[2017]JMCC Comm 4

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

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. 2017CDD00073**

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| **BETWEEN** | **ROSH DEVELOPMENT LIMITED** | **CLAIMANT** |
| **AND** | **CAYJAM DEVELOPMENT LIMITED** | **1st DEFENDANT** |
| **AND** | **PROLINE DEVELOPMENT CORP.** | **2nd DEFENDANT** |

**IN CHAMBERS**

Mr. Nigel Jones and Miss Kashima Moore instructed by Nigel Jones & company for the claimant

Mr. Keith Bishop, Mr. Andrew Graham and Mr. Romaine Tulloch instructed by Bishop & Partners for the 2nd Defendant

February 8 and 17 2017

**INJUNCTION–WHETHER AN EQUITABLE MORTGAGE IS CREATED WHERE A LEGAL MORTGAGE IS REGISTERED SUBJECT TO A CAVEAT**

**REGISTRATION OF TITLES ACT – FORECLOSURE – EFFECT ON PROPRIETARY RIGHTS**

**SIMMONS J**

[1] This is an application for an injunction to restrain the 2nd defendant, its servants or agents from taking steps to foreclose in respect of property described as ALL that parcel of land part of Portmore in the parish of St. Catherine registered at Volume 987 Folio 289 in the Register Book of Titles (the property).

[2] The claimant which is registered in Jamaica loaned the sum of United States three million seven hundred and seventy thousand dollars (US$3,770,000.00) to the 1st defendant which is a company registered in the Cayman Islands. That sum was secured by a mortgage dated the 1st November 2013 against the property.

[3] In September 2014 the 1st defendant wished to sell the property to the 2nd defendant and it was agreed by the claimant and the 1st defendant that the mortgage would be discharged in exchange for the payment of the sums due to the claimant. The claimant's attorney collected the sum of United States four million six hundred and fifty six thousand dollars (US$4,656,000.00) on its behalf in settlement of the sums due.

[4] The claimant was however of the view that the total sum outstanding was United States five million one hundred thousand dollars (US$5,100,000.00) and refused to sign the documents to effect the discharge of the mortgage.

[5] It was subsequently agreed between the claimant and the 1st defendant that there had been an error in the calculations and that the sum of United States three hundred and fifty thousand dollars (US$350,000.00) would be accepted in full and final settlement of the matter. The claimant has asserted that there was an agreement between itself and the first defendant that this sum was to be secured by the property.

[6] In a letter dated the 16th September 2014 addressed to the claimant, the 2nd defendant stated its intention to settle the outstanding sum after it received the first tranche of funds or at the discharge of the mortgage loan whichever came first. The claimant lodged a caveat to protect its interest. That caveat is numbered 1906966 (the caveat).

[7] The arrangement between the defendants was subsequently changed to that of mortgagor and mortgagee. This culminated in the caveat being warned and a claim no. 2015 CD 00039 filed in this court. The claimant applied for an injunction

and by consent it was ordered that the 1st defendant's mortgage be registered on the Certificate of Title subject to Caveat # 1906966 that had been lodged by the claimant.

[8] A Notice to the Caveator dated the 29th December 2016 was served on the claimant's Attorney-at-Law Messrs. Hamilton & Hamilton indicating that the 2nd defendant intends to apply for an order of foreclosure in respect of the property.

[9] It is that action which has resulted in the filing of this claim in which the claimant seeks the following declarations:-

(i) that the claimant is an equitable mortgagee with an interest in the property;

(ii) that the claimant has the right to exercise its power of sale;

(iii) that the claimant's interest in the property has priority over that of the 2nd defendant.

The claimant has also sought an injunction to restrain the 2nd Defendant from taking steps to foreclose on the property.

[10] In order to ground a claim for an injunction the claimant must first satisfy the court that there is a cause of action - ***Fourie v. Le Roux*** [2007] 1 W.L.R. 320. There is no dispute in this case regarding that issue.

[11] The principles which guide the court when considering whether or not to grant injunctive relief are to be found in the case of ***American Cyanamid v. Ethicon*** [1975] 1 All ER 504. In that case, Lord Diplock stated that before granting an injunction the Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious issue to be tried.

[12] Secondly, if there is a serious issue to be tried, the Court has to consider whether damages would be an adequate remedy. In the event that damages would not be an adequate remedy, it must be determined whether the defendant would be

adequately compensated under the claimant's undertaking as to damages. Where there is doubt as to the adequacy of damages and whether the claimant's undertaking would provide enough protection for the defendant the court must then decide where the balance of convenience lies.

[13] In this case the claimant is seeking to restrain the second defendant from foreclosing on the property.

**Is there a serious issue to be tried?**

[14] The issues which arise for consideration are:-

(i) Whether, in the circumstances of the case, an equitable mortgage has been created by the lodging of the caveat in respect of the property registered at Volume 987 Folio 289 in the Register Book of Titles; and

(ii) Whether the lodging of the caveat can be used as a basis to prevent the enforcement of the rights of the mortgagee.

[15] It is accepted that where a court is asked to make an assessment under this head, it is not to embark on a trial of the issues. In fact the claimant need not show that it has a prima facie case. Lord Diplock in the **American Cyanamid** case expressed that rule in the following terms:-

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial".*

[16] However, in the case of ***Series 5 Software v. Clarke*** [1996] 1 All E.R. 853 it was held that where a judge is able to form a clear view as to the relative strengths of the parties' cases that view is relevant to the issue of whether or not the injunction should be granted. Laddie, J. stated:-

> *"(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b)…….and (d) any clear view the court may reach as to the relative strength of the parties" cases."*

Lord Hoffmann in ***National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.*** [2009] UKPC 16 also expressed the view that the court's opinion as to the strength of each party's case is relevant to the determination of this issue.

[17] Mr. Jones submitted that there is a serious issue to be tried as the issue of whether an equitable mortgage had been created by the lodgement of the caveat needs to be settled.

[18] Mr. Bishop has submitted that there is no serious issue that needs to be resolved between the claimant and the 2nd defendant. He stated that this is not a case in which an application has been made under section 140 of ***Registration of Titles Act*** (***the Act)*** where a caveat has been lodged and the owner wants to transfer the property. He stated that the interests of the claimant are already protected by the caveat as the Registrar of Titles is required to give notice to the caveator before a caveat can be discharged. He emphasized that the mortgage was endorsed subject to the caveat. He argued that to grant injunctive relief would amount to a double protection. He also stated that the claimant has filed two claims and that neither of them seeks a declaration that the claimant is a mortgagee.

[19] He stated that in claim no. 2015 CD 00039 the same issue was raised by the claimant and should not be considered for a second time.

[20] Counsel also stated that no documents had been signed by the claimant and the 1st defendant which could be construed as a mortgage. He argued that the claimant should seek to recover the sum owing from the 1st defendant. Mr. Bishop also indicated that the 2nd defendant is not the party from whom the claimant could expect payment as it was not a party to the arrangement between the claimant and the 1st defendant. He also stated that that arrangement should not affect the 2nd defendant.

[21] Mr. Bishop also emphasized that before an order for foreclosure could be made, all parties would have to be notified and that the claimant had been notified of the 2nd defendant's intention. He said that the matter was in its preliminary stage and his client would have to satisfy the Registrar of Titles that the caveators had been notified and no action was taken by them.

[22] Mr. Jones countered by stating that where a party is proceeding under section 119 of ***the Act***, there is no requirement to warn the caveat. He also stated that the order of Laing J in claim no. 2015 CD 00039 was a final order and as such there is no other matter before the court. He also pointed out that in the current claim, the claimant is in fact seeking a declaration that an equitable mortgage exists.

[23] Where the creation of an equitable mortgage is concerned I have found the case of ***Swiss Bank Corporation v. Lloyds Bank Ltd.*** [1982] A.C. 584 to be quite instructive. In that case, the court in its examination of the issue of whether a loan agreement gave rise to an equitable charge, stated:-

> *"An equitable charge may, it is said, take the form either of an equitable mortgage or of an equitable charge not by way of mortgage.* ***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. An equitable charge which is not an equitable mortgage is said to be created when property is expressly or constructively made liable, or specially appropriated, to the discharge of a debt or some other obligation, and confers on the chargee a right of realisation by judicial process, that is to say, by the appointment of a receiver or an order for sale: see* Fisher and Lightwood*, p. 14."*[1]

[My emphasis]

[24] It can 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. Where a mortgagee wishes to enforce its rights in such circumstances it may bring an action for specific performance of the agreement.

[25] Under the Torrens System of land registration incumbrances affecting land that has been registered are entered in the Register Book. Section 139 of ***the Act*** provides for the lodging of a caveat to prevent the registration of any person as transferee or proprietor of land unless the instrument of transfer is made to be subject to the claim of the caveator. The effect of a caveat was described by Lord Millett in ***Half Moon Bay Limited v Crown Eagle Hotels Limited*** [2002] UKPC 24 as follows:-

> *"...the entry of a caveat merely operates to prevent registration of a transfer or dealing without the consent of the caveator or the removal or withdrawal of the caveat."*

[26] This statement of the law was also expressed by the Jamaican court of Appeal in ***Barrington Dixon v Angella Runte & another*** (unreported) Court of Appeal , Jamaica Civil Appeal No. 105/08 judgment delivered 17 July 2009. In that case Smith JA also said that the lodgement of a caveat *"...temporarily protects an*

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*unregistered interest in anticipation of legal proceedings. The caveator must make a claim with a view to establishing his interest".*

[27] This view was also expressed in following paragraph from the text Baalman, ***the Torrens System in New South Wales*** 2nd ed R.A. Woodman and P.J. Grimes to be instructive. It reads:-

> *"Originally, there were no half measures about caveats against dealings. They either prohibited or they did not.*
>
> *In 1956 the section was amended to forbid registration of prohibited dealings 'except with the written consent of a person entitled to withdraw the caveat'; ...It is inherent in the section that the consent should be absolute in form, not qualified nor expressed to be conditional upon the happening of some event. Such a consent is quite distinct from a withdrawal of the caveat. A withdrawal completely disposes of the caveat in respect of the titles specified in the withdrawal; a consent has no such effect – it merely permits registration of the dealing to which it relates, leaving the caveat an effective prohibition against further registrations. From this it follows that where a dealing – not being one to which s 72(7) applies – disposes of the whole of the interest claimed by the caveator, the proper procedure is withdrawal of the caveat.*
>
> *Whether a caveator consents to registration of a dealing, or whether he allows his caveat to lapse in respect of that dealing to permit registration thereof, in either case the prohibitory effect of the caveat is diminished only to the extent necessary to enable the new interest to be created by registration of the dealing.* ***It follows, as a matter of principle, that whether the caveator has consented to or allowed his caveat to lapse in favour of, a dealing, he has forfeited any right to use his caveat to prevent exercise of a power inherent in the interest created by that dealing. This may be illustrated by cases where the dealing is a mortgage or a lease; the caveator who has allowed registration could not rely upon his caveat to prevent the mortgage selling, or the lessee exercising an option to purchase or renew****."*

[My emphasis]

[28] It seems therefore that where a party has permitted another party's mortgage to be registered, a caveat will not without more, bar the mortgagee from exercising its rights under the mortgage.

[29] In this case however, it is in my view probable that the court could find that the claimant has an equitable mortgage based on its assessment of the intentions of the parties.

[30] An equitable mortgage is a contract that operates as a security and is specifically enforceable. It creates a charge on the property but does not convey a legal estate or interest to the creditor. A mortgagee who wishes to enforce his rights may therefore bring an action for specific performance of the agreement. In ***Swiss Bank Corporation v. Lloyds Bank Ltd.*** (supra), Buckley L.J. stated:-

> *"An equitable charge may, it is said, take the form either of an equitable mortgage or of an equitable charge not by way of mortgage. 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."*[2]

[31] The registration of the 2nd defendant's mortgage on the other hand, confers on that defendant a legal interest in the property. Buckley L.J. in the above case, expressed this principle was expressed in the following terms:-

> *"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 realisation or appropriation of which the creditor can procure the discharge of the debtor's liability to him, and that the proprietary*

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*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: compare* In re Nanwa Gold Mines Ltd*. [1955] 1 W.L.R. 1080 and contrast* Moseley v. Cressey's Co*. (1865) L.R. 1 Eq. 405 where there was no obligation to segregate the deposits. 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."*[3]

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[3]Pages 595-596

[32] The claimant relies on the case of ***Jamaica Redevelopment Foundation Incorporated v Ferguson*** (unreported) Supreme Court, Jamaica, Claim No 2010 HCV 03288 judgment delivered 22 July 2011, in support of its assertion that it has an interest in the property. Specific reference was made to the following paragraphs:-

> *"[9] Similarly, Romer J, in Cradock v Scottish Provident Institution (1893) 69 LT 380, at p. 382 said: "To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security." (Emphasis supplied) That decision was affirmed on appeal. (See (1894) 70 LT 718).*
>
> *Enforcement of an equitable mortgage*
>
> *[10] The effect of creating an equitable mortgage is explained in Fisher and Lightwood's Law of Mortgages – 2nd Australian Ed. at paragraph 1.28. There the learned authors state: "An equitable mortgage is a contract which operates as a security and is enforceable under the equitable jurisdiction of the court. The court carries it into effect either by giving the creditor immediately the appropriate remedies or by compelling the debtor to execute a security in accordance with the contract. (Emphasis supplied)"*

[33] Mr. Jones submitted that if the court accepts that the claimant is the first mortgagee or that its interest ranks before that of the 2nd defendant, it can ask the court to restrain the 2nd defendant from trying to foreclose on the property, having regard to the effect of an order for foreclosure. Reference was to paragraph 23 of the judgment of Evan Brown J in relation to the effect of an order for foreclosure. The learned Judge said:-

> *"After the order for foreclosure is issued, the Registrar of Titles enters the order in the Register Book. The effect of that entry is the destruction of the mortgagor's equity of redemption. The entry vests in the mortgagee or his transferee the mortgaged land. That vesting is free from all right and equity of redemption of the mortgagor, or*

*any person claiming through or under him, subsequent to the grant of the mortgage. The mortgagee or his transferee is thereby deemed a transferee of the mortgaged property and becomes the proprietor. Accordingly, the Registrar of Titles then cancels the previously issued certificate of title and the duplicate, and registers a new certificate, which the mortgagee is entitled to take in his own name."*

[34] He also submitted that the court may make orders which may restrict a defendant's freedom of action if it improves the chances of the court being able to do justice between the parties. Reference was made to the case of ***National Commercial Bank v Olint Corporation Ltd.*** (supra) at paragraph 16 where Lord Hoffman said:-

> *"The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account.* ***The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.*** *As the House of Lords pointed out in* American Cyanamid Co v Ethicon Ltd *[1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted".*

[My emphasis]

[35] Counsel also stated that since the 2nd defendant can only foreclose on subsequent mortgagees and having not redeemed the claimant's mortgage, the 2nd defendant is not entitled to foreclosure. It was argued that if the 2nd defendant

is allowed to foreclose the property would be held in its name and defeat the interest of the 1st defendant.

[36] The issue of whether a caveat can be construed as an equitable mortgage was considered by Mangatal J in ***Farren Lloyd Brown & another v Mandolin Investment Group LLC & another*** (unreported) Supreme Court, Jamaica, Claim No. 2010 HCV 02855 judgment delivered 20 September 2011. The learned Judge said:-

> *"[34] There are a number of points that must be considered under this issue. Firstly, what is the status of the caveat lodged by the Browns?* ***In my judgment, the caveat lodged on the 2nd of September 2008 does not constitute, and cannot be regarded in law as the registration of a mortgage. The caveat is simply notice to the world that the Browns were claiming an interest in the property. It is not itself a Mortgage, or Mortgage instrument and there is no evidence that any written document was ever signed by the Browns and Mandolin rendering the land security for the balance purchase proceeds*** *(separate and apart from a reference to the vendor's mortgage in the Agreement for Sale). Further, section 103 of the Registration of Titles Act speaks to a registered proprietor having the capacity to mortgage his land "by signing a mortgage thereof in the form in the Eighth Schedule". The words "… and as such the first legal mortgage has priority in registration and discharge" in Clause (v) of the Agreement, under the heading "How Payable", suggests that not only was it agreed that the MFC mortgage was to have priority, but also that it was contemplated that a Vendor's mortgage in favour of the Browns would be executed and registered on the Certificate of Title.*
>
> *[35] However, it does seem to me, that in accordance with equitable principles, an agreement for a mortgage would be treated as good as a mortgage. In other words, equity looks upon as done that which ought to be done along the lines of the principle in* ***Walsh v. Lonsdale*** *(1882) 21 Ch. D. 9 . The Browns have not, however, sought an order from the Court to have a mortgage executed by Mandolin (for specific performance of the agreement to execute a mortgage), and thus in my judgment, on*

*the facts as they presently exist, the Browns are entitled to a declaration only as to an equitable mortgage. This is also not a law suit in which the Browns are seeking to, or have sued to recover the mortgage debt. The Browns would have to first seek an order from the Court requiring Mandolin to execute a mortgage and in order to enforce the mortgage as a security the Vendors' Mortgage would have to be registered.*

*To date there is no Vendor's mortgage registered on the Title in favour of the Browns, and even the caveat, which I have indicated is not a mortgage, was lodged after the upstamping."*

[37] In the instant case, the claimant by its assertion that it was agreed between itself and the 1st defendant that the property was to be used as security for the balance owing has brought the issue of the intention of the parties to the fore. In assessing intention any documentary evidence must also be considered. The registration of the 2nd defendant's mortgage was done subject to the caveat and that in my view is quite relevant. The endorsements on the Title are as follows:-

*"Caveat No. 1906966 lodged on the 14th October, 2014 by Rosh Developments Limited estate claimed Equitable Interest.*

*Caveat No. 1914866 lodged on the 3rd day of December, 2014 by Rosh Developments Limited estate claimed Equitable Interest.*

*Mortgage No. 1925358 registered on the 2nd day of June, 2015 to Proline Development Corp. at Blenheim Trust (BVI) Limited, Post Office Box 3483, Road Town, Tortola, British Virgin Islands,* ***Subject to Caveat*** *Nos 35538,* ***1906966*** *and 1914866 to secure Seven Million Eight hundred Thousand Dollars United States Currency with interest."*

[38] Mr. Jones also submitted that by virtue of the caveat being first in time, the claimant's interest in the property enjoyed priority over that of the 2nd defendant.

[39] He stated that the law protects an equitable interest where the person seeking to rely on the legal interest has notice of the previous equitable interest. It was however pointed out that the claimant is not relying on principles surrounding the

issue of notice but on the fact that it was expressly stated that the mortgage was registered subject to the caveat.

[40] Reference was made to the case of ***Berwick & Co v Price*** [1905] 1 Ch 632 where Joyce J said:-

> *"It is well settled that a purchaser (in which term I must be understood to include a mortgagee or a transferee of a mortgage) of land will be deemed to have notice of all facts, which he would have learned upon a proper investigation of the title, under a contract containing no restriction of his rights in that respect. So, a purchaser who does not ask to have the title-deeds delivered -* Worthington v. Morgan *(5),* Maxfield v. Burton *(6), and* Lloyd's Banking Co. v. Jones *(7) - or, if they also relate to other property, to have them produced -* Oliver v. Hinton *(3) - is deemed to have notice if they turn out to be in the possession of a stranger and of that stranger's rights whatever they may be. Therefore a purchaser, who, without requiring delivery or production of the title-deeds, takes a title from a mortgagee who has deposited the deeds by way of sub-mortgage, is affected with constructive notice of such sub-mortgage, and the legal estate, whatever it may be, conveyed to the purchaser is in his hands subject to the equitable incumbrance, and this notice of the sub-mortgage will raise in such purchaser a trust to the amount of the sub-mortgage: Story's Equity Jurisprudence, s. 395."*

[41] It was argued that the position of the claimant in the instant case is even stronger than that of the plaintiff in the above case, as the 2nd defendant agreed to the mortgage being registered subject to the caveat.

[42] Counsel also submitted that the effect of the claimant's interest being ranked ahead of the mortgage is that the 2nd defendant is precluded from taking steps to foreclose on the property prior to redeeming the claimant's interest. Reference was made to ***Halsbury's Laws of England,*** 6th edition, volume 77 paragraph 673 in support of that submission. It reads as follows:-

> *"Where there are successive incumbrancers, the order directs redemption by them according to their priorities, a later mortgagee*

> *on redeeming the prior mortgagees being given the right to foreclose subsequent mortgagees and the mortgagor unless they in their turn redeem him. The order may declare the priorities of the various incumbrancers, or direct an inquiry as to priorities. If the claim is brought by a later mortgagee to redeem the first mortgagee and he fails to redeem, the claim will be dismissed with costs as against the mortgagor as well as the first mortgagee, but a later mortgagee of two properties, separately mortgaged to different prior incumbrancers, is entitled on redeeming the prior incumbrance on one property to foreclose the mortgagor as regards that property, although the prior incumbrance on the other property remains unredeemed."*

[43] Reference was also made to the cases of ***Hallett v Furze*** [1885] 31 Ch D 312 and ***Dennis Atkinson v Development Bank of Jamaica and others*** [2015] JMSC Civ 161. In the latter case Evan Brown J stated that the rights of a second or subsequent mortgagee were subject to that of the first mortgagee.

[44] It was submitted that in the instant case where the "mortgage" of the claimant is unregistered, its claim would still rank in priority to that of the 2nd defendant.

[45] This is therefore not a situation where effect of the caveat can be considered in isolation. The intention of the parties is also a vital part of the equation. That issue in my view, can only be resolved by an assessment of the evidence by a tribunal of fact.

[46] In the circumstances, I am of the view that there is a serious issue to be tried.

**Are damages an adequate remedy?**

[47] Having determined that there is a serious issue to be tried, I must now turn to the question of whether damages would provide an adequate remedy to the claimant.

[48] Mr. Jones has argued quite strongly that damages would not be an adequate remedy. He stated that if the 2nd defendant is allowed to foreclose and therefore take title in its own name, the claimant would lose the security given to it by the

1st defendant. He argued that the claimant ought not to be prejudiced and lose its preferred position and security.

[49] It was also submitted that in the event that the court is of the view that damages would be an adequate remedy for the claimant, it would also be an adequate remedy for the 2nd defendant who would only be seeking to foreclose to recover the sums loaned.

[50] In assessing whether or not an award of damages would be adequate it must be considered whether the granting or withholding of the injunction is likely to cause *"irremediable prejudice".* There is no magic formula which will assist a court in its assessment under this head as each case must be decided on its own facts. According to Lord Diplock in ***American Cyanamid*** **:**-

> *"It would be unwise to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them".*

In the ***Olint*** case Lord Hoffman listed the factors which are to guide the court in its deliberations. He said:-

> *"Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases".*

It is clear from the above, that a court is required to consider the probable consequences of the granting or withholding of the injunctive relief based on the facts of each case. In Spry, ***The Principles of Equitable Remedies***, 6th edition pages 464- 465 it was stated:-

*"The degree of probability of success of the plaintiff that must be established hence depends on 'a number of factors, including the nature of the right asserted by the plaintiff and its threatened infringement and the opportunities available to secure and present in the early stages of a suit evidence of such right and infringement' and on 'the practical consequences likely to flow from the order he seeks' or from the refusal of that order. Accordingly, for example, if there is substantial risk that the enjoyment of property of the applicant will be seriously diminished or that he will be otherwise seriously inconvenienced, it is generally sufficient that he should show a case that requires at least serious consideration, subject to special questions of hardship to the defendant…Often it is found that risks of substantial prejudice to the plaintiff are so great that, provided it appears that there is a substantial question to be determined at the final hearing, the balance of justice favours the grant of interlocutory relief. So it has been said, 'It is certain that the court will in many cases interfere and preserve property in status quo during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights".*

[51] In assessing the adequacy of damages the effect of an order for foreclosure must be examined. The issue of foreclosure is dealt with in section 119 of ***the Act.*** It states as follows:-

*"Whenever default has been made in payment of the principal or interest money secured by a mortgage and such default shall be continued for six months after the time for payment mentioned in the mortgage, the mortgagee or his transferee may make application in writing to the Registrar for an order for foreclosure; and such application shall state that such default has been made and has continued for the period aforesaid, and that the land mortgaged has been offered for sale at public auction by a licensed auctioneer after notice of sale served as hereinbefore provided, and that the amount of the highest 'bidding at such sale was not sufficient to satisfy the moneys secured by such mortgage, together with the expenses occasioned by such sale, and that notice in writing of the intention of the mortgagee or his transferee to make an application for foreclosure has been served on the mortgagor or his transferee, by being given to him or them, or by being left on the*

*mortgaged land, or by the same being sent through the post office by a registered letter directed to him or them at his or their address appearing in the Register Book, and also that a like notice of such intention has been served on every person appearing by the Register Book to have any right, estate or interest, to or in the mortgaged land subsequently to such mortgage, by being given to him or sent through the post office by a registered letter directed to him at his address appearing in the Register Book. Such application shall be accompanied by a certificate of the auctioneer by whom such land was put up for sale, and such other proof of the matters stated by the applicant as the Registrar may require, and the statements made in such application shall be verified by statutory declaration."*

[52] From all indications, it appears that the 2nd defendant has complied with the above section.

[53] Section 120 of ***the Act*** is also relevant. It states as follows:-

*"Upon such application the Registrar* ***may cause notice to be published once in each of three successive weeks, in at least one newspaper published in the city of Kingston, offering such land for private sale,*** *and shall appoint a time (not less than one month from the date of the first of such advertisements) upon or after which the Registrar shall issue to such applicant an order for foreclosure, unless the interval a sufficient amount has been obtained by the sale of such land to satisfy the principal and interest moneys secured, and all expenses occasioned by such sale and proceedings, and every such order for foreclosure under the hand of the Registrar when entered in the Register Book, shall have the effect of vesting in the mortgagee or his transferee the land mentioned in such order, free from all right and equity of redemption on the part of the mortgagor or of any person claiming through or under him subsequently to the mortgage;* ***and such mortgagee or his transferee shall, upon such entry being made, be deemed a transferee of the mortgaged land, and become the proprietor thereof, and be entitled to receive a certificate of title to the same, in his own name, and the Registrar shall cancel the previous certificate of title, and duplicate thereof and register a new certificate."***

[54] A mortgagee's interest has been described as encompassing two rights. They are:-

(i) His contractual right to sue for the debt; and

(ii) His proprietary rights in the security.

[55] The effect of an order for foreclosure was examined by Evan Brown J in the case of ***Dennis Atkinson v Development Bank of Jamaica and others*** (supra) the learned Judge said:-

> *"[18] Both the right to enter into possession of the mortgaged property and the right to foreclose the mortgage are two of a bundle of five rights belonging to the mortgagee, according to Gilbert Kodilinye in Commonwealth Caribbean Property Law 2nd ed. at page 237,(see also Cheshire and Burn's Modern Law of Real Property 17th ed. at page 762 et seq.; Fisher & Lightwood's Law of Mortgage Second Australian Edition para. 16.4). The other three rights are the right to sue on the mortgagor's personal covenant, to appoint a receiver and to sell the mortgaged property. According to the learned author, these rights are "both concurrent and cumulative."* ***The "exception to that is foreclosure, which, once made absolute, extinguishes the other remedies."****…*
>
> *[23] After the order for foreclosure is issued, the Registrar of Titles enters the order in the Register Book. The effect of that entry is the destruction of the mortgagor's equity of redemption. The entry vests in the mortgagee or his transferee the mortgaged land. That vesting is free from all right and equity of redemption of the mortgagor, or any person claiming through or under him, subsequent to the grant of the mortgage. The mortgagee or his transferee is thereby deemed a transferee of the mortgaged property and becomes the proprietor. Accordingly, the Registrar of Titles then cancels the previously issued certificate of title and the duplicate, and registers a new certificate, which the mortgagee is entitled to take in his own name."*

[56] There is no dispute that there was an agreement between the claimant and the 1st defendant that United States three hundred and fifty thousand dollars

(US$350,000.00) was outstanding after the discharge of the mortgage between the claimant and the 1st defendant. There is also no dispute that the sum was to be paid by a certain time. The claimant asserts that it is still outstanding.

[57] If the matter is ultimately resolved in its favour the claimant it would have both a financial interest in the property and a proprietary one. In the event that the 2nd defendant is permitted to proceed with its application for foreclosure, the claimant whose interest was noted before that of the second defendant, would have already lost its proprietary interest in the property. In such circumstances, it is my view that the withholding of the injunction may result in *"irremediable prejudice"* to the claimant.

[58] Damages would therefore not provide an adequate remedy.

**Balance of convenience**

[59] Mr. Jones submitted that the balance of convenience lies with the claimant as it has a strong case against the 2nd defendant and would be deprived of its security if it is not restrained.

[60] Mr. Bishop has stated that the matter is between the claimant and the 1st defendant as the 2nd defendant was not a party to their agreement.

[61] In ***Francome v Mirror Group Newspapers Ltd*** [1984] 2 All ER 408 at 413 Sir John Donaldson MR. stated that the term 'balance of convenience' might more properly be termed the 'balance of justice'. He also stated that when considering whether to grant injunctive relief *"we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders, if any, as are appropriate pending the trial of the action. It is sometimes said that this involves a weighing of the balance of convenience. This is an unfortunate expression. Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting*

*wholly inconsistent claims, this is difficult, but we have to do our best. In so doing, we are seeking a balance of justice, not of convenience."*

[62] In this matter bearing in mind the strength of the claimant's case and the dire consequences of an order for foreclosure, I am of the view that the balance of justice lies with the claimant and that the grant of the injunction is more likely to produce a just result.

**Undertaking as to Damages**

[63] This issue was discussed by Jessel M.R. in ***Smith v Day*** (1882) 21 Ch D 421. The learned Judge said:-

> *"I will first say a few words as to the history and meaning of this kind of undertaking. It was invented by Lord Justice Knight Bruce when Vice-Chancellor, and was originally inserted only in ex parte orders for injunctions. Its object was, so to say, to protect the Court as well as the Defendant from improper applications for injunctions. If the evidence in support of the application suppressed or misrepresented facts, the Court was enabled not only to punish the Plaintiff but to compensate the Defendant. By degrees the practice was extended to all cases of interlocutory injunction. The reason for this extension was, that though when the application was disposed of upon notice, there was not the same opportunity for concealment or misrepresentation, still, owing to the shortness of the time allowed, it was often difficult for the Defendant to get up his case properly, and as the evidence was taken by affidavit, and generally without cross-examination, it was impossible to be certain on which side the truth lay. The Court therefore required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression. I am of opinion that the undertaking was not intended to apply where the injunction was wrongly granted, owing to the mistake of the Court, as for instance, if the Judge was wrong in his law. I think this*

*is shewn by the fact that such an undertaking is never inserted in a final order for an injunction.*[4]

[64] The undertaking has been described as *"…the price which the person asking for an interim injunction has to pay for it*[1] *and any order for an interim injunction…"* The effect of the undertaking is that in the event that the party who obtains the order fails on the merits he is bound to pay any damages sustained by the respondent after an assessment of those damages.

[65] In this matter the claimant in its affidavit dated the 30th January 2017 stated that it can satisfy an undertaking to pay damages if the court finds that the injunction ought not to have been granted. The deponent, Mr. Ravi Rochlani who is a director of the claimant has stated that the claimant owns two properties in Portmore valued at approximately Jamaican fifty five million dollars (J$55,000,000.00). He has also stated that the claimant also owns property in Constant Spring. Copies of the relevant Certificates of Title were exhibited to that affidavit. The properties are registered at Volume 1323 Folio 965, Volume 1323 Folio 964 and Volume 1034 Folio 665.

[66] The claimant's ability to satisfy an undertaking as to damages has not been challenged.

[67] Upon the claimant giving an undertaking as to damages it is ordered as follows:-

(1) the 2nd defendant is restrained whether by itself, its servants or agents, until the trial of this matter from taking steps to foreclose property described as ALL THAT parcel of land part of PORTMORE in the parish of SAINT CATHERINE containing by survey One Hundred and Four Acres Two Roods and Thirty – eight perches of the shape and dimensions and butting as appears by the land thereof and being the land comprised in Certificate of Title registered at Volume 987 Folio 289 of the Register Book of Titles.

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[4] Pages 424-425

(2) Costs are awarded to the claimant against the 2nd defendant to be taxed if not agreed.