IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. CL 2002/L 030

BETWEEN	**LEXTON LIMITED**	**CLAIMANT**
AND	**RBTT BANK JAMAICA LIMITED (Removed as Party on November 10, 2009)**	**1ST DEFENDANT**
AND	**FINSAC LIMITED (Removed as Party on March 27, 2006)**	**2ND DEFENDANT**
AND	**DENNIS JOSLIN JAMAICA INC. (Removed as Party on April 26, 2006)**	**3RD DEFENDANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION, INC.**	**4TH DEFENDANT**

Mr. John Graham, Miss Annaleisa Lindsay and Miss Peta-Gaye Manderson instructed by John G. Graham and Company for the claimant

Mr. Charles Piper, Miss Marsha Locke and Mr. Wayne Piper instructed by Charles E. Piper and Associates for the 4th defendant

Heard: May 8, 9, 10 and November 28, 2012 and April 10, 2014

DETINUE-EQUITABLE MORTGAGE – DEPOSIT OF TITLE DEEDS

AGENCY – ACTUAL OR OSTENSIBLE AUTHORITY

SIMMONS, J.

[1] This matter is of some antiquity, having been filed in 2002. By way of an Amended Writ of Summons and Amended Statement of Claim, the claimant brought an action in detinue against the defendants seeking damages and the return of

Certificates of Title registered at Volume 1225 Folio 976 and Volume 1225 Folio 977 of the Register Book of Titles.

[2] The debt which is at the centre of the dispute between the parties was assigned to the fourth defendant and as such it is the only one from whom the claimant seeks redress.

[3] The claimant is the owner of two apartments situated at 43 Charlemont Drive, Kingston 6 in the parish of St. Andrew (the properties) and registered at Volume 1225 Folio 976 and Volume 1225 Folio 977 of the Register Book of Titles.

[4] These duplicate Certificates of Title (the titles) were delivered to the Jamaica Citizens Bank (JCB) during the processing of a loan to Couchere Limited and Soufare Limited T/A Selections (the companies) which the claimant had agreed to guarantee. This loan was to replace an overdraft facility that had been extended to Paulette Gayle also known as Paulette Gayle - Alexander and Marie Clarke T/A Selections (the partners).

[5] A letter of commitment to that effect was sent by JCB to the companies. The letter which is dated the 22nd June 1997 states in part:-.

> *"We are pleased to inform you that Citizens Bank Limited and/or Citizens Merchant Bank Limited and /or Citizens Building Society are prepared to increase credit facilities to you according to the following terms and conditions, as well as any other terms and conditions as may be embodied in the security documentation:-*
>
> | | |
> |---|---|
> | *BORROWER* | *Couchere Limited and Soufare Limited T/A Selections …….* |
> | *TYPE AND AMOUNT* | *1. Demand Loan $4,500,000* |
> | *OF CREDIT* | *2. EXIM Bank Demand Loan - Couchere Limited - $4,000,000* |

3. EXIM Bank Demand Loan - Soufare Limited - $4,000,000……

PURPOSE

1. *To hive off hard-core on overdraft in the names of Paulette Gayle and Marie Clarke, T/A Selections. Overdraft facility was extended to renovate and refurbish a new retail outlet at Lane Plaza……..*

SECURITY

1. *Unlimited Guarantee by Paulette Gayle-Alexander and Marie Clarke……..*
2. *…..*
3. *…..*
4. *Limited Guarantee of Lexton Limited for $2,600,000 supported by:*
   (a) *First Legal Mortgage over premises known apartments #3 and #4 located at 43 Charlemont Drive and contained in all that parcel of land at Volume 1225 Folio 977 and Volume 1225 Folio 976, stamped to cover $2,600,000. All Risk Insurance with Bank's interest noted. (The shareholders of Lexton Limited, James and Mary Mclean must obtain independent legal advice)…."*

[6] In accordance with that agreement the claimant executed a Guarantee and a Guarantor's Mortgage in 1998. The Guarantor's Mortgage names the companies as the borrowers and the liability of the claimant is limited to five million six hundred thousand dollars ($5,600,000.00).

[7] The terms of the security documentation required to complete the process were never agreed and as such the processing of the loan was not finalized.

[8] JCB continued to make funds available to the partners by way of an overdraft facility. It appears that the debt was not adequately serviced and it rose to over fifteen million dollars ($15,000,000.00).

[9] The operations of JCB were adversely affected during the period which has become known as the financial crisis of the 1990s and its debt portfolio was eventually assigned to the fourth defendant. By virtue of this assignment the titles were also delivered to the fourth defendant.

[10] The claimant's case is that no loan was made to the companies therefore liability as guarantor never arose and as such it is entitled to the return of the titles

[11] The fourth defendant, in its defence, stated that an equitable mortgage was created by the deposit of the titles and that the partners and companies took the benefit of the loan facilities by virtue of the former's continued use of funds that were made available by way of the overdraft on their account whilst the loan was being processed. This was said to have been done with the knowledge and consent of the claimant. It has also alleged that the processing of the loan was not completed due to the failure of the companies and partners to provide all the security documentation and funds required to stamp and register that documentation.

[12] Additionally, the fourth defendant has pleaded that in the circumstances the claimant is estopped by its conduct and that of its principals, servants or agents from asserting that the loans were never made and that the titles have been wrongfully detained.

[13] The fourth defendant maintains that the partners and the companies have either failed or refused to repay the sum of twelve million five hundred thousand dollars ($12,500,000.00) which was utilized under the overdraft facility.

[14] The counterclaim filed by the fourth defendant in summary, seeks the following declarations:-

(i) That it is the assignee of the claimant's liabilities to the first defendant;

(ii) That the claimant together with Paulette Gayle Alexander, Marie Clarke, Couchere Limited and Soufere Limited T/A Selections, have had the benefit of the proceeds of the loan and have

neglected or refused to give effect to the terms and conditions of the letter of commitment under which the funds were made available to them;

(iii) That it is entitled to hold the Duplicate Certificates of title as the assignee of the equitable mortgage given by the claimant to the first defendant;

(iv) That it is entitled to enforce the Deed of Guarantee given by the claimant;

The claimant's evidence

[15] The evidence in support of the claimant's case was given by Mr. Michael Samms who was appointed Company Representative for the claimant in Jamaica in 1996. His evidence is that the titles were to be used to guarantee a loan of nine million dollars ($9,000,000.00) to the companies by the Bank. He also states that prior to August 1997 the claimant did not send the titles to the Bank or give anyone the permission to do so. His evidence is that as far as he's aware the loan to the companies was never granted.

[16] In cross examination, the witness indicated that he had very little to do with the transaction in question but that he was the one who wrote the proposal to the companies outlining the terms of the claimant's security. He indicated that in 1998 an agreement was made between the companies and the claimant to lend the titles to the companies. The said titles were loaned to Paulette Gayle to show JCB and that she was authorized to take them to JCB. He said that at that time there was no agreement between the claimant and JCB.

[17] He said that it was in December 1998 that the agreement to use the titles as security for the loan was concluded.

[18] The attention of the witness was directed to the Finance Proposal dated the 11th July 1997 from Selections to JCB in which the titles were enclosed. He indicated that at the time it was his understanding that a proposal for a new loan of nine million

dollars ($9,000,000.00) was being made to JCB. He maintained that up to that time there was no agreement and Miss Gayle was only permitted to show the titles to JCB. Reference was made to letter dated the 15th July 1997 from Ivor Alexander to Lexton Limited. –

> *"As discussed on last Wednesday (July 10th), I have given to Paulette the two (2) Titles for Unites 4 5 at 43 Charlemount Avenue* ***to show to the bank officer to satisfy the rather rude questions being asked by its officer of me.***
>
> *This officer insisted on verification that the Titles existed, that I had them in my possession, that they were unencumbered and that I was Lexton's attorney-at-law. It was clear from the tone of these questions that she did not believe anything that Paulette had told her. She even asked if I was married to Paulette.*
>
> *All I know at this stage is that Paulette and her partner, Marie Clarke owe a lot of money to Citizens Bank and a restructuring is being discussed which involves a new loan which the bank is proposing to give to two companies which Paulette and Marie operate. The new loan is for JA $9,000,000.00 and the bank want security for this new loan.*
>
> *I had a short word with Jim who has no problem in principle, but of course we will need to see all the terms and conditions which may affect Lexton, including some special terms which I discussed with Jim which would limit Lexton's exposure to the two (2) Titles alone."*

[19] Mr. Samms indicated that he was not aware of the claimant ever requesting the return of the titles between July 1997 and December 1998. He also stated that it was in September 1997 that it was brought to his attention that JCB had kept the titles.

[20] He also said that in August 1997 the claimant was not aware of the Credit Proposal dated the 29th August 1997 in which a Guarantee of the claimant supported by mortgages of the properties to which the titles relate was listed among the Proposed Securities. He indicated that the agreement between the claimant and the companies was for the use of the titles for apartments 4 and 5 and not 3 and 4 as stated in the proposal.

[21] The witness gave evidence that he wrote to the companies outlining the terms and conditions under which the claimant would permit them to use the titles. However he was unable to say whether they communicated these terms and conditions to JCB.

[22] He also stated that by April 1998 the claimant was prepared to make the titles available to the companies subject to certain terms and conditions. The witness was unsure whether the claimant had informed JCB of those terms and conditions.

The Defendant's Evidence

[23] The defendant called two witnesses in support of its case, Jeffrey Chevannes, the Assistant General Manager of the first defendant and Joseph Gibson IV, President of the fourth defendant.

[24] Mr. Chevannes in his evidence in chief stated that a perusal of the Bank documents showed that in May or June 1997, the claimant, the companies and the partners all traded as Selections.

[25] The witness also states that by letter dated the 11th July 1997 the duplicate Certificates of Title for premises registered at Volume 1225 Folio 976 and Volume 1225 Folio 977 were delivered to JCB by Paulette Gayle. On July 14 1997, the partners executed an overdraft agreement in favour of JCB to a limit of eight million dollars ($8,000,000.00).

[26] Mr. Chevannes further stated that on the 10th November 1997 a letter of commitment was issued by JCB to the companies for a loan of twelve million five hundred thousand dollars ($12,500,000.00) and its terms accepted by them. Mr. Ivor Alexander signed as secretary to the claimant.

[27] On the 22nd June 1998, as a result of a request for additional financing from the partners, a letter of commitment was issued by JCB to the companies. The loan of twelve million five hundred thousand dollars ($12,500,000.00) was structured as: -

"… $4,500,000.00 to be financed by JCB, and separate loans of $4,000,000.00 to each of the companies from the EXIM bank". This loan was to enable the partners and

the companies to restructure existing overdraft liabilities of the parties and to finance the refurbishing and renovating of a new outlet. It was to be secured by a debenture over the companies' assets and a Guarantee from the claimant supported by a mortgage over the properties.

[28] The partners did not service the overdraft facility. The witness indicates that the partners and the companies permitted the overdraft facility to increase whilst continuing to negotiate the terms of the security documentation.

[29] In cross-examination, Mr. Chevannes stated that he began working at JCB in November 1997. He also gave evidence that the account that was sold to the second defendant was in the names of the partners.

[30] He indicated that he was not of the view that the letter written by Ms. Gayle which enclosed the title was sufficient to secure the bank position as an equitable mortgagee. He also indicated that he has no document in his possession which indicates that the claimant at any time traded as Selections. He did however say that he had a Director's Resolution which indicated that the claimant and the companies had a trading relationship. That document, he said, was generated in 1998 and as such no such evidence existed in 1997 when the letter was written.

[31] Mr. Chevannes also gave evidence that it was the companies and not the partners which were applying for a loan. He indicated that although the partners were the ones with whom JCB was negotiating, the intention was for the companies to be designated as the borrowers.

[32] He stated that by the 22nd June 1998 the loan funds had already been made available to the partners as the money was placed in a joint account which existed at the time in their names. This he said was done prior to the date when the commitment letter was signed by the companies.

[33] The witness indicated that he had not seen any correspondence addressed to the companies which indicated that JCB was making an advance on the loan and that it was been credited to the current account of the partners.

[34] He stated that the partners have been clients of JCB since 1986 and the parties enjoyed a cordial relationship. He also stated that they needed funding urgently and it was under those circumstances that JCB had extended a working capital line of credit to them. That account was used to implement an overdraft line for the total sum of Twelve Million Five Hundred Thousand Dollars ($12,500,000.00). Mr. Chevannes indicated that there is no correspondence in the records indicating that JCB had notified the claimant that a portion of the loan to the companies was being credited to the account of the partners.

[35] The witness was referred to the overdraft agreement dated 14th July 1997 for the sum of eight Million Dollars ($8,000,000.00) in the name of the partners. He stated that no advance was made to the companies. He also said that based on his perusal of the documents on file there is no liability in respect of the companies as they were not the ones to whom the overdraft had been extended. His evidence is that the account remained as an overdraft account when it should have advanced in accordance with the letter of commitment.

[36] He also indicated that the companies did not have a current account with overdraft privileges. It was also stated that the funding that was made available to the partners by way of the overdraft was for the purpose of funding the proposed business expansion. This was the same purpose for which the companies had applied for the loan and he was of the view that the companies would have benefited from the provision of those funds to the partners.

[37] The witness further stated that as far as JCB was concerned the companies and the partners were one and the same. He did however indicate that he had not seen any correspondence or document from JCB which indicated that it was holding the companies responsible for the debt incurred by the partners. He also indicated that JCB had not written to the companies demanding payment of the money which was extended to the partners by virtue of the overdraft agreement.

[38] When questioned in relation to paragraph 15 of his witness statement in which he had said that the claimant had refused to pay the sums due, his response was that

the claimant and the companies were inter-related and the partners were the beneficial owners of those entities. He indicated that he came to that conclusion on the basis of the following sentence in a letter from JCB to the companies: *"The shareholders of Lexton Limited, James and Mary McLean must obtain independent legal advice"*

[39] In addition to this reference was also made to the Credit Proposal dated the 29th August 1997 in which it was stated : *"Both Paulette Gayle and Marie Clarke are also joint owners of properties purchased through their holding company – Lexton Ltd. This company is not active. The assets are being pledged as collateral for the financing of this proposal"* and *"Mrs. Gayle has a personal net worth of $19.9 million comprised of $7.2 million interest in a companies such as Miles Out (this is the holding company of the Gayle family), Couchere Ltd & Soufare Ltd and Lexton Ltd. These assets are in real estate".*

[40] When asked whether the account in the names of the partners was closed and a new account opened in the names of the companies the witness referred to a letter from JCB to the partners in which it was stated that: *"The approved loans for Couchere Limited & Soufare Limited amount to $12.5 million, whilst the existing debt of Paulette Gayle Alexander and Marie Clarke is $14,260,729.73 (as at 17/12/98). Please communicate with us on your plans to repay the excess over the approved amount."*

[41] Mr. Chevannes went on to state that having perused the books and the records he was "…unable to conclusively come to any other opinion than that the debt that was sold and transferred was assigned to Marie Clarke and Paulette Gayle T/A Selections".

[42] The second witness, Mr. Joseph W. Gibson IV, gave evidence that in 1997 the partners, on behalf of the companies, sought financing from JCB in the sum of twelve million five hundred thousand dollars ($12,500,000.00). It was to be made up as follows:-

a. A demand loan of $4,500,000.00;
b. An EXIM Bank demand loan of $4,000,000.00 to Couchere Limited;
c. An EXIM Bank demand loan of $4,000,000.00 to Soufare Limited.

The purpose of the loan was to restructure their existing loan and overdraft facilities and to renovate and refurbish a new outlet for their business, Selections. In light of this, the letter of commitment dated the 22nd June 1997 was issued by JCB.

[43] The witness went on to state that the partners on their own behalf and on behalf of the companies allowed the overdraft facilities to increase until the principal sums being advanced under the loan facility had been exceeded. This he said was permitted by JCB on the understanding that upon completion of the security documentation and compliance by the companies with the other terms and conditions of the letter of commitment the proceeds of the expected loan from the EXIM Bank would be used to either liquidate or reduce the overdraft.

[44] Mr. Gibson said that the security documentation was not returned to JCB and the loan transaction was not completed. He stated that by letter dated the 9th September 1999 addressed to the second defendant, the claimant requested the return of the titles whilst indicating its willingness to provide security for the loan to the companies. He also stated that by letter dated the 11th July 2003 addressed to the third defendant, the claimant requested the return of the said titles on the basis that the transaction had fallen through.

[45] Mr. Gibson stated that there is no dispute that the loan that was referred to in the documents had been contemplated by the claimant. He also indicated his disagreement with Mr. Chevanne's opinion that no loan had been made to the companies.

[46] In cross examination, he indicated that he was not legally trained and that he was giving an opinion as a layperson as to whether a loan had been given to the companies.

[47] The witness also stated that when he became aware of the account in this matter, he knew that there was no perfected security in existence. He was referred to a letter dated the 7th October 1999 from JCB to its Attorneys which is captioned *"Indebtedness of Paulette Gayle-Alexander & Marie Clarke T/A Selections".* The letter went on to state:

> *"Our files reveal that the agreement by Citizens Bank Limited (CBL) to transfer the loan to certain companies owned by the debtors fell through as they failed to cooperate in perfecting the relevant securities.*
>
> *At the time of purchase by FINSAC Limited the loan facility was and still is, in the names of Paulette Gayle- Alexander & Marie Clarke T/A Selections".*

[48] In relation to the above, he stated that in October 1999 Finsac was of the view that no debt was owed by the claimant or the companies. He was however of the opinion having perused the documents that the debt was in the names of the companies. He referred to the commitment letters and an undated overdraft agreement which bears the seals of the companies.

[49] Mr. Gibson stated that Jomandex Limited, to whom JCB wrote on the 7th June 1999, was employed by the partners to resolve their issues with JCB. In that letter, JCB stated that it was unable to restructure the account and that the facility remained in the names of Gayle-Alexander and Clarke. He said that in his opinion JCB was wrong when it stated that the loan was not restructured.

Issues

[50] The issues in this matter are as follows:-

i. Did the deposit of titles create an equitable mortgage in favour of JCB?;
ii. Was a loan granted to the companies?;
iii. Has the fourth defendant properly retained the titles?

Claimant's submissions

[51] The claimant submitted that the burden is on the fourth defendant to prove that an equitable mortgage was created by the deposit of titles with JCB. Reference was made to the case of ***Re Alton Corporation*** [1985] BCLC 27 at 33 Sir Robert Megarry VC said:-

> *It must be for the party who sets up the existence of a mortgage to satisfy the court, on the civil standard of proof, that a mortgage has been created.*

[52] It was argued that where as in this case, liability under the mortgage arose as a result of a guarantee, the circumstances under which the titles were deposited ought to be examined by the court. Counsel referred to **Edge v. Worthington (1786) 1 Cox 211**, in which Sir Lloyd Kenyon, MR said:

> *"The circumstance of the deeds being deposited leaves to the court to infer the agreement or to admit parol evidence of the actual agreement".*

[53] Reference was also made to ***Halsbury's Laws of England,*** Fourth Edition Volume 32 at page 201 para 429 where the learned authors had this to say:-

> *"A deposit of title deeds does not in itself create a charge, and the mere possession of deeds without evidence of the contract under which possession was obtained, or of the manner in which the possession originated so that a contract may be inferred, will not create an equitable security. The deposit is a fact which admits evidence of an intention to create a charge which would otherwise be inadmissible, and raises a presumption of charge which throws upon the debtor the burden of rebutting it".*

[54] Counsel also cited the following passage from ***Re Alton Corporation*** (supra) in which Sir Robert Megarry VC said:

> *"…I have to remember that the basis of an equitable mortgage is the making of an agreement to create a mortgage, with the deposit of the land certificate...But some contract there must be. Furthermore, the creation of a mortgage is a significant transaction,*

and the courts ought not to be ready to infer that such transactions have taken place save on adequate grounds".

[55] However, it was submitted that based on the case of ***United Bank of Kuwait v. Sahib*** [1996] 3 All ER 215, the deposit of title deeds is prima facie evidence of a contract for a mortgage and is to be treated as part performance of that contract. In that case, Peter Gibson, LJ referred to the above passage from ***Halsbury's Laws of England*** as an accurate statement of the law.

[56] Mr. Graham argued that there were no sufficient grounds on which it could be inferred that there was a contract to create an equitable mortgage as the Claimant who owned the properties owed no debt and did not deposit the titles.

[57] He also stated that at all times the claimant was intended to be a guarantor in respect of a proposed loan. It was also submitted that no loan was ever made to the companies and as such the claimant's liability as a guarantor did not arise. Counsel also stated that it was clear from the correspondence surrounding the transaction, the guarantee and the mortgage that the Claimant's liability was to be secondary or contingent on a loan first being made to the companies by JCB.

[58] Mr. Graham stated that the loan was to be in the amount of twelve million five hundred thousand dollars ($12,500,000.00). The liability of the claimant according to a letter of the 21st April, 1998 addressed to the companies was to be limited to the sum of five million six hundred thousand dollars ($5,600,000.00). Reference was also made to the letter of undertaking dated the 22nd June 1998 in which it was stated that there was to be a limited guarantee by the claimant for two million six hundred thousand dollars ($2,600,000.00).

[59] Where the issue of the delivery of the titles is concerned, it was submitted that the circumstances in which they were delivered to JCB were insufficient to create an equitable mortgage.

[60] Particular reference was made to the letter of Mrs. Paulette Gayle Alexander dated the 11th July 1997 addressed to Mr. Loren Edwards at JCB which accompanied their delivery. The letter states:

> *"Re: Finance Proposal - J$9M*
>
> *Further to our discussion, we have enclosed herewith the original copies of titles registered:*
>
> *Volume No. 1225, Folio 977*
>
> *Volume No. 1225 Folio 976*
>
> *As discussed,* ***we are providing these two titles to complete the required security*** *of Five Million Jamaican Dollars (J$5,000,000.00). Should the revised valuation at Volume No. 1225 provide the requirement, then we will leave only one title in your possession. Please also consider a debenture on stock and fixture in view of the reduced requirement.*
>
> *As receipt of the original title, please sign and return one copy of this letter.*
>
> *Yours truly*
>
> *SELECTIONS*
> *Paulette Gayle"*

[Emphasis mine]

[61] Mr. Graham stated that the above letter was not written on the claimant's letterhead and the author did not purport to be writing on its behalf. He also stated that in order for the claimant to be bound by the actions of Paulette Gayle she would have needed to have its actual authority to use its property to secure her own personal loan.

[62] He also made the point that no evidence has been led by the fourth defendant in respect of the conversation between Miss Gayle and Mr. Edwards which was referred to in the above letter in order to ascertain the circumstances in which the titles were been delivered. It was argued that at that time, there was no evidence of the size of the loan which would have been secured by this equitable mortgage. This situation was contrasted with that which obtained in April 1998, at which time it was documented that the liability of the claimant was limited to Five million six hundred thousand dollars ($5,600,000.00).

[63] Counsel then proceeded to deal with the issue of whether Miss Gayle had ostensible authority to pledge the claimant's assets. He stated that in order for an agent to have ostensible authority the principal must have held him out as having authority to do the things that he did. He argued that in this case, there was no course of dealing between the claimant and JCB from it could have been inferred that Miss Gayle had the authority to pledge its property as security for her personal use.

[64] He also submitted that directors are required to act in the best interests of the company and a pledge of the company's assets for their personal benefit would not fall within the ordinary course of their duties. Reference was made to the case of ***A.L. Underwood Limited v. Bank of Liverpool and Martins*** (1923) 1 K.B. 775 in support of this submission.

[65] In that case, the sole director and shareholder of the claimant paid cheques which were drawn in favour of the claimant into his account with the defendant. It was not disputed that the director had the authority to endorse the cheques. The defendant did not enquire whether the company had a separate account and credited the director with the funds which were then misappropriated.

[66] In an action brought by the company on behalf of the debenture holder, it was held that the defendants were precluded from raising a defence that the director was acting as the agent of the company on two bases. Firstly, it was unusual for an agent to pay the principal's cheques into his own account and as such they ought to have enquired whether the company had a separate bank account. The court found that the

bank's failure to enquire whether the company had its own account and if so, the reason why the cheques were not being deposited in that account amounted to negligence. Secondly, that when the director deposited the cheques he did not purport to have been acting as the company's agent and was not treated as such by the bank.

[67] Reference was also made to ***Kelly & others v. Fraser*** [2012] UKPC 25 which endorsed Lord Keith's statement of the law in relation to ostensible authority. Lord Sumption said:

> *"Lord Keith's speech remains the classic statement of the relevant legal principles. An agent cannot be said to have authority solely on the basis that he has held himself out as having it. It is however, perfectly possible for the proper authorities of a company (or, for that matter, any other principal) to organize its affairs in such a way that subordinates who would not have authority to approve a transaction are nevertheless held out by those authorities as the persons who are to communicate to outsiders the fact that it has been approved by those who are authorized to approve it or that some particular agent has been duly authorized to approve it. These are representations, which if made by someone held out by the company to make representations of that kind, may give rise to an estoppel. Every case calls for careful examination of its particular facts".*

[68] In ***Armagas Ltd. v. Mundogas S.A.*** [1986] 1 A.C. 717, the vice-president of the defendant signed a charter-party for three years without the defendant's knowledge or authority. It was alleged that the broker was aware that he lacked the authority to enter into the agreement. At first instance the defendants were found liable on the basis that he had ostensible authority to communicate the fact that he had the defendants' express authority to enter into the agreement with the plaintiffs. On appeal, the court held that the defendants were not bound by the agreement as the vice-president had been acting outside the scope of his ostensible authority.

[69] The matter was further appealed to the House of Lords which dismissed the appeal. Lord Keith of Kinkel stated at page 782:-

> *"At the end of the day the question is whether the circumstances under which a servant has made the fraudulent misrepresentation which has caused loss to an innocent party contracting with him are such as to make it just for the employer to bear the loss. Such circumstances exist where the employer by words or conduct has induced the injured party to believe that the servant was acting in the lawful course of the employer's business. They do not exist where such belief, although it is present, has been brought about through misguided reliance on the servant himself, when the servant is not authorised to do what he is purporting to do, when what he is purporting to do is not within the class of acts that an employee in his position is usually authorised to do, and when the employer has done nothing to represent that he is authorised to do it".*

[70] Mr. Graham submitted that there was no course of dealing between the claimant and JCB from which it could be inferred that Miss Gayle had ostensible authority to pledge the titles. He also stated that what was done was outside of the scope of the normal duties of directors and that this was recognized by JCB in their letter which indicated the need for the McLeans who were shareholders of the claimant to obtain independent legal advice.

[71] He also stated that the Notice of Change of Directors was not generated until the 4th May 1998 although it was stated to have taken effect on the 1st January 1997. The titles were delivered to JCB in July 1997.

[72] Reference was also made to a letter from JCB to Jomandex dated the 7th June 1999 in support of his submission that there was no loan to the companies was stated in part, that: *"At this time, the facility will remain in the names of Gayle-Alexander &*

Clarke as we are currently unable to restructure the account. As a result, the security package will be re-done to match the existing names."

[73] Counsel also referred to a letter dated the 29th September, 1999 addressed to the partners in which it is stated:

> *(a) Citizens Bank Limited had approved the **transfer** of loan to Couchere Limited & Soufare Limited for $12.5m to be secured mortgages over properties comprised in Certificates of Title registered at Volume 1121 Folios 611 and 612. Funds to effect registration of the documents were not provided to the attorney-at-law. As a consequence this arrangement was rendered **null and void**.*
>
> *(b) The existing debt of Paulette Gayle Alexander and Marie Clarke as at December 17 1998 stood at $14,260,729.73 (letter dated December 18, 1998 refers).*
>
> *(c) The total debt now at FINSAC in the names of Paulette Gayle and Marie Clarke is as follows:*
>
> | | |
> |---|---|
> | *Principal* | *$14,793,015.00* |
> | *Interest* | *$ 1,847,198.00* |
> | | *$16,640,213.00* |

[Emphasis mine]

[74] Reference was also made to the evidence of Joseph Gibson IV in which he stated that the fourth defendant's claim was based on getting something from JCB and the second defendant. Counsel also highlighted the evidence of Jeffrey Chevannes in which he stated in cross examination that the debts that were assigned from JCB and later transferred to the fourth defendant were "…*designated to Marie Clarke and Paulette Gayle with the trading name Selections*".

[75] In those circumstances, it was submitted that no loan was given, no equitable mortgage was created and that the claimant was entitled to the return of the titles. Reference was made to the case of ***Re Molton Finance Limited*** [1967] 3 All ER 843 at page 845 in which Denning MR said:

> *"Where an equitable mortgage or charge is created by deposit of title deeds, there is an implied contract that the mortgagee or chargee may retain the deeds until he is paid. This implied contract is part and parcel of the equitable mortgage or charge. It is not a separate legal or common law lien. It has no independent existence apart from the equitable mortgage or charge".*

[76] In concluding, it was submitted that the claimant's intention was to guarantee a loan to the companies and that guarantee was limited to the sum of five million six hundred thousand dollars ($5,600,000.00). No loan was made to the companies and as such the liability of the claimant did not arise. It was also submitted that an equitable mortgage is grounded in contract and the terms under which the titles were deposited ought to be clear. Mr. Graham stated that the fourth defendant has failed to prove that an equitable mortgage was created when the titles were delivered to Mr. Loren Edwards of JCB.

Defendant's submissions

[77] Mr. Piper submitted that an equitable mortgage by deposit of deeds was created when by way of a letter dated the 11th July 1997 Paulette Gayle delivered the titles to JCB stating: *"we are providing these titles to complete the required security of five million Jamaican Dollars".*

[78] He stated that on January 1, 1997 Paulette Gayle and Marie Clarke were appointed as directors of the claimant and had full power and authority to bind the said claimant. Reference was made to the Notification of Change of Directors which was lodged at the office of the Registrar of Companies in May 1998. Mr. Piper submitted that it is the date of appointment and not the dates when that document was generated or lodged which grounds the authority of Miss Clarke to pledge the titles to JCB. It was also submitted that the date of the Notice was also of no importance if Mr. Edwards knew that she was a director of the claimant. He stated that in the absence of any evidence which indicates that two signatures were needed to bind the company

the court should proceed on the basis that one director could pledge the assets of the claimant.

[79] Mr. Piper stated that the loan process commenced with the Selections Business proposal in May 1997 and was actively pursued by the partners on behalf of the companies. At that time a loan of nine million dollars ($9,000,000.00) was proposed. A second mortgage on property situated at Kingslyn Avenue was advanced as security. This was followed by the July 1997 letter in which the titles were delivered to JCB as security for the loan. It was argued that when the titles were delivered to JCB Paulette Gayle was a director of the claimant and had either actual or ostensible authority to do so.

[80] The court's attention was then directed the Overdraft Agreement between JCB, and the partners dated July 14, 1997. Reference was also made to a memorandum dated the 15th July 1997 which it was argued, supports the fourth defendant's contention that the titles were intended to form part of the security for the loan. A letter of commitment was issued to the companies on November 10, 1997 in which the lands to which the titles relate was listed as one of the securities.

[81] Reference was made to ***Halsbury's Laws of England*** Vol. 49 (2008) 5th Edition paragraph 1152 where the learned authors restated the principle that "*a person who mortgages his property to secure the debt of another stands in the relation of guarantor to the person whose debt is thus secured".*

[82] Reliance was also placed on the case of ***Edge v Worthington*** (1786) 1 Cox, 211 which was determined on the effect of the deposit of title deeds to secure an unpaid debt. The case recognizes that the deposit of title deeds in such circumstances represents a part performance which took the matter outside of the strictures of the Statute of Frauds. Counsel stated that in the present case, there is clear evidence in writing, not only of the deposit of title deeds but of the intention on the part of the Claimant to guarantee the indebtedness and to mortgage its property as security for that guarantee. Indeed, the Master of the Rolls, Sir Lloyd Kenyon stated that:

> "*People have conducted themselves on the faith of the exceptions which have been made to the statute; and amongst others, that of depositing deeds is an excepted case. The cases have decided, that the Court is to infer an agreement from the deposit of the deeds, and that the party so depositing ought to go on to execute such agreement; and that such deposit constitutes a lien on the property. It has been supposed, that the present case falls short of the decided cases, but it seems to me to be a stronger case. The circumstances of the deed being deposited leaves the court to infer the agreement, or to admit parol evidence of the actual agreement. Here the parol evidence proves the actual agreement.*
>
> *The remaining reasons of the Learned Judge demonstrates the operation of the principle"*.

[83] Reference was also made to the case of ***Fitzritson v Administrator General*** (1969) 15 WIR 94 where the Court found that there was no evidence of deposit of title deeds by the owners with the Plaintiff. The Court was however of the view that an equitable mortgage was created when the plaintiff, at the request of the owners of the property paid sums which were part of the mortgage debt to the first mortgagee.

[84] It was argued that the analysis Graham Perkins, J. of the law relating to the effect of a deposit of title deeds accompanied by a clear intention to create a mortgage, at pages 98 - 89 could not be faulted. The learned Judge stated:

> *"It is beyond argument that, although a mortgage is an interest in land, and therefore not enforceable in the absence of a written memorandum of an act of part performance, an equitable mortgage is created by the delivery to the lender of the title deeds relating to the borrower's land, accompanied by a demonstrably clear intention to treat the land as security for the monies advanced. This result of a deposit of title deeds brought about a somewhat drastic change in the state of things existing up to the middle of the second half of the*

> *17th century, when a bare deposit of deeds, unaccompanied by a memorandum, offered a creditor no security other than that which might accrue from his right to detain the deeds as chattels against his debtor. (See Russel v Russel ((1783), 1 Bro CC 269).) In the event of such a deposit there is no need for a memorandum because the deposit itself is taken not only to be a sufficient act of part performance, but to constitute an agreement to execute a legal mortgage…But it is equally beyond argument that the depositee must establish not only that the deposit was clearly intended to be by way of security, but an actual or constructive deposit by the borrower. Mere possession by a creditor of his debtor's certificate of title does not constitute him an equitable mortgagee…This is clearly so because a mortgage, unlike a lien, does not come into existence except by agreement. Nor is it sufficient for the creditor to show that he obtained possession of his debtor's documents of title by some indirect route".*

[85] It was submitted that the present case is similar to ***Edge v Worthington*** and ***Fitzritson v Administrator General*** (supra) as there was a deposit of title deeds accompanied by documents demonstrating a clear intention to mortgage the properties and also payment of the sums required by the applicants for the loan, for their requested purposes. In addition the partners were directors of the claimant.

[86] It was submitted that the cases of ***Re Alton Corporation*** (supra) and ***United Bank of Kuwait plc v. Sahib and others*** (supra), ***Ex parte Mountfort*** and ***Re Wallace & Simmonds (Builders) Ltd.*** [1974] 1 All ER 561 and ***Rolled Steel Products (Holdings) Ltd. v. British Steel & Corp. and others*** which are being relied on by the claimant, are of no assistance as the law which was applied is not similar to Jamaican law. In addition, the facts of those cases are not similar to those in the instant case.

The law

How is an equitable mortgage created?

[87] An equitable mortgage is created where the legal owner of land enters into an instrument or does some act which is not sufficient to confer a legal estate or title in the subject matter on the mortgagee, but clearly demonstrates an intention to create a security in favour of the mortgagee (see ***Swiss Bank Corporation v. Lloyds Bank Ltd*** [1982] A.C. 584 at 595).

[88] It may therefore arise where there is an agreement to create a legal mortgage, a defective legal mortgage or the deposit of title deeds. It creates a charge on the property in question but does not give rise to any legal interest in favour of the lender. In order to enforce its rights a mortgagee may bring an action for specific performance of the agreement.

[89] Good security in equity may be created by the deposit of title deeds. It is regarded as an imperfect mortgage which the mortgagee is entitled to have perfected or as a contract for a legal mortgage which gives to the party entitled all such rights as he would have had if the contract had been completed. By depositing the title, the mortgagor contracts that his interest in the property comprised in the deeds shall be liable to the debt and binds himself to do all that is necessary to effect the vesting in the mortgagee of such interest as a mortgage should create.

[90] An equitable mortgage may be created by deposit alone or deposit accompanied by a memorandum of the terms of the deposit or an agreement to give a mortgage. Where the deeds are deposited without writing or by word of mouth it may create a charge on the property as it is regarded as an act of part performance of an implied agreement to give a security.

[91] In ***Bank of New South Wales v. O'Connor*** (1889) 14 App. Cas. 273 at 282, this principle was stated by Lord MacNaghten in the following terms :

> *"It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit".*

[92] It is important to note that a charge may be created even where the deeds which are delivered by the debtor to secure his indebtedness belong to a third party. In ***Re Wallis & Simmonds (Builders) Ltd*** (supra), **Templeman J.** said:

> "...*in my view the doctrine is that as a general rule a deposit of title deeds to secure a debt creates a charge on the land; it does not make any difference whether the debt is owed by the debtor or whether it is owed by somebody else, and the person who deposits the title deeds is in some way acting as a surety. There can be no distinction in logic between the two cases".*

[93] Where the deposit of the deeds is accompanied by a written document, reference must be made to that document in order to determine the exact nature of the charge. In ***Shaw v. Foster, Bart., Pooley*** (1872) L.R. 5 H.L. 321 at 340, Lord Cairns stated the principle in the following terms:-

> *"It is a well-established rule of Equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in Equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed".*

[94] The basis of the equitable mortgage that was created by the deposit of deeds was a contract. In ***United Bank of Kuwait v. Sahib*** [1996] 3 All E.R. 215 at 226, Phillips L.J. said:-

> *"The mere deposit of title deeds was never of itself an act which created a mortgage. It was an act which led the court, despite the Statute of Frauds (1677), to receive parole evidence to prove that it had been agreed that the deeds should be deposited by way of security for a loan. The agreement was no legal fiction. It is true that in the most extreme case the court would infer the agreement when the evidence showed no more than that the deeds had been deposited with a creditor, who had advanced a loan to the depositor. In most cases, however, evidence was adduced of a specific agreement reached before, or at the time that the deeds were deposited, or of a variation of it thereafter. Often, the issue was as to the precise terms of that agreement… In my judgment, the cases fully support the following clear and succinct statement of the law in 32 Halsbury's Laws (4th edn) para 429:*
>
> > *'A deposit of title deeds does not in itself create a charge, and the mere possession of deeds without evidence of the contract under which possession was obtained, or of the manner in which the possession originated so that a contract may be inferred, will not create an equitable security. The deposit is a fact which admits evidence of an intention to create a charge which would otherwise be inadmissible …'*

[95] The deposit of the title deeds signifies that the mortgagor agrees that his interest in the property is subject to the debt. This principle was accepted in ***National Provincial Bank Of England v. Games*** (1885) 31 Ch. D. 582 in which Pearson, J. cited with approval the following passage in ***Pryce v. Bury*** 2 Drew. 41 at 42 where *Kindersley*, V.C. said:

> *"the common rule of this Court as to an equitable mortgage by deposit is this: by the deposit, the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee. He does not contract that he will make a perfect title, but he does bind himself to do all that is necessary to have the effect of vesting in the mortgagee such interest as he, the mortgagor, has".*

[96] Where the title deeds have been deposited in order to obtain credit it does not cover monies previously advanced unless there is evidence to the contrary. However, it will extend to subsequent advances by the same lender even if their deposit was accompanied by a memorandum limiting the purpose of the deposit where there is evidence in support of that position (see ***Ex parte Langston*** [1803-13] All ER Rep 767).

[97] Where the deposit of the title deeds is accompanied by a memorandum in writing, it should also be clear that it is intended that the property should be equitably charged with the repayment of the funds advanced.

[98] The intention to create an equitable mortgage may be established by written evidence, written and parol evidence, parol evidence alone or by the inference that in the particular circumstances the possession of the documents cannot otherwise be explained.

[99] In ***Edge v. Worthington*** (1786) 1 Cox Eq. Cas. 211 it was stated that: "*The circumstance of the deeds being deposited leaves to the court to infer the agreement, or to admit parol evidence of the actual agreement. Here the parol evidence proves the actual agreement".*

[100] Where deeds are deposited with a view to the preparation of a future mortgage but without an intention to give immediate security, the deposit will not be viewed as an equitable mortgage by deposit. However, an equitable mortgage will be created if

there was an immediate advance or if they were deposited under a promise to forbear suing.

[101] In ***Keys v. Williams*** 3 Younge & Coll 55 Lord Abinger, C.B.at page 61 said:-

> *"The doctrine of equitable mortgages has been said to be an invasion of the Statute of Frauds; and no doubt there was great difficulty in knowing how to deal with deposits of deeds by way of security after the passing of that statute. But in my opinion that statute was never meant to affect the transaction of a man borrowing money and depositing his title deeds as a pledge of payment. A court of law could not assist such a party to recover back his title deeds by an action of trover, the answer to such an action being that the title deeds were pledged for a sum of money, and that, till the money is repaid, the party has no right to them. So, if the party came into equity for relief, he would be told that before he sought equity he must do equity, by repaying the money in consideration for which the deeds had been lodged in the other party's hands. The doctrine of equitable mortgages, therefore, appears to have arisen from the necessity of the case. It may, however, in many cases, operate to useful purposes, and is certainly not injurious to commerce. In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title deeds and preparing the mortgage. Expediency, therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute. The question here is whether the circumstances under which these deeds were deposited lead to any distinction between this case and others which have been decided on the general doctrine… Certainly, if before the money was advanced the deeds had been deposited with a view to prepare a future mortgage, such a transaction could not be considered as an equitable mortgage by*

deposit; but it is otherwise where there is a present advance, and the deeds are deposited under a promise to forbear suing, although they may be deposited only for the purpose of preparing a future mortgage. In such case the deeds are given in part of the security, and become pledged from the very nature of the transaction…If it were necessary to decide the specific point, I should say that an agreement to grant a mortgage for money already advanced, and a deposit of deeds for the purpose of preparing a mortgage, is in itself an equitable mortgage by deposit."

Was an equitable mortgage created by the deposit of the titles?

[102] In this matter, it is alleged that an equitable mortgage was created when Paulette Gayle delivered the titles to JCB. The circumstances in which they were deposited with JCB must therefore be examined in some detail.

[103] By way of a letter dated the 11th July 1997 from Selections signed by Paulette Gayle and addressed to Mr. Loren Edwards the titles were delivered to JCB *"to complete the required security of Five Million Jamaican Dollars (J$5,000,000.00)".* The letter went on to state *"Should the revised valuation of Volume No. 1225 provide the requirement, then we will leave only one title in your possession. Please also consider a debenture on stock and fixtures in view of the reduced requirement….."*

[104] The fourth defendant contends that the delivery of the titles to JCB ought to be treated as delivery by the claimant as Paulette Gayle as a director was acting on its behalf.

[105] The sequence of events in this matter is as follows:-

i) In May 1997, a Business proposal was prepared for Selections in which it was stated that a loan was being sought in the amount of nineteen million dollars ($19,000,000.00). The proposed security was a second mortgage on 6 Kingslyn Avenue and a debenture on stock, fixtures and fittings.

ii) This was followed by a letter dated the 8th July 1997 which speaks to a revised loan of nine million dollars ($9,000,000.00). Its purpose was to liquidate an existing overdraft and the balance of two million five hundred thousand dollars ($2,500,000.00) was to be placed in an account. Mrs. Gayle also requested an overdraft of three million dollars ($3,000,000.00).

iii) By way of letter dated the 11th July 1997, Mrs. Gayle delivered the titles to JCB.

iv) An Overdraft Agreement in the amount of eight million dollars ($8,000,000.00) was executed by the partners on the 14th July 1997. These sums were credited to account number 1102-006168.

v) There was also an undated Overdraft Agreement in the sum of three million dollars ($3,000,000.00). It was executed by the companies and has the same account number as that with which the partners were associated.

vi) This is followed by a letter of the 19th August from Selections to JCB renewing its request for a loan of nine million dollars ($9,000,000.00) and an overdraft of three million five hundred thousand dollars ($3,500,000.00). The property comprised in the titles was listed among the securities.

vii) JCB's Credit Proposal dated the 29th August 1997 describes the facilities being considered as an overdraft of three million five hundred thousand dollars ($3,500,000.00) and a demand loan of nine million five hundred thousand dollars (9,500,000.00). The claimant's guarantee which is supported by a first mortgage over the properties comprised in the titles is listed among the securities. The document also states: "***Both Paulette Gayle and Marie Clarke are also joint owners of properties purchased through their holding company – Lexton Ltd. This***

company is not active. The assets are being pledged as collateral for the financing of this proposal."

[Emphasis mine]

viii) By letter dated the 10th November 1997, JCB approved the companies' application. The claimant's guarantee which was supported by a mortgage over the properties comprised in the titles to cover two million six hundred thousand dollars ($2,600,000.00) was listed among the securities. The loan was also subject to the receipt of *"certified copies of such corporate and other documents as the bank and its counsel mat reasonably request, including but not limited to all documentation required to be executed by the borrower in accessing…"* the facility.

ix) In 1998, the claimant passed a resolution to issue a Guarantee to repay the loan granted to the companies by JCB in the amount of five million six hundred thousand dollars ($5,600,000.00) which was secured by a mortgage on the properties.

x) On the 14th January 1998, JCB wrote to Couchere Limited requesting certain documents that were necessary to complete the loan process. The documents were sent by letter dated the 5th February 1998 to JCB by Selections.

xi) By way of letter dated the 11th March 1998 JCB indicated to its Attorneys-at-law that it had agreed to grant an overdraft facility of three million dollars ($3,000,000.00) and a demand loan of nine million five hundred thousand dollars ($9,500,000.00) to the companies. Instructions were also given for the preparation of the security documents including the Guarantor's Resolution of the claimant as well as its Corporate Guarantee supported by first legal mortgage over the properties in the amount of $2,600,000.00.

xii) On the 29th April 1998, the claimant wrote to the companies confirming its willingness to pledge the properties as security for a **loan** of nine million dollars ($9,000,000.00). The letter also indicates a maximum liability of five million six hundred thousand dollars ($5,600,000.00) and that its liability is to be restricted to the properties. These terms were agreed and Paulette Alexander signed on behalf of the companies.

[Emphasis mine]

xiii) This was followed by a letter dated the 14th May 1998 from Selections indicating dissatisfaction with the terms of the Guarantee. The writer makes suggestions for amendment and raises the issue of additional funding and repackaging of the security.

xiv) On May 19, 1998, JCB wrote to Mrs. Paulette Gayle Alexander indicating that additional information was required in order to justify an increase in the facilities from twelve million five hundred thousand dollars ($12,500,000.00) to fourteen thousand five hundred thousand dollars ($14,500,000.00). It ends with the following: "*We are eager to proceed with restructuring of the account and anticipate your cooperation in achieving that objective".*

xv) Mrs. Paulette Gayle Alexander of Selections responded to that letter on the 28th May. In that letter, she expressed her regret that the documentation had not been amended by JCB. She also indicated that as drafted, the documentation was *"entirely against"* their "*understanding and negotiations"* and that having informed the two third parties they were *"faced with their justifiable refusal to participate on those grounds".* The letter goes on to state: *"You continue to maintain the debt as an overdraft…"*

xvi) This was followed by a meeting on the 1st June and another Credit Proposal. On June 22, 1998 JCB issued a letter of commitment to the

companies. The expiry date was stated as July 22, 1998. It was also stated as follows:

> *"The credit facilities will be made available upon **all** of the following being achieved:-*
>
> *(a) Acceptance of this commitment letter*
>
> *(b) Satisfactory perfection of the security documentation*
>
> *(c) Payment of the commitment fees*
>
> *(d) Compliance with all applicable "Special and General Conditions …*
>
> (e) *On receipt of funds from the National Export-Import Bank of Jamaica Limited".*

[Emphasis mine]

xvii) In September 1998 it was indicated by way of an Inter-Office Memorandum that the facility had not been restructured as JCB had not received the duplicate Certificate of Title for the Kingslyn Avenue property. It was also stated that a temporary overdraft line of twelve million five hundred thousand dollars ($12,500,000.00) was extended on the existing account pending the completion of the restructuring process. In addition, it was noted that Lilieth Jones was no longer willing to offer her property as security. The extent of the claimant's liability was now stated to be five million six hundred thousand dollars ($5,600,000.00)

xviii) On the 17th December 1998, JCB wrote to the partners indicating that the overdraft had not been restructured due to their failure to cooperate with the bank in executing the security documentation. The partners were asked to attend on JCB's Attorney-at- Law to execute the documents which were said to have been prepared since July of that year.

xix) In December 1998, a Guarantee was signed by the Claimant to secure the sum of five million six hundred thousand dollars ($5,600,000.00). It is also indicated in that instrument that the titles were to be mortgaged to cover that amount. The Guarantee appears to have been signed by Paulette Gayle Alexander and Marie Clarke.

xx) By letter dated the 17th December, it was indicated that the documents had been signed that very day. A request was also made for the accounts that were being operated in the names of the partners to be closed and the balances transferred to a new account in the names of the companies T/A Selections.

xxi) On the 18th December, JCB wrote to the partners indicating that the holder of the mortgage on the Kingslyn Avenue property had refused to send the duplicate Certificate of Title to JCB. The partners were also informed that they needed to pay the necessary fees for the registration of the security documentation. The final paragraph states: "*The approved loans for Couchere Limited and Soufare Limited amount to $12.5 million, whilst the existing debt of Paulette Gayle Alexander and Marie Clarke is $14,260,729.73 (as at 17/12/98). Please communicate with us your plans to repay the excess over the approved amount".*

xxii) On May 3, 1999, Jomandex on behalf of the partners, wrote to JCB requesting that a loan account be established in the names of the companies for twelve million five hundred thousand dollars ($12,500,000.00) as had been agreed. It was also proposed that the loan would be repaid by the sale of the shop at Lane Plaza and the properties.

xxiii) JCB responded on the 7th June 1999 indicating that the facility would remain in the names of the partners as it was unable to restructure the account as the ability to repay had not been established. It was also indicated that the security package would have had to be redone to

match the existing names. At that time JCB appeared to have been concerned that the principal payment would have come from the sale of property which it felt may have been protracted.

xxiv) By letter dated the 7th July 1999, the partners were informed by JCB that its credit portfolio had been purchased by Finsac Limited.

xxv) On the 9th September 1999, the claimant wrote to Finsac. The letter states:

"We refer to previous correspondence in this matter and our agreement in 1999 to mortgage our real estate at the above address (as guarantor) to secure, a part of the captioned loan.

We now understand that the terms and conditions agreed between lender and borrower (guaranteed by us) have not been fulfilled or completed and have been advised that, in such circumstances, our guarantee has been automatically rendered null and void, and we hereby confirm its immediate cancellation.

*Accordingly, we ask that, for the time being you return to us by September 14, 1999 all **"original"** documents signed by us, as well as the Duplicate Certificates of Title registered at Volume 1225 Folios 976 and 977 along with **"official"** confirmation that your Bank has not utilized our mortgage in any form or manner for any purpose whatsoever. Please deliver all documents to Miss L. Marie Clarke at Selections – 6 Kingslyn Avenue, Kingston 10.*

*Please be assured that we regard this as a temporary situation as we remain interested in providing our real estate as security for a portion of your loan to Couchere Limited and Soufare limited, but we must be **first** given the opportunity of reviewing the applicable terms and conditions of your new loan and look forward to receiving same".*

xxvi) This was followed by a letter from Paulette Gayle Alexander addressed to Finsac in which she indicated that: *"…Lexton's letter was prompted only by the realization that your Bank and ourselves have not yet completed the loan agreement and documentation approved by Lexton and guaranteed by them. We are anxious to have our new loan arrangements negotiated and approved for review by Lexton Limited…"*

xxvii) By letter dated the 29th September, Finsac indicated that the existing debt in the names of the partners was sixteen million six hundred and forty thousand two hundred and thirteen dollars ($16,640,213.00). They were given three months to present a proposal for the liquidation of the debt *"in a meaningful way".*

xxviii) On the 7th October 1999, Finsac indicated by letter to Mr. Howard Facey, Attorney-at-Law that at the time of its purchase, the loan facility was in the names of Paulette Gayle Alexander and Marie Clarke T/A Selections and had remained so.

[106] The fourth defendant contends an equitable mortgage was created by the deposit of the titles as Paulette Gayle Alexander, who is a Director of the claimant, had either actual or ostensible authority to do so. In addition, the claimant's letter of the 29th April 1998 made it clear that it was committed to pledging the titles as security for the loan. .

[107] The fourth defendant also argued that the claimant was fully aware of the proposed loan of nine million dollars ($9,000,000.00) which was being sought by the companies from JCB. Reference was made to a letter from Ivor Alexander & Company, Attorneys –at-law dated the 15th July 1997 in support of its submissions. The letter states as follows:-

"To: Lexton Limited

Attention; Mr. Michael Samms

Re: Collateral for proposed loan of JA$9,000,000.00 to Couchere Ltd and Soufare Ltd

As discussed on last Wednesday (July 10th), I have given to Paulette the two (2) Titles for Units 4 & 5 at 43 Charlemont Avenue ***to show*** *to the bank officer to satisfy the rather rude questions being asked by its officer of me.*

The officer insisted on verification that the Titles existed, that I had them in my possession, that they were unencumbered and that I was Lexton's attorney-at-law. It was clear from the tone of these questions that she did not believe anything that Paulette had told her. She even asked me if I was married to Paulette.

All I know at this stage is that Paulette and her partner Marie Clarke owe a lot of money to Citizens Bank and a restructuring is being discussed which involves a new loan which the bank is proposing to give two companies which Paulette and Marie operate. The ***new loan*** *is for JA$9,000,000.00 and the bank wants security for this* ***new loan****.*

I had a short word with Jim who has no problem ***in principle, but of course we will need to see all the terms and conditions which may affect Lexton, including some special terms which I discussed with Jim which would limit Lexton's exposure to the two (2) titles alone***

Please sign and return to me a copy of this letter confirming your approval.

Regards

Ivor Alexander

Confirmed:

Michael Samms"

[Emphasis mine]

Did Paulette Gayle have actual or ostensible the authority to deposit the titles with JCB?

[108] Generally speaking, a company can only act through its agents. Where a person purports to be an agent of a company it may be difficult for third parties to determine whether he is in fact its agent and if so, the scope of his authority.

[109] Where a person by deeds, words or conduct represents or permits it to be represented that another person has authority to act on his behalf he is bound by the acts of that person. This principle is applicable in respect of anyone dealing with him as an agent on the faith of any such representation even though he had no actual authority.

[110] Directors are however, recognized in law as being agents of the company for which they act. This was established in the case of ***Ferguson v. Wilson*** (1866) L.R. 2 Ch. 77 at 89 in which Cairns L.J. said:-

> *"What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company".*

[111] As agents, directors may possess actual or ostensible authority to act on the company's behalf.

[112] Actual authority may be express or implied. Where it is implied the act is one that is incidental to that for which the director has actual authority. In other words, it is something which is required in the circumstances.

[113] Ostensible authority arises where the principal by his words or conduct represents or permits it to be represented that the agent has the authority to act on his behalf. In such a case, the principal is bound by the acts of the agent. In other words, the principal is estopped from denying that it could reasonably be inferred from his words or conduct that the agent was authorized to act on his behalf.

[114] It must however be noted that the representation on which the third party seeks to rely, must have been either made by the principal or with his authority. Therefore

ostensible authority cannot be created solely by the agent's own representation. This principle was confirmed by Lord Diplock in ***Freeman & Lockyer v. Buckhurst Park Properties (Mangel) Ltd.*** [1964] 2 Q.B. 480 at 505 where he stated: *"the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates"*.

[115] In ***Freeman & Lockyer v. Buckhurst Park Properties (Mangel) Ltd.*** (supra) at 503, Lord Diplock stated the principle in the following terms:

> *"An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract".*

[116] Lord Diplock went on to indicate that the most common form of representation by a principal is by conduct, that is, permitting the agent to act in the management or conduct of his business. His Lordship went on to state: *"Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum*

and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has the authority to enter on behalf of the corporation into contracts of a kind which an agent authorized to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business…"

[117] In ***New Falmouth Resorts limited v. International Hotels Jamaica Limited*** [2013] UKPC 11, Sir Alan Ward in his judgment stated that the judgment of Lord Diplock in the above case *"..has stood the test of time".*

[118] In addition, the third party must have relied on the representation and the agent's lack of authority must have been unknown to the third party. The doctrine does not apply where the third party does not know or believe that the person is acting as an agent of the principal.

[119] This principle was confirmed by the court in ***Armagas Ltd. Appellants and Mundogas S.A*** [1986] A.C. 717 at 777 where Lord Keith of Kinkel stated:-

> *"Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation…Ostensible general authority can, however, never arise where the contractor knows that the agent's authority is limited so as to exclude entering into transactions of the type in question, and so cannot have relied on any contrary representation by the principal."*

[120] Paulette Gayle was appointed as a director of the claimant on the 1st January 1997. This is borne out by the Notification of Change of Directors which is dated the 4th May 1998.That document was deposited at the office of the Registrar of Companies on the 15th May 1998.

[121] The titles were delivered to JCB by letter dated the 11th July 1997. That letter was signed by Paulette Gayle and was written on the letterhead of Selections. It states:-

> *"Re: Finance Proposal – J$9M*
>
> *Further to our discussion, we have enclosed herewith the original copies of titles registered:-*
>
> 1. *Volume No. 1225, Folio 977*
> 2. *Volume No. 1225, Folio 976*
>
> *As discussed, we are providing these two titles to complete the required security of Five Million Jamaican Dollars (J$5,000,000.00). Should the revised valuation of Volume No. 1225 provide the requirement, then we will leave only one title in your possession. Please also consider a debenture on stock and fixtures in view of the reduced requirement…….*
>
> *Yours truly*
>
> *SELECTIONS*
>
> *Paulette E. Gayle".*

[122] Mr. Piper submitted that this letter makes it clear that Miss Gayle had actual or ostensible authority to pledge the titles to JCB.

[123] I find that I am unable to agree with counsel on this point for two reasons. Firstly, the letter is not written on the claimant's letterhead and secondly, Miss Gayle signed as Selections and there is no reference to the claimant in this piece of correspondence.

[124] Whilst it is clear that a charge may be created where a debtor deposits a title which belongs to a third party, there is no evidence that JCB was aware that Miss Gayle was a director of the claimant and was acting as its agent. It has also been

noted that the Notice of Change of Directors which would have constituted notice to the world, was not lodged with the Registrar of Companies until approximately ten (10) months after the delivery of the titles. In fact, the notice is dated the 4th May 1998 and as such, did not exist when the titles were being pledged. In addition, there is no evidence before the court that the claimant by some representation to JCB conveyed that Miss Gayle had the authority to pledge the titles.

[125] The question does however, arise as to whether the claimant by its subsequent conduct in this matter, ratified the actions of Miss Gayle. Where an agent does an act for which he lacked the requisite authority, the principal may by his subsequent conduct ratify that act. (See ***Maclean v. Dunn and Watkins,*** 130 E.R. 947).

[126] Whilst ratification must be clear, it may be proved by evidence that the principal having been informed of **all** the material facts took no steps to disassociate himself from the agent or to assert his rights within a reasonable time. The burden of proof rests on the person who has asserted that the act has been ratified. (See ***Morison v. London County and Westminster Bank Ltd.*** [1914] 3 K. B. 356).

[127] The claimant's letter to the companies dated April 29, 1998 is instructive. It states:-

Couchere Limited & Soufare Limited,
6 Kingslyn Avenue,
Kingston 10.
Jamaica

Attn. Mrs. Paulette Alexander

Dear Sir/Madame,

Re: Lexton Limited: Proposal for collateral for new loan to you by Bank: J$9,000,000.00

This letter serves to confirm the willingness of Lexton Limited to provide our two properties as collateral security for the captioned loan on the following terms and conditions:

THE PROPERTIES: Units 4 & 5 at 43 Charlemount Dr., Kingston 6, Jamaica Volume 1225 Folio 976 & 977 respectively.

Our maximum liability: J$5,600,000.00

Our liability is to be restricted to the two properties only. (i.e.. Lexton cannot be sued. The only way for the liability to be recovered is against the two properties).

No costs or fees be borne by Lexton.

Our documents to be approved by Ivor Alexander & Co., Attorneys-at-Law.

Please sign and return to me the enclosed copy of this letter indicating your agreement.

Yours sincerely,

Agreed

Michael Samms *Paulette Alexander*
(for Lexton Limited) *(for Couchere Ltd. & Soufere Ltd).)*

[128] I have noted that Mr. Alexander's letter to Lexton states that he gave the titles to Paulette Alexander to show to the bank. Mr. Alexander was the claimant's Attorney-at-law. Nowhere in that correspondence has he indicated that the titles were lodged with JCB. Mr. Michael Samms in his evidence stated that it was in September 1997 that he became aware that JCB had kept the titles.

[129] The above letter is captioned *"Proposal for a new loan…"* and indicates the claimant's willingness to pledge the titles as collateral for a loan of nine million dollars ($9,000,000.00) to the companies. This letter does not, in my view, appear to be a ratification of Mrs. Alexander's deposit of the titles with JCB.

[130] There is also no evidence that the claimant made any representation to JCB that Miss Gayle was a director and that she had the authority to pledge its titles. In the circumstances, I accept the claimant's evidence that she was only permitted to show the titles to JCB and find that she had no actual or ostensible authority to pledge the titles to that institution.

[131] That having been said, it must now be considered whether the fourth defendant is entitled to enforce the terms of the Guarantee.

[132] In order to treat with that issue certain aspects that Instrument need to be highlighted. It states in part:-

> *" 1. In consideration of the Bank, at our request, granting a credit facility to* ***Couchere Limited*** *and* ***Soufare Limited t/a Selections*** *("the Borrower") and for good valuable consideration…we LEXTON LIMITED ("the Guarantor") hereby unconditionally and irrevocably, subject to the limit of liability hereinafter contained, guarantee payment to the Bank on the dates and in the manner set forth in the Facility Letter dated June 22, 1997 (as same may be amended or renewed from time to time) ("the Facility Letter") of all the Guaranteed Obligations (as hereinafter defined),….*
>
> *6. The liability of the Guarantor hereunder shall not exceed the sum of Five Million Six Hundred Thousand Dollars ($5,600,000.00) and the only recourse of the Bank shall be against the real estate mortgaged by the Guarantor to the Bank as security…*
>
> *7. The Guarantee is a continuing security notwithstanding liquidation of the Borrower or any settlement of account thereunder or other matter whatsoever and is in addition to ant other guarantee, indemnity, lien, pledge, bill, note, mortgage or other security or general lien, right of setoff or other remedy now or hereafter held or available to the Bank….*
>
> *15. In this Guarantee:*
>
> *(a) the term "Guaranteed Obligations" means all principal, interest, fees…and other moneys from time to time owing by the Borrower to the Bank under or in connection with the Facility Letter and/or any other banking facility granted by the Bank to the Borrower; and …*
>
> *16. As security for our obligations hereunder we hereby mortgage to the Bank our property situate at 43 Charlemont Drive, Kingston 6 in the parish of saint Andrew being the land comprised in Certificates of title registered at Volume 1225 Folio 976 and Volume 1225 Folio 977 of the Register Book*

of Titles to cover an indebtedness of five Million Six Hundred Thousand Dollars ($5,600,000.00)…"

[Emphasis mine]

[133] The letter of the 22nd June 1997 speaks to a loan being granted to the companies to *"hive off hard-core on overdraft in the names of Paulette Gayle and Marie Clarke T/A Selections".* The overdraft was extended to the partners to renovate and refurbish a new retail outlet in Lane Plaza.

[134] A Guarantor's Mortgage was also executed by the claimant in 1998. In that document, the companies are named as the borrower. It clearly states that the titles were being pledged as security for the loan and also indicated the extent of the liability. Whether or not a particular transaction creates an equitable mortgage is a question of fact. The court therefore has a duty to examine the relevant document in order ascertain whether an equitable mortgage has been created. The intention of the parties is also relevant. However, where it is clear on a true construction of the relevant documents that an equitable mortgage has arisen, the question of intention is secondary. The parties are presumed to have intended the consequences of their acts. In ***Swiss Bank Corporation v. Lloyds Bank Ltd.*** [1982] AC 584 at 595-596, Buckley LJ said:

"An equitable mortgage is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless demonstrates a binding intention to create a security in favour of the mortgagee, or in other words evidences a contract to do so: see Fisher and Lightwood's Law of Mortgage, 9th ed. (1977), p. 13. ….The essence of any transaction by way of mortgage is that a debtor confers upon his creditor a proprietary interest in property of the debtor, or undertakes in a binding manner to do so, by the realization or appropriation of which the creditor can procure the discharge of the debtor's liability to him, and that the proprietary

interest is redeemable, or the obligation to create it is defeasible, in the event of the debtor discharging his liability. If there has been no legal transfer of a proprietary interest but merely a binding undertaking to confer such an interest, that obligation, if specifically enforceable, will confer a proprietary interest in the subject matter in equity. The obligation will be specifically enforceable if it is an obligation for the breach of which damages would be an inadequate remedy. A contract to mortgage property, real or personal, will, normally at least, be specifically enforceable, for a mere claim to damages or repayment is obviously less valuable than a security in the event of the debtor's insolvency. If it is specifically enforceable, the obligation to confer the proprietary interest will give rise to an equitable charge upon the subject matter by way of mortgage.

It follows that whether a particular transaction gives rise to an equitable charge of this nature must depend upon the intention of the parties ascertained from what they have done in the then existing circumstances. The intention may be expressed or it may be inferred. If the debtor undertakes to segregate a particular fund or asset and to pay the debt out of that fund or asset, the inference may be drawn, in the absence of any contra indication, that the parties' intention is that the creditor should have such a proprietary interest in the segregated fund or asset as will enable him to realise out of it the amount owed to him by the debtor.…But notwithstanding that the matter depends upon the intention of the parties, if upon the true construction of the relevant documents in the light of any admissible evidence as to surrounding circumstances the parties have entered into a transaction the legal effect of which is to give rise to an equitable charge in favour of one of them over property of the other, the fact that they may not have realised this consequence will not mean that there is no charge. They must be presumed to intend the consequence of their acts".

[135] Where there is a memorandum or an agreement in writing which clearly demonstrates an intention to charge property comprised in title deeds that is sufficient to create an equitable mortgage. However, a promise to give security to a person who already holds those deeds does not without more create an equitable charge.

[136] In this matter the Guarantee clearly states that the titles are being used as security for the loan. Having found that Miss Gayle was not acting as an agent of the claimant when she deposited the titles it must be then be considered whether the claimant by its execution of the Guarantee ratified her actions.

[137] A guarantee is a contract by which a surety agrees to be bound by its terms and is to be construed in the same way as any other contract. However, the authorities suggest that its terms must be strictly construed. The result therefore, is that, no liability will be imposed on a surety unless it is clearly covered by the terms of the guarantee. **In *Blest v Brown*** (1862) 4 De G.F. & J 367, Lord Campbell stated:

> ***"It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound therefore merely according to the proper meaning and effect of the written engagement that he has entered into."***

[138] In order for the execution of the Guarantee to be considered as a ratification of Miss Gayle's actions, it must be established that a loan was granted to the companies by JCB.

Was a loan granted to the companies?

[139] The claimant has maintained that no loan was given to the companies and that in those circumstances it is entitled to the return of the titles. The fourth defendant's position is that although partners' overdraft was never converted to a demand loan, the funds which were to be loaned to the companies were made available to the

partners. It is on that basis that it has maintained that it is entitled to enforce the terms of the Deed of Guarantee.

[140] In cross examination, the fourth defendant's witness Jeffrey Chevannes stated that the partners had been clients of JCB since 1986 and they enjoyed a cordial relationship. He stated that there was an urgent need for funding and a total of twelve million five hundred thousand dollars ($12,500,000.00) was made available through a current account operated by the partners. He also stated that funds were disbursed to the partners due to the urgency of the situation and the good relationship that existed between them and JCB.

[141] It is also evident from the evidence of Joseph Gibson IV that the fourth defendant has treated the companies and the parties as one and the same. This approach clearly ignores the principle enshrined in ***Salomon v. Salomon*** [1897] A.C. 22 at 51 where it was stated that: "*The company is at law a different person altogether from the subscribers to the memorandum".* The witness did however indicate that he was not legally trained and JCB from whom the debt was assigned were clearly not of the same opinion.

[142] Having reviewed the documentary evidence and analyzed that given by the witnesses, I find that no loan was granted to the companies. The overdraft facility that was extended to the partners cannot be treated as a loan to the companies as they are separate legal entities. This was clearly recognized by JCB in its letter of the 7th October 1999 which was referred to in paragraph 47 above. The claimant's execution of the Instrument of Guarantee does not therefore in my view, amount to a ratification of the actions of Miss Gayle. The terms of the Guarantee are very specific and refer to a loan being granted to the companies.

[143] The evidence suggests that JCB advanced the sums to the partners without having the requisite security in place. In so doing, they ran the risk of exposing themselves in the event of a default. The evidence of Mr. Chevannes is that the funds were in fact disbursed before the June 1998 Letter of Commitment was signed by the parties. There being no loan or security documentation in place, the fourth defendant,

as the assignee of the debt, cannot be the beneficiary of any greater protection than that enjoyed by JCB. I therefore find that they were the authors of their own demise.

Has the fourth defendant properly retained the titles?

[144] Having found that Miss Gayle had no authority to pledge the titles and that no equitable mortgage was created by their deposit, it is my view that the fourth defendant has no legal basis on which to retain them.

[145] In the circumstances, judgment is awarded to the claimant on the claim and counterclaim with costs to be taxed if not agreed.