IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016CD00003

BETWEEN	**Darnel Fritz**	**CLAIMANT**
AND	**John Collins**	**DEFENDANT**

Paul Beswick, Georgia Buckley, April Grapine-Gayle instructed by Ballentyne Beswick & Co. for the Claimant

Michael Hylton QC, Shanique Scott instructed by Hylton Powell for the Defendant.

Mortgage – Whether fraud or undue influence – Limitation of Actions Act – Whether applicable to Statutory Power of Sale - Whether duty of Mortgagee to satisfy self of mental competence of the person executing the mortgage.

Heard: 11th, 12th & 13th July 2016, 30th September 2016.

BATTS, J.

[1] In this action the Claimant, Darnel Fritz, alleges fraud, misrepresentation and/or undue influence :

> "arising out of Mortgage No. 122630 for US$40,000 with interest and Mortgage No. 1700296 for US$88,000 with interest which were recorded on the Certificate of Title for property registered at Volume 1018 Folio 159 of the Register Book of Titles."

There is an alternative Claim for breach of contract. The reliefs claimed are: a permanent injunction to restrain the exercise of the mortgagee's power of sale, a

declaration that the Defendant has no enforceable mortgage, an account of all many paid under the mortgages, and damages.

[2] The Particulars of Claim itemise the particulars of fraud as follows:

a) Registering two mortgages on the Claimant's property without informing her of the intention to do so.

b) Registering two mortgages on the Claimant's property without receiving her permission to do so.

c) Misleading the Claimant as to the true nature of the documents she was required to sign.

d) Not advising the Claimant to obtain independent legal advice before signing the alleged mortgage documents.

[3] The Defendant filed a Defence and Counterclaim. This traversed the Claimant's detailed allegations and counterclaimed for the sum of US $159,805.00 being amounts allegedly owed to the Defendant. Interest and late fees were also claimed.

[4] The Claimant filed a Reply and Defence to Counterclaim on the 6th May, 2016. This repeats the assertion of invalidity of the first mortgage and denies owing any debt. Para 9 is worthy of quotation,

> "The Claimant repeats paragraph 25 and will further say that in furtherance of the line of credit established in 2010 the goods received under that facility was (sic) solely the two containers. These two containers being one 40 foot and one 20 foot were entered on Customs C87 Import Entry numbers CEK870GBWW and CEK870GBWW respectively with a total value inclusive of the cost of the goods, insurance and Freight Charges detailed in Box 29 to the Entry as US $15,033.05 and US $9,680.68 respectively. Copies of the Customs Entries are attached. The Claimant will further say that since receiving the line of credit in 2010 she has made payments totalling US $42,345 which has (sic) been

confirmed by the Defendant which would have discharged her obligations to him in full."

[5] Prior to commencement of his closing submissions Mr. Beswick applied, by written Notice of Application filed on the 22nd July 2016, to amend the Claimant's statement of case. He wished to include an alternative plea that the Mortgage No. 1226300 for US$40,000 signed on the 20th March 2003 is unenforceable pursuant to Sections 30 and 33 of the Limitation of Actions Act. In the course of submissions, and in particular after Mr. Hylton QC submitted that the proposed amendment to the Claim did not address the counterclaim, Mr. Beswick applied to amend his Defence to Counterclaim in order to allege that the mortgage was unenforceable as being barred by Statute of Limitation .The application was opposed. Having heard submissions I allowed the application insofar as the Defence to Counterclaim was concerned but refused permission for the Claim to be amended. I promised then to put my reasons in this judgment, and they are contained in Paragraphs 6 – 10 below.

[6] Mr. Beswick's submission, supported by the Affidavit of Miss Buckley, is that the Claimant was unaware that the Defendant was alleging that the mortgage in question had never been serviced and hence was unaware that a time bar applied. This information came about when the Defendant was giving evidence orally. The Claimant, says Mr. Beswick, could not have known because the business involved a sort of running account and, as she said in evidence, her requests for an account did not meet with a favourable answer.

[7] If granted the amendments would enable Mr. Beswick to argue that as the monthly instalment had not been paid since March 2003, and as the mortgage provided that all principal and interest became due on a default, it followed that Sections 30 and 33 operated to bar legal action. He says this means the mortgage became unenforceable.

[8] Queens Counsel opposed the application on several bases.

a) Relying on Chitty and Ketteman he submitted that it is not appropriate given the time that has elapsed and the stage of the trial to allow the amendment at this late stage of the litigation.

b) He submitted further that Para 28 of the Defence and Counterclaim pleaded "or at all" and hence the Claimant ought to have been alerted to the allegation that no money had ever been paid.

c) He relied on my recent decision in ***Dagor Ltd. v MSB Ltd. and National Commercial Bank Ja. Ltd.*** [2015] JMSC Civ 242 Unreported Judgment delivered 4th December, 2015, and submitted that insofar as unenforceability of the mortgage is concerned, the plea of limitation could not prevent exercise of the statutory power of sale.

d) Insofar as the debt is concerned, the principal sum was not due until 2008 so no time had begun to run.

e) Finally, Mr. Hylton submitted that there is clear evidence of an acknowledgement, such as to defeat the reliance on the limitation defence.

[9] Having considered the submissions I granted the application to amend the Defence to Counterclaim. I refused the application to amend the Claim. It seems to me that a counterclaim for the money due is "an action suit or other proceeding," within the meaning of Section 33 of the Limitation of Actions Act. It will be a question of mixed law and fact whether the right accrued and when and whether there has been an acknowledgement. I bear in mind how late a stage of the proceedings this occurred, and that the Claimant's position when the case commenced, was that she had repaid the debt. I accept that the Defendant's pleadings were not such as to alert her that it was contended that the entire amount of the first mortgage remained un-serviced. The pleader in fact spoke only to the principal not being repaid. It was not until the Defendant's evidence

in cross-examination that it was said that nothing at all had been paid on that first mortgage. Since the entire loan became due upon a default, it seems to me the cause of action accrued outside the limitation period. I bear in mind the caution of Lord Neuberger in **Charlesworth v Relay Roads Ltd. [2000]** 1 WLR 230 @235 B-H and of their Lordships words in ***Ketteman v Hansel Properties Ltd.*** [1987] 1 AC 189 @ 220 C-D***.*** However, I think the justice of the case, having regard to the relative un-sophistication of the Claimant, demands that the amendment be granted, notwithstanding the lateness of the application.

[10] The application to amend the Claim involved an assertion that the mortgage is "unenforceable" because it had not been serviced. Section 30 of the Limitation of Actions Act, on which reliance was placed, speaks to "the right and title" of a person to the land or rent for the recovery of which such " entry, action or suit" might have been brought being extinguished after the limitation period has passed. Section 33 bars "an action suit or other proceeding to recover any sum of money secured by any mortgage, judgment or lien....". The *ejusdem generis* rule precludes "other proceeding" being interpreted to include a statutory power of sale .So too does the literal meaning of the word."Proceeding" is to be distinguished from "Procedure" . The exercise of the statutory power of sale does not require an entry or the bringing of a suit action or other proceeding. The application to amend the claim was therefore refused.

[11] At the commencement of the trial the parties indicated that a representative of the Customs Department was present having been summoned. A pre-trial Order dated 30 May 2016 provided that that witness was not to be counted as a witness of either party. It was agreed that this witness would give evidence first.

[12] Her name is Hazel Edwards. She expressed a desire to be affirmed rather than sworn, and this was granted. She put in evidence certified copies of 2 Bills of Lading.

Exhibit 2 was Bill of Lading GMLU2577400J002

Exhibit 3 was Bill of Lading GMLU2577400J003

Exhibit 1 I should add was an Agreed Bundle of Documents as to which more will be said in this judgment.

[13] When cross-examined the witness, who described herself as the Senior Director of Legal Affairs of the Jamaica Customs Agency, was calm and confident with her answers. She explained Exhibits 2 and 3 and the power of the Commissioner of Customs as it relates to the values stated by the importer.

[14] The Claimant then gave evidence. Her witness statement dated the 30th May 2016 stood as her evidence in chief. That evidence revealed she is a businesswoman and owner of Darnel Fritz Enterprise. That business involves the purchase and sale of goods. The Claimant is what in Jamaica we commonly call an Informal Commercial Importer or "higgler". She stated that herself and the Defendant had a longstanding relationship, the Defendant being her freight forwarder. She explained that eventually the Defendant became a buyer's agent and she started to buy from him instead of directly from the suppliers. She trusted him implicitly. In or about the year 2000 he offered and she accepted a line of credit of US$40,000.00 and thereafter ordered goods "on consignment" from him. The Claimant asserts that the Defendant gave her a document marked "Schedule" to sign and she signed it.

[15] In or around 2008 the Claimant states that the Defendant ordered goods from Proveedora Jiron Inc. and gave her a credit arrangement. She received several such shipments between 2008 and 2010. She said, "Whenever I got goods from Proveedora they were paid for and receipts obtained from the Defendant's company." (See Para 17 of her Witness Statement). She denies getting goods to the value of US$500,000.

[16] In 2010 the Defendant asked her to sign a credit facility of up to US $88,000 and told her the monthly payments would be US $1,100.00. He told her to go to his lawyer's office to sign the papers. She stated

that in June 2010 she went to Mr. Raymond Clough, the Defendant's lawyer. Mr. Clough told her she needed to register the death of her mother who died in 2006. She paid Mr. Clough for doing that. She understood this had to be done in order to obtain the US$88,000 credit. The Claimant denies ever receiving the full credit line of US $88,000.00. She says she got 2 containers which arrived in Jamaica on the 8th November 2010. The Input entry numbers were CEK870GBWW and CEK870GBWW. They cost US $15,033.95 and US $9,680.68 respectively. She states that she has fully paid for the goods sent in those containers.

[17] The Claimant states that after receiving a Notice of Default from the Defendant she employed various attorneys at law to attempt to negotiate an end to the matter. In 2015 after receiving a Statement of Account that she owed J$16,392,342.27 she approached both the Bank of Nova Scotia Jamaica Limited and the Jamaica National Building Society. She was only able to obtain approval for a loan of $12 million. The Defendant refused to accept that. In October 2015 she received another Notice of Default for J$16,156,286.60. She consulted another attorney who made checks at the National Land Agency and "discovered that there were mortgages registered on the property."

[18] She stated that she trusted the Defendant and therefore did not take care as she did when dealing with strangers. She denied owing the money claimed. The Claimant states in relation to the 1st mortgage:

> Para 33 "I did not agree to give Mr. Collins any mortgage over my property. My mother did not sign any documents as at the time Mr. Collins is saying she signed papers my mother was bedridden and unable to move due to her illness and she was also suffering from Alzheimer's Disease."

[19] The Claimant's attorney applied for and was granted permission to ask further questions in chief. In answer to these the Claimant denied knowing Mr. Lawton Heywood and denied carrying any title to Mr. Heywood's office. She denied that herself and her mother attended on Mr. Heywood's office to execute a mortgage.

She was asked about a letter dated 20th March 2010 written by an attorney ,Ms Linda Wright, who wrote on her behalf admitting $33,000 was owed (exhibit #1 page 36), she responded,

> "Lawyer write it that I owe Mr. Eddie."

She was also asked about the two containers and the Defendant's assertions in that regard. The following exchange occurred:

> "Q: Each you say you received 2 shipments in October 2010 were the shipments paid for
>
> A: Yes the 20-foot and the 40-foot container. I paid for them. Him set up a payment. I must pay for them. I pay $1,100 per month for interest"

[20] When cross-examined her answers were more revealing. She acknowledged her signature on the documents at page 11, of the Bundle (Exhibit 1),being the Schedule to the Mortgage of 25th February, 2003. She admitted that in 2010 she signed a document for more credit. The following exchange occurred,

> "Q: did you owe him for any goods that you receive and did not pay for
>
> A: no
>
> Q: during 2010 before you sign the documents were you trying to borrow money to pay Mr. Collins what you owed him.
>
> A: I went to First Global to get that $33,000 that him say I owe him"

She said in 2015 she was trying to borrow to pay out of fear even though she did not owe him.

[21] When asked about her understanding of the documents signed, her response is of relevance:

"Q: What did you think was effect of document. See reference to #4 Meadowland Drive.

A: yes. That is my house

Q: what was effect of document?

A: Just to give me credit. He have the title to give me credit. He says he have to have security to give me credit.

Q: how he got the title.

A: I give it to him."

The Claimant gave similar responses as regards the other mortgage executed by her at page 76 of the Bundle (Exhibit 1). She maintained that she never got the whole document but only signed the Schedule. She signed it "to continue the credit."

[22] Interestingly, and not unimportantly, one of the two "schedules" she admits signing has all the relevant terms of the mortgage including identity of borrower, "principal sum" and item 8 (Exhibit 1 page 76):

"The Mortgaged premises:

All that parcel of land known as number four Meadowland drive part of Meadowland in the parish of St. Andrew being the lot numbered Twenty-Five on the Plan of Meadowland aforesaid deposited in the Office of Titles on the 7th day of December 1964 of the shape and dimensions and butting as appears by the plan hereof thereunto annexed and being the and comprised in volume 1018 Folio 180 of the Register Book of Titles (sic)."

[23] The Claimant, was asked to read the letter at page 77 of Exhibit 1 to herself and say whether she now recalled receiving the full mortgage. Her response:

"Just receive the page not the full mortgage:

The letter, which she did not deny receiving, is from Clough, Long& Co. and reads:

8th November 2010

"Mrs. Darnel Fritz
4 Meadowland Drive
Kingston 19

Dear Madam,

Re: Mortgage to Mr. John Collin

We refer to our meeting today.

We attach a copy of the Mortgage you signed today."

She signed acknowledging receipt of the letter.

[24] Miss Fritz maintained that she was unaware 15% of $88,000 is exactly $1,100. Further, she was unaware that the monthly payment of $1,100 was for interest. The following exchange occurred:

"Q: did you owe $88,000

A: No

Q: so you never intended to pay $1,100, what you thought you were paying.

A: I pay for two containers. First receipt it mark interest. To my knowledge, I pay for the 2 containers.

Q: Reference them in Para 25

A: Yes

Q: Before you sign schedule you never owe anything so when got those two shipments all you owe

A: yes"

[25] The witness in cross-examination admitted she was aware of what a mortgage was as she first purchased her house on mortgage from Jamaica National. She also admitted that in March 2010 she already owed $33,000. She even got a loan from First Global to repay that. The agreement was for her to pay to Mr. Collins who would pay the supplier.

[26] It was suggested to the Claimant that the invoices she produced to Customs were not the ones given her by Mr. Collins. In other words, she changed the quantities and prices before submitting them to Customs. She denied any such thing. She maintained that the one submitted was the one given to her by Mr. Collins. When shown the letter at page 137 she admitted that Mr. Tom Tavares-Finson wrote the letter dated 29th August, 2014 on her behalf. Her explanation as to why he described the premises as "mortgaged" was because he had spoken to Mr. Clough.

[27] The re-examination of the Claimant was innocuous. The first witness called on her behalf was Mr. Sheldon McKenzie. He is her son. He describes how in 2000-2001 he observed his grandmother (Celeste Brown) wandering aimlessly and her strange behaviour. He describes the close relationship with Mr. Collins who he said was more than a business associate of his mother. When cross-examined Mr. McKenzie admitted sending emails on his mother behalf. These are at page 172 of the Bundle (Exhibit 1). That email said in part,

> "The statement given to us before does not apply and CAN NOT BE USED. The bank is requesting the TOTAL owed to you. Please let us know when this letter will be ready. "

He admitted to the crossexaminer that at the time a loan of about $12 million was contemplated. The statement received from Mr. Collins claimed $16 million. However, they consulted their lawyers and an offer to pay $12 million in full settlement was made.

[28] The Claimant's next witness was Dr. Cecile Greaves. This expert witness stated that she had not been the attending physician for Celeste Brown. The patient information form dated 29th December 2015, which was tendered through her and admitted as Exhibit 4, was compiled from information on the patient's file at the Andrews Memorial Hospital. When cross-examined she stated that she had never treated the patient and that Alzheimer's is a progressive and irreversible disease.

[29] I have gone in detail through the evidence of the Claimant and her witnesses in order to demonstrate how incredible, even on the face of it, is her case. The assertion that she only signed a "Schedule" and never saw a mortgage runs counter to the documentation. Further, inasmuch as the schedule to the second mortgage clearly makes reference to "mortgage" and she admitted being familiar with a mortgage having first purchased a house with one, the allegation that she never knew the effect of that which she signed becomes doubtful. Finally the evidence, admitted and supported by documentation, of the several efforts made on her behalf by professionals and family to settle outstanding sums, throws great doubt on the assertion that no money was due and owing. I do not accept the Claimant as a truthful witness and I formed the view that her effort to deny execution of the mortgages was a desperate attempt to avoid the dire consequence of the non-fulfilment of her obligations.

[30] If the Claimant's evidence was burdened with inconsistency and incredulity, the Defendant's was not. Mr. Collins gave evidence clearly and with cohesion. His account, and in particular the basis on which the amounts were owed, was consistent and supported by documentation. I observed his demeanour in the witness box and am satisfied that he is a truthful witness. He explained the kindnesses he had done and the fact he attended the Claimant's mother's funeral, thus:

> "I have known Miss Fritz for over 20 years. She used to come to my place of business in Miami and many times her

children Saphronia and Sheldon accompanied her. I am who I am. A nice person. We got along very well."

I accept this aspect of his evidence. The kindness he demonstrated was just that and that which might be expected after a long and profitable business relationship. There was no fiduciary or special relationship between the Claimant and the Defendant.

[31] Mr. Collins explained that the mortgage of US$88,000 was partly in respect of US$33,000 owed by the Claimant to Proveedora Jiron Inc. for goods supplied and for which she had not paid. He was admirably able to explain the details of the account notwithstanding extensive cross-examination. I was generally impressed with his evidence and where it conflicted with the Claimant's preferred his account.

[32] There were two factual issues which deserve special mention. The first involved the circumstances under which the first mortgage came to be executed and the second concerns the value of the items on the invoices submitted to customs. As regards the execution of the first mortgage, Mr. Collins stated this was handled by his attorney Mr. Lawton Heywood, see Paras 11 and 12 of his witness statement. Mr. Heywood on the other hand, in an undated witness statement (which he orally indicated he signed in May 2016), states that the 1st Mortgage was prepared and sent for signature to Mr. Collins' Kingston office. It was returned to his, Mr. Heywood's office, in February 2003 with the signatures of Miss Fritz and Ms. Brown.

[33] The oral evidence of Mr. Collins makes it clear that his account of how the 1st mortgage was prepared and executed, was based almost entirely on information given to him by the staff at his Kingston office. Mr. Collins has another office in the United States at which he is based. The divergence between Mr. Heywood's account and that of Mr. Collins did not therefore impact Mr. Collins' credibility. An affidavit dated 29th January 2016 and signed by Mr. Collins, stated that he

was advised by Mr. Heywood that the two ladies attended and signed the document. When this affidavit was put to Mr. Collins he said,

> "Q: Mr. Heywood advised you they attended his office in 2004
>
> A: going back to 2003 would I be prepared to say that Mr. Heywood handled the matter through my local office in Kingston. I believe that is correct."

Mr. Heywood on the other hand when asked about the assertion in Mr. Collins' affidavit stated,

> "I have never spoken to either of these 2 ladies to the best of my knowledge they did not attend on my office to collect mortgage. My recollection is that the mortgage document was sent to Mr. Collins' office."

When asked if he had told Mr. Collins otherwise, Mr. Heywood said,

> "I don't recall doing that."

When asked if he recognised the signature of the Justice of the Peace on the document, Mr. Heywood stated,

> "It is the signature of a JP who was Bishop of the Halibethean Church of Jamaica. I have seen her signature before. I was quite satisfied it was signed by the persons whose signatures the JP witnessed."

[34] It appears to me most unlikely that Mr. Heywood in 2016 would be able to precisely recall whether the two (2) ladies came in 2003 to his office to collect the document or whether the document was sent to Mr. Collins' Office. He may be able to say what was the usual course of conduct but in the absence of documentation, for example a letter sending it to the client or a file note, I rather doubt he can really say. Indeed, and insofar as probabilities are concerned, his familiarity with the Justice of the Peace who witnessed the signatures suggests that the ladies may well have collected the documents at his office. It is after all not uncommon for attorneys to direct persons to Justices of the Peace with

whom they are familiar when documents are to be notarised. To the extent it is relevant, I think it more probable than not that the document was collected for execution at Mr. Heywood's office and returned there by the Claimant.

[35] I say to the extent relevant because I do not believe at the end of the day much turns on this question. My reasons are as follows:

a) It is not suggested, nor was the Justice of the Peace impugned on this, that the signature of the Claimant was not affixed to the document.

b) There is no expert evidence that at the time the document was purportedly signed by the Claimant's mother, Celeste Brown, she was incompetent to sign or understand it. I am asked only to infer this fact.

c) Even if it were accepted that Celeste Brown was on that date mentally incompetent, it is the Claimant who would have to answer to any allegations of fraud. It is clear that she collected the document, either at Mr. Heywood's or at Mr. Collins Kingston office, for the purpose of having it duly executed. I reject her evidence to the contrary. If she attended a Justice of the Peace with her mother while knowing her mother was mentally disabled, there is no indication that the Justice of the Peace would or ought to have known her mother was incompetent. The Claimant would in those circumstances be estopped from averring otherwise .Similarly if she attended with someone posing as her mother. This court would not allow her to take advantage of her own wrong.

d) The property was jointly owned. Her mother having subsequently died then the estates would have merged. It

therefore does not lie in the mouth of the Claimant, having received the benefit of the loan or credit, to assert that the mortgage is invalid due to her mother's incapacity. There is no claim by a third party or the mother's estate. The Claimant is bound by the 1st Mortgage.

e) It was suggested that a mortgagee, or his attorney, has a duty to ensure the mental competence of those executing a mortgage that is, they should go behind the Justice of the Peace's authentication. There is no basis in law or on the facts for such an assertion. To create such a duty would be to undo the purpose behind attestation. In the absence of evidence capable of impugning the Justice of the Peace, this effort to deny the validity of the mortgage fails..

[36] As regards the other major factual issue joined in the cross examination of Mr. Collins, viz. the value of items declared at Customs, I accept the account of Mr. Collins as to the invoices he delivered to the Claimant. It is apparent that Mr. Collins cannot say whether the supplier Proveedora Inc. supplied another set of invoices "for Customs purposes" to the Claimant. He admitted as much,

"Q: You are not aware what documents sent by Mr. Eddie directly to Mrs. Fritz

Obj.

Q: Are you aware if any documents sent to Mrs. Fritz for Eddie

A: Most of these documents

Q: Would you be aware if any sent directly to her

A: No but most are sent directly to my Miami office and forwarded to Kingston for Mrs. Fritz to collect

Q: you cannot say documents were not sent directly to her

A: I cannot assert. There are many occasions she buys directly from them and we just are a medium to collect."

[37] It is not part of my task, nor particularly relevant to my enquiry, to determine whether there was a fraud on the revenue or if so who was responsible. The evidence of Mr. Collins, and which I accept, is that he paid for goods supplied to Miss Fritz of a certain value. Proof of that is supplied by invoices submitted to her. Proof of her liability to him is contained in the two mortgages and if necessary, supported by her several overtures to settle and promises of payment.

[38] Against the background of my analysis of the evidence (documentary and oral) and the comparative credibility of the witnesses, my findings of fact are as follows:

a. The Claimant and the Defendant have been in business for a number of years

b. The Defendant is a freight forwarder however, over time he became a purchasing agent on the Claimant's behalf.

c. In this regard, he would extend credit, grant loans or make advances on behalf of the Claimant.

d. In or about March 2003 the Defendant granted to the Claimant a credit facility of US $40,000. It was secured by way of a mortgage dated 25th February 2003, over her property. [Exhibit 1 page 11].

e. That property was her house at 4 Meadowland Drive Kingston 19. (Volume 1018 Folio 159) of the Register of Book of Titles.

f. Goods to the value of US $40,000 were shipped to the Claimant.

g. The Claimant and the Defendant opened a running account in respect of their business transactions. This is evidenced by the statement of account pages 220 - 224 Exhibit 1. Payments were not always specifically assigned or applied to particular liabilities.

h. In the period February 2008 to February 2010, the Defendant paid for a number of shipments of goods from Proveedora Jiron Inc on the Claimants behalf.

i. Cumulatively by March 2010 the Claimant owed the Defendant US $33,000.

j. In or about October 2010 the Claimant asked the Defendant to finance two more shipments from Proveedora. One for US $31,318.80 and the other for US $23,147.79.

k. At this juncture the Claimant's total liability to the Defendant inclusive of the first mortgage, the payments made on her behalf and the two (2) shipments of October 2010, totalled U$138,974.00.

l. It was agreed between both the Claimant and the Defendant that her total liability would be settled at US $128,000 and that a further mortgage of US $88,000, over the same premises, would be granted in order to secure the sums due and owing.

m. In other words, the total due of US $128,000 would be secured by both mortgages.

n. The Claimant failed to pay the sums due and owing in it's entirely.

o. As at the 1st April 2016 the Claimant was indebted to the Defendant in the amount of US $159,805.00 being principal interest and late fees.

[39] These being my findings of fact, there is no basis to prevent the Defendant exercising his power of sale under the mortgage. The claim is dismissed with costs to the Defendant to be taxed or agreed.

[40] The Defendant has counter claimed for damages being the balance due and owing on the mortgage. The Claimant by way of an Amended Defence to Counterclaim asserts that the counterclaim for the money secured by the mortgage is barred by statute of limitations. It is relevant to consider this plea because, in the event the sale of the premises does not recoup the amounts due, the Defendant would then have to enforce its money judgment.

[41] I am satisfied that the Claimant or her agent had acknowledged the debt in writing within the meaning of Section 33 of the Limitation of Actions Act. The execution of the second mortgage is an acknowledgement of the pre-existing debt. This is because, by agreeing a total balance as at that date, and that the second mortgage was to secure the amount over and above that secured by the first mortgage, the Claimant was acknowledging the validity in 2010, of the 1st mortgage and the debt thereby secured.

[42] Furthermore, the several letters written by the attorneys and the emails by her son, all acting as agents on her behalf, separately and/or cumulatively are an acknowledgement in writing of her liability to the Defendant. The Defence to Counterclaim, which seeks in its amended form to rely on the Limitation of Actions Act, fails.

[43] There will therefore be judgment as follows:

1. The Claim is dismissed.

2. Judgment for the Defendant against the Claimant on the Counterclaim in the amount of US$159,805.00

3. Interest on that amount at a rate of 2% per annum from the 15th May 2016 until the date of payment.

4. Costs to the Defendant to be taxed or agreed.

David Batts
Puisne Judge