[2019] JMSC Civ 09

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV05095

BETWEEN	**IMPERIAL SUITES HOTEL LIMITED**	**CLAIMANT**
AND	**LEROY JOHNSON**	**DEFENDANT**

IN CHAMBERS

Seyon T. Hanson instructed by Seyon T. Hanson & Co. for the claimant

Keith Bishop and Andrew Graham instructed by Bishop & Partners for the defendant

June 1, 30, July 7, November 30 and December 8, 2017; March 13, 19, 23 and April 3, 2018; January 15, 2019

Application for striking out of Defence and/or Summary Judgment – Whether there exists reasonable grounds for defending the claim pursuant to rule 26.3(1)(c) of the Civil Procedure Rules or a real prospect of successfully defending the claim pursuant to rule 15.2(b) of the Civil Procedure Rules – Defendant lacking locus standi as either shareholder or creditor of company to defend action on behalf of company – The company was the mortgagor and has a separate legal personality – Only the company has the legal standing to challenge the transfer of title pursuant to mortgagee's power of sale – Allegation that property sold at an undervalue – Remedy for mortgagor lies in damages against the mortgagee under s. 106 of the Registration of Titles Act – Mortgagor company now non-existent – Indefeasibility of Certificate of Title except where there is fraud pursuant to s. 70 of the Registration of Titles Act – General and vague allegations insufficient for the purposes of establishing fraud – Robust statutory protection of the bona fide purchaser for value of property by virtue of sections 68 and 106 of the Registration of Titles Act – Purchaser not required to be concerned about manner in which the

mortgagee came by Registered Title pursuant to s. 71 of the Registration of Titles Act – Circumstances do not disclose claimant was or could subsequently be shown to be a party to a "continuing fraud" – Absent "continuing fraud" right to pursue action for fraud extinguished by the Limitation of Actions Act see sections 27, 30 and 46 and Interpretation Act section 41

D. FRASER J

The Application

[1] This application was filed by the claimant on November 11, 2016. Save for the first two orders sought, the application seeks the same reliefs as those in the parent claim filed on October 29, 2015. The orders sought are:

i) That the defendant's defence be struck out;

ii) That summary judgment be entered in favour of the claimant;

iii) A declaration that it is the legal and beneficial owner of land registered at Volume 1165 Folio 960 of the Register Book of Titles with civic address 5 Pointe Crescent, Ocho Rios in the parish of Saint Ann;

iv) An injunction to restrain the defendant his servants or agents from renting, leasing, collecting rent or otherwise dealing with the property and from threatening and/or preventing the claimant its servants or agents from entering upon and possessing the property;

v) An order for recovery of possession of the property against the defendant;

vi) An account of all the rental unlawfully collected by the defendant since April 2015 and ongoing;

vii) That the defendant pays to the claimant all the sums unlawfully collected for rental since April 2015/or in the alternative damages for trespass;

viii) That the defendant pays to the claimant the sum of $326,444.24 paid by the claimant to the National Water Commission for water usage on the property by the defendant his servants or agents.

ix) Interest;

x) Such further and/or other relief as this Honourable Court deems just;

xi) Costs to the claimant.

The Evidence

[2] The evidence on behalf of the claimant was contained in the affidavit of Dave Green. A part of the challenge to the application by the defendant is that Mr. Green is not an appropriate affiant on behalf of the company and that significant content in his affidavit is compromised by hearsay. These issues will be addressed later. At this point his affidavit will be utilised to outline the evidence on which the claimant sought to rely.

[3] The Affidavit of Dave Green filed on November 11, 2016 includes the following evidence outlined in summary:

i) That he is the Secretary of the claimant company and is duly authorized to swear the affidavit having direct knowledge of the events arising in this matter and by virtue of his position in the claimant. The claimant company is duly incorporated under the Laws of Jamaica – *(A copy of the Certificate of Incorporation was exhibited marked DG-1);*

ii) The claimant became the registered proprietor of the property registered at Volume 1165 Folio 960 of the register book of titles on or about **March 12, 2015** which it bought for US$350,000.00 – *(A copy of the Duplicate Certificate of Title is exhibited marked DG-2);*

iii) The defendant is a businessman who occupies the 3 bedroom penthouse unit on the 3rd floor at 5 Pointe Crescent, Ocho Rios in the parish of Saint Ann, however he has no legal or equitable interest in the property which was previously owned by L.F.G.J. General Contracting Company Limited from whom the property was transferred based on a power of sale pursuant to a mortgage;

iv) L.F.G.J. General Contracting Company Limited was removed from the register of Companies on February 15, 2010 – *(A copy of the Status Letter from the Registrar of Companies is exhibited marked DG-3)*;

v) The defendant is not a tenant of the property and to the best of his knowledge pays no rental for the part of the property he occupies;

vi) That an injunction was granted by this Honourable Court on September 12, 2016 restraining the defendant his servants or agents from: i) preventing the claimant its servants or agents from entering or remaining on the property in dispute in this

matter; and ii) collecting rent; until the determination of the claim. *(A copy of the Formal Order was exhibited marked DG-4)*. The defendant was also ordered to disclose details of all the leases and/or rental agreements he had entered into with tenants at the property. In the defendant's affidavit filed September 30, 2016 he failed to fully make those disclosures.

vii) The defendant's defence was filed out of time and makes allegations of fraud against a third party being the mortgagee who sold the property pursuant to powers of sale;

viii) The defendant's defence has no real prospect of success as the matters raised in the defence would only lead to damages against Mr. Aloi the mortgagee who exercised his powers of sale;

ix) Neither the claimant nor its managing director has been a party to any fraud as alleged;

x) That the claimant has not been able to enter into tenancy arrangements with the occupants of the property, and the defendant is acting in breach of the Injunction which prohibits him from collecting rental;

xi) That agents of the claimant are being intimidated upon visits to the property;

xii) That the defendant has allowed the payments for water supplied to the property to fall into arrears and the claimant paid an outstanding bill of $326,444.24 in September 2015 – *(A copy of National Water Commission and National Commercial Bank receipts were exhibited marked DG-8)*;

xiii) The defendant has no defence to the claim filed, and has no legal right to maintain possession and/or occupation of the property to the exclusion of the registered proprietor;

xiv) That any damages flowing from the sale of the property to the claimant would be against the person who exercised the power of sale to sell the property to the claimant and the only person who would be entitled to pursue a claim in damages would be LFGJ General Contracting Company Limited which is no longer in existence;

xv) That judicial time and costs would be saved by dealing with the matter summarily.

[4] The Affidavit of Leroy Johnson in response to that of Dave Green was filed on January 11, 2017. It includes the following evidence outlined in summary:

i) That he resides at Lot 5 Point Ocho Rios, C/o Falcon Crest Hotel, Ocho Rios in the parish of Saint Ann and he is a businessman and the defendant in the matter;

ii) That though the claimant is the paper title owner of the premises registered at Volume 1165 Folio 960 of the Register Book of Titles as it was "sold" to the claimant by Mr. Leonard Aloi, that sale was procured by fraud as Mr. Leonard Aloi and other persons:

(a) Caused his name to be associated with the Incorporation of L.F.G.J General Contracting Company Limited;

(b) Caused his address and other personal details to be associated with the said Company;

(c) Without his knowledge and/or consent wrote a signature resembling his signature on documents, including the Instrument of Transfer, on the Company documents used to Incorporate L.F.G.J General Contracting Company Limited; and

(d) Presented the Incorporating documents as a legitimate Company that was used to purchase Lot 5 Point Ocho Rios in the parish of Saint Ann.

iii) That the premises is about one and one half acres of land in the heart of Ocho Rios on which is a 30 bedroom Hotel; three big halls that include an entertainment area; six shops and a three bedroom pent house. The sale price of US$350,000 is a massive reduction on the real value of the premises which was valued by two reputable valuers. *(Copies of those valuations were exhibited marked LJ500 and LJ600);*

iv) That in "selling" the property to the claimant, Leonard Aloi failed and/or neglected to give the required statutory notice under the Registration of Titles Act;

v) That the claimant was incorporated months before the alleged purchase and does not seem to have a bank account or any business in Jamaica or anywhere in the world.

vi) That his legitimate Company incorporated in New York City in the United States of America is L.F.G.J. General Contracting Company Inc. and it is clear Leonard Aloi and others formed L.F.G.J. General Contracting Company Limited to confuse and deceive himself and others;

vii) That it was money from his savings and investments loaned to his company that was used to purchase Lot 5 Point Ocho Rios in the parish of Saint Ann;

viii) That in recent years a hand writing expert examined questioned documents used to transfer Lot 5 Point Ocho Rios and opined that the signatures on the Transfer and Company documents were not his – *(A copy of the Instrument of Transfer and the*

Report from the hand-writing expert were exhibited them marked LJIOO and LJ200 respectively);

ix) That his correct signature is on the Agreement for Sale and also his correct Company L.F.G.J General Contracting Co. Inc.[1] *(A copy of the Agreement is exhibited marked LJ300);*

x) That he received legal advice that a Company incorporated using fraudulent documents did not hold and could not have given a good legal title to the claimant;

xi) That after receiving the handwriting expert's report he reported the matter to the police which have provided several letters to him over the years – *(Copies of the letters were exhibited marked LJ400)*. He understands the police intend to interview agents of the claimant to determine if they have breached the law;

xii) That the issue of fraud will be a part of the claim against Leonard Aloi in one of the Supreme Court matters and he has instructed his lawyers to make an application to consolidate the matters in the Supreme Court with this claim and/or join this claimant to those matters;

xiii) That at the time the property was transferred, the issue whether or not any sum was owed to the mortgagee was and remains a live issue, as the appeal is still pending before the Court of Appeal;

xiv) That when the injunction was granted to the claimant the court indicated that there were triable issues to be determined;

xv) That he has already instructed his attorney-at-law to file for extension of time and/or to allow the Defence filed to stand;

xvi) That the Managing Director of the claimant, Carl Roberts resides in New York and is associated with the same building that Leonard Aloi works from for several years. To the best of his knowledge, information and belief, Leonard Aloi and Carl Roberts are close friends and as such the property was conveniently transferred to Carl Roberts' claimant company as part of the continuing fraud.

xvii) That the application should be denied.

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[1] This is a Memorandum for Sale dated 23rd day of August 1983 where the purchaser of the land comprised in Certificate of Title registered at Volume 1165 Folio 960 was L.F.G.J General Contracting Co., Inc. said to have its registered office in Ocho Rios.

The Submissions

Counsel for the Claimant

[5] Counsel for the claimant submitted that the defendant has no *locus standi* to challenge the claimant for the ownership of the disputed premises as he has no legal or equitable interest in the land. This is so as the registered owner immediately prior to the claimant was L.F.G.J. General Contracting Company Limited a separate legal personality from the defendant.

[6] Based on sections 68 and 106 of the **Registration of Titles Act (ROTA)**, the claimant being endorsed on the Certificate of Title should be accepted as the registered proprietor. Further as the claimant purchased the property pursuant to a mortgagee's powers of sale the statutory protection provided to the claimant means that any remedy lies only in damages and solely against the mortgagee who exercised the power, and not against the claimant. See the cases of ***Lloyd Sheckleford v Mount Atlas Estate Limited*** SCCA 148/2000 (December 20, 2001) and ***Cabot Paul v Victoria Mutual Building Society*** 2007HCV05120 (February 29, 2008). The defendant's predicament is complicated by the fact that the company that could have sought to take any action against the mortgagee no longer exists.

[7] As the defendant has no *locus standi* the question arises whether the claimant is entitled to obtain summary judgment. Similar provisions govern the exercise of the court's discretion to strike out a defendant's defence and to order summary judgment. See Rules 15.2 and 26.3 of the **Civil Procedure Rules** 2002 as amended through 2011 (CPR). Once an applicant/claimant asserts that the respondent has no real prospect of success, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case *"which is better than merely arguable".* He must show that he has *"a 'realistic' as opposed to a 'fanciful' prospect of success".* See ***Ase Metals NV v***

Exclusive Holiday of Elegance Limited [2013] JMCA Civ 37 and ***ED & F Man Liquid Products Limited v Patel et al*** [2003] EWCA Civ 472.

[8] In the instant case the defendant's case not only has no realistic prospect of success, and shows no reasonable grounds for defending the claim, but also taken at its highest does not even rise to the level of a fanciful prospect of success, which even if it did, would not be enough to resist the application.

[9] The defendant has filed a defence disclosing the issues he intends to rely on, but it was filed out of time and there was no application to extend the time for its filing. Further concerning the defendant's allegations of fraud, and the consequential effect, if any, they should have on the summary judgment application, counsel advanced that:

i) The allegations of fraud are against the mortgagee not the claimant. Any forgery would have taken place long before any sale to the claimant;

ii) While questioning the propriety of the tenure of the previous registered proprietor the defendant has failed to indicate the fact that he has consistently provided instructions on behalf of the previous registered proprietor in commencing and pursuing claims in court geared towards resisting paying the mortgage owed by L.F.G.J. General Contracting Company Limited. On the mortgage being found to be due and payable, the defendant sought to distance himself from the company which he says is fraudulent.

iii) The defendant has rented from and lived in what he says is a fraudulent company's property for years. He would therefore have acquiesced in, ratified or been a party to the fraud. The defendant could not approbate and reprobate as it suited him.

iv) The Report of the handwriting expert was received in 2009, which was the latest possible time the defendant could say the alleged fraud came to his attention. He has however not brought a claim of fraud against anybody. Had

he brought a claim of fraud he could not have continued trying to avoid the payment of the mortgage. The defendant was now affected by the limitation period as more than six years had elapsed since the latest time it could be said he discovered the fraud.

v) The claimant was a bona fide purchaser for valuable consideration who had not assisted in the commission of the fraud as alleged, and had no reason to believe that any such fraud had been committed. Considering the date of the report from the handwriting expert the defendant has not brought any evidence that he has instituted a claim for the alleged fraud within the six year limitation period either of the fraud being committed, or of it being discovered. However such a claim in any event would be limited to Mr. Aloi and other persons known and unknown and would not raise any defence to the instant claim nor assist the defendant in resisting the summary judgment application.

See ***Bank Fur Gemeinwirtschaft Aktiengesellschaft v City of London Garages Ltd. and others*** [1971] 1 W.L.R. 149; ***Lloyd Pommells et al v Donald Kerr et al*** [2015] JMCC Comm 26; ***Applegate v Moss*** [1971] 1 Q.B. 406; ***Doris Willocks v George Wilson and Doreen Wilson*** (1993) 30 J.L.R. 297 and **The Limitation of Actions Act** section 27.

Counsel for the Defendant

[10] Counsel for the defendant submitted that the claimant must have been relying on the CPR Part 26.3 (b) or (c) for the striking out application and Part 15 for the summary judgment. Concerning the striking out he submitted he did not think it was being pursued under Part 26.4, but the claimant had not made it clear the evidential basis on which the striking out should be based. There was no suggestion of a lack of cause of action, deficiency in the statement of case, *res judicata* or abuse of process.

[11] He argued that on most occasions the striking out would end the matter and there would be no need for summary judgment, though if the claimant wanted judgment

he could proceed to obtain it. See CPR r. 26.5. Counsel cited in support the cases of ***The Minister of Housing v New Falmouth Resorts Limited*** [2016] JMCA Civ 20 at paras 18 and 19, and ***Three Rivers District Council v Bank of England (No. 3)*** [2001] 2 All ER 513.

[12] He further submitted that the court needs to determine whether the process of discovery would assist in the just resolution of the issues and therefore the matter should be allowed to proceed. He highlighted that the issue of forgery was raised by the defendant in a context where there were two companies with similar names save for the fact that one ended with Limited registered in Jamaica and the other, his company, ending with Inc., registered in New York.

[13] Counsel further advanced that the opinion of the handwriting expert supported the defendant's allegation of fraud which is being investigated by the fraud squad. This would bring into play sections 70 and 71 of the **ROTA** and the ability to particularise the fraud. From looking at the two valuation reports, one from Concepts Real Estate Management Limited dated September 28, 2011 marked LJ500 valued the premises at $170,000,000, the other from V.B. Williams Realty Company Limited dated April 15, 2015 marked LJ600 at $202,000,000, it is clear the premises was sold at a significant undervalue. Further, the assertion by the defendant was that Mr. Carl Roberts the Managing Director of the claimant company was in another jurisdiction avoiding the investigations. There was therefore a serious issue to be tried concerning fraud, as the authorities show that purchasers must come with clean hands.

[14] He further submitted that section 106 of the **ROTA** relied on by counsel for the claimant seems to contemplate a situation where there was no fraud, e.g. when a mortgagee undersells and the remedy is in damages.

[15] Concerning the application for summary judgment, counsel submitted that under Part 15 (2) (b) of the CPR the claimant would have to prove that the defendant has no real prospect of successfully defending the claim. This in a context where he

contended the affidavit relied on by the claimant was not compliant with Part 30.3 of the CPR as the authority/ability of the affiant to swear the affidavit was not clearly established, and the affidavit did not clearly state which matters were recounted on the basis of the affiant's own knowledge and which were based on his information and belief supported by the source of the information.

[16] He specifically challenged/commented on the following in the affidavit of Dave Green:

i) He is the secretary not an officer of the company like a director and there was no indication when he became secretary;

ii) The suggestion that the defendant had neither a legal nor an equitable interest in the property was countered by the defendant's evidence that he had loaned $50,000 to L.F.G.J. General Contracting Company Inc. to purchase Lot 5 Point Ocho Rios (see paragraph 6 of the defendant's affidavit) which would suggest he had an equitable interest in the property;

iii) The assertion that L.F.G.J. General Contracting Company Limited was removed from the Companies Register was possibly hearsay. It would have been better to get a member of the Companies Office to give an affidavit;

iv) He should indicate his knowledge of the purpose for which the property was acquired outlined in paragraph 7, for example, was he walking around with Carl Roberts at the point of the sale and a part of the negotiations? Further while there is an order of the court that the defendant should not collect rent his occupation was not challenged;

v) Paragraph 8 which spoke to the financial challenges of the claimant was not supported by any audited accounts or statement from a director. It was also prejudicial as that information was not necessary to address the question of summary judgment;

vi) Paragraph 10 which outlined the terms of the injunction granted against the defendant was prejudicial and did not assist the application;

vii) Paragraph 12 which suggested that the defendant had not complied with disclosures ordered in the injunction was prejudicial and should be struck out;

viii) Paragraph 13 which spoke to a survey of occupants of the property should be struck as the claimant being a legal personality, it should have been stated who did the survey and in any event that information was improper for the summary judgment application;

ix) Paragraph 14 - concerning the fact that the defendant's Defence was filed out of time without the consent of the claimant or an order for extension of time obtained from the court, the court has wide discretion and applications for extension of time now turn more on the justice of the case. The overriding objective should therefore be applied;

x) Paragraph 15 – The assertion that the only remedy available to the defendant was possibly damages was answered by the defendant in his Defence and paragraph 9 of his affidavit. Based on the forgery that caused L.F.G.J. General Contracting Company Limited to be formed it did not have proper legal title and hence could not have passed proper legal title to the claimant. (See exhibits LJ 100 and LJ 300). Damages would not be the appropriate remedy if no good title was given and also because the statutory notice required by section 106 of the **ROTA** was not sent. The question of fraud requires more investigations. The defendant based on interrogatories may get more information to support his indication of fraud and this should cause the matter to go to trial;

xi) Paragraph 16 – The statements attributed to the defendant concerning his posture in relation to L.F.G.J. General Contracting Company Limited in legal proceedings may be hearsay as Mr. Green did not for example say he had perused the documents and they were signed by the defendant;

xii) Paragraph 17 in which Mr. Green sought to exonerate the claimant and its Managing Director Mr. Roberts from any fraud was in breach of CPR rule 30.3 as Mr. Green has not shown how he came by the knowledge of where Mr. Aloi and Mr. Roberts' offices were, such as he having travelled to New York. Therefore his assertions should be struck. Further neither Mr. Aloi nor Mr. Roberts gave an affidavit speaking to their involvement in the purchase of the land;

xiii) Para 19 – which speaks to the claimant wishing to take measurements to facilitate additions and renovations should not have been included. However in any event there is an order of Palmer J that agents of the claimant can enter and remain on the land;

xiv) Paragraph 20 was prejudicial as although from the injunction it was clear the defendant should not collect rental, there was no indication that the claimant should collect the rental. That was a matter that should be further adjudicated by the court;

xv) Paragraph 21 – Though the defendant admits to being in possession that does not mean he must be collecting rent;

xvi) Paragraph 22 – states the problem as the court that granted the injunction and found that there is an issue to be tried on the question whether or not the claimant had a good title, did not indicate to whom the rent should be paid There ought to have been an arrangement to have the money paid to a 3rd party to pay the bills and the rest of the money put in escrow;

xvii) Paragraphs 23, 26, 27 and 28 that deal with issues of rental to tenants and the maintenance of the pool are replete with hearsay;

xviii) Paragraph 29 – it is not the case that damages would be incalculable;

xix) Para 30 – concerning the assertion that the defendant has no right to possession, there is no request in the application to have Mr. Johnson

removed from possession. Therefore that assertion was more prejudicial than probative;

xx) Concerning paragraphs 31, 32, 35 and 37 which spoke to the mortgage taken out by L.F.G.J. General Contracting Company Limited and subsequent litigation he reiterated that the defendant's contention was that L.F.G.J. General Contracting Company Limited was not legitimate as the defendant's signature had been forged. Further that after the court upheld the mortgage though the defendant was unable to fulfil the conditions of the stay originally granted the appeal is still pending and the claimant should have been joined in the matters before the Court of Appeal.

[17] After reviewing aspects of the defendant's affidavit that addressed issues challenged in the affidavit of Dave Green counsel for the defendant submitted that if there was nothing that could connect the claimant to fraud then the defendant has no case. However he contended that was not the case and the court should not form the view that nothing could be unearthed to establish fraud or dishonesty especially as the court had not heard from Mr. Carl Roberts who played a central role in this process.

[18] Counsel advanced that if the impugned sections of Mr. Green's affidavit were struck out both the paragraphs and their accompanying exhibits would go leaving insufficient material on which the court could make an adverse finding against the defendant. Additional material counsel asked the court to consider was that based on the defendant's investigation the claimant had no address, and the Memorandum of Sale and Transfer by which the claimant obtained the property which should have been stamped were not. Counsel maintained that if any one of the several issues raised in the defendant's Defence have merit then the matter should proceed to trial. Counsel therefore advanced that the defendant had a good arguable case with a chance of succeeding, the claimant was not entitled to summary judgment and the application should be dismissed with costs to the defendant.

[19] Counsel invited the court to review the following authorities: ***Three Rivers District Council v Bank of England*** (No. 3) [2001] 2 All ER 513; ***Swain v Hillman*** [2001] 1 All ER 91; ***Eureka Medical Ltd. v Life of Jamaica Ltd*** Claim No. 2003HCV01268 (October 12, 2005) especially paragraph 8 where Mangatal J looked at the ***Three Rivers District Council*** case and indicated that it, *"stated that the question whether a claim has no real prospect of succeeding at trial is a question that has to be answered having regard to the overriding objective of dealing with the case justly";* ***Ase Metal NV v Exclusive Holiday of Elegance Limited*** [2012] JMCA Civ 37, especially paragraphs 10 – 11 and 14 – 18; ***Leonoria Taylor v Hojapi Limited*** [2015] JMSC Civ 119, especially paragraph 12 and ***Dotting v Clifford and Spanish Town Funeral Home Ltd.*** Claim No. 2006HCV0338 (March 19, 2007)

Counsel for the Claimant in Reply

[20] In submissions in reply counsel for the claimant pointed out that Part 26.5 of the CPR deals with unless orders not with regular striking out orders made after an application by a party. The claimant was however proceeding under rule 26.3 (b) & (c) which gives the court power to strike out.

[21] He also emphasized that no claim for fraud was filed against the claimant, Mr. Aloi or Mr. Tomlinson. Further that no counterclaim was made against the claimant nor were particulars of fraud pleaded. The issue of fraud therefore could not be used as a defence in the manner the defendant sought to deploy it. He highlighted that the claimant did not purchase from the previous registered proprietor said to be tainted with fraud but from the mortgagee. He also reminded the court that section 68 of the **ROTA** protected the indefeasibility of the Certificate of Title even if there were irregularities in proceedings prior to the registration of the Title. Concerning the defendant's claim that he had an equitable interest in his company he submitted that there was no loan documentation nor any indication that the defendant had been repaying a loan.

[22] Concerning the challenges to the affidavit of Dave Green counsel submitted that the affidavit complied with 30.3(2)(b) as at paragraph two he stated he had direct knowledge of the events arising in the matter by virtue of his position of Secretary in the claimant. Further, he maintained that throughout the affidavit Mr. Green stated the basis of his belief where he did not have personal knowledge and the person from whom he obtained the information.

[23] Regarding the authority of Mr. Green as Secretary to swear to the affidavit, counsel advanced that evidence from a company does not have to be given by an officer. Whoever has the information can be authorised by the company to give evidence. Significantly no authority had been provided to support the position that a company secretary cannot give evidence on behalf of a company.

[24] The significant note counsel closed on however was that regardless of challenges to the affidavit, the fundamental points it made which remained unshaken were that the defendant was not the owner of the property, and L.F.G.J. General Contracting Company Limited which had owned the property had been removed from the registry and no longer exists as a legal entity. Further even if there was an entity to make a claim for some breach of the mortgagee's duty the remedy would only sound in damages.

Analysis

The Law on Striking Out and Summary Judgment

[25] The claimant has applied both for the striking out of the defendant's case as well as for summary judgment to be entered in its favour. CPR rule 26.3 (c) provides:

> In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> …
>
> (c) that the statement of case or part to be struck out discloses no reasonable grounds for bringing or defending a claim; …

[26] CPR rule 15.2 addresses the power of the court to grant an order for summary judgment. It states:

> The court may give summary judgment on the claim or on a particular issue if it considers that –
>
> (a) the claimant has no real prospect of successfully defending the claim or the issue; or
>
> (b) the defendant has no prospect of successfully defending the claim or the issue.
>
> (Rule 26.3 gives the court power to strike out the whole or part of *(sic)* statement of case if it discloses no reasonable ground for bringing or defending the claim.)

[27] The reference in CPR rule 15.2 to rule 26.3 is logical given the similarity in their terms. In ***Ase Metals NV v Exclusive Holiday of Elegance Limited*** Brooks JA observed at paragraph 13, *"The similarity of the effect of these rules allows a conflation of the principles…"* He thereafter, as I shall shortly outline, proceeded only to refer to the principles applicable to the grant of an order for summary judgment.

[28] Before that outline, I interpose a reference to the case of ***Leonoria Taylor v Hojapi Limited*** where Sykes J (as he then was) adopted a similar approach. At paragraphs 12 – 13 he stated:

> [12] The court also refers to the discussion in Three Rivers District Council and others v Governor and Company of the Bank of England [2003] 2 AC 1 by Lord Hope of striking out applications and summary judgment applications. His Lordship observed that while the difference between the two tests is not easy to determine the court must seek to give effect to the overriding objective. His Lordship observed that the practical effect of an application under either head is the same, namely termination of the proceedings at an early stage before significant sums of money are expended on a claim that cannot succeed or fanciful *(sic)*. There is not much to choose his Lordship observed, between a test that asks 'whether the claim is bound to fail' (striking out) and one that asks, 'whether there is a real prospect of success' (summary judgment).

> [13] Lord Hope also indicated that the court had a discretion to treat striking out applications as summary judgment applications and act accordingly. This court has elected to do that in this application…This permits the court to look wider than the pleadings and look at affidavit evidence.

[29] There is thus no incongruence or procedural discord, occasioned by an application that seeks relief under both rules. Returning to the case of ***Ase Metals NV v Exclusive Holiday of Elegance Limited*** Brooks JA after having stated that he would only refer to the principles applicable to the grant of an order for summary judgment at paragraphs 14 – 15 outlined that:

> [14] In **ED & F Man Liquid Products Ltd v. Patel and Another** [2003] EWCA Civ 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment:
>
> > "…the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success..."
>
> [15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable" (see paragraph 8 of **ED & F Man**). The Defendant must show that he has "a 'realistic' as opposed to a 'fanciful' prospect of success".

[30] Brooks JA went on to emphasize that the standard of a 'realistic' as opposed to a 'fanciful' prospect of success taken from ***Swain v Hillman*** [2001] 1 All ER 91 was meant to indicate that the requirement was not to prove that a defendant had no prospect of success, as that would be setting the standard too high. Of significance, he additionally pointed out that in ***Swain v Hillman*** Lord Woolf MR also explained at page 95 that:

> [T]he proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

[31] While the court should not engage in a mini-trial in ***ED & F Man*** the court gave important procedural guidance by indicating at paragraph 10:

> [T]hat does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable…

[32] In ***Swain v Hillman*** Lord Woolf MR at page 94 highlighted that the power to make an order for summary judgment was in keeping with the overriding objectives as it saves expense, time and resources and enables a claimant to know as soon as possible if his case is bound to fail or to succeed.

The Challenge to the Affidavit of Dave Green

[33] I accept the submissions of counsel for the claimant that Mr. Green was authorised to swear the affidavit as Secretary and based on the knowledge he gained by virtue of his position in the company. Where he did not have personal knowledge sometimes he did indicate the source of his information and belief. There were however occasions when he did not most notably when referring to matters concerning the tenants at and the maintenance of the property and when refuting the allegations of fraud against the claimant and its managing director.

[34] The fundamental elements of the affidavit I however find are unimpeachable. There is no challenge to the fact that the claimant obtained the property from the mortgagee by power of sale and holds the registered title to it. The challenge to the production of the status letter from the Registrar of Companies I also find misconceived. No challenge was made to its authenticity or accuracy. The only issue was whether or not he could properly exhibit it. Pursuant to CPR rule 30.3 (2) (b) Mr. Green did show the source of his information. The letter was therefore properly before the court. The relevant history of the litigation involving the defendant is revealed in the court injunction and the judgments delivered which are public records of the courts. I therefore do not find that there is any evidential

insufficiency concerning the main planks on which counsel mounted the case for the claimant

The Issue of Locus Standi

[35] This issue is significant as its determination by itself could be dispositive of the matter. The defendant asserts that he loaned $50,000 to L.F.G.J. General Contracting Company Inc. to acquire the property in Ocho Rios. That action he says would entitle him to an equitable interest in the company. He further alleges that L.F.G.J General Contracting Company Limited was fraudulently incorporated in 1987. He received one share and Mr. Dennis Tomlinson the other share. He was therefore co-owner of L.F.G.J. General Contracting Company Limited to which the property was subsequently transferred subject to a mortgage in 1994.

[36] Counsel for the claimant has however made two significant points. The first that only L.F.G.J. General Contracting Company Limited would have *locus standi* to challenge the sale of the property as it was the owner of the property and a separate legal entity from the defendant.

[37] The resolution of this issue sounds in company law. Multiple cases have addressed this area of law. I will refer to three. In ***Pan Caribbean Financial Services Ltd v Robert Cartade and Ors, Jamaica Redevelopment Foundation Inc v Robert Cartade and Ors, National Investment Bank of Jamaica Ltd v Robert Cartade and Ors and Robert Cartade and Ors v Pan Caribbean Financial Services Ltd and Ors*** [2011] JMCA Civ 2 one of the issues the Court of Appeal had to consider was whether individual shareholders could bring an action on behalf of a company. At paragraph 51, the court stated:

> The appellants…made two valid points in relation to the first issue. The first is that the respondents Robert Cartade, Jack Koonce and Shirley Shakespeare had no locus standi to bring the action. As shareholders they could not properly maintain the claim for damages on behalf of Western Cement. This is so because they would have been in breach of the rule in **Foss v Harbottle**. That case held that in seeking redress for a wrong done

> to a company, the company was the only proper claimant in an action to recover in respect of the wrong.

[38] In ***International Hotels (Jamaica) Ltd v Proprietors Strata Plan No. 461*** [2013] JMCA Civ 45 this principle was reiterated at paragraph 63. The Court of Appeal said:

> It is therefore clear that a company generally falls to be treated as an independent person, separate and distinct from its shareholders, capable of holding land and other property, entering into contracts and incurring debts and other liabilities in its own name…As Slade LJ, delivering the judgment of the Court of Appeal in **Adams v Cape Industries plc** [1990] Ch 433 … observed (at page 536): "…the court is not free to disregard the principle of **Salomon v A Salomon & Co Ltd** [1897] AC 22 merely because it considers that justice so requires…"

[39] Finally on this point I refer to ***Ocean Chimo Ltd v Royal Bank (Jamaica) Ltd (RBC) and Ors***, *and* ***Delroy Howell v Royal Bank of Canada and Ors*** [2015] JMCC Comm. 22. This consolidated case concerned applications for summary judgment by the 3rd, 4th, 5th and 6th defendants in the first matter (Ocean Chimo suit). It arose from an arrangement between Ocean Chimo and RBC Royal Bank (Jamaica Limited) and RBC Royal Bank (Trinidad and Tobago Limited) (the lender banks) for a syndicated loan to be made to Ocean Chimo. The loan was secured by a mortgage and a debenture over the property and the fixed assets of Ocean Chimo the then Hilton Kingston hotel. It was also secured by the assignment of the Fire and Allied Perils insurance over the buildings and assets of the hotel. Additionally the loan was also guaranteed by Mr. Delroy Howell the Chief Executive Officer and Chairman of Ocean Chimo.

[40] The claimants in both claims argued among other things that there was conspiracy as well as fraud and loss of reputation. In the 2nd matter brought by the CEO and Chair of Ocean Chimo, the remedies sought by Mr. Howell were in effect based on the same set of facts but applied in respect to his personal guarantee given for the loans. Mr. Howell alleged that there was a conspiracy amongst the defendants themselves and with the Hilton Management resulting in an agreement between

the lenders and Hilton to have the lenders appoint a receiver manager and cause that receiver/manager to sell the hotel and so deprive him of his rights to the assets of Ocean Chimo.

[41] At paragraphs 239 to 240 Edwards J (as she then was) stated:

> [239] The gravamen of Mr. Howell's claim is that because of the actions of the defendant he has suffered loss of valuable property (that is the hotel). However Mr. Howell has no locus standi to bring such a claim in his personal capacity or as a guarantor. A shareholder cannot bring action to recover losses suffered by a company. Only a company can do so. See **Johnson v Gore Wood & Co** [2001] 1 All ER 481 and **Stein v Blake et al** [1998] 1 All ER 724.
>
> [240] Mr. Howell personally guaranteed the loan to Ocean Chimo but has not suffered any loss under the guarantee since the call was made to him to pay up under the guarantee and he ignored it. No payments were made and therefore no loss was suffered. This cause of action must also fail in the face of the absence of evidence to substantiate any pleaded losses.

[42] Based on the time honoured principles of company law outlined in these cases, counsel for the claimant's submissions on the *locus standi* point are powerful and irresistible. Only L.F.G.J. General Contracting Company Limited would have had the standing to bring a legal challenge in relation to the sale. I will subsequently deal with the issue of against whom such an action may have laid and for what cause of action, but at this juncture it is sufficient to stipulate that the point advanced by counsel for the claimant that the defendant lacks *locus standi* has been made out. I am also aware and will later additionally address, the contention of counsel for the defendant that, due to the fraud alleged, L.F.G.J. General Contracting Company Limited did not receive good title to the property and therefore could not pass good title to the claimant.

[43] At this point however it is important to deal with the further submission of counsel for the claimant that the one entity that would have had standing to challenge the outcome of the sale no longer exists. The status letter from the Companies Office of Jamaica, which has not been challenged as inaccurate, indicates that L.F.G.J.

General Contracting Company Limited incorporated December 8, 1987 was removed on February 15, 2010 and no longer appears on their Register. Therefore the company that would have standing to bring any challenge to the mortgagee's exercise of the power of sale no longer existed, long before the sale took place. Accordingly there was no legal personality in being, that could have been a victim of any impropriety regarding the sale.

[44] Of course it is the defendant's case that his genuine company was L.F.G.J. General Contracting Company **Inc.** Hence, when the land was transferred to L.F.G.J. General Contracting Company Limited which he alleges was fraudulently created, L.F.G.J. General Contracting Company Limited would not have received good title. If that is true, and if as he maintained the land was initially purchased by L.F.G.J. General Contracting Company **Inc** as per Memorandum of Sale in 1983 then, by logic the property would have remained that of L.F.G.J. General Contracting Company **Inc.** It is that company if it exists that would have to seek to sustain any challenge to dealings with the land. On no scenario would the defendant in his personal capacity have standing. Therefore on the issue of *locus standi* alone, the claimant is entitled to succeed.

Is the Defendant entitled to resist the application based on an allegation of Fraud?

[45] While the matter could be disposed of solely on the *locus standi* point, it is important to consider the matter further in case I am wrong on that point. The issue that consumed most of the arguments in this case surrounded whether it was possible that if the matter proceeded to trial the defendant would be able to successfully challenge the claimant's Title to the property based on the claimant or its principal Mr. Carl Roberts being a party to fraud in its acquisition of the property.

[46] Counsel for the defendant acknowledged that if the court were to find that any alleged fraud would have ended with Mr. Aloi, then that would be the end of the defendant's case. If on the other hand there was other evidence that could be

forthcoming linking the claimant through its principal(s) to alleged fraud, then the matter should proceed to trial.

[47] Counsel for the claimant on the other hand was resolute that there was no indication of fraud that could be laid at the doorstep of the claimant or Mr. Roberts. Consequently, any successful complaint that the defendant may have concerning the manner in which the power of sale was exercised, would only sound in damages against Mr. Aloi, and the company which had the *locus standi* to pursue such a remedy no longer existed.

[48] The contending views require analysis of different sections of the **ROTA** and engage contemplation of the nature of the allegations of fraud levelled in this matter, the steps taken by the defendant to address them, and in particular the possibility of the allegations involving the claimant being substantiated.

[49] Counsel for the claimant hinged one limb of his arguments on the effect of sections 68 and 106 of the **ROTA**. Section 68 provides that a Certificate of Title is conclusive evidence of title subject to the subsequent operation of any statute of limitations. It reads:

> No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.

[50] Section 106 of the **ROTA** addresses the power of sale granted when there is default on a mortgage or charge. It provides:

> If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such

> other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.

[51] Counsel for the claimant therefore relied on the indefeasibility of the title conferred by section 68 of the **ROTA** and the remedy limited to damages prescribed by section 106 of the **ROTA,** in favour of any person *"damnified by an unauthorised or improper or irregular"* exercise of the power of sale, and only against, *"the person exercising the power."*

[52] In ***Lloyd Sheckleford v Mount Atlas Estate Ltd*** the plaintiff/respondent (mortgagor) had successfully obtained an injunction restraining the exercise of the powers of sale contained in a mortgage, after the defendant/appellant (purchaser) had signed an agreement to purchase the property in question, paid the purchase price and signed the transfer, though the transfer had not yet been registered on the Certificate of Title. The Court of Appeal allowed the appeal of the defendant/appellant and discharged the injunction on the basis of the strong protections afforded to the purchaser of property sold under a power of sale pursuant to a mortgage. Forte P. who delivered the leading judgment stated at page 14 as follows:

> I am of the view…that in our jurisdiction by virtue of section 106 of the Act, the purchaser is protected when he enters into contract with the mortgagee

> and consequently the only remedy available to the mortgagor is in damages.
>
> In any event in my judgment, on a simple reading of section 106, it is clear and unambiguous that the legislature intended to give the purchaser the protection as soon as the mortgagee, in the exercise of his power, enters into a contract with a bona fide purchaser for the sale of the mortgaged property.

[53] Then at page 16 he stated:

> [T]he express restriction in section 106, puts it beyond doubt that the protection to the purchaser was created as soon as the mortgagee had entered into the agreement to sell the property to the purchaser. In the instant appeal further steps had been taken, - the full purchase price had been paid and the transfer had been executed.

[54] At page 19 Harrison J.A. referring to the effect of section 106 put it this way:

> Clearly in section 106, the protection provided to both the purchaser from enquiry and the Registrar "…upon production of a transfer made in professed exercise of the power of sale…" exists before any registration of transfer has been effected. The "immunity" therefore exists from the time when the contract is entered into.

[55] Of course, in the instant case, the claimant is on even stronger ground as the process has been fully completed. The transfer has been effected and the Certificate of Title registered in the name of the claimant. However, as will become important in my later analysis, in response to the contention of counsel that "since the mortgagor still remained the registered owner, he has an indefeasible title which can only be removed on registration of the transfer or by the exceptions in section 70", Forte P had earlier observed at page 8 that:

> In my view, that indefeasible title is subject to the statutory protection given to the ***bona fide purchaser***, and is akin to the exceptions to indefeasibility of title stated in section 70 of the Registration of Titles Act. (Emphasis added)

[56] The effect of section 106 of the **ROTA** was also considered in ***Cabot Paul v Victoria Mutual Building Society.*** In that case the claimant and his wife having

defaulted on repayment of a mortgage taken out with the Society, their property was put up for sale. A purchaser having been identified through public auction, the Society and the purchaser both executed the transfer to have the property transferred to the purchaser. The claimant filed a claim to have the sale set aside on the ground that the Society had acted in bad faith given the small amount of money owed and the fact that he was willing and able to repay the debt. He sought an injunction to restrain the society from completing the sale pending the outcome of the claim. Brooks J (as he then was) applying the principle outlined in ***Lloyd Sheckleford v Mount Atlas Estate Ltd*** refused the application holding that based on section 106 the only remedy that would be available to the claimant at trial if he established his case against the mortgagee Society, would be damages.

[57] As indicated earlier a lot has however been made by counsel for the defendant of the alleged fraud perpetrated against Mr. Johnson by Mr. Aloi, that he has sought to link to the claimant, as part of a continuing fraud to deprive the defendant of his property. For the purpose of the development of the argument I will for the moment ignore the *locus standi* point based on the separate legal personality of the companies the defendant has been associated with. The contention of the defendant requires an analysis of sections 70 and 71 of the **ROTA** and applicable case law.

[58] Those two sections provide:

> 70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a

> purchaser for valuable consideration or deriving from or through such a purchaser:
>
> Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement required by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument.
>
> 71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

[59] Section 70 therefore provides for the general indefeasibility of a registered title except in a case where it was obtained by fraud. Section 71 complements section 70 by indicating among other things that except in the case of fraud a person seeking to obtain registered land from a proprietor or mortgagor need not look behind the title or concern himself with the application of the purchase or consideration money.

[60] In seeking to refute the allegations of fraud, Mr. Hanson sought support from the case of ***Bank Fur Gemeinwirtschaft Aktiengesellschaft v City of London Garages Ltd and others***. The headnote contains a useful summary. It reads:

> A German bank, holder of bills of exchange, drawn in London and discounted in Hamburg, which had not been honoured on the due date, claimed summary judgment under *R.S.C., Ord. 14, r. 1* against the

defendants, two English companies, a director of the two companies and an Indian bank which carried on business in England, as drawer, acceptor and indorsers of the bills. The first three defendants sought leave to defend on the grounds of fraud and illegality on the part of the London manager of the Indian bank on the issue, acceptance and indorsement of the bills. The plaintiffs, in an affidavit in reply, supported by contemporary documents, set out facts which showed that the German company which had discounted the bills and for which the plaintiffs were agents, had at no time had reason to question the authority of the bank manager to guarantee or sign the bills on behalf of his bank, nor to suspect his bona fides. The Indian bank, which denied that their London manager had authority to bind the bank by his sole signature was given leave to defend, but the judge refused the first three defendants leave to defend. On appeal by those defendants: —

Held , dismissing the appeal, that there was uncontested evidence that the German company gave value in good faith and did so subsequent to any fraud or illegality at the earlier stages of the bill, and accordingly the defences of fraud and illegality failed; and since there was no other reason which justified the giving of leave to defend, the plaintiffs were entitled to judgment.

[61] In his concurring judgment Davies L.J. stated as follows at page 159:

> [I]t is a remarkable thing that here we have really no suggestion made by the defendants of an attack upon the bona fides of the plaintiffs. It is plain from contemporary documents that Ingeba did give value and the defendants received it… So that even if there were fraud or illegality, the plaintiffs or Ingeba show that subsequently value in good faith was given…

[62] For his part Philmore L.J. also concurring stated at page 160 that, "*The mere assertion of fraud or illegality can no more entitle defendants to have leave to defend than can a mere assertion that they gave value entitle the plaintiffs to judgment:"* He then at page 160 – 161 went on to quote Lord Watson's judgment in ***Wallingford v Mutual Society*** 5 App. Cas. 685 where he said at page 709:

> My Lords, it is a well-known and a very proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of common law, I think the terms of Order 14 would require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud, because I cannot think that a mere statement that fraud had been committed, is any compliance with the

> words of that rule which requires the defendant to state facts entitling him to defend. The rule must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true.

[63] The situation in this case is however different from that in the ***Bank Fur Gemeinwirtschaft Aktiengesellschaft*** case where there was no suggestion that the plaintiffs were themselves tainted by fraud. In the instant case counsel for the defendant alleges that fraud was perpetrated against Mr. Johnson by Mr. Aloi, in conjunction with the claimant, as part of a continuing fraud to deprive the defendant of his property. Later when the allegations are specifically examined, an assessment will be made of their cogency or lack thereof. It is to be noted that the cases decided under section 106 of **ROTA** have emphasised the robust protection guaranteed a bona fide purchaser of property for value from a mortgagee. The submissions of counsel for the defendant challenge the bona fides of the claimant as purchaser.

[64] As noted earlier counsel for the defendant candidly admitted that unless a case could be made that the allegations of fraud could plausibly extend to the claimant the basis of his objection to the application would evaporate. For allegations of fraud to have the effect desired by counsel for the defendant however as stated in ***Wallingford v Mutual Society*** there must be, *"not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true."* It is therefore important to outline a chronology of significant events in this matter with appropriate commentary that will assist in the analysis of the effect of these allegations on the claimant's application.

[65] The saga begins with the Memorandum of Sale for the property in dispute at an agreed sale price of $50,000 dated the 23rd day of August 1983. The vendors being Don Perreira, Audrey Robinson and Norton Francis and the purchaser L.F.G.J General Contracting Co. **Inc.** with registered office at Ocho Rios in the parish of Saint Ann. The defendant has averred that he loaned the company the

$50,000 and relies on that as a basis grounding his equitable interest in the property. He however provided no documentary proof of his loan to the company.

[66] Two other things are worthy of note here. Firstly, the defendant did not exhibit any Certificate of Incorporation or any other proof of the existence of a company owned by him in New York or anywhere else for that matter named L.F.G.J General Contracting Co. **Inc.** that had its registered office in Ocho Rios. Secondly, there is no indication that this sale was completed, as no transfer document was exhibited that conveyed the property to L.F.G.J General Contracting Co. Inc. Further, the Certificate of Title for the property does not reflect any transfer of the property from the vendors to L.F.G.J General Contracting Co. **Inc.** There is however a caveat endorsed on the Title dated 31st July 2009 lodged by L.F.G.J General Contracting Co. **Inc.** which indicates it is claiming to be the purchaser under an agreement for sale.

[67] Enter LFGJ General Contracting Company **Limited**, incorporated in 1987. The Companies Office of Jamaica Certificate of Incorporation dated November 6, 1987 shows that both the defendant and Dennis Tomlinson were each assigned one share. It is on this certificate that in the opinion of Beverly East, Forensic Document Examiner, provided September 24, 2009, the signature purporting to be that of the defendant Leroy Johnson was not made by him and further that it is highly probable that the same person who signed Dennis Tomlinson also signed the defendant's name.

[68] It is endorsed on the Certificate of Title for the property that on May 17, 1994 it was transferred to L.F.G.J. General Contracting Company **Limited**. The last owners listed on the Title prior to the transfer being Don Perreira, Audrey Robinson and Norton Francis. Significantly, in respect of that transfer the consideration money was listed as $50,000, the same amount as that contained in the Memorandum of Sale for the same property eleven years earlier. The main difference being that in the 1983 agreement the purchaser was listed as L.F.G.J. General Contracting Company **Inc**. Also on the said May 17, 1994 there was a mortgage registered to

"Leonard Aloi to secure monies mentioned in the Mortgage stamped to cover One Million Eighty-one Thousand Eight Hundred and Fifty-three Dollars United States currency with interest."

[69] The reason for that mortgage is revealed in the judgment of McCalla J, as she then was, in a suit brought in 1995 by the defendant then as 1st Plaintiff, LFGJ General Contracting Company Limited (2nd Plaintiff) and Falcon Crest Limited (3rd Plaintiff), against Mr. Leonard Aloi and Mr. Victor Markman, a receiver of the property owned by LFGJ General Contracting Company Limited. (Suit No. E.54 of 1995 jud. del. January 15, 2003). By agreement, the suit was discontinued against Mr. Markman at the start of the trial. The judgment indicates at page 1 that, *"The first plaintiff is a businessman who resides in St. Ann, Jamaica and is the person responsible for the management of the second and third plaintiffs."* At page 2, it was indicated that, *"The second plaintiff was at all material times the equitable owner of property in Ocho Rios, St. Ann on which it has built the Falcon Crest Hotel which it has leased to the first plaintiff."* It is not clear why the 2nd Plaintiff LFGJ General Contracting Company **Limited** was described as the "equitable" owner of property given that the relevant property had been transferred to it in 1994, though it was subject to a mortgage.

[70] The pleadings of the plaintiffs alleged that starting in 1985, Mr Johnson, the 1st plaintiff/the defendant herein, borrowed US$320,000 from Mr. Aloi to complete the furnishings and fittings of the Falcon Crest. That date, if true, would indicate that a company connected to Mr. Johnson had obtained the property after the Memorandum of Sale in 1983 and prior to the transfer to LFGJ General Contracting Company **Limited** in 1994. Was it as maintained by the defendant that when he signed documents in relation to LFGJ General Contracting Company **Limited** he thought he was signing in relation to LFGJ General Contracting Company **Inc.**? Was the property actually purchased in 1983, but the transfer not effected until 1994 or is/are there some other explanation(s)?

[71] The complaint in the suit was that that sum of US$320,000 and subsequent sums said to be loaned to the plaintiffs in loan amendment agreements incorrectly,

"included accrued interest in the principal sum specified in each new agreement" so that in effect the first defendant, *"was charging compound interest on the accrued interest."* (See page 4 of the judgment.).

[72] The mortgage sum of US$1,081,853.00 represented a consolidation of all the sums said to be owed and the suit sought among other things to have those loan agreements and the mortgage declared illegal and or unenforceable. By the 1st defendant's defence and counterclaim he sought primarily to have the various agreements and mortgage declared valid and enforceable. The court found that interest had been charged by Mr. Aloi in breach of the Money Lending Act and ordered among other things: ***1)*** On the claim that an account be taken by the Registrar of the Supreme Court to determine what amount, if any, is due by the Plaintiff to the 1st Defendant; and ***2)*** On the counterclaim a declaration that the loan agreements, lease, mortgage, debenture and securities are valid and enforceable to the extent which might be found to be due and owing to the 1st Defendant.

[73] What happened next was summarised by Brooks JA in a judgment in the application ***Leroy Johnson, LFGJ General Contracting Company and Falcon Crest Limited v Mr. Leonard Aloi and Mr. Victor Markman*** [2015] JMCA App 37. The registrar did the account and found that US$318,729.00, with interest on US$54,406.00, was due to Mr Aloi. Dissatisfied with the result, the applicants appealed to Campbell J who upheld the registrar's ruling. Still aggrieved, an appeal was lodged to the Court of Appeal in 2005 and a stay of execution of the order of Campbell J. was granted by Harrison P on 15 June 2006 on condition that the applicants paid into an agreed account in the names of the parties, US$200,000 within 30 days of the date of the order pending the appeal.

[74] Despite extensions of time to fulfill the conditions for the stay, only half of the sum was paid in and Mr. Johnson subsequently swore an affidavit on 8 March 2007 requesting the return of those funds to the person who had advanced them, as the purpose for which they had been provided could not be achieved. Significantly, in that affidavit at paragraph 6 Mr. Johnson indicated, *"That the Mortgagee is now in*

the process of selling the property under powers of sale." The next significant events as disclosed by the evidence available to this court are the incorporation of the claimant herein Imperial Suites Hotel and then the sale of the mortgaged property by Mr. Aloi to the claimant.

[75] Four main factors underpin the defendant's allegation of "continuing fraud". Firstly, the opinion of Ms. Beverly East proffered in 2009 that the signature on Companies Office of Jamaica Certificate of Incorporation for LFGJ General Contracting Company **Limited** dated November 6, 1987, purporting to be that of the defendant Leroy Johnson was not made by him.

[76] Secondly, the allegation that Mr. Carl Roberts the principal behind the claimant was a friend of Mr. Aloi and worked out of the same building, by which the defendant sought to raise the spectre of possible collusion between Mr. Aloi and Mr. Roberts to deprive the defendant Mr. Johnson out of the equitable interest he alleges he holds in the disputed property.

[77] Thirdly the incorporation of the claimant on December 30, 2014 and the allegation that it had no bank account or any business in Jamaica or any other jurisdiction, whereby the defendant has sought to raise the inference that the claimant was incorporated specifically to facilitate Mr. Aloi's "expropriation" of the mortgaged property.

[78] Fourthly, the allegation that the property was sold at a gross undervalue in furtherance of a fraudulent plot between Mr. Aloi and Mr. Roberts to deprive the defendant of the interest which he alleges he holds in the property. I will deal with each allegation in turn.

I The Alleged Forgery of Mr. Johnson's signature on the Certificate of Incorporation of LFGJ General Contracting Company ***Limited***

[79] The evidence is that in the opinion of Beverly East, Forensic Document Examiner, provided September 24, 2009, the signature purporting to be that of the

defendant Leroy Johnson on the Certificate of Incorporation of LFGJ General Contracting Company **Limited** was not made by him and further that it is highly probable that the same person who signed “Dennis Tomlinson” also signed the defendant’s name. At least five things are significant about this evidence.

[80] A) The alleged forgery was found only to be on the Certificate of Incorporation and not also on the Transfer of the property to LFGJ General Contracting Company **Limited** as alleged by the defendant. This suggests that the defendant himself signed the Transfer and hence on the face of it would have agreed to it;

[81] B) Dennis Tomlinson was the defendant’s attorney-at-law when LFGJ General Contracting Company **Limited** was incorporated and the defendant and Dennis Tomlinson were each awarded one share. Dennis Tomlinson represented the defendant’s interests over many years and numerous transactions regarding his properties as was discussed in the judgment of McCalla J in Suit No. E.54 of 1995, earlier referred to.

[82] C) The defendant does not seem to have been adversely affected by the alleged forgery for a number of years as he continued to run his companies and live on the property as is the situation to the present. Another curious reality is that LFGJ General Contracting Company **Limited** was removed from the Register of Companies in February 2010, but that did not seem to affect the businesses to which it leased property continuing to operate or the accommodation arrangements of the defendant given the collection of rental and maintenance issues raised in the affidavits filed.

[83] Counsel for the claimant submitted that the defendant was guilty of approbating and reprobating at the same time as he continued to associate with the company while trying to avoid the company having to pay the mortgage and then alleged that it had been fraudulently incorporated as he sought to impugn the sale to the claimant. The evidence is actually divided on this point. It is clear the defendant made a report to the police alleging fraud before Ms. East was engaged to provide

her report. It was however not disclosed what lead him to suspect or discover that there was some impropriety in the formation of LFGJ General Contracting Company **Limited.**

[84] It also should be bourne in mind that the first instance litigation concerning the validity of the mortgage occurred before the defendant's report to the police and the opinion of Ms. East was obtained. Further, though there has been an application to the Court of Appeal, referred to earlier, ruled on by Brooks JA, heard while the substantive appeal from the sequelae flowing from the judgment of McCalla J is pending it was observed by this court from the judgment that the name used for the then claimant company was LFGJ General Contracting Company without either **"Limited"** or **"Inc"** at the end. That may well have been deliberate given the posture now adopted by the defendant.

[85] D) Of greater significance however is the date of the opinion from Ms. East which means that more than six years has elapsed before any claim has been brought alleging fraud. Therefore by the operation of sections 27, 30 and 46 of the **Limitation of Actions Ac**t and section 41 of the **Interpretation Act**, any right to seek recovery, even if one was vested in the defendant which my earlier finding negates, that would have been extinguished. (See ***Brown (Bartholomew) and Brown (Bridgette) v Jamaica National Building Society*** 2010 JMCA Civ 7 at paragraphs 38 – 40). In this regard the only remedy available if *locus standi* could be established would be in damages pursuant to section 106 of the **ROTA.**

[86] E) Of course counsel for the defendant constructed his argument around the concept of a "continuing fraud" flowing from Mr. Aloi and Mr Tomlinson in 1987 through to the claimant's purchase of the property from Mr. Aloi as mortgagee in 2015 which if proven would not be caught by the **Limitation of Actions Act**. It is however impossible to seek to tie the claimant to any fraud in 1987 as it never existed then. Any action of the claimant that is sought to be impugned would have to relate to the purchase of the property in 2015.

III The allegation that the claimant company incorporated on December 30, 2014, had no bank account or any business in Jamaica or any other jurisdiction, whereby the defendant has sought to raise the inference that the claimant was incorporated specifically to facilitate Mr. Aloi's "expropriation" of the mortgaged property.

[87] As I intend to deal with points (ii) and (iv) together I will now address point (iii). This is by far the defendant's weakest point. The fact that he is unaware of the claimant's business arrangements in Jamaica and overseas is unsurprising. It would actually be remarkable if the defendant were able to easily ascertain information concerning bank details and business interests of the claimant company especially in relation to any interests the company may have outside of this jurisdiction. The company has been able to instruct counsel and take concerted legal action seeking to safeguard its rights as it sees them. Even if its sole purpose was its incorporation to take over the operation of the property it purchased that without more could not in any way be indicative of evidence of fraud.

II & IV The assertion that to the best of the defendant's knowledge, information and belief, Leonard Aloi and the Managing Director of the claimant Carl Roberts are close friends, work out of the same building in New York and the property was transferred to the claimant company as part of the continuing fraud **&** *The allegation that the property was sold at a gross undervalue in furtherance of a fraudulent plot between Mr. Aloi and Mr. Roberts to deprive the defendant of the interest which he alleges he holds in the property.*

[88] The defendant's evidence of the friendship and close working proximity between Mr. Aloi and Mr. Roberts suffers the same lack of source information that counsel for the defendant raised as a ground challenging some of the evidence contained in the affidavit of Dave Green sworn on behalf of the claimant. No indication is given of the basis of the defendant's knowledge information and belief of the nature of the alleged relationship between Mr. Roberts and Mr. Aloi. No

affidavit was received from Mr. Roberts in the application, though counsel for the claimant sought to refute the allegations. In any event, friendship and a close working proximity in and of themselves are not without more evidence of fraud, These allegations by themselves, would not meet the threshold set by ***Wallingford v Mutual Society.***

[89] The fourth issue regarding the value at which the property was sold requires consideration of the obligations on a mortgagee exercising a power of sale. A plethora of authorities addresses this issue. It will be sufficient to cite two. In ***Royden Riettie v National Commercial Bank Jamaica Ltd and Ors*** [2014] JMCA App 36 McDonald-Bishop JA (Ag.) (as she then was) writing on behalf of the court stated at para 61 that:

> The authorities are clear that a mortgagee, in the exercise of the power of sale, owes a duty to take reasonable precaution to obtain the true market value of the property at the date on which he decides to sell. See **Cuckmere Brick Company Limited et al v Mutual Finance Limited** [1971] 2 WLR 1207; **Moses Dreckett v Rapid Vulcanizing Co Ltd** (1988) 25 JLR 130 (CA) and **Dian Jobson v Capital and Credit Merchant Bank Limited** SCCA No 113/2002, delivered 29 July 2005.

[90] In ***Dennis Atkinson v Development Bank of Jamaica and Ors*** [2015] JMSC Civ 161 the unique position of the mortgagee and the balancing act required in the exercise of the power of sale was highlighted by Evan Brown J at paragraph 47 to 48 where he stated that:

> [47] The starting point is that the power of sale is given to the mortgagee for his own benefit. That is, the power is given to the mortgagee to enable him to realise his security: **Fisher & Lightwood's Law of Mortgage** op. cit. para. 20.21. In **Cuckmere Brick Co Ltd**, supra, at page 646, Cross LJ said this:

“

> > A mortgagee exercising a power of sale is in an ambiguous position. He is not a trustee of the power for the mortgagor for it was given to him for his own benefit to enable him to obtain repayment of his loan. On the other hand, he is not in the position of an absolute owner selling his own property but must undoubtedly regard pay some regard to the

> interests of the mortgagor when he comes to exercise the power. Some points are clear. On the one hand, the mortgagee, when the power has arisen, can sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it. On the other hand, the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at.

> [48] What Cross LJ said is fortified by Salmon LJ, at page 646, who concluded: "both on principle and authority, ... a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it."
>
> ***Cuckmere Brick Co Ltd*** was applied in ***Moses Dreckett v Rapid Vulcanizing Company Limited*** (1988), 25 JLR 130 ***(Moses Dreckett)***. The Jamaican Court of Appeal, in addition to adopting the dictum of Salmon LJ, held that there is a burden on the mortgagee to show that he acted fairly to the borrower and used his best endeavours to obtain the best price reasonably obtainable for the mortgagor‟s property

[91] At paragraph 50 in further outlining the responsibility of mortgagees Evan Brown J referred to the case of ***Colson v Williams*** (1889) 58 LJ Ch 539 which Salmon LJ reviewed in ***Cuckmere Brick Co Ltd.*** In ***Colson v Williams*** at page 541 Kekewich J stated that:

> A mortgagee to whom is owed a certain sum of money on security of land cannot offer the land to a purchaser merely for that which would cover his principal, interest and costs, independently of the value of the property. If there is a margin which can reasonably be obtained he must remember that there is a mortgagor, or possibly a second mortgagee claiming through him, or possibly other persons having charges who are entitled to be considered.

[92] What was the situation in the instant case at the time Mr. Aloi exercised his power of sale? As previously indicated, subsequent to the judgment of McCalla J in 2003, the Registrar's accounting disclosed that US$318,729.00, with interest on US$54,406.00, was due to Mr. Aloi. The property was sold in 2015 under power of

sale by Mr. Aloi for US$350,000. Presumably that would have been enough to cover the principal and interest costs due to him. At prevailing exchange rates at the time, the equivalent JMD value would have been in the region of $40M. Two valuations of the property were commissioned by the defendant. The first was done by Concepts Real Estate Management Limited dated September 28, 2011. That valuation indicated its open market value was $170M, the value for insurance $160M and the reserve price in case of foreclosure $136M. The second valuation was done by V. B. Williams Realty Co. Ltd on April 15, 2015 after the property had been sold to the claimant herein. The fair market value was now placed at $202M, the replacement value at $200M and the forced sale value at $161,600,000. Based on the second valuation the sale price was approximately 20% of the Open Market value and 25% of the Forced Sale value.

[93] If the mortgagor still existed and was aggrieved by the sale price on the basis that the value obtained for the property breached the duty owed by the mortgagee to it section 106 of the **ROTA**, indicates that an action could be brought for damages. The issue at the point is however not negligence but fraud. The critical question is, can the sale price generate any suspicion of impropriety rising to the level of fraud on the part of the mortgagee, and if so can that suspicion reasonably extend to taint the claimant as purchaser? This in a context where section 68 of the **ROTA** operates to render the Certificate of Title indefeasible even in the face of irregularities such as the failure to have documents stamped or to send the mortgagor statutory notice as required under section 105 of the **ROTA**. However the mortgagor no longer having been in existence at the time of the sale it is not clear that a notice under section 105 would have been required.

[94] The mortgagee is not an institution but an individual. There is evidence coming from the defendant himself in the affidavit referred to by Brooks JA in the 2015 application to the Court of Appeal that the mortgagee was from at least 2007 seeking to exercise his power of sale. In a context where the mortgagor no longer exists, and there is no evidence that other debts secured by the property were

due to other creditors it is difficult to see how the mortgagee could be a party to fraud where there is no victim to defraud.

[95] Concerning the allegation that the claimant as purchaser was engaged in fraud, The combined effect of section 71 of the **ROTA** and the ***Bank Fur Gemeinwirtschaft Aktiengesellschaft*** case demonstrate that except where a purchaser is a party to fraud that purchaser need not be concerned about the manner in which the mortgagee came by the Title or what is to be done with the proceeds of the sale. He can thus take advantage of a great deal without being required to consider how his good fortune might imperil the interests of others who may have had some interest in the land. Even if there was such a duty, which there is not, as just outlined there is no remaining legal entity that had any interest in the land other than the mortgagee himself who exercised the power of sale. In those circumstances I do not see any circumstance in which the claimant could even remotely be said to be a party to fraud.

[96] I am aware that the defendant has consistently maintained that there is an open, if not an active fraud investigation ongoing. What is the status of that investigation? He exhibited a letter from the Superintendent i/c Fraud Squad dated July 22, 2009 to Ms. Julian Mullings Attorney-at-Law indicating that on April 27, 2009 the defendant had reported a case of forgery of his name by Dennis Tomlinson on the Memorandum of Association of L.F.G.J. Contracting Company Limited. The letter also stated that the forgery was confirmed after the examination of specimen signatures by the Questioned Document Section of the Police Forensic Science Laboratory.

[97] A subsequent letter dated April 14, 2015 from the Superintendent at the Fraud Squad to Mr. Keith Bishop Attorney-at-Law indicated a case of forgery had been reported by Mr. Johnson against Mr. Dennis Tomlinson, Attorney-at-Law and Mr. Leonard Aloi. After outlining the allegation of forgery the letter went on to state that after L.F.G.J. Contracting Company Limited was formed, Mr. Johnson and Mr. Tomlinson were each assigned one share and the Mr. Johnson’s property

registered at Vol. 1165 Fol. 960 was transferred to the company. The letter continues that based on enquiries it was assumed the forgery of Mr. Johnson's signature was to facilitate the transfer of his property to a company with a similar name and therefore to defraud him of his company. A third letter sent to Mr. Bishop dated January 10, 2017 essentially indicated that suspects had been identified in their investigations with a view of preferring charges. No indication was however given who these suspects were.

[98] In none of the communication from the police is the claimant or Mr. Carl Roberts mentioned. The contention is that Mr. Roberts has declined to make himself available to be interviewed. Whether that is so or not the evidence does not indicate. However given the circumstances of this case and the law as outlined the fruits of any investigation could not imperil the claimant's title to the property.

[99] I will end my analysis by referring to the case of ***Sagicor Bank Jamaica Ltd v Taylor-Wright*** [2018] 3 All ER 1039 which was decided after submissions closed in this matter. The main holding in that case by the Judicial Committee of the Pricy Council was that:

> [I]f a pleaded claim was met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still have entitled the claimant to the relief sought, then generally there could not be a need for a trial. If the pleaded claim justified granting the relief sought then, if the claimant proved that claim, it would succeed. If the alleged defence also justified the relief sought, then the claimant would succeed even though the defendant proved the facts alleged in her defence. In either case, the defendant would have no real prospect of successfully defending the claim within the meaning of CPR 15.2(b)

[100] In the ***Sagicor*** case therefore, whichever version of the facts was ultimately accepted the claim was entitled to be successful. In the instant case however I have found that 1) the defendant has no *locus standi* to defend the claim and challenge the indefeasibility of the claimant's Title; and 2) that the defendant's theory of "continuing fraud" has no substance and even if it did, the absence of *locus standi* would preclude the defendant from deploying a viable defence.

[101] One relief sought by the claimant was the striking out of the Defence. However the Defence was filed out of time without there having been consent by the claimant so to do or an order of the court granting an extension of time to file the Defence and for the filed Defence to stand. While the Defence had to be considered for the court to treat with the application, up to this point it has not been properly received and hence does not need to be struck out. If it was properly in evidence, based on my findings I would have struck it out as it discloses no reasonable grounds for defending the claim. The claimant is entitled to summary judgment as having considered the proposed Defence and evidence in support, I have found the defendant has no real prospect of successfully defending the claim.

Disposition

[102] Accordingly the court makes the following orders:

i) That summary judgment be entered in favour of the claimant;

ii) A declaration that it is the legal and beneficial owner of land registered at Volume 1165 Folio 960 of the Register Book of Titles with civic address 5 Pointe Crescent, Ocho Rios in the parish of Saint Ann;

iii) An injunction restraining the defendant his servants or agents from renting, leasing, collecting rent or otherwise dealing with the property and from threatening and/or preventing the claimant its servants or agents from entering upon and possessing the property;

iv) An order for recovery of possession of the property against the defendant;

v) An account by the defendant to the claimant of all the rental unlawfully collected by the defendant since April 2015 and ongoing;

vi) That the defendant pays to the claimant all the sums unlawfully collected for rental since April 2015/or in the alternative damages for trespass;

vii) That the defendant pays to the claimant the sum of $326,444.24 paid by the claimant to the National Water Commission for water usage on the property by the defendant his servants or agents;

viii) Interest; and ix) Costs to the claimant to be agreed or taxed.