apply for a foreclosure order "*by registered letter addressed to the Mortgagor and a copy of this Notice and the Post Office receipt for the same are exhibited to the Statutory Declaration lodged herein"*

[7] The Registrar of Titles having been satisfied that the provisions of section 119 of the RTA had been complied with, in accordance with the provisions of section 120 of the RTA, issued an Order for Foreclosure to the Defendant in respect of the Property on the 15th day of July 2015.

[8] The Claimant has asserted that there was non-compliance with section 119 of the RTA because he was not served with the Notice of Foreclosure and accordingly the Order for Foreclosure ought not to have been granted. He has also asserted that the foreclosure by the Defendant was fraudulent. It was submitted on his behalf that the declaration that was made to the Registrar of Titles that the Notice of Foreclosure was served on him by registered post, is tantamount to fraud, in obtaining by deception, the benefit of a foreclosure order, by falsely claiming to have complied with section 119 of the RTA

[9] Another ground submitted on behalf of the Claimant as to why the Order for Foreclosure should be set aside, is based on his assertion that at all material times he was in negotiations with the Defendant as to how best to offset his obligations to it and that representatives employed to the Defendant had given him their undertaking not to foreclose on the Property. Based on this undertaking, he asserted that the Defendant's actions in foreclosing on the Property was in breach of the policy of the Defendant and/or the agreement between the parties and/or the expectation held out by the Defendant to the Claimant and/or its statutory and fiduciary duties to him.

The Issue of service

[10] It is the Defendant's case that it exercised their right of foreclosure and that on the 15th day of September 2014 they issued the Notice of Foreclosure to the Claimant in compliance with section 119 of the RTA, which states as follows:

> *"119. Whenever default has been made in payment of the principal or interest money secured by a mortgage and such default shall be continued for six months after the time for payment mentioned in the mortgage, the mortgagee or his transferee may make application in writing to the Registrar for an order for foreclosure; and such application shall state that such default has been made and has continued for the period aforesaid, and that the land mortgaged has been offered for sale at public auction by a licensed auctioneer after notice of sale served as hereinbefore provided, and that the amount of the highest 'bidding at such sale was not sufficient to satisfy the moneys secured by such mortgage, together with the expenses occasioned by such sale, and that notice in writing of the intention of the mortgagee or his transferee to make an application for foreclosure has been served on the mortgagor or his transferee, by being given to him or them, or by being left on the mortgaged land, or by the same being sent through the post office by a registered letter directed to him or them at his or their address appearing in the Register Book, and also that a like notice of such intention has been served on every person appearing by the Register Book to have any right, estate or interest, to or in the mortgaged land subsequently to such mortgage, by being given to him or sent through the post office by a registered letter directed to him at his address appearing in the Register Book".*

[11] The sole witness on behalf of the Defendant was Mrs Patricia Williams-Coore, who is the Recovery Officer of the Defendant. Her evidence was that letters to its members such as the Claimant are usually sent to the main address which the member submitted on the member's application and if they had any other address for the member the letters would be sent to that address as well. She confirmed that as far as the Claimant was concerned, the Defendant had an address for him at Lot 13 St Jago Meadows, St Catherine PO and Shops 5 & 6 Spanish Village, Spanish Town, St Catherine.

[12] The Claimant's evidence was that his home address is Keith Hall, Bog Walk, St. Catherine, which is also his address as reflected on the certificate of title in respect of the Property, but he said that he does not take his mail at that

address. He asserted that he only sleeps at Bog Walk because he leaves early in the mornings to take his children to school and returns late at night.

The submissions on behalf of the Claimant on the issue of service

[13] In support of the argument that because the Notice of Foreclosure which was sent by registered mail was not actually received and therefore did not satisfy section 119 0f the RTA. Counsel for the Claimant relied on the case of **Beer v. Davies** 1958 2 All ER 255. In that case the respondent was involved in a motor vehicle accident and notice of intended prosecution of a driving offence was sent to his home address by registered post within the statutory period. Unfortunately, it was not delivered because he was away on vacation and no one was at this home. The notice was returned to the Appellant by the Post Office. The information against the respondent was dismissed on the ground that the notice of intended prosecution was not served within the statutory period as it had not been delivered. Lord Goddard CJ at 257E commented as follows:

> *"The Court of Appeal in **R v London Quarter Sessions, Ex p. Rossi** (1) ([1956] 1 All E.R. 670, have decided that where a notice is to be served by registered post, though it is prima facie enough to prove that it was correctly directed, stamped and posted, yet if it can be shown that the notice was never delivered there has not been service and s. 26 of the Interpretation Act, 1889 does not assist. In **R v London Quarter Sessions, Ex p. Rossi** (1) the Court of Appeal were not concerned with the Road Traffic Act, 1930. The question was one of an appeal to quarter sessions in a bastardy matter, but the substance of the decision applies equally here because the Court of Appeal were considering s. 3 of the Summary Jurisdiction (Appeals) Act , 1933, which provides for the giving of various notices, and says:*
>
> > *'A notice required by this sub-section to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode'."*

[14] At page 258C Lord Goddard CJ said:

> *"…but any rate there is the decision of the Court of Appeal that a notice sent by registered post but not delivered is not good service. I do not see, therefore, that we can possibly hold otherwise in this case without disregarding that decision, though, technically, it may not be binding because it is a criminal cause or matter."*

[15] Hilbery, J in **Beer v Davies** at page 259 F, also referred to **R v London Quarter Sessions, Ex p. Rossi** (supra) and in particular to the judgment of Morris, L,J. (at page 678) which he quoted as follows:

> *"The Act of 1933 clearly permits or authorises the giving of a notice as to a hearing by sending a document by registered post. But if the primary obligation of giving notice means in this context the giving of some form of notice which reaches the party interested so that he may be present or represented at the hearing, then the permissive user of the post denotes a user so that notice may reach the party interested so that he may be present or represented at the hearing."*

[16] Counsel for the Claimant also relied on the Jamaican Court of Appeal decision of **George Anthony Hylton v. Georgia Pinnock & Others** [2011] JMCA Civ 8 in support of his submission that was that there is a need to prove '*actual service*' where the RTA stipulates service by registered post.

[17] The **George Hylton** case concerned section 140 of the RTA and in particular the portion of the section which provided that:

> *"...every caveat lodged against a proprietor shall be deemed to have lapsed as to the land affected by the transfer or other dealing, upon the expiration of fourteen days after notice given to the caveator...."*

A central issue in the case was when the notice is to be regarded as being given to the caveator, and whether it was given outside the 14 day period. This was in circumstances where the Registrar of Titles had issued a notice to caveator, in keeping with the then established practice of posting a letter to the caveator's address for service, which was in care of her Attorneys-at-law at 66 Barry Street, Kingston.

[18] It was not in dispute that section 140 of the RTA did not provide any instructions as to the method of service of the notice. It only provided that notice must be given. Having noted that section 140 did not provide a method of service, Phillips JA observed that section 139 provided that:

> *"No caveat shall be received-*

> *(a) unless some address or place within the city of Kingston shall be appointed therein as the place at which notice and proceedings relating to such caveat may be served;*
>
> *(b) ...A caveator may, however give an additional address out of the city at the foot of such caveat, in which case a registered letter shall be sent through the post office to such address on the same day as that on which any notice relating to such caveat is served in Kingston. Every notice relating to such caveat, and any proceedings in respect thereof if served at the address or place appointed as aforesaid, shall be deemed to be duly served."*

[19] Phillips JA concluded that sending the letter through the post was not the primary method of service and was only an additional method of service for caveators residing outside of Kingston. It did not obviate the need to send the notice to the address in Kingston which was a mandatory requirement pursuant to section 139 (a). The learned Judge accordingly concluded at paragraph 34, that the effect of these findings was that "*the Act is silent as to the method of service other than to provide that the notice must be served at the address given for service*". As a consequence the learned judge also concluded at paragraph 35 of the judgement that the provisions of section 52 of the interpretation act which provided for "deemed service" "…*at the time at which the letter would be delivered in the ordinary course of post*", were of no assistance since those provisions spoke to the situation "…*where the Act in question states that the method is to be by post but does not prescribe the manner of posting."*

[20] Phillips JA examined a number of cases on the issue of service generally including **Holwell Securities Ltd v. Hughes** [1974] 1 All ER 161. In that case a letter purporting to exercise an option to purchase contained in a lease agreement had been posted, properly addressed and prepaid but it was never in fact delivered to the landlord or his address. It was held by the Court of Appeal of England that the requirement that the option was to be exercised by 'notice in writing to' the landlord meant that a written document had to be communicated or notified to the Defendant.

[21] Phillips JA also examined the case of **Beer v Davies** (supra) and referred to the dicta of Morris LJ which was quoted by Hilbery J, to which reference has been made earlier in this judgment.

[22] At paragraph 38 of the **George Hylton** case, Phillips JA reached the following conclusion:

> *"[38] The notice must therefore be delivered to and be received at the address given in the caveat. That, I think, is the most that can be done to ensure that the notice reaches the caveator. I do not agree that it should mean notice actually communicated. To insist upon such a requirement would be contrary to the clear words of the Act that service is duly effected once notice reaches the address and it is received at that address. It therefore need not be further proved when the notice actually reaches the caveator's attention.*
>
> *[39] I should point out that even if the words of the section had not been so clear in respect of service being effected, since the Registrar had adopted a method that was not stipulated in the Act, it would be necessary to prove that the notice had actually been received at the address (see **Chiswell**)[Chiswell v Griffon Land and Estates Ltd [1975] 1 WLR 1181].*
>
> *[40] Such a result, in my view, accords with fairness. It must be remembered that a caveat is lodged to protect the caveator's interest. If the caveator does not appear to seek relief, then the Registrar will be obliged to enter the dealing with the property. The consequence of this would be that the caveator's interest in the property would have been extinguished..."*

The submissions on behalf of the Defendant on the issue of service

[23] Counsel for the Defendant sought to distinguish the **Hylton** case and submitted that it does not assist the Claimant's case because the issue considered related specifically to the warning of a caveat and that the narrow focus was the date of service, particularly in circumstances where section 140 of the RTA did not outline a method of service. Counsel submitted that, in contrast, in this case section 119 of the RTA is very detailed in its provisions as to the methods of service.

[24] Because of the detailed methods of service in section 119 of the RTA, which includes service by registered post, Counsel for the Defendant submitted that the English case of **Chiswell** which was also relied on in the **George Hylton** case is not of much assistance in the case before the Court, because the value of **Chiswell** lies in its confirmation that notice using a method not prescribed in the relevant legislation could nevertheless be good service if in fact it was received by the person to whom the notice was required to have been served. Counsel submitted further, that this is evident in the portion of the judgment of Megaw LJ reproduced in the **George Hylton** case where he stated as follows:

> *"It is provided, as what I may call at any rate the primary means of effecting service, that it is to be done either by "personal" service or by leaving the notice at the last known place of abode, or by sending it through the post in a registered letter, or (as now applies) in a recorded delivery letter. If any of these methods are adopted, they being the primary methods laid down, and, in the event of dispute, it is proved that one of those methods has been adopted, then sufficient service is proved...But, as I think may be assumed for the purposes of this appeal, if the person who gives the notice sees fit not to use one of those primary methods, but to send notice through post, not registered and not recorded delivery, that will nevertheless be good notice, if in fact the letter is received by the person to whom notice has to be given".*

[25] Counsel for the Defendant placed reliance on the Australian case of case of **Yap Cheng See v Challenge Bank Ltd** (unreported), WASC Library No 970695, 12 December 1997. The particular provision of the legislation which was being considered in that case was section 6 of the Transfer of Land Act 1893, which at the relevant time provided as follows:

> *"A mortgage and a charge under this Act shall when registered as hereinbefore provided have effect as a security but shall not operate as transfer of the land thereby mortgaged or charged; and in case default be made in payment of the principal sum interest or annuity secured or any party thereof respectively or in the performance or observance of any covenant expressed in any mortgage or charge or hereby declared to be implied in any mortgage and such default be continued for one month or for such other period of time as may therein for that purpose be expressly fixed the mortgagee or annuitant or his transferees may serve on the mortgage or grantor or his transferees notice in writing to pay the money owing on such mortgage or charge or to perform and observe the aforesaid covenants (as the case may be) by giving such notice to him or*

> *them or by leaving the same on some conspicuous place on the mortgaged or charged land or by sending the same through the post office by a registered letter directed to the then proprietor of the land at his address appearing in the register book."*

[26] At page 29 of the judgment, Parker J made the following observations:

> *"The methods of service provided for in s106 suggest that it is not the intention of the provision that the notice to which it refers must reach the mortgagor. That is readily apparent from the method of service identified whereby the notice can be left on a conspicuous place on the mortgaged land, which method by no means ensures that the notice will be brought to the attention of the mortgagor. It seems to me, therefore, that there is no reason to understand the third method of service 'sending through the post office a registered letter' as requiring that the notice actually be received by the mortgagor. This was the view taken by Higinbotham CJ in* ***Gunn v Land Mortgage Bank of Victoria Ltd*** *(1890)12 ALT 49 at 51, where he was considering a virtually identical provision of the equivalent Victorian statute in force at that time. In* ***Irving v Commissioner of Titles*** *[1963] WAR 67 at 68 Hale J, after having referred to* ***Gunn v Land Mortgage Bank of Victoria Ltd****, said of s106:*
>
> > *'It is difficult to see why the section was drafted as it was, but clearly the essential idea is that a notice shall be given even though it may not come to the knowledge of the addressee'."*

[27] Counsel for the Defendant also sought support in a later Australian case of **Commonwealth Bank of Australia v. Shaddick** [2011] WASC 205 which followed the approach of and referred to **Yap Cheng See.** The case concerned a default notice that was posted by registered letter to the Defendant. The default notice was addressed to the Defendant at her residential address which was also the address of the mortgaged property. The letter containing the default notice was returned unopened. The Defendant said that she was on holiday in Spain and the property was unoccupied and it was not contested by the plaintiff that the default notice was not received by the defendant.

[28] The legislation that was being relied on by the Defendant in the case of **Shaddick** was the Australian Transfer of Land Act 1893, in particular section 106(2) which at the time was an amended version of the Act considered in **Yap Cheng See** and which provided as follows:

(2) Notwithstanding section 240, service of the notice referred to in subsection (1) is not properly effected unless –

"(a) the notice is delivered personally to the mortgagor or the grantor or his transferees, as the case requires; or

(b) the notice is sent by registered post to -

(i) the address entered in the Register as the address of the mortgagor or the grantor or his transferees, as the case requires; or

(ii) the address known to the mortgagee or the annuitant or his transferees as the current address of the mortgagor or the grantor or his transferees, as the case requires;

or

(c) the notice is left in a conspicuous place on the mortgaged or charged land; or

(d) the notice is sent to the number of the facsimile machine of the mortgagor or the grantor or his transferees, as the case requires (but only where the mortgagor or the grantor or the transferee has specified in writing to the mortgagee or the annuitant or his transferees, as the case requires, that notices under this section may be served on him by facsimile transmission)."

[Section 106 amended by No.81 of 1996 s.66; No.31 of 1997 s.108; No.10 of 1998 s.69(1).]

[29] Master Sanderson in handing down the decision opined at paragraph 6 of the judgment as follows:-

"This subsection is not in the nature of a consumer protection provision. It sets out a method by which default notices can be served. It is clear the subsection does not anticipate a default notice will, in every instance, actually come to the attention of the party to be served. Clearly section 106(2)(a) anticipates this will occur. But subs s (2)(b), (c) and (d) provide a method of service which is by no means certain to ensure the default notice will come to the attention of the registered proprietor. It may be a notice left in a conspicuous place on the mortgaged land will come to the attention of a registered proprietor who attends on the property. But if, as is the case here, the registered proprietor is overseas and does not

> *attend the property, then the notice will not come to his or her attention. But service is still effected."*

[30] Master Sanderson went on to confirm that there were a number of cases in the jurisdiction of Australia which adopted a similar interpretation of the section including **Yap Cheng See** and boldly declared that it would seem to him that there is no decision in that jurisdiction which is at odds with the interpretation found in the cases to which he referred.

[31] Counsel for the Defendant submitted that a similar approach ought to taken in respect to the interpretation of section 119 of the RTA and in determining the legislative intent having regard to the methods of service permitted by that section. Counsel also argued that because of the difference in the types of legislation in **Beer** and **R v London Quarter Sessions, Ex p. Rossi,** the approach taken in those cases of requiring actual notice is understandable, but those cases are distinguishable and their conclusions inapplicable to a consideration of section 119 of the RTA.

The Court's conclusion on the issue of service

[32] It is my view that the case of **George Hylton** has to be read in the context of its special facts. As I interpret it, the case decided that notice to a caveator at his primary address which is required by section 139(a) to be in Kingston, is "served" when it is delivered to and received at that address. This is because section 139 does not provide a method of service at the primary address in Kingston.

[33] The case also decided that where a caveator who resides outside of Kingston has also given an address outside Kingston, then **a registered letter shall** also be **sent** through the Post Office to such address outside of Kingston, on the same day that notice of the caveat is **served** in Kingston. Sending the registered letter does not obviate the requirement for the notice to be served at the Kingston address. For there to be service at the Kingston address, the notice must be delivered to and received at the address given in the caveat. If the notice is

delivered to and received at the address or place appointed in the caveat, it shall be **deemed** to be duly served.

[34] The case of **George Hylton** can therefore, to my mind, be relied on for the proposition that every notice to a caveator can only be considered as duly served if it is delivered to and received by him at his primary address given in his caveat. Since every caveator must state a primary address in Kingston, the practical effect of this is that every caveator must be warned by a notice delivered to and received by him.

[35] It is my considered opinion, that the case of **George Hylton** is not support for the general proposition that all notices in the RTA can only be served if delivered to and received by the person to whom the notice is directed. Specifically, it is not authority to support the proposition that for there to be valid service of a notice of foreclosure by registered mail pursuant to section 119 of the RTA, the notice by registered post must actually be delivered to and received by the mortgagor.

[36] The authorities such as **Beer** and **R v London Quarter Sessions, Ex p. Rossi** demonstrate that there are some instances in which actual service is required. I accept the submission of Counsel for the Defendant that given the legislation considered in each of those cases, the conclusion of the Court in those cases that the requirement for service meant actual service with receipt of communication by the person to whom the notice is directed, is easily appreciated.

[37] As a matter of contract law one can understand the conclusion of the Court in the case of **Holwell Securities Ltd v. Hughes** (supra), that the requirement in a lease for notice in writing to a landlord in order to exercise an option to purchase, meant actual communication to the landlord. It is accepted that an option has some characteristics of an offer. For that reason, the decision in **Holwell Securities** is consistent with general contract law principles of offer and acceptance and the general rule that an acceptance has no effect until

communicated to the offeror. However, even within the sphere of contract law there are some exceptions as it relates to communication as is evidenced in the application of the "postal rule" which is a general rule that a postal acceptance takes effect when the letter of acceptance is posted.

[38] Australia also operates the Torrens system of land registration. Although only of persuasive authority, I am attracted to the approach adopted in the Australian cases of **Yap Cheng See** and **Shaddick** which seek to ascertain the legislative intent behind the particular legislative provision that is being considered. In order to discern the legislative intent behind section 119 of the RTA, it is my view that it is instructive if one examines the nature of the right to foreclose as a remedy of a legal mortgagee for enforcing his security. In **Megarry and Wade The Law of Real Property**, 7th edition at page 1098 [25-0006] the right is described as follows:

> *"(a) The right to foreclose*
>
> *(1) EQUITY'S INTERVENTION. By giving the mortgagor an equitable right to redeem after he had lost his legal right of redemption, equity interfered with the bargain made between the parties. But equity prescribed limits to the equitable right to redeem which it created. Thus, before 1926, a legal first mortgagee of freeholds had a fee simple vested in him, and once the legal date for redemption had passed, the mortgagor's right to redeem was merely equitable. "Foreclosure" was the name given to the process whereby the mortgagor's equitable right to redeem was declared by the Court to be extinguished and the mortgagee was left owner of the property, both in law and in equity. Equity had interfered to prevent the conveyance by way of mortgage from having its full effect; but there had to be some final point at which the mortgagee could enforce his security, and therefore by foreclosure "the court simply removes the stop it has itself put on". The Mortgagee was from the first entitled to the property at law; and when he obtained the necessary order of the court, foreclosure made him an absolute owner in equity as well."*

[39] The foreclosure of land process is therefore of a different nature than, for example, a secured creditor appropriating shares under a security agreement (see **Cukurova Finance International v Alfa Telecom Turkey** 2013 UKPC 2). At the point when an application for foreclosure is made in Jamaica pursuant to section 119 of the RTA, the relevant property would have already been offered

for sale at public auction by a licensed auctioneer after notice of sale, with the amount of the highest bid at that auction being insufficient to satisfy the sum secured by the mortgage. The applicant for foreclosure would be required to confirm these facts on the application. The mortgagor at this stage would already be aware of the mortgagee's attempt to sell his property and it is against this backdrop that the notice provision on section 119 of the RTA must be viewed.

[40] The purpose of the Notice of Foreclosure in this case, therefore, was not to give the Claimant an opportunity to rectify his default. Considerations of fairness in my respectful view ought therefore to be weighted differently than when one is considering the implications of a notice to a caveator as concerned the Court in the case of **George Hylton** (supra). Whereas there is obvious desirability in advising the Claimant of the foreclosure proceedings, it is clear that the legislators did not see the need to elevate this desirability to the level of an absolute necessity.

[41] I find that the analysis in the Australian cases of **Yap Cheng See** and **Shaddick** dealing with Transfer of Land Act 1893, are apposite and I am of the view that they offers helpful guidance in the construction to be placed on section 119 of RTA. I also similarly conclude that that service of the notice of foreclosure by being left on the mortgaged land, is a method of service which does not ensure that the notice will be brought to the attention of the mortgagor. It is therefore this Court's opinion that the inclusion of the method of service of leaving it on the mortgaged land demonstrates that it was not the legislature's intent that the notice of foreclosure in every instance, including a notice "*sent through the post office by a registered letter*", must actually be received by or come to the attention of the mortgagor for there to be effective service of it.

[42] I suppose it could be posited that service through the post by registered letter should be effective but not in cases where the sender of the notice has reasonable cause to believe that the notice has not been received by the addressees. The effect of this approach would be that section 119 would be read

by implying a proviso which includes words to the effect that "...*save where there is reasonable grounds for concluding that the notice has not actually reached the addressee*...". In my view such an implication would be a strained and unnatural construction of section 119 and could not be justified using general principles of construction of statutes. Had the legislators intended such a construction then they certainly could have easily worded the section in those terms.

[43] I therefore find that there was no defect in the service of the Notice of Foreclosure, in that it complied with section 119 of the RTA, notwithstanding the fact that it was not actually received by the Defendant. I also find that the fact that it was not received is not fatal to the Defendant's exercise of its right to foreclose on the Property.

The Issue of deception of the registrar/fraud

[44] The Claimant has averred in his statement of case that:

> *"the Declaration made to the Registrar of Titles that the Notice of Foreclosure was served upon the mortgagor by registered post is tantamount to fraud in obtaining by deception the benefit of a foreclosure order by falsely claiming to have complied with section 119 of the Registrar (sic) of Titles Act when the letter sent by registered post had been returned as not delivered."*

[45] It was submitted on behalf of the Claimant that section 119 of the RTA provides for verification of the application by declaration and that in the statutory declaration of Janice Green, she speaks to notice of foreclosure but made no mention of the fact that the notice was returned. It was further submitted that the statutory declaration imposed an obligation on the part of the Defendant to disclose the return of the letter which was sent by registered post and not doing so was tantamount to deceiving the Registrar by having her believe that all steps were properly taken.

[46] The Application for Foreclosure of Mortgages form stipulates that "*If the Notice of Foreclosure has been served personally, a Statutory Declaration to that effect*

should be given and the form varied". Paragraph 11 of the statutory declaration of Ms Janice Green reads as follows:

> *"11. That notice has been given to the Mortgagors of the Society's intention to apply for a Foreclosure Order by registered letter addressed to the Mortgagors and a copy of this Notice and the Post Office receipt for the same are exhibited to the Statutory Declaration lodged herein."*

[47] As I have stated earlier, it has not been refuted that the notice sent to the Claimant was returned to their Attorneys-at-Law by the Post Office. It was submitted on behalf of the Defendant that there was no obligation on the Defendant to disclose this fact to the Registrar and as a consequence such a non-disclosure could not amount to fraud.

[48] Counsel for the Defendant submitted that section 68 and section 70 of the RTA are relevant to this issue. Section 68 stipulates that:-

> *"68. No certificate of title registered and granted under this Act shall 'be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power."*

[49] Counsel for the Defendant further submitted that their title to the subject property may only be defeated by fraud subject to section 70 of the RTA.

> *"70. Notwithstanding the existence in any other person of any estate or interest, whether derived 'by grant from favour of the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to my qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but*

> *absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."*

[50] Reliance was placed by Counsel for the Defendant on the case of **Iris Anderson v. Thomas Anderson & The Registrar of Titles [2014] JMSC Civ 62,** where Batts J explained at paragraph 71 that:

> *"Fraud in this context denotes dishonesty or dishonest intent. Assets Co Ltd v Mere Roihi and Others (1905) AC 176 , Alele v Honnibal & Brown SCCA 111/789 (upheld on appeal by Judicial Committee of Privy Council) and Daley V RBTT et al CL 1995/D162 Per Sykes J @ para 113 and @118' "118. I have now established under the RTA contrived ignorance or wilful blindness is sufficient for a finding of dishonesty. Although there are dicta that suggest that fraud is not confined to the obtaining of the transfer or in securing registration, it now seems well established that fraud committed in securing registration is included (see Bahr v. Nicolay (No. 2) per Wilson and Toohey JJ @ 633 "the fraud to which SS68 and 134 refer is fraud committed in the act of acquiring a registered title" and Mason CJ and Dawson J at page 615 'for our part we do not see the illustrations given and the statements made in the cases as amounting to definitive pronouncements that fraud is confined to fraud in the obtaining of a transfer or in securing registration.')"*

[51] Counsel for the Defendant also cited Batts J in the **Anderson** case as saying, at paragraph 72:

> *"[72] Conduct which the First Defendant knowingly embarked upon in order to obtain a registered title but which the First Defendant knew to be wrong is dishonesty."*

[52] It was submitted on behalf of the Defendant, that even if there was irregularity or informality in the application process, they would have the benefit of section 68 of the RTA as pursuant to section 70 a title will only be impeached or defeasible in instances of fraud, and the Claimant has not proved fraud in this case.

The Court's conclusion of the issue of fraud/deception

[53] I accept that my learned brother Batts J accurately expressed the law relating to fraud in cases of this sort in the case of **Anderson,** (supra) to which reference was made by Counsel for the Defendant and portions of which are reproduced in this Judgment. It is this Court's finding that in order for the non-disclosure of the fact of the return of the Notice of Foreclosure to Richards & Richards to be evidence of dishonesty and/or fraud, there would have had to have been a positive duty placed on the Defendant to have made that disclosure in the statutory declaration of Ms Janice Green filed in support of the application of foreclosure.

[54] Having regard to this Court's conclusions expressed previously in this judgment that section 119 of the RTA did not require the Notice of Foreclosure to actually be received by the Claimant, there was no duty on the Defendant to positively assert that the Claimant received the notice. It is this Court's finding that by sending the Notice of Foreclosure to the address of the Claimant as contained in the certificate of title, the Defendant had complied with the requirement of section 119 of the RTA as regards service of the Notice of Foreclosure. The Defendant was accordingly in a position to honestly and accurately assert in compliance with the requirements of section 119 of the RTA, that "*notice in writing of the intention of the mortgagee [or his transferee] to make an application for foreclosure has been served on the mortgagor*" notwithstanding the fact that the Notice of Foreclosure sent by registered mail had been returned.

[55] Since there was no requirement that the Defendant proves receipt by the Claimant of the Notice of Foreclosure sent by registered mail, the omission to mention the fact of its return cannot in this Court's view amount to dishonesty fraud or deception. It should be highlighted that it was not asserted in the statutory declaration of Ms Green that the Statutory Notice was personally served by it being handed directly to the Claimant, nor was it declared that the Claimant received actual notice. There was therefore not a positive assertion of a false fact

in that regard. Although the fact of the return of the Notice of Foreclosure would have been evidence of the non-receipt of it by the Claimant, having regard to this Court's findings as to the requirement of service contained in section 119 of the RTA, that is not a matter which could have properly affected the exercise of the discretion of the Registrar of Titles or her decision to eventually grant the order of foreclosure. The Court therefore finds that in these circumstances there was no failure on the part of the Defendant to disclose a material fact which could amount to dishonesty, misrepresentation, fraud or deception.

The issue of the breach of the oral representation

[56] The Claimant is of the view that the Defendant breached an oral representation that was made to him after he defaulted on his regular monthly payments. In paragraph 5 of his witness statement the Claimant said that he "*held discussions with two senior representatives of the St Catherine Cooperative Credit Union and made arrangements on their advice to make periodic payments of certain sums until I was in a position to resume the regular monthly payments*."

[57] At paragraph 6 of his witness statement he stated:

> *"That in pursuance of this arrangement, I made payments of $500,000 on the 10th of June, 2014, $250,000 in November, 2014, $50,000 in April, 2015 and $50,000 in May 2015. That on presenting a further sum of $100,000 in July 2015. I was advised that no further payment would be accepted on that account."*

[58] At paragraph 8 of his witness statement the Claimant states further, that:

> *"That at all material times it was represented to me, both verbally and as well as in writing, by the General Manager and the Operations Manager of the Credit Union that it was a policy of the credit union which would be applicable in my case, that upon the execution of the power of sale under the mortgage, if a buyer was not found, the debt would be re-negotiated and a new and acceptable repayment schedule would be entered into."*

[59] In amplification at trial the Claimant indicated that there were actually three senior representatives with whom he spoke, namely the President Mr. Winston Fletcher, the General Manager Ms Sandra Thompson and the Operations

Manager Ms Williams. He said these discussions took place on a number of occasions. He spoke to the President Mr Fletcher in May or June 2014 and with the General Manager maybe eight times during 2014. The Claimant stated that he was informed by Mr. Winston Fletcher that he should go to the General Manager Ms Sandra Thompson and make a payment because the Defendant was not generally in the business of taking people's property. The Claimant also said that the General Manager advised him that in the event that the Defendant was not able to find a buyer for the property they would renegotiate his loan or he could seek funding from a bank. His evidence was that she told him that in order to qualify for the re-negotiation of the loan he should make lump sum payments to the Defendant "over a period", which should cumulatively amount to the sum of One Million Dollars ($1,000,000.00) after which the loan would be re-negotiated in the event a buyer was not found.

The Court's conclusion on the issue of the breach of the oral representation

[60] As I understand the Claimant's position, there was an agreement between himself and the Defendant whereby the Defendant agreed to re-negotiate his loan provided that he made a payment of One Million Dollars ($1,000,000.00) and provided that a buyer was not found for the Property. I find it odd that it is not pleaded nor is it stated in his witness statement that there was a specific sum that he was required to pay in order to qualify for the re-negotiating and that the sum was one million dollars. It was only in amplification that this assertion was first made.

[61] If there was an "agreement" between the parties as asserted by the Claimant there are a number of questions which arise. If there was to be the payment of one million dollars as a pre-condition, over what time period were the periodic payments totalling this sum to be made? Was there a time limit for a buyer to be found after which the re-negotiation would take place? Since the terms of the restructured loan were to be negotiated, what was to happen in the event that the parties could not successfully negotiate and agree such terms? In the absence of

an agreement for new payment terms, was there a default position of reverting to the original monthly payments?

[62] It is generally accepted that the Courts are usually reluctant to hold as being void for uncertainty any bargain or any agreement between parties that was intended to have legal effect. However it is settled law as demonstrated in the case of **Courtney & Fairburn Ltd. v Tolaini Brothers (Hotels) Ltd.** [1975] 1WLR 297 that the English law does not recognise a contract to negotiate and when a fundamental matter is left to be the subject of negotiation, there is no contract. This is because such an agreement is too uncertain to have binding force. In the case of **Courtney & Fairburn** the Court disapproved of dicta to the contrary in **Hillas & Co Ltd v Arcos Ltd** (1932) 147 L.T.R 503. It should also be noted that such agreements do not impose any obligation on the participants to negotiate or to use their best endeavours in an effort to reach a valid and legally binding agreement.

[63] I therefore find that as a matter of law, an agreement in the terms asserted by the Claimant would be void for uncertainty having regard to the absence of the fundamental elements which I have identified and in respect of which there was no agreement between the parties. It is at best an "agreement to negotiate" which the law does not recognise. As a consequence of these findings, it follows naturally that the Defendant could not be in breach of contract by invoking foreclosure proceedings.

The issue of the breach of fiduciary/statutory duty

[64] The Claimant pleaded that the Defendant was in breach of its fiduciary/statutory duty for that proper and/or adequate relevant notices were not duly served upon the Claimant. The Court has previously ruled on the issue as to the Notice of Foreclosure. The Court does not accept that the Claimant did not have a valid notice of sale served on him in accordance with the RTA. Other than saying in cross examination that he did not recall having received any notices of sale, the

assertion that he was not given an appropriate notice of sale was not pursued at trial with any vigour. In fact Counsel for the Claimant in challenging the service of the Notice of Foreclosure submitted that "*the previous notices went out to him at all the addresses, but this crucial one did not go to any other address".* It was therefore not surprising that there was no complaint as it relates to the public auction, or as to the absence of notices which were a necessary precursor to the auction, save and except for an issue which arose as to whether the property was properly described in the notice of action as having the address "Lot 19 Ferdi Neita Blvd. Twickenham Park, St Catherine." The address of Ferdi Neita Boulevard appears to be the civic address of the Property and the valuation report of the CD Alexander Company Realty Limited dated 26th Oct 2013 describes the Property as being "*located on the northern side of Ferdienieta Boulevard*". The agreement to negotiate to which the Claimant referenced was also premised on the sale of the Property not being completed and I find as a fact that the Claimant was given notice of sale of the Property. Accordingly the Court finds that there was no breach of a statutory duty by the Defendant in failing to give notices.

[65] As it relates to the assertion that there was the existence of a fiduciary duty owed by the Defendant to the Claimant, it was submitted on behalf of the Defendant that no such duty existed. Counsel relied on a passage from **Halsbury's Laws of England** 4th Edition, Volume 32, paragraph 726 which states:-

> *"a mortgagee is not a trustee for the mortgagor as regard the exercise of the power of sale; he has been so described, but this only means that he must exercise the power in a prudent way, with a due regard to the mortgagor's interests the surplus sale money he has his own interest to consider as well as that of the mortgagor... and so long as he keeps within the terms of his power, exercises the power in good faith for the purpose of realising the security and takes reasonable precautions to secure a proper price, the court will not interfere".*

Counsel also referred to a number of cases which confirm that there is no fiduciary duty owed by the mortgagee in exercising its power of sale.

The Court's conclusion on the issue of the breach of fiduciary/statutory duty

[66] It is beyond challenge based on general principles explained in cases such as **Mothew (T/A Stapley & Co) v Bristol and West Building Society** 1996 EWCA Civ 533, that the relationship between the Claimant as borrower/mortgagor and the Defendant as lender/mortgagee in this case would not have created a fiduciary relationship, without more, since there was no evidence of a special relationship. Even if the Defendant was subject to a fiduciary duty, that would not have required the Defendant to act in the best interest of the Claimant. At its highest, the only obligation that would be imposed on the defendant would be merely to refrain from placing itself in a position in which its duties and its interests conflicted.

[67] The Court therefore finds that in the circumstances of this claim, the Defendant did not owe a fiduciary duty to the Claimant and accordingly could not be in breach of a fiduciary duty to the Claimant.

Whether the retention and ownership of the Property by the Defendant is inequitable and an act of unjust enrichment

[68] There were two valuations of the Property. The first, by CD Alexander Realty valued the Property at fifteen million dollars ($15,000,000.00). The second, by Venecia Realty Company Limited, valued it at forty-two million dollars ($42,000,000.00) with a forced sale value of thirty-three million dollars ($33,000,000.00).

[69] The gravamen of the Claimant's complaint as it relates to this issue is that, since his debt at the relevant time was approximately five million nine hundred thousand dollars ($5,900,000.00), had the property been sold he would have recovered the difference between his then outstanding debt and the sale price. On a sale he was likely to receive a significant amount and that opportunity has been lost as a consequence of the Defendant going the route of foreclosure

proceedings. His position is that such action in the circumstances was inequitable and resulted in the Defendant being unjustly enriched.

[70] It is the Defendant's contention that the value of the property is irrelevant and there is no inequity or unjust enrichment in the Defendant exercising its rights as legal mortgagee.

The Court's conclusion on the issue of unjust enrichment

[71] In **Goff & Jones, The Law of Restitution**. 5th ed at pg 15 the law is summarised as follows:

> *"As might be expected a close study of the English decisions, and those of the other common law jurisdictions, reveals a reasonably developed and systematic complex of rules. It shows that the principle of unjust enrichment is capable of elaboration and refinement. It presupposes three things. First, the defendant must have been enriched by the receipt of a* ***benefit****. Secondly, that benefit must have been gained* ***at the plaintiff's expense****. Thirdly, it would be unjust to allow the defendant to retain that benefit."*

[72] I accept the submission on behalf of the Defendant on this point. There is no doubt that by exercising its right to foreclose and thereby extinguishing the Claimant's interest in the Property, there is a real possibility that the Defendant will eventually make a profit having regard to the value of the Property and the amount of the arrears of the Claimant. However based on the findings of this Court as earlier expressed herein, there is no basis for the challenge to the foreclosure. As a consequence any enrichment of the Defendant arising from the foreclosure of the Property would be as a result of a lawful exercise of a power and it would not be unjust to allow the Defendant to retain such benefit. For this reason the claim fails in respect of this limb of challenge.

Disposal

[73] For the reasons given herein the Claim fails and the Court makes the following orders:

1. The Court refuses to make the orders and declarations sought by the Claimant and judgment is entered in favour of the Defendant.

2. Costs of the claim are awarded against the Claimant in favour of the Defendant to be taxed if not agreed.