



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN CIVIL DIVISION  
CLAIM NO. SU 2019 CV 04678**

**IN THE MATTER OF** an equitable  
mortgage on land registered at Volume  
1051 Folio 48 of the Register Book of Titles

**AND**

**IN THE MATTER OF** the Registration of  
Titles Act

**BETWEEN** **KARIN MURRAY** **CLAIMANT**

**AND** **BRILLIANT INVESTMENTS  
LIMITED** **1<sup>ST</sup> DEFENDANT**

**AND** **SHURNETTE DAVIS  
(Representative of the Estate  
of Allan Davis)** **2<sup>ND</sup> DEFENDANT**

**BETWEEN** **BRILLIANT INVESTMENTS  
LIMITED** **ANCILLARY CLAIMANT**

**AND** **JENNIFER MESSADO** **ANCILLARY DEFENDANT**

**IN CHAMBERS**

**Mrs Symone Mayhew Q.C. instructed by Ms Carol Davis for the Claimant  
Mesdames Keisha Spence and Zoya Edwards instructed by Zara Lewis & Company  
for the 1<sup>st</sup> Defendant/Ancillary Claimant and the 2<sup>nd</sup> Defendant  
The Ancillary Defendant is unrepresented**

**Heard: January 24 and 25, May 20 and 27 and June 16, 2022**

**Mortgage – Equitable mortgage – Creation of an equitable mortgage – Monies owed – Agreement for land to be used as security for monies owed – Deposit of certificate of title in pursuance of agreement – No instrument of mortgage executed – Whether equitable mortgage in place – Whether deposit of title deed gives rise to presumption of charge**

**Company – Charge – Charge created by company – Deposit of title deed to secure debt owed by third party – Equitable charge – Deposit of title deed giving rise to presumption of charge – Whether deposit created a registrable charge or merely a lien on title deed – Whether charge created by company or arising by operation of law – Companies Act, sections 174 and 176, Registration of Titles Act, section 103, Civil Procedure Rules, 2002, rules 66.2 and 66.4**

**A. NEMBHARD J****INTRODUCTION**

- [1] This matter concerns the creation of an equitable mortgage and the circumstances in which an equitable mortgage might be created.
- [2] By way of a Fixed Date Claim Form, filed on 25 November 2019, the Claimant, Karin Murray, seeks the following Orders against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Brilliant Investments Limited and Allan Davis, respectively: -

- (i) A Declaration that the Claimant holds an equitable mortgage in the sum of United States Dollars (USD\$250,000.00), plus interest at the rate of seven percent (7%) per annum from 23 February 2018, on all that parcel of land, part of BENGAL in the parish of St. Ann and being the land comprised in Certificate of Title registered at Volume 1051 Folio 48 of the Register Book of Titles;
  - (ii) An Injunction restraining the 1<sup>st</sup> Defendant, its servants or agents from selling, charging, mortgaging or in any way whatsoever dealing with the property being the land comprised in Certificate of Title registered at Volume 1051 Folio 48 of the Register Book of Titles;
  - (iii) An Order directing the Registrar of Titles to register the said mortgage on the Title to the land being the land comprised in Certificate of Title registered at Volume 1051 Folio 48 of the Register Book of Titles;
  - (iv) That, in the event that the sum of United States Dollars (USD\$250,000.00), plus interest at the rate of seven percent (7%) per annum from 23 February 2018, due to the Claimant, is not paid within sixty (60) days of the date herein, the Claimant be entitled to exercise a power of sale over the said land for the purpose of recovering the sum secured by the 1<sup>st</sup> Defendant from the sale of the 1<sup>st</sup> Defendant's share in the said land;
  - (v) That any monies remaining after the payment of the sum due to the Claimant, from the proceeds of the sale of the said land, be paid to the Court;
  - (vi) That the Claimant's Attorney-at-Law shall have carriage of sale of the said land; and
- (vii) Liberty to Apply.
- [3] At the beginning of the trial of the instant matter, it was indicated on behalf of Mrs Murray, that the Order sought at paragraph 2 of the Fixed Date Claim Form is no longer required.

## THE ISSUES

- [4] The Claim raises several issues for the Court's determination. The central issues may be distilled in the following way: -
- (a) Whether an equitable mortgage was created over the land part of BENGAL, in the parish of St. Ann, being the land comprised in Certificate of Title registered at Volume 1051 Folio 48 of the Register Book of Titles; and
  - (b) The appropriate interest rate to be applied should the Court find that an equitable mortgage was created.
- [5] In seeking to determine the central issues raised, the following sub-issues must also be resolved: -
- (a) Whether Ms Jennifer Braham had the authority to act on behalf of Brilliant Investments Limited;
  - (b) Whether the actions of Ms Jennifer Braham bind Brilliant Investments Limited;
  - (c) Whether, on a balance of probabilities, the evidence adduced on Mrs Murray's behalf is sufficient to establish the creation of an equitable mortgage; and
  - (d) Whether the consent of Mr Allan Davis as the tenant-in-common is required for the creation of an equitable mortgage.

## BACKGROUND

### The factual background to the Claim

- [6] The Claimant, Mrs Karin Murray, contends that a debt is owed to her by the Ancillary Defendant, Mrs Jennifer Messado, in the sum of Five Hundred Thousand United States Dollars (USD\$500,000.00).

- [7] Mrs Murray further contends that this debt has been acknowledged in writing by Mrs Messado and, in respect of which, an equitable mortgage has been created over the land, part of BENGAL, in the parish of St. Ann, being the land comprised in Certificate of Title registered at Volume 1051 Folio 48 of the Register Book of Titles (“the BENGAL property”).
- [8] The 1<sup>st</sup> Defendant/Ancillary Claimant, Brilliant Investments Limited, is a limited liability company which was incorporated on or about 7 June 2005, under the laws of Jamaica, with its registered office at 15 Norwood Avenue, Kingston 5 (“Brilliant Investments”). The incorporation of Brilliant Investments was effected by Mrs Messado, who was at the material time an Attorney-at-Law, acting on the instructions of her then client, Mr Paul Morrison.<sup>1</sup>
- [9] The 2<sup>nd</sup> Defendant, Mr Allan Davis, together with Brilliant Investments are the registered proprietors of the BENGAL property. They hold the said land as tenants-in-common.<sup>2</sup>
- [10] In or around February 2018, Mrs Messado acknowledged in writing, the debt owed by her to Mrs Murray, in the sum of Five Hundred Thousand United States Dollars (USD\$500,000.00). As security for that debt, Mrs Messado delivered her Jamaican passport to Mrs Murray’s Attorney-at-Law, Ms Carol Davis.<sup>3</sup>
- [11] In or around February 2018, Mrs Messado requested the return of her passport in order that she might travel from the Island. Subsequent to that, on 23 February 2018, Ms Davis received a letter from Brilliant Investments that was written on its letter head, duly signed by its Directors and which bore its seal. That letter authorized Ms Davis to sell the BENGAL property. The proposal was further, that,

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<sup>1</sup> See – Affidavit of Paul Morrison in Response to Affidavit of Karin Murray, which was sworn to on 26 March 2021 and filed on 29 March 2021, at paragraph 6 and exhibit “PM-1” which contains the Certificate of Incorporation together with the Articles of Incorporation as well as the TRN Registration Data Sheet of Brilliant Investments Limited

<sup>2</sup> See – Affidavit of Karin Murray in Support of Fixed Date Claim, which was sworn to on 15 November 2019 and filed on 25 November 2019, exhibit “KM1”

<sup>3</sup> See – Affidavit of Karin Murray in Support of Fixed Date Claim, which was sworn to on 15 November 2019 and filed on 25 November 2019, exhibit “KM2”

from the proceeds of the sale of the said land, Mrs Murray would be paid the sum of Two Hundred and Fifty Thousand United States Dollars (USD\$250,000.00).<sup>4</sup>

- [12] As security for the payment of that sum, Brilliant Investments also provided Ms Davis with the Duplicate Certificate of Title to the BENGAL property.<sup>5</sup>
- [13] The Duplicate Certificate of Title was delivered to Ms Davis by Ms Jennifer Braham, a Director of Brilliant Investments and who was an employee of the firm Jennifer Messado & Company, Attorneys-at-Law, of which Mrs Messado was a Partner.

## **THE LAW**

### **Mortgage**

- [14] A mortgage may be both legal and equitable. It is a disposition of property as security for the repayment of a loan or discharge of an obligation. Generally, whenever a disposition of an estate or interest is originally intended as a security for money, whether this intention appears from the deed itself, from any other instrument or from oral evidence, it is considered as a mortgage and redeemable.

### **The burden and standard of proof**

- [15] Where a claimant alleges that a mortgage has been created, a burden of proof is cast on him or her to prove his or her case on a balance of probabilities. This principle was enunciated by Sir Robert Megarry V-C in **Re Alton Corporation**,<sup>6</sup> at page 33, paragraph b:-

*“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.”*

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<sup>4</sup> See – Affidavit of Karin Murray in Support of Fixed Date Claim, which was sworn to on 15 November 2019 and filed on 25 November 2019, exhibit “KM3”

<sup>5</sup> See – Affidavit of Karin Murray in Support of Fixed Date Claim, which was sworn to on 15 November 2019 and filed on 25 November 2019, exhibit “KM4”

<sup>6</sup> [1985] BCLC 27

- [16] In **Miller v Minister of Pensions**,<sup>7</sup> Denning J, speaking of the degree of cogency which evidence must reach in order that it may discharge the legal burden in a civil case, said: -

*"That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged but if the probabilities are equal it is not."*

### **The creation of a legal mortgage**

- [17] Section 103 of the Registration of Titles Act ("the ROTA") provides that the proprietor of land may mortgage same by signing a mortgage in a form authorized by one of three specified Schedules of the ROTA. Unlike a mortgage of land which does not fall under the operation of the ROTA, a mortgage of registered land does not operate as a conveyance of the interest in that land. The registration of a mortgage under the ROTA does, however, provide security to a mortgagee, in that it is a charge on the land. Registration allows the mortgagee specific powers provided by the ROTA. These powers are in addition to any powers contained in the mortgage instrument.

### **The creation of an equitable mortgage**

- [18] Where the mortgagor executes a document purporting to charge his interest in land, which document does not satisfy the requirements of the ROTA, the question to be determined is, what is the effect that that document has, if any at all.
- [19] There can be no doubt that the owner of an interest in land may create an equitable mortgage.
- [20] One method by which an equitable mortgage may be created is by the delivery to the lender of the title deeds relating to the borrower's land, accompanied by a

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<sup>7</sup> [1947] 2 All ER 372 at pages 373-374

demonstrably clear intention to treat the land as security for the monies advanced.<sup>8</sup> It is not necessary that any general words of charge be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property referred to in the document should constitute a security.<sup>9</sup>

**[21]** The law clearly establishes that an equitable mortgage may be created by: -

- (a) an agreement to create a legal mortgage;
- (b) a mortgage of an equitable interest;
- (c) a mortgage that fails to comply with the formalities of creating a legal mortgage;<sup>10</sup> or
- (d) a deposit of the title deeds or duplicate certificate of title to the lender.<sup>11</sup>

### **The effect of an equitable mortgage**

**[22]** An equitable mortgage creates a charge on the property but does not convey a legal estate or interest to the mortgagee. It only transfers an equitable estate or interest in the property. The legal interest in the property remains with the mortgagor.<sup>12</sup> The operation of an equitable mortgage is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.<sup>13</sup>

<sup>8</sup> See – **Fitzritson v Administrator General** (1969) 11 JLR 288; (1969) 15 WIR 94, as per Graham-Perkins J (as he then was)

<sup>9</sup> See – **Cradock v Scottish Provident Institution** (1893) 69 LT 380, at page 382, per Romer J

<sup>10</sup> See – Halsbury's Laws of England/Mortgage (Volume 77 (2021))/3, at paragraph 215

<sup>11</sup> See – **Fitzritson v Administrator General** (*supra*)

<sup>12</sup> **Downsview Nominees Ltd. and Another v First City Corporation Ltd. and Another** [1993] A.C. 295, at page 311 C-E

<sup>13</sup> **Downsview Nominees Ltd. and Another v First City Corporation Ltd. and Another** (*supra*)

## **Enforcement of an equitable mortgage**

- [23] Under the equitable jurisdiction of the court, an equitable mortgagee may be entitled to a variety of equitable remedies. Halsbury's Laws of England Volume 77 (2021))/3, at paragraph 248 provides a detailed summary of the remedies available to an equitable mortgagee. It reads as follows: -

*"An equitable mortgagee is entitled to possession if there is a special agreement or the court so orders. He may appoint a receiver if empowered to do so expressly or by statute; otherwise an application to the court is necessary. If an express or statutory power exists he may sell the property and may have express powers enabling him to convey the legal estate. He may obtain an order for sale, specific performance, or foreclosure; and he may, instead of proceeding against the security, bring a claim on the personal covenant."*

- [24] Additionally, an equitable mortgagee by deposit is entitled to call for a legal mortgage, even in the absence of an express agreement, unless the right is excluded by an agreement.
- [25] In **Jamaican Redevelopment Foundation Inc v Anthony Everald Ferguson**,<sup>14</sup> Brooks J (as he then was) in speaking of the enforcement of an equitable mortgage stated as follows: -

*"For the equitable mortgagee to have the right to call for a legal mortgage to be executed, requires an intention on the part of the mortgagor to create a mortgage. There, however, need be no specific words to that effect. So long as the right has not been excluded, the mortgagee, who has had a title deposited with him as security, may call for a legal mortgage."*

## **Approaching the court**

- [26] The procedure with respect to mortgage claims is outlined in Part 66 of the Civil Procedure Rules, 2002 ("the CPR"). Rule 66.2 provides that a mortgage claim is to

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<sup>14</sup> Claim No. 2010 HCV 03288, unreported, judgment delivered on 22 July 2011

be commenced by way of a Fixed Date Claim Form and is to be supported by evidence on affidavit.

- [27] The cogency of the evidence required is also provided for by the CPR. Rule 66.4 of the CPR provides that the supporting evidence is to include: -
- (a) exhibiting a copy of the original mortgage;
  - (b) exhibiting a copy of any other document which sets out the terms of the mortgage;
  - (c) giving particulars of –
    - i. the amount of the advance;
    - ii. the interest payable under the mortgage;
    - iii. the amount of any periodic payments required to be made and stating whether or not such payments include interest;
    - iv. the amount of the repayments that have been made;
    - v. the amount of any repayments or interest due but unpaid at the date of the claim and at the date of the affidavit;
    - vi. the amount remaining due under the mortgage; and
    - vii. where the claim includes a claim for interest to the date of judgment, the daily rate at which such interest accrues.

## ANALYSIS

**Whether an equitable mortgage was created over the land part of BENGAL, in the parish of St. Ann, being the land comprised in Certificate of Title registered at Volume 1051 Folio 48 of the Register Book of Titles**

- (i) *Whether Ms Jennifer Braham had the authority to act on behalf of Brilliant Investments Limited*
  - (ii) *Whether the actions on the part of Ms Jennifer Braham bind Brilliant Investments Limited*
- [28] The evidence discloses that Ms Braham was one of the Directors of Brilliant Investments and remained a Director from the time of its incorporation until at least 2018. The evidence equally discloses that Ms Braham was an agent of Brilliant Investments who acted as such and who conducted business on its behalf. Ms Braham was also represented by Brilliant Investments as being authorized to conduct business on its behalf, by virtue of her appointment as a Director as well as by the subsequent registration of that appointment at the Company's office.
- [29] There can be no doubt that Ms Braham had actual authority to act on behalf of Brilliant Investments and to bind the company by her actions. Indeed, by virtue of section 176 of the Company's Act, the acts of a director or manager of a company shall be valid notwithstanding any defect that may be subsequently discovered in his appointment or qualification.
- [30] In the present instance, there is no suggestion of any limitation expressed in the documents filed with the Company's office, on behalf of Brilliant Investments, as to Ms Braham's being a nominee Director. Nor is there any suggestion of any limitation of her powers to act as a Director of Brilliant Investments.
- [31] Even if Ms Braham did not have actual authority to bind Brilliant Investments, the Court finds that she had apparent or ostensible authority to act for and on behalf of Brilliant Investments and to bind the company by her actions.

- [32] In Jamaica, the duties of a director are set out in detail in section 174 of the Companies Act. The section reads as follows: -

*"174. – (1) Every director and officer of a company exercising his powers and discharging his duties shall –*

*(a) act honestly and in good faith with a view to the best interest of the company; and*

*(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including but not limited to the general knowledge, skill and experience of the director or officer.*

*(ii) A director or officer of a company shall not be in breach of his duty under this section if the director or officer exercised due care, diligence and skill in the performance of that duty or believed in the existence of facts that, if true, would render the director's or officer's conduct reasonably prudent.*

*(iii) For the purposes of this section, a director or officer shall be deemed to have acted with due care, diligence and skill where, in the absence of fraud or bad faith, the director or officer reasonably relied in good faith on documents relating to the company's affairs, including financial statements, reports of experts or on information presented by other directors or, where appropriate, other officers and professionals.*

*(iv) In determining what are the best interests of the company, a director or officer may have regard to the interests of the company's shareholders and employees and the community in which the company operates.*

*(v) The duties imposed by subsection (1) on the directors or officers of a company is owed to the company alone.*

*(vi) Where pursuant to a contract of service with a company, a director or officer is required to perform management functions, the terms of that contract may require the director or officer in the exercise of those functions, to observe a higher standard than that specified in subsection (1)."*

- [33] It is therefore clear, that, Ms Braham, in exercising her powers as a Director of Brilliant Investments and in discharging her duties as such, has a statutory duty to act honestly and in good faith with a view to the best interests of Brilliant Investments; and to exercise due care, diligence and skill in her conduct of the internal management of the company.
- [34] The Court is strengthened in this regard by the pronouncements of Laing J (as he then was) in the authority of **Brilliant Investments Limited v Jennifer Messado, Jennifer Braham and Rory Chin**.<sup>15</sup> At paragraph [121], Laing J cited the pronouncements of Brooks JA (as he then was) in **Ase Metal NV v Exclusive Holiday Elegance**.<sup>16</sup> Brooks JA is quoted as follows: -

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

- [35] The facts in **Brilliant Investments Limited v Jennifer Messado, Jennifer Braham and Rory Chin**<sup>17</sup> are that, on or about 20 December 2005, Mr Morrison instructed Mrs Messado to represent Brilliant Investments in its purchase of all that parcel of land, part of 137 Constant Spring Road, now known as 5 Grove Park Avenue, in the parish of St. Andrew, being the land comprised in Certificate of Title registered at Volume 1296 Folio 973 of the Register Book of Titles ("the Grove Park property").

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<sup>15</sup> [2019] JMCC Comm 26

<sup>16</sup> [2013] JMCA Civ 37

<sup>17</sup> *supra*

- [36] A deposit and further payment were made and, on 17 January 2008, the Grove Park property was transferred to Brilliant Investments.
- [37] In or around October 2007, Mr Morrison instructed Mrs Messado to represent Brilliant Investments in respect of its purchase of two (2) other properties, being the land comprised in Certificate of Title registered at Volume 1401 Folio 931 and Volume 1401 Folio 936, respectively.
- [38] Mrs Messado and Mr Chin entered into a business transaction, as a part of which, Mrs Messado instructed Ms Braham to execute transfer documents in respect of the Grove Park property as well as the properties referred to at paragraph [37] above. The executed transfer documents were provided to Mr Chin through his Attorney-at-Law and were used to effect the registration of Mr Chin as the registered proprietor of these parcels of land on earth.
- [39] It is these transfer documents that formed the genesis of the claim in respect of the matter.
- [40] In those circumstances, Laing J found that a nominee director does not constitute a separate class of directors and, accordingly, owes the same duty of care to a company. Additionally, a nominee director is held to the same standard as other directors.
- [41] Laing J also found that Brilliant Investments was bound by the actions of Ms Braham. He reinforced the fact that Brilliant Investments is not confined to Mr Morrison; that Mr Morrison is the beneficial shareholder in and may even be considered a shadow Director of Brilliant Investments; and that Ms Braham was the sole shareholder in and Director of Brilliant Investments. By executing documents in the manner in which Ms Braham did, it created a situation in which any person in the position of Mr Chin could reasonably have concluded that Mrs Messado did have the apparent authority to act on behalf of the company in a transaction that involved its properties.

*(iii) Whether on a balance of probabilities, the evidence adduced on Mrs Murray's behalf is sufficient to establish the creation of an equitable mortgage*

- [42] In seeking to establish the creation of an equitable mortgage, Mrs Murray relies primarily on the actions of Ms Braham, as a Director of Brilliant Investments and one whom the company represented as having the authority to bind it.
- [43] Mrs Murray relies firstly, on the letter dated 23 February 2018, from Brilliant Investments.<sup>18</sup> This letter is printed on the company's letter head and is duly signed by its Directors. The letter also bears the seal of Brilliant Investments. Mrs Murray contends that that letter authorizes Ms Davis to pay to Mrs Murray the sum of Two Hundred and Fifty Thousand United States Dollars (USD\$250,000.00), together with interest, from the proceeds of the sale of the BENGAL property.
- [44] Secondly, as security for the payment of that sum, Brilliant Investment also provided Ms Davis with the Duplicate Certificate of Title to the BENGAL property. The Duplicate Certificate of Title was delivered to Ms Davis by Ms Braham.
- [45] Thirdly, Mrs Murray relies on letter dated 23<sup>rd</sup> February 2018, under the hand of Ms Davis, to which Ms Braham signed in acknowledgement of receipt.<sup>19</sup> In that letter, Ms Davis expressly states, *inter alia*, the following: -

*"The said passport [of Mrs Messado] is returned to you in consideration of Brilliant Investment Ltd agreeing to pay to Mrs Karin Murray the sum of US\$250,000.00 from the proceeds of sale of property at Bengal, St. Ann and registered at Volume 1051 Folio 48 of the Register Book of Titles.*

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<sup>18</sup> See – Affidavit of Karin Murray in Support of Fixed Date Claim, which was sworn to on 15 November 2019 and filed on 25 November 2019, exhibit “KM3”, which may be found at page 14 of the Index to Judge’s Bundle, which was filed on 13 January 2022

<sup>19</sup> See – Affidavit of Karin Murray in Support of Fixed Date Claim, which was sworn to on 15 November 2019 and filed on 25 November 2019, exhibit “KM4”, which may be found at page 15 of the Index to Judge’s Bundle, which was filed on 13 January 2022

*For further security of the loan Brilliant Investment Limited has provided me as Attorney-at-Law for Mrs. Murray the duplicate of title for the land registered at Volume 1051 Folio 48 of the Register Book of Titles.*

*This letter is further confirmation that the sum of US\$250,000.00 represents part payment of the sum of US\$500,000.00 currently owed to Mrs Murray by Mrs Messado.*

*Please sign and return the enclosed copy of this letter in confirmation of receipt of the passport and of the arrangements set out above.”*

- [46] Mrs Murray contends that this letter was duly signed by Ms Braham, in the presence of Mrs Davis, on 23 February 2018 and that that was done in her capacity as Director and authorized agent of Brilliant Investments. Mrs Murray further contends that Ms Braham signed the letter dated 23<sup>rd</sup> February 2018, in acknowledgement of receipt of Mrs Messado's passport and in confirmation of the arrangements outlined therein.
- [47] Brilliant Investments has challenged the authenticity of the letter dated 23 February 2018. To that end, it relies on the expert evidence of Mrs Dianne C. Flores, Forensic Document Examiner, Hart & Flores Questioned Document Laboratory, Inc. Her findings, in respect of Ms Braham's signature, were that Ms Braham very probably did not sign the name "JBraham" where it appears on the letter dated 23 February 2018. What she does say however, is that there is no way to determine whether Ms Braham printed her name on the said letter.
- [48] The evidence of Mrs Flores in this regard, bears repeating: -

*"I was only able to examine printed writing for Jennifer Braham but it was very limited and the opinion is inconclusive. I did not receive any printed writing for Ms Morrison. If it was meant to be signatures they very probably did not sign the document. If it was meant to be printed name, then it is inconclusive because I did not have sufficient samples of their writing."*

- [49] In any event, this Court is of the view that there is a body of evidence, on the basis of which it can properly find that Brilliant Investments intended to treat the BENGAL property as security for the sum of money that is owed to Mrs Murray. This is made apparent by Ms Braham's attendance on Ms Davis for the purpose of collecting Mrs Messado's passport; by the fact that Ms Braham delivered to Ms Davis the Duplicate Certificate of Title to the BENGAL property as security for the sum of money that is owed to Mrs Murray; and by Ms Braham's signing the letter dated 23<sup>rd</sup> February 2018, not only in acknowledgement of receipt of Mrs Messado's passport but also in confirmation of the arrangements stated therein.
- [50] It is also significant to note the evidence of Mrs Messado in this regard. Her evidence is that she was never involved in the preparation of the letter dated 23 February 2018, from Brilliant Investments nor did she have a specific conversation with Ms Braham about the arrangements set out therein.
- [51] In the circumstances, the Court finds that these were the actions of Ms Braham, in her capacity as one of the Directors of Brilliant Investments.
- [52] For his part, Mr Morrison avers that he did not authorize Ms Braham to deliver up the Certificate of Title to the BENGAL property, as security for the sums of money that are owed to Mrs Murray. The Court has given careful consideration to Mr Morrison's evidence in this regard. If this is so, Ms Braham would be in breach of her duty, in her capacity of Director of Brilliant Investments, to act honestly and in good faith, with a view to the best interests of Brilliant Investments and to exercise due care, diligence and skill in her conduct of the internal management of the company.
- [53] The Court is constrained however, to find that, as a matter of Law, this concerns the internal management of Brilliant Investments. Mr Morrison's averment in this regard does not nullify Ms Braham's actions nor does it render Brilliant Investments any less bound by those actions.

- [54] The indoor management rule, as laid down in **Royal British Bank v Turquand**<sup>20</sup> would apply in these circumstances. The rule is one which permits a party who acts in good faith and without any knowledge of any irregularity in respect of the internal management of a company, to assume that there is compliance with the internal procedures of the company.
- [55] The facts of the case are that Mr Turquand was the official manager (liquidator) of the insolvent Cameron's Coalbrook Steam, Coal and Swansea and Loughor Railway Company. The company had given a bond for £2,000 to the Royal British Bank, which secured the company's drawings on its current account.
- [56] The bond was under the company's seal and was signed by two directors and the company secretary. When the company was sued, it asserted that, under its registered deed of settlement (the articles of association), directors only had power to borrow up to an amount authorized by a company resolution. A resolution had been passed but did not specify how much the directors could borrow.
- [57] The court held that persons dealing with the company were bound to make themselves acquainted with the statute and the deed of settlement of the company but they were not bound to do more; a person, on reading the deed of settlement, would find, not a prohibition against borrowing but a permission to borrow on certain conditions and, on learning that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.
- [58] In the final analysis, the court held that the company was liable whether or not a resolution had been passed.

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<sup>20</sup> [1843-60] All ER Rep 435

- [59] This rule has been approved in a number of other cases, including **Morris v Kanssen and Others**.<sup>21</sup> There, Lord Simonds approved this statement of the rule in HALSBURY, Hailsham Edn., Volume V, at page 423: -

*“...persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.”*

- [60] Nor does the fact that the Certificate of Title to the BENGAL property was deposited to secure the loan of a third party negate the creation of an equitable mortgage. The general rule is that a deposit of the title deeds to real property in an effort to secure a debt creates an equitable charge on the land and this principle applies even where the debt is not owed by the owner of the deeds but by a third party. The deposit of the title deeds must however have been made for the purpose of providing security for the debt that is owed. As between a debtor and a creditor, the possession of the title deeds raises the presumption that they were deposited by way of security. The deposit is a fact which lets in evidence of an intention to create a charge that would otherwise be inadmissible and raises the presumption of a charge which casts on the debtor the burden of rebutting it.<sup>22</sup>

- [61] Similarly, in **Re Molton Finance Ltd**,<sup>23</sup> Lord Denning MR added that: -

*“When an equitable mortgage or charge is created by the 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*

<sup>21</sup> [1946] 1 All ER 586, at page 592 C-D, per Lord Simonds

<sup>22</sup> See – **Re Wallis & Simmonds (Builders) Ltd** [1974] 1 All ER 561 at page 564 f-h, per Templeman J. Templeman J stated as follows: - “There is a similar statement in Halsbury’s Laws of England, 3<sup>rd</sup> Edn, vol 27, p 168, para 263 and in particular it is said: ‘A mere deposit of title deeds upon an advance, with intent to create a security thereon, but without a word passing, gives an equitable lien, so that, as between the debtor and creditor, the fact of possession of the title deeds raises the presumption that they were deposited by way of security...The deposit is a fact which lets in evidence of an intention to create a charge that would otherwise be inadmissible, and raises a presumption of charge which throws upon the debtor the burden of rebutting it.’”

<sup>23</sup> [1967] 3 All ER 843, [1968] Ch 325

*charge. It is not a separate legal or common law lien. It has no independent existence apart from the equitable mortgage or charge.”*

- [62] In the result, the Court finds, on a preponderance of the evidence, that there was an intention to create an equitable mortgage, on the BENGAL property, as security for the sum of money that is owed to Mrs Murray by Mrs Messado. This is as a result of the actions of Ms Braham, in her capacity as Director of Brilliant Investments. The Court finds that the actions of Ms Braham, in her capacity as Director of Brilliant Investments, in fact created an equitable mortgage on the BENGAL property and that this was with the purpose of providing security for the sum of money that is owed to Mrs Murray by Mrs Messado. Additionally, the Court also finds that Mrs Murray has satisfied the requirements of Part 66 of the CPR, in respect of the creation of an equitable mortgage.<sup>24</sup>

(iv) *Whether the consent of Mr Allan Davis as the tenant-in-common is required for the creation of an equitable mortgage*

- [63] There is no dispute among the parties that Mr Allan Davis is the registered co-owner of the BENGAL property along with Brilliant Investments. They hold the BENGAL property as tenants-in-common. There is equally no dispute that Mr Davis gave no consent to the use of the BENGAL property as security for the sum of money that is owed to Mrs Murray by Mrs Messado.
- [64] In the circumstances, the issue that arises for the Court’s determination is whether the consent of Mr Davis is required for the creation of an equitable mortgage.
- [65] Unlike the case of joint tenants, where there is unity of possession, unity of interest, unity of title and unity of time, in a tenancy-in-common, the co-owners have unity of possession only. As such, each co-owner has a separate and distinct and fixed share in the property. Each co-owner is able to dispose of his separate and distinct and fixed share in the property. Brilliant Investments is therefore able to create a

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<sup>24</sup> See – Affidavit of Karin Murray in Support of Fixed Date Claim, which was sworn to on 15 November 2019 and filed on 25 November 2019, at paragraph 11, i. – vii.

charge in respect of its share of the BENGAL property and is able to do so without any reference to or the need of any consent from, Mr Davis.

**The appropriate interest rate to be applied should the Court find that an equitable mortgage was created**

- [66] It is clear from the evidence before the Court that there was no agreement in respect of the rate of interest to be applied to the sum of money that is owed to Mrs Murray by Mrs Messado.
- [67] In respect of the claim for interest, Mrs Murray relies on section 3 of the Law Reform (Miscellaneous Provisions) Act which provides that, in any proceedings for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given, interest at such rate as it thinks fit, whether on the whole or any part of the debt or damages for the whole or part of the period between the date when the cause of action arose and the date of judgment.
- [68] The Court recognizes that it is the debt that is owed to Mrs Murray by Mrs Messado that underpins this Claim. However, this is not a claim for the recovery of that debt. In those circumstances, this Court is of the view that section 3 of the Law Reform (Miscellaneous Provisions) Act does not apply.

**The application for an Order for the sale of the BENGAL property**

- [69] The Court declines to make an Order for the sale of the BENGAL property for the reason that there is no evidence that this Claim was served on or brought to the attention of the person(s) who has/have an interest in it.
- [70] Whilst Mrs Shurnette Davis was appointed the representative of the estate of Mr Allan Davis, for the purpose of the continuation of litigation in respect of this Claim, there is no evidence that the persons who would be entitled to an interest in Mr Allan Davis' share of the BENGAL property, either by way of testacy or intestacy,

have been served with notice of the application for an Order for the sale of the BENGAL property.

### **Costs**

- [71] Part 64 of the CPR contains general rules in relation to costs and the entitlement to costs. Where a court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.<sup>25</sup>
- [72] Rule 64.3 of the CPR provides that the court's power to make orders about costs include the power to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings.
- [73] In deciding who should be liable to pay costs, the court must have regard to all the circumstances and, in particular, to the conduct of the parties both before and during the proceedings. The court may also consider whether it was reasonable for a party to pursue a particular allegation; and/or to raise a particular issue; the manner in which a party has pursued his/her case, a particular allegation or a particular issue; and whether the claimant gave reasonable notice of an intention to issue a claim.<sup>26</sup>
- [74] In the present instance, this Court is of the view that there is nothing that warrants a deviation from the general rule.

### **The ancillary claim**

- [75] On 29 March 2021, the Ancillary Claimant, Brilliant Investments Limited, filed an Ancillary Claim Form and Particulars of Ancillary Claim Form, against the Ancillary Defendant, Mrs Jennifer Messado. By virtue of its Ancillary Claim Form, Brilliant Investments Limited seeks: -

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<sup>25</sup> See – Rule 64.6(1) of the CPR

<sup>26</sup> See – Rules 64.6(3), 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g) of the CPR

- (i) To be indemnified against the Claimant's Claim and costs of this action; and/or
  - (ii) To be entitled to contribution from the Ancillary Defendant in respect of any sum which the Claimants may recover against it to the extent of such amount as may be found by the court to be just and equitable having regard to the Ancillary Defendant's responsibility for the Claimant's loss.
- [76] It was asserted, on behalf of Brilliant Investments Limited, that Part 18 of the CPR allows it to seek the relief that it does, by way of the Ancillary Claim Form. This Court is not convinced that the Ancillary Claim Form is the appropriate originating document to have been used in the present instance nor is the Court convinced that Part 18 of the CPR applies in the present instance.
- [77] In any event, the Court finds no merit in the Ancillary Claim Form.

## **DISPOSITION**

- [78] It is hereby ordered as follows: -
- (i) That it is hereby declared that the Claimant, Karin Murray, holds an equitable mortgage in the sum of Two Hundred and Fifty Thousand United States Dollars (\$US250,000.00), over the interest held by Brilliant Investments Limited in all that parcel of land, part of BENGAL, in the parish of St. Ann, being the land comprised in Certificate of Title registered at Volume 1051 Folio 48 of the Register Book of Titles;
  - (ii) That the Registrar of Titles is to register the said equitable mortgage on the Certificate of Title for all that parcel of land, part of BENGAL, in the parish of St. Ann, being the land comprised in Certificate of Title registered at Volume 1051 Folio 48 of the Register Book of Titles;
  - (iii) That the Court declines to exercise its discretion in respect of the Order sought at paragraph 4 of the Fixed Date Claim Form, which was filed on 25 November 2019 and the consequential Orders sought at paragraphs 5 and 6

of the Fixed Date Claim Form, which was filed on 25 November 2019, are refused;

- (iv) That the costs of the Fixed Date Claim Form, which was filed on 25 November 2019, are awarded to the Claimant, Karin Murray, against the 1<sup>st</sup> Defendant, Brilliant Investments Limited and are to be taxed if not sooner agreed;
- (v) That the Ancillary Claim Form, which was filed on 29 March 2021, is dismissed;
- (vi) That there shall be no order as to costs in respect of the Ancillary Claim Form, which was filed on 29 March 2021;
- (vii) That the Claimant's Attorneys-at-Law are to prepare, file and serve these Orders.