



[2019] JMSC Civ. 8

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. E 810 of 2002**

<b>BETWEEN</b>	<b>DOREEN HARLEY</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>NORMAN HARLEY</b>	<b>DEFENDANT</b>
<b>AND</b>	<b>JAMAICAN REDEVELOPMENT FOUNDATION INC.</b>	<b>INTERESTED PARTY</b>

**IN CHAMBERS**

Ms Carol Davis, Attorney-at-law for the Claimant

Mr Lijyasu Kandekore, Attorney-at-law for the Defendant

Mrs Sandra Minott-Phillips QC and Mr Litrow Hickson instructed by Myers Fletcher & Gordon, Attorneys-at-law for Jamaican Redevelopment Foundation Inc., the Interested Party

Heard: 15<sup>th</sup> March, 17<sup>th</sup> October, 6<sup>th</sup> November, 17<sup>th</sup> December 2018 and 14<sup>th</sup> January 2019

**Civil Procedure - Joinder of party – Whether Mortgagee should be joined on an application to restrain the Registrar of Lands from registering an order foreclosure**

**Statutory Interpretation – Whether there is a requirement under section 119 of the Registration of Titles Act for a caveator claiming a beneficial interest to be served with a notice of intention to make an application for foreclosure – Whether there**

**is a requirement for such a notice if the caveat is based on a beneficial interest awarded by the court**

**LAING, J**

### **The Application**

- [1] The parties have been involved in litigation for a considerable time as evidenced by the original suit number. By Judgment of the Honourable Mr Justice Morrison dated 24<sup>th</sup> July 2012, the Claimant was awarded one hundred percent beneficial interest in property at Lot 17 part of 19 Waterloo Road, registered at Volume 1364 Folio 214, formerly registered at Volume 1163 Folio 699 (“Lot 17”) and an order was made that the property be transferred to the Claimant.
- [2] Lot 17 is the subject of mortgages in respect of which Jamaican Redevelopment Foundation (“JRF”) is the registered mortgagee. The JRF applied for and received an order for foreclosure from the Registrar of Titles dated 3<sup>rd</sup> May 2017 which now bears order number 2068573 (the “Lot 17 Foreclosure Order”).
- [3] In an effort to prevent the registration of the Lot 17 Foreclosure Order, the Claimant filed a Notice of Application on 25<sup>th</sup> September 2017, seeking various orders which were further amended and found their final form in Further Further Amended Notice of Application for Court Orders filed 22<sup>nd</sup> January 2018 as follows:
1. *That the Jamaica Redevelopment Foundation Inc be added as an interested party and/or party to the proceedings herein.*
  2. *That the Registrar of Tiles be restrained from registering the order for foreclosure no 2068573 which was applied for by the Jamaica Redevelopment Foundation for a period of 21 days from the date hereof, or such other period as determined by this Honourable Court.*
  3. *That the land known as Mistletoe Cottage being the lot numbered 17 on the plan of 19 Waterloo Road and being the land registered at Volume 1364 Folio 214 be transferred to the Claimant.*

4. *That Jamaica Redevelopment Foundation provide to the Claimant a statement of account with respect to the monies (if any) due to it with respect to the mortgages registered on the title registered at Volume 1364 Folio 214 of the Register Book of Titles.*
5. *A declaration that the Order for Foreclosure No. 2068573 is invalid, since no notice of intention to make application to make application for foreclosure had been served on the Claimant.*
6. *A declaration that the Order for Foreclosure No. 2068573 is invalid because the interested Party had previously made application for foreclosure with respect Lot 16 part of 18 Waterloo Road and to land part of Caribbean Park in the parish of St. Mary, which said foreclosure relates to mortgages no. 407422, 436196 and 475012 which are the same mortgages to which the Order for Foreclosure No. 2068573 now relates.*
7. *An Order that the application for foreclosure with respect to Lot 16 proceed prior to any foreclosure with respect to lot 17.*
8. *An order that the land known as Lot 17 part of 19 Waterloo Road and being the land registered at Volume 1364 Folio 214 of the Registrar Book of Titles be transferred to the Claimant subject to the mortgages No. 407422, 436196, 475012 registered on the said title.*
9. *That the interested party be directed to deliver to the Claimant's Attorney-at-law the Certificate of Title with respect to Lot 17 part of 19 Waterloo Road and being the land registered at Volume 1364 Folio 214 for purpose of transferring the said title to the Claimant subject to mortgage.*
10. *In the alternative, an Order that the said mortgages No. 407422, 436196, 475012 registered on the said titles be transferred to the Claimant.*
11. *A Declaration that the proposed foreclosure with respect to Lot 17 part of 19 Waterloo Road is a disposition in order to defeat the claims of the Claimant.*
12. *Further or other relief*

*(reproduced as filed with underlined insertions)*

**[4]** Paragraphs 1-4 reflect the original relief sought in the Notice of Application filed on 25<sup>th</sup> September 2017, save that paragraph 1 originally referred to the Registrar of Titles. By the Further Further Amended Notice of Application for Court Orders filed 22<sup>nd</sup> January 2018, the Claimant sought an order that the

Jamaica Redevelopment Foundation Inc be added as an interested party and/or party to the proceedings herein. Purely by way of comments, it should be noted, that that amendment should have been properly reflected by a strikethrough of the deleted words “the Registrar of Titles” in order to visually demonstrate the change.

#### **Whether the Court could hear from the JRF before it was added as a party**

[5] Ms Davis argued that because the JRF was not yet added as an Interested Party the Court should not consider its submissions as to whether it ought to be joined or its submissions on the Claimant’s substantive application. It was therefore necessary for the court to determine this issue at the outset.

[6] In **R v Industrial Disputes Tribunal (Ex parte J Wray and Nephew Limited)**, Claim No 2009 HCV 04798 (unreported), Sykes J (as he then was), considered the issue of whether a party should be heard, at the stage of an application to apply for leave to apply for judicial review. Notwithstanding the difference in the context in which that issue arose and the Court’s consideration of part 56.4 8 of the Civil Procedure Rules 2000 (CPR), I wholly agree with the conclusion of the Court, that if the Court is aiming to do justice between the parties, the overriding objective of dealing with cases justly, must include a power to give a directly affected party an opportunity to say how a particular order may affect him. It is clear in the instant case that the JRF, as mortgagee, may be affected by the orders which are being sought by the Claimant. For that reason the Court concluded that in the interests of justice and fairness it should consider the submissions from the JRF without awaiting its determination as to whether it should be joined in the proceedings.

#### **Whether the JRF should be added as a party**

[7] It is against the backdrop of the Court’s ruling that the JRF ought to be heard that the Court heard the submissions of Mrs Sandra Minott-Phillips QC, which focused, firstly, on the fact that this application for joinder of the JRF had

previously been refused by another Judge. It is a matter of record that by Notice of Application filed 5<sup>th</sup> August 2010, the Claimant had applied for the JRF to be added as an interested party in the proceedings herein and for an injunction restraining the JRF from selling or otherwise disposing of Lot 17. On 20<sup>th</sup> December 2018 Justice Paulette Williams, (as she then was), dismissed the Notice of Application for Court Orders dated 5<sup>th</sup> August 2010 with costs of the application being awarded to the JRF.

[8] Ms Davis argued that the nature of the application to join the JRF is different from the application which was before Justice Paulette Williams because the matters to be determined are entirely different.

[9] I agree with Counsel that at the time of Justice Williams' order, all the issues raised and the relief which are now being sought would not have then been matters for the Court's consideration. Although the fundamental ground on which the application was being sought was the fact that the JRF was the Mortgagee of Lot 17, there have been considerable developments since then, including the application for an order for a foreclosure order in respect of Lot 17, the granting of which is now being challenged by the Claimant. I therefore agree with the submissions of Counsel for the Claimant that the previous decision of Justice Paulette Williams, in and of itself ought not to preclude a fresh application or necessarily result in this Court arriving at the same conclusion as the learned Judge. I will therefore consider the new application on its own merits.

[10] The Claimant is challenging the legality and regularity of the foreclosure process. However, the issue as to whether there was service of the notice of intention to foreclose in compliance with section 119 of the Registration of Titles Act ("RTA") was an obligation of the JRF. The resolution of this issue in particular, would, in the opinion of the Court, be assisted by the joinder of the JRF.

[11] There is a need to prevent the multiplicity of actions and the Court of Appeal in **Jamaica Citizens Bank Ltd v Dyoll Insurance Co. Ltd.** (1991) 28 JLR 415

suggested that Courts should guard against this occurrence. The JRF is a party which, as mortgagee of Lot 17, may be directly affected by the Court's decision. The Court concluded that should it set aside the Lot 17 Foreclosure Order in proceedings to which the JRF is not joined as an interested party, there would be a risk that this could give birth to another action, unnecessarily. Therefore, having concluded that there was a benefit to be gained by having the JRF joined as a party, the Court formed the view that the JRF should be joined to these proceedings and consequently an order was made to that effect.

**Is there a requirement under section 119 of the Registration of Titles Act for a caveator to be served with a notice of intention to make an application for foreclosure?**

[12] The Claimant asserted that there has been non-compliance with section 119 of the RTA, because as the person who registered a caveat against Lot 17 and a person with an equitable interest, she should have been served with notice in writing of the intention of the mortgagee or his transferee to make an application for foreclosure. It was submitted by Ms Davis that the failure of JRF to have served the Claimant deprived her of the opportunity to make representations as to the registrar as to, *inter alia*, what amount was owing and in the absence of such service, the foreclosure procedure is invalid as is the resulting Lot 17 Foreclosure Order.

[13] Section 119 of the RTA 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...". (emphasis supplied)*

- [14] Mrs Minott-Phillips QC submissions in writing on this point succinctly captures the JRF's position on the issue of notice and I reproduce it here as follows:

*"19. No notice of JRF's intention to foreclose on Lot 17 needed to be served on Mrs Harley. Section 119 of the RTA requires notice to be served on the mortgagor or his transferee and "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**". The Register Book of Titles is defined as the book of the Office of Titles binding the original certificates of titles (or in which they are filed). Mrs Harley has no interest appearing by the Register Book. She only has a caveat protecting her equitable interest.*

*20. The endorsement of her caveat in the body of the title to Lot 17 reads "...**estate claimed Equitable Interest**". JRF submits that the endorsement of caveats in the body of the original certificate of title is a fairly recent practice which (while lessening the chances of caveats being in advertently overlooked by the Registrar) does not operate to elevate the status of the Caveat from being anything other than notice of a claim to an interest in land.*

*(emphasis supplied)*

### **Analysis of the notice issue**

- [15] It is clear that a caveat does not establish that the Caveator has an interest in property. What it does is to provide notice of the Caveator's assertion of an interest in property. As the Privy Council expressed in **Half Moon Bay Ltd v Crown Eagle Hotels Ltd** (2002) 60 WIR 330 at 340:

*[30] Be that as it may, the entry of a caveat merely operates to prevent the registration of a transfer or dealing without the consent of the caveator or the removal or withdrawal of the caveat. It does not of itself subject the title of the transferee to the interest or encumbrance which the caveat serves to protect. If, notwithstanding the failure to obtain the consent of*

*the caveator or the withdrawal of the caveat, and in breach of s 142, the registrar mistakenly registers a transfer without making the appropriate entry or notification of the caveator's interest in the Register Book, then subject to the registrar's powers under s 15(b) the transferee takes free from that interest.*

- [16] The **Half Moon** case was referred to with approval in the case of **Barrington Dixon v Angella Rente & Another** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 105/08, judgment delivered 17 July 2009, Smith JA, at paragraph 11 of the judgment made the following comments:

*"...Of course, as contended by the 2<sup>nd</sup> respondent, a caveat is not an interest in land. It merely operates to prevent any dealing with the land in question without the consent of the caveator or the removal or withdrawal of the caveat (See Half Moon Bay Limited v Crown Eagle Hotels Ltd Privy Council No. 31/2000 delivered 20<sup>th</sup> May 2002) It temporarily protects an unregistered interest in anticipation of legal proceedings. The Caveator must make a claim with a view to establishing his interest."*

- [17] In the case of **Helga Stoeckert v Paul Geddes** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 50/98, judgment delivered 1<sup>st</sup> March 1999, the Court of Appeal of Jamaica confirmed that the Registrar's function in relation to the entry of a caveat is ministerial. The Court referred to **Registration of Titles, Johore, Bahru v Temehorry Securities Ltd.** (sic) (**Registrar of Titles, Johore, Johore Bahru v Temenggong Securities Ltd.**) [1977 AC 302 which was a Privy Council case on appeal from Malaysia. The Court of Appeal quoted with approval Lord Diplock's statement at page 308 where he said as follows:

*"The purpose of a private caveat is to preserve the status quo pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts. If the person whose land or interest is bound by the caveat applies to the registrar for its removal, the registrar must remove it at the expiry of a month unless the court upon the application of the caveat orders otherwise, any person aggrieved by a private caveat may apply to the court at any time for an order for its removal. The registrar's function in relation to the entry and removal of private caveat are ministerial only. He is not concerned to enquire into the validity of the claim on which an application for a private caveat is based; without reasonable cause is liable to compensate anyone who suffers loss or damage as a result of such entry"*

[18] In **Stoeckert v Geddes** (supra), the Court of Appeal also referred to the Privy Council case of **Eng Mee Yong v Letchumanan** [1980] A.C. 331. This was an appeal concerning section 327 of the Malaysian National Land Code which the Court of Appeal stated is similar to section 140 RTA. The Court of Appeal also made specific reference to Lord Diplock's statement at page 335 of the **Letchumanan** Judgment as follows:

*"The caveat under the Torren System has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title the land, in an ordinary action brought by the caveators against the caveatee for that purpose. Their Lordships accepts this as an apt analogy with its corollary that caveat are available, in appropriate case, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved. Nethertheless their Lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued ex parte by the registrar acting in an administrative capacity without the intervention of the court and is wholly unsupported by any evidence at all.*

[19] In this case, by Judgment of the Honourable Mr Justice Morrison dated 24<sup>th</sup> July 2012, the Claimant had already acquitted a 100 percent equitable interest in Lot 17 and therefore had a caveatable interest which formed the basis for the caveat which was registered in her favour. What remained was for her to formally register this unregistered, but registrable interest. The entry of the caveat being a ministerial function cannot be elevated to anything more than what it was a ministerial entry distinct from a formal entry by the Registrar recognising the equitable interest conferred by the judgment of Morrison J. The **Half Moon Bay** case and the other cases to which reference has been made, clearly demonstrate, that the entry of the caveat was not and did not operate as an entry in the Register Book of the equitable interest of the Claimant as determined by the Court.

[20] The Court therefore finds that there is considerable force in the submission of learned Queen's Counsel that the notation in the Register Book of Titles (it being

the book at the Office of Titles binding the original certificates of title or in which they are filed) of the caveat by which the Claimant “*claimed equitable interest*” in Lot 17, does not make the Claimant a “... **person appearing by the Register Book to have any right, estate or interest, to or in the mortgaged land subsequently to such mortgage**”.

[21] In the circumstances of this case, it is the Court’s finding that on a strict construction of section 119 the JRF was not required by this section to give the Claimant notice in writing of its intention to make an application for foreclosure.

[22] Ms Davis submitted that the notation of the Caveat on the register without more was sufficient to entitle the Claimant to notice pursuant to section 119. However, I do not share Counsel’s view in this regard. In my opinion, a distinction must be drawn between endorsements purporting to register an interest in land and a mere notice of a claimed interest such as a caveat. The fact that an entry is made in the Register Book cannot be the end of the matter. There has to be a consideration of the nature of the entry and of what the entry purports to record. In this regard, I also accept the submission of Queen’s Counsel that the notation of the caveat without it being accompanied by the Registrars signature or the stamp of the registry (which are present in the case of entries recording an interest in land) is further evidence of the distinction between these categories of notation and is indicative of a deliberate effort on the part of the Registrar to accentuate the difference.

[23] In the **Half Moon Bay** case (supra) Lord Millet at paragraph 25 commented on the salient features of the RTA regarding caveats as follows:

*Caveats are dealt with by ss 139 to 143. Section 139 provides that any person with an adverse claim against the land may lodge a caveat with the registrar forbidding (inter alia) the registration of any person as transferee or proprietor of the land unless the instrument of transfer is expressed to be subject to the claim of the caveator. Section 140 provides for notice of the caveat to be given to the registered proprietor, who may if he thinks fit summon the caveator to show cause why the caveat should not be removed. Except in the case of a caveat lodged by the registrar, every caveat is deemed to lapse upon the expiration of 14*

*days after notice to the caveator of an application for registration of a transfer or dealing. Section 142 provides that, so long as the caveat remains in force, the registrar shall not enter a transfer in the Register Book without the written consent of the caveator”.*

**[24]** The Court has been presented with a certified true copy of the Registrar’s Notice to Caveator of an application for the registration of an instrument dealing with Lot 17, dated 24<sup>th</sup> August 2017 addressed to the Claimant at Lot 17, c/o her Counsel Ms Davis at her firm’s address and also c/o another Attorney-at-Law. It appears that this notice was the catalyst which resulted in the application of the Claimant for an injunction which was granted by Justice Haisley-Jackson on 28<sup>th</sup> Sept 2017 restraining the Registrar of Titles from registering the Order of Foreclosure in respect of Lot 17. It is also notable that the Claimant has not complained of not having received this notice.

**[25]** The Court concludes that there is no legal basis for the Claimant to challenge the foreclosure Order on the basis that she did not receive appropriate notice. The Court finds that the only notice she was entitled to receive as caveator was the notice of an application for the registration of an instrument dealing with Lot 17 and this was duly complied with.

**Were the relevant mortgages discharged?**

**[26]** The Claimant asserted that the foreclosure order was invalid because all three mortgages registered on the title to Lot 16 have been discharged as follows:

(i) The mortgage numbered 407422 (dated 10<sup>th</sup> November 1982 and registered 17<sup>th</sup> November 1982) was discharged by Discharge No. 635909 registered on 10<sup>th</sup> September 2010;

(ii) The mortgage numbered 436196 (dated 26<sup>th</sup> March 1985 and registered 3<sup>rd</sup> April 1985) was discharged by Discharge No. 635910; and

(iii) The mortgage numbered 457012 (dated 22<sup>nd</sup> October 1987 and registered 30<sup>th</sup> October 1987) was discharged by Discharge No. 635911.

[27] In support of this assertion, the Claimant has exhibited a copy of a Certificate of Title in respect of Volume 1227 Folio 856 (Lot 16) showing the discharges, However this evidence has been challenged by the Affidavit of Ms Naudia Sinclair in which she explains that the application of these discharges to Lot 17 was an error. These mortgages were restored to Lot 17 and resulted in the cancellation of the original Certificate of Title registered at Volume 1163 Folio 699 and its replacement with a Certificate of Title registered at Volume 1364 Folio 214.

[28] The Court accepts the explanation contained in the affidavit of Ms Sinclair and the evidence she has offered in support thereof. The copy of the Certificate of Title registered at Volume 1364 Folio 214 produced to the Court clearly shows these mortgages endorsed on the Title. For this reason, the Court finds that there is not any merit in the Claimant's submissions on this point.

**Is the Foreclosure Order invalid because the interested Party had previously made an application for foreclosure with respect Lot 16 part of 18 Waterloo Road and to land part of Caribbean Park in the parish of St. Mary,**

[29] It was submitted by Ms Davis that the Foreclosure Order is also invalid because the JRF has already collected on mortgages, namely those that are endorsed on the title for Lot 17. It was not contested that these same three mortgages were also endorsed on the Certificate of Title in respect of an entirely separate but adjoining property registered at Volume 1227 Folio 856 ("Lot 16"). Ms Davis placed a lot of stock on the fact that the notice dated September 2016 in respect of Lot 16 which was published in the newspaper referenced the same three mortgages numbered 407422 (dated 10<sup>th</sup> November 1982 and registered 17<sup>th</sup> November 1982), 436196 (dated 26<sup>th</sup> March 1985 and registered 3<sup>rd</sup> April 1985)

and 457012 (dated 22<sup>nd</sup> October 1987 and registered 30<sup>th</sup> October 1987), that were subsequently referenced in the Lot 17 Foreclosure Order. Ms Davis submitted that because the JRF has already had recourse to Lot 16 by way of foreclosure proceedings in respect of that property and the JRF must be deemed to have received moneys in satisfaction of those three mortgages.

**[30]** The JRF as mortgagee had previously obtained an order of foreclosure in respect of Lot 16 on the 21<sup>st</sup> December 2016 (the Lot 16 Foreclosure Order). As a consequence of the Lot 16 Foreclosure Order, Lot 16 is now the subject of a new title, registered at volume 1508 folio 403 of the Register Book of Titles and issued in the name of the JRF. It is significant that the Lot 16 Foreclosure Order does not make any reference to the three mortgages which were referenced in the notice that was published in the newspaper. Instead, it refers only to Mortgage number 650908 dated 2<sup>nd</sup> January 1991 and registered 11<sup>th</sup> January 1991.

**[31]** Although there is the absence of an explanation for the discrepancy between the published notice and the Lot 16 Foreclosure Order as it relates to the mortgages referenced, I am of the view that the operative instrument is the order. Consequently, the relevant mortgage is mortgage number 650908. I also find that this discrepancy could not have and did not prejudice the Claimant. Ms Davis has submitted that the Claimant did not contest the Lot 16 Foreclosure, because, as a result of the reference to the three mortgages in the notice published in the newspaper, she believed that the foreclosure of Lot 16 would have satisfied all the debt. If the Claimant did form that view, it was erroneous and does not affect the validity of the security held in respect of Lot 17. The securities referenced in the Lot 17 Foreclosure Order are:

- (i) The mortgage numbered 407422 dated 10<sup>th</sup> November 1982 and registered 17<sup>th</sup> November 1982;

(ii) The mortgage numbered 436196 dated 26<sup>th</sup> March 1985 and registered 3<sup>rd</sup> April 1985; and

(iii) The mortgage numbered 457012 dated 22<sup>nd</sup> October 1987 and registered 30<sup>th</sup> October 1987.

There was therefore no proper basis for the Claimant to have concluded that the Lot 16 Foreclosure Order applied to the mortgages attached to Lot 17.

**Is the JRF required to account for the proceeds of Lot 16 before it may be permitted to obtain a foreclosure order respect of Lot 17**

[32] The Claimant's other submission was that it is necessary for the JRF to account for the proceeds of its Lot 16 acquisition before it may be permitted to properly obtain and rely on the an order of foreclosure in respect of Lot 17. Counsel's arguments in relation to this point relied primarily on section 118 of the RTA which provides as follows:

*118. Any money received by a first mortgagee or his transferee under any proceeding commenced in his name at law or in equity shall, after payment thereof of his costs, be applied in reduction or satisfaction of the moneys secured and, subject thereto, shall be disposed of according to the equities of the parties interested .*

[33] Ms Davis asked the Court to note that the claimant was advised by the JRF's letter dated 2<sup>nd</sup> February 2016 that the outstanding debt as at that date was \$7,572,946.86 which was incurring interest at a rate of \$448.62 per diem. Counsel referred to the evidence of the Claimant that in 2015 Mr McBride, a representative of the JRF showed her valuations for Lot 16 in the sum of approximately \$19,000,000 and Lot 17 at \$23,000,000.00. The Claimant is of the belief that in 2017 both properties were valued in excess of those sums and the JRF was likely to experience a significant windfall if it were allowed to continue to conclusion with the foreclosure in respect of Lot 17. Counsel submitted that if an accounting revealed that there was no deficit as a result of the foreclosure of Lot

16, then the JRF should be barred for proceeding with the Lot 17 Foreclosure Order.

### **Analysis of the notice issue**

**[34]** In **Megarry and Wade The Law of Real Property**, 7<sup>th</sup> edition at page 1098 [25-0006] the right to foreclose 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.*

**[35]** The foreclosure of land process therefore results in the mortgagee becoming the absolute owner of the land. It extinguishes the mortgagor's right of redemption but it also extinguishes the mortgagee's right to sue on the covenants contained in the mortgage. The practical effect of this, is that it is not commercially sensible to obtain an order for foreclosure where the outstanding debt is significantly greater than the value of the property. However, the foreclosure order can be a double edged sword. The mortgagee may end up with property which has greater value than the outstanding debt or with property the value of which is substantially less. That is a risk which the mortgagee bears, but that is the nature of the remedy. What is clear, is that there is no obligation on him to account to the mortgagor for any amount in excess of the debt should he be so fortunate as to make a profit on a later sale.

**[36]** In the instant case therefore, there is no obligation on JRF to account to the Claimant in respect of the proceeds of Lot 16. As a practical matter, there would be numerous difficulties were this the position. By way of example, this would place an obligation on the JRF to sell Lot 16 which flies in the face of the foreclosure order which vested the JRF with all the usual rights of the title holder, including the right to retain possession of the property and to any dispose of it should it deem this necessary for its own purposes. Placing an obligation on the JRF to realise proceeds from the property would in fact place the JRF back in the very position which was one of the bases on which the foreclosure order was obtained. This was, the condition which had to be satisfied on the application for foreclosure, that the property was offered for sale but the highest offer was not sufficient to satisfy the moneys secured by such mortgage together with the expenses occasioned by such sale.

**[37]** Because there is no obligation on the JRF to account for the proceeds of Lot 16, then, by extension, there can be no obligation on it to satisfy the Registrar that the debt has not been fully satisfied before it can seek an order of foreclosure in respect of Lot 17. The essence of Ms Davis' submission is that having regard to the amount of the debt, if the JFR is permitted to obtain a foreclosure order in respect of Lot 17 in addition to the previously obtained foreclosure order in respect of Lot 16 it will obtain a significant windfall. There is no doubt that by exercising its right to foreclose in respect of Lot 17 there is a real possibility that the Defendant will make a significant 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, that is not a basis for the challenge to the foreclosure in respect of Lot 17. Any enrichment of the JRF arising from the foreclosure of Lot 17 would be as a result of a lawful exercise of a power it has and it would not be unjust to allow the Defendant to retain such benefit.

### **Conclusion and disposition**

**[38]** For the aforementioned reasons, the Court makes the following orders.

1. The orders sought by the Claimant on her Further Further Amended Notice of Application for Court Orders filed 22<sup>nd</sup> January 2018, are refused.
2. The Claimant is to pay the Costs of the Jamaica Redevelopment Foundation from 22<sup>nd</sup> January 2018.
3. Leave to Appeal is refused.