[2016] JMCC COMM37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00358

BETWEEN	**DENNIS ATKINSON**	**CLAIMANT**
AND	**DEVELOPMENT BANK OF JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**AZZURO COAST LIMITED**	**2ND DEFENDANT**
AND	**CASH PLUS DEVELOPMENT LIMITED INTERESTED PARTY**	**3RD DEFENDANT**

IN CHAMBERS

Mr. Joseph Jarrett for the Claimant Dennis Atkinson.

Mrs. Sandra Minott-Phillips Q.C. and Ms. Rachel McLarty instructed by Myers Fletcher & Gordon for the 1st Defendant Development Bank of Jamaica Limited.

Mr. Stuart Stimpson and Mr. Hadrian Christie instructed by Hart, Muirhead, Fatta for the 2nd Defendant Azzuro Coast Limited.

Ms. Celia Barclay for the Interested Party Cash Plus Development Limited.

December 6 and 16, 2016

Civil Procedure – Application to strike out claim - principles to be applied - whether there is a reasonable ground for seeking a declaration that Mortgagee was negligent.

LAING, J

The Application

[1] The First Defendant, the Development Bank of Jamaica ("DBJ") and the Second Defendant Azzuro Coast Limited ("Azzuro") have each filed a notice of application seeking orders that the Claimant's Statement of case be struck out and that judgment be entered against the Claimant with an appropriate cost order. Azzuro is also seeking a wasted costs order against the Claimant's attorneys-at-law; or alternatively against the Claimant.

[2] The Grounds on which DBJ's application is made, are:

> 1. *The Fixed Date Claim Form discloses no reasonable grounds for bringing a claim because the 1st Defendant as first legal mortgagee exercising its power of sale over the mortgaged property acted pursuant to an interest that ranked ahead of that of the Claimant (2nd Mortgagee);*
>
> 2. *Additionally or alternatively, these proceedings are an abuse of the process of the court as the court has already given final judgment to the 1st defendant against the Claimant on similar, if not identical, issues between them in a previous and similar claim;*
>
> 3. *The Claimant has no real prospect of succeeding on the claim.*

[3] The Grounds on which Azzuro relies have been particularised in greater detail but are captured in essence by the DBJ grounds.

Striking out

[4] There is no dispute that the Court has the power pursuant to CPR 26.3(1)(b) to strike out a statement of case or part of a statement of case if it appears to the Court that it is an abuse of the process of the court or is likely to obstruct disposal of the proceedings. A similar power exists pursuant to CPR 26.3(1)(c) if satisfied that the statement of case or the part to be struck out discloses no reasonable ground for bringing the claim. The other provisions of CPR 26.3 are not

applicable on the facts under consideration and as such no reliance is being placed on them.

The Background

[5] The property concerned is known as 14 James Avenue, Ocho Rios, St Ann, registered at Volume 1269 Folio 97 of the Register book of Titles ("the Property"), and the previous claim to which reference is made in the grounds, is **Dennis Atkinson v Development Bank of Jamaica [2015] JMSC Civ 161**(herein referred to for convenience only as "the Previous Claim") a judgment of His Lordship the Honourable Mr. Justice Evan Brown delivered on 31st July 2015.

[6] Evan Brown, J in his judgment sets out the background to the Previous Claim, and in the proceedings before me none of the parties have suggested alternate versions of the learned Judge's summary. I will therefore take the liberty of reproducing the most relevant portions as follows:

> *[2] By an Agreement entered 30th March, 1998, the Development Bank of Jamaica (DBJ) granted a loan to Ocean Sands Resorts Limited ("Ocean Sands") up to a maximum of US$308,106.00 for the expansion and upgrading of the property (a 29- room hotel at 14 James Avenue, Ocho Rios, St. Ann, registered at Volume 1269 Folio 97 of the Register Book of Titles). At the time the loan was granted the claimant was the Managing Director of Ocean Sands Resorts Limited.*
>
> *[3] The security for the loan included a guarantee of repayment by the claimant personally, supported by his guarantor's mortgage of the property given on May 22, 1998 and registered on the title on March 30, 1999. Ocean Sands Resorts Limited did not repay the debt in accordance with the terms of the loan and, in an effort to sell the property and pay off the debt , the claimant, with the consent of DBJ, agreed to transfer the property to Cash Plus Development Limited for US$1m, subject to DBJ's mortgage. The sale to Cash Plus Development Limited was by way of cash and a vendor's mortgage of US$668,116.28. The transfer of the property to Cash Plus Development Limited was effected by an instrument of transfer dated 9th July, 2007. That transfer was registered on the title for the property on September 4, 2007.*
>
> *[4] DBJ was a party to the instrument of transfer dated July 9, 2007. Under that instrument of transfer, Cash Plus Development Limited*

> *assumed the liability for the payment of the total sum outstanding to DBJ. The sale required Cash Plus Development Limited to make a lump sum US$250,000.00 to DBJ, which it did on August 13, 2007, followed by monthly instalments. However, Cash Plus Development Limited failed to make any further payments on the debt owed to DBJ. DBJ therefore tried to realize the mortgage security. To that end, DBJ contracted Kenneth Tomlinson on September 30, 2010, to, among other things explore the most beneficial method of realization of the security for its loan to Ocean Sands....*
>
> *...[8] The property was advertised several times by Kenneth Tomlinson, who was appointed a receiver under the mortgage to DBJ, in the local daily newspapers and on Mr. Tomlinson's website, on DBJ's behalf. The highest offer received at the time of the filing of the claim, was that made by Digiorder (Ja) Limited on September 6, 2013. Digiorder (Ja) Limited wished to purchase for J$50,000,000.00. In accordance with its obligations under the Registration of Titles Act, DBJ issued a Statutory Notice dated October 10, 2013 to the registered proprietor, Cash Plus Development Limited, of its intention to sell the property.*

Developments since the Previous Claim

[7] DBJ exercising its powers of sale under registered mortgage No. 1021228 has sold the Property to Azzuro for $72,000,000.00. Mr. Peter McMaster and Mrs. Elaine McMaster (together referred to herein as "the McMasters") are directors of Azzuro and negotiated on its behalf It is this sale which has triggered the Fixed Date Claim Form in Claim No. 2016 HCV 03716 (as amended) which has been transferred to the Commercial Division and now bears the Claim No. 2016 CD 00358. The Amended Fixed Date Claim Form ("AFDCF") was filed on 29th September 2016, 6 days after the Claimant's Counsel received DBJ's Notice of Application (without the hearing date inserted) to have the claim struck out and the amendments appear to be an attempt to bolster the claim in response to the application to strike out.

Discloses no reasonable ground for bringing or defending the claim

[8] The first limb of the application to strike out the claim, relying on CRR 26.3(1)(c), is that it discloses no reasonable ground for bringing or defending the claim. Batts, J examining that provision in **City properties Limited v New Era Finance Limited 2013 JMSC Civil 23** opined, in my view accurately, as follows:

> *"[9] On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me to be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.*
>
> *[10] Therefore it seems to me that when the rule refers to "reasonable grounds" for bringing a claim, it means nothing more or less than that the claimant has disclosed in the pleadings that he has a reasonable cause of action against the Defendant".*

[9] The learned authors of **The Caribbean Civil Court Practice 2011** at note 23.24 in discussing the phrase "Discloses no reasonable ground for bringing or defending the claim" expressed the following view:

> *This provision addresses two situations:*
>
> *(1) where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed: or*
>
> *(2) where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.*

It is primarily on this basis that the Court will approach its analysis of the statement of case, armed with an appreciation of the fact that the AFDCF is supported by affidavit evidence in contrast to the situation where there is a claim form and particulars of claim constituting the statement of case. The issue of negligence as raised in the AFDCF will be dealt with on a slightly different basis, the reasons for which will be addressed later in this decision.

[10] The nature of the application before this court makes it prudent, even if unnecessary, for me to set out the AFDCF in detail hereunder.

1.1

A declaration that the Claimant is a mortgagee of 14 James Avenue, Ocho Rios in the parish of St. Ann, registered at Volume 1269 Folio 97, in the matter of Mortgage No. 1486323 registered on the 4th day of September, 2007 in the sum of Six Hundred and Sixty Eight Thousand One Hundred and Sixteen Dollars and Twenty Eight Cents United States Currency (US$668,116.28) plus interest thereon at the rate of 12% per cent per annum from the date of registration to the date of filing.

1.2

A declaration that the Claimant interest as mortgagee arose from:

The Transfer Subject to Mortgage Under The Registration of Titles Act agreement date the 9th day of July, 2007 the parties being Dennis Atkinson, Cash Plus Development Limited and The National Development Bank of Jamaica Limited; whereby the Claimant freehold interest in 14 James Avenue was Transferred to Cash Plus Development Limited by way of transfer No. 1486318 for a consideration of US$1 Million, along with the sole responsibility for the discharge of mortgage No. 1021228

Mortgage Under The Registration of Titles Act signed by Cash Plus Development Limited on the 30th of June, 2007 whereby they became liable for a vendor's mortgage in favour of the Claimant in the sum of US$668,116.28, duly registered on the title for 14 James Avenue registered at Volume 1269 Folio 97 of The Register Book of titles with interest at the rate of 12% per annum as mortgage No. 1486323.

1.3

A declaration that the sale and transfer of 14 James Avenue, Ocho Rios to the 2nd Defendant AZZURI COAST LIMITED at Suit 9, Ansuya Estate, Revolution Avenue, Victoria, Seychelles for a consideration of Seventy Two Million Dollars ($72,000,000.00) Power of Sale under Mortgage No.1021228 was subject to the Claimant's interest as a Mortgagee who at all material times was entitled to formal notification of the sale.

1.4

A declaration that the sale to the 2nd Defendant AZZURO COAST LIMITED for $72 Million Dollars resulted in the Claimant being deprived of his interest exceeding US$1 million inclusive of accumulated interest (in excess of $100 million Jamaica Dollars) in 14 James Avenue without being given the opportunity to challenge this specific sale.

1.5

A declaration that the sale to the 2nd defendant AZZURO COAST LIMITED was below the March 2012 forced sale value of $105 Million recommended by The CD Alexander Company Realty Limited report

which had been requested by the 1st Defendant pursuant to exercising their power of sale.

1.6

A declaration that the sale to the 2nd Defendant AZZURO COAST LIMITED was below the $155,548,163.40 or US$1,296,234.96 forced sale value recommended in the valuation report of Theo M Dixon Valuator dated the 12th May, 2016 which was supplied to the 1st Defendant's Attorneys-at-Law, Myers Fletcher & Gordon for the Attention of Mrs. Sandra Minott-Phillips, Q.C. on the June, 2016.

1.7

A declaration that the 2nd Defendant AZZURO COAST LIMITED had prior notice of the Claimant's interest in 14 James Avenue, Ocho Rios from the caveats registered by the Claimant on the titles for the property as well as through their own inquiries before their purchase and by their use of Mr. Franz Jobson at their Attorney-at- Law who had represented Digiorder Jamaica Limited in their failed attempt to purchase the property and which was the subject of another claim. Namely Claim HCV 05656 of 2013Dennis Atkinson v Development Bank of Jamaica Limited. Business Recovery Services Limited, Kenneth Tomlinson, Digiorder Jamaica Limited. In which claim the Claimant was unsuccessful when it was revealed that there had been no sale to Digiorder Jamaica Limited after the Development Bank Limited had written to the Claimant stating that they had sold 14 James Avenue to Digiorder Jamaica Limited for $50 Million Dollars, in October 2013.

1.8

A declaration that the sale to the 2nd Defendant AZZURO COAST LIMITED for $72 million was fraudulent transfer and ought to be set aside in the interest of justice.

1.9

That in the alternative, a declaration that the 1st Defendant was grossly negligent in the sale to the 2nd Defendant AZZURO COAST LIMITED for $72 Million when they had prior knowledge that the forced sale value was $105 Million as at March 2012 and $155 Million as at May 2016 and that the Claimant interest exceeded $100 Million as at June 2016 and that the 1st Defendant own as mortgagee exceeded US$411,947.02 or approximately $51 Million Jamaican Dollars.

1.10

In the alternative, that the 1st and / or 2nd Defendants be liable to the Claimant in damages jointly and severally, such damages to be assessed to take into account the improvements made to the property by the

Claimant since exercising his right to maintain and preserve 14 James Avenue on the default of Cash Plus Development Limited in 2007/2008.

1.11

Costs to the Claimant to be agreed or taxed.

1.12

Liberty to apply.

[11] In paragraphs 1.1 and 1.2 of the AFDCF, the Claimant is seeking declarations as to the primary facts on which he bases his claim, that is to say, that he is a mortgagee and as to the details of that mortgage. Paragraphs 1.3 and 1.4 seek declarations in relation to notice. Paragraphs 1.5 and 1.6. seek declarations in respect of the fact that the sale was below the forced sale value of 2 valuations. If one focuses on the main elements of the claim, it is apparent that it involves at its core, a challenge to the sale of the Property to Azzuro. The support for this challenge can be reduced for convenience, (without diluting or unfairly mischaracterising the Claimants position), to the following bases:

(1) The Claimant was entitled to formal notification of the sale;

(2) The sale was below the forced sale value of $155,548,163.40 as recommended in the valuation report of Theo M. Dixon dated 12 May 2016 and the forced sale value of $105,000,000.00 recommended by the earlier March 2012 valuation report of CD Alexander Company Realty Limited;

(3) The sale to Azzuro was fraudulent; and

(4) That DBJ Defendant was grossly negligent in selling the Property to Azzuro for $72 Million in light of the following facts as asserted:

(i) the forced sale value was $105 Million as at March 2012 and $155 Million as at May 2016;

(ii) the Claimant's interest which exceeded $100 Million as at June 2016; and

(iii) DBJ's own as mortgagee exceeded US$411,947.02 or approximately $51 Million Jamaican Dollars.

Was there a requirement for notice to the Claimant?

[12] Mrs. Sandra Minott-Phillips QC. Submitted that notwithstanding the provisions of the Registration of Titles Act ("RTA"), the express provisions of clause 6.1 of the mortgage instrument dated 22 May 1998 entitled DBJ to proceed with the sale without notification to the Claimant. Learned Queen's Counsel submitted and I accept, that it is now well settled law following the Privy Council Decision in **Diane Jobson v Capital and Credit Merchant bank Limited and another DBJ Privy Council Appeal No 52 of 2006**, that a narrow construction should not be placed on section 128 of the RTA which provides as follows:

> *"Every covenant and power to be implied in any instrument by virtue of this Act may be negative or modified by express declaration in the instrument..."*

Accordingly DBJ was entitled to modify the mortgage instrument so as to remove any requirement for notice present in the RTA.

[13] Learned Queen's Counsel submitted that DBJ qualified to sell the Property without notice under three distinct heads. The material portions of clause 6.1 of the mortgage instrument which are being relied upon are as follows:

> *6.1. The powers of sale and distress and of appointing a Receiver and all ancillary powers conferred upon mortgagees by the act shall be conferred upon and be excercisable by the Bank without any notice to or demand or consent by the Mortgagor (anything in the Act or any law or regulation to the contrary notwithstanding), upon the happening of any of the following events, namely:*
>
> *(a) if the Mortgagor shall fail to pay the whole or any part of the Secured Obligations on demand; or*
>
> *(b) if an event of default shall occur under any such Related Document or Security (whether issued by the Principal Debtor, The Mortgagor or any*

> *other Security Party), or if the Principal Debtor or the Mortgagor or any other Security Party shall commit any default of, or non-compliance with , any of the terms, covenants or obligations of this Mortgage or of any Related Document or other Security ; or ...*
>
> *..(j)if a Chargee (including the Bank) shall take possession or a Receiver liquidator or trustee shall have been appointed, of the whole or any part of theundertaking, assets or property of the Mortgagor or any other Security Party: or....*

[14] Learned Queen's Counsel referred the Court to the Statutory Notice dated 10th October 2013 signed by Ms. Sheron Henry. Counsel pointed out the fact that the address of Cash Plus Development Limited stated therein is Suite 12, 10 Holborn Road, Kingston 10 in the parish of St Andrew which is the address listed for Cash Plus Development Limited in the instrument of transfer made 9 July 2007 headed "Transfer subject to Mortgage under the Registration of Titles Act". Mr. Jarrett submitted that given the insolvency proceedings in respect of the Cash Plus entities that address was no longer valid or effective for purposes of effecting service. Queen's Counsel argument to the contrary was that in any event the service of the Statutory Notice was a mere courtesy and even if there was any defect or error in the address, that matters not.

[15] The Claimant also complained that he received no warning to caveator. The Registrar of Titles is not a party and accordingly the Court did not obtain the benefit of her explanation as to why this was not done. Mrs. Minott-Phillips submitted that the Registrar would not have been required to notify the Claimant of the actions taken by DBJ, it being a mortgagee that ranked prior to the Claimant. I am prepared to accept that in principle, this is correct, albeit in the absence of any conclusive authority on the point However even if this is not so, I am of the view that this omission by the Registrar could not, by itself, impugn the validity of the concluded sale to Azzuro.

[16] I accept the submissions of learned Queen's Counsel as to there being no requirement for DBJ to give the claimant notice of the sale as a matter of law. That being the case, the reliefs sought in the AFDCF which are premised on the existence of such a legal obligation have no prospect of success.

The Allegation of Fraud

[17] As stated by Harris JA in **Harley Corporation Guarantee Investments Co. Ltd V The Estate Rudolph Daley [2013] JMSC Civ.114**

> *"...Rule 8.9 (1) prescribes that the facts upon which a claimant relies must be particularised. It follows that to raise fraud, the pleading must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud. Not only should the requisite allegations be made but there ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by fraud"*

[18] In support of the Allegation of Fraud in the AFDCF the Claimant is relying on particulars supplied in the Affidavit of Dennis Atkinson in his affidavit filed on 7th November 2016. Mr Jarrett on behalf of the Claimant, asked the Court not to confine its assessment of the particulars of fraud to those reasons synopsized in paragraph 24 of that affidavit but to consider the affidavit in its totality and the particulars of fraud contained throughout. Whereas I have analysed the entire affidavit, it is my opinion that paragraph 24 does accurately reflect in summary the particulars of fraud which are being relied on by the claimant. For that reason I will quote that paragraph in its entirety.

> *"24. Further, I believe that the transfer to the 2nd Defendant was fraudulent for the following reasons:-*
>
> *(a) That I received no warning to caveator:*
>
> *(b) That the 2nd Defendant was aware of my interest in 14 James Avenue at all material times and were never bona fide purchasers for value without notice:*
>
> *(c) That the Development Bank of Jamaica Limited and the 2nd Defendant entered into a conspiracy/collusion to deprive me of my interest in 14 James Avenue before I had any opportunity to challenge the sale.*
>
> *(d) That the sale was kept secret from me until the transfer was endorsed on the title.*
>
> *(e) That the consideration provided by the 2nd Defendant is significantly below the force sale value of Mr. Theo Dixon which had been supplied to Myers Fletcher & Gordon on the 2nd June, 2016.*

(f) That the Development Bank of Jamaica failed to rely on an up to date valuation report since the 2012 valuation report of the CD Alexander Company Realty Limited.

(g) That Mr. Franz Jobson had also for Digiorder Jamaica Limited and by virtue of the same was aware of the extent of my interest and the improvements I had carried out to 14 James Avenue since taking possession of the property in 2008. The same had been disclosed in HCV 05656 of 2013.

(h) That the consideration of $72 million paid by the 2nd Defendant was not honestly arrived at.

(i) That the 1st and 2nd Defendants were duty bound to consider my interest.

[19] In **Harley Corporation** (supra), the Court of Appeal considered the requirement of fraud in the context of RTA. Harris JA at paragraphs 51 and 52 provides the following analysis:

51. As earlier indicated, sections 70 and 71 of the Registration of Titles Act, confer on a proprietor registration of an interest in land, an unassailable interest in that land which can only be set aside in circumstances of fraud. In Fels v Knowles (1906) 26 NZLR 604 the New Zealand Court of Appeal in construing statutory provisions which are similar to sections 70 and 71 said at page 620:

"The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute." ("By statute" would be more correct.) "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered."

[52] The true test of fraud within the context of the Act means actual fraud, dishonesty of some kind and not equitable or constructive fraud. This test has been laid down in Waimiha Sawmilling Company Limited v Waione Timber Company Limited [1926] AC 101 by Salmon LJ, when atpage 106 he said:

> *"Now fraud clearly implies some act of dishonesty. Lord Lindley in Assets Co. v. Mere Roihi (2) states that: 'Fraud in these actions' (i.e., actions seeking to affect a registered title) 'means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud." The test has been followed and approved in many cases including Stuart v Kingston (1923) 32 CLR 309; and Willocks v Wilson and Anor (1993) 30 JLR 297.*

[20] It is my finding that none of these factual allegations which are being relied on by the Claimant, if proved, either singly or collectively could support a finding of fraud by a reasonable tribunal and the Claimant cannot succeed in respect of his claim of fraud. A more complete statement of the circumstances on which the Claimant places substantial support for his allegation of fraud is seen in paragraph 23 of same the Affidavit of Dennis Atkinson which provides as follows:

> *Further, it is now evident that the McMasters and the 2nd Defendant entered into secret negotiations with the Development Bank of Jamaica Limited to bypass me and to obtain the property for well below the forced sale value. It has also come to my attention that Franz Jobson who was one of Digiorder Jamaica Limited's Attorneys-at-Law had conduct of the sale to the 2nd Defendant. By virtue of the same the 2nd Defendant was aware of my interest in 14 James Avenue at all material times and were never bona fide purchasers for value without notice of my interest which exceeds US$1 million or in excess of $100 million Jamaican Dollars. Had the 2nd Defendant paid me the asking price of US$2 million it would have been sufficient to discharge my Vendor's Mortgage as well as that of the Development Bank of Jamaica Limited. The 2nd Defendant took the option of getting 14 James Avenue for $72 million when they bypassed me and dealt instead with the Development Bank of Jamaica Limited.*

It is noteworthy that in **Harley Corporation** (*supra*), the Court of Appeal found that even if the purchaser in that case had known that the value of the land he was purchasing was greater than the price at which the bank exercising a power of sale was selling it to him, he was under no duty to disclose that fact to the bank and such non disclosure could not be considered evidence of fraud on the purchaser's part. It is therefore difficult to see how Azzuro in this case could be considered to have acted improperly or worse fraudulently in purchasing the

Property at a price which (on the evidence which appears to be unchallenged) DBJ knew was below the forced sale value as per the CD Alexander valuation.

[21] It is also noteworthy and the Court takes into consideration, the fact that there is absolutely no assertion by the Claimant that the McMasters had agreed to purchase the Property from the Claimant for the sum of US$2,000,000.00 or any sum at all. There is no written agreement for sale. The assertion that the McMasters' conduct in negotiating with DBJ directly and obtaining a sale price of $72,000,000.00 was improper or rises to the level of fraud is totally without merit.

Are there reasonable grounds for the declaration sought in relation to the allegation of gross negligence?

[22] In the case of **Khiatani Jamaica Limited and others v Sagicor Bank Jamaica Limited [2016] JMCC Comm 34** a judgment of Sykes J delivered 9th December 2016, the Court considered whether it was permissible to plead that a mortgagee was negligent when exercising its power of sale. The learned Judge in his usual style, conducted a scholarly analysis in which he traced in great detail the history of the development of claims against a mortgagee exercising its power of sale. In the **Khiatani** case the claimants had brought their claim in equity and also at common law for the tort of negligence. The court held at paragraph 71 of the judgment as follows:

> *[71] There is no need for pleading both in common law and equity where the mortgagor is bringing an action against the mortgagee for a breach of his duties in relation to the exercise of his powers of sale. The present case is an ordinary mortgagor/mortgagee dispute which equity has been dealing with for over 200 years. The common law adds nothing to mortgagor/ mortgagee disputes. It does not provide any remedy where none existed. There is no remedial gap. The case can proceed adequately without implicating the tort of negligence. The allegations of the claimants, if established, are sufficient to secure their remedy."*

[23] Whereas there is considerable force and logic in my learned brother's conclusion as to the absence of any need to invoke the common law jurisdiction in challenging a mortgage's exercise of his powers of sale, I am not convinced that

the current state of the law precludes it. My position is based largely of the fact that cases such as **Cuckmere Brick Co. Ltd. v Mutual Finance Ltd. [1971] Ch.969** which lend support for a claim in negligence have not been expressly overruled, although criticised in dicta. The Claimant has framed his claim for a declaration that DBG was "*grossly negligent*" and not for damages for negligence. There is an alternative claim for damages as against DBJ and/or Azzuro but it is not expressly made referable to a claim for negligence or any other cause of action. Consequently, this claim for damages is vague and ambiguous. It therefore appears clear to me, that the claim in respect of gross negligence, even on a liberal construction, can only be construed as a claim for a declaration only and not a claim for negligence and consequential damages.

[24] If the Claimant is of the view that DBJ was grossly negligent or negligent, and that there is some benefit in making a common law negligence claim, as opposed to relying on the equitable jurisdiction, then I would think that the proper course would be to expressly plead such a claim. I cannot see any benefit to be gained in having a court simply declare that DBJ was negligent (if it was), without more. In **Sebol Limited and another v Ken Tomlinson as the receiver of Western Cement Co Ltd.) and Others** delivered on 9th October 2007 Sykes J in examining CPR 26.3(1)(c) opined as follows:

> *"...It does not necessarily follow, however that merely because the claim is known to law the grounds for bringing it are reasonable. The rule focuses on the grounds for bringing the claim and not just whether the pleadings disclose a reasonable cause of action."*

On the appeal from the decision of Sykes J, the Court of Appeal did not clearly decide whether this statement of the law was correct or not. However it does appear to me on a plain reading of the rule, that the aforementioned construction placed on the provision by Sykes J, is reasonable and is to be applied in an appropriate case. Clearly the instances in which a court will find that although there is a recognized claim the reason for bringing it is so unreasonable that the statement of case should be struck out, will be very rare indeed. However, I am of the view that this is one of those rare cases. As a consequence, I am of the

firm opinion that the statement of case seeking a declaration in respect of gross negligence discloses no reasonable grounds for bringing that claim and should be struck out.

[25] The Court is guided by the words of Lord Bingham of Cornhill in **Johnson v Gore Wood (a firm) [2002] 2 AC 1 at page 22 C** where he said:

> *"The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court: Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581, 590 per Lord Kilbrandon, giving the advice of the Judicial Committee..."*

Nevertheless, for the reasons given above I am of the view that the Claimants statement of case in its entirely discloses no reasonable grounds for bringing that claim and should be struck out on that ground.

Abuse of Process

[26] The applicants also submitted that the claim is an abuse of process because it is a claim between the same parties (in the case of DBJ) based upon the same or substantially the same matters which have already been adjudicated upon; and /or it amounts to a collateral attack upon an earlier decision of a court of competent jurisdiction, more specifically the judgment of Evan Brown, J in the Previous Claim.

[27] Among the relief sought by the Claimant in the Previous Claim were:

> *"2. A declaration that any sale of the property registered at Volume 1269 Folio 97 must be at a price which takes into account the Claimant's interest as a mortgagee and must be at the market value or not less than the forced sale value.*
>
> *3. A declaration that the proposed sale of the property registered at Volume 1269 Folio 97 by the 1st Defendant [DBJ] to the 4th Defendant for a consideration of $50,000,000.00 Jamaican Dollars was below the forced sale value and a breach of the 1st*

> *defendant's obligations as a trustee for the Claimant and the Mortgagor/s".*

[28] For reasons which are clearly set out in his judgment my learned brother Evan Brown, J refused to grant declaration 2 above. This result in my respectful view was a foregone conclusion since it is trite, that there is no general proposition of law that a mortgagee exercising his power of sale must sell the property at the market value or not less than the forced sale value. Although the learned judge had specifically asked in a portion of his judgment "at what Price should he property be sold", while deciding on whether the second declaration ought to be granted, he explored the principles relating to the sale by the mortgagee without, in my view, making a conclusive finding as to whether $50,000,000.00 was an appropriate price of not. This was because the way in which the declaration that was being sought was framed did not require him to do so. The learned Judge commented as follows:

> *"[52] To turn the declaration on its head, it amounts to this, unless the price at which the mortgaged property is sold is either at the market value, or the forced sale value, the interests of the Claimant would not have been taken into account. If, as was accepted in* ***Moses Dreckett****, Supra, at page 144, a mortgagee does not have an obligation to fix, or have fixed, a reserve price at an auction, on what authority could the court limit DBJ's exercise of its power of sale? To so direct DBJ would be tantamount to saying no sale can take place below the forced sale value..."*

At Paragraph 57 the learned Judge concluded as follows;

> *"[57] It is therefore clear, that it is unsound to assert that a subsequent mortgagee's interest has not been taken into account because the proposed sale will be unable to satisfy in full, both the prior and the subsequent mortgages. The entitlement the claimant has to satisfaction in full cannot be divorced from what the mortgaged property can actually be sold for. What the property is eventually sold for will depend on the state of the market."*

[29] It may therefore be correctly suggested as has been done by Mr Lieba in paragraph 29 of his written submissions that:

> *"29. Hon. Mr Justice E. Brown found in this judgment in the Related Claim Atkinson labours under a mistaken appreciation of his rights*

> *as second mortgagee and how a sale at an undervalue is actually determined."*

However, In my opinion, it would be inaccurate to suggest and it would be a mischaracterisation of the learned Judge's statements in addressing the second declaration sought by the Claimant, that his lordship made a positive finding that DBJ would have fully and properly discharged its legal obligations by the sale of the property at $50,000,000.00, or that the learned Judge "sanctioned" the sale at $50,000,000.00.

[30] As it relates to declaration 3 sought by the Claimant in the Previous Claim, there are 2 elements. Firstly, a declaration that the proposed sale of the Property by DBJ to the 4th Defendant for a consideration of $50,000,000.00 Jamaican Dollars was below the forced sale value, and secondly, that it was a breach of DBJ's obligations as a trustee for the Claimant and the Mortgagor/s". The first element poses no difficulty because the price of $50,000,000.00 was obviously below the forced sale value of $105,000,000.00 recommended in the valuation report of CD Alexander Company Realty Limited. The inclusion of the second element makes it patently clear that the Court was not required to decide whether the sale price of $50,000,000.00 constituted a breach of any of DBJ's obligations. What the court considered, (so constrained because of the framing of the declaration 3 which was being sought) was whether the sale at a price of $50,000,000.00 constituted a breach of DBJ's **obligations as a trustee** for the Claimant and the Mortgagor/s.

[31] This is clearly expressed by the learned Judge and I reproduce in full the appropriate portion of his judgment below as follows:

> *"[58] Coming now to the third declaration being sought, the fact of the proposed sale price being below the forced sale value is undeniable. However, the force of the declaration is that, by virtue of that fact, DBJ is in breach of its obligation as a trustee for the claimant and the mortgagor. As was pointed out by learned Queen's Counsel, Cash Plus Development Limited, the mortgagor is not a party to these proceedings. Therefore, any reference to the mortgagor is purely for the purpose of the analysis and*

> *not with a view to making any pronouncement in respect of a party who is not before the court.*
>
> *[59] It has long been established that, in the exercise of the power of sale, the mortgagee is not a trustee for the mortgagor:* ***Halsbury's Laws of England*** *4th ed. Reissue vol. 32 para. 316. Since the mortgagee is not a trustee for the mortgagor, neither can it be said that he is a trustee for a subsequent mortgagee. The mortgagee only becomes a trustee in respect of any surplus arising from the sale of the mortgaged property. In* ***Weld-Blundell v Synott*** *[1940] 2 KB 107, 115, Asquith J said that the duty of the first mortgagee "is to hold the balance of the proceeds after satisfying his own debt in trust for those other encumbrances." In those circumstances, it is clear, that it a constructive trust which arises as there was no antecedent fiduciary relationship.*
>
> *[60] Since there was no trust relationship between the DBJ and the claimant, it is incongruous to say that DBJ is in breach of trust in proposing to sell the mortgaged property for a consideration which is below the forced sale value. Unless, and until, there is a sale of the property which results in a surplus, no trustee relationship will arise between the claimant and DBJ. In short, to speak of DBJ being a trustee for the claimant in the proposed sale of 14 James Avenue, Ocho Rios, St. Ann, is simply to put the cart before the horse.*
>
> *[61] In consequence of the foregoing, I am constrained to refuse the declarations sought. Costs are awarded to the 1st defendant, to be agreed or taxed.*

[32] It was submitted to this Court that because the Claimant failed to obtain relief before Evan Brown, J when the challenge was to the proposed sale at $50,000,000.00, then the sale to Azzuro for the higher price of $72,000,000.00 would invite the same refusal of declarations and overall result that obtained in the prior action. Such submissions are, I find respectfully, misconceived.

[33] I therefore do not find that there is a proper basis to strikeout the claim on the ground that it is an abuse of process in re-litigating the issue as to the appropriateness of the sale price of the Property.

The position as it relates to Azzuro in particular

[34] Azzuro's position and submissions were closely aligned with that of DBJ as it relates to the reasons why the Claim ought to be struck out. However it was additionally submitted on Azzuro's behalf that even if the Claimant were able to

establish his claim of fraud against DBJ, Azzuro would be insulated from such a claim and the sale would be protected by virtue of the operation of section 163 of the RTA which provides as follows:

> *"163. Nothing in this Act contained shall be so interpreted so as to leave subject to an action for recovery of land, or to an action for recovery of damages as aforesaid, or for deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser bona fide for valuable consideration of land under the operation of this Act, on the ground that the proprietor through or under whom he claims may have been registered as proprietor through fraud or error, or may have derived from or through a person registered as proprietor through fraud or error and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever."*

[35] Section 106 of the RTA is also applicable, it provides as follows:

> *"If such default in payment or in performance or observance of covenants continues or one month after the service of such notice for such other period as in such mortgage or change is for that purpose fixed, the mortgagee or annuitant or his transferees may sell or concur with any other person in selling the mortgaged or charged land, or any part thereof, either subject to prior mortgages or charges or not, and either together or in lots, by public auction or by private contract, and either at one or several times, subject to such terms and conditions as the mortgagee or annuitant thinks fit, with power to vary any contract for sale, and to buy in at auction, or to vary or rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages, and grant such easements of right of way or drainage over the same, as the circumstances of the case require and the mortgagee or annuitant thinks fit; and may make and sign such transfers and do such acts and things as are necessary for effectuating any such sale; and no purchaser shall be bound to see or inquire whether such default as aforesaid has been made or has happened, or has continued or whether such notice as aforesaid has been served, or otherwise into the propriety or regularity of any such sale. Where a transfer is made in professed exercise of the power of sale conferred by this Act, the title of the transferee shall not be impeachable on the ground that no cause has risen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised, but any person damnified by an authorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power. "*

[36] Harrison JA in **Lloyd Sheckleford v Mount Atlas Estate Limited SCCA No. 148/2000** expressed his view as to the effect of section 106 of the RTA as follows:

> *"The words and tenor of section 106 provide protection to a bona fide purchaser for value innocent of any wrongdoing of a mortgagee in the exercise of the power of sale of the mortgaged property"*

[37] The Claimant argued that Azzuro is not a purchaser for value without notice because it had notice of the claimant's interest in the property. There is no doubt that Azzuro had notice of the fact that the Claimant is a second mortgagee, it is endorsed on the certificate of title in respect of the Property. There is however no evidence that Azzuro or its principals had knowledge of any irregularity in the sale or in the steps antecedent thereto. The sale was on the face of it a fairly straightforward sale of the Property by DBJ lawfully exercising its power of sale to a willing purchaser at arm's length.

[38] I find that section 106 of the RTA provides an additional reason why the claim as against Azzuro cannot succeed and why the claim against Azzuro is dismissed, the statement of case disclosing no reasonable grounds for bringing the claim.

The claim for wasted costs

[39] CPR rule 64.13 (2) provides that wasted costs means any cost incurred by a party :

> *(a) as a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or any employee of such attorney-at-law; or*
>
> *(b) Which, in the light of any act or omission occurring after they were incurred, the court considers it unreasonable to expect that part to pay.*

[40] For the reasons which have been explained in the course of this judgment it is clear that the Claimants statement of case has been presented in a less than ideal fashion. However I am not of the view that the filing of the claim rises to the

level of conduct which merits an order of wasted costs and the Court refuses to make such an order in this case.

[41] In the premises, the Court makes the following orders;

1. The Amended fixed date Claim Form is struck out.
2. Judgments issues for the 1st and 2nd Defendants against the Claimant.
3. The application for a wasted costs order is refused
4. Costs to the First and Second Defendants to be taxed if not agreed.