[2019] JMCC COMM 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2017 CD 00347

BETWEEN	**GEROGICS INVESTMENTS LIMITED**	**CLAIMANT**
AND	**JMMB MERCHANT BANK LIMITED**	**DEFENDANT**

IN OPEN COURT

Mr Gordon Robinson instructed by Mrs Winsome Marsh for the claimant

Mr Michael Hylton QC and Miss Shanique Scott instructed by Hylton Powell for the defendant

Heard: December 4, 2018, February 25 and October 7, 2019

Mortgage – Power of Sale – Whether the striking out of a claim is a bar to the enforcement of a mortgagee's power of sale

SIMMONS J

THE CLAIM

[1] The claimant, Gerogics Investments Limited ('Gerogics') is the registered proprietor of properties known as Haughton Hall Estate and Haughton Hall in the parish of Hanover registered at volume 1123 folio 16 and volume 1080 folio 370 respectively, of the Register Book of Titles ('the properties'). On 5 April 2007

mortgage no. 1465452 was registered on the certificates of title for the properties in favour of Capital and Credit Merchant Bank Limited ('Capital & Credit') to secure an alleged principal debt of United States Five Million Four Hundred and Seventy-Eight Thousand Seven Hundred and Fifty Dollars (US$5,478,750.00) with interest. On 29 August 2007 it was upstamped to secure an additional United States Ninety-Six Thousand Three Hundred and Eight Dollars and Twenty-Seven Cents (US$96, 308.27). The mortgage was admitted in evidence and marked as exhibit 2.

[2] On 28 June 2017,Gerogics, filed a fixed date claim form seeking among other things, a declaration that mortgage no. 1465452 registered on 5 April 2007 ('the mortgage') on its certificates of title registered at volume 1123 folio 16 and volume 1080 folio 370 of the Register Book of Titles together with any upstamping is invalid, void, of no effect, serves no legal purpose and ought to be discharged.

[3] The grounds upon which the orders are sought are set out below: -

(a) The alleged principal debt for which the said mortgage was purportedly security is unenforceable as against Gerogics.

(b) Since the said mortgage was issued as a security for an alleged principal debt only and itself gives rise to no principal obligation, the alleged principal debt's unenforceability automatically discharges all security purportedly given to secure that debt.

(c) Section 5 of the **Registration of Titles Act** (the **ROTA**), provides that any mortgage is security only; "shall not operate as a transfer of the land" unlike in the UK; and is only effective if "default be made in payment of the principal sum…"

(d) JMMB has admitted it cannot prove default in payment of the principal sum and any future attempt, including in this matter, to try to do so would be an abuse of the process of the court. Accordingly, the mortgage secures

no obligation or default that can be proven and, as such, must be discharged.

(e) The said mortgage was made on 13 February 2007 months after the alleged agreement for the principal debt on 3 November 2006 and accordingly, is made for past consideration which is no consideration at all is void and invalid.

(f) All other securities given in the matter of this alleged principal debt, including personal and corporate guarantees have been discharged as a consequence of the court's ruling so, a fortiori, the mortgage ought also to be discharged and JMMB in breach of duty is refusing to discharge the mortgage.

[4] It was subsequently ordered that the matter was to be treated as if begun by a claim form. The particulars of claim filed on 18 June 2018 seek the following orders:

(i) A declaration that the mortgage together with any upstamping is invalid, void, of no effect, serves no legal purpose and/or, is voidable at Gerogics' option and ought to be discharged;

(ii) An order that the mortgage and all collateral upstamping is hereby discharged;

(iii) An order that JMMB, at JMMB's expense, return to Gerogics, the said titles with the relevant discharge of mortgage duly registered thereon or, alternatively, an order directed to the Registrar of Titles that the said certificates of title can be cancelled and new certificates of title issued in the name of Gerogics as registered proprietor with the discharge of mortgage ordered hereby duly endorsed on the new titles;

(iv) Damages; and

(v) Aggravated or exemplary damages.

Background

[5] Prior to the filing of the present claim, Capital & Credit (now JMMB Merchant Bank Limited) ('JMMB'), filed two claims in which it sought to recover monies allegedly loaned to Gerogics. Exclusive Holidays of Elegance Limited ('Exclusive') and Mr Fred Smith ('Mr Smith') were sued as guarantors.

The first claim - claim no. 2012 CD 00035

[6] This claim was commenced on 1 May 2012 by Capital & Credit against Gerogics, Exclusive and Mr Smith.

[7] In that matter, Capital & Credit claimed the sum of United States Seven Million One Hundred and Thirty-Two Thousand Four Hundred and Thirty-Three Dollars and Six Cents (US$7,132,433.06) which represented the principal outstanding on a loan granted to Gerogics plus interest and other expenses. The second and third defendants were sued as guarantors of the loan.

[8] The amended particulars of claim state that in November 2006, Capital & Credit agreed to lend United States Five Million Four Hundred and Seventy-Eight Thousand Seven Hundred and Fifty Dollars (US$5,478,750.00) to Gerogics. That sum was to be repaid over a period of 24 months from the date of initial disbursement. The terms and conditions of the loan were set out in a letter of commitment dated 1 November 2006.

[9] A promissory note was issued in favour of Capital & Credit for the sum of United States Five Million Four Hundred and Seventy-Eight Thousand Seven Hundred and Fifty Dollars (US$5,478,750.00) plus interest as security for the alleged loan. The alleged loan was also secured by a mortgage over the properties owned by Gerogics and by guarantees from Exclusive and Mr Smith.

[10] In March 2007 another loan was said to have been granted to Gerogics and a second promissory note issued. This loan was also guaranteed by Exclusive and Mr Smith.

[11] Gerogics defaulted in its payments and the loans were restructured on two occasions.[1] Gerogics subsequently failed to make the payments as agreed and a claim was filed for the recovery of the sums owing.

[12] The trial commenced before Mangatal J but was discontinued due to Capital & Credit's difficulty in proving the existence of the loans.[2]

The second claim - claim no. 2014 CD 00128

[13] On 10 November 2014, JMMB (formerly known as Capital & Credit) initiated a claim against Gerogics, Exclusive and Mr Smith, in respect of the same loan plus interest. By this time, the interest had increased the sum due to United States Eight Million Nine Hundred and Forty-Nine Thousand Four Hundred Dollars and Thirty-Nine Cents (US$8,949,400.39), inclusive of interest to 31 July 2014.

[14] This claim was struck out as being an abuse of the court's process. Sykes J (as he then was) stated:

> *"It is clear then that other than the sums of money claimed whether as principal, interest or recoverable expenses the claims are identical. The parties are the same except for the name change of the claimant from Capital & Credit Merchant Bank to JMMB Merchant Bank Limited. There is no new cause of action in the second claim."*

[15] However, the saga did not end there. JMMB's spirits were not dashed. On receipt of a request from Gerogics' attorneys-at-law for the discharge of the mortgage and

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[1] May 2009 and May 2010
[2] Detailed in the judgment of Sykes J in ***JMMB Merchant Bank Limited v Gerogics Investments Limited et al*** [2016] JMSC COMM 12

the return of the certificates of title, it promptly communicated its refusal. The reason stated for its refusal is that a mortgagee's power of sale can be exercised independently of court proceedings. It is that indication which has spurred Gerogics into action and has given rise to the present claim.

The Present Claim

[16] In this claim, the tables have turned. Gerogics is now the claimant. It is seeking the discharge of the mortgage and the return of its certificates of title for the properties.

[17] The particulars of claim in addition to reciting the history of the litigation between the parties, state that on 30 May 2017 Mrs Patricia Duncan-Sutherland ('Mrs Duncan-Sutherland'), a director of JMMB, informed Mr Smith by telephone, that she had located a purchaser for the properties who was willing to pay United States Six Million Five Hundred Thousand Dollars (US$6,500,000.00) for their purchase. During the said telephone conversation, she asked him to come in and sign a power of attorney authorising JMMB to sell the properties at that price.

[18] Gerogics contends that JMMB by the above request, has admitted that it has no independent authority to sell the property pursuant to the alleged mortgage. Gerogics also contends that the contents of the said telephone conversation is an express admission by JMMB that the said mortgage is invalid, void, of no effect, served no legal purpose and/or, is voidable at Gerogics' option and ought to be discharged.

[19] Further, JMMB has no power in law, whether pursuant to the **ROTA** or under the original mortgage deed, to sell or otherwise to use the security given thereunder, unless a default of the alleged principal debt can be proved.

[20] Gerogics also stated that since JMMB has failed to prove the principal debt in the two prior claims filed, there can be no default which would give JMMB the legal right to retain the certificates of title or sell the properties concerned.

[21] It is alleged that JMMB's refusal to release the certificates of title for the properties and discharge the said mortgage has caused and continues to cause Gerogics damage, loss, expense, inconvenience and loss of opportunity.

THE DEFENCE

[22] JMMB has denied that the mortgage was used to secure an alleged principal debt of United States Five Million Four Hundred and Seventy-Eight Dollars (US$5,478,000.00) with interest. It has stated that it is an "all monies mortgage" in that it was granted and registered to secure all monies payable to JMMB by Gerogics.

[23] It was pointed out that in clause 1(a)(i) of the mortgage, Gerogics covenanted to pay to the bank "…*all such sums of money as are now or shall from time to time hereafter be or become owing to the [Bank] in respect of monies advanced or paid to or for the use of the mortgagor*…"

[24] Clause 2(c) of the said mortgage provides:

> *"This security shall be a continuing security and shall avail the mortgagee in respect of all present and future indebtedness of the mortgagor and any accounts whatever."*

[25] JMMB admitted that the mortgage was upstamped. It was stated that this was effected pursuant to clause 2(g).

[26] It was also asserted that the mortgage is valid and enforceable.

[27] JMMB admitted that one of its directors, Mrs Duncan-Sutherland, telephoned Mr Smith and asked him whether Gerogics would make an application to subdivide the property or execute a power of attorney authorising it to do so, on Gerogics' behalf.

[28] JMMB also stated that it has no intention of releasing the certificates of title for the properties unless and until the debt owed to it by Gerogics and secured by the

mortgage is paid. JMMB has denied that it is seeking to unlawfully dispose of the properties and that the loan was made and disbursed before the mortgage was granted. It also denied that the loan cannot be proven or enforced and that it has no legal right to keep possession of the said title or to exercise its powers of sale.

[29] In the circumstances, it has asserted that Gerogics is not entitled to the relief claimed.

The evidence

A. *Gerogics' case*

[30] Gerogics relied on one witness at the trial, Mr Smith. Mr Smith is a businessman and a director of Gerogics.

[31] In his evidence in chief, Mr Smith stated that in 2006 an informal arrangement was made between himself and Mr Ryland Campbell ('Mr Campbell'), who according to him owned and controlled Capital & Credit. He asserted that this arrangement was never the subject of a loan agreement. He did however, state that Mr Campbell had asked him to sign certain security documents, including a mortgage of the properties, and he complied with that request. He stated that the only arrangement he made in relation to financing was an informal agreement with his friend Mr Campbell. He indicated that he did not enter into any agreement with any bank. He did however recall receiving a letter of intent from Capital & Credit which he signed "at Ryland's [Mr Campbell's] request" indicating acceptance of Capital & Credit's intention to grant a loan to Gerogics. His evidence is that Capital & Credit's intent was never converted into an actual loan.

[32] Where the mortgage is concerned, Mr Smith stated that he did not intend to give Capital & Credit the right to sell the properties in the absence of a loan agreement or its ability to prove either the loan or default.

[33] He stated that after JMMB took over ownership and control of Capital & Credit he received a letter purporting to call the alleged loan.

[34] The witness also stated that it is his understanding that as a result of the judgment of Sykes J, any attempt by JMMB to prove the existence of the loan or Gerogics' default, would be an abuse of process.

[35] He also gave evidence about the previously mentioned telephone call that he received from Mrs Duncan-Sutherland. His evidence was that this telephone call took place on 3 May 2017, and that Mrs Duncan-Sutherland informed him that JMMB had found a buyer for the properties. He stated that she asked him to sign a power of attorney to permit JMMB to enter into a sale agreement with the proposed purchaser. After consultation with Gerogics' Financial Advisor, Miss Okelia Parredon, he decided not to respond to Mrs Duncan-Sutherland's request.

[36] Mr Smith also stated that he had no dealings with Mr Andrew Cocking, an officer of Capital & Credit and subsequent director of JMMB, before 2016. He also stated that he had no dealings with any committee of Capital & Credit. He testified that he did not make a loan application to Capital & Credit.

Cross-examination

[37] During cross-examination, Mr Smith said that he is involved in tourism. He stated that he owned a business in tourism called Exclusive. He gave evidence that he does not own Tropical Tours. He stated that it is a company to which he was employed. He did however, state that he could have been on the boards of Exclusive and Tropical Tours in either 2005 or 2006.

[38] Mr Smith testified that he is a graduate of a programme at the Stanford University School of Business. He stated that Ms Thamani Roxanne Smith ('Ms Smith'), who is a lawyer, is his daughter. He indicated that it is possible that she was a director or secretary of Gerogics in 2006.

[39] He stated that when Gerogics was formed names were added, which included his daughter's but he was not sure whether her name was added as a director or shareholder.

[40] Mr Smith gave evidence that Mr Campbell is his friend. He said that he sought to borrow some money from him and that it was an informal arrangement.

[41] He stated that the properties became available for sale and he had discussions with Mr Campbell, who also had an interest. He stated that Mr Campbell told him that he would take care of it. He stated that they would both have an interest in the properties.

[42] He testified that the title to property called Haughton Hall could be the property. He gave evidence that it is referred to as Green Island. Mr Smith stated that the properties he discussed with Mr Campbell were transferred to Gerogics. He gave evidence that he has no recollection of the purchase price.

[43] Mr Smith stated that he has never collected a cheque from JMMB on behalf of Gerogics and that he does not remember signing any agreement. He also stated that he could not recall if Gerogics ever had a loan agreement with Capital & Credit and that Capital & Credit was not Gerogics' banker.

[44] Mr Smith stated that he does not recall Gerogics having an agreement for a loan of United States Five Million Dollars (US$5,000,000.00). He stated that Mr Campbell and himself had an arrangement.

[45] Learned Queen's Counsel, Mr Hylton, directed Mr Smith's attention to paragraph five (5) of his witness statement, which reads:

> *"Gerogics defended the first suit on many grounds including that nothing was owed. I maintain that there was never any loan made to Gerogics by JMMB under previous names or incarnations and that the informal arrangement between Gerogics and Ryland Campbell was honoured by Gerogics. Gerogics has no debt to JMMB nor has it ever defaulted on any agreement with JMMB or with Ryland Campbell."*

[46] Mr Smith when questioned about this paragraph and he stated that he wants to say that whatever is written on the paper is correct.

[47] He stated that Gerogics has not made payments to JMMB and that he had an arrangement with Mr Campbell who communicated with him and asked him to *"do things in a certain way".*

[48] He also stated that he does not remember what was in the first claim. He also stated that paragraph 5 of his witness statement which refers to *"the first suit"* he was speaking of the proceedings before Mangatal J. He indicated that in respect of his assertion in that paragraph, that claim was defended on the basis that nothing was owed, but that he would have to refresh his memory.

[49] Mr Hylton directed Mr Smith's attention to a copy of the judgment of Sykes J in the second claim - claim no. 2014 CD 00128, specifically, paragraph [38], which provides in part:

> *"The court will add a further extract from Mr. Robinson's comments. Learned counsel is recorded as saying:*
>
> > *Mr. Robinson: Precisely. And I have told my client after he wins this case today, on the assumption that he wins it, and he gets away with having to pay zero of this money that he did borrow, he now has to continue business in Jamaica and operate with other banks and nobody will lend him a dollar, so we are anxious to pay; but the truth of the matter is we cannot pay what we don't have. I don't know what the bank thinks is available to it, but it seems to believe that bad debts are the same as good debts, so less (sic) go…"*

[50] He was then asked whether his counsel, Mr Robinson, made the comment therein outlined. Mr Smith stated that he does not recall all the things that Mr Robinson had said.

[51] Mr Smith was also questioned in relation to paragraph [42] of the judgment, which provides, in part:

> *"Her Ladyship engaged in the following exchange with Mr Gordon Robinson.*

…

Mr Gordon Robinson: …It is a most usual loan which is the reason why Mr Ferguson can't recall and I promise you faithfully that when Mr Wint comes, he won't be able to recall either because this is a most unusual loan.

Her Ladyship: I have read enough to see what you are saying.

Mr Gordon Robinson: It's one thing to say money has been loan (sic), you know, ma'am. Money has been loaned. The issue is, can a loan agreement be enforced against the borrower. This is why he have court…"

[52] Mr Smith was again asked about Mr Robinson's statement. He testified that he had no reason to doubt that those words were said but he could not recall if they had in fact been said.

[53] With respect to the mortgage, Mr Smith stated that one of the signatures is his and the other is that of Ms Smith, his daughter.

[54] His attention was also directed to paragraph 3 of his witness statement, which provides:

"That informal arrangement was never the subject of any loan agreement and was being honoured by Gerogics when, in 2011, after new principals had taken over ownership and control of CCMB, Gerogics received a letter purporting to call an alleged "loan." When asked why, then President of the Bank Curtis Martin's first response was that BOJ allowed the Bank to call loans even if they were fully paid up because of lack of proper documentation. I did not believe then and I do not believe now that BOJ would, in any way, interfere with any banker/customer relationship nor would it specifically authorize or order any individual loan to be called. I do believe the Bank didn't then and does not now have any documentation to establish that any loan was ever agreed with the Bank. The only agreement I made regarding any financing whatsoever was the informal agreement with my friend Ryland and not with any Bank. I do recall receiving, on Gerogics' behalf, a letter of intent from the

Bank which, again on behalf of Gerogics and at Ryland's request, I signed as accepting the Bank's intent but the Bank's intent was never converted into any actual loan."

[55] Mr Smith stated that he did not recall why he called the document a letter of intent.

[56] When his attention was directed the commitment letter dated 1 November 2006, Mr Smith stated that he did not think that that document was the letter of intent which he had referred to in his witness statement. He identified his and his daughter's signatures on the form of acceptance dated 3 November 2006.

[57] The witness also stated that one of the security documents referred to in his witness statement is the promissory note dated 13 February 2007 which *"Ryland"* (i.e. Mr Campbell) had asked him to sign. Paragraph 4 of the witness statement provides as follows:

"For his internal purposes, Ryland asked me to sign certain security documents including a mortgage of the property to the Bank which I did. However, I understood these documents to be security documents only and not intended to give the bank ownership of Gerogics' property or the right to sell same in the absence of any default by Gerogics; or in the absence of the bank's ability to prove either loan or default."

[58] He stated that he and his daughter signed the promissory note at the request of Mr Campbell.

[59] He also identified his signature on the borrowing resolution of Gerogics dated 13 February 2006. The resolution states in part:

"BE IT RESOLVED that the Company do obtain loan and credit financing in the sum of FIVE MILLION, FOUR HUNDRED SEVENTY-EIGHT THOUSAND, SEVEN HUNDRED AND FIFTY DOLLARS UNITED STATES CURRENCY (US$5,478,750.00) from CAPITAL & CREDIT MERCHANT BANK LIMITED…to assist in financing the purchase of 620 acres of land known as Haughton Hall estate in the parish of Hanover registered at volume 1123 Folio 16 of the Register Book of Titles AND THAT the said sum and interest

thereon be secured by way of a promissory Note issued by the Company to CCMB supported by:

a) A first legal mortgage over 620 acres of land …. Hanover registered at volume 1123 Folio 16 of the Register Book of Titles in the name of Gerogics Investments Limited.

AND BE IT FURTHER RESOLVED that CCMB's Commitment Letter of 2006 and the aforementioned Promissory Note and Mortgage document in respect of this facility be executed on behalf of the Company by two Directors or a Director and Secretary of the Company under its common seal."

[60] He indicated that he had seen letters which had been exchanged between JMMB and his attorneys. The letters which were marked as exhibits 4, 6 and 7, were shown to Mr Smith. He stated that he did not know that JMMB's position is that the mortgage is valid.

[61] It was suggested to Mr Smith that JMMB never asked him to sign a power of attorney to sell the property. Mr Smith stated that Mrs Duncan-Sutherland had made that request on its behalf after the letter dated 1 November 2016 was sent to JMMB from his attorney requesting the release of the certificates of title and the execution of forms of discharge of mortgage.

[62] It was further suggested to Mr Smith that she did not ask him to sign a power of attorney to permit the subdivision of the property, to which Mr Smith responded - that is not true.

[63] In response to the suggestion that Mrs Duncan-Sutherland had said that JMMB's lawyers would prepare the power of attorney, Mr Smith stated that they spoke about selling and Mrs Duncan-Sutherland had indicated she had a prospective purchaser. He stated that there was no discussion about subdivision of the properties.

[64] When it was suggested to Mr Smith that Mr Campbell did not own or control Capital & Credit, he stated that Mr Campbell is his friend who spends time at his house and that he was led to believe that Mr Campbell owned and controlled that entity.

Re-examination

[65] Mr Smith was re-examined in respect to paragraph 1 of the amended defence filed by Gerogics in the first claim,[3] which reads:

> *"The Defendants dispute the claim on the following grounds:*
>
> *Paragraphs 2, 3, 4, 5, 6 and 7 of the Amended Particulars of Claim are admitted save and except that as regards paragraph 4 and of the Amended Particulars of Claim, the Defendant's say that the sum loaned to the 1st Defendant was US$ 5, 478, 699.67 and not US$ 5, 478,750.00 as alleged therein."*

[66] He stated that in 2013 they needed somebody to do the case and he was not exposed to the documents. He said it was the attorney's idea to draft the defence in that way. He stated that since then he came to realize that it should not have been written that way. He indicated that it is a documentation issue.

B. *JMMB's case*

[67] JMMB relied on two witnesses at the trial; Mr Andrew Cocking ('Mr Cocking') and Mrs Duncan-Sutherland. Mr Cocking is a retired banker and an independent financial consultant. In 2006 and 2007, he was a director of JMMB. Mrs. Duncan-Sutherland is one of the directors of JMMB.

Mr Cocking's evidence

[68] Mr Cocking indicated that he was employed to Capital & Credit which was started on 24 January 1994. He stated that he was the first officer of that entity and was

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[3] Claim No. 2012 CD00035 filed 30 April 2013

a shareholder and its first president. He served as its president until 2003. Mr. Cocking testified that he remained on the Credit Investment Committee ('the committee') until Capital & Credit was sold to JMMB Group in 2012.

[69] His witness statement is dated 13 November 2018. He stated that paragraph three (3) of his statement contains an error, in that the date of the memoranda is incorrectly stated to be 2016. He indicated it should read 2006.

[70] Mr Cocking's attention was directed to paragraph two (2) of his witness statement which reads:

> *"In 2006 and 2007 I was a director of the Defendant (which was then known as Capital & Credit Merchant Bank Limited), and a member of its Credit Investment Committee ("the Committee"), which was responsible for reviewing and approving loan applications."*

[71] Mr Cocking was then referred to the memoranda from the credit department of Capital & Credit ('the credit department') to the committee dated 23 and 31 October 2006 respectively. He stated that the documents came to the committee for approval. He testified that they are the documents he referred to in paragraph three (3) of his witness statement which provides:

> *"In October 2006, the Committee received two memoranda dated October 23, and 31, 2016 (sic) recommending approval of a loan to the Claimant, Gerogics Investment Limited ("Gerogics"). The members of the Committee including me approved the loan request by signing the two memoranda. I attach copies of the memoranda marked "AC-1" for identity."*

[72] Mr Cocking stated that he was a member of the committee and his signature appears on the above documents to the right of the chairman's signature.

[73] His attention was once again directed to paragraph two (2) of his witness statement. He stated that he helped to design the approval process based on his experience as a banker. Mr Cocking testified that the credit department reviews all credits which are then sent to the committee after they have been analysed. The

committee will then conduct an in depth analysis and if the loan is approved, the documentation will be signed by its members. At that stage the credit department will issue a commitment letter to the customer setting out the terms and conditions of the loan. The commitment letter will then be sent to the customer for signing. He indicated that there is a page on which the conditions for the grant of the loan are set out and the customer is asked to sign the letter acknowledging his or her agreement with those terms and conditions. Mr Cocking stated that when a loan is being granted there may be a loan agreement but this is not always necessary. He indicated that once approved by the customer, the commitment letter goes to the legal and security department. That department he said, ensures that the terms and conditions are met, and if so, the securities are perfected. Once perfected, the legal and security department alerts the credit department which will then send a letter of undertaking to the customer.

[74] Mr Cocking was then referred to the commitment letter dated 1 November 2006 and the letter dated 6 February 2007, from Ripton McPherson & Co to Capital & Credit, which was addressed for his attention. Mr Cocking stated that he did not receive those letters as he was not the President of Capital & Credit at that time. He stated that he was President from 1994 to 2003.

[75] Mr Cocking's attention was directed to paragraph two (2) of the witness statement of Mr Smith which reads:

> *"In 2012, Gerogics was sued by the Defendant (hereinafter "JMMB") to recover an alleged debt that was not owed by Gerogics. The allegations made in that suit (hereinafter "the first suit") arose out of a lack of knowledge on the part of JMMB's principals at the time regarding an informal arrangement between myself and a friend, Ryland Campbell, who, in 2006 when this informal arrangement was made, owned and controlled the Defendant [then known as Capital and Credit Merchant Bank Limited (CCMB)]."*

[76] The witness testified that he found the above statement perplexing. He stated that Capital & Credit became a public company and was listed on the Jamaica Stock

Exchange in May 2003. He stated that at the time when the loans were granted it was public company and was run in such a way that no one individual made decisions. He also indicated that the credit department was comprised of three persons and loans could not be granted without its approval. He stated that all loans were considered by the committee which was not an informal body. He reiterated that the decision of whether to grant a loan was not the responsibility of any one individual.

Cross-examination

[77] During cross-examination, Mr Cocking stated that he retired from banking in 2012 and sold his shares when JMMB assumed ownership of Capital & Credit. He currently sits on JMMB's Board.

[78] Mr Cocking gave evidence that he, along with Mr Curtis Martin and Mr Ryland Campbell were members of the committee.

[79] Mr Cocking when directed to 'document 11' of the bundle of exhibits (memorandum dated 23 October 2006), which was marked for identity, stated that he did not agree that it was an approval of a loan to purchase the Haughton Hall property. Mr Cocking stated that it was a request for an additional amount of United States two hundred and twenty-eight thousand seven hundred and fifty dollars (US$228,750.00) which was required for the upstamping of the documents and the payment of duties associated with the purchase. He indicated that the document states that the loan was approved on 12 October 2006. He testified that the properties could not be purchased without additional funds.

[80] Mr Cocking's attention was also directed to paragraphs two (2), three (3), four (4) and five (5) of the memorandum dated 31 October 2006), which was marked for identity which reads:

> *"The Sale Agreement submitted in support of the application was not in the name of the borrowing company, Exclusive Holidays of*

Elegance Ltd, but the agreement however provided for the transfer of the property to the purchaser or a nominee.

The customer is therefore exercising its right to name a nominee under the Agreement and has indicated that the property will be registered in the name of a related company, Gerogics Investments Limited, a company registered in Jamaica. We are in receipt of the relevant company documents for this entity and have requested a search at the Companies office to verify the its (sic) status and legal standing.

Given that Gerogics Investments Ltd will be acquiring the property, the customer is requesting that the borrowing entity be changed from Exclusive Holidays of Elegance Ltd to Gerogics Investments Limited.

Exclusive Holidays of Elegance Ltd will provide a Guarantee for the loan and will represent the source for loan payments as Gerogics Investments Ltd is merely a holding company without the relevant cash flow to service the debt."

[81] Mr Cocking testified that this document was to done to reflect the change of the borrower from Exclusive to Gerogics. He indicated that whenever there was any change in respect of a loan, the matter had to be referred back to the committee.

[82] Mr Cocking's attention was also directed to the letter dated 8 November 2006 from Capital & Credit to Ripton McPherson & Co. His evidence is that it was signed by Mr Curtis Martin and Mr Ryland Campbell and not him. He indicated that he was unaware that Gerogics had been represented by Ripton McPherson & Co.

[83] He stated that the above letter was an offer of finance to Gerogics and that the normal banking practise is that the legal and security department would ensure that all the terms and conditions were complied with. He stated that he did not know if it was the usual practice for Capital & Credit to give an "irrevocable undertaking" to pay the sum specified based only on an offer of finance. He testified that it could only be done with the approval of the legal and security department and there was no document from that department.

[84] Mr Cocking stated that the letter of 8 November 2006, which was an offer of finance to Gerogics was written by Mr Curtis Martin[4] and Mr Campbell, was not copied to that department. He indicated that it was not the practice to do so but the legal and security department would have been aware of the letter.

[85] Mr Cocking testified that the loan process starts with an application by the proposed borrower who would provide financial information such as balance sheets, profit and loss accounts and cash flow reports to help the bank do its due diligence. He stated that the bank's credit department would deal with this aspect. He did however state that an application form was not necessary.

[86] He gave evidence that, if the borrower is a start-up company, it would not have audited financial statements so the bank would ask for a guarantee from an existing company. He stated that generally a borrower would be required to present cash flow projections. Mr Cocking stated that cash flow projections are necessary in assessing the ability to repay the loan.

[87] He stated that most financial institutions have a standard template which is used to the do the analysis. This template allows the credit officer to put in information regarding the loan. After due diligence, the analysis is presented to the committee which is a committee of the board. If it is not supported, it will not be submitted.

[88] Mr Cocking testified that based on the recommendation of credit department, the committee would review and assess the loan application to decide whether it will be denied or approved.

[89] In outlining factors that would move the committee to reject a recommendation from a credit officer, Mr Cocking gave evidence that the committee might believe that the customer will be unable to service the loan, or a judgment may be made

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[4] President and CEO

based on what is happening in the industry or marketplace, or the character of the proposed borrower, for example, a corporate entity which is not in good standing.

[90] Mr Cocking stated that when the committee signs off on the loan, a commitment letter is prepared. He stated that he is unable to say whether he has seen an agreement which includes a provision which specified the date on which a mortgage commitment is required to be done.

[91] Mr Cocking also stated that the commitment letter is, in many cases, the loan agreement, although, in some cases there is a separate loan agreement. He stated that a loan agreement is not necessary if the commitment letter contains the terms and conditions accepted by the customer. His evidence is that the dates are filled in by the legal and securities department.

[92] Mr Cocking testified that in this case there was no loan application form from Gerogics. He stated that it was not required. He stated that Gerogics was a start-up company and as such had no financial statements. Exclusive who guaranteed the loan would have provided its financial information.

[93] When his attention was directed to paragraph three (3) of his witness statement which stated that there was a loan request from Gerogics, Mr Cocking stated that the request for a loan was made by Exclusive and Gerogics was Exclusive's nominee for the receipt of the funds.

[94] He disagreed that there was no loan request from Gerogics. He stated that the original borrower was Exclusive. He stated that Gerogics was a start-up company that had just been registered and was not yet active. He restated that a start-up company may not have cash flow projections and such a company had no record of doing business. The bank he said, would not loan money to such an entity unless the company had some form of support. He stated that it is not unusual in banking to lend money to a start-up company if the lending institution was confident that the company and its guarantor have the capacity to repay the loan.

[95] Mr Cocking gave evidence that this case was one of asset lending where the borrower had an asset which was valued at almost twice the amount of the loan. He explained that in such a case an institution would feel that it has coverage. In addition, it had a guarantee of a company and an individual. In such a case the need for cash flow projections from a start-up company is not critical or necessary. He stated that the asset in this case was owned by Gerogics and not the guarantors.

[96] Mr Cocking restated that the original borrower was Exclusive which requested that the loan amount be paid to its nominee (Gerogics) and the asset being acquired was to be placed in Gerogics' name.

[97] Mr. Cocking was asked about the basis on which he stated that Gerogics was a start-up company. He stated that a search was done at the office of the Registrar of Companies to verify its status and legal standing. When it was suggested to him that Capital & Credit knew that Gerogics was a holding company, the witness indicated that that information was not disclosed in the relevant documents.

[98] When Mr Cocking's attention was again directed to the memorandum dated 31 October 2006 in which it was stated that *"…Gerogics Investments Ltd is merely a holding company"* he said that he was depending on Exclusive to pay the debt. He also indicated that Exclusive was one source from which the debt could be recovered. He stated that he did not know what happened to the guarantee from Exclusive.

[99] He also gave evidence that the loan was granted to Gerogics with the knowledge that it did not have the capacity to repay. When counsel asked whether a loan was made to a holding company without the relevant cash flow to service the debt, Mr Cocking testified that the value of the asset that was being acquired was twice the amount of the sum borrowed.

[100] He stated that the commitment letter is sometimes used to proceed with the transaction and agreed that there was no formal loan agreement before the court.

[101] Mr Cocking's attention was directed to the letter dated 8 November 2006 from Capital & Credit to Ripton McPherson & Co. He indicated that the credit had already been approved. When asked whether Mr Curtis Martin and Mr Ryland Campbell had taken control of the situation and communicated an irrevocable undertaking, Mr Cocking stated that-that is what was indicated in the document.

[102] He testified that once the credit is approved by the committee and the commitment letter comes back to the bank, the legal and securities department would ensure that all requirements had been met. He stated that all members of the committee must vote in favour of granting the loan and if one member disagrees it will not be granted.

[103] He disagreed with the suggestion that based on the memoranda, Gerogics never applied for a loan. Mr Cocking's attention was directed to the memorandum dated 31 October 2006 and he was asked whether in the beginning the loan application was from Gerogics. His evidence is that Exclusive made the application and exercised its right to name a nominee and indicated that the property would be registered in the name of its nominee.

[104] He stated that the bank had no relationship with Gerogics up to this point and that there was no loan application from Gerogics; it was Exclusive which requested that the loan be made to Gerogics. He testified that on it was on that basis that on 8 November 2006, Capital & Credit gave an irrevocable undertaking to Ripton McPherson & Co who was representing the vendor in the purchase of the property. He stated that he did not consider it to be an informal arrangement.

Mrs Duncan-Sutherland's evidence

[105] Mrs Duncan-Sutherland's witness statement, which was permitted to stand as her evidence in chief, is dated 25 September 2018.

[106] Learned Queen's Counsel commenced by asking her to comment on paragraphs 12 and 13 of the witness statement of Mr Smith. Paragraph 12 provides as follows:

> *"On May 30, 2017, I was in Miami in the United States of America travelling along the "I95" when the phone rang and I answered. The person said this is Patricia Sutherland. I said "Hi Miss Pat." Then she proceeded to tell me that she had found a buyer for the property who was prepared to pay USD$6.5 million for the property. She asked me to sign a Power of Attorney in order to permit the Defendant to enter into a sale agreement and then complete the sale. I said to her that I would first need to discuss it with Gerogics' Lawyers. She said "you know how those Lawyers complicate things" and that I could just use "our Lawyers". By "our Lawyers", I understood her to mean JMMB's lawyers."*

[107] Paragraph 13 provides as follows:

> *"I insisted that I needed to first speak with my lawyers. She then suggested we could do a three-way-call immediately. I again said "no" because I needed to speak with my Lawyers first and told her that I would call her when I returned to Jamaica in a week. She asked if I could get back to her by the following Wednesday, which would have been less than the one week I had proposed. Only the two of us spoke during this telephone conversation."*

[108] In commenting on these paragraphs, Mrs Duncan-Sutherland said that she had met Mr Smith before and they were acquaintances. She stated that she told him that they had found a buyer for the property but did not recall giving him a price. Her evidence is that she asked Mr Smith to sign a power of attorney to permit its subdivision in order to make the property "shovel ready". She explained that is the term that is used where the property is being prepared for use in the tourism industry and includes getting approvals from National Environmental Protection Authority (NEPA) and the Parish Council where necessary, so that the buyer can start construction immediately.

[109] Mrs Duncan-Sutherland testified that she did not ask for a power of attorney to complete the sale as that was not necessary. She stated that Mr Smith stated that he wished to speak with his attorneys. This conversation took place on the Tuesday and she indicated that she would get back to him on Wednesday. She

said that only the two of them spoke and that she did not recall saying that lawyers complicate things but may have done so.

Cross-examination

[110] During cross-examination, Mrs Duncan-Sutherland stated that she has been in the financial sector since 1994. Her attention was directed the mortgage dated 13 February 2007. She testified that it was not the first or second mortgage that she has seen.

[111] Her attention was then referred to page seven (7) of the document, clause(h), which concerns the statutory powers of sale and reads:

> *"The statutory powers of sale and of appointing a Receiver and all powers conferred in mortgagees by the Registration of Titles Act may be exercised by the Mortgagee not only on the happening of the events mentioned in the said Act, but also upon any default after any demand for payment of the monies hereby secured or any part thereof or immediately upon any other default in or non-compliance with any of the covenants, conditions or obligations on the part of the Mortgagor herein contained or hereunder implied and whenever or whereupon the principal interest or other moneys secured hereunder shall become payable without it being necessary in any one or more of such cases to serve any notice or demand on the Mortgagor anything in the Registration of the Titles Act or any other Act or Law to the contrary notwithstanding BUT upon any sale made under the statutory power the purchaser shall not be bound or concerned to see or enquire whether such sale is consistent with this proviso and if a sale is made in breach thereof the title of the purchaser shall not be impaired in that account."*

[112] Mrs Duncan-Sutherland was asked whether she understood the clause to be conferring on the bank the right to sell. She stated that the clause says you can sell or appoint a receiver under the Act.

[113] She said that clause (l) which reads:

> *"The Mortgagee has the right to assign, transfer, dispose and otherwise deal with all its interest under this security without the consent of or notice to the Mortgagor",*

means that Mr. Smith was not needed by Capital & Credit as long as its acts were covered under the contract.

[114] Her attention was also directed to page six (6), clause (f), which reads:

> *"The Mortgagor irrevocably and by way of security, appoints each of them, the Mortgagee and any person nominated for the purpose by the Mortgagee in writing under hand by an officer of the Mortgagee (including every Receiver appointed by it) severally as attorney of the Mortgagee for the Mortgagee and in their names and on their behalf and as their act and deed to execute, seal and deliver and otherwise perfect and do any deed, assurance, agreement, instrument, act or thing which it ought to execute and do under the covenants undertakings and provisions contained in this security or which may be required or deemed proper in the exercise of any rights or powers under this security under the Registration of Titles Act and the Mortgagor covenants with the Mortgagee to ratify and confirm all acts or things made, done or executed by such attorney as specified above."*

[115] Mrs Duncan-Sutherland testified that her understanding of the above clause is that Capital & Credit did not need a power of attorney from Mr Smith to sell the property.

[116] Her attention was directed to JMMB's supplemental list of documents filed 15 March 2018. She indicated that one of the documents included in the list was the option to purchase agreement between JMMB and Panorama International Inc dated 27 November 2017.

[117] Mrs Duncan-Sutherland stated that JMMB entered into an option agreement in November 2017 to sell property. That document was admitted in evidence by consent as exhibit 13. It was pointed out that the option was entered into on 27 November 2017 and the option period was six (6) months from that date (clause 1, page 2 of the document) and the draft agreement was annexed.

[118] Mrs Duncan-Sutherland stated that, having not read the document in detail, she assumes that, had the option been exercised, this would be the terms of the agreement.

[119] It was pointed out that the prospective purchaser was a Texas Corporation and the purchase price was Six Million Eight Hundred and Forty-Two Thousand One Hundred and Five United States dollars (US$6,842,105.00).

[120] Her attention was then directed to the special conditions of the draft sale agreement. It was stated (by counsel) that condition 1 is usual. In respect of condition 2, Mrs Duncan-Sutherland stated that she cannot say what is normal in a sales agreement as she is not a lawyer.

[121] Counsel then took her though clauses 3 to 15. Mrs Duncan-Sutherland agreed that the agreement is in no way conditional on subdivision approval.

[122] Her attention was drawn to the letter dated 1 November 2016 from Gerogics' attorney-at-law to JMMB (exhibit 4)[5]. Mrs Duncan-Sutherland stated that she is aware of the letter but had not seen it. She testified that she became aware of it after it had been received by Capital & Credit.

[123] It was suggested to her that when she called Mr Smith the conversation proceeded in the way that Mr Smith has said in his witness statement. Mrs Duncan-Sutherland did not agree with this suggestion.

Re-examination

[124] During re-examination Mr Hylton pointed out to Mrs Duncan-Sutherland that she had agreed with Mr Robinson that the proposed agreement was not subject to subdivision approval. When asked about the acreage of the land Mrs Duncan-Sutherland having been directed to the mortgage stated that it was about six

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[5] That letter requested the discharge of the mortgage after the second claim had been dismissed

hundred and twenty (620) acres. Mrs Duncan-Sutherland also stated that it would command a better price when subdivided.

[125] Mr Hylton then asked if a large property was being sold ‘as is where is’ or shovel ready, which would get a higher price. Mrs Duncan-Sutherland answered that the shovel ready property would get a higher price and that it was being sold “as is where is”.

SUBMISSIONS ON BEHALF OF GEROGICS

Admissibility of documents

[126] Counsel for Gerogics, Mr Robinson, submitted that the court’s decision on the admissibility of the documents included in the ‘Defendant’s Bundle of Documents’ is crucial, in that, if those documents are excluded, then Gerogics must succeed. It was submitted that if the documents are admitted then Gerogics’ case remains to be proved on a balance of probabilities.

[127] It was argued that the documents should not be admitted into evidence because their tender is for the sole purpose of proving that a loan was entered into between Gerogics and JMMB, a purpose which is expressly barred by the decision of Sykes J in ***JMMB Merchant Bank Limited v Gerogics Investment Limited et al*** [2016] JMSC COMM 12 (which relates to the second claim).

[128] Counsel argued that there are other grounds of objection to the admissibility of the documents, including that many are attempts to give evidence of material facts or support phantom legal issues which have not been pleaded by JMMB.

[129] Mr Robinson enumerated the documents and then stated the bases of his objection. These included hearsay, failure to prove authenticity and irrelevance.

[130] It was submitted that even if a document is proved to be authentic, which most of the documents have not been proven to so be, the litigant seeking to have any document admitted into evidence must prove its admissibility under the normal

rules of evidence. Counsel argued that, among other things, relevance and hearsay must still be addressed. He cited the case of ***Jamaica Money Market Brokers Limited and JMMB International Limited v Pradeep Vaswani et al*** [2012] JMCC Comm. No. 5(1) in support of his submission.

[131] Counsel stated that in that case the learned judge found that, even where a party had admitted authenticity, it was open to that party to object to the admissibility of each individual document on other grounds.

[132] Mr Robinson argued that the documents fall afoul of the rules against inadmissible evidence on many grounds all rooted in the purpose for which they are tendered. He stated that they are tendered to prove the truth of their contents which is hearsay and they are tendered for the purpose of proving in court an alleged event (loan/default) which is a purpose explicitly barred by the decision of Sykes J in the second claim.

The substantive issue

[133] In respect of the relevant law, Mr Robinson submitted that the court must look to sections 103 to 125 of the **ROTA**. Counsel also directed the court's attention to section 2 of the **ROTA**.

[134] Counsel argued that a mortgage is a security for a loan and nothing more. He contended that like a guarantee or promissory note, it only operates as a second or third option to the mortgagee if there is default on the loan which is not remedied by the borrower in a reasonable time. Counsel emphasised that it is not a loan and it does not give the mortgagee any proprietary rights over the mortgaged property.

[135] Mr Robinson stated that JMMB tried to prove that there was a loan supported by this security twice and failed on both occasions. He stated that on the second occasion the court ruled that JMMB was barred from proving the alleged loan in court. Counsel pointed out that JMMB's assertion is that it is not prevented from enforcing the loan outside of court. Mr Robinson argued that this is a circular and

illogical argument because, if JMMB tries to "enforce" the security outside of the court, Gerogics will be permitted to sue to prevent such enforcement. JMMB will then be faced with its admitted inability to prove it has any basis for enforcing a security because it has admitted it is barred from enforcing the loan in court.

[136] Counsel directed the court's attention to the pleadings. He pointed out that Gerogics pleaded that the mortgage was registered as "security for an alleged principal debt" which JMMB has admitted it cannot prove and which the court has prevented JMMB from attempting to prove. Counsel pointed out that Gerogics pleaded that, after receiving a demand that the mortgage be discharged, JMMB's director, Mrs Duncan-Sutherland telephoned Gerogics' director, Mr Smith, and asked him to assent to a proposed sale by JMMB by way of signing a power of attorney. It was pleaded that the effect of the request, in the face of Gerogics' demand for a discharge of the mortgage was an admission that JMMB knew that the mortgage was no longer valid.

[137] Counsel stated that the effect of Gerogics' pleading is that the mortgage, as security, had no basis or foundation and ought to be discharged as was the agreed effect of the two previous claims on the other securities including the personal guarantees.

[138] Mr Robinson then pointed out that JMMB, in its pleadings, relied heavily on the terms of the mortgage deed, and denied Gerogics' assertion that the effect of the judgment in the second claim is that the loan cannot be proven or enforced but does not allege that any amounts are due to JMMB from Gerogics nor that there was any default of the alleged loan.

[139] It was submitted that the judgment of Sykes J in ***JMMB Merchant Bank Limited v Gerogics Investment Limited et al*** (the second claim) and JMMB's own pleading prevents it from leading any evidence for the purpose of proving a loan or a default on any alleged loan, the details of which have not been pleaded in the defence.

[140] Counsel argued that JMMB's pleadings assert a right to maintain and enforce a mortgage deed in a vacuum while Gerogics asserts that the failure of JMMB to establish any legal or evidential foundation for the mortgage and the said judgment of Sykes J would lead to the inevitable consequence of the discharge of the mortgage.

[141] Mr Robinson then dealt with the evidence. He argued that it is the uncontradicted evidence of Mr Smith that there was no loan agreement and that he merely had an informal arrangement with a friend, Mr Campbell, who owned and controlled JMMB (which was then known as Capital & Credit).

[142] Counsel argued that JMMB's witness, Mr Cocking had nothing to do with the alleged loan process apart from providing, when asked, one of the signatures of the credit investment committee long after the events. Mr Robinson contended that all Mr Cocking did was sign two memoranda that he obviously failed to read. It was argued that his evidence is unreliable and irrelevant and should not be accepted by the court. Mr Robinson submitted that the court has no option but to accept Mr Smith's evidence that there was no loan agreement between Gerogics and JMMB.

[143] Counsel further submitted that the court has no option but to find that there was no default on any loan of any kind. He contended that since a mortgage can only be a security for a loan and only enforceable "in case default be made in payment of the principal sum, interest or annuity secured…", in the absence of any proof of any loan by the bank there can be no proof of default in payment hence the mortgage should be discharged.

[144] Mr Robinson further contended that the telephone call from Mrs Duncan-Sutherland to Mr Smith, in effect, amounts to an admission that the mortgage could not be enforced because the terms of the mortgage itself makes it expressly clear that no power of attorney or any other authority is needed by the mortgagee in order to sell or subdivide.

[145] Counsel referred to ***Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited*** [2015] JMSC Civ 242, and stated that throughout this matter, JMMB has sought to rely on the judgment of the court in that case

[146] . He submitted that the issues in that case are unrelated to the issues in the case at bar. The issue in ***Dagor***, he said, was simply whether the mere passage of time extinguished a mortgagee's right and title. The court, in that case, was concerned with the construction of the **Limitation of Actions Act**.

[147] Mr Robinson argued that the present case has nothing to do with time. Mr. Robinson further pointed out that the ***Dagor*** case was decided without any reference to section 105 of the **ROTA** and most importantly was not decided in the face of an express judgment of the Supreme Court, banning any claim for any debt by the mortgagee.

[148] Mr Robinson argued that JMMB cannot try to prove a debt and so would be unable to defend any claim by Gerogics restraining it from exercising the power of sale.

[149] Counsel argued that the trial exposed the continuing tension between two principles: The first is the public interest in the finality of litigation. He cited the case of ***Hon Gordon Stewart OJ, Christopher Zacca and Air Jamaica Requisition Group v Independent Radio Company Limited and Wilmot Perkins*** [2012] JMCA Civ 2. The second principle is that of access to justice: the right of a litigant to bring a genuine subject of litigation before the court and to choose which parties to sue. He contended, however, that JMMB has already had "two bites of the cherry".

[150] It was submitted that the court should put a stop to the continued stubborn refusal by JMMB to accept reality. He argued that recovery of a non-existent or unprovable debt is not a real prospect.

SUBMISSIONS ON BEHALF OF JMMB

[151] According to Queen's Counsel, Mr Hylton, two issues arise on this claim. The first is a question of fact and the second is primarily a legal question. They are as follows:

1. Did JMMB make a loan to Gerogics?

2. Is the effect of the order of Sykes J in 2012 CD 00128 (the second claim) that the mortgage is void or voidable and should be discharged?

[152] Mr Hylton argued that the basic facts are not in dispute. He stated that Gerogics owns a property at Haughton Hall in the parish of Hanover. There is a mortgage on the title to the property in favour of the bank. Mr Hylton stated that in 2010 Capital & Credit sued Gerogics, its principal, Mr Smith and a related company, Exclusive in claim no. 2012 CD 0035 (the first claim), claiming the debt secured by the mortgage. In the course of the trial the bank filed a notice of discontinuance.

[153] Learned Queen's Counsel further informed the court that in 2014 Capital & Credit filed a second claim (claim no. 2014 cd 00128) against the same parties, claiming the same debt (the second claim). Sykes J struck out the second claim as an abuse of process of the court. Mr Hylton stated that Gerogics took the position that as a result of Sykes J's order in the second claim the mortgage is invalid and should be discharged. JMMB disagreed. Therefore, Gerogics brought this claim seeking declarations and orders discharging the mortgage.

Admissibility of documents

[154] In respect of the documents which have only been marked for identity, Mr Hylton pointed out that Gerogics' counsel has objected to the admission of the documents on the basis that the documents are not relevant and Sykes J's decision in the second claim prevents the bank from proving that there was a loan.

[155] Learned Queen's Counsel submitted that all the documents marked for identity should be admitted into evidence. He submitted that in order to have a document admitted into evidence, a litigant must establish two things: that the document is relevant and that it is authentic. He contended that the documents satisfy both tests.

[156] Mr Hylton argued that the factual issue in this case will depend largely on the evidence of Gerogics' sole witness, Mr Smith, and there are significant challenges to his credibility and the documents marked for identity are relevant for that purpose as they would assist the court in assessing his credibility.

[157] It was argued that the issue of relevance of the documents has already been litigated and settled by the court, as last year JMMB applied for specific disclosure of these very documents. Gerogics opposed the application on the ground that the documents were not relevant. In April and June 2018 Edwards J (as she then was) heard and ruled on this challenge. In a written judgment delivered on 4 June 2018[6], the learned judge ruled that these documents are directly relevant to the claim. It was contended that Gerogics did not appeal against the ruling and that issue is now *res judicata* as between the parties.

[158] With regard to authenticity, it was submitted that under cross-examination, Mr Smith admitted signing the promissory note and the borrowing resolution, two of the documents which have been marked for identity.

[159] Mr Hylton submitted that the documents at 11[7] and 12[8] were authenticated by one of their makers, namely Mr Cocking; who gave evidence that for an extended

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[6] See ***Gerogics Investments Ltd. v JMMB Merchant Bank (Jamaica) Ltd***. [2018] JMCC Comm 19
[7] Memorandum dated 23 October 2006
[8] Memorandum dated 31 October 2006

period he was a member of JMMB's credit committee (the committee that approved the loan to Gerogics).

[160] It was further submitted that the commitment letter was signed by Mr Smith and his daughter and this was confirmed during cross-examination.

[161] It was therefore contended that the court should rule that all the documents in the bundle of exhibits and documents marked for identity filed 17 December 2018 should be admitted into evidence.

The substantive issue

[162] As regards the factual issue, Queen's Counsel submitted that all the documentary evidence in this case contradicts Mr Smith's evidence that he had an "informal arrangement" with Mr Campbell, the former Chairman of Capital and Credit and executed the mortgage on Gerogics' behalf for Mr. Campbell's "internal purposes."

[163] Mr Hylton stated that JMMB was forced to discontinue the first claim because Gerogics' counsel successfully objected to relevant documents being adduced into evidence. In this case, however, Gerogics was forced to tender the mortgage into evidence. As such, it could not question the authenticity of that document since it was seeking to have it discharged. Queen's Counsel submitted that the mortgage itself confirms that there was a loan.

[164] Reference was made to clause 2 of the mortgage which states:

> *"The Mortgagor has requested the bank to extend to it a loan of US$ 5,478,750 (hereinafter referred to as the "CCMB loan") which the [Bank] has agreed to provide for the purpose and upon the terms set out in a Letter of Commitment dated the 1st day of November 2006…"*

[165] It was submitted that two things are plain from this statement. The first is that the letter of commitment is relevant and the second is that contrary to Mr Smith's oral evidence, JMMB and Gerogics agreed on a loan in that amount.

[166] Mr Hylton highlighted Mr Smith's testimony during cross-examination that he did not read the document when he signed it but relied on his relationship with Mr Campbell. It was argued that Mr. Smith is effectively relying on a plea of undue influence. The cases of ***Royal Bank of Scotland v Etridge (No. 2)*** [2001] 4 All ER 449 and ***National Commercial Bank (Jamaica) Limited v Hew and another*** [2003] UKPC 51 were cited as instructive on the issue of undue influence.

[167] In the latter, the court stated that the doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence and secondly the influence generated by the relationship must have been abused.

[168] It was submitted that Gerogics has not proven either of these two elements. Mr Hylton argued that Mr. Smith's witness statement indicates that he correctly understood the effect of the mortgage.

[169] Mr Hylton also argued that at the trial JMMB called one of the witnesses it perhaps should have called in the first claim and put into evidence numerous other loan documents which were signed by Mr Smith on behalf of Gerogics. These include the company's resolution to take the loan and a promissory note undertaking to repay it.

[170] It was submitted that there is oral and further documentary evidence of Mr Cocking, who was one of the persons who approved the loan. He confirmed that the bank did in fact make the loan.

[171] Mr Hylton argued that Gerogics bears the burden of proving that there was no loan and it has not discharged that burden. The court was asked to find that JMMB did make a loan to Gerogics.

[172] Learned Queen's Counsel noted that Gerogics contends that a statement made during a conversation between Mrs Duncan-Sutherland and Mr Smith constitutes an admission by the bank that the mortgage is invalid. It was submitted that even if Mrs Duncan-Sutherland had made such a statement, it could not make the

mortgage invalid. Mr Hylton argued that the fact that an officer of JMMB or an officer of Gerogics may think that the mortgage is invalid cannot make it invalid. It was also argued that even if such a statement was made, it would not constitute any such admission. It was contended that a mortgagee could request the mortgagor's cooperation in effecting a sale to avoid any possible litigation as to the terms or timing of the sale. It was also submitted that it is simply not credible that at the same time JMMB was refusing to discharge the mortgage and was insisting that it was valid, it would be admitting to Mr Smith that it was invalid.

[173] In respect of the effect of the order of Sykes J, Mr Hylton submitted that one fact should be enough to dispose of this issue. He stated that the validity of the mortgage was not an issue at all in the second claim and the learned judge did not rule on it. He pointed out that in the first two paragraphs of the judgment in the second claim, Sykes J set out the issues that arose and the validity of the mortgage or whether the debt was owed was not mentioned. It was contended that the issue in the second claim was whether JMMB should be barred from pursuing that claim.

[174] It was argued that Gerogics' case overlooks one simple issue, that is, that a lender who holds a mortgage can seek to collect its debt in either of two ways. It can enforce the mortgage by exercising its power of sale or it can sue the borrower and any guarantors. The case of ***China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)*** [1990] 1 AC 536 was cited in support of this position. The case of ***Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited*** (supra) was also relied on.

[175] Mr Hylton stated that in the first two claims, the bank attempted to pursue the second option of suing the borrower and the guarantors and the court held that it should not be allowed to do so a third time. According to him, that option is therefore no longer available, and as such JMMB can no longer pursue the guarantors since it could only do so by instituting legal actions. If the value of the property is less than the amount of the debt and it can only sell for that value, it

would have to write off the shortfall, but JMMB still has the second option and the mortgage itself remains unaffected.

[176] The court's attention was directed to the judgment of Edwards J (as she then was) in ***Gerogics Investments Ltd v JMMB Merchant Bank (Jamaica) Ltd*** [2018] JMCC Comm 19. Specific reference was made to paragraphs [32] to [37] in which the learned judge dealt with the issue of whether a claimant who has been barred from recovering a debt by way of court action could utilize other methods to recover the debt.

[177] Queen's Counsel stated that whilst it is accepted that this court is not bound by the judgment of other judges of concurrent jurisdiction, the reasoning and conclusions of such judges are highly persuasive.

[178] In concluding, the court was asked to find that JMMB did make a loan to Gerogics and the mortgage is valid and enforceable.

Discussion and analysis

[179] Gerogics seeks a declaration that the mortgage under which JMMB has sought to exercise its power of sale is invalid and ought to be discharged. In order to succeed in its claim, Gerogics must satisfy the court that there was no loan agreement between it and Capital & Credit and as such, it is not indebted to its successor, JMMB. Unlike in the previous claims, it is Gerogics which has the burden of proof. JMMB has made no positive assertions in its defence.

[180] Gerogics has objected to certain documents being admitted in evidence on the basis that they constitute hearsay and are being used by JMMB in an attempt to prove the existence of a loan. That issue it was submitted was laid to rest by Sykes J and ought not to be resurrected.

[181] Documents may be admitted in evidence by agreement.[9] In the absence of agreement, the party seeking to rely on the document must tender the document through a witness or rely on statutory provisions. In order to determine whether they are admissible the court has to firstly consider whether the document is relevant to the issues in the case and if so, whether it is excluded by the rules of evidence.

[182] In the 9th edition of the text, **Murphy on Evidence** by Peter Murphy, it is stated at pages 24 and 25:

> *"2.6 FACTS IN ISSUE*
>
> *The facts in issue in a case, sometimes called ultimate facts, are the facts which a party to litigation (including the prosecution in a criminal case) must prove in order to succeed in his claim or defence and to show his entitlement to relief (or to obtain a conviction). Such facts are often said to be "material" to the case. What these facts may be is not really the concern of the law of evidence, but must be derived from the substantive law applicable to the cause of action, charge or defence in each case. In procedural terms, they are to be found in the statements of case, indictment or charge as the case may be.*
>
> *In a civil case, any fact is in issue if, having regard to the statements of case and the substantive law, it is a fact necessary to the success of any claim or defence at issue…*
>
> *2.6.1 Secondary facts in issue*
>
> *Also treated as facts in issue in any case, are facts which affect either the credibility of a witness, or the admissibility of any evidence. Such facts are known as 'secondary' or 'collateral' facts in issue. Evidence may be called, for example, tending to show that a witness for the other side is biased or partial, or suffers from some medical condition which renders his evidence unworthy of belief…*

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[9] See: section 31CA of the Evidence Act and rule 39.1 of the **Civil Procedure Rules**, 2002

[183] The learned author goes on to note the following on pages 27 and 28:

> *"2.8 FACTS RELEVANT TO FACTS IN ISSUE*
>
> *In **DPP v Kilbourne** [1973] AC 729 at 756 Lord Simon of Glaisdale said:*
>
> > *Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e., logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.*
>
> *…*
>
> *Thus, relevant evidence is evidence which has probative value in assisting the court or jury to determine the facts in issue. Relevance is not a legal concept, but a logical one, which describes the relationship between a piece of evidence and a fact in issue to the proof of which the evidence is directed. If the evidence contributes in a logical sense, to any extent, either to the proof or disproof of the fact in issue, then the evidence is relevant to the fact in issue. If not, it is irrelevant. It is a fundamental rule of law of evidence that, if not actually material, evidence must be relevant in order to be admissible. The converse, however, is not true, because much relevant evidence is inadmissible under the specific rules of evidence affecting admissibility.*

[184] On page 31 of the text, it is stated as follows:

> *"2.10.1 Admissibility*
>
> *Evidence is said to be admissible or receivable if it is relevant and if it is not excluded by the rules of evidence. The rules of evidence are rules of law, and it follows that, unlike relevance, which is determined solely by reference to logical relationship between the evidence and a fact in issue, admissibility is a matter of law. **To be admissible, evidence must be relevant, but relevance is not enough to result in admissibility. While evidence must be relevant to be***

admissible, the converse proposition is not true. Not all relevant evidence is admissible*."*

[Emphasis added]

[185] All relevant evidence is potentially admissible, subject to common law and statutory rules on exclusion. Some examples of rules of evidence which may result in the exclusion of evidence are hearsay, public interest immunity and privilege.

[186] In dealing with the issue of admissibility of evidence, it is also important to consider authenticity. In the Canadian case of ***Ontario v. Rothmans et al.*** 2011 ONSC 5356. Conway J said:

> *"[47] Generally speaking, before a document can be admitted into evidence, it must be "proved" as authentic – that is, it must be shown to be what it purports to be (or a true copy of the original), and signed or written by the person by whom it purports to be signed or written: see Sopinka, Lederman & Bryant,* ***The Law of Evidence in Canada****, 3d ed. (Toronto: LexisNexis Canada, 2009), at para. 18.3.*
>
> *[48] The authenticity of the document is sometimes admitted by counsel, thereby dispensing with the need for proof. In this case, counsel for the JCDs, except Carreras, have now admitted the authenticity (as defined above) of some of the Documents.*
>
> *[49] Where authenticity has not been admitted, proof of the document is required."*

[187] In the text, **Civil Litigation** by Craig Osborne, the following is noted on page 90:

> *"Documentary evidence*
>
> *The authenticity of documents*
>
> *When producing documents to the court it is necessary to demonstrate their authenticity.*
>
> *…[T]here is a procedure known as disclosure in most claims, in which each party is required to serve on his opponent a list of documents which are in his possession and which are relevant to the*

action. Where this happens then by virtue of CPR, r. 32.19 (1), the party receiving that list is deemed to admit the authenticity of the document unless he serves a notice that he wishes it to be formally proved at trial… Accordingly if no such notice is served, it will be taken that the opponent admits that the document are authentic. If there is an active dispute as to the authenticity of the document, then the party who disclosed it must formally prove it at trial, which will involve calling evidence about how the document came into being…"

[188] In this case, the authenticity of the documents in question was not admitted and Gerogics requested that JMMB prove their authenticity at trial.[10]

[189] Gerogics has asserted that the mortgage, as security, has no basis or foundation. It is my view that all the documents in the bundle[11] are relevant to the issues in this case, as well as secondary facts in issue such as the credibility of the witnesses. They are therefore, *prima facie* admissible. The question then arises as to whether the documents should be excluded because of the operation of certain rules of evidence.

[190] In the text **Murphy on Evidence**, on pages 190 and 191, the learned author states:

"7.1 DEFINITION OF HEARSAY

The rule against hearsay is one of the most important and commonly applied rules of the law of evidence, and yet at the same time, the least understood…Many definitions of hearsay have been advanced…

In earlier editions of this work, the present author offered the following….:

> *Evidence from any witness which consists of what another person stated (whether verbally, in writing, or by any other method of assertion such as a gesture) on any prior occasion,*

---

[10] See Rules 28.19 and 28.20 of the **Civil Procedure Rules**, 2002
[11] **Bundle of Exhibits and Documents marked for Identity**

is inadmissible, if its only relevant purpose is to prove that any fact so stated by that person on that prior occasion is true. Such a statement may, however, be admitted for any relevant purpose other than proving the truth of the facts stated in it.

Similarly, American Federal Rule of Evidence 801 (c) provides that 'hearsay':

…is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

[191] On page 192 it is also noted:

"7.2 DANGERS OF HEARSAY EVIDENCE

The rule against hearsay originated in centuries-old judicial awareness that the admission of hearsay evidence involves two serious dangers. The first is that the repetition of any statement involves the inherent danger of error or distortion, which increases in proportion to the number of repetitions and the complexity of the statement. The second is that it is virtually impossible to engage in effective cross-examination of a witness who is testifying about a hearsay statement, because the witness did not perceive the events in question. The latter disadvantage is the more serious. As Lord Bridge of Harwich put it in ***Blastland*** *[1986] AC 41 at 54:*

The rationale of excluding [hearsay evidence] as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination."

[192] The learned author goes on to state, on pages 203 and 204:

"7.6 HEARSAY AND NON-HEARSAY STATEMENTS: THE TWO QUESTIONS

At the outset of this chapter, we saw that the rule against hearsay excludes evidence of statements made by others on prior occasions

if tendered for the purpose of proving that any fact so stated on the prior occasion is true, but not for any other relevant purpose. It is essential to remember that evidence of a statement made on a prior occasion is not necessarily hearsay. It may, depending on the purpose for which it is tendered, be admissible evidence of, e.g., the fact that the statement was made, or that it was made on a certain occasion or in a certain way, or that it had a certain legal effect. Whether the evidence is admissible for one or more of these purposes will depend upon whether any such issue is relevant. If the only relevance of the statement is the proof of the truth of some fact stated, the evidence is hearsay.

…

The simplest way to determine whether a statement is hearsay or non-hearsay is to ask two questions:

Question 1: Was the statement made on a 'prior' occasion? This is almost always straightforward. Unless the statement was made in the course of giving oral evidence in the instant proceedings, it was made on a prior occasion.

Question 2: For what purpose or purposes is the evidence tendered? The failure to answer this question correctly is the most common source of error. Another way to ask it is: Why is this evidence said to be relevant? If it is relevant only to prove the truth of the matter stated, the evidence is hearsay for that purpose. But it will be non-hearsay for any other purpose for which it is relevant."

[193] The bundle of exhibits and documents marked for identity filed on 17 December 2018 contains 15 documents. Documents 1A, 1B to 7 were admitted into evidence and documents 8A, 8B to 13 were not. Mr Hylton submitted that all the documents in the bundle should be admitted into evidence. He stated that in order for a document to be admitted into evidence, a litigant must establish that it is relevant and that it is authentic. He submitted that the documents in question satisfy both tests. Queen's Counsel also reminded the court that Edwards J had already determined that the documents in question were relevant when she granted the order for specific disclosure.

[194] Mr Robinson does not agree. He maintained that the authenticity of the documents was in issue as the makers of the documents have not been called as witnesses. Mr Robinson also objected to the admissibility of the documents on the basis that JMMB was seeking to prove the debt having been barred from doing so by the judgment of Sykes J in ***JMMB Merchant Bank Limited v Gerogics Investments Limited, Exclusive Holidays of Elegance Limited and Fred Smith*** [2016] JMSC Comm 12.

[195] Documents 1 to 7 are:

(i) Exhibit 1 - certificate of title registered at volume 1123 folio 16 of the Register Book of Titles.

(ii) Exhibit 1A - certificate of title registered at volume 1080 folio 370 of the Register Book of Titles.

(iii) Exhibit 2- mortgage under the Registration of Titles Act dated 13 February 2007.

(iv) Exhibit 3 - affidavit of Symone Mayhew in response to the defendant's affidavit for trial of preliminary issues filed 11 March 2016.

(v) Exhibit 4 - letter dated 1 November 2016 from Gerogics' attorney-at-law to JMMB requesting the return of the certificates of title.

(vi) Exhibit 5 - letter dated 4 November 2016 from JMMB's attorneys-at-law to Gerogics' attorney-at-law indicating that the debt could still be recovered through the enforcement of the mortgage.

(vii) Exhibit 6 - letter dated 13 February 2017 from Gerogics' attorney-at-law to JMMB's attorneys-at-law renewing the request for the discharge of the mortgage and the return of the certificates of title.

[196] I will now proceed to consider the admissibility of documents 8A to 13.

Document 8A - Commitment Letter Agreement dated 1 November 2006 between Capital & Credit Merchant Bank Limited and Gerogics Limited

[197] Mr Robinson argued that the makers of this document, Mr Richard Dyche[12] and Mr Curtis Martin were not called to prove its authenticity or contents. It was also contended that no proper foundation was laid for Mr Cocking to testify in relation to this letter. Mr Robinson submitted that there is no nexus between any of his duties as a maker of corporate policy (member of Board of Directors) or member of the committee (responsible for reviewing and approving loan applications) and the preparation of the letter. Mr Robinson argued that Mr Cocking conceded that the input of the legal and security department would be required in finalising either a loan agreement or a commitment letter and deciding whether one or both would be used. He stated that, in any event, Mr Cocking had no part in the making of the commitment letter.

Document 8B -The Form of Acceptance dated 3 November 2006

[198] It was argued by Mr Robinson that the document is being tendered for an inadmissible purpose which is to prove a loan. He also submitted that this document is irrelevant without the commitment letter (document 8A).

[199] Mr Hylton reminded the court that Mr Smith in his evidence confirmed that the signatures on this document were those of himself and his daughter. It was also not suggested that this document was separate from the commitment letter. In this regard, Mr Hylton stated that the “conditions” referred to in the form could only relate to the proceeding pages (the commitment letter) and as such, the two documents were meant to be read together.

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[12] Executive Vice President & General Manager

Resolution

[200] The general rule is that a statement will not be deemed to have been made by a person unless the document was written, made or produced by him. The test will also be satisfied if he has signed the document and can attest to its accuracy. The witness must also be responsible for the accuracy of the information in the document.

[201] The commitment letter was not prepared by either of JMMB's witnesses. Mr Cocking testified that he was a member of the committee and had helped to design the loan approval process. The memoranda were sent from the credit department to that committee. The process as explained by Mr Cocking is that the loan application would be considered by the credit department and sent to the committee for approval. That committee he said "deeply" looks at the application. Once approval is given a commitment letter would be prepared and sent to the applicant for signing. He indicated that there is a page on which the customer approves the terms and conditions in the commitment letter. He identified document 8B as being that page.

[202] On page 7 of the commitment letter, the following appears:

> *"Acceptance:*
>
> *This Offer of Finance will remain available for acceptance up until November 7, 2006 and any request for renewal or extension will be subject to further negotiation. Subject to acceptance, the Lender reserves the right to cancel its commitment in the event that the Borrower does not satisfy the conditions within thirty (30) days after the date of acceptance of this Offer of Finance.*
>
> ***If the foregoing terms and conditions are acceptable, kindly confirm by signing the Form of Acceptance on the enclosed duplicate hereof and returning it to CCMB along with your cheque for the Commitment Fee plus G.C.T****."* [My emphasis]

[203] The document tilted 'Form of Acceptance' reads in part:

> *"**RE: Application for Loan Finance of US$5,478,750.00***
>
> *The Borrower hereby accept your Offer of Finance upon the terms and subject to the conditions set forth above."*

[204] Mr Smith identified his signature on that document. The mere admission of a signature on a document may not amount to an admission of the contents of the document depending on the circumstances of a particular case. However, when a signature is affixed to a document which creates an obligation on the person signing it, it signifies that the person who signed it has agreed to the terms and conditions contained in that document.

[205] It seems to me that the danger of hearsay evidence (the unreliability of the evidence) wanes when a witness to the proceedings has admitted to signing the document he challenges.

[206] I am satisfied that the document is what JMMB contends it to be. Mr Cocking spoke generally about how a document like a commitment letter would come into being. The commitment letter clearly indicates that where its terms and conditions are acceptable, the form of acceptance is to be signed. By affixing his signature to that document, there is a presumption that Mr Smith who gave evidence of his qualifications, agreed with the terms and conditions set out therein. I will therefore treat this as a question of the weight that is to be accorded to the document.[13]

[207] With regard to his signature, Mr Smith has not alleged fraud, incapacity, *non est factum*, mistake or that his signature was conditional, or that the contents of the document were misrepresented to him, or that Capital & Credit unilaterally added material terms to the document after he signed. He did however give evidence that Mr Campbell asked him to sign the document, I am not quite clear whether this

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[13] See ***Linel Bent and anor v Eleanor Evans*** (unreported), Supreme Court, Jamaica, Suit No. C.L. 1993/B 115, judgment delivered 27 February 2009, paras. 57 and 58.

was meant to suggest that there was some undue influence. I will therefore briefly address the matter.

[208] I have found the Privy Council's decision in ***National Commercial Bank (Jamaica) Ltd v Hew and Others*** [2003] UKPC 51, to be particularly helpful. Lord Millet who delivered the decision of the Board said:

> *"[29] Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them…*
>
> *[30] Thus the doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence. And secondly the influence generated by the relationship must have been abused.*
>
> *[31] The necessary relationship is variously described as a relationship "of trust and confidence" or "of ascendancy and dependency". Such a relationship may be proved or presumed. Some relationships are presumed to generate the necessary influence; examples are solicitor and client and medical adviser and patient. The banker-customer relationship does not fall within this category. But the existence of the necessary relationship may be proved as a fact in any particular case.*
>
> *…*
>
> *[33] But the second element is also necessary. However great the influence which one person may be able to wield over another equity does not intervene unless that influence has been abused. Equity does not save people from the consequences of their own folly; it acts to save them from being victimised by other people: See* ***Allcard v Skinner*** *(1887) 36 Ch D 145, 182.*
>
> *[34] Thus it must be shown that the ascendant party has unfairly exploited the influence he is shown or presumed to possess over the vulnerable party. It is always highly relevant that the transaction in*

> *question was manifestly disadvantageous to the person seeking to set it aside; though this is not always necessary: see* ***CIBC Mortgages plc v Pitt*** *[1994] 1 AC 200, [1993] 4 All ER 433. But "disadvantageous" in this context means "disadvantageous" as between the parties. Unless the ascendant party has exploited his influence to obtain some unfair advantage there is no ground for equity to intervene. However commercially disadvantageous the transaction may be to the vulnerable party, equity will not set it aside if it is a fair transaction as between the parties to it."*

[209] Whilst the relationship between Mr Smith and Mr Campbell, may be capable of giving rise to the *"necessary influence"* no evidence has been presented to the court which is capable of satisfying the second limb of the test which relates to abuse of the relationship. I am therefore of the view that Mr Smith's signature cannot be impugned on the basis of undue influence. In this regard, I have also noted that Mr Smith identified the signature of his daughter on the same document. His evidence is that she is an attorney-at-law.

[210] Based on the wording of the commitment letter and the form of acceptance I accept the submissions of Mr Hylton that they are to be read together. Although the makers were not called, document 8B was signed by Mr. Smith and no evidence of undue influence has been presented to the court. In the circumstances, both documents ought to be admitted into evidence.

Document 9 - The Memorandum dated 23 October 2006 from the Credit Department of Capital & Credit Merchant Bank Limited to the Credit Investment Committee

[211] Mr Robinson objected to the admission of this document into evidence on the basis that it is hearsay. Counsel argued that it could not be admitted based on Mr Cocking's evidence that he signed the document signifying the committee's approval of the recommendation made by the credit department. In this regard he reminded the court that Mr Cocking had stated in cross-examination that he was not a member of the credit department and that whilst he can say that he approved a recommendation made by that department, the details of the recommendation

are not his. In the circumstances, it was submitted that the document ought to be excluded.

Document 10 - The Memorandum dated October 31, 2006 from the Credit Department of Capital & Credit Merchant Bank Limited to the Credit Investment Committee

[212] Mr. Robinson applied the same reasoning as in the case of document 9 to this document.

[213] Mr Hylton submitted that this document ought to be admitted in evidence as it was authenticated by Mr Cocking.

Resolution

[214] Mr Robinson took issue with the memoranda because the makers were not called to testify to the contents of these documents.

[215] In respect of the memoranda, although Mr Cocking was not the maker, as a member of the committee they were signed by him. His evidence is that he had seen and reviewed the documents and signed off on them. Therefore, the contents are somewhat within his knowledge. I say somewhat, because the witness not being a member of the credit department, would not have necessarily been privy to any discussions between the parties. He would therefore, not be in a position to verify the accuracy of the information in the memoranda.

[216] In this regard, the memorandum dated 31 October 2006 contain assertions regarding the customer. The committee of which Mr Cocking was a member, approved certain changes to the loan documentation based on the assertions in the documents. It is unclear whether any supporting documents were provided to that committee in support of the memorandum.

[217] Morrison P (Ag) (as he then was) in ***National Water Commission v VRL Operators Limited et al*** [2016] JMCA Civ 19 adopted the following passage from ***Subramaniam v Public Prosecutor*** [1956] 1 WLR 965, 970:

> *"As is well known, evidence of a statement made by someone not called as a witness may or may not be admissible. If what it is intended to prove by the evidence is the fact that the statement was made, then it will, generally speaking, subject to considerations of relevance and any other exclusionary factor, be admissible for that purpose. However, if the evidence is tendered to establish the truth of what is contained in the statement, it is hearsay evidence and as such generally inadmissible".*[14]

[218] Section 31F of the **Evidence Act** deals with the admissibility of business documents.

> *"(1) A statement in a document shall be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible in relation to –*
>
> …
>
> *(b) civil proceedings, the conditions specified in-*
>
> *(i) subsection (2); and*
>
> *(ii) subsection (4),*
>
> *are satisfied.*
>
> *(2) The conditions referred to in subsection (1) (a) and (b) (i) are that-*

[14] Paragraph 9

(a) the document was created or received by a person in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid;

(b) the information contained in the document was supplied (whether directly or indirectly) by a person, whether or not the maker of the statement, who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the statement;

(c) each person through whom the information was supplied received it in the course of a trade, business profession or other occupation or as the holder of an office, whether paid or unpaid.

(3) The condition referred to in subsection (1) (a) (ii) is that it be proved to the satisfaction of the court that the person who supplied the information contained in the statement in the document-

(a) is dead;

(b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance,

(d) cannot be found or identified after all reasonable steps have been taken to find or to identify him;

(e) is kept away from the proceedings by threats of bodily harm and no reasonable step can be taken to protect the person; or

(f) cannot reasonably be expected, having regard to the time which has elapsed since he supplied the information and to

all the circumstances, to have any recollection of the matters dealt with in the statement.

…"

[219] Morrison P (Ag) in his examination of the above section stated:

> *"[77] My conclusion on the true import of section 31G primarily affects the Category A documents, which the learned judge admitted as business documents under section 31F and computer-generated documents under section 31G. So it is in the first place necessary to determine whether, as Mr Scott submitted that he was, the learned judge was correct to treat these documents as business documents falling within section 31F.*
>
> *[78] The conditions of admissibility of statements contained in a document under that section are, it will be recalled, that, firstly, the document must have been created or received by a person in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid; secondly, the information supplied in the document must have been supplied (whether directly or indirectly) by a person, whether or not the maker of the statement, who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the statement; and thirdly, each person through whom the information was supplied must have received it in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid.*
>
> *[79] I think that it is clear enough, as Batts J found, that the Category A documents were, if not created, certainly received by Mr Lobban, who produced them, "in the course of a trade". It seems to me that the learned judge was also entitled to conclude from the evidence that the information supplied in these documents was supplied, either directly or indirectly, by persons (who section 31F does not require to have been the makers of the statements) who may reasonably have been supposed to have personal knowledge of the matters dealt with. These were, as Batts J put it, "…the assorted persons, possibly in the hundreds at tour desks, front desks in the hotels, and even customers online, [who] would have personal knowledge of the bookings they were making…". Finally, I also*

consider that each person through whom the information came to be supplied would have done so in the course of business or trade.

[80] ***In my view, therefore, the primary conditions for the admission of the Category A documents as business documents under section 31F were satisfied by the evidence produced before the judge on behalf of VRL. Thereafter, the defendants having exercised their right to require that the makers of the statements in question be called as a witness, VRL was required to prove "to the satisfaction of the court", as section 31F (6) states, that the maker was unavailable by reason of one (or, in a proper case, more than one) of the reasons set out in that subsection.*** *So the burden of proof in this regard was, as Mr Williams submitted, on VRL. I have already referred to Sykes J's conclusion in* ***Sinclair and Jackson v Mason and Dunkley*** *that the section 31E (4) grounds relied on by the party seeking to tender a hearsay statement must be established by evidence called at the trial. I am also prepared to accept that view as equally applicable to the grounds listed in section 31F (6). But it seems to me that the nature of the evidence required to satisfy this obligation must necessarily vary from case to case, depending on the particular ground of exemption relied on and the overall circumstances of the case."* [15]

[My emphasis]

[220] The memoranda in my view qualify as business documents. They were on the face of it, created by credit department personnel and received by Mr Cocking and the other members of the committee in the course of business.

[221] The signatories to those memoranda from the credit department are Ms Diane Bolton and Mr Richard Dyche, neither of whom were called as witnesses. No explanation has been given for their absence.

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[15] ***National Water Commission v VRL Operators Limited et al*** (supra)

[222] JMMB called Mr Cocking who is a signatory to the memoranda. The challenge however is that though Mr Cocking signed the documents, he is not the maker of the documents. Therefore, it seems to me that while he can authenticate the documents, the hearsay obstacle still remains.

[223] In ***Jamaica Money Market Brokers Limited and JMMB International Limited v Pradeep Vaswani and Santoshi Limited***, Mangatal J said:

> *"[6] It is important to note that the rule against hearsay applies equally to former oral statements of a party as well as to documents."*

[224] As stated previously, hearsay is evidence from any witness which consists of what another person stated (whether verbally, *in writing*, or by any other method of assertion such as a gesture) on any prior occasion if its only relevant purpose is to prove that any fact so stated by that person on that prior occasion is true.

[225] In the UK the **Civil Evidence Act** 1995 achieved the abolition of the rule against hearsay in civil cases. The focus was shifted from admissibility to weight. The **Evidence Act** of Jamaica is not quite as ground-breaking. In respect of the admission of certain evidence, it does not extinguish the right of an objector to request the calling of the maker of the document as a witness. However, it does provide that If it can be proven to the court's satisfaction that the witness is unavailable, then the document may be admitted.[16]

[226] In light of the foregoing, the memoranda will be excluded. I am aware that I have admitted the commitment letter even though the makers were not called. The difference between that document and the memoranda is that, the commitment letter was signed by the objector himself signifying his agreement with its terms.

Document 11- Promissory Note dated 13 February 2007

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[16] See: section 31F(6) of the Evidence Act

[227] Mr Robinson argued that a promissory note is a security and the sole purpose for introducing this document would be to fly in the face of the judgment of Sykes J in the second claim, as an attempt to prove the existence of a loan which the bank secured. Counsel contended that the promissory note is irrelevant to the issue of whether the mortgage can stand in light of the judgment.

[228] Counsel further argued that there is no difference in the legal effect between the promissory note and the mortgage; one cannot be used to save the other. Both will stand or fall together. Mr Robinson argued that the promissory note has already fallen and the judgment of Sykes J in the second claim expressly bars the introduction of this sort of evidence into any court proceedings.

Resolution

[229] The basis of counsel's objection to the document was that its admission would fly in the face of the judgment of Sykes J in ***JMMB Merchant Bank Limited v Gerogics Investments Limited et al***. I am however of the view that since the promissory note was signed by Mr Smith it is relevant in assessing his credibility. I will admit it into evidence.

Document 12 - Borrowing Resolution by Gerogics Investments Ltd dated 13 February 2007

[230] It was argued by Mr Robinson that this document is irrelevant as it is internally inconsistent regarding dates and Mr. Cocking's evidence as to there being an "error" in the date is obviously unfounded, unreliable and inadmissible. Counsel contended that a borrowing resolution's purpose in evidence can only be to prove a loan by inference. He submitted that the document should not be admitted.

Resolution

[231] The borrowing resolution was signed by Mr Smith and his daughter, Ms Smith. This document, in my view will also assist the court in assessing the credibility of Mr Smith. I will admit it into evidence.

Document 13 – The Option to Purchase Agreement between JMMB and Panorama International Inc. dated 27 November 2017

[232] The option to purchase agreement between JMMB and Panorama International Inc. was signed by Ms Janet Small and Ms Kathleen Williams and witnessed by Ms Trudy-Ann Bartley Thompson and Mr Patrick Foster. None of the claimant's witnesses are makers of that document. I will therefore, not admit it.

[233] In the circumstances, documents 8A, 8B, 9 and 10 are admitted into evidence. Documents 11and 13 are not admitted.

THE SUBSTANTIVE ISSUE

Discussion and analysis

[234] Gerogics' case can be simply stated. In a nutshell, it asserts that the mortgage endorsed on the certificates of title should be discharged and the titles returned to it since JMMB was unable to prove the alleged loan and is also barred from making another attempt to do so.

[235] Gerogics has argued that the loan is unenforceable because in the first claim, JMMB ran into evidentiary difficulties and in the second claim, Sykes J ruled that that claim was an abuse of process because the bank was essentially trying to resuscitate a matter that it had discontinued.

[236] Gerogics contends that given the litigation history JMMB cannot prove a loan. Hence there is nothing for the mortgage to secure.[17]

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[17] See the Claimant's Submissions, para 19- "The effect of the Claimant's pleading is that the Mortgage, as security had no basis or foundation; that the Claimant did not owe the Defendant any money; and that the mortgage should be discharged as was the agreed effect of the two previous suits on the other securities including the personal guarantees. The Mortgage is but one more collateral security that must now be discharged."

[237] Gerogics would perhaps formulate the issue in this proceeding as follows:

"Whether the defendant can enforce a mortgage granted as security for an alleged loan, which it has failed to prove and cannot be proved or enforced in a court of law as any such attempt would be an abuse of process."

[238] JMMB's case can also be simply stated. Firstly, it has asserted that Gerogics has the burden of proving that no loan was granted and it has not discharged that burden. Secondly, as mortgagee, JMMB by virtue of the **ROTA** has a statutory right to exercise their power of sale without recourse to court. JMMB contends that in the two previous claims it had sought to secure the payment of the outstanding sum on the basis of the commitment letters, guarantees and promissory notes. It also contends that there was no attempt on those occasions to pursue the sale of the secured properties pursuant to the mortgage and it cannot be precluded from so doing because of its statutory right.

The burden of proof

[239] Unlike in the previous claims, it is Gerogics that has initiated this claim. It follows therefore that it is Gerogics who has the burden of satisfying the court that it is entitled to the reliefs sought. The evidential burden of proving that there is no loan agreement on which JMMB can rely rests upon Gerogics. He who asserts must prove.

[240] In an article titled '**Burdens and Standards in Civil Litigation**' (2003) 25 (2) Sydney Law Review 165, by C R Williams, it was stated:

> *"At any given point in time a party who has the legal burden in respect of a particular issue may appear more or less likely to be able to discharge that burden. If that party appears likely to be able to discharge the legal burden, then the tactical burden shifts to the other party; the other party must produce contradictory evidence or run the risk of losing on that issue. If that other party produces such evidence, then the tactical burden may shift back to the party bearing the legal burden. Such swings of the forensic pendulum as a case*

progresses involve, however, no shift in either the legal or the evidential burden."

[241] Gerogics who has invoked the judicial process is tasked with convincing the court that no debt is owed to JMMB.

Whether a loan was granted to the claimant?

[242] The particulars of claim speak to an alleged principal indebtedness and Mr Smith's witness statement develops the point further. In paragraphs two (2) to five (5) of his witness statement, he stated:

> *"2. In 2012, Gerogics was sued by the Defendant (hereinafter "JMMB") to recover an alleged debt that was not owed by Gerogics. The allegations made in that suit (hereinafter "the first suit") arose out of a lack of knowledge on the part of JMMB's principals at the time regarding an informal arrangement between myself and a friend, Ryland Campbell, who, in 2006 when this informal arrangement was made, owned and controlled the Defendant [then known as Capital and Credit Merchant Bank Limited (CCMB)]."*
>
> *3. That informal arrangement was never the subject of any loan agreement and was being honoured by Gerogics when, in 2011, after new principals had taken over ownership and control of CCMB, Gerogics received a letter purporting to call an alleged "loan." When asked why, then President of the Bank Curtis Martin's first response was that BOJ allowed the Bank to call loans even if they were fully paid up because of lack of proper documentation. I did not believe then and I do not believe now that BOJ would, in any way, interfere with any banker/customer relationship nor would it specifically authorize or order any individual loan to be called. I do believe the Bank didn't then and does not now have any documentation to establish that any loan was ever agreed with the Bank.* ***The only agreement I made regarding any financing whatsoever was the informal agreement with my friend Ryland and not with any Bank. I do recall receiving, on Gerogics' behalf, a letter of intent from the Bank which, again on behalf of Gerogics and at Ryland's request, I signed as accepting the Bank's intent but the Bank's intent was never converted into any actual loan.***

> *4.* ***For his internal purposes, Ryland asked me to sign certain security documents including a mortgage of the property to the Bank which I did.*** *However, I understood these documents to be security documents only and not intended to give the bank ownership of Gerogics' property or the right to sell same in the absence of any loan agreement; in the absence of any default by Gerogics; or in the absence of the bank's ability to prove either loan or default.*
>
> *5. Gerogics defended the first suit on many grounds including that nothing was owed.* ***I maintain that there was never any loan made to Gerogics by JMMB under previous names or incarnations*** *and that the informal arrangement between Gerogics and Ryland Campbell was honoured by Gerogics. Gerogics has no debt nor has it ever defaulted on any agreement with JMMB or with Ryland Campbell."*
>
> [Emphasis added]

[243] Gerogics' own pleading and evidence have brought to the fore the issue of whether a loan was granted by JMMB.

[244] Mr Smith's evidence is that Gerogics had no loan agreement with Capital & Credit. However, Mr Cocking gave evidence that the commitment letter is in many cases the loan agreement. He testified that a loan agreement is not necessary if the commitment letter contains all the relevant terms and conditions accepted by the customer.

[245] Queen's Counsel submitted that the mortgage[18] itself confirms that there was a loan between the parties. Reference was made to clause 2 which states:

> *"The Mortgagor has requested the bank to extend to it a loan of US$5,478,750 (hereinafter referred to as the "CCMB loan") which the [Bank] has agreed to provide for the purpose and*

[18] Exhibit 2

upon the terms set out in a Letter of Commitment dated the 1st day of November 2006…"

[246] He also stated that having tendered the mortgage into evidence Gerogics cannot question its authenticity. I have also noted that the mortgage refers to the letter of commitment.[19]

[247] In **Halsbury's Laws of England**, volume 77 (2016) the following passage can be found:

> *"Characteristics of a mortgage.*
>
> *A mortgage consists of two things, namely a personal contract for payment of a debt and a disposition or charge of the mortgagor's estate or interest as security for the repayment of the debt; in equity the estate or interest so transferred is no more than a pledge or security.* ***Every mortgage implies a debt*** *and a personal obligation by the mortgagor to pay it …"*[20]
>
> [Emphasis added]

[248] I have relied on the passage in a very limited way, that is, for the words which have been highlighted.

[249] In the ***Zinda v Bank of Scotland plc*** [2011] EWCA Civ 706, Munby LJ said:

> *"16.* ***A mortgage is a charge on property to secure the repayment by a debtor to his creditor of moneys lent****. The word mortgage is used in a number of different senses. Colloquially it may be used to refer to the loan (as in 'I have a mortgage from the bank') or to the overall contractual arrangements (as in 'I have a mortgage with the bank'). In law, however, the mortgage is neither the loan nor the contract. It is that element of the overall transaction constituting the charge on property which gives the lender his security. The effect of the Law of Property (Miscellaneous Provisions) Act 1989 is that the*

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[19] Exhibit 8A
[20] Paragraph 102

mortgage or charge can only be created by a written document complying with certain statutory formalities. Typically, as in the present case, the document is in the form of a deed.

17. From the point of view of the lender—the mortgagee—a mortgage has a number of advantages. In the first place it enables him, if the borrower defaults, to obtain possession of the mortgaged property and sell it in order to recoup the moneys he has lent. The mortgagee does not need to obtain a money judgment and then a charging order; he can proceed immediately to obtain a possession order. Second, it gives him priority over the borrower's unsecured creditors. Assuming there is adequate equity in the mortgaged property, the lender will recover his debt in full, even if the debtor is insolvent. But a mortgage also has a number of advantages from the point of view of the borrower—the mortgagor. Precisely because the debt will be secured, a lender is likely to be more willing to lend money to people whose credit would otherwise be thought inadequate and, crucially, more willing to lend larger amounts and at a lower rate of interest than he would be prepared to agree if the loan was unsecured. It is, after all, these commercial and economic realities which have enabled so many people to become the owner-occupiers of houses which they would otherwise never have been able to afford."

[Emphasis added]

[250] The mortgage deed is a document which, on its face, evidences the grant of a loan. Gerogics is therefore in the position of having to show the court that this document ought not be accepted. It has to impeach the document it has tendered. A document which was admittedly signed by two of its directors.

[251] Additionally, the commitment letter[21] and form of acceptance[22] and the borrowing resolution[23] all point to the fact that the bank granted a loan to Gerogics. The very

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[21] Exhibit 8A
[22] Exhibit 8B
[23] Exhibit 10

existence of these documents cast doubt on Mr Smith's assertion that the arrangement between the parties was an informal one. I have found Mr Smith's evidence on this point to be less than credible. He sought to convince the court that he had an informal arrangement with Mr Campbell in the face of mortgage documents having been signed by him and his daughter, who is an attorney-at-law. The letter of intent was also signed by both of them. His signature also appears on the borrowing resolution which refers to the intention to grant a mortgage to secure the loan.

[252] In the circumstances, I do not accept Mr Smith's evidence that there was an informal arrangement between he and Mr Campbell. The documents say otherwise.

[253] I accept the submission of Queen's Counsel that the mortgage confirms the existence of the loan.

Whether the judgment of Sykes J in the second claim renders the mortgage invalid or unenforceable?

[254] On 20 May 2016, Sykes J delivered a judgment in the second claim.[24] He detailed the first claim in his judgment. At paragraphs [4] and [5] he stated:

> *"**The first claim***
>
> *In May 2012 Capital & Credit Merchant Bank Limited sued the defendants in Claim No 2012CD00035 (**Capital & Credit Merchant Bank v Gerogics and others**).*
>
> *The claim form stated that it was suing on an amount (irrelevant for present purposes) being principal and interest accrued as well as recoverable expenses. The claim was brought 'pursuant to promissory notes issued by the 1st defendant in favour of the claimant and the (sic) pursuant to guarantees issued by the 2nd and 3rd*

[24] ***JMMB Merchant Bank Limited v Gerogics Investments Limited*** [2016] JMSC COMM 12

defendant in respect of the 1st defendant's indebtedness to the claimant."

[255] In respect of the second claim Sykes J said, at paragraph [16]:

> *"**The second claim***
>
> *In the claim form the bank seeks to recover specified sums, interest and 'recoverable expenses' 'incurred by the claimant.' Other than the sum sought to be recovered and the rate of interest, the claim form in this second claim is identical to the first claim."*

[256] In deciding the issue of whether the second claim is an abuse of process, the learned judge stated as follows:

> *"[81] It was known before the trial that the defendants had not agreed any of the documents. This meant that leading up to the trial and in the days immediately preceding the trial, the bank should have been prepared to prove the matter the old fashioned common law way in the absence of agreement about the documents to be used at trial. There were also the provisions of the Evidence Act which might have been used to get the documents into evidence. Whether the bank would have met the statutory criterion would be a matter for the trial court judge.*
>
> *...*
>
> *[83] …The real problem was that the bank could not prove the case through the witnesses it had selected to prove the case at trial (those present at trial and those absent) because of the non-agreement of documents. It was not a lack of opportunity to prove the case but rather it was one in which the case could not be proved because it appears that none of the bank's witnesses would ever be able to provide the foundation for admissibility of the crucial documents.*
>
> *….*
>
> *[85] …The reason given by Mrs. Mayhew for discontinuing the trial was not lack of identifiable witnesses but the inability to prove the case…*

….

[88] Mr. Hylton pointed out to the court that the defence in the present claim is different from the defence in the previous claim. That may well be true but this case is not about whether the defendants have no defence but about whether it is an abuse of process for the bank to commence a new second claim after discontinuing the first one after it has started because of difficulties of proof."

[257] Earlier in his judgment Sykes J emphasized that the Court of Appeal of Jamaica has made it abundantly clear that the House of Lords' decision in ***Johnson v Gore Wood & Co*** (a firm) [2002] AC 1 is now the authoritative decision to be used in Jamaica when the issue of abuse of process is being considered. Sykes J highlighted a portion of the judgment of Lord Bingham which reads in part:

*"…But **Henderson v Henderson** abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing*

> *attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether on, given facts, abuse is to be found or not."*[25]

[258] In my judgment, Sykes J's decision was based on the particular facts of the case before him. The paragraphs reproduced earlier make this clear. Trial dates especially in this jurisdiction are sometimes set far in advance. The expectation is that they will be kept and the bank as the claimant would have been aware from the outset that the burden of proving the case was on its shoulders. It had also received an indication that the documents it was seeking to tender into evidence would have been objected to. Nonetheless, it neglected to place itself in a position to discharge its burden of proof at the trial.

[259] JMMB has asserted that its rights under the **ROTA** have not been affected by the judgment of Sykes J.

[260] Sections 105 and 106 of the **ROTA** provide as follows:

> *"105. 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 the land thereby mortgaged or charged; and in case default be made in the payment of the principal sum, interest or annuity secured, or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage or charge or hereby declared to be implied in any mortgage, and such default be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee or annuitant, or his transferees, may give to the mortgagor or grantor or his transferees notice in writing to pay the money owing on such mortgage or charge, or to perform and observe the aforesaid covenants (as the case may be) by giving such notice*

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[25] Paragraph 72

to him or them, or by leaving the same on some conspicuous place on the mortgaged or charged land, or by sending the same through the post office by a registered letter directed to the then proprietor of the land at his address appearing in the Register Book.

106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

[261] The above section is not dependent on any court action unlike the enforcement of a guarantee or promissory note.

[262] The independence of the mortgagee's power of sale was recognized by Batts J in ***Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited*** (supra) who said:

"…the Limitation of Actions Act does not apply to the exercise of the mortgagee's statutory power of sale."[26]

[263] Similarly, Laing J in ***Dorrett Wong Sam v Jamaica Redevelopment Foundation Inc*** [2018] JMCC Comm 13 stated:

> *"[50] This statutory power of sale permits the mortgagee to pass the ownership of the mortgaged interest to a bona fide purchaser. Although the Mortgage instrument may contain an express contractual power of sale, sections 105 and 106 of the [Registration of Titles Act] provide assistance to the Mortgagee by way of an independent power of sale. This was recognised by the Court in* ***SSI (Cayman) Limited v International Marabella Club*** *(SCCA No. 57/1986, judgment delivered 6 February 1987) where at page 25 the Court stated as follows:*
>
> > *'This is particularly so when the consequences are implied by statute see sections 105 and 106 of the [Registration of Titles Act] and sections 22 and 23 of the Conveyancing Act which gives the Mortgagee the power of sale part from any term in the deed'.*
>
> *[51] It is the ability of the Mortgagee to exercise this independent power of sale without recourse to the Court which in my view prevents the operation of the Limitation of Actions Act since the process of sale is not an '****action suit or other proceeding'*** *within section 33 of that act. The mortgagee's execution of a transfer to the purchaser derives its force and effect from section 106 of [Registration of Titles Act] which allows him to* ***"make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale..."***

[264] Gerogics has asked the court to discharge the mortgage on two bases. Firstly, that there was no loan agreement between it and Capital & Credit and secondly, on the

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[26] Paragraph 14

basis that JMMB is barred from proving the loan and any indebtedness flowing therefrom.

[265] Mr Robinson argued that there must be finality to litigation and if JMMB is allowed to argue and present evidence to prove the existence of a loan, having failed to do so on two previous occasions, that would be its third bite at the cherry. Indeed, there can be no argument against the principle that there must finality to litigation. However, the facts in each case must be carefully assessed.

[266] A number of cases that were included in Gerogics' bundle of authorities were concerned with abuse of process.

[267] In ***Gilham v Browning and another*** [1998] 2 All ER 68, the claimant, Mr Gilham issued proceedings against the defendants for the balance of the purchase price from the sale of some goats. The defendants contended that no further payment was due and counterclaimed £120,000 without giving details. The claimant died and the action was continued by his personal representative. The defendants subsequently served an expert's report particularising their loss. Leave to adduce the evidence was refused on the basis that there was no proper explanation for the late service of the report and that its admission could result in considerable prejudice to the claimant.

[268] The defendants who did not appeal the order, served a notice of discontinuance. On the claimant's application, the notice of discontinuance was set aside on the ground that it was an abuse of process because the defendants were trying to escape the effect of the order by abandoning their counterclaim, so that they might bring new proceedings in which the disallowed evidence could be tendered. The defendants then chose to be nonsuited on their counterclaim, but the judge refused to permit them to do so. The defendants appealed against the judge's order. There was no dispute that they were attempting the order refusing permission for the expert's report to be adduced.

[269] In dismissing the appeal May LJ stated:

> *"It was, I think, seeking to use the court process to obtain a collateral advantage which it would be unjust for the Brownings to obtain, ie to escape by the side door from the first action where their counterclaim was evidentially hopeless in order to start a new action where the evidential problems would not arise, and this in circumstances where a long overdue date for trial of the first action was fixed and imminent. If it were necessary to characterise the abuse adjectivally, I should say that it was plain."*[27]

[270] In ***Coffee Industry Board v Oswald O'Meilly et al*** (unreported), Supreme Court, Jamaica, Claim No. 2004 HCV 1657, judgment delivered 16 October 2004, the court was tasked with considering the circumstances in which a notice of discontinuance may be set aside as being an abuse of the court's process. Sinclair-Haynes J (Ag), as she then was, stated that the circumstances which may amount to an abuse of process varies from case to case. The learned judge also stated:

> *"The creation of the new Trust presupposes a consensual arrangement amongst all the interested parties to the present Trust. To create a new Trust lawfully and fairly must entail a resolution of the outstanding and burning issues raised by the Board in its Fixed Dated Claim Form and the questions raised by the beneficiaries. I am taken aback that the Board now seeks to discontinue in the face of the Judge's orders that all the parties be heard. In my view, the creation of a new Trust ignoring the court's orders and the issues and questions raised by the beneficiaries will not serve to resolve the ongoing issues that cry out for resolution. It would only postpone the inevitable and ill-fated date of reckoning. Such a course of action, the Court should not be a party to.*
>
> *It is inappropriate and ill advised for the Board to rely on the advice of the Attorney General as being the end of the matter in light of Mr. Wood's contention that the bust is indeed lawful. The opinion of the Attorney General at this stage, cannot oust the jurisdiction of the Court seised with the matter, in the face of the issues joined. In my*

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[27] Pages 76-77

judgment the arguments advanced by Mr. Wood are sound and have real prospect of success should the matter be heard. It would be wholly unjust to allow the Board 'to escape by the side door and avoid a contest'…

The Board's purpose in discontinuing the matter seems an attempt to determine the matter without having to deal with the questions raised by the beneficiaries."[28]

[271] In ***Hon Gordon Stewart OJ et al v Independent Radio Company Limited and another*** [2012] JMCA Civ 2, the appellants, filed a claim in the Supreme Court against the respondents which was subsequently amended to claim damages for defamation "arising from a number of publications maliciously and falsely made by Wilmot Perkins on the programme Perkins-On-Line broadcast by Independent Radio Company Limited on the radio station Power 106 FM over an extended period, particularly from the year 2004 to 2008 which were defamatory of the claimants personally and in the way of their business."

[272] Paragraph 43(a) of the amended particulars of claim stated:

"The 1st Defendant's station broadcast the contents of a parliamentary speech made by a member of the House of Representatives Mr. Andrew Gallimore on the 28th June 2005. This presentation assailed the 3rd Claimant's management team in an unjustifiable manner. This had occurred while there was a pending case in Miami between Mr. Andrew Gallimore's brother, Miguel Gallimore against Air Jamaica arising from an incident, which occurred when the 3rd Claimant was in control of Air Jamaica's management and in which Andrew Gallimore had abused his parliamentary privilege. The 1st Defendant's station has been energetic and highly motivated in promoting the contents and sentiments of the speech and promotion of its accusations against the Claimants by repeating them outside of Parliament."

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[28] Pages 15-17

[273] In July 2010, the appellants again sued the respondents, claiming among other reliefs damages for *"libel in respect of the republication of a speech, and or parts thereof, presented in the Houses of Parliament by Andrew Gallimore, M.P. on June 28, 2005."*

[274] Paragraph 20 of the particulars of claim stated:

> *"On July 29, 2005, the 2nd Defendant, while hosting his radio programme ''Perkins On Line' on Power 106, which was aired on the internet as well, falsely and maliciously republished a speech, or parts thereof, presented in the Houses of Parliament on June 28, 2005 by the current State Minister in the Ministry of Labour and Social Security, Andrew Gallimore, M.P. which was defamatory of the Claimants. At the time of the speech, Minister Gallimore was the M.P. for West Rural St. Andrew, the Jamaica Labour Party's parliamentary whip and shadow cabinet secretary."*

[275] The respondents filed an application seeking an order that the July claim be struck out on the basis that it was an abuse of the process of the court as the claimants were advancing the same claim and seeking the same relief as in the earlier claim. The application was granted by P. Williams J (as she then was) on 13 January 2011.

[276] In allowing the appeal, Hibbert JA (Ag) (as he then was), in his analysis of the law concerning abuse of process and then stated:

> *[39] In the case before this court, what was stated in the written submissions of the appellant was that the second suit was brought ostensibly to cure a perceived defect in the pleadings in the first suit. Although a defect in the pleadings in the original claim may have been cured by amendment, the consolidation with a second suit or the ordering of the two to be tried together as was envisaged in* ***Talbot v Berkshire CC*** *could also be adopted. This approach would put no additional burden on the court in its adjudication on the issues, nor would it cause any injustice to the defendants, bearing in mind paragraph 59 of the claimants' amended particulars of claim in the first suit which stated that:*

> *'The Claimants, to the extent desirable, will refer to other publications concerning them or any of them which may come to their attention and relevant to the Claimants.'*
>
> *[40] In light of the fact that no trial date had been set in the first claim and that the two claims could be easily consolidated and tried together, I am of the opinion that in the circumstances of this case the drastic steps of striking out the appellants' statement of case should not have been taken by the learned judge. If a trial court thinks it appropriate, I believe a penalty, by awarding costs, would be a more appropriate remedy. Accordingly, I would allow the appeal with costs to the appellants to be taxed if not agreed.*

[277] Whilst I take no issue with the principles enunciated in those decisions, their utility in respect of the issue in this case is in my opinion, limited. I have already addressed the issue of who bears the burden of proof in this matter and am not of the view that, JMMB in seeking to defend its actions is abusing or misusing the process of the court.

[278] Counsel for Gerogics contended that the issues in the case of ***Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited*** (supra), which has been relied on by JMMB, are unrelated to the issues in this case. The facts of the ***Dagor Limited*** case are different. However, it is quite useful in so far as it outlines the different remedies available to mortgagees. The case also makes it clear that although a claim may be barred by limitation defence, the exercise of a mortgagee's power of sale is not.

[279] In ***Dagor Limited***, Batts J said:

> *"[12]. …The Registration of Titles Act allows the mortgagee to transfer that title by way of sale. The sale is only one of several methods to enforce his security. The others are: (a) an action on the debt (b) appointment of a receiver (c) re-entry and possession (d) foreclosure. The Limitation of Actions Act applies to the making of an entry and the bringing of actions…"*

[280] In the 14th edition of the text '**Paget's Law of Banking**', the learned editors Ali Malek QC and John Odgers QC note on page 452:

> *"REMEDIES OF A LEGAL MORTGAGEE*
>
> *17.59 As a legal mortgagee the lender has a number of powerful remedies which it can bring to bear. For the most part, these are remedies against the borrower and the mortgaged property. However, the lender may have other valuable remedies. There may be guarantees from third parties…The lender may also have the benefit of mortgage indemnity insurance. The existence of these alternative remedies will affect how the lender goes about exercising its powers as mortgagee against the borrower and the mortgaged property and it is important that they are taken into account to maximise the return to the lender.*
>
> *17.60 The remedies of a lender secured by way of a registered legal mortgage are cumulative and with the exception of foreclosure their exercise does not generally need to be preceded by a judgment of the court…"*

[281] In chapter 20 of the text '**Fisher and Lightwood's Law of Mortgage**' 12th ed. the mortgagee's power of sale out of court is addressed. It provides:

> *"INTRODUCTION*
>
> *[20.1]* ***Under most mortgages, the property comprised in the security may, in certain circumstances, become liable to be sold for the purpose of discharging the debt, without the need for the mortgagee to obtain a court order****…*
>
> *THE POWER OF SALE*
>
> *[20.2] The mortgagee may have a power of sale as a legal incident of the security, under an express power, or under a statutory power…*
>
> *Express power of sale*
>
> *[20.5] To remedy the lack of a legal or equitable right to sell free from the equity of redemption, it became common from the early nineteenth century to insert an express power of sale in the*

mortgage, until the introduction of a statutory power of sale by Lord Cranworth's Act 1860. The statutory power of sale now contained in the Law of Property Act 1925 has rendered the inclusion of an express power of sale unnecessary. However, there is nothing in ss 101 or 103 of the Law of Property Act 1925 which restricts express powers conferred on the mortgagee by the mortgage deed itself and the mortgagee is entitled to extend or vary the statutory power of sale by express provisions in the deed; …

Statutory power of sale

The statutory power

[20.6] Where: (a) a mortgage is made by deed (which will apply to all legal mortgages), and (b) the mortgage money has become due, the mortgagee has a statutory power of sale under s 101(1)(i) of the Law of Property Act 1925, to the same extent as if a power in the following terms had been conferred by the mortgage deed…"

[Emphasis added]

[282] There are three clauses in the mortgage deed which I consider it important to highlight. They are set out below:

"IT IS HEREBY AGREED AND DECLARED: -

…

(c) This security shall be a continuing security and shall avail the Mortgagee in respect of all present and future indebtedness of the Mortgagor on any accounts whatever and is in addition to any security which would be implied or arise in the ordinary course of business between the Mortgagor and the Mortgagee and shall be deemed to continue notwithstanding any payments from time to time made by the Mortgagor or any settlement of account or other things whatever.

(d) This security shall not be affected by nor affect any other security which the Mortgagee may now or hereafter hold from the Mortgagor and the Mortgagee shall be at liberty to realise its securities in such order and manner and to apply and appropriate any moneys at any time or times paid by or on behalf of the Mortgagor or resulting from

a realization of this or any other security or any part thereof to such account or item of indebtedness and in such sequence, priority and order as the Mortgagee may in its absolute discretion from time to time determine any direction from the Mortgagor to the contrary notwithstanding.

…

(h) The statutory powers of sale and of appointing a Receiver and all powers conferred on mortgagees by the Registration of Titles Act may be exercised by the Mortgagee not only on the happening of the events mentioned in the said Act, but also upon any default after any demand for payment of the moneys hereby secured or any part thereof or immediately upon any other default in or non-compliance with any of the covenants, conditions or obligations on the part of the Mortgagor herein contained or hereunder implied and whenever or whereupon the principal interest or other moneys secured hereunder shall become payable without it being necessary in any one or more of such cases to serve any notice or demand on the Mortgagor anything in the Registration of the Titles Act or any other Act or Law to the contrary notwithstanding BUT upon any sale made under the statutory power the purchaser shall not be bound or concerned to see or enquire whether such sale is consistent with this provision and if a sale is made in breach thereof the title of the purchaser shall not be impaired on that account."[29]

[283] I have also noted that on certificate of title registered at volume 1080 Folio 370 the following appears:

"Mortgage No. 1465452 registered in duplicate on the 5th day of April, 2007 to Capital & Credit Merchant Bank Limited at 6-8 Grenada Way, Kingston 5, St. Andrew, secure the monies mentioned in the mortgage stamped to cover Five Million Four Hundred and Seventy Eight Thousand Seven Hundred and Fifty Dollars United States Currency with interest. For this and another registered at Volume 1123 Folio 16"

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[29] Pages 5 to 7

[284] The mortgage was upstamped on two occasions. It was registered and as such, the provisions of the **ROTA** are relevant. The **ROTA** gives the mortgagee a power of sale once there is a default in payment (or in the performance or observance of covenants) that continues for one month after the service of notice upon the mortgagor or for such other period as may in such mortgage be for that purpose fixed.

[285] Even if the statutory power of sale did not exist, the mortgage deed itself contains an express power of sale.[30] This was recognized in ***Dorrett Wong Sam v Jamaican Redevelopment Foundation, Inc*** by Laing J.[31]

[286] JMMB has opted to pursue its rights under the **ROTA.** As pointed out by Batts J in **D*agor Limited v MSB Limited and National Commercial Bank Jamaica Limited*** (supra), this is one of the options which is open to a mortgagee where there has been default in loan payments.[32]

[287] The judgment of Sykes J, which was concerned with claims made pursuant to promissory notes and guarantees, does not in my view affect JMMB's rights as mortgagee. There was no ruling on the existence of a loan and/or the validity of the mortgage and as was demonstrated in ***Kasumu and others v Baba-Egbe*** [1956] 3 All ER 266, the fact that a loan exists is a separate issue from its enforceability by way of court proceedings. In that case a breach of the Nigerian Moneylenders Ordinance resulted in the respondent's loss of the right to take any legal proceedings in respect of the loan.

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[30] The case of ***Jobson v Capital & Credit Merchant Bank Ltd and Others*** (2007) 70 WIR 204 is instructive as regards the interplay between the statutory power of sale and the express power of sale.
[31] See paragraph [262] above
[32] See paragraph [278] above

[288] In this regard, I am also mindful of the following statement made by Edwards J in ***Gerogics Investments Ltd. v JMMB Merchant Bank (Jamaica) Ltd***. [2018] JMCC Comm 19:

> *"The fact that a claimant is barred from claiming on a debt whether by limitation of time or court order, does not mean the debt does not exists (sic), he just cannot recover it by way of court proceedings".*[33]

[289] In relation to the telephone call which took place between Mr Smith and Mrs Duncan-Sutherland, I prefer her evidence that that the purpose of the call was with a view to subdividing the property so that it could be sold "shovel ready" to Mr Smith's evidence. I find Mrs Duncan-Smith to be a more credibile witness whose evidence was not shaken by cross-examination.

[290] In any event, even if the purpose of the call was as was stated by Mr Smith, it could not in my view constitute an admission that the mortgage was invalid as was asserted by Mr Robinson. Mrs Duncan-Sutherland was not an attorney-at-Law at the time and even if she was, her views as to the validity of the mortgage could not override the provisions of the **ROTA**.

[291] In ***Gerogics Investments Ltd. v JMMB Merchant Bank (Jamaica) Ltd***. (supra), Edwards J, in considering the issue of disclosure, expressed the following view which I adopt:

> *"[31] … Once a valid mortgage is in place it becomes a separate question whether JMMB is barred from pursuing its rights as a mortgagee because it cannot pursue its money debt in a court of law.*
>
> *[32] The question I must ask myself at this stage without pre-empting the decision of the trial judge is this: would a court, in considering whether the defendant should be allowed to retain the security because it is barred from claiming on the debt itself, be necessarily interested in the documents which led to the mortgage in the first*

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[33] Paragraph [32]

place? The answer is that it may and in my humble view it should. The fact that a claimant is barred from claiming on a debt whether by limitation of time or court order, does not mean the debt does not exists (sic), he just cannot recover it by way of court proceedings. It also does not mean that the claimant is prima facie barred from exercising any other rights, he may have or from proceeding with any other cause of action it may have, which is not affected by the limitation or court order. Any collateral documents to the debt, as for example a security document, may carry its own rights against a defendant and its own cause of action. Proving the loan in an action on the debt is different in my view from proof of the mortgage which is security for the loan, even though it may involve the same documentation.

[33] A court in considering whether the mortgage is invalid may well think the documentation leading to the mortgage directly relevant to the question despite the narrow view taken by Gerogics that its invalidity is being claimed solely on the basis of the order that any claim for the debt is an abuse of process. It was an abuse of process because the bank abandoned its 1st claim and had its second attempt struck out. The order striking out the second claim made no finding as to whether there was an actual loan or not.

[34] The issue of the mortgage being a separate question which could give rise to a separate cause of action, all documents relating to it are directly relevant regardless of whether Gerogics intends to rely on them or not. A mortgagee has the right to claim on the debt, to claim the right of re-entry and possession and the right to exercise a power of sale. The latter rights may be exercised without bringing any action on the debt. See generally the views of Batts J which I endorse, in the case of ***Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited*** *[2015] JMSC Civ 242 and specifically paragraph [121].*

[35] The mortgage does not stand in isolation. Any claim on or against the mortgage suggests that any document relating to its existence or how it came about is directly relevant to the claim, whether or not that claim is solely asking the court to declare it void because of a former court order against the claim for the debt which resulted in the said mortgage. For example the claim on the pleading is that the mortgage is void on the basis of past consideration.

However, one of the promissory notes sought to be disclosed is dated the same date as the mortgage. This is directly relevant to the issue of whether the mortgage is void on the basis that consideration was past.

[36] There is nothing in the statements of Sykes, J or in his judgment and orders which says anything about the mortgage. The bank is always at liberty to move against the security. If the claimant wishes to pre-empt the bank from moving against the mortgage, it may do so, but it cannot say that the fact of the mortgage and the circumstances leading up to it is not directly relevant to its claim to invalidate the mortgage.

[37] I have already outlined the affidavit evidence supplied by both parties in this application. I have looked at the lists of all the documents requested to be disclosed. The documents tend to support JMMB's case that it has a valid mortgage which it is entitled to move against despite the court's ruling on the separate claim for debt. It does not matter that there may be an overlap in documents necessary to prove the mortgage and those necessary to prove a debt. The claim which was struck out did not involve the mortgage."

[292] In the case of ***Dorrett Wong Sam v Jamaican Redevelopment Foundation, Inc*** (supra), Laing J said:

> *"[51] It is the ability of the Mortgagee to exercise this independent power of sale without recourse to the Court which in my view prevents the operation of the Limitation of Actions Act since the process of sale if not an "action suit or other proceeding"…"*

[293] It is clear that a mortgagee's power of sale can be exercised independently of court proceedings,[34] thus proving a loan in court is not a condition precedent to the exercise of that power. The mortgage deed and the subsequent endorsement on the certificates of title are sufficient indicia of the existence of a loan. It is the mortgagee who determines that there has been a default and then decides which

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[34] The Privy Council case of ***Jobson v Capital & Credit Merchant Bank Ltd and Others*** (2007) 70 WIR 204 is further demonstrative that the mortgagee can exercise its power of sale without a court order.

remedy or remedies to pursue to secure repayment. If a claimant takes issue with the mortgagee's power of sale and files a claim, it is he who must satisfy the court that the mortgagee is not at liberty to exercise its statutory power of sale and/or its express power of sale.

[294] In light of the foregoing, I am of the view that the judgment of Sykes J does not lead to the inescapable conclusion that the mortgage is void and ought to be discharged. The exercise of a mortgagee's power of sale is not dependent on judicial determination that a debt is due and owing.

[295] In addition, the claims which were previously initiated by JMMB (or its predecessor) were not concerned with the mortgage. They were initiated pursuant to promissory notes and guarantees.

Past Consideration

[296] Gerogics, in its pleadings, stated that the mortgage was made on 13 February 2007, months after the alleged agreement for the principal debt in November 2006 and accordingly, is made for past consideration which is no consideration at all and is therefore void and invalid. I am of the view that this argument is not one which can be used to secure the discharge of the mortgage.

[297] In ***Classic Maritime Inc v Lion Diversified Holdings Berhad*** [2009] EWHC 1142 (Comm), the claimant brought an action against Lion under a written guarantee dated 28 August 2008 by which it guaranteed the obligations of its subsidiary, Limbungan, under the contract of affreightment. One of the defences raised by Lion was that the guarantee was unenforceable because any consideration given was past consideration. Cooke J addressed the issue thus:

> *"35. Lion's argument that there was no valid consideration and only past consideration hangs upon the opening words of the guarantee itself, which reads as follows:*
>
> > *'In order to induce Classic Maritime Inc. to enter into a contract of affreightment dated 13th August 2008 (the "Contract") with*

Limbungan Makmur Sdn Bhd of Kuala Lumpur, Malaysia, the undersigned (the "Guarantor"):

> *1. Represents that it owns, directly or indirectly, all of the equity interests in Limbungan Makmur Sdn Bhd and, accordingly, benefit from Classic Maritime Inc's entering into and performing its obligations under the Charterparty, and*
>
> *2. Guarantees and promises to pay to Classic Maritime Inc., on demand, any and all amounts (the "Obligations") that Limbungan Makmur Sdn Bhd becomes obligated to pay to Classic Maritime Inc. as a result of Limbungan Makmur Sdn Bhd's failure to perform its obligations or otherwise under the Charterparty when each of the Obligations becomes due.'*

36. ***As already mentioned, the date of this guarantee is 28th August 2008 and the opening wording refers to the inducement of the contract of affreightment dated 13th August 2008, 15 days earlier. Lion submits that the guarantee, on its face, therefore refers to past consideration and it is therefore unenforceable****. Moreover, Lion maintains that it is inadmissible to look at extrinsic evidence to show other consideration.*

37. ***This argument is totally devoid of commercial sense and, I am glad to say, wrong as a matter of legal analysis.***

38. The Recap for the August COA stated that the COA was for the account of Limbungan but that its performance was to be fully guaranteed by Lion Industries. Limbungan was therefore under an obligation to procure such a guarantee from Lion Industries. The terms of the guarantee had not been negotiated at that stage but Limbungan had undertaken an obligation which was enforceable. ….

39. ….

43. ***The reality is that the guarantee was given as part and parcel of a single transaction, since it was specifically required by the August COA.*** *There was no subsequent demand for a*

guarantee to be given, because it was already provided for in that COA. Consideration moved from Classic as the promisee in the context of the transaction as a whole. As originally set out in the August COA, the obligations undertaken by Classic were good consideration for the obligations undertaken by Limbungan, including the obligation to procure the guarantee. When the guarantee was given pursuant to Limbungan's obligations, (whether varied or not by the substitution of a different guarantor) the consideration it had in mind for the guarantee was the fulfilment by Classic of its obligations under the August COA. When Classic tendered performance for the first two voyages of the August COA by nominating the performing vessels and arranging for them to sail to the load ports, it was fulfilling its obligations under the August COA as part and parcel of the single transaction which included the guarantee. The performance of those obligations towards Limbungan in itself amounted to good consideration in relation to the third party guarantor, Lion.

44. In paragraph 1 of the guarantee dated 28th August 2008, Lion represents that, by reason of its shareholdings in Limbungan, it benefits from Classic's performance of its obligations under the August COA. Presumably such benefit to a parent company is one of the reasons which could be put forward for the requirement suggested by Lion for a guarantee to be given only by a parent company. Regardless of that, there is no doubt that the clause specifically states that Lion benefits not only from Classic entering into the COA with Limbungan but also from performing its obligations under it and in those circumstances there can be no doubt that the future performance of the COA after 28th September, as actually occurred, does amount to good consideration moving from Classic.

45. Furthermore, although the guarantee is dated 28th August and refers to the contract of affreightment already concluded on 13th August, there is an artificiality about Lion's argument, simply because the first few lines of the guarantee refer to the representations being made and the guarantee being given in order to induce Classic to enter into that COA. What is actually being stated is that the guarantee, whatever the date of its execution, operates to induce the conclusion of the COA. The reality of course is that it is part of a single transaction where the obligation to obtain the guarantee rested on the subsidiary Limbungan as at 13th August and the

guarantee was executed pursuant to that obligation. The promise of the future guarantee did induce Classic to enter the COA. It is merely that the guarantee itself, instead of being dated 13th August, is dated 28th August. Because of the closeness of parent and subsidiary, as referred to in the guarantee itself, there can be no doubt that the guarantee forms part and parcel of the single transaction and that, whatever the wording of the guarantee, it was provided by Lion, because without it, the transaction could not go ahead.

46. ***In Chitty on Contracts (30th Edition) paragraph 3-027 it is stated that, in determining whether consideration is past, the courts are not bound to apply a strictly chronological test. If the giving of the consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive.*** *It was accepted by Lion that the issue of a single transaction is always a question of degree but that what was envisaged by the authors was the case where the same parties were involved throughout. That does not however appear to me to be a sufficient answer to the point. It is the exchange of one obligation from one party for another from a different party which, in any event, changes the analysis, as set out earlier in this judgment.*

47. There was argument about the decision of the Privy Council ***Pao on v Lau Yiu Long*** *[1980] AC 614 and the statement in the judgment of the Board at page 631 that extrinsic evidence is admissible to prove the real consideration in three circumstances. The first is where no consideration or a nominal consideration is expressed in the instrument, which is not this case. The second is where the express consideration is in general terms or ambiguously stated. The third is where a substantial consideration is stated but an additional consideration exists which is not inconsistent with the terms of the written instrument. Lion submitted that, because the guarantee referred to the inducement of the COA by it, any reference to present or future consideration was inconsistent with that past consideration and could therefore not be admitted. I cannot accept this submission. The inconsistency arises in the terms of the guarantee itself because an instrument dated 28th August 2008 is said to induce a contract of affreightment dated 13th August 2008. Given that, there is plainly room for reference to extrinsic evidence to clarify the anomaly. The guarantee, if executed on 28th August,*

without any prior commitment on the part of Lion could not induce the conclusion of the COA on 13th August. That in itself therefore could not be consideration at all, let alone past consideration. Since the guarantee refers to the benefit to Lion from Classic's performance of the obligations, there is reference to future consideration within the terms of the guarantee and the other matters to which I have already referred, insofar as they constitute additional consideration, are not inconsistent with that. As stated in Halsburys Laws of Evidence 4th Edition Volume 12, as current in 1975, paragraph 1487:

> *"It is not in contradiction to the instrument to prove a larger consideration than that which is stated."*

*48. **Frith v Frith** [1906] AC 254 and the reference in it to **Clifford v Turrell** at pages 258-259 established that where there is one consideration stated, extrinsic evidence is allowed to prove any other consideration which existed and it is not in contradiction to the instrument to prove a larger consideration than that which is stated."*

[298] In the case at bar, the commitment letter dated 1 November 2006, identified the borrower as Gerogics and the lender as Capital & Credit. It stated that the purpose of the loan was to assist in financing the purchase of lands known as Haughton Hall estate in the parish of Hanover and registered as Volume 123 Folio 16. In respect of the security or support for the loan, the following was stated:

> *"The Loan is to be evidenced by a Promissory Note executed by Gerogics Investments Limited along with a Corporate Borrowing Resolution and secured:*
>
> ***1) First Legal Mortgage to be stamped for US $5, 478,750.00 plus interest over lands known as Haughton Hall Estate in Hanover and registered at Volume 1123 Folio 16 ("the property").***
>
> *2) Personal Guarantee of Director, Mr. Fred Smith for US $5,478,750.00.*
>
> *3) Assignment of Keyman Insurance policy over principal, Fred Smith for an amount of US$1M.*

4) Corporate Guarantee of Exclusive Holidays of Elegance Ltd for the full amount of the debt.

[Emphasis added]

[299] In November 2006, it was understood that the bank had intended to execute a mortgage for the loan that had been granted. The reality of the situation is that the mortgage was secured as part and parcel of a single transaction, since it was specifically required by the November 2006 commitment letter. There was no subsequent demand for a mortgage as security, because it was already provided for in that commitment letter. This argument therefore fails.

CONCLUSION

[300] Based on the foregoing, it is my view that Gerogics is not entitled to the reliefs claimed. Judgment is entered for JMMB. Costs are awarded to JMMB to be taxed if not agreed.