IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. CD00097/2015

BETWEEN	**NEALE BROWN**	**CLAIMANT**
AND	**GLOBAL LEASING AND FINANCE COMPANY LIMITED**	**DEFENDANT**

Contract - Mortgage - Loan – Money Lending Act –Section 8 Subsections (1) and (3) - whether mortgage illegal and unenforceable – Whether loan disbursed prior to execution of mortgage – Whether relief to be granted – Whether full loan disbursed

Jerome Spencer and Vanessa Young instructed by Patterson Mair and Hamilton for Claimant

Capt. Paul Beswick, Georgia Buckley and Novia Cotterell instructed by Ballantyne Beswick & Co. for Defendant.

Heard: 3rd, 4th, 5th & 6th April, 2017; 5th December, 2017; 5th April, 2018; 25th July, 2018; 15th August 2018 & 2nd November, 2018.

In Open Court

Coram: Batts J.

[1] This action was commenced by way of Fixed Date Claim Form filed on the 15th July 2015. The claim was amended on the 28th July, 2015 and again on the 14th July, 2016. The relief claimed in the final Amended Claim are as follows:

1) *A declaration that the mortgage dated September 2014 bearing registration number 1906331 was unenforceable pursuant to Section 8 of the Money Lending Act.*

2) *A declaration that the letter dated May 13, 2014 prepared by Global Leasing & Finance Company Limited represents the true loan agreement between Nicole Brown and Global Leasing and Finance Company Limited.*

3) *A declaration that the loan agreement between Global Leasing & Finance Company Limited and Neale Brown contained in letter dated May 13, 2014 was secured by the mortgage granted by Neale Brown in May 2014.*

4) *A declaration that it was an implied term of the mortgage granted by Neale Brown in May 2014 that it could be redeemed upon three months notice to Global Leasing & Finance Company Ltd.*

5) *Alternatively a declaration that the mortgage dated September 24, 2014 bearing registration number 1906331 could be redeemed at any time.*

6) *In the further alternative a declaration that the mortgage dated September 24, 2014 bearing registration number 190606331 could be redeemed upon three months notice to Global Leasing & Finance Company Limited.*

7) *Damages for breach of contract*

8) *Interest pursuant to the Law Reform Miscellaneous Provisions Act.*

9) *Costs*

10) *Such further and other relief as this Honourable Court may determine arising from a loan obtained by the Claimant form the Defendant in May 2014.*

[2] The matter proceeded as if begun by Claim. The Amended Particulars of Claim filed on the 14th June 2016, alleged that the Claimant agreed to borrow US $350,000 from the Defendant. The terms of the loan were contained in a letter dated 13 May 2014 which was signed by the Claimant. The interest rate agreed was 15% and the loan would be secured by a mortgage.

[3] These amended particulars commenced by indicating that the Claimant is a businessman who operated a company "New City Fish, Meats and Groceries Ltd." "New City". It operated from 15 North Parade in Kingston, which property was "recently registered" in the Claimant's name. This is property registered at Volume 1394 Folio 35 of the Register Book of Titles, "the property." New City is described as a well-established "meat mart" which for the better part of its existence did well. However, "approximately 6 years ago," the Company was defrauded $40 million by a former employee over a seven month period. This resulted in the Claimant's finances diminishing "considerably." He, it is alleged, had great difficulty operating and stocking the business and providing for his family and meeting his mortgage obligations.

[4] The Claimant alleges, at paragraph 7 of the Amended Particulars, that he was introduced to Winston Finzi of the Defendant in 2013. He sought then to "borrow J$35,000,000.00 from or through GLF and/or Marcelles James, a close personal friend and business associate of Mr. Finzi." It is alleged that an initial proposal was to raise funds using property owned by Marcelles James in return for her receiving a 40% share of the business. This failed as the "application for the bank loan was rejected by two different banks."

[5] The Claimant, in 2014, decided to rent the property for $600,000 per month. This however only netted him $10,000 per month after all expenses. He therefore decided to sell the property to his lessee for $80 million. He alleges that he was dissuaded from doing so by Mr. Finzi who offered to lend him US$350,000. This could settle the existing mortgage debt and provide "a sufficient amount in

excess of US$100,000 to provide working capital for his business." It is, alleged that (para. 15):

> " *It was an implied term of the loan agreement based on the contemplation and understanding of the parties, primarily because of Mr. Brown's impecunious state, that the loan proceeds would be disbursed in full by the time the duplicate certificate of title for the property was released by the mortgagee, RBC Royal Bank Jamaica Limited to GLF if not earlier."*

[6] The amended particulars reference an amortization schedule for the loan agreement which was prepared by Mr. Dale Blair and forwarded to Mr. Finzi on the 18th May 2014. Also mentioned are the mortgage and a promissory Note prepared by the Claimant's attorney contained in an email dated 19 May 2014. Ms. Jade Hollis was the Claimant's attorney at law. The Claimant says he printed three copies of the documents and signed them and handed them to Mr. Finzi in the latter part of May 2014.

[7] The Defendant liquidated the Claimant's mortgage debt of $26,312,206.33 then due to RBC Royal Bank Jamaica. The Defendant received the duplicate certificate of title for the property on the 17th July 2014. It is alleged that in breach of the loan agreement the Defendant failed to disburse the remainder of the loan proceeds to the Claimant who was thereby deprived of working capital and unable to meet his financial obligations.

[8] It is alleged that in or around September 2014 Mr. Finzi called the Claimant and demanded that he sign another mortgage. He then represented to the Claimant that:

a) once the subsequent mortgage was signed the remainder of the loan would be immediately disbursed.

b) The mortgage could be redeemed at any time by paying the principal and interest accrued

c) The mortgage would not be stamped or registered until the Claimant obtained independent legal advice and a document for that purpose was given to him.

[9] The Claimant "who believed he had no alternative at this point reluctantly signed the new mortgage." It was signed in the presence of the Defendant's attorney Ms. Gillian Mullings. It is alleged that the Defendant's representations were false as the Defendant:

a) failed to disburse the remainder of loan proceeds

b) stamped and registered the mortgage before the Claimant was able to secure independent legal advice

c) refused to permit the Claimant to redeem the mortgage when he chose to by paying principal and interest due.

[10] The Claimant alleges that he has not received the agreed loan amount of US $350,000 or its Jamaican dollar equivalent. Further, that the mortgage is unenforceable because –

a) It was procured by "economic duress"

b) It was signed by the Claimant after the mortgage due to RBC, Royal Bank Jamaica Ltd. was discharged, that is after the first part of the loan proceeds were paid for the Claimant's benefit.

[11] The Claimant's prayer for relief in his amended particulars of claim is as follows:

1) A declaration that the mortgage dated September 24, 2014 bearing registration number 1906331 was unenforceable.

2) *A declaration that letter dated May 13, 2014 prepared by Global Leasing & Finance Company Limited represents the true loan agreement between Neale Brown and Global Leasing & Finance Company Limited.*

3) *A declaration that the loan agreement between Global Leasing & Finance Company Limited and Neale Brown contained in the letter dated May 13, 2014 was secured by the mortgage granted by Neale Brown in May 2014.*

4) *A declaration that it was an implied term of the mortgage granted by Neale Brown in May 2014 that it could be redeemed upon three months notice to Global Leasing & Finance Company Limited.*

5) *Alternatively, a declaration that the mortgage dated September 24, 2014 bearing registration number 1906331 could be redeemed at any time.*

6) *In the further alternative, a declaration that the mortgage dated September 24, 2014 bearing registration number 1906331 could be redeemed upon three months' notice to Global Leasing & Finance Company Limited.*

7) *Damages for breach of contract*

8) *Interest pursuant to the Law Reform Miscellaneous Provisions Act.*

9) *Costs*

10) *Such further and other relief as this Honourable Court may determine.*

[12] The Second Further Amended Defence was filed on the 5th day of September 2016. It asserts that the Claimant is an experienced businessman and had a "long history of business dealings and loan transactions," with the Defendant. It is alleged that in relation to the transaction in question the Claimant had already defaulted on his loan with the Royal Bank of Canada (hereinafter referred to as RBC) when he approached the Defendant. The first purpose of the loan

was to discharge the mortgage to the bank. This was done in the amount of J$26,312,206.33.

[13] The Defendant contends in Paras 30 and 31 that in July 2014 its attorneys at law indicated the several documents necessary to register a mortgage to secure the sums loaned. Further that the letter of 13 May 2014, which the Claimant avers contained the terms of the loan, contained an error in that the :

> "*sum that was set out as the monthly payment after sixty (60) months would only result in the principal being repaid and would not account for the interest."*

[14] The Defendant further alleges that its attorneys prepared a mortgage but the Claimant could not afford the requisite monthly payments. As such it was eventually agreed that the monthly payment would be the same as the rent the Claimant was collecting from its tenant, Spanish Grain Ltd, that is US$6,000.00. It was therefore agreed that "balloon" payments would be made. This allowed the mortgage repayment period to remain at 60 months, at an affordable amount , at the agreed rate of interest and with a one year moratorium on interest.

[15] The Defendant contends that in addition to the amounts loaned, to discharge the mortgage to the bank, a further J$4,632,780.00 was borrowed on the 11th September, 2014. The Defendant alleges that only one mortgage was signed and, prior to signing it, the Claimant informed the Defendant he was going to have his attorney Mr. Rudolph Francis look over it. The Claimant thereafter signed it without hesitation. It is alleged that the Claimant made no complaint about disbursements, or late disbursements, until he had to repay the loan. The Defendant denies the allegations in the Claim and counterclaimed for an amount owed of U$530,897.36.

[16] The statements of case, it is fair to say, were particularly detailed in this case. There were several issues of fact. The extent to which the evidence of one party or the other departed from these detailed allegations will be a matter for comment later in this judgment.

[17] In his brief opening, Claimant's counsel was clear as to the bases on which the Defendant challenged liability. These were:

a) The entire sum of US$350,000 agreed was never received by the Claimant.

b) The loan is unenforceable due to the Money Lending Act.

c) Contrary to an agreement, that the mortgage would not be registered until the Claimant obtained independent legal advice, the Defendant registered the mortgage.

d) Contrary to the agreement the loan was disbursed in Jamaican dollars.

e) The mortgage was executed whilst the Claimant was under duress.

f) In consequence the Claimant is only liable to the Defendant in the sum of J$600,000. Mr. Spencer gave his professional undertaking that that amount would be paid to the Defendant's attorney by the morning of the 4th April, 2017.

[18] In the course of an exchange, between both counsel and the bench, it emerged that:

a) The Defendant wanted the $600,000 paid prior to the start of the trial.

b) The parties were agreed that the relevant rate of interest was 15 percent

c) That the Defendant would wish the Claimant to compute the applicable interest and pay it at the end of the trial "with fulsome alacrity."

[19] I decided to accept the Claimant's counsel's undertaking and commenced the trial immediately. I did this in the interest of time as, to await payment in the face of an undertaking from a reputable firm, would cause us to lose one day of trial unnecessarily.

[20] The Claimant gave evidence and called his former attorney Jade Hollis, as well as Mr. Warrick Bogle a professional auditor, to give evidence on his behalf. Testifying on behalf of the Defendant were Mr. Patrick Evelyn, Ms. Gillian Mullings and Mr. Winston Finzi. Witnesses were subjected to rather detailed and at times rigorous cross-examination. I will reference only such of the evidence as I find necessary to explain my decision and findings of fact.

[21] The Claimant's witness statement dated 11th February 2016, and a supplemental statement dated 2nd September 2016, stood as his evidence in chief. They were consistent with the allegations in his Amended Particulars of Claim filed on the 14th June 2016. Paragraphs 23, 24 and 25 of his witness statement are however sufficiently important to warrant a full quotation.

> "***23.*** *That the mortgage was registered contrary to the agreement between Mr. Finzi and me as it was our understanding that the document was to be reviewed independently by an attorney of my choosing and that I would revert to him after obtaining legal advice. Mr. Finzi went behind my back and proceeded to have the mortgage registered.*
>
> ***24****. The Mortgage instrument was kept by the Defendant Company.*

> ***25.*** *That subsequently I received a schedule of the principal disbursement from the Defendant company which reflected that it had deducted several fees from the principal sum before the full distribution of the loan. Thereafter without completing the full disbursement of the loan proceeds the Defendant company deducted mortgage payments for five (5) months from the balance of the loan proceeds which it had improperly retained and held on account."*

[22] Importantly, in his supplemental witness statement, the Claimant states that the mortgage he signed would involve him paying $6,000 per month and not $9,000. Further, in paragraph 15, that Mr. Finzi told him that the $9,000 per month would be a challenge for him to pay. The Claimant does not seem to have demurred to this at the time and did not, in the supplemental witness statement, contend that he did.

[23] At paragraphs 17 to 19 the Claimant deponed that, in response to his request that his own attorney review the mortgage, Mr. Finzi promised that the signed document would not be stamped until his lawyer reviewed it. This was to be one Mr. Sean Shelton. The Claimant further alleges that he told Mr. Finzi he had two containers on the wharf. Mr. Finzi agreed to advance the money for their clearance and he signed a promissory note for J$4,600,000.00. He was therefore able to clear them and sold them to Spanish Grains. As a result he was able, on the 15th September 2014, to pay Mr. Finzi J$150,000.00 cash. This cash was handed to Mr. Jordan Finzi. He paid the Defendant a cheque for J$4,485.894.94. Then follows an assertion (para.19) :

> *"Subsequently in November 2014 Mr. Finzi paid me what he said was the final disbursement on the loan. I told him that he could not be correct because I had not received US$350,000.00 or its equivalent. I then received a schedule from Jordan Finzi. The schedule revealed that several charges were taken out from June 2014. These charges included interest payment on the mortgage between June and November 2014 and other charges which I had not agreed to pay."*

[24] The Claimant then says he thereafter retained an attorney, Mr. Dwight Sibbles, to sell his property to Spanish Grains. That sale would enable a payout to Mr. Finzi as he realised he was not dealing with an "honest" individual. The witness identified Exhibit 1B as the mortgage prepared by Ms. Jade Hollis and which he had signed. Exhibit 2 was a document "certificate of legal advice" which was handed to him by Ms. Gillian Mullings. The document is unsigned.

[25] Cross-examination of the Claimant was extensive and effective. In the first place it became clear that the Claimant's business involved perishable items namely meat. He relied on cold storage and movement in a timely fashion. At the time he went to the Defendant for a loan he was badly in need of money. The Claimant admitted that the mortgage, he allegedly signed in May 2014 (Exhibit 1b), provided for a 15% rate of interest. However the amortization schedule attached to it was incorrect. The following exchange was important:

> *"Q: But most importantly Mr. Brown all of this was based on a payment of $8,326.46 per month, you agree with that*
>
> *A: yes sir*
>
> *Q: so if you were to pay less than that $8,326.48 you would not be paying the correct amount based on your agreement to pay 15 per cent interest and to pay off the loan over 5 years, agreed?*
>
> *A: yes sir"*

[26] The witness then admits that at the time he says he signed the document he was not in a position to pay $8,326.96 per month. He expected to be able to if he got capital to finance his business. In the first year after signing there was a moratorium, and he would only be paying US$4,000 per month for interest. He admitted that the schedule originally attached had an error which had to be corrected by the Defendant's lawyer. He was unable to say how long it took to have that corrected. He was clear that in June Mr. Finzi promised to disburse the

final US$100,000 upon receipt of the title. Mr. Finzi he says received the titles in July. He expected immediate disbursement even before the mortgage was registered on the title. He said up to September he had not got the balance. He had received the benefit of US$250,000 used to pay out the bank. He had made no monthly payments to the Defendant. Importantly he asserts that in a meeting in September the 2nd mortgage was presented to him. He, in the presence and hearing of both Mr. Finzi and Miss Mullings, said to Mr. Finzi,

> *'I told him that I already signed a mortgage before and he said that he is not going to use that mortgage anymore so he went ahead and prepared a new one that is easier for me, so I should sign it if I want the money to do my business."*

[27] He admitted to the cross examiner that he had not been threatened in any way prior to signing the mortgage. He also admitted meeting Mr. Finzi at the offices of the Defendant's accountants but denies that the accountant, Mr. Dawkins Brown, was present. He said whenever they were to speak with the accountant he would step out of the room. He however admits that it was the accountant who came up with the idea of balloon payments so as to allow the monthly mortgage payments to be below $9,000 per month. He denied being told that interest would no longer be on the reducing balance but rather on an add on basis.

[28] Importantly the Claimant stated that he started monthly payments under the mortgage in December 2014. This was by instruction to his tenant Spanish Grain who paid over the entire rental of $600,000 to the Defendant (See Exhibit 1(a) p. 49). The following exchange occurred:

> *"Q: And you understand and understood then what was in that schedule? You understood that the schedule was saying you pay six thousand dollars a month and at the end of twenty four, thirty six and 4 eight months you going to add the eighty four thousand dollars to it.*
>
> *A: yes sir*

Q: And you understand that

A: yes sir

Q: and you signed it

A: yes sir

Q: you chose to sign it

A: yes sir."

[29] The Claimant, also in cross-examination, admitted receiving several cash advances from the Defendant prior to the registration of the mortgage. They were intended to be part of the loan. He also received a motor car from the Defendant which he describes as "equivalent" to cash. He also acknowledged that he understood principal fees, stamp duties and charges would be deducted from the loan amounts.

[30] As regards the promissory note dated 11 September 2014 the Claimant maintained that it had nothing to do with the mortgage. His account is that he returned a few days after signing the mortgage in September and the funding was not ready to be disbursed. It was then Mr. Finzi let him have the over J$4 million in return for signing a promissory note. It seems to me, and I accept, that the money represented a further advance under the mortgage which had not yet been registered although signed.

[31] The Claimant admitted in cross-examination that his cold storage was not in operation at the time. He asserted:

> *"The deep freeze broke down. If I got money in time I would have cleared and delivered in time to the customers. ... would not have had to put it in storage."*

[32] He also introduces two further containers in November. He said the two in September had been sold and Mr. Finzi repaid. The introduction of two additional containers in cross-examination sheds doubt on the Claimant's credibility. Neither his witness statements nor his Amended Particulars of Claim

indicated there were in all 4 containers of meat imported. Indeed the scenario was quite dramatic as the cross examiner asked the Claimant to indicate, in his witness statements or his particulars of claim, where he mentioned two shipments of 2 containers. He was of course unable to. It culminated in the following exchange:

> *"Q: nowhere else in witness statement is reference to shipment in November*
>
> *A: no sir*
>
> *Q: suggest you are lying, no November shipment*
>
> *A: I am not"*

And later,

> *"Q: you made no reference to November*
>
> *A: no*
>
> *Q: nor in Particulars of Claim*
>
> *A: No*
>
> *Q: create shipment since giving evidence*
>
> *A: no sir."*

These exchanges to my mind had a telling impact on the Claimant's credibility. I do not see how such an important aspect of his case could have been forgotten.

[33] The Claimant has agreed that his final payment was not based on the document Exhibit 1A page 14. He agreed that the final payment was $1,540,495. He acknowledged signing, although angrily, the receipt for final payment, page 50 Exhibit 1A. On the question of the alleged oppressive rate of interest the following exchange occurred:

> *"Q: I am talking about the mortgage of Three Hundred and Fifty Thousand Dollars with the add-on interest*

and I am saying you agreed to repay the total of the mortgage amount plus the add-on interest of fifteen percent for five years and the total of that was six hundred and twelve thousand five hundred dollars

A: like I said, sir, I signed that mortgage without it being explained to me that it was an add on and the terms of it and also I signed it without any counsel, sir. And it being explained to me that it was an add-on and the terms of it and it was never explained to me the basis of add on.

Q: I am also putting it to you that you agreed to pay that amount of sixty hundred and twelve thousand five hundred dollars within sixty months

A: I signed it, sir"

[34] Re-examination did not, it is fair to say, improve my unfavourable impression of the Claimant's evidence. It consisted of an attempt to introduce a document into evidence in circumstances where the witness' evidence, relative to that matter, had not been ambiguous,

[35] The Claimant's expert witness was Mr. Worrick Bogle. He prepared a report which was put in evidence as Exhibit 6. Cross-examination of Mr. Bogle made it clear that his briefing prior to making his report had been incomplete. His source of information was the Claimant. He admitted that the letter, on which he relied to say interest would be on the reducing balance (Exhibit 1A page 1), contained a grave error in that only principal was taken into account. He admitted that based on the September 24th mortgage, if calculated on an add-on basis, the correct interest payable was stated. The calculations of Mr. Evelyn, the Defendant's expert witness, was correct but reflected add-on interest. In answer to the court the expert said,

"J: But earlier you said that looking at the same document I recall that you would not call it, agree that it was on add-on, could you just explain.

A: The calculation, one is a matter of the calculations, the calculation is that, but based on the balloon payments it is unusual for balloon payments to be other than on the reducing balance, so to me it is as if both are dealing with a different method.

And later,

"J: so when you combine a reducing balance with a balloon payment is that better for the borrower or worse.

A: better for the borrower

.....

J: I meant to ask you with the add-on

A: with the add on it really doesn't matter as such, because regardless of the way that it is done, the lender would be getting full interest on the principal, the original principal for the period."

[36] The Claimant's next witness was Ms. Jade Hollis an attorney at law. Her witness statement dated 20th March 2017 stood as her evidence in chief. She was not challenged in cross examination on its content. In truth, however, her evidence did not impact in a significant way the issues for my determination.

[37] The Defendant's counsel opened his case to the fact that there had been two "stumbling blocks," in the way of "memorialising," the loan agreement between the Claimant and the Defendant. Firstly, an error occurred on the face of the

document and secondly the Claimant was unable to afford the monthly payment required. The subsequent negotiations resulted in an agreement whereby US$6,000 would be paid for 60 months and "balloon" payments made to make up the shortfall. A total of US $350,000 was loaned on these terms. The add-on method of interest computation was used. Disbursement took the form not only of cash but also by settlement of disbursements at the Claimant's request. As regards the counterclaim the Defendant indicated that since filing the Claimant had made more payments.

[38] The Defendant's first witness was Mr. Michael Patrick Andrew Evelyn. I indicated to the parties that Mr. Evelyn, many years ago, had played football for my club and was therefore known to me. I had not recognised the name as I had always known him as Patrick Evelyn, not Michael. Be that as it may no objection was taken and I dare say quite properly so. I do not feel in any way compromised or conflicted as those footballing days were over 20 years ago.

[39] Mr. Evelyn describes himself as a chartered accountant and has been so for over 25 years. His expert report dated 21 February 2016 was put in evidence as Exhibit 7. The conclusion to the report was formatted as answers to questions posed in his letter of instruction and are as follows:

> *"The answers to the questions raised by Ms. Buckley of Ballantyne Beswick and Company in the sequence asked are as follows and encompasses my conclusions on the matter:*
>
> *<u>Conclusions re letter May 13, 2014 loan terms</u>*
>
> 1. *The loan payment terms in the letter of May 13, 2014 are not mathematically possible. Loan Schedule, #1 calculated on this basis is attached.*
>
> 2. *The monthly loan payments are not mathematically accurate as Loan Schedule #2 shows; the monthly*

payment would have to increase to US$9,740.76 to clear the loan in the stipulated time

3. *The monthly loan repayment must be approximately US$8,326.48.*

<u>Conclusions re letter May May 13, 2014 loan terms</u>

4. *In my professional opinion the interest calculated of US$262,500 is the correct interest on the captioned loan over 5 years at 15% as it is in keeping with the Add-on interest calculation method. See Loan Schedule #3.*

5. *The total interest so calculated does not change regardless of the actual monthly loan repayment arrangement including agreed balloon payments and early repayment of the loan."*

[40] His answers in cross-examination, it seemed to me, were credible and consistent. So, for example, when challenged on the rate of interest used in his calculation the following illuminating exchange occurred,

Q: *Thank you. Now, I am going to ask you Mr. Evelyn take a few minutes to go through page thirty nine to forty eight and indicate to me whether you see anything in there making reference to fifteen per cent per annum.*

A: not in those specific sums

Q: don't see the words fifteen per cent per annum

A: no

Q: Good. Thank you. But to be fair to you, your conclusion at paragraph four at page two of your report.

A: yes

Q: Has its origins in the letter of February 16, 2016, your instructing letter, could I ask you to turn to page fifty one paragraph two at the very bottom of that page sir

A: No

Q: okay, on what basis did you then make this conclusion that the $262,500 was the correct interest on the captioned loan over five years at fifteen per cent using the add on interest. I am going to ask you to listen carefully – when the mortgage – it made no reference to fifteen per cent?

A: page 47, it says interest United States $262,500

Q: Right

A: Now, the only way interest can be calculated at this amount is if you apply fifteen per cent on the add on basis.

Q: for five years

A: for five years."

[41] The Defendants' next witness was Ms. Gillian Mullings. She was the attorney who acted for the Defendant in the transaction. Her witness statement dated 18th February 2016 stood as her evidence in chief. She states that on or about the 5th June 2014 she contacted the Claimant's bank, Royal Bank of Canada (hereinafter RBC), and enquired of the amount to clear the Claimant's debts. On the 30th June 2014 she sent the Defendant's cheque to RBC in that amount. On the 16th July 2014 she received from Sagicor (successor to RBC) the duplicate Certificate of Title and a Discharge of Mortgage among other documents. She advised the Defendant of the necessary costs to register the mortgage. It was, she said, the Claimant's attorney who drafted a mortgage with monthly payments of US$9,385.17. However the Claimant was unable to afford that amount. After discussions involving herself, the Claimant and the accountant from UHY Dawgen Chartered-Accountants, it was decided that a payment schedule of U$6,000 per month was appropriate. This was because it matched the rental received from the Claimant's tenants. This meant that the loan would not be

repaid in 60 months. Three balloon payments of US$84,166.67 were therefore added to the repayment schedule by agreement. The plan included a 24 month grace period at the start of the mortgage. She said the mortgage was signed at her offices on the 24th September 2014 and that at no time was the Claimant, in her presence, induced to sign any document. The letter of instruction to Spanish Grain (the Claimant's tenant), to pay over the rent, was prepared by her and signed by the Claimant. It is dated the 18th November 2014. (See Exhibit 1a page 49).

[42] In cross-examination Ms. Mullings admitted that at some point in the transaction the Claimant was represented by Ms. Jade Hollis. Jade Hollis was the attorney who had prepared the draft mortgage. Miss Mullings was unclear as to exactly which documents were prepared by her and when. However, when shown Exhibit 1 pages 31 and 32 and asked whether in May 2014 she prepared a mortgage in accordance with that schedule, she said after some pressing by the cross examiner:

> *"I really can't remember what happened. We received an initial set of documents that didn't work out, these documents were redrafted over and over again, particularly the schedule. I don't recall anything else being redrafted. At the end of the day, we ended up speaking with Mr. Dawkins Brown to say that we drafted. I can't remember drafting this document, but I do remember it went through several permutations and combinations trying to come up with some kind of schedule."*

Ms. Mullings, after some hesitation and what appears to be prevarication, admitted that by July 2014 there was in existence a mortgage which the Claimant had signed to secure the loan of US$350,000.00. This explains her letter of the 18th July 2014 Exhibit 1 (a) page 66. The attorney admitted that by the amortization schedule prepared in May 2014 (Exhibit 1(a) page 31) the payment was to be $4,375 for the first year before increasing to $9,835 per month thereafter. Then the following exchange:

"Q: *You see I am going to suggest to you Miss Mullings, that at no point in time did Mr. Brown express in your presence, having a difficultly with paying anything he had agreed to in May 2014.*

A: well, I was not there when the parties made their agreement as to how the loan was to go, so I came in to draft the documents and I don't recall every meeting we had and how it went but I do recall a specific conversation that that amount is too high because of some issue with the Spanish Grain rent being used to cover it in terms of detail."

[43] Interestingly, when cross-examined about the several meetings she refers to in her witness statement, the witness again had recollection issues. She alleges that she took notes but would not now be able to find them. She could not say specifically who was in these meetings or where they took place. Then the following exchange:

"Q*: Let me try and see if I understand you. You were not a party to a meeting at which Mr. Neil Brown and Mr. Dawkins Brown were present to discuss an alternative replacement schedule.*

A: I don't specifically remember that

Q: do you remember how many times you have met Mr. Neil Brown

A: no, but there were many times

Q: Okay, do you remember how many times you would have met Mr. Neil Brown and discussed the repayment schedule of the mortgage.

A: Well, first of all, I didn't discuss the terms of repayment, what happened would be that the parties meet and then they would instruct me as to what is to be done and if I needed anything in confirmation I asked them.

Q: but this was never a meeting in the context of meeting involving Mr. Neil Brown and Global Leasing

A: there were meetings but at those meetings the parties had already decided."

[44] When it was suggested to her that there was only one meeting with the Claimant at which she was in attendance, her memory was vivid. She recalled because he would bring his wife. She recalled Mr. Brown's wife reading the magazines in her office. She recalls this occurring on several occasions. She was sure it was several meetings she had with the Claimant. The following exchange occurred thereafter:

"Q: now at these several meetings, did you ever suggest to Mr. Brown that he ever get a lawyer to assist him.

A: No

Q: wouldn't you think that it was ... it would have been prudent to make that recommendation.

A: No, because ultimately, when the parties make the decision they will only communicate to me and I will just do what they said, it was not a case where I was advising anybody.

Q: But you were in a meeting discussing issues concerning repayment, you represent Global Leasing and Finance isn't that correct

A: that's correct

Q: And you .. a debtor who is unrepresented

A: he was not unrepresented all of the time, so for a large portion of the transaction he was represented and at some point I spoke to another attorney Mr. Rudolph Francis, I wouldn't say that he was unrepresented, there were an assortment of discussions in relation to how this money was going to be paid back, my understanding was that it was fairly urgent for him to arrive at some kind of settlement."

The attorney was not challenged on this reference to discussions with other attorneys and in particular Mr. Rudolph Francis. It does seem, and I find as a fact, that the Claimant in the course of the transaction consulted several attorneys being, Jade Hollis, Rudolph Francis and Mr. Sean Shelton.

[45] The cross-examiner challenged Miss Mullings on whether the Claimant was told, at the meeting in September 2014, that the new mortgage terms were better for him. She first claimed no memory. Then, when confronted with paragraphs 13 and 14 of her witness statement, admitted that the paragraphs were saying that the items were indeed better. This aspect of the exchange was telling:

> "*Q: Let me repeat – Question, your paragraph 14, 15, 16 agreed that you appreciated why he was being asked to pay on different terms than he had originally agreed.*
>
> *A: I don't know, whether he originally agreed with Mr. Finzi. I don't know.*
>
> *Q: you have read paragraph 16*
>
> *A: but I still don't know what the original discussion was with Mr. Brown, he came to me initially with Mr. Finzi after having an initial discussion."*

[46] This witness did not impress me. I would have expected an attorney, attending to give evidence, to have refreshed herself on the facts. Also the witness seems to want it both ways. On the one hand she says, the parties came to her with an agreement. On the other she says there were several meetings with her prior to arriving at an agreement. One wonders why the reluctance to say that the terms were changed and the Claimant was informed that they were changed for the better. Whereas she admits the terms were changed and that they were advantageous to the Claimant, by reducing his monthly payment to the level of his rent receipts and by allowing him time, she did not want to be party to a

representation to the Claimant to that effect. I find as a fact that the Claimant was told by the Defendant in the presence of Ms. Mullings that the terms of the 2nd mortgage document were to his advantage. Which indeed they were to the extent that his monthly payment was reduced and he had a one year moratorium on interest.

[47] Ms. Mullings stated that she had no recollection of the Claimant stating in September that he had already signed a mortgage; nor did she recall him being told by Mr. Finzi that the new mortgage was better for him. She did not recall him saying he wanted to get legal advice; nor did she recall the Claimant saying he would consult an attorney, Mr. Shelton. She did not recall Mr. Finzi telling the Claimant to go get the advice and return. Nevertheless, she strenuously denied that Mr. Finzi told the Claimant to sign and that he promised not to register the mortgage until the Claimant returned with proof of legal advice. Her reason for that firm recollection:

> "*A: That is absolutely not true. I have been doing business with Mr. Finzi for many years, what I know about Mr. Finzi is that he would not be paying out any money until his security is properly registered on the title, so that I absolutely know, that whatever balance was left Mr. Finzi would not be paying out until it is secured."*

[48] When shown Exhibit 2 (Certificate of Legal Advice) Ms. Mullings denied it was prepared by her and given to the Claimant. It was suggested to the witness that the reason it took three (3) weeks for the mortgage to be registered ,after it was signed by the Claimant, was to allow him to get legal advice. She denied that. She was unable to say why it took 3 weeks for the mortgage to be registered. She also denied that, at the time the final disbursement was sent to the Claimant, he protested. She denied that Mr. Finzi told him, in her presence, unless he

signed the letter he would not get the payment. I find, on a balance of probabiltites, that the Claimant was encouraged to return with the certificate of legal advice which was prepared and given to him, by the Defendant or his representative.

[49] Mr. Winston Finzi, principal of the Defendant, was the next witness to give evidence. His witness statement dated the 19 February 2016 stood as his evidence in chief. In it he indicated that the instant transaction was initially handled by Ms. Marcelles James of the Defendant Company. Later negotiations commenced towards a loan, secured by mortgage, of US$350,000. It was Ms. Jade Hollis who drafted the first documents relative to the transaction. The Defendant paid out the RBC loans prior to the loan documentation being finalised. Thereafter, and over the course of several months, payments were made to or on behalf of the Claimant. The documents signed on the 13th May 2014 contained an error in that no interest was included in the calculations. The Claimant said he could not afford a monthly mortgage payment of US$9,385.17. Therefore further discussions took place involving accountants and lawyers. Eventually it was determined that he could afford monthly payments of US$6,000.00 commensurate with the rental earned. Mr. Finzi asserts that all the terms were explained to the Claimant who knew that it was an add-on mortgage at 15% interest with monthly payments of US$6,000 and three balloon payments of US$84,166.67.

[50] Interestingly Mr. Finzi gave evidence, which was not challenged, of three occasions subsequent to the instant transaction when the Claimant made further propositions to him. On the 13th April, 2015 the Claimant told Mr. Finzi he wanted to sell the mortgaged property and it was agreed that out of the proceeds of sale US$450,000 would settle the amounts owed. Secondly on the 22nd May 2015 the Claimant borrowed US$1,100 from the Defendant and this was secured by promissory note. In June 2015 the Claimant posited 2 proposals. One was a further loan of J$25,000,000 to repay Mr. Raymond Clough amounts owed. The

other was a loan to purchase for, J$40,000,000, property in Parade owned by the Claimants father. It was while discussion of these latter proposals were in progress that the instant suit was commenced. It certainly is strange that someone, who alleges he was deceived and so unfairly treated, would return to the source of such mistreatment. By way of amplification Mr. Finzi stated that this had been the largest mortgage transaction his company had handled for an individual. It therefore took time to work something out.

[51] It is fair to say that Mr. Finzi was not unduly shaken by cross-examination. It does appear that the Defendant, Mr. Finzi and the Defendant's employee, Ms James, had at various times gone out on a limb to try to help the Claimant. There were some interesting exchanges:

> *"Q: Did Mr. Brown say he wanted part of loan to inject capital in his business.*
>
> *A: he might have said it. He had grand idea that he could start again. But I was not sure after selling or leasing the place how he could but he might have said it."*

And,

> *Q: When agreement entered into the amount, period agreed the rate of interest was agreed, repayment terms were 60 monthly instalments US$5835.00*
>
> *A: this was the spirit of agreement but when you worked it out. The schedule and terms and conditions varied. All I would get back is US$450,000 and no interest.*
>
> *Q: US$40.00 interest*
>
> *A: (Laughs) true"*

And later,

"Q: The funds were not disbursed at that point

A: for very good reasons

Q: what were those good reasons?

A: it was discovered that Mr. Brown owed significant funds to other suppliers. We had to be sure when we disbursed it would not pay others. Took us time to clear up those matters.

Q: is any of that in your witness statement

A: No but I am telling you now that you ask. Mr. Brown could not get the loan from anybody else.

Q: put to you that the reason you gave for not disbursing balance of the funds had nothing to do with due diligence.

A: well that was a part of it Mr. Brown is somebody I really wanted to help out and helped on numerous occasions even after disbursing this loan.

Q: You are an astute businessman

A: sometimes I wonder if that astute why get into this situation."

Later still,

Q: Mr. Finzi I suggest the provision of this schedule as to interest is completely different to the provision of interest in the mortgage prepared by Ms. Hollis

A: you could be right Ms. Hollis did not provide interest everybody agreed it was a mistake.

Q: the mortgage prepared by Ms. Hollis made for express provision for 15% per annum. Calculated on reducing balance.

A: If we did it that way he could not afford $9,000 per month. We had numerous discussions trying to get it to work. He said he could not afford $9,000 per month. That's why we use balloon and find creative ways for him to keep the property.

Q: are you aware from documentation you have seen that the mortgage prepared by Ms. Hollis on the reducing balance made interest payments, taking $149,000 on the life of the mortgage.

A: I don't know but I think her calculation is wrong. 15% of $350,000 over 60 months does not come to that."

[52] It should be noted, for the record, that at the close of the evidence both parties requested a transcript before being asked to do submissions in writing. We had for this case, been provided with stenographers. The matter therefore adjourned on the 5th December 2017 to be resumed on the 5th April 2018. The notes of evidence were not available on that date and the matter was further adjourned. In fact obtaining the notes proved to be quite a challenge. The fact that there had been several different stenographers and that they were not specifically assigned to this court, I think, contributed to the delay. In the result I was only able to obtain, and correct, some of the transcript. The notes for the 4th April 2017 and 5th December 2017 were my own because, fortunately, I did make detailed notes notwithstanding the presence of the stenographers. One hopes that the challenge of obtaining real time notes of evidence in civil proceedings will be overcome sooner rather than later.

[53] The Notes of Evidence became available and the case was relisted for the 25th July 2018. On that date the Claimant's written submissions were not yet completed. We therefore adjourned to the 15th August 2018 when each party made oral submissions in response to the written submissions of the other. I will not repeat the submissions advanced. I have carefully considered the points made. In the end I have come to the conclusion that the evidence of Mr. Finzi and his expert witness is to be preferred to that of the Claimant's.

[54] I do not rely only on the fact that Mr. Finzi's demeanour and forthrightness impressed me. It is I think significant that the Claimant had already been in a serious financial crisis when he approached the Defendant for the loan. The Claimant's position, that the Defendant had somehow coerced him into signing

and somehow tried to take advantage of him, is undermined by two uncontested facts. Firstly, the Defendant first offered mortgage security support in the form of land owned by an employee of the Defendant. The idea was to have a bank or financial institution lend the money not the Defendant. The bank turned down the proposal because of the Claimant's credit rating. Secondly the Defendant advanced considerable sums on behalf of the Claimant even before the mortgage document had been signed. On the Claimant's evidence, the cost to clear and pay for a container was paid for on the security only of a promissory note. The Claimant alleges that he repaid that amount .I do not accept that but ,even if in fact that was done, it further undermines the narrative of a deliberate delay to cause him loss.

[55] It is more probable, and I so find, that the Defendant was reluctant to distribute the balance of the loan until its interest had been properly secured by registration of a mortgage. It is apparent that the first mortgage was defective. That was drafted by the Claimant's attorney Ms. Jade Hollis. It failed to properly or at all take account of the 15% interest agreed. Upon her departure the Claimant did not immediately retain another lawyer. The Defendant involved his own professionals in the process, his accountant and his lawyers. They had several meetings. I agree with Ms. Mullings that there was more than one such meeting. Eventually a schedule, which could accommodate a monthly payment that the Claimant could afford, was arrived at. I accept that the schedule, to the Claimant's knowledge, was tailored to fit his monthly rental. The Claimant was told in the presence of Ms. Mullings that the agreed schedule was to his advantage. The Claimant did consult other attorneys and I accept that Ms Mullings did speak to one in that regard. Ms. Mullings did prepare a certificate of legal advice (exhibit 2) for the Claimant to have completed. I do not accept, as he alleges, that there was a promise to disburse the balance but not to register the mortgage until he returned with the certificate of legal advice signed by an attorney. It would have meant that the Defendant agreed to disburse the balance without a registered security, to a person who the Defendant knew was already,

if not insolvent, on the verge of so becoming. Furthermore, it would mean, if the Claimant is to be believed, the Defendant would have agreed to fund not one but two shipments of containers without a registered security.

[56] The Claimant is an experienced businessman. It is far more probable, and I so find, that given his financial situation no attorney would certify advising him to sign. He signed the mortgage knowing the terms and payments expected. He pressed the Defendant to disburse the money and they decided to do so without the attorney's certificate. His loss on the shipment of meat was due more to the absence of a reliable refrigerator than to any delay in disbursement by the Defendant. He knew, or ought reasonably to have known, that disbursement of the final amount would follow, not precede, registration of the mortgage.

[57] On the matter of the second container in November I do not accept that the Claimant is being truthful. It is very strange that the Claimant had not mentioned that there had been two separate shipments prior to his cross-examination. He struggled to explain this when asked about it. The November shipment is only recalled when he was trying to explain the J$2 million advanced on the statement. He asserts that the September shipment was cleared and the Defendant repaid. This I do not accept.

[58] There is on the evidence, no unconscionable or dishonest conduct such as to give rise to the setting aside of this transaction. There is no requirement in law that the Claimant obtain legal advice prior to entry into a mortgage. The desire, as I find, that one be obtained was a counsel of prudence. Ms. Mullings no doubt was concerned that given his desperate circumstances, the fact that he was unrepresented and the several adjustments made to the documents, the Claimant might try to deny liability. This clearly is what eventually transpired. Ms. Mullings cannot recall the content of her discussion with Mr. Francis. This is strange. It suggests however that, whatever Mr. Francis told her, it was not favourable to the Defendant. If it were I imagine it would have been duly recorded. There is no legal requirement for the Claimant to obtain legal advice.

He is not under disability or in a position of dependency, nor is there a fiduciary relationship. The Claimant, I find, having failed to have the certificate executed impressed upon the Defendant the need for disbursement. This prompted the registration and disbursement. In all probability it is the hoped for certificate which lead to the 3 week delay in registration, which Ms. Mullings was unable to explain. There was at no time a promise not to disburse prior to registration of the mortgage. Even if there were such a promise I fail to see its legal significance. If it was not registered the Defendant would be an equitable mortgagee because it had disbursed funds and had the title and other signed documents in its position. I do not see how the breach of a promise not to register would, on the facts of this case, affect the issues for my determination.

[59] I also find as a fact that the entire loan promised was disbursed. The Defendant has put in evidence a statement as well as a signed letter by the Claimant acknowledging this. These I accept as factual. The Claimant either kept no records of his own or has decided not to put them in evidence. He was in desperate financial straits. He had been in this position prior to his approach to the Defendant. I do not accept that he signed the final receipt under duress. The mortgage was tailored to meet the rent he was receiving. He hoped to import and sell meat and keep his business afloat. The Defendant facilitated this endeavour. Several disbursements were made prior to execution and registration of the mortgage. There is no evidence that he advised the Defendant that his deep freeze was down. In any event he ought reasonably to know that to import perishables, without a facility to preserve them, is very risky indeed. The Claimant voluntarily gambled and lost. That is the nature of business.

[60] The Claimant urges that the loan agreement is unenforceable by virtue of Section 8 of the Money Lending Act which states that :

> **"8-**
>
> (1) *Subject to subsection (3), no contract for the repayment by a borrower of money lent to him or to an agent on his behalf after the*

commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract containing the particulars required by this section be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be.

(2) *The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and the interest charged on the loan expressed in terms of a rate per centum per annum.*

(3) *Notwithstanding anything in subsection (1) or (2) any court of competent jurisdiction may, upon application being made and if it considers it equitable to do so, declare the contract to be enforceable in the same manner and to the same extent as if the requirements of subsections (1)and (2) had been complied with."*

[61] The Claimant's counsel relies also on the authorities of ***Palmer v Cornerstone Investments and Finance Company Limited [2007] UKPC 48*** *and* ***Crooks v Elliott (1988) 25JLR 185.*** They submit that the Defendant made no application for relief pursuant to Section 8 (3).

[62] The Defendant's counsel did, in oral submissions, seek that relief. She (Miss Guyah who made those submissions) invited the court to exercise its discretion pursuant to Section 8 (3). I allowed the oral application. The Claimant's Amended Particulars of Claim (filed 14 June 2016, page 116 Volume 1 of Index to Judges Bundle), unlike the Amended Claim, made no express mention of the Money Lending Act. If it is fair to allow the point to be taken in the absence of a written plea, it is equally fair to allow the relief under Section 8 (3) to be requested orally. The statute, in any event, did not say the application had to be in writing.

[63] That being said I am satisfied that this is an appropriate case in which to grant relief and refuse a Section 8 remedy. In the first place it is common ground that a written agreement was signed prior to disbursement. The Claimant gave evidence of those documents, a promissory note and a letter dated 13 May 2014. It is however also common ground that the schedule to the mortgage prepared by the Claimant's attorney at law contained an error in that interest was not included. The mortgage was redone in the exact terms and the interest rate agreed of 15% computed. The mortgage, ultimately signed in September 2014, was the product of negotiation. It reflected the same basic terms, principal and interest agreed, as the documentation of May 2014. Further the Claimant had at times been represented. He had also received the benefit of several disbursements made to, or on his behalf or on his instruction while the loan documentation was being negotiated and finalised. It surely is not the type of case Section 8 was seeking to address. Surely, it would be inequitable to allow the Claimant, in these circumstances, to avoid his lawful debt. I therefore granted to the Defendant relief pursuant to Section 8 (3).

[64] The two authorities cited in relation to Section 8 of the Money Lending Act are of little assistance. ***Crooks v Elliott*** (1988) 25JLR 185 is a judgment of Vanderpump J, dated 25th April 1988. The learned judge decided that, as the loan agreement did not comply with Section 8, it was unenforceable. There was no application for relief, presumably because subsection (3) of Section 8 had not yet been legislated. The other case is a decision of the Judicial Committee of the Privy Council, ***Estate of Imerette Palmer (deceased) v Cornerstone Investments & Finance Company Ltd. (Jamaica) (2007) UK PC49 (16 July 2007).*** That case is distinguishable on the facts. The Claimants were guarantors who were unaware of the entire liability of the debtor mainly because the documentation did not conform to Section 8 Subsections (1) and (2). The application for Section 8(3) relief was refused because inter alia, (paragraph 41 of the judgment):

> ***" The fact that Mr. Salter's liability in respect of the $160,000 part of the $250,000 related to a sum he had not been lent and from which he had had and would have no benefit, a sum owing to Cornerstone by a third party whose default would trigger the liability of the ladies under their guarantee and mortgage, and ought to have been made known to them."***

It is not surprising that their Lordships, in agreement with the dissenting judgment of Downer JA in the Court of Appeal, decided that it would not be equitable to restore the liability of the guarantors.

[65] In the result and, given my factual findings, there will be judgment for the Defendant against the Claimant on the claim and the counterclaim. It is common ground that the Claimant continued to make payments to the Defendant even after this trial commenced. My Orders therefore are:

1. The Claim is dismissed.
2. The Registrar of the Supreme Court shall having regard to my findings of fact and unless the parties otherwise agree; take an account as between the Claimant and the Defendant as to the balance due, if any, from the Claimant to the Defendant as at the 15th day of August 2018. The amount due if any shall be certified and judgment entered accordingly.
3. Costs to the Defendant to be taxed or agreed.
4. Liberty to apply.

David Batts
Puisne Judge