



[2022] JMCC Comm 12

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

**COMMERCIAL DIVISION**

**CLAIM NO. SU 2020 CD 00174**

**BETWEEN            CHINA SINOPHARM INTERNATIONAL CORPORATION            CLAIMANT**  
**AND                            RIVI GARDNER & ASSOCIATES LIMITED                            DEFENDANT**

**IN CHAMBERS**

Ms Georgia Hamilton instructed by Georgia Hamilton & Co for the claimant/ applicant

The defendant did not appear and was unrepresented

Ms Amanda Montague and Ms Kimberley Brown instructed by Myers Fletcher & Gordon for interested person, GK Investments Limited

Ms Rita Allen-Brown instructed by RC Allen-Brown Attorneys-at-law for objectors Alberson Riley and Camille Wellington

November 25, 2021 and April 8, 2022

**Civil Procedure-Application for a final charging order – whether mortgage pursuant to loan agreement ranks ahead of provisional charging order – nature of mortgage – nature of provisional charging order – whether interested person, part 48 – Civil Procedure Rules (CPR).**

**PALMER HAMILTON J**

[1] The claimant/applicant, China Sinopharm International Corporation ('China Sinopharm'), is a limited liability company registered under the laws of the Republic of China; it is involved in, among other things, the provision of services as building contractors. The defendant/respondent, Rivi Gardner & Associates Limited ('RGA'), is a limited liability company incorporated under the laws of Jamaica. It

was the developer of property located in the parish of St. Catherine, commonly referred to as 'The Orchards'.

- [2]** RGA had contracted China Sinopharm's services as building contractors in respect of the Orchards. A dispute arose between them regarding the termination of China Sinopharm's services as building contractors. By an agreement made on or about December 2019, the parties entered into a written agreement for the settlement of their dispute. It was an express term of the agreement that RGA would pay China Sinopharm the sum of forty million dollars (\$40,000,000.00) in two equal tranches; one due December 31, 2019 and the other, January 31, 2020. If RGA failed to pay, China Sinopharm would be entitled to interest on the said amounts at a rate of 10% per annum from the payment due dates until payment in full. It was also an express term of the agreement that the sums together with interest would be recoverable summarily in the event of RGA's default.
- [3]** RGA did not pay the sums agreed by the parties. This resulted in China Sinopharm instituting proceedings against it for the sums owed.
- [4]** The claim form and particulars of claim (one document), dated April 6, 2020, was filed on May 1, 2020. No acknowledgment of service was filed on behalf of RGA. China Sinopharm therefore requested that judgment in default of failure to file an acknowledgment of service be entered. The request was filed on May 21, 2020. An affidavit of service sworn by Oswald Hamilton on May 21, 2020 was also filed. The registrar entered judgment in default as requested.<sup>1</sup>
- [5]** On August 7, 2020, a notice of application was filed on behalf of China Sinopharm; it sought an order for oral examination and it also sought an order for the production of documents. It was asked, among other things, that:

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<sup>1</sup> Obtained on June 1, 2020 and entered in judgment binder 775 folio 79. Judgment was entered for the sum of \$41,245,890.20 inclusive of interest and costs

“Rivington Gardner, Architect...and Khalifa Scott, Administrator...directors of the Defendant Company, are to attend at the Supreme Court of Judicature of Jamaica at King Street...on the day of ....at ...a.m/p.m and such other day/s and time/s as may be ordered by this Honourable Court to be examined under oath as to what property or means the Defendant Company has, and as to any debts which are owing to the Defendant Company.”

**[6]** The order was granted on September 16, 2020 by a learned Master.<sup>2</sup> Prior to this, a without notice of application for court orders was filed on September 14, 2020. It was asked that Delroy Brown, Building Contractor, Christopher Burgess, Engineer and Dennis Hickey, Marketer and Financier be allowed to intervene in the proceedings.

**[7]** The grounds upon which the order was sought are, in part, as follows:

- (i) Rule 19.3 of the Civil Procedure Rules makes allowance for a party to intervene in proceedings and this is a proper case where the applicants, who are themselves also judgment creditors of the defendant, ought to be allowed to intervene;
- (ii) The applicants all wish to associate themselves with the claimant's application for oral examination of the officers of the defendant to ascertain its means and assets.

**[8]** In support of their application, Mr Brown, Mr Burgess and Mr Hickey deposed to affidavits which were filed on September 14, 2020. They were permitted to intervene.<sup>3</sup> The oral examination was slated to be conducted on January 21, 2021. It was then adjourned to January 27, 2021.

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<sup>2</sup> The formal order does not reflect all orders made as per the minute sheet

<sup>3</sup> See formal order filed September 22, 2020

[9] On January 27, 2021, the affidavit of Mr Ray Williams was filed. Mr Williams deposed that he served Ms Khalifa Scott various documents including the without notice application for court orders for oral examination. Another affidavit was filed on January 27; it was intituled 'Affidavit of Service on Counsel', Ms Hamilton, attorney-at-law for China Sinopharm was the affiant. She stated, among other things, that she spoke with counsel, Mr Abraham Dabdoub, and she was advised that Mr Gardner and Ms Scott had informed Mr Dabdoub that they had been served with subpoenas.

[10] On January 28, 2021, an urgent without notice application for provisional charging order was filed on behalf of China Sinopharm. Ms Hamilton filed an affidavit of urgency which was stated to be in support of the without notice application for the provisional charging order. In her affidavit, Ms Hamilton stated, in part, that:

*"5...the Defendant, Rivi Gardner & Associates Limited, is the judgment debtor. That to the best of my knowledge, information and belief, the judgment debtor's registered address is 7 Belmont Road, Kingston 5 in the parish of St. Andrew and its principal place of business [is located at] 18 South Avenue, Kingston 10 in the parish of St. Andrew.*

*6...on 21 May 2020, default judgment was entered herein against the judgment debtor in the sum of Forty-One Million Two Hundred & Forty-Five Thousand Eight Hundred & Ninety Dollars & Twenty Cents (\$41,245,890.20) inclusive of interests and costs. That the default judgment was served on the judgment debtor on July 28, 2020, but it has failed and/or refused to settle the judgment sum. That the Claimant now wishes to enforce this judgment...*

*8...I hereby certify that the amount of...(\$41, 245,890.20), which has been attracting interest at a daily rate of Six Thousand Seven Hundred & Eight (sic) Dollars & Fifteen cents (\$6,780.15) since 22 May 2020, remains owing by the judgment debtor. That the Claimant is entitled to post-judgment interest on the judgment sum at a rate of 6% per annum starting 22 May 2020 and as at this date, this interest amounts to \$1,708,597.80.*

*11..acting on a tip, I did some investigations and after carrying out a search at the National Land Agency, I was able to identify two properties as belonging to the Defendant and which are unencumbered. These are **ALL THAT** parcel of land part of **NO.5 LADY MUSGRAVE ROAD, PART OF KENSINGTON** in the parish of **SAINT ANDREW** being **STRATA LOT 2** together with one undivided 34/250<sup>th</sup> share in the common property and being all the land comprised in Certificate of Title registered at Volume 1528 Folio 242 and **ALL THAT** parcel of land part of **NO 5. LADY MUSGRAVE ROAD, PART OF KENSINGTON** in the parish of **SAINT ANDREW** being **STRATA LOT 14** together with one undivided 26/250<sup>th</sup> share in the common property and being all the land comprised in Certificate of Title registered at Volume 1528 Folio 254...*

*13...I was quite surprised when I made this discovery as only days ago, I was having a telephone conversation with Mr Abraham Dabdoub of counsel, who has advised that he acts for the Defendant, when he told me that the Defendant has nothing; that is, it had no assets to meet the liabilities herein. That if the Defendant could mislead its attorneys-at-law as to its true financial position then I have cause to be concerned about the continued availability of these assets, as a means against which the judgment sums herein may be liquidated, especially since the oral examination is not scheduled for hearing until almost three months from now."*

[11] On February 3, 2021, the provisional charging order was granted. It was further ordered that the "[h]earing of the application for final charging order is set for 3<sup>rd</sup> of June 2021 at 10 am for 1 hour." The hearing was adjourned to July 28, 2021. It was then adjourned to July 30, 2021. On July 30, 2021, the hearing was reslated to be heard on November 25, 2021.

#### **The application for a final charging order**

[12] In support of the application for a final charging order, Cui Jiao deposed to an affidavit that was filed on September 15, 2021.

[13] Mr Jiao deposed that he is the Deputy General Manager for China Sinopharm. He stated, among other things that, on or about June 9, 2021 he was informed by Ms

Hamilton that she discovered that after the provisional charging order was registered (a) Alberson Riley and Camille Wellington caused a caveat to be registered against all that parcel of land part of No 5 Lady Musgrave Road, part of Kensington in the parish of Saint Andrew being strata lot 2 together with one undivided 34/250<sup>th</sup> share in the common property and being all the land comprised in the Certificate of Title registered at Volume 1528 Folio 242<sup>4</sup>; the registration of the caveat was based on a provisional charging order which they (Mr Riley and Ms Wellington) obtained on February 4, 2021. To date, Mr Riley and Ms Wellington have not registered this provisional charging order and (b) GK Investments, on May 21 2021, caused a mortgage to be registered over all that parcel of land part of No 5 Lady Musgrave Road, part of Kensington in the parish of Saint Andrew being strata lot 14, together with one undivided 26/250<sup>th</sup> share in the common property. The mortgage was registered to secure the sum of \$65,000,000. Mr Jiao stated that he reviewed the mortgage instrument and it revealed that RGA, whilst ignoring its liability to China Sinopharm, granted a mortgage over strata lot 14 in its capacity as guarantor for a line of credit held by Hartland Holdings Investments Limited.

- [14]** Mr Jiao further stated that he instructed Ms Hamilton to serve the court documents on GK Investments as well as Mr Riley and Mr Wellington or their attorneys at law.
- [15]** He stated that RGA has neither responded nor taken any steps to set aside the provisional charging order.
- [16]** Mr Jiao then outlined how the dispute between the parties arose. He stated that the parties entered into a works agreement whereby China Sinopharm was hired, by RGA, to carry out certain infrastructure and building works. RGA purported to terminate China Sinopharm's services as contractor and China Sinopharm insisted on being paid in respect of several outstanding payment certificates. Discussions

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<sup>4</sup> See also the affidavit of Leonardo Brown filed July 29, 2021, paragraph 5

between the parties resulted in two settlement agreements; one which forms the subject of this claim. The other settlement agreement pertained to amounts incurred by China Sinopharm in engaging the services of nominated subcontractors and suppliers. The total amount outstanding to the nominated subcontractors and suppliers was \$142,986,572.70.

[17] Mr Jiao deposed that China Sinopharm has incurred (i) legal costs in negotiating with and responding to claims by these nominated subcontractors and suppliers and (ii) interest charges among other losses, which it will be asking the court to assess. He stated that China Sinopharm has been sued by one of the nominated suppliers. He stated further that China Sinopharm has made arrangements to settle the liabilities owing to three of the nominated subcontractors and suppliers but it has not done anything to satisfy the amounts outstanding to four nominated subcontractors and suppliers.

[18] It was stated that Ms Hamilton advised counsel for one of the nominated subcontractors and suppliers that provisional charging orders were obtained by China Sinopharm against two properties of RGA and gave an undertaking to settle the amounts due to that company from the net proceeds of sale received from the sale of the properties once the provisional charging orders were made final and an order for sale obtained.

[19] Mr Jiao stated that China Sinopharm is facing significant prejudice as it is exposed to several claims from the other subcontractors and suppliers because RGA has failed to pay the sums due to it. He asserted that China Sinopharm is trying to recover the judgment sum, not for its benefit, but for offsetting liability to these nominated subcontractors and suppliers.

### **Interested persons/objectors**

[20] With respect to whether the provisional charging order ought to be made final, the court has heard the contentions of GK Investments Limited ('GK Investments'), and Ms Camille Wellington.

## **The affidavit evidence**

### *GK Investments Limited*

- [21]** Ms Kerri-Ann Mew deposed to an affidavit that was filed on July 29, 2021. She stated that she is the Legal Officer employed to GraceKennedy Financial Group Limited who provides legal services to GK Investments.
- [22]** She deposed that on June 18, 2021, GK Investments received from China Sinopharm's attorney at law, a letter dated June 9, 2021 which enclosed various documents including a copy of the provisional charging order.
- [23]** Ms Mew stated that GK Investments believes it is an interested person in respect of the provisional charging order over the property (Volume 1528 Folio 254 of the Register Book of Titles, strata lot 14).
- [24]** It was her evidence that by commitment letter dated February 28, 2020, GK Investments agreed to extend to Hartlands Holdings Investments Limited ('Hartlands') a JMD denominated loan facility up to the sum of \$65,000,000 on terms and conditions set out in the commitment letter together with a loan agreement. In consideration of the facility being made available to Hartlands, guarantees were issued in favour of GK Investments by directors of Hartlands, collateralised by mortgages over properties owned by the respective directors.
- [25]** Ms Mew stated that RGA also agreed to execute a second mortgage over the property in favour of GK Investments as security for the facility to Hartlands. On March 9, 2020, RGA issued a guarantor's mortgage in favour of GK Investments in respect of the mortgaged property to secure the sum of \$65,000,000 together with interest and the costs. GK Investments' mortgage no 2319850 was endorsed on the title to the property on May 21, 2021 to secure the sum of \$65,000,000 together with interest.



**[26]** Ms Mew deposed that the loan facility to Hartlands has not been repaid, either wholly or partly.

*Camille Wellington*

**[27]** An affidavit was filed on August 25, 2021 on behalf of Ms Camille Wellington. It was noted as being in response to the affidavit of urgency in support of the without notice application for provisional charging order. As previously mentioned, the affidavit of urgency was filed in January 2021 and the provisional charging order was obtained on February 3, 2021.

**[28]** Ms Wellington deposed that she is a judgment creditor/interested party. She stated that on January 26, 2021, her attorney-at-law, filed a without notice application for a provisional charging order and an injunction.

**[29]** Her attorney carried out extensive searches and investigations into the assets of RGA and found that it was the sole proprietor of ALL that parcel of land known as 5 Lady Musgrave Road, part of Kensington strata lot No 2 together with one undivided 15/250<sup>th</sup> share in the common property in the parish of Saint Andrew registered at Volume 1528 Folio 242. Upon her attorney's discovery of the property she immediately hired the services of a valuation surveyor to prepare a valuation report for the property.

**[30]** Based on her attorney's knowledge of RGA's assets, she prepared and filed a without notice application for a provisional charging order and injunction on January 26, 2021. The application was heard and granted on February 4, 2021.

**[31]** Notably, no detailed background was given by Ms Wellington in her affidavit, the picture became clearer when the court saw the amended claim form and particulars of claim filed on August 25, 2020<sup>5</sup> wherein Ms Wellington and Mr Riley

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<sup>5</sup> They are dated August 26, 2020. This appears to be an error.

were listed as 1<sup>st</sup> and 2<sup>nd</sup> claimants and RGA and Hartlands were listed as the 1<sup>st</sup> and 2<sup>nd</sup> defendants (Claim No SU 2020 CD 00316). The amended particulars of claim revealed that RGA and Hartlands were the vendors of two bedrooms, one bathroom unit situated on land part of Two Mile Wood, Lot #67, the Orchards in the parish of St Catherine registered at Volume 1440 Folio 985 of the Register Book of Titles. By a sales agreement made in writing on July 25, 2019 RGA and Hartlands agreed to sell the premises to Mr Riley and Ms Wellington. On July 4, 2019 Mr Riley and Ms Wellington paid \$6,000,000.00 to the vendors' attorneys-at-law as part payment on the premises. It was a term of the agreement that in the event that the agreement was cancelled due to the fault of the purchasers, all monies paid under the agreement by the purchasers would be returned without interest and free from deductions save and except for the purchasers half cost of the sale agreement in addition to \$80,000.00 plus GCT which would be retained by the vendors to cover its expenses to the date of the cancellation. The vendors agreed to give possession of the premises to the purchasers no later than September 2019. The vendors failed to give possession at the agreed time. In or about October 2019, Mr Riley and Ms Wellington gave notice, cancelled the agreement and requested the return of their money. Despite several promises made by the vendors to return the money, they have not received the sums due to them. On December 3, 2020, they obtained judgment in default of the defendants' failure to file an acknowledgement of service and defence.<sup>6</sup>

### **Submissions on behalf of China Sinopharm<sup>7</sup>**

**[32]** Ms Hamilton began her submissions by outlining the background of the matter. She then brought the court's attention to the applicable laws and rules. She specifically made reference to section 28 (D) of the Judicature (Supreme Court)

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<sup>6</sup> Entered in judgment binder 775 Folio 453. Judgment was entered for the sum of \$6,321,517.05 inclusive of interest and costs

<sup>7</sup> Oral submissions were also made by counsel for China Sinopharm, GK Investments and Mr Riley and Ms Wellington

Act, Part 48 of the Civil Procedure Rules ('CPR') and sections 58, 59 and 63 of the Registration of Titles Act. She also made reference to the UK Charging Orders Act 1979.

- [33] She submitted that the effect of section 58 of the Registration of Titles Act was highlighted in **Capital & Credit Merchant Bank Limited v The Real Estate Board consolidated with The Real Estate Board and Jennifer Messado & Co** [2013] JMCA Civ 29. She stated that in that case Morrison JA (as he then was) contemplated the priority of a debenture registered only at the Companies Registry over a mortgage registered under the Registration of Titles Act. She stated that the court agreed that without registration under the Act, the debenture lacked efficacy because a mortgage or charge of land derives its effect as a security by virtue of its registration pursuant to section 105 of the Act. Therefore although the debenture was created prior to the execution of the mortgage, the registration of the latter under the Act secured its priority over the debenture. Ms Hamilton stated that in accordance with section 59, priority was determined by the date of registration and not the date of the instrument.
- [34] She pointed out that section 63 of the Registration of Titles Act was considered in **National Import-Export Bank of Jamaica v Montego Bay Investment Company Limited** [2017] JMCA Civ 67. In that case, the applicant sought a variation of a final charging order to exclude property she alleged was given to her as a wedding gift by her father. The instrument of transfer was neither executed nor registered before her father died. Ms Hamilton stated that the court ultimately refused the application finding no evidential or legal basis for the claim. The absence of registration was fatal to the deed of gift. Counsel stated that the court found that the equitable interest claimed by the applicant was not binding on third parties, as it had not been registered. She pointed out that the court endorsed the Privy Council decision of **Thomas Edward McEllister and Others v William Biggs and Other** (1883) 8 App Cas 31, which affirmed that an unregistered transfer was incapable of passing an interest in land.

- [35] Ms Hamilton submitted that under our system of registration, registration not only determines the priority of competing equitable interests, but it may also afford priority where the rival interest is a legal one. She cited the case of **Sagicor Bank Jamaica Limited v Marvalyn Taylor-Wright and Others** [2021] JMSC Civ 26, in support of this submission. Counsel brought the court's attention to a passage cited by the judge from Halsbury's Laws of England<sup>8</sup>, she stated that on that authority, although the charging order does not create a legal estate, a duly registered equitable charge on land may entitle the chargee to priority over the holder of a legal estate.
- [36] In addressing the requirement for diligence, counsel pointed out that in **Beverley Levy v Ken Sales & Marketing** [2008] UKPC 6 it was stated that a creditor who wants execution against land belonging to the debtor must pursue his remedy with negligence.
- [37] She stated that the consequence of lack of diligence in registration was similarly considered in **Pasley v Jamaica Redevelopment Foundation Inc and the Registrar of Titles** [2012] JMSC Civil 58. In that case, the claimant sought an injunction to restrain the 1<sup>st</sup> defendant from exercising its power of sale pursuant to a mortgage executed in 1995 but not registered until 2011. The claimant asserted that she acquired an equitable interest by virtue of the Property (Rights of Spouses) Act upon the death of her husband in 2001. It was further argued that the 1<sup>st</sup> defendant's legal interest was postponed by the claimant's equitable interest by reason of gross negligence. The court, in that case, cited from Fisher and Lightwood's Law of Mortgage which states that allowing a subsequent right to be created may be regarded as gross negligence on the part of the mortgagee.
- [38] Ms Hamilton submitted that the case is useful in illustrating the necessity of a prior interest holder conserving his own interests by appropriate means. Otherwise, the

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<sup>8</sup> At paragraph 22 of her judgment

omission by the prior equitable owner will likely cause creation of a later equitable interest, based on the assumption that no earlier interest exists.

- [39] Counsel argued that lack of diligence also manifests in a failure to investigate. This, she contended, was demonstrated in the case of **National Provincial Bank of England v Jackson** (1886) 33 Ch.D.1. In that case, the defendants' brother Jackson had, through misrepresentation, conveyed properties belonging to the defendants to himself. Subsequently, the plaintiff bank accepted the deed as a deposit for an advance in sole reliance on Jackson's statements, neglecting to make further enquiries. The bank then sought to enforce its equitable charge over the properties. Finding the legal estate had not been reconveyed to the defendants because the brother's instruments had not been sealed, the question was which of the parties had the better equity. Cotton LJ was of the view that there was great negligence on the part of the bank in not making further investigation.
- [40] Ms Hamilton also cited the case of **Rice v Rice** (1853) 2 Drew 73; (1853) 61 ER 646 which she regarded as instructive on the considerations for a court deciding rival equities. She stated that the decision must depend on all circumstances of each particular case especially the conduct of the respective parties claiming a better equity. She pointed out that in that case, since the equities of the vendor and the mortgagee were equal, the deciding factor was not the time the interests were created but the fact that the vendors had negligently allowed the mortgagee to rely on the purchaser's title, having endorsed on the title that all purchase moneys were paid when there were in fact outstanding sums due.
- [41] In dealing with caveats, Ms Hamilton pointed out that the nature of caveats was explored in **Redelfsen v Silver Sands Estates Limited, Development Bank of Jamaica and Sagicor Property Services Ltd** [2021] JMCC COMM 11. In that case, the claimant's bids on the subject properties were not accepted by the defendant companies. Asserting that he was the highest and therefore successful bidder, the claimant lodged caveats against the lots to prevent their sale. In considering whether the claimant had a caveatable interest the court cited the

Western Australian case of **Jandric v Jandric & Anor** [1999] WASC 22. Acknowledging that a purchaser acquires a beneficial interest once there is a valid contract for sale, the court concluded, among other things, that there were serious issues to be tried as to whether the claimant acquired a beneficial interest by submitting the highest valid bid and consequently, whether he had sufficient interest in the lots entitling him to have the caveats remain in place.

- [42] Counsel also made reference to the case of **Barclays Bank v Taylor** [1973] 1 All ER 752 which dealt with statutory provisions similar to sections 139 and 140 of the Registration of Titles Act. In that case, the defendants contracted in 1968 to purchase land which was the subject of an unregistered mortgage executed in 1962. The defendants lodged a caution objecting to the registration of the mortgage by the appellant bank in priority to their contract. The court held both the unregistered mortgage and the contract were similar minor interests in equity and therefore the ordinary rules of priority applied. Counsel pointed out that Russell LJ explained that the caution lodges on behalf of the Taylors had no effect whatever by itself on priorities: it simply conferred on the Taylors the right to be given notice of any dealing proposed to be registered so that they might have the opportunity of contending that it would be a dealing which would infringe their rights and to which the applicants for registration were not, as against them, entitled.
- [43] In respect of strata lot 14, Ms Hamilton submitted that if GK Investments now has a legal mortgage, it is misleading to suggest that the court is concerned with competing equities.
- [44] She stated that even if there were any merit in its contention, GK Investments must not be allowed to ignore the maxim that "equity follows the law." The implication of this maxim, she asserted, is that sections 58, 59 and 63 of the Registration of Titles Act take precedence, so that the crucial date is that of registration and not creation of the interest. She submitted that the consistent approach of the courts has been to give precedence to the date of registration vis-à-vis the date of creation of an interest. Consequently, the registered charging order over strata lot 14 is protected

against GK Investments' mortgage interest. Ms Hamilton submitted that as illustrated by the decision of **Capital & Credit Merchant Bank Limited v The Real Estate Board** (supra), without registration, a mortgage lacks efficacy because it derives its effect as a security by virtue of its registration. Further, based on **McEllister v Biggs** (supra), the unregistered instrument did not pass an interest or estate in strata lot 14 before registration; therefore up to May 21, 2021, GK Investments merely had an equitable right.

[45] Ms Hamilton argued that when the provisions from the Registration of Titles Act are read in light of Part 48 of the CPR, it is clear that the grant of the mortgage by RGA to GK Investments did not take effect until May 28, 2021 and so the mortgage is invalid as against China Sinopharm. She stated that this is bolstered by the clear pronouncement in rule 48.9 that a disposition by a judgment debtor is invalid against the judgment creditor. She then stated that China Sinopharm's provisional charging order, having been registered on February 3, 2021, the registration of a mortgage in GK Investments' favour some 114 days later (which would be the effective date of the disposition by RGA at law) is invalid as against China Sinopharm.

[46] Counsel submitted that the effect of the registration of GK Investments mortgage on May 28, 2021 is that its interest is subject to China Sinopharm's, albeit the mortgage instrument predates the provisional charging order. Between execution of the mortgage and registration, the equitable mortgage would not have been binding on third parties, including China Sinopharm, as indicated in section 63 of the Registration of Titles Act and illustrated by the **National Import-Export** (supra) case.

[47] Ms Hamilton contended that the subsequent registration of the earlier equitable interest does not automatically entitle the interest holder to priority. She stated that, as established by the **National Import-Export** case, GK Investments' equitable interest did not pass before the legal estate, as it was registration of the transfer which operated to pass both the equitable and legal interest. She argued that since

GK Investments did not acquire a legal interest until registration of the mortgage under section 59 of the Registration of Titles Act, China Sinopharm's prior registered equitable interest prevails. She contended that it is clear on the authorities that registration of the interest is paramount regardless of their equitable or legal nature. She pointed out that this was stated in **Sagicor Bank Jamaica Limited v Marvalyn Taylor-Wright** (supra). Ms Hamilton argued that registration of the charging order entitles China Sinopharm to priority even over GK Investments' legal mortgage.

- [48] In respect of strata lot 2, Ms Hamilton contended that China Sinopharm and Mr Riley and Ms Wellington have obtained provisional charging orders, consequently, both parties have similar minor interests in the lot. She submitted that a charging order takes effect as an equitable charge. She cited the authority of **Bardi Ltd v McDonald Milligen** [2018] JMCA Civ 33 in support of this position. She then submitted that as equitable charges rank in order of the date of creation, China Sinopharm's provisional charging order plainly takes priority to the provisional charging order obtained by Mr Riley and Ms Wellington.
- [49] She stated that only China Sinopharm has protected its interest by registering its provisional charging order. Consequently, as established by section 59 of the Registration of Titles Act, China Sinopharm has gained priority of interest by virtue of registration. According to counsel, Mr Riley and Ms Wellington's assertion that their application for a charging order was first in time therefore carries no weight otherwise China Sinopharm would be penalised for being efficient and diligent.
- [50] Ms Hamilton submitted that the court emphasised in **Rice v Rice** (supra) that where there are other grounds for supporting an assertion of better equity, priority in time is immaterial. Conversely, consideration of the nature and condition of the parties' respective equitable interests is crucial. This includes considering that, to date, Mr Riley and Ms Wellington's charging order remain unregistered and they have chosen instead to lodge a caveat, which is quite a curious way of proceeding given the expenses/costs associated with such an application. She submitted that



Jamaica has a system of registration and until registration, an interest being asserted does not pass.

- [51] Ms Hamilton further submitted that the registration of a caveat does not create an interest in land but merely signifies an interest being claimed. It operates as an injunction to the Registrar of Titles restraining registration of any dealing affecting the ownership of the land without notifying the caveator. A caveat has no effect, by itself, on priorities. She cited the case of **Barclays Bank v Taylor** to support this argument. She submitted, therefore, that the caveat lodged by Mr Riley and Ms Wellington does not entitle them to priority.
- [52] In deciding whether to grant the final charging order, Ms Hamilton asked the court to consider the conduct and circumstances of RGA, the conduct and circumstances of GK Investments and the conduct and circumstances of Mr Riley and Ms Wellington.
- [53] Counsel pointed to the fact that RGA has simply ignored the claim and enforcement proceedings. She then stated that the court has no evidence as to RGA's circumstances. Ms Hamilton asserted that the court, however, has evidence of its persistent unconscionable conduct in its dealings with China Sinopharm.
- [54] Ms Hamilton then pointed out that according to GK Investments' commitment letter, repayment of the loan was due on June 30, 2020. She stated that GK Investments was offered three other properties, two of which were and remain unencumbered, in addition to four personal guarantees as security for the loan. She stated that paragraph 16.1 of the loan agreement entitled GK Investments to "take such action by suit or otherwise for the recovery of such monies as it may think fit" in circumstances including default of payment of any instalment of interest or principal in respect of the loan. Counsel stated that considering the default in repayment since June 2020 and the entitlement to undertake recovery, it is quite curious that GK Investments took no steps to register the mortgage until May 21, 2020. Further, there is no indication that GK Investments has taken steps to realise

any of the other securities freely offered to it; instead, it is attempting to deprive China Sinopharm of its interest when it has an array of securities against which it can seek satisfaction. She stated that the three other security properties are not registered to RGA and thus China Sinopharm would have no right to pursue charges over these properties.

- [55]** Ms Hamilton submitted that diligence would have required prompt registration of the mortgage. She contended that GK Investments, by not acting diligently and with all expedition has only itself to blame. She stated that the negligence of GK Investments justifies China Sinopharm insisting on its equity as against GK Investments'. Counsel stated that China Sinopharm would suffer greater prejudice than GK Investments if the final charging order is not granted.
- [56]** Ms Hamilton argued that the actions of Mr Riley and Ms Wellington do not warrant the exercise of the court's discretion in their favour as, to date, they have not seen it fit to register the provisional charging order made in their favour with the result that not only is China Sinopharm's charging order first in time but, by virtue of the Registration of Titles Act, it enjoys priority due to its registration. Further, China Sinopharm's judgment was also first in time, the judgment having been entered from 1 June 2020 and Mr Riley and Ms Wellington only obtaining judgment on December 3, 2020.
- [57]** Counsel stated that Ms Riley and Ms Wellington have not explained why they have not pursued a charge over the property from which their claim arises, that is, the two bedroom unit situated at Two Mile Wood, Lot # 667 Orchards. She argued that they already have some equitable interest in this property as it is trite law that the purchaser on paying his deposit becomes equitable owner of the property forming the subject of the sale.
- [58]** She pointed out that Mr Riley and Ms Wellington have contended that they are better suited for a final charging order because their judgment debt is smaller. Ms Hamilton argued that their contention missed the more important consideration that

the debt due to China Sinopharm is some seven times what is due to them. By dint of these numbers, there can be no argument about who would suffer the greater prejudice. She pointed out that China Sinopharm is trying to recover sums to save itself in respect of extant liability it has incurred as a result of other breaches by RGA.

[59] Having regard to the foregoing, it was asked that the final charging order be granted in favour of China Sinopharm.

### **Submissions on behalf of GK Investments Limited**

[60] Ms Montague also began her submissions by giving some background in respect of the matter. She then outlined what she considered to be the issues for resolution.

[61] In contending that GK Investments is an “interested person” she cited rules 48.6 (1), (2) and 48.1 (2) of the CPR, she then submitted that GK Investments is an interested person in these proceedings since it had an equitable interest in the property charged, almost a year before the provisional charging order was obtained. She contended that, in any event, GK Investments now has a legal interest in the property, having registered its mortgage. According to Ms Montague, it is trite that equity follows the law and a legal interest must supersede an equitable one. To bolster her contention that GK Investments is an interested person she cited the case of **Beverly Levy v Ken Sales & Marketing Ltd** (supra).

[62] Ms Montague submitted that since the guarantor’s mortgage issued by RGA in favour of GK Investments created an equitable interest in the property on March 9, 2020 and the provisional charging order created China Sinopharm’s equitable interest in the property on February 3, 2021, it is clear that these two equities existed simultaneously as of February 3, 2021. She pointed out that in **Shernett Manning v Twin Acres Development Company Limited** [2017] JMSC Civ 54 Dunbar Green J explained that where a charging order exists along with an equitable mortgage, they are competing equities and the equitable interest created

by a charging order is subject to all prior equities. Ms Montague stated that the court confirmed that giving effect to equities that arise from a charging order should not involve a detrimental effect on any prior right existing in the property charged.

- [63] She submitted that, in any event, the fact that GK Investments now has a legal interest in the property disposes of the contentions by China Sinopharm.

### **Submissions on behalf of Mr Riley and Ms Wellington**

- [64] Mrs Allen-Brown's submissions also outlined the background and relevant law. In respect of whether Mr Riley and Ms Wellington are interested persons, she submitted that since they are judgment creditors of RGA they are in fact interested persons.
- [65] She further submitted that by virtue of the charging order granted, they have an equitable charge on the property. In support of this contention she relied on the case of **Bardi Ltd v McDonald Millingen** (supra). She also contended that the lodging of a caveat against the land charged is sufficient notice of Mr Riley and Ms Wellington's equitable charge on the land. She cited the case of **J & H Just (Holdings) Pty Ltd v Bank of New South Wales** (1971) 123 CLR as being instructive in this regard.
- [66] Mrs Allen-Brown argued that it is unfair and unjust that the Commercial Division of the Supreme Court fixed an earlier date for the hearing of China Sinopharm's ex parte application for a provisional charging order, despite the fact that Mr Riley and Ms Wellington filed their ex parte application for a provisional charging order before China Sinopharm filed its application.
- [67] Counsel submitted that the provisional charging order obtained by China Sinopharm is preliminary. She then submitted that the value of the debt owing to China Sinopharm is far more than the value of the land over which the debt is provisionally charged, therefore the value of the land charged could not satisfy the entire debt owing to China Sinopharm. On the other hand, the value of the debt

owed to Mr Riley and Ms Wellington is far below the value of the land over which their debt is provisionally charged.

[68] She asked therefore that the court grant the orders sought in Mr Riley and Ms Wellington's notice of application for final charging order filed on May 18, 2021.<sup>9</sup>

### **Analysis**

[69] The rules concerning charging orders can be found in Part 48 of the CPR.

[70] Rule 48.6 deals with 'interested persons'. It provides:

*"Interested persons*

*48.6 (1) The persons specified in paragraph (2) have an interest in the charging order proceedings as well as the judgment creditor and the judgment debtor and are referred to in this Part as "the interested persons".*

*(2) The interested persons are-*

*(a) any person who owns the land, stock or assets to be charged jointly with the judgment debtor;*

*(b) the company whose stock is to be charged;*

*(c) any person who is responsible for keeping the register of stock for that company;*

*(d) if the stock is held under a trust, the trustees or such of them as the court may direct;*

*(e) if the stock is held by the judgment debtor as a trustee, such of the other trustees and beneficiaries as the court may direct;*

*(f) if the stock is held in court, the registrar; and*

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<sup>9</sup> Affidavit of Ms Wellington was filed in support on said date

*(g) any other person who has an interest in the personal property to be charged.”*

[71] Rule 48.8 deals with the making of a final charging order. It reads in part:

*“Making of final charging order*

*48.8 (1) This rule deals with-*

*(a) the filing of objections to a provisional charging order; and*

*(b) the making of a final charging order.*

*(2) The following persons may file objections to a provisional charging order-*

*(a) the judgment creditor;*

*(b) the judgment debtor; and*

*(c) any interested person*

*...*

*(4) At the hearing, if satisfied that the provisional charging order has been served on the judgment debtor, the court has power to-*

*(a) make a final charging order;*

*(b) discharge the provisional charging order;*

*(c) give directions for the resolution of any objections that cannot be fairly resolved summarily.”*

### **Interested Persons**

[72] In **Beverley Levy v Ken Sales & Marketing Ltd** (supra), Lord Scott of Foscote said:

*“22. Their Lordships’ attention has been drawn to Rule 48.6 in Part 48 of the Civil Procedure Rules 2002 which deals with charging orders and defines the “interested persons” who have an interest in charging order proceedings and may make objections to the making*

*of a charging order as including “any person who owns the land to be charged jointly with the judgment debtor”. It was suggested that Mrs Levy, a person who claims an equitable interest under various mortgages, does not fall within the definition last cited. The Rule does not apply to the present case for reasons already expressed but in any event their Lordships disagree with the proposition. A person with an arguable case for being the owner of an equitable interest in land must, their Lordships think, be in general a member of the class of persons entitled to object to the making of a charging order. **Their Lordships, if it were necessary to do so, would incline to give a wide construction to the words “any person who owns the land ...” in Rule 48.6(2)(a).”***

*(Emphasis added)*

[73] The **Beverly Levy** case emanated from the Jamaican courts. The Privy Council’s decision is therefore not merely persuasive. It was not strenuously argued that GK Investments, Mr Riley and Ms Wellington are not interested persons. A wise decision given the stance of many authorities.<sup>10</sup> I therefore need not be detained with this point.

### **Relevant considerations**

[74] In **Bardi Limited v McDonald Millingen** [2018] JMCA Civ 33, Phillips JA, at paragraph 12, outlined her understanding of the status of ex parte orders against the framework of the provisions of Part 48 of the CPR. She then said:

*“[13] It is clear, in my view, that Part 48 of the CPR envisages a two step approach, namely, (i) that the application for the provisional charging order must first be obtained, which when obtained must state the date, time, and place when the court will consider making a final charging order; and (ii) then subsequently, there is the making of the final charging order. Rule 48.8 of the CPR permits the discharge of the provisional charging order at the application for the*

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<sup>10</sup> See for example the case of *Sagicor Bank Jamaica Limited v Marvalyn Taylor-Wright and the Supervisor of Insolvency* [2021] JMCA Civ 26

*making of the final charging order, once the objections to the same have been filed not less than 14 days before the hearing of the application. In my view, as there are no restrictions in the rule, an interested person can make an application to discharge the provisional charging order, otherwise than at the hearing for the making of the final charging order, particularly as the provisional charging order is obtained on an application made without notice.”<sup>11</sup>*

**[75]** The learned Judge of Appeal continued:

*“[14] I have set out all of this to say that a 'provisional' charging order means as the word 'provisional' indicates "arranged or existing for the present, possibly to be changed later" (Concise Oxford Dictionary, 11th Edition, Revised). So it is, as the word suggests, preliminary only.*

*[15] The provisional charging order was obtained as stated without notice or ex parte. The rule dictates this (rule 48.2 of the CPR). Halsbury's Laws of England, 5th Edition, Volume 77, 2016, paragraph 331 states:*

*“A charge imposed by a charging order has the like effect as an equitable charge. [See the [United Kingdom] Charging Orders Act 1979 s 3(4); and para 220; and Civil Procedure Vol 12A (2015) para 1475]. The court by which a charging order is made may at any time, on the application of the debtor or any person interested in any property to which the order relates, make an order discharging or varying the charging order. [See the Charging Orders Act 1979 s3(5); and Civil Procedure Vol 12A (2015) para 1479].”*

**[76]** Phillips JA did not address the relevant considerations for the court when it is faced with the question of whether a provisional charging order should be made final. The CPR is silent in this respect. However, in **Jennifer Messado and Company**

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<sup>11</sup> See also *DYC Fishing Limited v Perla Del Caribe Inc* [2012] JMCA App 18, para 32



**v North America Holdings Company Limited**<sup>12</sup> (unreported), Supreme Court, Jamaica, Claim No. 2011 HCV 04943 & Claim No. 2011 HCV 04669, judgment delivered 20 June 2014, Brown J gave some guidance. He said:

*“[60] Perhaps now is a good time to segue into a consideration of the procedure for the grant of a charging order. The most profound observation is that the judgment creditor is not entitled to a PCO [provisional charging order] as of right. The language of section 28D of the Act as well as rule 48.5 is directory. That is, both say the court ‘may’ make, in the former ‘a charging order’ and in the latter, ‘a provisional charging order’. It is therefore clear that the court has a discretion whether or not to make a charging order, be it final or provisional. In other words, at either the ex parte hearing for the PCO or the hearing to make the PCO final, the court has to consider whether in all the circumstances the charging order should be granted and if it is to be granted, what its reach should be.*

*[61] What, then, may be some of the matters to meet for the court’s consideration in the exercise of its discretion whether to make a charging order? Under the **UK’s Charging Orders Act 1979 (COA 1979)** the court is required to consider matters such as the personal circumstances of the debtor and whether any of his other creditors would likely be unduly prejudiced. Although these requirements have not been the subject of a statutory command to a Jamaican court, any court which is anxious to do justice would take them into consideration as a matter of course. In any event, the court has at least to consider all the circumstances before deciding to grant the charging order.”*

**[77]** It seems to me therefore that whether a provisional charging order ought to be made final is a decision that depends on the justice in all the circumstances of an individual case.

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<sup>12</sup> On the Supreme Court website, the neutral citation is stated as [2014] JMSC Civ 101, this citation does not appear on the judgment itself

**[78]** In this case, in deciding whether to grant final charging orders, I must deal with issues concerning priority. To put it simply, in this matter there are competing interests as the debts of RGA seemingly exceed its assets and those who are owed wish to be paid. Consequently, who will first be paid is a question of great significance. Indeed, the first payee may devour the assets.

### **An overview**

**[79]** China Sinopharm has contended that RGA, after terminating its services as contractor, failed to honour the terms of a settlement agreement and sums due to it remain outstanding. It has further stated that the termination of its services and RGA's failure to pay the company has had a ripple effect as it had engaged the services of subcontractors and suppliers and these persons are now anxious to be paid. China Sinopharm obtained a provisional charging order on February 3, 2021 and it has been noted on property belonging to RGA.

**[80]** Mr Riley and Ms Wellington are also not pleased with RGA. On August 21, 2020, they instituted proceedings against RGA and Hartlands on the basis that RGA and Hartlands agreed to sell them premises. They paid over the sum of \$6,000,000.00 as part payment for said premises. It was a term of the agreement that in the event the agreement was cancelled due to the fault of the purchasers, all monies paid under the agreement by the purchasers ought to be returned without interest and free from deductions save and except for the purchasers half cost of the sales agreement in addition to \$80,000.00 plus GCT, which would be retained by the vendors. RGA and Hartlands failed to give possession on the agreed date. Therefore, in or about October 2019, Mr Riley and Ms Wellington gave notice of their cancellation and requested the return of their money. Despite several promises, RGA and Hartlands have failed to return their money.

**[81]** Like China Sinopharm, Mr Riley and Ms Wellington obtained judgment in default and a provisional charging order charging property belonging to RGA. The

provisional charging order was obtained on February 4, 2021, one day after China Sinopharm had obtained its provisional charging order.

- [82]** Then there is GK Investments. GK Investments gave Hartlands a loan; the security for this loan includes property owned by RGA (pursuant to a guarantor's mortgage). The mortgage was executed on March 9, 2020. It was registered in accordance with section 105 of the Registration of Titles Act and noted on the title after the notation of China Sinopharm's provisional charging order had been made. The mortgage was registered on May 21, 2021.
- [83]** China Sinopharm, Mr Riley and Ms Wellington argued that a final charging order should be granted in their favour. GK Investments argued that the registration of its mortgage, puts it beyond doubt, that its mortgage reigns supreme and defeats a provisional charging order.
- [84]** For that reason, one issue that arises is whether a judgment creditor ranks in priority to a mortgagee who registered its mortgage subsequent to the notation of the judgment creditor's charging order on the title. Stated differently, whether a mortgage, created pursuant to a loan agreement, may properly rank ahead of a provisional charging order which was noted on the title prior to the registration of the mortgage.
- [85]** I must mention here that I am yet to see an authority that is on all fours with the facts of this case and the issues to be decided. In many instances, the cases, though somewhat relevant, contemplated statutory provisions which Jamaica does not have or contemplated Jamaican statutory provisions which are inapplicable in this case. Furthermore, Jamaica uses the Torrens title system which is not used in some jurisdictions.
- [86]** I therefore believe that it is important to firstly examine the nature of a mortgage and the nature of a provisional charging order.

## The nature of a mortgage

[87] In the 4<sup>th</sup> edition of the text 'Commonwealth Caribbean Property Law' the author Gilbert Kodilinye, on page 195, states that a mortgage is essentially a real security for the repayment of money lent.

[88] He then notes:

*“A legal mortgage of unregistered land may be created by a conveyance of the mortgagor’s fee simple estate to the mortgagee subject to a proviso that, upon redemption (that is, repayment of the debt), the property should be reconveyed to the mortgagor...*

*A mortgage of registered land is created by execution of a memorandum of mortgage or charge in the prescribed form, which must be lodged for registration in the Land Registry.*

*Equitable mortgages are created:*

*(a) by deposit of title deeds (or deposit of a duplicate certificate of title to registered land), usually with a bank to secure an overdraft or loan;*

*(b) under the Walsh v Lonsdale principle, where there is an agreement to grant a legal mortgage; or*

*(c) where the mortgagor has only an equitable interest in property, by assignment of the interest to the mortgagee.”*

[89] In the case of **Jamaica Youth Development Foundation v Portfolio International Jamaica Ltd** (unreported), Supreme Court, Jamaica, Claim No 2004/HCV 2305, judgment delivered 10 December 2004, Sykes J (Ag) (as he then was) discussed the position of the mortgagee at common law. He said:

*“14...In relation to land, at common law, there was a transfer of the legal estate from the mortgagor to the mortgagee who would be obliged to retransfer the legal estate to the mortgagor once the debt was paid. The mortgage of land was an actual conveyance from the mortgagor to the mortgagee. The condition of the reconveyance was the payment of the debt by the date specified in the instrument of*

*mortgage. The common law knew no mercy. If the mortgagor did not discharge his debt by the date agreed, the mortgagee's estate in the land became absolute and he was no longer bound by the condition to reconvey...*

*15. Equity mitigated the rigours and treated the mortgagor as having an equity of redemption that existed beyond the date of repayment. In equity, this meant that failure to repay by the stated date did not mean that the title of the mortgagee became absolute. The mortgagee was not discharged from his obligation to reconvey and neither was the mortgagor relieved of his obligation to repay the loan. It was a short step from this initial development to the enunciation of the principle that the equity of redemption could not be excluded by agreement. This was the foundation for the rule that there could not be a clog on the equity of redemption. **These were the straws from which equity established the principle that the mortgagee of land was the holder of a security interest in the land but not the owner of the estate or interest. In the eyes of equity, the mortgagee had a charge on the property. What the mortgagee had, in equity, was a right to repayment and not a right to the mortgaged property. This right to repayment became, in equity, a personal right, and not a proprietary right. This led to the ultimate view of equity that the mortgagor held the legal estate subject only to the mortgagee's charge...***

*(Emphasis added)*

**[90]** The learned judge further explained:

*"16. At law, the mortgagee was the legal owner with the right to take possession. The mortgagee could oust the mortgagor at any time. In fact, the mortgagor was a tenant by sufferance. If the mortgagee chose to take possession, the mortgagor could not resist. Equity redressed this by holding the mortgagee strictly accountable if he took possession. Because of this, most mortgagees did not enter into possession. They allowed the mortgagor to remain in possession.*

*19. The lawyers for the mortgagees devised a stratagem to mitigate the great efforts of equity to reduce the mortgagee to creditor. Their nuclear weapon was the power of sale. This was inserted into mortgage deeds.*

*20...The second device inserted into mortgages was the power to appoint a receiver who could take possession..."*

- [91] Sykes J then went on to discuss the Registration of Titles Act. At paragraph 25 of his judgment he stated:

*"Section 108 provides that the estate and interest of the mortgagor passes to whomever the land is transferred when the mortgagee exercises his power of sale. In my view, this provision had to be there since section 105 says that registration of the mortgage does not transfer the legal estate to the mortgagee. Therefore, without section 108 any purchaser from a mortgagee could not get any legal estate of the mortgagee since he had none."*

- [92] The above extract from Sykes J's judgment touches on what section 105 of the Registration of Titles Act provides. In part, the section provides as follows:

*"A mortgage and charge under this Act shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of land thereby mortgaged or charged..."*

- [93] Section 105 demonstrates that the Act is supportive, in a sense, of equity's efforts to temper the common law. Section 106 of the Act deals with the statutory power of sale. Sykes J's view regarding section 108 may be equally applicable in respect of section 106. Since the Act makes it clear that a mortgage does not operate as a transfer of land and does not make the mortgagee the legal owner, it was judicious of the framers to indicate that despite this fact, it was permissible for a mortgagee to sell the mortgaged property and the purchaser could obtain a good title.

- [94] In the recent Court of Appeal case of **Darnel Fritz v John Collins** [2021] JMCA Civ 3, Brooks JA (as he then was) said:

*"[20]...it must first be noted that a mortgage under the common law is an entirely different creature from a mortgage under the ROTA, which utilises a Torrens-style system of registration. A mortgage at common law is a conveyance of the mortgaged property to the*

*mortgagee, who is entitled to possession of the property. The mortgagor has the right to redeem the property if he or she satisfies the debt owed to the mortgagee. **A mortgage under the ROTA, on the other hand, is a charge on the property. The difference must be borne in mind when considering the decided cases.***<sup>13</sup>

*(Emphasis added)*

*The effect of registering a mortgage*

[95] Bearing in mind what has been outlined, the answer to the question of what is the effect of registering a mortgage seems clear. The mortgage shall, when registered, have effect as a security. That is, however, not all. Campbell J in **King Investments Solutions v Hussain** [2005] NSW 1076, an Australian case, explained:

***“Nature of the Interest of a Registered Mortgagee of RPA Land***

*52 In contrast to the position under the old system, section 57 [of the] Real Property Act 1900 provides that a mortgage under that Act “has effect as security but does not operate as a transfer of the land mortgaged”. The registered proprietor remains as registered proprietor, even when a mortgage is registered against his or her title.*

*53 However, statute confers upon a registered mortgagee a variety of powers which can be used to enforce the mortgage, including a power upon default to sell the land without taking any court proceedings. **The interest of a registered mortgagee of Torrens Title land is sometimes referred to as a “statutory charge”, to recognise that it is an interest somewhat analogous to a charge, which has many important attributes which derive from statute.***

*(Emphasis added)*

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<sup>13</sup> See also *Peter Perry v Carol Baugh* [2018] JMCA Civ 12, paragraph 23

[96] He then said:

***“Nature of the Interest of an Unregistered Mortgagee of RPA Land***

*54 The Real Property Act 1900 itself confers no status upon an unregistered mortgage. Rather, the attributes of such a mortgage derive from the contract between the mortgagor and mortgagee, and the general law. Relevant provisions of the contract can include whether there is a right to possession of the mortgaged land, whether there is a power of sale out of court upon default, whether there is a covenant to execute a registrable mortgage, and whether there is a covenant to procure the registration of a registrable mortgage. The rights under the general law could be affected by whether the unregistered mortgagee had custody of the certificate of title, and whether there were any prior mortgages. Rights under the general law may also depend upon the extent to which it is possible to obtain specific performance of particular covenants in the mortgage. Provided only that the intention to make the land security for a debt is clear, an unregistered mortgage will confer at least the rights which the general law confers upon a chargee. Whether there are any more extensive rights will depend upon the circumstances of the particular mortgage. In the present case, the intention of the mortgagors to make the land act as security for the debt is clear.*

***Availability of a Statutory Power of Sale Exercisable Out of Court by a Mortgagee***

*55...it is appropriate to look at the circumstances in which a mortgagee can sell the mortgaged property without invoking the assistance of the Court.*

*56 Section 58 [of the] Real Property Act 1900 confers on a mortgagee a power to:*

*“... sell the land mortgaged ... or any part thereof, and all the estate and interest therein of the mortgagor ...”*

*However, as section 58(1) makes clear, that power can be exercised only when the mortgagee is authorised by section 57(2) to exercise the power under section 58. Section 57(2) confers power on “a*



*registered mortgagee ...” to exercise the powers conferred by section 58, if certain preconditions arise. Thus, the statutory power of sale of Real Property Act 1900 land conferred by section 58 can be exercised only by a mortgagee who is registered: Midland Montagu Australia Ltd v Cuthbertson & Anor (1989) 17 NSWLR 309 at 313-5...”*

- [97] The judgment of Campbell J authoritatively conveys that the registration of a mortgage confers on the mortgagee a variety of powers that would not be available or readily available to that mortgagee under the general law.<sup>14</sup> Importantly, Campbell J asseverated that the interest of a registered mortgagee of Torrens Title land is sometimes referred to as a “statutory charge” to recognise that it is an interest somewhat analogous to a charge.

*The unregistered mortgage*

- [98] In **Cowell Anthony Forbes (Representative of Estate of Wilfred Emmanuel Forbes, deceased) and Cowell Anthony Forbes v Miller’s Liquor Store (Dist) Limited** [2016] JMCA Civ 1, Brooks JA outlined that:

*“[19] The Forbeses also asserted that Miller’s failure to register the mortgage prevented it from exercising powers of sale as prescribed by section 106 of the Registration of Titles Act (the ROTA). The only remedy that Miller’s was entitled to have, the Forbeses argued, was that of foreclosure under the supervision of the court.*

*[20] The learned trial judge, after examining sections 63, 105 and 106 of the ROTA, found, at paragraph 13 of her written judgment, that the mortgage did not confer a legal interest on Miller’s. She found, however, that Miller’s was an equitable mortgagee and that it did have the power, provided by the mortgage document, to sell...*

*[21] The learned trial judge was also correct in this finding. The position that an equitable mortgagee could only rely on the remedy*

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<sup>14</sup> See *Jamaica Redevelopment Foundation Inc v Anthony Everal Ferguson* (unreported), Supreme Court, Jamaica, Claim No 2010 HCV 03288, judgment delivered 22 July 2011, paragraph 6

*of foreclosure, was subject to the agreement that the parties had concluded between themselves...”*

[99] He later opined:

*“[22] ... It is true that the instrument of mortgage was not created as a deed. It was, however, no less an agreement between the parties. The document was capable of creating a contractual power of sale.*

*[24] Mr Braham submitted that the power of sale contained in the instrument of mortgage could only have had effect if the instrument had been registered. This, learned Queen’s Counsel submitted, was because it referred to the power contained in the ROTA...*

*[25] The submission cannot succeed. The clause does not depend on the registration of the instrument of mortgage in order for the terms of the ROTA to be effective. The clause imports into its provisions, the relevant provisions of section 106 of the ROTA... Miller’s was given, by clause (i) of the mortgage instrument, the right to sell the premises and call upon any of the provisions of the ROTA that could assist it in that regard. The power exists, by way of reference, in section 106. This complaint against the learned trial judge’s judgment cannot succeed.”*

[100] In the more recent case of **Darnel Fritz v John Collins** (supra), Brooks JA, quoted from the 2<sup>nd</sup> edition of the text ‘The Torrens System in New South Wales’, he noted that the learned authors in addressing the issue of the mortgagee’s power of sale, stated, in part, at page 282:

*“Mortgagees and encumbrances under the [relevant real property act in that state], being merely chargees, have no inherent power to pass ownership of the estate or interest mortgaged or encumbered. To be able to do so they need some assistance outside their instrument of charge. [The statutory provisions similar to sections 105 through 108 of the ROTA] give them that assistance. Although a mortgage or encumbrance of Torrens title land might itself contain an express power of sale, in the absence of specialised legislation the rights arising under that power would be contractual, only [sic] requiring Court assistance for implementation. An express power could not in itself enable a mortgagee for encumbrance to execute a registrable*

*transfer of an estate in fee. His ability to do so is entirely the creature of the statute, dependent on occurrence of default under a memorandum of mortgage or encumbrance 'registered under this Act': [equivalent of section 105]."*

*(Extract taken from the judgment of Brooks JA)*

[101] The foregoing passage seems to convey that though a mortgagee may have a contractual power of sale by virtue of the mortgage instrument, in the absence of registration under the Act, the mortgagee would require the court's assistance in selling the property. The benefits of registration under the Act are therefore striking.

*An equitable mortgage*

[102] In **Rosh Development Limited v Cayjam Development Limited and Proline Development Corp** [2017] JMCC Comm 4, Simmons J (as she then was) stated, at paragraph 30, that an equitable mortgage is a contract that operates as a security and is specifically enforceable. She further stated that a mortgagee who wishes to enforce his rights may therefore bring an action for specific performance of the agreement.

[103] In Fisher and Lightwood's Law of Mortgage it is stated that:

*"An equitable mortgage is either: (1) a contract, or (in the case of land) an unregistered deed, that operates as security and is enforceable under the equitable jurisdiction of the court; or (2) a mortgage over an equitable interest."*<sup>15</sup>

[104] In **Wilfred Emmanuel Forbes and Cowell Anthony Forbes v Miller's Liquor Store (Dist.) Limited** [2012] JMCA App 5, Morrison JA seemingly said, with approval, the following:

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<sup>15</sup> Lexis Nexis-Fisher and Lightwood's Law of Mortgage/Part I Mortgages and Charges/ Chapter 1 Mortgages and other securities generally/Equitable mortgages/Generally

*“[7] In respect of the first issue, the learned judge took the view, after careful consideration of the provisions of the RTA, in particular sections 63 and 105, that a mortgagee of registered land whose mortgage was not registered on the title “has no status under the Act...” and that the power of sale given by section 106 does not apply to such a mortgagee (para. 12 of the judgment). However, the judge found, although such a mortgage could not take effect at law, because of its non-registration, it could and did take effect as an equitable mortgage. 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...”*

[105] Having regard to the foregoing, the instrument intituled “Guarantors Mortgage” (which was exhibited to Ms Mew’s affidavit), in the absence of registration under the Registration of Titles Act, would be regarded as an equitable mortgage.

### **The nature of a provisional charging order**

[106] It will be recalled that in **Bardi Limited**, Phillips JA discussed the nature of a provisional charging order. The relevant passages were outlined earlier in this judgment. A provisional charging order is made in the first instance without notice, and without a hearing and as Phillips JA stated it is, as the word suggests, preliminary only. Phillips JA then went on to cite a passage from Halsbury’s Laws of England which indicated that a charge imposed by a charging order has the like effect as an equitable charge.

[107] In the previously mentioned case of **Jennifer Messado and Company**, Brown J said:

*“[57] A charging order is granted by the Court to secure payment of money pursuant to a judgment or order. Although the charging order*

*has been described as a form of compulsory mortgage (see Land Law, Elizabeth Cooke), it differs from a mortgage. The differences are, it passes no property (notionally or actually) to the judgment creditor, no right of possession or foreclosure but only a right of realisation by the judicial procedure created under rule 48.11. The charging order is therefore a security for a judgment debt and is imposed on property in which the judgment debtor is beneficially entitled (see rule 48.3 (2) (h)). A charging order extends to cover the judgment debt, interest and costs even without being expressly so stated: Ezekiel v Orakpo [1971] 1 WLR 340.”*

[108] Later on in his judgment, the learned judge stated the following:

*“[59] So, the charging order is a court imposed equitable charge for securing a money judgment or order. While it does not divest the judgment creditor (sic) of his proprietary rights, its interference with those rights is reflected in the judgment debtor’s inability to dispose of the charged property to the detriment of the judgment creditor. Although the right to dispose of the charged property is part of the bundle of rights the owner of property enjoys, any disposal of the judgment debtor’s interest therein is invalid against the judgment creditor...”*

[109] In the aforementioned passage Brown J refers to the effect of a charging order; this is outlined in the CPR. Rule 48.9 (1) provides:

*“Effect of a provisional or final charging order*

*48.9 (1) No disposition by a judgment debtor of an interest in property subject to a provisional or final charging order is valid against the judgment creditor.”*

[110] In **Jennifer Messado and Company**, Brown J, in referring to the charging order as an equitable charge, did not make a distinction between a provisional and a final charging order. Also, in **Bardi Limited**, the passage from Halsbury’s Laws of England cited by the learned Judge of Appeal<sup>16</sup> did not specifically refer to a

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<sup>16</sup> See paragraph 15 of the judgment

provisional charging order. They simply use the term 'charging order'. Rule 48.9 (1) indicates that the provisional charging order has the same effect as a final charging order. The passage from Fisher and Lightwood's Law of Mortgage, set out below, gives an indication as to why the CPR makes no distinction:

*"The interim charge creates an immediate charge over the judgment debtor's property. It has been described as being a charge which at this stage is 'defeasible', being capable of being revoked on further consideration of the application to make the charge final. A charging order takes effect from the date of the interim order not the final order, since the latter simply confirms the former and does not itself impose any new or distinct charge."*<sup>17</sup>

#### *Equitable charge*

**[111]** In explaining the nature of a charge, the authors of Fisher and Lightwood's Law of Mortgage disclosed that:

*"A charge is the appropriation of real or personal property for the discharge of a debt or other obligation. 'It is of the essence of a charge that a particular asset or class of assets is appropriated to the satisfaction of a debt or other obligation of the charger or a third party, so that the chargee is entitled to look to the asset and its proceeds for the discharge of the liability'. A mere charge is an appropriation which does not give the creditor either a general or special property in, or possession of, the subject of the security. Unlike a mortgagee, the creditor with a mere charge has no rights of enforcement without judicial intervention. The creditor has a right of realisation by judicial process in case of non-payment of the debt or non-performance of the obligation."*<sup>18</sup>

**[112]** The authorities cited above broadly state that a charging order is essentially an equitable charge.

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<sup>17</sup> See Lexis Nexis-Fisher and Lightwood's Law of Mortgage>Part I Mortgages and Charges> Chapter 12 Charging Orders> Effect of interim charging order

<sup>18</sup> Supra, Chapter 1 Mortgage and other securities generally>Securities generally> Charge

[113] In Fisher and Lightwood's Law of Mortgage it is noted that an equitable charge is created when real or personal property is expressly or constructively made liable, or specially appropriated, to the discharge of a debt or some other obligation without there being any change in ownership either at law or in equity. It creates an equitable interest and confers on the chargee a right of realisation by judicial process.<sup>19</sup>

[114] I have not been presented with any authority which indicates that the juridical nature of a provisional charging order, taken at its highest, is greater than an equitable charge. In fact, it seems that even a final charging order is an equitable charge. Ms Hamilton, in her submissions, accepted that the provisional charging order is an equitable charge; interestingly, she also submitted that the provisional charging order is insufficient to create a caveatable interest.<sup>20</sup>

[115] It is well known that a charging order precedes an order for sale. In **King Investment Solutions** (supra), Campbell J said:

*"51 Where there is a charge simpliciter, and not a mortgage, or an agreement for a mortgage, the right of the party having such a charge is a sale, and not foreclosure: Tennant v Trenchard (1869) LR 4 Ch App 537 at 542 per Lord Hatherley LC; In re Owen [1894] 3 Ch 220. Under the general law a charge can be enforced only by application to the Court for an order for the sale of the charged property, not by the chargee taking unilateral action out of court: Melbourne Tramways Trust v Melbourne Tramway & Omnibus Co Ltd [1887] VicLawRp 96; (1887) 13 VLR 487 at 490."*

[116] Notably, in **Beverley Levy v Ken Sales & Marketing Ltd** (supra), the Privy Council stated as follows:

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<sup>19</sup> Lexis Nexis-Fisher and Lightwood's Law of Mortgage/Part I Mortgages and Charges/Chapter 1 Mortgages and other securities generally/Equitable mortgages/Equitable charges

<sup>20</sup> See paragraph 51 of her written submissions filed November 11, 2021. Also, in comparing China Sinopharm's provisional charging order and Mr Riley and Ms Wellington's provisional charging order, Ms Hamilton contended, at paragraph 46 of her submissions, that both parties have "similar minor interests"

*“17. It is common ground that a mere order for sale under section 134 [of the Registration of Titles Act] does not vest in the judgment creditor who has applied for the order any interest in the land. An interest in land is acquired when the Registrar, having been served with a copy of the order for sale, enters the order in the Register Book. The interest acquired by the judgment creditor at that point is an equitable interest subject to other interests already on the Register.”*

[117] If an order for sale, when entered in the Register Book, gives rise to an equitable interest, then it stands to reason that the effect of a provisional charging order cannot be greater than the effect of an order for sale.

### **The provisional charging order and the Registration of Titles Act**

[118] China Sinopharm’s provisional charging order, as mentioned before, is noted on the certificate of title registered at Volume 1528 Folio 254.<sup>21</sup> It is my understanding also that it is noted on the certificate of title registered at Volume 1528 Folio 242.<sup>22</sup> Ms Hamilton brought the court’s attention to sections 58, 59 and 63 of the Registration of Titles Act. It is, in my view, unnecessary to outline them all in detail. Section 59 states that:

*“Every instrument presented for registration may be in duplicate (except a transfer whereon a new certificate of title is required), and shall be registered in the order of, and as from, the time at which the same is produced for that purpose; and instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the time of registration, and not according to the date of the instrument. Upon the registration of any instrument the Registrar shall bind up the original in his office in a book to be kept for that*

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<sup>21</sup> See the affidavit of Kerri-Ann Mew filed July 29, 2021, exhibit KAM-2

<sup>22</sup> See the affidavit of Cui Jiao filed September 15, 2021, paragraphs 5 and 6. See also Ms Hamilton’s submissions, dated November 11, 2021, paragraph 9



*purpose and shall deliver the other (hereinafter called the duplicate) to the person entitled.”*

[119] The marginal note<sup>23</sup> reads: “Order of priority and registration”.

[120] In her oral submissions, Mrs Allen-Brown brought the court’s attention to section 3 of the Act, which is the definition section. Section 3 provides that “instrument” shall include a conveyance, assignment, transfer, lease, mortgage, charge and also the creation of an easement.<sup>24</sup>

[121] A further examination of the Act will reveal that the word “charge” is also defined in section 3. It states that “charge” shall mean the instrument creating and charging an annuity. Helpfully, the word “annuity” is also defined in the Act; it provides that “annuity” shall mean a sum of money payable periodically and charged on land under the operation of this Act by an instrument thereunder.<sup>25</sup>

[122] In my judgment, bearing in mind the foregoing, the inclusion of the word ‘charge’ in the definition of an instrument, under the Act, does not capture a provisional charging order. No authority has been cited which holds a contrary view. It is arguable that the words “shall include” which follow the word “instrument” indicate that the class is not a closed one. This, it seems to me, would require an examination of what is included and whether the provisional charging order is of the same genus. The submissions of counsel did not adopt this approach.<sup>26</sup>

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<sup>23</sup> See *Lijyasu M Kandekore v COK Solidarity Co-operative Credit Union Limited, Deidre Daley and Donnovon Ward* [2017] JMCA App 20, paragraph 43; *DPP v Schildkamp* [1971] AC 1, per Lord Reid; *Stephens v Cuckfield Rural District Council* [1960] 2 QB 373, page 383; *Imperial Oil Ltd v Canada; Inco Ltd v Canada* [2006] 2 SCR 447, paragraph 57

<sup>24</sup> Contrastingly, see the definition section (section 2) of the Barbados Land Registration Act and the definition section of the South Australian Real Property Act. See also the definition of ‘charge’ in the New South Wales Real Property Act 1900

<sup>25</sup> In respect of annuities charged on land, the *Encyclopaedia of Forms and Precedents* provides that if the settlor wished to secure a certain income to a person out of the rents and profits of the land for life, or some other period, it was usual to limit the land to trustees on trust so that the proposed annuitant would receive a yearly rentcharge of the proposed amount

<sup>26</sup> In fact, the detailed submissions of Ms Hamilton made no reference to section 3 of the Act

[123] I do have my doubts that the provisional charging order could be included; at first glance, what is itemised contemplates dealings with real property at the outset. A provisional charging order is granted subsequent to the default of a debtor; usually in instances where the judgment creditor did not take any security in its dealings with the debtor. Furthermore, the legislature has seen it fit to define the word “charge” and has adopted a narrow definition of the term.

[124] Ms Hamilton cited numerous cases in support of her respective arguments. The cases proved to be a wealth of information on various issues, but they were distinguishable. In **Capital & Credit Merchant Bank Limited v The Real Estate Board consolidated with The Real Estate Board v Jennifer Messado & Co** [2013] JMCA Civ 29, Morrison JA, in his characteristically careful fashion, examined some of the provisions of the Real Estate (Dealers and Developers) Act. He begins his judgment by stating that:

*“[3]...these consolidated appeals...are primarily concerned with the interpretation and effect of the provisions of the [Real Estate (Dealers and Developers)] Act.”*

[125] He said:

*“[7] Sections 29- 31 of the Act are at the heart of the regime created by the Act. Moneys received by a vendor from a purchaser under a prepayment contract in a development scheme must without delay be paid by the vendor into a trust account...Such moneys, together with any interest earned thereon, are required to be held in trust in the account until completion or rescission of the contract...They may not be sooner withdrawn, save...*

*[8] As a condition of such withdrawal, the owner of the land upon which the construction is taking place must have executed and lodged with the Registrar of Titles **a charge on the land (deemed to be, and enforceable as, a mortgage)** in favour of the Board to secure repayment by the vendor...The Board’s charge ranks in priority to all other mortgages and charges on the land...(section 31(5)).”*

*(Emphasis added)*

[126] This case was not concerned with a provisional charging order nor did Morrison JA examine, in detail, the statutory provisions that Ms Hamilton relied on. Further, and quite importantly, he was not tasked with looking at section 3 of the Registration of Titles Act. The case dealt with other statutory provisions<sup>27</sup> which addressed priority.

[127] Notably, Morrison JA said:

*“[108]...The Board’s charge, which is deemed by section 31(7) of the Act to be a mortgage under the Registration of Titles Act, therefore attracts upon registration under that Act all the usual incidents of such a mortgage, as set out in sections 102-125 of that Act, including, hardly least of all in the instant context, the power of sale in case of default under section 106...”*

*“[109]...as regards...the determination of priorities, it is clear that in this context that subject is intended by the legislature to be governed by section 31(5) of the Act, under which, as the court has now confirmed, the Board’s charge ranks in priority to all other mortgages or charges on the land save for those created by statute in respect of unpaid rates or taxes.”*

[128] In **National Import-Export Bank of Jamaica v Montego Bay Investment Company Limited** (supra), a final charging order had been made over the relevant property. A variation of the order was sought to exclude the property on the grounds that Mr Sinclair, who at that time had died, had given the property to his daughter, Ms Symister, as a wedding gift (an inter vivos disposition). The instrument of transfer was not registered before Mr Sinclair died. Wint-Blair J identified the issues as follows:

*“[10]...what is the position of a transferee named in an instrument of transfer, made pursuant to section 88 of the Registration of Titles*

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<sup>27</sup> See for example, the Companies Act, Part III

*Act, when said transfer had been executed but not registered before the death of the transferor.”*

[129] I am not concerned, in this case, with the registration of a transfer.

[130] Also Wint-Blair J, in **National Import-Export Bank of Jamaica v Montego Bay Investment Company Limited**, did not have as her focus section 3 of the Registration of Titles Act, specifically the definitions of the words “charge” and “instrument”.

[131] In **Thomas Edward McEllister and others v William Biggs and others** (supra), the Privy Council held that although an unregistered deed is not effectual to pass any interest in land under s. 39 of Act 22 of 1861, it is effectual to pass an equitable right to set aside a certificate of title relating thereto which has been obtained by fraud.

[132] The authorities cited by Ms Hamilton are not directly on the point. A bit more will be said about this later.

### **The nature of a caveat**

[133] A caveat was lodged on behalf of Mr Riley and Ms Wellington. In **J & H Just (Holdings) Pty Ltd v Bank of New South Wales** (1971) 125 CLR 546, Barwick CJ stated, at page 552, that a caveat serves to:

*“...act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealing for registration. The purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator’s estate or interest though if noted on the certificate of title, it may operate to give such notice.”*

**[134]** In **Barrington Dixon v Angella Runte and Anthony Depaul** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 105/08, judgment delivered 17 July 2009, Smith JA said:

*“11...Of course, as contended by the 2<sup>nd</sup> respondent, a caveat is not an interest in land. It merely operates to prevent any dealing with the land in question without the consent of the caveator or the removal or withdrawal of the caveat. (See Half Moon Bay Limited v Crown Eagle Hotels Ltd Privy Council No. 31/2000 delivered 20<sup>th</sup> May 2002). It temporarily protects an unregistered interest in anticipation of legal proceedings. The caveator must make a claim with a view to establishing his interest...”<sup>28</sup>*

**[135]** In **Half Moon Bay Ltd v Crown Eagle Hotels Ltd**<sup>29</sup> [2002] UKPC 24, Lord Millet, at paragraph 30, stated the following:

*“...the entry of a caveat merely operates to prevent the registration of a transfer or dealing without the consent of the caveator or the removal or withdrawal of the caveat. It does not of itself subject the title of the transferee to the interest or incumbrance which the caveat serves to protect.”*

**[136]** It seems to me that a caveat may be a helpful tool for a judgment creditor who has obtained a provisional charging order. The authorities do not suggest that the notation of a provisional charging order on a title is necessary for its operation as an equitable charge. Therefore Mr Riley and Ms Wellington, having obtained a provisional charging order, have an equitable charge.

### **Who has priority?**

**[137]** In Chapter 7 of Sampson Owusu’s text ‘Commonwealth Caribbean Land Law’, the author deals with priorities. On page 217, he noted that the doctrine of priorities

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<sup>28</sup> See *Venus Investments Limited v Wayne Ann Holdings Limited* [2015] JMCA App 24, paragraphs 18 to 20

<sup>29</sup> See also *Eng Mee Yong and Others v Letchumanan S/O Velayutham* [1980] AC 331, per Lord Diplock at pages 335 to 336

has been developed to meet situations where there are rival claimants all asserting their rights to certain property, the value of which may not be adequate to meet all their claims. He pointed out that the following rules were developed: “Qui prior est tempore, potior est jure”, that is, the order of creation rule, which means that he who is earlier in time is stronger in law.

**[138]** The author elucidated:

*“THE ORDER OF CREATION RULE*

*The primary rule is that estates and interests prima facie rank in the temporal order in which they are created...priority is accorded to the person whose interest was first created. The authority usually cited for this doctrine is the opinion of Lord Westbury expressed in Phillips v Phillips [(1862) 4 De G F & J 2018, 215]:*

*“The subsequent grantee takes only that which is left in the grantor. Hence the grantees and incumbrances claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, Qui prior est tempore potior est jure. The first grantee is potior-that is, potentior. He has a better and superior-because a prior-equity.”*

...

*In Rice v Rice, [(1853) 2 Drew 73] Kindersley V.-C. held that “as between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives better equity...”*

*The doctrine, qui prior est tempore, potior est jure, applies not only to equitable interest, but also with equal, if not greater, force to legal interests.”*

**[139]** It must be acknowledged, however, that the basic doctrine of priorities may be displaced by, among other things, fraud and statutory ranking regimes.<sup>30</sup>

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<sup>30</sup> See Glenton McFarlane v Hopeton Ferguson [2017] JMSC Civ 21, paragraph 47

**Certificate of Title registered at Volume 1528 Folio 254 (Strata Lot No 14)**

[140] GK Investments is only concerned with one of the properties, strata lot No 14. It obtained an equitable mortgage on March 9, 2020, months before China Sinopharm even instituted proceedings against RGA (proceedings were instituted on May 1, 2020). Having regard to all that has been stated above, in my judgment, the registration of GK Investments mortgage gave it more extensive powers than it would otherwise have under the general law. Before its registration, the mortgage was an unregistered/equitable mortgage and after its registration it became a registered mortgage.

[141] With respect to the notation of the provisional charging order on the title, it seems to me that the effect is that, like a caveat, it may operate to give notice to persons who may consider dealing with the registered proprietor.<sup>31</sup> When one recalls the effect of a provisional charging order, as stated by rule 48.9 (1) of the CPR, the notation is informative and if its effect is appreciated then it is unlikely that someone will become a party to an agreement that seeks to dispose of the property.

[142] In my view, China Sinopharm's provisional charging order, being an equitable charge would therefore be defeated by GK Investments' equitable mortgage which was first in time. Prior to the registration of the mortgage, the equities were equal. In **Bailey v Barnes** [1894] 1 Ch 25, Lindley LJ said, at page 36:

*“Equality, here, does not mean or refer to priority in point of time...Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other...”*

[143] In my judgment, even if the mortgage had not been registered, the provisional charging order would still have been unable to defeat it when one bears in mind

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<sup>31</sup> See *Air Jamaica Ltd v Stuart's Travel Service Limited* (unreported), Supreme Court, Jamaica, Claim No 1998/A-018, judgment delivered 24 February 2011, paragraph 31

the nature of a provisional charging order. Resultantly, GK Investments' delay in the registration of the mortgage is, in my view, though a factor to be considered, not highly determinative.

**[144]** In **Amari Lifestyle Ltd (trading as Amari Super Cars) v Warnes and others** [2018] Ch 161, Stephen Jourdan QC, sitting as a deputy High Court judge, said:

*“44 The legal mortgage was never registered against the title to the property... However, subject to the points argued by Mr Goldstone, it did take effect in equity as an equitable mortgage, which takes priority over the charge created by the charging order in favour of the claimant. A charging order has the like effect and is enforceable in the same courts and in the same manner as an equitable charge created by the debtor under his hand: section 3(4) of the Charging Orders Act 1979. A charging order therefore takes effect subject to any prior legal or equitable mortgages or charges.”*

**[145]** In considering priorities, it is noted, in Fisher and Lightwood's Law of Mortgage, that:

*“PRIORITIES*

*The position would appear to be that:*

*(1) a charging order takes effect subject to any prior mortgages or charges (whether legal or equitable) or, in registered land, any prior beneficial interests;*

*...*

*(6) where two creditors in otherwise similar positions have both obtained interim charging orders, one before the other, and both seek to have them made final, the Court has to weight up all the circumstances, in order to decide whether they have equal priority,*



*or the one which was obtained first should have priority over the one obtained second.”<sup>32</sup>*

[146] The UK does have statutes<sup>33</sup> which Jamaica does not have and it is important to bear that in mind when examining the UK decisions, texts and legal encyclopaedias.<sup>34</sup>

[147] Of note though is the Privy Council decision of **Wickham and Others v New Brunswick and Canada Railway and Land Company and Others (Canada)** (1865) LR 1 PC 64. Lord Chelmsford, at pages 75 and 76, said:

*“There is no doubt upon principle, as well as on the authority of the cases cited in the argument at the Bar, that the right of a Judgment creditor under an execution is to take the precise interest, and no more, which the debtor possesses in the property seized, and consequently that such property must be sold by the Sheriff with all the charges and incumbrances, legal and equitable, to which it was subject in the hands of the debtor. In other words, what the debtor has power to give is the exact measure of that which the execution creditor has to take.”*

*(Emphasis added)*

[148] This case has been cited because it expresses that upon principle what the debtor has power to give is the exact measure of that which the creditor has to take. Lord Chelmsford’s pronouncement seems similar to that of Lord Westbury in **Phillips v Phillips** (mentioned above in the extract from Owusu’s text), that the subsequent grantee takes only that which is left in the grantor. Lord Chelmsford was concerned with execution but by analogous reasoning, the property having already been

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<sup>32</sup> Lexis Nexis- Fisher and Lightwood’s Law of Mortgage/Part I Mortgages and Charges/Chapter 12 Charging orders/Priorities

<sup>33</sup> See for example the UK’s Charging Orders Act 1979, sections 3 (4) and (6), the Land Charges Act 1972, section 2 (4) and the Land Registration Act 2002, Part 5. In the UK, the Charging Orders Act specifically contemplates the protection of a charging order by an entry registered under the Land Charges Act 1972 or the Land Registration Act 2002.

<sup>34</sup> For example, Halsbury’s Laws of England. The passage cited by Barnaby J, at paragraph 22 of her judgment in *Sagicor Bank Jamaica Ltd v Marvalyn Taylor-Wright and Others* must be looked at in this light

encumbered by an equitable mortgage, prior to the provisional charging order, China Sinopharm can only 'take what is left'.

[149] Broadly speaking, I agree with the proposition that giving effect to equities that arise from a charging order should not involve a detrimental effect to any prior right existing in the property charged.<sup>35</sup>

[150] I must point out that the UK authorities are not without company. In **Moore v Devanjul Pty Ltd (No 5)** [2013] QSC 323, a case emanating from the Supreme Court of Queensland, McMeekin J said:

*"74. The second problem is a related one. Mr Moore seeks an immediate order that an interest in the land be transferred to him to the extent of the equitable charge or lien. It is well accepted that the creditor's rights cannot exceed those of the trustee. If the trustee has lawfully created interests in the trust assets in favour of third parties then the creditors must take subject to those rights...**These concerns are alleviated when it is appreciated that a charging order "does not either displace existing charges over the property concerned, nor is it immune from subsequently acquired interests."** United Travel Agencies Pty Ltd v Cain (1990) 20 NSWLR 566 at 571 per Young J."*

*(Emphasis added)*

[151] Based on the terms of the instrument of mortgage,<sup>36</sup> GK Investments was always vested with a contractual power of sale which, upon Hartland's default, it could have exercised with the court's assistance.

[152] It is atypical that the mortgage was registered over a year after the instrument was executed. No explanation was advanced for the late registration. There is no evidence before me as to what transpired. Most mortgagees are commercial

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<sup>35</sup> Of course, as previously acknowledged, there is no hard and fast rule

<sup>36</sup> See clause 3.03 of the Instrument of Mortgage

organisations that are able to act with the benefit of legal advice and it is reasonable to expect them to register their mortgages in good time, not only for priority purposes but also to ensure that they can make use of the powers the statute confers.

**[153]** It could be said that it is desirable that a register accurately reflects all encumbrances and interests bearing on or existing in every piece of land under the system. I appreciate Ms Hamilton's contention that the omission by a prior equitable owner will likely cause the creation of a later interest but, it cannot be ignored that generally speaking, the law recognises equitable interests and these may not always be noted on a title.<sup>37</sup> It is noteworthy that the Jamaican system of land registration recognises that a registered title can be defeated by adverse possession.

**[154]** In my judgment, the equitable mortgage could only be defeated if it is that the Registration of Titles Act provides for the registration of a provisional charging order, which thereafter clothes it with the status of a statutory/registered charge and entitles it to priority if it is registered first in time.

*Number of securities*

**[155]** In her submissions, Ms Hamilton brought the court's attention to the fact that GK Investments had a number of securities for their debt. The affidavit of Mr Leonardo Brown filed on July 30, 2021, outlines these securities at paragraph 5. The documents exhibited to Ms Mew's affidavit are also telling. There is no evidence before me as to the value of the properties which are not the subject of this application but there is evidence that GK Investments loaned \$65,000,000 to Hartlands. In my mind, the number of securities that GK Investments has cannot be looked at in a vacuum. Notably, the notations on some of the titles reveal that

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<sup>37</sup> See *National Import-Export Bank of Jamaica v Montego Bay Investment Company Limited* [2017] JMSC Civ 67, paragraph 55

GK Investments is not the first mortgagee. Further, one notation reveals that one property was recently transferred to NCB Insurance Company Limited.

[156] The affidavit of Ms Mews did not specifically address the issue of prejudice as it relates to GK Investments, but it was pointed out that the loan facility has not been repaid either wholly or partly and GK Investments is undoubtedly owed the largest amount.

**Certificate of Title registered at Volume 1528 Folio 242 (Strata Lot No 2)**

[157] Unlike China Sinopharm, Mr Riley and Ms Wellington only sought a charging order in respect of one of the properties, strata lot No 2.

[158] As previously mentioned, China Sinopharm obtained its provisional charging order one day before Mr Riley and Ms Wellington obtained theirs. Mrs Allen-Brown emphasised the circumstances that led to the grant of the provisional charging order later than China Sinopharm's. She pointed out that Mr Riley and Ms Wellington's application for a provisional charging order was in fact filed first in time but China Sinopharm's application was given an earlier hearing date. She essentially contended that had the applications been heard according to when they were filed, she would have been the first to bat.

[159] Mrs Allen-Brown also pointed out that Mr Riley and Ms Wellington's judgment debt is much smaller than China Sinopharm's judgment debt. It is my understanding that, in her view, the amount of monies owed and the likelihood of full debt satisfaction should be a major consideration. Mrs Allen-Brown further pointed out that China Sinopharm is a company while Mr Riley and Ms Wellington are individuals.

[160] I certainly appreciate the contentions of counsel regarding what transpired with the scheduling but if one were to follow her line of argument, it could be said that since China Sinopharm's claim was filed in May 2020, and Mr Riley and Ms Wellington's claim was filed in August 2020, it should be first in line to obtain a remedy. It could

also be said, and Ms Hamilton did in fact point this out, that China Sinopharm obtained default judgment before Mr Riley and Ms Wellington.

[161] I would have been grateful for an authority from counsel which shows the court's consideration of, as major factors, the amounts owed and whether the judgment creditor is a natural or juridical person. Again, it seems to me that the argument could be made that the court should favour the creditor who is owed more as he is in a more unenviable position, being out of pocket such a large amount. Ms Hamilton made these arguments.

[162] Though China Sinopharm is a company, the affidavit of Cui Jiao has painted a grim picture. In trying to carry out the agreement it had with RGA, China Sinopharm hired subcontractors and suppliers and these companies are now displeased because payment has not been forthcoming. One company has even instituted proceedings against China Sinopharm. A valuation of the property was exhibited to the affidavit of Ms Wellington filed August 25, 2021, and it divulges that, as at January 2021, the property was valued at \$13,500,000.00. This is significantly less than what is due to China Sinopharm.

[163] The position that Mr Riley and Ms Wellington have found themselves in is unfortunate; for many individuals those sums are a product of hard work and many years of saving. That may or may not be so for Mr Riley and Ms Wellington.

[164] In **Jennifer Messado and Company** (supra), Brown J said:

*“60...It is therefore clear that the court has a discretion whether or not to make a charging order, be it final or provisional. In other words, at either the ex parte hearing for the PCO or the hearing to make the PCO final, the court has to consider whether in all the circumstances the charging order should be granted and if it is to be granted, what its reach should be.”*

[165] When there are different parties and competing interests, it is not just to consider one perspective. In this case, with respect to Mr Riley and Ms Wellington, in my view, the equities are equal and I will follow the rule that the first in time shall

prevail. Mr Oswald Hamilton's affidavit filed on July 22, 2021 indicates that the provisional charging order was served on RGA. Therefore, a final charging order will be granted in favour of China Sinopharm in respect of strata lot No 2.

[166] Mrs Allen-Brown pointed out that the description of the property in the application for a charging order does not match the description of the property on the title. This, in my mind, is a minor issue given that the description in the application is substantially accurate and is sufficiently descriptive of the property to be charged. The discrepancy can, however, be corrected by an amendment.

### **Preliminary Objection**

[167] At the beginning of her written submissions Ms Hamilton took issue with statements made in the affidavit sworn by Ms Wellington. Given the approach of her oral submissions, it was my understanding that counsel did not wish to pursue this objection.

### **Costs**

[168] Part 48 of the CPR does not include provisions concerning how the court should treat with costs as regards interested person/objectors.

[169] I will therefore turn to Part 64 for guidance. Rule 64.3 is stated in broad terms, it provides:

*"Orders about costs*

*64.3 The court's powers to make orders about costs include power to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings."*

[170] Rule 64.9 reads, in part:

*"Costs against person who is not a party*

*64.9 (1) This rule applies where –*

*(a) an application is made for; or*

*(b) the court is considering whether to make,*

*an order that a person who is not a party to the proceedings nor the attorney-at-law to a party should pay the costs of some other person.*

...

*(3) If the court is considering making an order against a person it must give that person notice of the fact that it is minded to make such an order.*

*(4) A notice under paragraph (2) or (3) must state –*

*(a) the grounds of the application or on which the court is minded to make the order; and*

*(b) the date, time and place at which that person may attend to show cause why the order should not be made.*

*(5) The-*

*(a) registry, in the case of paragraph (3); or*

*(b) party seeking the order under paragraph (2),*

*must serve the notice on the person against whom the costs order is sought and all parties to the proceedings not less than 14 days before the date fixed for hearing the application.”*

**[171]** GK Investments is an interested person but since it was successful in its objections, a court order will not be made *against* it and a notice therefore need not be sent to the company.

**[172]** Mr Riley and Ms Wellington are, it seems to me, not only judgment creditors in respect of another claim before the court but they are interested persons in this application before me (not being a party to the claim). Their objections were not successful. If the court is minded to make a cost order against them, and I am so minded, they must be served with notice.

## CONCLUSION

[173] In the circumstances it is ordered as follows: -

- (1) The application for a final charging order, in respect of property known as No 5. Lady Musgrave Road, part of Kensington, strata lot no 14 together with one undivided 26/250<sup>th</sup> share in the common property, which is comprised in the certificate of title registered at Volume 1528 Folio 254, is refused. The notation by the Registrar of Titles of the provisional charging order granted by Palmer Hamilton J, on February 3, 2021, on said property is to be cancelled.
- (2) The application for a final charging order, in respect of property known as No 5. Lady Musgrave Road, part of Kensington, strata lot no 2 together with one undivided 15/250<sup>th</sup> share in the common property, which is comprised in the certificate of title registered at Volume 1528 Folio 242, is granted. The notation by the Registrar of Titles of the caveat lodged on March 8, 2021 on said property is to be removed.
- (3) Costs of this application are awarded (1) to GK Investments against China Sinopharm to be taxed if not agreed and (2) in respect of Mr Riley and Ms Wellington, notice to be sent to indicate that the court is minded to make a cost order against them.
- (4) China Sinopharm's attorneys-at-law to prepare, file and serve orders made herein. The Registrar of Titles is to be served.
- (5) Leave to Appeal is refused.