[2017] JMSC Civ 54

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016 HCV 02320

BETWEEN	**SHERNETT MANNING**	**CLAIMANT/APPLICANT**
AND	**TWIN ACRES DEVELOPMENT COMPANY LIMITED**	**DEFENDANT/RESPONDENT**
AND BETWEEN	**TWIN ACRES DEVELOPMENT COMPANY LIMITED**	**ANCILLARY CLAIMANT**
AND	**HORACE MANDERSON**	**1ST ANCILLARY DEFENDANT**
AND	**MICHAEL GYLES**	**2ND ANCILLARY DEFENDANT**

IN CHAMBERS

Mrs. Daniel Gentles Silvera and Mr. Adam Jones for the Claimant/Applicant instructed by Livingston Alexander

Miss Carol Davis for the Defendant/Respondent

Mr. Alton Morgan and Miss Kathrina Wilson for the 1st and 2nd Ancillary Defendants instructed by Alton Morgan and Company

PRACTICE AND PROCEDURE – Application to strike out Defence – Application for summary judgment – Estoppel - Equitable Mortgage – Whether Court should order sale of property - CPR, rules 15.2, 26.3, 55.2 and Part 66.

Heard: 6TH & 15TH February 2017 and 21st April 2017

CORAM: DUNBAR GREEN J.

BACKGROUND

[1] Twin Acres Development Company (The Defendant/Respondent and Ancillary Claimant) was the developer of an apartment complex at Constant Spring Estate, St. Andrew.

[2] On 14th December 2009 one of its directors, Mr. Manderson (1st Ancillary Defendant) arranged for the sale of one of the apartments (lot 21/ B6) to Ms. Manning (The Claimant/Applicant). Further to the Sale Agreement, Ms. Manning lodged six million dollars ($6M) in two installments to Mr. Manderson's personal account, at his instruction.

[3] The sale of the apartment was aborted by mutual agreement and a Settlement Agreement (The Agreement) was executed on terms that Twin Acres would repay the six million dollars and interest within 180 days. Another term of the Settlement Agreement was that the debt would be secured as a mortgage over the apartment. Pursuant to the Settlement Agreement, Ms. Manning registered a caveat against the title.

[4] Twin Acres did not repay Ms. Manning and she filed suit for recovery of the sum.

[5] This proceeding concerns an interlocutory application to strike out the defence, for summary judgement and an order for sale of the property to satisfy the debt.

The Application

[6] An Amended Notice of Application was filed 15th December 2016, seeking the following orders:

(i) The Defence filed on 29th September 2016 be struck out;

(ii) Further and/or in the alternative, Summary Judgment be entered in favour of the Claimant in respect of the Claim for the amount of Nine Million Five Hundred and Seventy-Eight Dollars and Ten Cents ($9,572,548.10) together with interest at a rate of 10% per annum from 7th June 2016 to the date of judgment on the Six Million Dollars ($6,000.000.00);

(iii) Further and/or in the alternative, an Order that all that parcel of land part of Lot Twenty-One B and part of Constant Spring Estate known as part of Number Fourteen Stilwell Road in the parish of Saint Andrew being the Strata Lot numbered Four comprised in Certificate of Title registered at Volume 1399 Folio 793 of the Register Book of Titles known as Apartment B6, Twin Acres Apartments be sold to satisfy the sum of $6,000,000.00 plus interest at the rate of 10% per annum from 1st July 2010 to the date of payment; and

(iv) Costs be granted in favour of the Claimant to be taxed if not agreed.

[7] The orders are sought on the following grounds:

1) The Defence filed has no real prospect of success and fails to disclose any reasonable grounds for defending the claim for the reasons that:

(b) the parties herein entered into a written agreement dated 7th June 2010 ("the Settlement Agreement") by virtue of which the Defendant acknowledged owing the Claimant $6,000,000.00 and it agreed to pay the Claimant the sum of Six Million Dollars ($6,000,000.00) ("the Principal") together with interest at a rate of 10% per annum in consideration of the Claimant forbearing to demand immediate payment of the same sum within one hundred and eighty (180) days; and

(c) to date the Defendant has failed to pay any of the monies owing to the Claimant as agreed or at all in breach of the Settlement Agreement and/or has had the sum of $6,000,000.00 and used it for some other purpose.

2) The Defence provides no reasonable grounds for invalidating the Settlement Agreement.

3) The directors of the Company were authorised to:

   (i) accept money on the Defendant's behalf; and

   (ii) enter into the Settlement Agreement which continues to bind the Company.

4) The Defence filed does not disclose any reasonable grounds for defending the claim and is an abuse of the process. Accordingly, the Defence ought to be struck out pursuant to Rule 26.3 of the Civil Procedure Rules, 2002.

5) The Defendant had failed to comply with Rule 10.5(1) Civil Procedure Rules, 2002 in that it has failed to set out the facts with sufficient particulars on which it intends to rely. The Defence contains an allegation of fraud but it has not been sufficiently pleaded.

6) Further, the Claimant is an equitable mortgagee of ALL THAT parcel of land part of LOT TWENTY-ONE B part of CONSTANT SPRING ESTATE known as part of NUMBER FOURTEEN STILWELL ROAD in the parish of SAINT ANDREW being the strata Lot numbered FOUR comprised in Certificate of Title registered at Volume 1399 Folio 793 of the Register Book of Titles known as Apartment B6, Twin Acres Apartments ("the Property") pursuant to a Settlement Agreement entered into by the Claimant and Defendant herein on 7th June 2010.

[8] Ms. Manning filed an affidavit on 17th November 2016 in support of the application and sought permission to rely on affidavit of 8th December 2016. The relevant paragraphs are reproduced below.

<u>The Affidavit of the 8th December, 2016</u>

3. On or about the 14th December, 2009 I entered into an Agreement for Sale for the purchase of Apartment B6, Twin Acres Apartments comprised in Certificate of Title registered

at Volume 1399 Folio 793 of the Register Book of Titles ("the Property") from the 1st Defendant/Ancillary Claimant, Twin Acres Development Company Limited. Pursuant to the said Agreement for Sale, I paid monies on account of the purchase price to Twin Acres Development Company Limited including a cheque for Two Million Dollars ($2,000,000.00) dated the 30th November, 2009 and another cheque for Four Million Dollars ($4,000,000.00) dated the 22nd December, 2009.

4. *The aforesaid transaction was cancelled by mutual agreement between the parties but the 1st Defendant/Ancillary Claimant did not have the liquidity to repay the said sum to me immediately. Accordingly on the 7th June, 2010 I entered into a Settlement Agreement by virtue of which the 1st Defendant/Ancillary Claimant acknowledged its indebtedness to me in the sum if Six Million Dollars ($6,000,000.00). I exhibit hereto photocopy of the Settlement Agreement marked **"SM 1"** for identification.*

5. *In consideration of me forbearing from insisting on immediate payment from the company for the sum of Six Million Dollars ($6,000,000.00), the 1st Defendant/Ancillary Claimant agreed that it would within one hundred and eighty (180) days from the date of the agreement or where there was a binding signed contract for the sale of the Property subsisting, pay to me the sum of Six Million Dollars ($6,000,000.00) together with interest from the 1st July 2010 at 10% per annum.*

6. *The Settlement Agreement expressly provided that the Property would be charged as security for the debt to me together with interest and that upon demand the 1st*

Defendant/Ancillary Claimant would make and execute in my favour, a legal mortgage over the Property. If the 1st Defendant/Ancillary Claimant fails to establish that legal mortgage, the Settlement Agreement empowers me to act on the behalf (sic) of the 1st Defendant/Ancillary Claimant and have the mortgage created, duly executed and registered on the title to the property in my favour.

7. *Pursuant to the said Settlement Agreement and in support of my charge I lodged a caveat against the title to the said Property on the 29th August 2012, prior to the judgment upon which the Provisional Charging Order is based being handed down and clearly prior to the Order granting the Provisional Charging Order. The endorsement on the title reads as follows:*

"Caveat No. 1778351 lodged on the 29th day of August, 2012 by SHERNETT MARIE ALICIA MANNING estate claimed Equitable Interest pursuant to an Agreement dated the 7th day of June, 2010."

*I exhibit hereto photocopy of Certificate of Title registered at Volume 1399 Folio 793 marked "**SM 2"** for identification.*

8. *The Agreement referred to in the above notation is the said Settlement Agreement between myself and the 1st Defendant/Ancillary Claimant herein.*

9. *In the circumstances I have an equitable interest in the said Property over which a Provisional Charging Order has been granted in favour of L.D.T. Services Limited and Leon Forte, the 1st and 2nd Claimants named herein who must have been aware of my interest, yet failed to disclose it in the affidavit filed on the 30th September, 2016 by Leon Forte. Indeed*

the Judgment which he is seeking to enforce refers to the fact that the 1st Defendant/Ancillary Claimant is indebted to me for Six Million Dollars ($6,000,000.00) plus interest and that the Settlement Agreement acknowledge that the said Defendant company is indebted to me.

10. That on the 6th June 2016 I filed suit (Claim No. 2016 HCV 02320) against the 1st Defendant/Ancillary Claimant, Twin Acre Development Company Limited, to recover the sum of Six Million Dollars ($6,000,000.00) plus interest. A Defence has been filed in response. On the 17th November, 2016 I filed a Notice of Application for Summary Judgment and/or to Strike out the Statement of Case. This application is listed for hearing on the 19th December, 2016.

The Affidavit of the 17th November 2016

"2. Sometime in 2009 I was looking to purchase property when I was introduced to Mr. Horace Manderson, as one of the developers of a new development in Stony Hill called Twin Acres Apartments. I thereafter met Mr. Manderson up at Twin Acres apartment and he showed me Apartment B6, Twin Acres Apartments which he advised me was available for sale.

3. On or about 14th December 2009 I entered into an agreement to purchase apartment B6 Twin Acres Apartments comprised in Certificate of Title registered at Volume 1399 Folio 793 of the Register Book of Titles ("the Property") in the development known as Twin Acres Development, was constructed by Twin Acres Development Company Limited, the Defendant herein. At all material times the Defendant was the owner and registered proprietor of the Property. I exhibit hereto photocopy of Agreement for Sale for the property marked "**SM 1**" for identification.

4. On two separate occasions, I gave cheques to Mr. Horace Manderson towards the purchase price of the Property. The cheques were drawn on my accounts at Scotiabank and Barita Investments Limited for a total sum of Six Million Dollars ($6,000,000.00). On each occasion Mr. Manderson instructed me to draw the cheques in his favour. I thought nothing of this as Mr. Manderson was a director and shareholder of the Defendant company and had been the representative/agent of the Company with whom I was dealing in this transaction and who signed the Agreement for Sale on behalf of the Defendant company. I exhibit hereto a photocopy of the Articles of Association of the Defendant company marked "**SM 2**" for identification. In the Articles of Association Mr. Manderson is listed as one of the directors of the Company together with Mr. Michael Gyles. The payment of the sum of money to Mr. Horace Manderson was not a part of any fraudulent conspiracy.

5. In or about June 2010 the transaction was cancelled by mutual agreement between the parties and it was agreed that the sum of $6,000,000.00 would be returned to me. The Defendant Company did not have the liquidity to repay me immediately as a result of which we entered into a settlement agreement on 7th June 2010 ("the Settlement Agreement"). By virtue of the Settlement Agreement the Defendant acknowledged indebtedness to me in the sum of Six Million Dollars ($6,000,000.00).

6. In consideration of me forbearing from insisting on immediate payment from the Company for the sum of $6,000,000.00 the Defendant company agreed that it would within one hundred and eighty (180) days from the date of the agreement or where there was a binding signed contract for sale of the Property subsisting, pay to me the sum of $6,000,000.00 together with interest from 1st

July 2010 at 10% per annum. This was to give the Company an opportunity to sell the apartment which was the subject of the cancelled transaction and repay the debt from the proceeds of sale. I exhibit hereto a photocopy of the Settlement Agreement marked "**SM 3**" for identification.

7. The Settlement Agreement was signed by Mr. Horace Manderson and Mr. Michael Gyles in their respective capacities as directors of the Defendant. The Defendant company seal was affixed to the Settlement Agreement. The said directors' signatures were witnessed by the Defendant's Attorney-at-Law, Basil Parker of the Law Firm Livingston, Alexander & Levy.

8. To date I have received no payment in breach of the Settlement Agreement. I have seen the Defence filed 20th September 2016 in which I have been accused of conspiring to defraud the Defendant. At no time did I conspire with anyone to defraud the Defendant. At all times I acted in good faith in the belief and understanding that Mr. Manderson was acting on behalf of the Company and was authorized to accept money on its behalf.

9. The Settlement Agreement acknowledges a debt owed to me by the Defendant including interest at the agreed rate of 10% per annum.

10. I have been advised by my Attorneys and do verily believe that a judgment has been delivered by the Honourable Mr. Justice David Batts in Claim No. C. 00030 of 2011 [2016] JMCC Comm. 20 in a suit filed by L.D.T. Services Ltd. and Leon Forte against the Defendant named herein, Horace Manderson, Garth Williams and Michael Gyles in which the judge found that the Defendant is indebted to me for the sum of $6,000,000.00 plus interest at 10% per annum commencing on 1st July 2010 and that the Settlement

Agreement acknowledges that the Defendant company is indebted to me. The learned judge further found that Horace Manderson and Michael Gyles breached their fiduciary duty owed to the Defendant company by distributing some of the proceeds of the sale of the apartments in the Development to themselves but that they are not guilty of fraud.

11. I have been advised by my Attorneys and do verily believe that this issue of fraud of the directors of the Defendant, Horace Manderson and Michael Gyles has therefore already been determined by the Court. Accordingly the defence filed is an abuse of the process of the Court and ought to be struck out. Further the Defence filed has no real prospect of success.

The Settlement Agreement

[9] The Settlement Agreement was made by deed on 7th June, 2010 between Twin Acres Development Company Limited and Shernett Marie Alicia Manning. The relevant clauses are set out below:

Whereas:

1. *The Company is indebted to the Creditor in the sum of SIX MILLION DOLLARS ($6,000,000.00) hereinafter called "the Principal".*

2. *The Company is the registered proprietor of Strata lot numbered four (4) in the Twin Acres Development in the Parish of Saint Andrew registered at Volume 1399 Folio 793*

   ("the Property")

3. *The Creditor having demanded payment of the Principal, The Company has requested her to forbear from insisting*

on immediate payment which she has agreed to do on the terms of and conditions hereof.

NOW THIS DEED WITNESSETH:

(1) In pursuance of the above agreement and in consideration of the Principal now owing to the Creditor by the Company and of the forbearance of the Creditor to require immediate payment thereof, the Company hereby covenants that it will within one hundred and eighty (180) days ("the Redemption Date") hereof or where a binding duly stamped contract for the sale of the property is subsisting upon the completion of such sale be it sooner or later than the redemption date, pay the Principal to the Creditor together with interest thereon from the first day of July 2010 at the rate of ten percent (10%) per annum ("The Agreed Interest Rate") and as security for the due payment thereof, the Company charges the Property with the payment to the Creditor, of the Principal with interest.

(2) The Company shall from the date hereof, actively and diligently pursue efforts to sell the Property on or before the Redemption Date and to settle the Company's indebtedness to the Creditor out of the proceeds of sale.

(3) If the Principal is not paid on or before the Redemption Date then so long as the whole or any part of it remains owing, the Company will (as well after as before any judgment) pay to the Creditor interest at the Agreed Interest Rate on the Principal or such part of it as from time to time remains owing.

(4) In the event that the Property is not sold by the Redemption Date or the Company has no binding

contract of sale is otherwise unable to liquidate its indebtedness to the Creditor, the Company undertakes that it will on demand by the Creditor at its own expense, make and execute in favour of the Creditor a valid legal mortgage of the Properties or any part thereof in such form and containing such covenants and provisions as the Creditor may require and for the purposes hereof the Company hereby irrevocably appoints the Creditor as its Attorney for, in the name and on behalf of the Company and as the Company's act and deed or otherwise to sign, seal and deliver and otherwise perfect a legal mortgage of the Properties or any part thereof.

(5) Any amendments to this agreement must be in writing and signed by both parties.

(6) This agreement will bind the parties and their respective heirs, executors, administrators and assigns.

(7) Time shall be of the essence in the performance of all obligations by the parties to this agreement.

[10] **T**he Settlement Agreement is signed by Michael Gyles, Director, Horace Manderson, Director/Secretary, Shernett Manning and Alton Morgan, the latter in his capacity as Attorney-at-Law and witness. The Seal of the company is also affixed.

The Defence

[11] I have set out below the relevant paragraphs of the Defence filed 20th September 2016:

3. Paragraph 2 of the Particulars of Claim is denied. The defendant says that the document referred to as a Settlement Agreement is fraudulent, in that to the full

knowledge of the claimant the sum of $6,000,000 referred to in the said document was not paid to the defendant but was paid personally directly and in cash and/or cheque to Mr. Horace Manderson who with the agreement of Mr. Michael Gyles distributed same to themselves.

4. *In the circumstances the defendant says that the claimant, together with Messrs. Manderson and Gyles fraudulently agreed and conspired to defraud the defendant.*

Particulars of Fraudulent Conspiracy

a. *The Claimant paid the sum of $6,000,000 by cheque and/or cash directly to Mr. Manderson*

b. *To the knowledge of the Claimant Mr. Manderson received the said money personally.*

c. *The Claimant and Messrs. Manderson and Gyles agreed and conspired to sign a document referred to as a settlement agreement to repay the said sum of $6,000,000 to the Claimant well knowing that the sum of $6,000,000 referred to therein was never paid to or received by the Defendant.*

5. *Paragraphs 5 and 6 of the Particulars of Claim are denied.*

6. *In the alternative the Defendant says that the sum of $6,000,000 was not paid to the Defendant but personally to Mr. Manderson and in the circumstances if, which is denied, any sum is found to be due from the Defendant, the Defendant seeks a full indemnity of the sum plus interest and costs from Messrs. Manderson and Gyles."*

[12] Filed on behalf of the defendant is the affidavit of Leon Forte, sworn on 13th December 2016. The relevant paragraphs are set out below:

> "2. That I am a director of the 1st Claimant I am authorized to make this affidavit on behalf of the 2nd Claimant. I make this affidavit from facts within my own knowledge, unless otherwise stated.
>
> 3. That I have read the affidavit of Shernett Manning filed on 17th November, 2016 herein, (hereinafter the said affidavit) and make this affidavit in response to same.
>
> 4. With respect to paragraph 3 of the said affidavit, I note that the agreement for sale provided that there be a deposit of $2,000,000 and a further payment of $1,000,000 with the balance on completion. To my knowledge these sums were duly paid by Mrs. Manning to her Attorney-at-Law, who duly paid same to the Attorney-at-Law for the Vendor. There is no provision in the agreement for sale for the payment of $6,000,000 to Mr. Manderson, whether in his capacity of Director of the Company or otherwise.
>
> 5. With respect to paragraph 4 of the said affidavit, I say that there was no reason pursuant to the agreement for sale between the parties for Mrs. Manning to be paying $6,000,000. Further as a Director of the Claimant company and generally as a Developer, I have had considerable experience in the sale of apartments in a complex such as Twin Acres. From my experience monies payable pursuant to an agreement for sale are paid by the purchaser to his/her Attorney-at-Law, who in turn pays same to the Vendor's Attorney-at-Law. Certainly, I consider it very strange that Mrs. Manning should be paying cheques to Mr. Manderson

at all, whether he requested her to draw the cheques in his favour or otherwise. Indeed I say that the entire transaction was very strange in that

a. The $6,000,000 was not due pursuant to the contract

b. The $6,000,000 was not paid to Mrs. Manning's own Attorney-at-Law.

c. The $6,000,000 was not paid to the Attorney-at-Law for Twin Acres, who was the only person authorized to receive monies from the purchaser pursuant to the Agreement for Sale.

d. The $6,000,000 was paid in cheques paid out in the name of Mr. Manderson, and not in the name of the company, who was the owner of the apartment. I attach marked "LF1" copy cheque in the sum of $4,000,000 made directly to Mr. Manderson. I have requested of Mrs. Manning a copy of the other cheque which I understand is also in the name of Mr. Manderson but she has refused to give it me.

6. I have checked the company records and the said sum of $6,000,000 was never entered in the company records. No receipt for the said sum was ever issued to the Claimant by the company.

7. In the circumstances I verily believe that the monies paid to Mr. Manderson were not paid pursuant to the agreement for sale at all. Indeed I say further that the Claimant and Mr. Manderson were fully aware that the monies paid by the Claimant were not for the benefit of the company. In the circumstances similarly the Claimant, Mr. Manderson and

Mr. Gyles were fully aware that they were defrauding the Company when they signed the alleged "Settlement Agreement".

8. Further both Mr. Manderson and Mr. Gyles signed a document in which the $6,000,000 paid by Mrs. Manning is described as a "loan". I attach a copy of the said document marked "LF2".

9. I say further that I verily believe that in any event the alleged settlement agreement is void as there was no consideration with respect to same received by the company. Additionally Miss Manning was at the very least grossly negligent, because having paid the money directly to Mr. Manderson in his personal capacity she had a duty to ensure that this money was actually received by the company. She totally failed in that duty.

10. With regard to paragraph 10 of the said affidavit, I say that the Claimant was not a party to the Claim No. CD 0030. It is denied that the Learned Judge found that the Defendant was indebted to the Claimant herein, and further that the Settlement Agreement acknowledged that the Defendant company was indebted to the Claimant. The Learned Judge did give judgment on the Ancillary Claim in the sum $6,000,000 but the Defendant is prepared to forego that judgment.

11. I verily believe that the Claimant did indeed conspire with the Ancillary Defendant herein to fraudulently deprive the Defendant of monies that they all well knew never paid to the Defendant, and that the Defence has a good chance of success in the circumstances herein.

Reply to Defence

[13] The reply, in so far as is relevant, states:

> …6. The claimant denies that she is guilty of any fraud or conspiracy as alleged in Paragraph 4 of the Defence and specifically denies the particulars of fraudulent conspiracy set out thereunder save that the Claimant gave Mr. Manderson two (2) cheques amounting to Six Million Dollars ($6,000,000.00). The Claimant repeats paragraphs 3, 4, and 5 in further response to paragraph 4 of the Defence.
>
> 8. The Settlement Agreement was in writing and duly signed by two (2) directors of the Defendant as authorised by the Articles of Association and the Companies Act of Jamaica who were expressly and/or under implied authority to sign same in the presence of a witness and was sealed with the company seal and is therefore binding on the Defendant.
>
> 9. The Claimant further says that the said Six Million Dollars ($6,000,000.00) was paid to Horace Manderson as agent of the Defendant who had express and/or implied and/or ostensible/apparent authority to accept same on behalf of the Defendant and the Claimant has no knowledge that same was never received by the Defendant. If which is not admitted Horace Manderson never paid the sum of Six Million Dollars ($6,000,000.00) paid by the Claimant on account of the purchase price over to the Defendant, the Claimant says that is a matter between the Defendant as principal and Horace Manderson as agent and accordingly the Defendant is liable for the actions of its agent, Horace Manderson.

Defence of Ancillary Defendants

[14] The Ancillary Defendants have filed no evidence in this application. The relevant parts of their defence are that:

> 2. *Paragraphs 5 of the Ancillary Particulars of Claim is denied. The Ancillary Defendants did not fraudulently conspire with the Claimant to sign a document referred to as Settlement Agreement to repay sums to the Claimant.*
>
> 3. *The Ancillary Defendants rely on the Judgment of the Honourable Justice Batts in Claim No CD 00030 of 2011 in this Honourable Court.*
>
> 4. *in the aforementioned Claim No. CD 00030 0f 2011 the Ancillary Claimant herein brought an Ancillary Claim against the Ancillary Defendants herein claiming:*
>
> a. *an account of all monies collected by the Ancillary Defendants, Messrs. Manderson and Gyles, in their purported sale of properties belonging to the Ancillary Claimant;*
>
> b. *conversion; and*
>
> c. *fraudulent misrepresentation*.
>
> 5. *The Ancillary Defendants deny the allegation of fraud made by the Ancillary Claimant and say that there was no fraud against the Ancillary Claimant. The Ancillary Defendants always intended and testified under oath to the Court in the trial of Claim No. 00030 of 2011 that they would account for all monies advanced to all the directors at the end of the Twin Acres Development project,* ***including the $6,000,000.00 advanced to them from the aborted sale of***

Apartment B6.

6. *The issues concerning the monies collected by the Ancillary Defendants from the claimant herein, Ms. Shernett Manning, through the aborted sale of apartment B6 were considered upon the trial of Claim No. CD 0030 of 2011 by his lordship 2011 the Honourable Justice Batts who made a finding of fact and a ruling in respect thereof.*

7. *At paragraph 51 of the Judgment delivered in Claim No CD 00030 of 2011 the Honourable Justice Batts found that "The Ancillary Defendants breached their fiduciary duty to the Ancillary Claimant by the distribution of the sums collected from the sale of the apartment units at the time and in the manner in which it was done."*

8. *The Ancillary Defendants will rely on paragraph 52 of the above mentioned Judgment delivered in Claim No. CD 0030 of 2011 where the Court found that "The Ancillary Claimant has also pleaded conversion and fraudulent misrepresentation. I do not find that there was anything fraudulent in the conduct of the Ancillary Defendants."*

9. *In Claim No CD 00030 of 2011 judgment was awarded to the Twin Acres Ancillary Claimant have judgment against the Ancillary Defendant in the amount of $6,000,000.00 plus interest at 10% per annum from December 14, 2009 until payment.*

10. *The Ancillary Defendants say that the $6,000,000.00 that was the subject of the Ancillary Claim in Claim No. 00030 of 2011 is the same $6,000,000.00 that is now the subject of the Ancillary Claim herein and is not an additional sum due to the Ancillary Claimant from the Ancillary Defendants.*

11. The Ancillary Defendants maintain that it would be "issue estoppel" and "res judicata" for the claim of fraud raised by the Ancillary Claimant to be tried again.

12. The Ancillary Defendants maintain that it would be double jeopardy if they are again found liable to pay the $6,000,000.00 plus interest to the Ancillary Claimant in addition to the previous Judgment award in Claim No. CD 00030 of 2011.

*13. The Ancillary Defendants maintain that if they are found liable to pay the $6,000,000.00 plus interest to the Claimant in this action they should be exonerated from being liable to pay the Ancillary Claimant in the previous Judgment award in Claim No. CD 00030 of 20*11."

ANALYSIS

Striking Out

[15] Rule 26.3(1) of the Civil Procedure Rules (CPR) confers a power on the Court to strike out a statement of case in whole or part, if it appears, inter-alia:

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10."

[16] Rule 26.3 (1) is referenced in Rule 15.2, which governs applications for summary judgment. Rule15. 2 states:

The court may give summary judgment on the claim or on a particular issue if it

considers that-

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim.

[17] I will now assess whether the requirements are satisfied to justify an order under rule 26.3(1) of the CPR. I will apply the "plain and obvious" test, which is outlined by the learned authors of **A Practical Approach to Civil Proceeding** as a "broad-brush" approach in cases where several of the grounds for striking out are relied on. The test, in reference to equivalent English Rules, is described in these terms:

Where several of the grounds stated in CPR, r 3.4 are relied on in a single application, the court will often take a broad-brush approach and simply ask whether the case is a plain and obvious one for striking out, rather than considering each of the grounds in detail. (p.312, para 22.14).

[18] It is convenient to point out as well that when I come to deal with summary judgment under rule 15.2, the considerations will not be very different because as the learned authors of **A Practical Approach to Civil Proceeding** state:

> *…striking out under r.3.4 is closely related to the jurisdiction to enter summary judgment…Both powers are used to achieve the active case management aim of summarily disposing of issues that do not need full investigation at trial.* (p.319, para 22.03).

[19] The learned authors cited ***Three Rivers District Council v Bank of England (No 3)*** [2003] AC 1 to further distinguish between the two powers.

[20] At para 91 of the judgment, Lord Hope referred to the explanation by Woolf MR in ***Swain v Hillman*** [2001] 1 ALL ER 91, 92) that when the court deals with a procedure to strike out it is "concerned with a statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim".

Lord Hope then referred to the judgment of Stuart Smith LJ in ***Monsanto v Tilly*** (1999) The Times, 30 November 1999 in which it is explained that the power to enter summary judgment is of wider scope. Here the court is looking ahead to the trial and if it finds that the case is so weak that it has no reasonable prospect of success, summary judgment will be entered.

[21] In ***ASE Metals NV v Exclusive Holiday of Elegance Limited*** [2013] JMCA Civ 37 Brooks JA said the similarity of rules allowed for 'a conflation of the principles' and he found it convenient to proceed only by reference to the principles guiding an application for summary judgment (para 13).

[22] The defendant's position is that the transaction between Miss Manning and Messrs. Manderson and Gyles was a fraudulent conspiracy to deprive the company of funds and which resulted in its indebtedness to Miss Manning. In essence, the contention is that the three of them were each responsible for the diversion of funds from the company, the distribution of proceeds between Manderson and Gyles, and the eventual indebtedness of the company to Ms. Manning.

[23] The evidence before me discloses that Messrs. Manderson and Gyles did two essential things in their capacity as directors. First, Mr. Manderson made the arrangements with Ms. Manning for the purchase of the apartment and he personally collected payments from her. Second, when the Sale Agreement was mutually aborted, Messrs. Manderson and Gyles executed a Settlement Agreement for the company to repay the funds which had been paid into Mr. Manderson's account.

[24] Counsel for the defendant has asked me to draw an inference of a conspiracy to defraud from the following evidence: (i) that the sum was paid by cheques drawn in the name of the 1st ancillary defendant; (ii) that the $6,000,000.00 or portions of it were paid at a time when they were not yet due; and (iii) that those sums were not paid through the purchaser or vendor's attorney-at-law.

[25] Counsel for the claimant contends that the defendant had made serious allegations of fraud which were bereft of any form of factual basis. She submitted that the Defence provided no particularity, specificity or cogent matrix of facts from which an allegation of fraud "could be cobbled together"; only bald allegations.

[26] Counsel contends further that the fact of Ms. Manning paying $6M to Mr. Manderson was not sufficient facts on which to find fraud on her part, particularly in light of the fact that Mr. Manderson is a director and shareholder of the defendant company and the defendant's representative with whom Ms. Manning had dealt. Further, no facts were averred to demonstrate that Ms. Manning knew that Mr. Manderson did not hand over the $6M to the defendant company, but rather distributed the money between himself and Mr. Gyles. It was only stated that "she knew".

[27] Counsel also submitted that the fact that the Agreement for Sale did not specify the payment of $6M could take the allegation of fraud no further, as Ms. Manning clearly stated that it was a payment on account of the purchase price. It therefore did not matter that the payments had not been made in accordance with the schedule in the agreement.

[28] I agree with counsel for the defendant that payment of the sums directly to Mr. Manderson was irregular as it did not conform to usual conveyancing practice but I have seen no evidence of any information which was available to Ms. Manning to cause her to doubt the actions or bona fides of Mr. Manderson and Mr. Gyles or which establishes that she had not acted in good faith in her dealings with them as directors and representatives of the company.

[29] I accept Ms. Manning's evidence as to why she might have seen no problem with that course of conduct. She deposed "…I was introduced to Mr. Horace Manderson, as one of the developers of a new development in Stony Hill called Twin Acres Apartments…[and]… On two separate occasions, I gave cheques to Mr. Horace Manderson towards the purchase price of the Property. The cheques

were drawn on my accounts at Scotiabank and Barita Investments Limited for a total sum of Six Million Dollars ($6,000,000.00). On each occasion Mr. Manderson instructed me to draw the cheques in his favour. I thought nothing of this as Mr. Manderson was a director and shareholder of the Defendant company and had been the representative/agent of the Company with whom I was dealing in this transaction and who signed the Agreement for Sale on behalf of the Defendant company." (Para 2 & 4 of Affidavit signed 17th November, 2016).

[30] It is often the case that individuals incorporate companies as a vehicle through which they conduct business but are not always careful to separate their own convenience from proper fiduciary conduct. Such shortcomings are not sufficient, without more, to establish unauthorized or fraudulent behavior. This was essentially what Batts J. concluded in the related case of ***L.D.T. Services Ltd. and Leon Forte v Twin Acres Development Company Limited and others [2016] JMCC Comm. 20*** to which I have referred at paragraph 57 of this judgement.

[31] I will not speculate as to why the payment was allegedly made early. It is only necessary for me to say, that fact does not make the payment suspicious or tending towards fraudulent conspiracy.

[32] The defendant contends that the $6M was paid as a loan and Ms. Manning knew the sums had not been received by the company. I do not see how this could be established, were the matter to proceed to trial.

[33] In my judgment, it has to be a salient feature of the defendant's case and established unequivocally from the pleadings and facts, that when Ms. Manning handed over funds to Mr. Manderson she was fully aware or could reasonably have been expected to have had knowledge about the nature of the transaction being alleged by the defence.

[34] There are no particulars sufficiently unequivocal to support that allegation. The evidence establishes that her course of dealing with Mr. Manderson had only been in relation to the apartment. Mr. Manderson was introduced to her as one of

the developers of the property, he showed her the apartment and then arranged for its sale to her. Neither is there any evidence of her having any knowledge of the internal operations of the company or as between its shareholders and directors.

[35] As to the purported "loan agreement", the respondent relies on a document exhibited in the affidavit of Mr. Forte, which states inter alia:

"Loan from Shernnett Manning on Apartment B6
Twin Acres, St. Andrew
Principal to Partners: -
Horace Manderson $2 million
Michael Gyles $2 million
Garth Williams $2 million"

It appears to bear the signatures of Messrs. Manderson and Gyles.

[36] That document is undated and does not bear the signature of Ms. Manning. It is of no weight in these proceedings. It certainly cannot displace the Settlement Agreement which is made in the form of a deed and duly executed by Mr. Manderson, Mr. Gyles and Ms. Manning, witnessed by an Attorney-at-Law and bears the company seal.

[37] I therefore do not accept the submission that the facts adduced are more consistent with the money advanced being a loan rather than a payment under the Agreement for Sale or justify an inference that Ms. Manning well knew that the money was a loan to Mr. Manderson and that the sums had never been received by the company.

[38] In applications, such as these before me, the defendant must put to the Court evidence of a quality which can establish a defence that discloses reasonable grounds for defending the claim and/or has a real prospect of success. This requires more than taking issue with the claim and proffering an argument. The defendant is not required to provide excessive details but rather his defence must be properly particularized and supported by evidence.

[39] In ***Three Rivers***, at para 49, Lord Hope of Craighead said that there must be "a balance between the need for fair notice to be given on the one hand and excessive demands for details on the other." He cited with approval the passage from the judgement of Saville LJ in ***British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd*** (1994) 45 Con LR 1, 4-5 where his Lordship said, inter-alia:

> *The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it.*

[40] It is a well-established principle of law that allegations of conduct which is fraudulent and dishonest must be particularized and unequivocal, in the sense that a Court should not be able to infer innocence from the facts that are pleaded.

[41] The following passages from the judgment of Hope LJ in ***Three Rivers*** are particularly instructive:

> *On the other hand it is clear that as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud." (para 51).*
>
> *In* ***Wallingford v Mutual Society*** *(1880) 5 App Cas 685 at 697 Lord Selborne LC said:*
>
> > *'With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.' (para 52).*

A party is not entitled to a finding of fraud if…the facts on which he relies is equivocal…Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. (para 55). (My emphasis).

[42] In the same case, Millet LJ said at paragraphs 184-187:

It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr on the Law of Fraud and Mistakes (7th edn, 1952) p 644, Davy v Garrett (1878) 7 Ch D 473 at 489, Bullivant v AG for Victoria [1901] AC 196, [1900-3] All ER Rep 812, Armitage v Nurse [1997] 2 All ER 705 at 715, [1998] Ch 241 at 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so (184).(My emphasis).

It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirements is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort (185).

And at para 186:

The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonestly, and this fact must be both pleaded and proved.

In Davy v Garrett Thesiger LJ a well-known and frequently cited passage stated:

> *'In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intent. (see 1878) 7 Ch D 473 at 489.) (My emphasis).*

[43] In ***Wallingford v Mutual Society*** (1880) 5 App Cas 685, extracts of which were cited with approval by Harris JA in ***Smith v Steer*** [2009] JMCA Civ. 43, para 20, Heatherley LJ, said:

> *There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be*

by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest." (p.701).

[44] Blackwook LJ said, at p. 704:

"So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence." (My emphasis)

[45] Lord Watson said, at p. 709:

"My Lords, it is a well-known and very a proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of the Common Law, I think the terms of Order XIV, would require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud, because I cannot think that a mere statement that fraud had been committed, is any compliance with the words of that rule which require the Defendant to state facts entitling him to defend. The rule must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true." (My emphasis).

[46] I agree with counsel for the claimant that the requirement is more than a technicality and is fundamental to the efficient functioning of the judicial system. The requirement is not only at common law but falls within rule 10.5(1) of the CPR which requires the defence to "set out all the facts on which the defendant relies to dispute the claim".

[47] The particulars that have been pleaded by the defendant are sparse and for that reason I find the pleadings to be inadequate. To adapt a formulation of Lord Selborne LC in ***Wallingford*** (supra), no single material fact is condescended upon, in a manner which would enable the Court to understand what it was about the settlement agreement and the conduct of Ms. Manning that could reasonably establish fraud or a conspiracy to defraud. In the same case, Blackburn LJ said that affidavits brought forward by the defence must "condescend upon particulars" (p. 704).

[48] Counsel for the defendant submitted that the pleadings before me pertain to conspiracy to defraud and not fraud. In paragraph 3 of the Defence it is pleaded that the Settlement Agreement itself is fraudulent in that to the full knowledge of the claimant the sum of $6M was paid personally and directly to Mr. Manderson. I therefore do not see how it could be said that the case is only about conspiracy to defraud. In any event, on either formulation there are no particulars to satisfy me that the defendant has a case which could be sustained at a trial.

Estoppel

[49] The definition, operation and governing principles of estoppel were reviewed extensively by Bishop J. (as she then was) in ***Fletcher & Company Limited vs Billy Craig Investments Limited et al*** (2012) JMSC Civ 128, citing several of the well-known authorities which deal with the issues.

[50] The overarching principle is stated in *Halsbury's Laws of England, 4th edition, Vol. 176, paragraph 1530:*

Even if the objects of the first and second actions are different the

findings on a matter which came directly (not collaterally or incidentally) in issue in the first action and which is embodied in a judicial decision, that is final, is conclusive in a second action between the same parties and their privies..."

[51] Estoppel can arise in three circumstances. The *first,* "cause of action" estoppel bars an action from proceeding if (a) the cause of action is the same as in an earlier proceeding; (b) the parties are the same (or their privy) as in the earlier proceeding; and (c) both the earlier and later proceeding deal with the same subject matter. The *second,* "issue estoppel" operates against the raising in a subsequent proceeding of an issue that had been decided in a previous proceeding. The third, which can be called the 'Henderson v Henderson principle' is grounded in public policy and precludes raising a point in a later proceeding which could and should have been raised in the earlier one.

[52] The following passages from the judgment of Lord Keith of Kinkel in ***Arnold v NatWest Bank Plc.*** (H.L.E.), 93, are most elucidatory of the distinction between the three.

At p. 104, dealing with Cause of action estoppel -

Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter…Cause of action estoppel extends also to points which might have been put but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action... (p. 104).

At pp. 104-105 dealing with the Henderon v Henderson principle -

Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action. In Henderson v Henderson (1843) 3 Hare 100, 114-115, Sir James Wigram V.-C. expressed the matter thus:

> *"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

And at p. 105-106, dealing with Issue estoppel -

…Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue…The name "issue estoppel"…was adopted by Diplock L.J. in Thoday v Thoday [1964] P. 191. Having described cause of action estoppel as one form of estoppel per rem judicatam, he said, at p. 198:

> *"The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the*

> *condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."*

[53] This is not a case in which cause of action estoppel applies because the parties and cause of action are not the same, although I should point out that on the ancillary claim in both suits, the parties are the same.

[54] In ***LTD Services Limited*** (supra***)***, the cause of action was in contract for payment of monies for work done, recovery of monies under a loan, misrepresentation, fraudulent conversion and breach of fiduciary duty and/or duty of good faith and for accounting of funds, as between the defendants and different parties, arising from a partnership/business arrangement (See Judgement of Batts. J paras 7, 8, 10, 12,). The instant case is concerned with a breach of deed, recovery of monies owed and order for sale of property.

[55] In relation to issue estoppel, I agree with the conclusion of Bishop J., on the strength of the judgments in ***Northwest Water Ltd. v Binnie & Partners*** [1990] 3 All ER 547and ***Yat Tung Investments Co. Ltd v Dao Heng Bank Ltd***. [1975] AC 581, that it can be availed in a later action even where all the parties are not the same as in the earlier one. (para 50).

[56] The authorities establish that it would be an abuse of process were a trial to be no more than a rehearing of a matter which had already been determined in earlier proceedings. In ***Hunter v Chief Constable of West Midlands Police*** [1982] A.C. 529, 541-542, Diplock J. said that the principle is simply and clearly stated in the following passage from Lord Halisbury's speech in ***Reichel v. Magrath*** (1889) 14 App.Cas. 665, 668:

> *"… I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."*

[57] In considering the application of the general principles to the instant case, I have had regard to the decision of Batts J. in ***L.D.T. Services Ltd.*** I should say that

although Ms. Manning was not a party to that action her interest was considered. Batts J. made findings in relation to the conduct of Messrs. Manderson and Gyles, and the validity of the Settlement Agreement they executed with Ms. Manning.

[58] At paragraph 18, the learned judge sets out in detail the circumstances in which the Settlement Agreement was entered into and in so doing made reference to the evidence of Mr. Leon Forte (the sole witness for the defendant/ancillary claimant in the instant case):

> *On December 14, 2009 the [the Defendant] entered into an agreement for sale of apartment B4 being the land comprised in the Certificate of Title registered at Volume 1399 Folio 793 for a price of twenty million Jamaican dollars ($20,000,000.00). The purchaser of the apartment initially paid a deposit of three million Jamaican dollars ($3,000,000.00). Interestingly, [Mr. Manderson] admitted to receiving six million ($6,000,000.00) in his own name from the then purchaser as a deposit and a further payment for the apartment. This sale was however never concluded. In fact, what occurred was that the sale of the apartment was aborted. The Defendants instead of refunding the sums, sought to, and did execute a settlement agreement with [Mrs. Manning] for sums paid to be converted to a loan to the [Defendant] (see paragraph 6 of the witness statement of Lean Forte dated April 6, 2016 and the admissions made in cross examination by [Mr. Manderson and Mr. Gyles]. Therefore, the [Defendant] became indebted to [Mrs. Manning] in the sum of six million Jamaica dollars ($6,000,000.00) plus interest at 10% per annum commencing on July 1, 2010 (see documentation at page 170-174 of exhibit 1)."*

And at paragraph 47:

> *The 2nd Claimant was the sole witness called by the [Defendant].*

The basis of the ancillary claim is the return of money which the Ancillary Defendants have allegedly diverted away from the Defendant. This relates primarily to the aborted sale of [the Property]. That apartment was to be sold for $20,000,000.00. A deposit of $3,000,000.00 was paid to the [Defendant] by [Mrs. Manning]. A further payment of $6,000,000.00 was paid by her but this paid by her but this paid directly to [Mr. Manderson] who deposited the money into his personal bank account at what was then RBTT bank at Sovereign Center in Liguanea in the parish of Saint Andrew. The sale was aborted but instead of refunding the $6,000,000.00 to [Mrs. Manning] the Ancillary Defendants executed [the Settlement Agreement] with [Mrs. Manning]. By that agreement the [Defendant] became indebted to the aborted purchaser in the sum of $6,000,000.00 plus interest at 10% per annum commencing on the first day of July 2010... [Mr. Manderson] after being effectively cross examined on this loan stated:

"Q: For you and Mr. Gyles to sign a document agreeing for the company to repay $6 million where that money had never been received by the company was improper.

A: We sought legal advice and this is what the lawyer suggested.

[59] Against this background of facts surrounding the payment of $6M by Ms. Manning and the subsequent Settlement Agreement, Batts J. reviewed the law relative to the fiduciary responsibility of directors and found, at paragraph 51, that Messrs. Manderson and Gyles had breached their fiduciary duty to the company "*by the distribution of the sums collected from the sale of the apartment units at the time and in the manner in which it was done."*

[60] At paragraph 52, Batts J said, in relation to fraud:

The Ancillary Claimant has also pleaded conversion and fraudulent

> *misrepresentation. I do not find that there was anything fraudulent in the conduct of the ancillary defendants. Their conduct was the result most probably of a misplaced sense of right, that is, they believed that they were entitled to take those amounts because they thought the second claimant was also "taking".*

[61] To me, the matter is plainly this. In the case heard by Batts J., it had been asserted that Messrs. Manderson and Gyles had acted in a fraudulent manner. In this application, the assertion is that there was a "conspiracy to defraud". The difference, in my view, is a matter of semantics. What is being asserted is illegality in their actions, including the payment of $6 million by Miss Manning and its receipt and use. Batts J. found that there was no fraud. In those circumstances, the substratum of the conspiracy now being alleged falls away and the outcome in any further litigation would be the same as that decided by Batts J. because the characterization which is used to attack the claimant's conduct remains essentially the same.

[62] Although Ms. Manning is not privy in interest to Messrs. Manderson and Gyles, she was a part of the factual matrix on which the defendant relied in advancing its accusation of fraud in ***LTD Services***. Ms. Manning also has an interest which came up for protection in those proceedings.

[63] It is trifling with the Court to rely on essentially the same pleadings and it would be an abuse of process to permit the defendant to pursue its line of defence for a second time, in reliance on the same evidence which had been ventilated before Batts J.

[64] I understand the authorities to be saying that a party is estopped whenever the justice of the situation requires it to be done, including the avoidance of wasted resources in circumstances where a trial would be no more than a rehearing of a matter which has already been determined in earlier proceedings and an abuse of process. This is a principle of justice and a matter of public policy.

[65] In ***House of Spring Gardens Ltd. v Waite*** [1990] 2All ER 990 Stuart-Smith LJ contended with whether the English Court should permit litigation on an issue of fraud which had already been decided by the Irish Court. His lordship said, inter-alia:

> *I think it would be a travesty of justice. Not only would plaintiffs be required to relitigate matters which have twice been extensively investigated and decided in their favour…but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves. The Waites have not appealed Sir Peter Pain's judgment, and they were quite right not to do so. The plaintiff will no doubt proceed to execute their judgement against them. What could be a greater source of injustice, if in years to come, when the issue is finally decided, a different decision is reached in Mr. Macleod's case? Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause."* (My emphasis).

[66] There is a similar situation in this case. The effect of Batts J.'s judgment in ***L.D.T. Services*** is that the Settlement Agreement has legal force, although the construction of the agreement, per se, was not before him. Re-litigating the issue, risks inconsistent judgements. Such a scenario would be contrary to justice and public policy.

[67] In any event, I do not see how any other decision could be arrived at. Messrs. Manderson and Mr. Gyles had the authority, actual and ostensible, to execute the Settlement Agreement. Their authority is inherent in the office of director, as derived from Article 89 of the defendant's Articles of Association which provides, inter-alia :

> *The business of the Company shall be managed by the Directors,… [who]… may exercise all such powers of the company*

as are not, by the Act or these Articles, required to be exercised by the Company in general meeting…

[68] The role and authority of directors, as representatives and agents of the company, was affirmed by the Court of Appeal in ***ASE Metals*** (supra). At paragraph 25, Brooks JA states the following:

There is one aspect of the substantive law which is relevant to the issues joined between these parties. Its concerns the reliance that a third party may place on actions done by a representative of a company. The basis of this aspect of the law is that a company, being an artificial entity, can only act through agents. Those agents may have actual authority from the company to bind it. Even where an agent does not have actual authority to bind the company, third parties may, nonetheless, be entitled to rely on acts done by that agent, where the agent is held out by the company to have the requisite authority. That may be done either by actual representations to that effect, or by placing the agent in a position which usually carries that authority. The resultant authority is said to be an 'apparent' or 'ostensible' authority." (My emphasis).

[69] Brooks JA applied the dictum of Diplock LJ in ***Freeman & Lockyer (a Firm) v Buckhurst Park Properties (Mangal) Ltd and Another [1964] 1 All ER 480***, 502-503:

It is necessary at the outset to distinguish between an "actual" authority of an agent on the one hand and an "apparent" or "ostensible" authority on the other. Actual authority and apparent authority are quite independent of one another. Generally, they co-exist and coincide, but either may exist without the other and their respective scope may be different. As I shall endeavour to show, it is upon the apparent authority of the agent that the contractor

normally relies in the ordinary course of business when entering into contracts.

An "actual" authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement, the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter a contract pursuant to the "actual" authority, it does create contractual rights and liabilities between the principal and the contractor. It may be that this rule relating to "undisclosed principals," which is peculiar to English law, can be rationalised as avoiding circuity of action, for the principal could in equity compel the agent to lend his name in an action to enforce the contract, against the contractor and would at common law be liable to indemnify the agent in respect of the agent in respect of the performance of the obligations assumed by the agent under the contract.

An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the

agreement as principal himself. The representation, when acted upon by the contractor by entering a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either on the representation of the principal, i.e., apparent authority or on the representation of the agent i.e. warranty of authority. The representation which creates the "apparent" authority may take a variety of forms of which the commonest is representation by conduct, i.e. permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of principal's business has normal "actual" authority to enter into.

[70] The point had been earlier illustrated in the judgment of Wilmer L.J. at pp.491-492 where he approved the following statement of the law by Lord Hatherly in ***Mahony v East Holyford Mining Co*** (1875) L.R. 7 H.L. 869, 894:

[When] there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the

internal management of the company

[71] At p.493 Wilmer LJ cited, as an example, ***Clay Hill Brick & Tile Co. Ltd v Rawlings*** 1983 4 All E.R. 100, where a company was held bound by the act of its chairman, who acted as managing director though never appointed as such, in receiving cheques from a customer in payment for goods supplied by the company. The Articles of Association conferred powers on the directors to delegate and the person who purported to act on the company's behalf had acted in the scope of what would normally be expected of the position.

[72] Even were the defendant able to establish some material difference in the pleadings before me, it is manifestly clear that it could have raised conspiracy to defraud in ***L.D.T. Services Ltd.*** A broader principle of justice and public policy applies, as enunciated by Sir James Wigram V-C in ***Henderson v Henderson*** **(1843) 3 Hare 100, 1**14-115:

> *In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." (My emphasis)*

[73] In ***Yat Tung Investment*** (supra), the Privy Council said "it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings." The principle enunciated in ***Henderson v Henderson*** (supra) was cited *as* "*the locus classicus of that aspect of res judicata." (591).*

Should there be Summary Judgment?

[74] I will now deal with the application for summary judgement, bearing in mind the approach I outlined at paras. 16, 18, 19, 20 and 21.

[75] ***Swain*** (supra) is considered the authority on how the courts determine whether a defendant has a real prospect of successfully defending the claim. In that case Lord Wolfe considered the equivalent of our Rule 15.2 under Part 24 of the English Rules and observed:

> *The words 'no real prospect of succeeding' do not need any amplification. They speak for themselves. The words "real" distinguishes fanciful prospects of success... they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success. (p.92)*

[76] What is the rationale behind summary judgment? Lord Wolfe answered that question in these terms:

> *... if a claimant has a case which is bound to fail then it is in the claimants interests to know as soon as possible that this is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.* (p.94).

[77] These observations by Lord Woolfe were cited, with approval, by our Court of Appeal in ***Gordon Stewart v Merrick Samuels*** SCCA No. 2/2005, delivered November 18, 2005, at page 6.

[78] The learned authors of the **White Book Civil Service 2014** (volume) also considered the meaning of the words 'real prospect of success' in summary judgment applications and observed:

> *In order to defeat the application for summary judgment it is sufficient for the respondent to show some "prospect" i.e. some chance of success. That prospect must be "real" i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the words "real" means that the respondent has to have a case which is better than merely arguable... (P.*734, par 24.2.3).

[79] In one of the leading cases on summary judgment, ***Three Rivers*** (supra), Lord Hope reviewed the principles that are applicable, gave examples of situations that may be appropriate for summary judgement and expounded on the use of the term "fanciful" as articulated in **Swain (supra).** He stated at para 95:

> *I would approach that further question in this way. The method by which issues of facts are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which*

> *it is based. The simpler the case the easier it is likely to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in Swain's case [2001] 1 ALL ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all. (My emphasis).*

[80] In the instant case, both parties agree that the main issue for the court is whether the Settlement Agreement is enforceable. I have already expressed a view on this but will amplify.

[81] As I said before, when the Settlement Agreement is examined, it is seen that there are the signatures of two directors, witnessed by an Attorney-at-Law, and affixed with the corporate seal. Accordingly, the Settlement Agreement satisfies s. 28 of the **Company Act** and is binding on the defendant.

[82] If must be noted that the list at section 28 is not exhaustive. It states:

> *"28 (1) Contracts on behalf of a company may be made as follows –*
>
> *(g) a contract which is made between private persons would be by law required to be in writing and if made according to the law of Jamaica to be under seal, may be made on behalf of the company in writing under the common seal of the company;*
>
> *(h) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith may be made on*

behalf of the company in writing signed by any person acting under its authority express or implied;

(i) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.

(2) A contract according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.

(3) A contract made according to this section may be varied or discharged in the same manner in which it is authorised by this section to be made."

[83] I should add here that counsel for the defendant submitted that the Settlement Agreement is void for reason that there was no consideration. As indicated by the learned authors of **Chitty on Contracts** (31st ed.) para. 1-128, consideration is not required for contracts contained in deeds.

[84] The words "Now This Deed Witnesseth" at the very beginning of the Settlement Agreement is a clear and unequivocal expression of intent to execute a deed.

Evidence in Summary Judgment Applications

[85] When an application for summary judgment is made, it is incumbent on the parties to file an affidavit of evidence where factual issues arise on the application. The relevant section of rule 15.5 CPR reads as follows:-

15.5 (1) The applicant must –

(a) file affidavit evidence in support with the application; and

(b) serve copies on each party against whom summary judgment is sought, not less than 14 days before the date fixed for hearing the application.

(2) A respondent who wishes to rely on evidence must –

(a) File affidavit evidence; and

(b) serve copies on the applicant and any other respondent to the applicant, not less than 7 days before the summary hearing."

[86] In ***ICI Chemicals & Poymers Ltd. v TTE Training Ltd*** **[2007] EWCA Civ 725,** paras. **1**2 – 14 of Moore-Bick LJ said:

"[12] In my view the judge should have followed his original instinct. It is not uncommon for an application under Pt. 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the Respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him. Similarly, if the Applicant's case is bad in law, the sooner that is determined, the better.

[13] In cases where the issue is one of construction the Respondent often seeks to persuade the court that the case should go to trial arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the

> responsibility of the Respondent to an application of this kind to place before the court, in the form of a witness state, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the Respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.
>
> *[14] Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction. (My emphasis).*

[87] I do not accept the defendants' submissions that summary judgment should not be given because there is a clear dispute of facts which ought to be determined by the trial judge who sees and hears the witnesses and has all the evidence before her.

[88] Litigation by its very nature involves disputes of facts. These are usually resolved on the basis of the evidence the trial judge finds proved and accepts. In a summary judgment application, the judge is expected to examine and assess the evidence on which each party relies for support of its case. It is not expected

that either party would refrain from putting before the court evidence which would be available at the trial. If this were so, what would be the purpose of the hearing? It is abundantly clear from the Rules that evidence in support of a case should be put before the Court. This is not only desirable but necessary.

[89] It is not enough for the defendant to say that because there might be a dispute as to why the sums were paid over to Mr. Manderson, the matter should go to trial. It is also not enough to say that there might be evidence called at the trial which could shed a different light on the issues.

[90] In summary judgment applications, it is the obligation of the respondent to put before the court the material it considers necessary to support its case (See ***ICI Chemicals***). That is the intent of the requirement in CPR 15.5 (2). It goes back to the rationale behind summary judgment which is in keeping with the overriding objectives of the CPR to dispose of cases justly, expeditiously and with the lease expense of time and resources. (See ***Swain***, supra).

[91] In the circumstances of this case, I find that the defendant has no real prospect of successfully defending the claim.

EQUITABLE MORTGAGE

[92] The remaining issues for me to decide are whether the claimant has an equitable mortgage over the apartment and if it is appropriate to grant an order that the property be sold.

[93] In ***Jamaica Redevelopment Foundation Inc. v Anthony Everald Ferguson*** Claim No. 2010 HCV 03228 delivered on 22nd July, 2011, Brooks J (as he then was) dealt with the nature and enforcement of an equitable mortgage. At para 9, Brooks J cited, with approval, the following passage from the Judgment of Romer J in **Cradock v Scottish Provident Institution** (1893) 69 LT 380, dealing with the characteristics of an equitable mortgage and how it might be created:

To constitute a charge in equity by deed or writing it is not

> *necessary that any general words of charge should be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security.*

[94] Clause 1 of the Settlement Agreement provides:

> *"In pursuance of the above agreement and in consideration of the principal now owing, the Creditor by the Company and of the forbearance of the Creditor to Creditor to require immediate payment thereof, the Company hereby covenants that it will within one hundred and eighty (180) days ("The Redemption Date") hereof or where a binding duly stamped contract for the sale of the property is subsisting upon the completion of such sale be it sooner or later than the redemption date, pay the Principal to the Creditor together with interest thereon from the first day of July 2010 at the rate of ten percent (10%) per annum ("Agreed Interest Rate") and as security for the due payment thereof, the Company charges the Property with the payment to the Creditor, of the Principal with interest." [My emphasis]*

[95] Clause 4 of the Settlement Agreement prescribes an entitlement to Ms. Manning for a legal mortgage over the property which is to be executed upon her demand. The defendant also appointed Ms. Manning as its attorney to make, execute and otherwise perfect a legal mortgage over the said property.

[96] In my view, the language in Clauses 1 and 4 is plain. It shows clearly that it was the defendant's intention to create an equitable charge over the property. I am therefore satisfied that the answer as to whether an equitable mortgage exists, is in the affirmative.

[97] I now turn to the claimant's rights to enforce the equitable mortgage. A convenient starting point is the following passage from the judgement of Morrison

J A in ***Wilfred Forbes Anor v Miller's Liquour Store (Dist.) Limited*** [2012] JMCA App 5:

> *The rights of a mortgagee under an equitable mortgage accordingly derived from the general law, under which the matter was governed by the contract between the parties. In the instant case, the mortgage agreement did contain an explicit power of sale which, although obviously drafted on the assumption that the RTA would apply, had "an existence of its own outside the Act". On this issue, the learned judge accordingly concluded that the respondent, albeit an equitable mortgagee of the property, did have the right to sell upon the applicants' default. (See also the very similar analysis on the identical point in the New South Wales case of King Investment Solutions Property Ltd v Hussain NSWSC 1076, para. 54, which Smith J expressly adopted at para. 14 of her judgment.)* (para. 15).

[98] In ***Jamaica Redevelopment*** (supra), at para 10, Brooks J. referred to the statement by the learned authors of **Fisher and Lightwood's law of Mortgages** (2nd Australian Ed) at paragraph 1.28, where they explain the effect of creating an equitable mortgage:

> *An equitable mortgage is a contract which operates as a security and is enforceable under the equitable jurisdiction of the court. The court carries it into effect either by giving the creditor immediately the appropriate remedies or by compelling the debtor to execute a security in accordance with the contract...*

[99] *Brooks J. said those rights to enforcement are* applicable to lands under the Registration of Titles Act (ROTA) (para 13, supra). The learned judge cited, as an example, in the Torrens System, ***Avco Finance Services Ltd v White*** [1977] VR 561, in which Gillard J stated:

> *For the equitable mortgagee to have the right to call for a legal mortgage to be executed, requires an intention on the part of the mortgagor to create a mortgage. There, however, need be no specific words to that effect.*

[100] Brooks J. having found that an equitable mortgage had been created on the facts of the case, stated that the equitable mortgagee could obtain an order for sale or an order to have a mortgage registered against the title. These remedies are to be found in statute:

> *Firstly, Section 48 of the* ***Judicature (Supreme Court) Act*** *authorises [this] Court to grant any equitable remedy which could have been granted by the Court of Chancery before the passing of this Act. Secondly, Section 28(2) of the* ***Conveyancing Act*** *specifically authorises a sale of the mortgaged property to recover monies owing on the debt.* (para 17).

[101] The defendant contends that the claimant is not entitled to an order for sale on two grounds. The first is that the claimant has not complied with the requirements of Part 55.2 which deals with Sale of Land by Order of the Court, and 55.2 which sets out the requirements for an application for order of sale. The second is that LDT Services and Mr. Leon Forte have obtained a charging order with respect to the property at 14 Stillwell Road, and Mr. Justice Batts has ordered inter alia that the question of priorities is to be determined at the hearing of the application for sale. In the circumstances, the defendant contends that the application for order for sale is premature.

[102] Part 55 of the CPR governs the sale of land by order of the Court, whether the sale is pursuant to statute or in exercise of the Court's discretion when it appears necessary or expedient that such an order be made for any reason.

[103] The application must be supported by affidavit which must , among other things:

> 55.2 (2) (b) – state-
>
> (i) the reason for seeking the order for sale;
>
> (ii) the grounds on which it is said that the court should order a sale of the land,

(iii) the full names and addresses of all persons who to the knowledge or belief of the applicant have an interest in the land;…

(c) exhibit a current valuation of the land by a qualified land surveyor or Valuer

[104] Rule 55.2 (4) requires that the application and copies of the evidence in support be served on the judgment debtor and every person who has an interest in the land.

[105] In my view, rule 55 is meant to cover the powers of the Court to make an order for sale of land in the general exercise of its inherent jurisdiction. Part 66 are those rules which pertain specifically to mortgage claims and for specified reliefs, including an order for the sale of a mortgaged property. It is noted that these sections are not cross-referenced and can therefore be applied independently.

[106] In ***King Investment Solutions Property Ltd v Hussain*** *NSWSC 1076* an objection was raised on grounds that no proper notice had been given to the mortgagors, as required by Australian law. Campbell J. said that the exercise of the Court's equitable jurisdiction to order a sale of mortgaged property did not depend upon the service of notices under the statutory provisions. I hold a similar view, in the sense that the Court may invoke equitable powers in the exercise its jurisdiction under Section 48 of the **Judicature (Supreme Court) Act**, independently of the CPR.

[107] Another issue which confronted Campbell J. was whether to exercise her equitable jurisdiction and order the sale of property, in circumstances where a first mortgagee was not a party to the proceedings.

[108] I believe it to be a proper statement of the law, when Campbell J said at para 87:

"[It is] an application of a fundamental requirement for the exercise of a court's

powers that a person whose rights will be affected by an order sought in proceedings should be a party to those proceedings."…. That is because they are all people who are interested in the taking of the account, and also because they are the people whose rights in the property will cease if the foreclosure order is made.

[109] Campbell J. found that although the Court had jurisdiction to order a sale at the suit of an unregistered mortgagee to land, it needed to give further considerations to the circumstances in which it would be proper to do, including the precise interest in the land (para 82).

[110] One of the main reasons for declining the application, as shown in the passages below, was a concern that an order for sale could extinguish the interest of the first mortgagee and be detrimental to his position.

[111] At para 91, Campbell J said:

In the present case, the first mortgagee is a necessary party to an action seeking an order for sale of the entire interest in the property. The orders which were made in the present case are ones which could result in the interest of the first mortgagee in the land being terminated, as a consequence of a transfer to a purchaser, which was authorised by the orders, becoming registered. That result could arise even if the sale proceeds were insufficient to pay out the interest of the first mortgagee. Particularly is that so when the orders empowered the second mortgagee to sell the land "either by public auction or by private contract on such terms as the Plaintiff may think fit". That termination of the interest of the first mortgagee could follow from the orders even if the first mortgage had a high interest rate or some other feature which was attractive to the first mortgagee, and the first mortgage did not want the mortgage to be paid out on any basis other than those contractually agreed between the mortgagor and the first mortgagee, or available to the mortgagor as a matter of law, e.g. under section 93 ***Conveyancing Act 1919****.*

[112] And at para 92:

> *The court does not take away property rights of a person, without specific statutory authority, in proceedings to which that person is not a party. The absence of the first mortgagee from the proceedings is a fundamental flaw to the order for sale which was made in the present case. It is not cured by having given informal notice of the Notice of Motion to the first mortgagee.*
>
> *Giving effect to the equities that exist between the chargor and the chargee could not involve an order that had a detrimental effect on that prior right of property of the first mortgagee.*

[113] I am also called upon to consider the position of LTD Services and Mr. Leon Forte, who have an equitable interest, having obtained a charging order against the property which is the subject matter in this case.

[114] In ***Jennifer Messado and Company v North America Holdings Company Limited***, Claim Nos. 2011 HCV 04943 and 2011 HCV 04669, delivered 20th June 2014, para 57A, Brown J. describes a charging order as "a court imposed equitable charge for securing a money judgment or order."(See also Stuart Sime, **A Practical Approach to Civil Procedure**, Ninth Edition, (2006), 495 where the learned author says "charging order is an order of the court which imposes a charge on a debtor's property to secure a judgment debt".

[115] In the course of her judgment in ***Air Jamaica Limited v Stuart's Travel Service Limited*** Claim No 1998/A-018 (unreported) (delivered February 24, 2011), Mangatal J. described a charging order as follows:

> *I agree with Mr. Graham that a charging order does not necessarily lead to the issue of an order for the sale of land, and a charging order has a utility of its own. It has the effect of being notice to other parties with whom the owner of the land may want to have dealings that the recipient of the charging order has an interest which needs to be recognised or cleared off. (para 31).*

[116] In First Global Bank Limited v Rohan Rose [2016] JMCC COMM 19, delivered July 29, Sykes J made an observation at paragraph 19 that:

> *It is true to say that a charging order does not necessarily lead to an order for sale but there is no denying the fact that it is an essential step. The whole point of getting a charging is not just notice to the world but also to place one's self in pole position to sell the property should that become necessary.*

[117] In its effect, the charging order creates an equitable charge over the property (see ***Halifax Plc v Curry Popeck (A Firm)*** 2008 EWHC 1692). In circumstances, as the instant case, where the charging order exists along with an equitable mortgage, they are competing equities.

[118] At the time the charging order was obtained, Ms. Manning already had an equitable mortgage, and had given notice of it to the world when she entered a caveat against the land. The charging order, in my view, put LTD and Mr. Forte in the same position as if it had been obtained from the debtor itself, and their rights are therefore subject to all prior equities (See ***Dunster v Glengall 3 Irish Chan. Rep.. 47).*** This is the main difference between the instant case and ***King,*** which bears some significance.

[119] However, in exercising my equitable powers, I have had to consider that although the mortgagor is a party to these proceedings, LTD Services and Mr. Forte are not. In the absence of affidavit evidence, the Court is bereft of any reason why or in what terms it would be appropriate to grant an order for sale. The application is therefore denied.

ORDERS

[120] It is ordered as follows:

(i) The Defence filed on 29th September 2016 be struck out;

(ii) Summary Judgment is entered in favour of the Claimant in respect

of the Claim for the amount of Nine Million Five Hundred and Seventy-Eight Dollars and Ten Cents ($9,572,548.10) together with interest at a rate of 10% per annum from 7th June 2016 to the date of judgment;

(iii) Sale of Property denied; and

(iv) Costs on the Claim to the Claimant against the Defendant and to the Ancillary Defendants against the Ancillary Claimant. Such costs to be taxed if not agreed.