JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2008 HCV 02664

BETWEEN	**JAMAICAN REDEVELOPMENT FOUNDATION INC.**	**CLAIMANT**
AND	**CAPITAL SOLUTIONS LIMITED**	**DEFENDANT**

IN CHAMBERS

Heard : 12th June, 5th August, and 23rd October 2009.

Mr. Maurice Manning instructed by Nunes, Scholefield, DeLeon and Co. for the Claimant.
Mr. Christopher Dunkley instructed by Phillipson Partners for the Defendant.

Mortgage-Priority- Discharge of Mortgage as Opposed to purchase or acquisition- In what circumstances does the presumption arise that stranger paying off mortgage intends to keep mortgage alive- What amounts to evidence of contrary intention.

Mangatal J:

1. This is a claim in which the parties seek declarations as to the status and priority of certain mortgages in relation to premises owned by Howard Clarke "Mr. Clarke" , registered at Volume 1389 Folio 627 of the Register Book of Titles.
2. Before discussing the very interesting issues raised in this case, I wish to commend both Counsel for the well-thought out and thorough submissions which were made before me. I do not mind stating from the outset that the issues proved more complicated

and less easy of resolution than I had at first blush thought. The matter concerns important points to do with the law pertaining to Mortgages and proved most thought-provoking.

FACTUAL BACKGROUND

3. A useful starting point is to set out the factual background which has given rise to the present dispute. The Claimant Jamaica Redevelopment Foundation Inc. "JRF" is a financial institution. By deed of assignment dated the 30th of January 2002 JRF acquired the loans and banking facilities originally granted by the National Commercial Bank Jamaica Limited "NCB" to its customer Mr. Clarke. JRF acquired the loans from Refin Trust who purchased same from Recon Trust and also acquired all of the securities for the loans including mortgage numbered 908276 registered on the 24th of November 1995 in favour of NCB in respect of property 6 Mimosa Avenue, Kingston 11, being registered at Volume 139 Folio 627 of the Register Book of Titles.

4. Prior to the registration of mortgage numbered 908276, a mortgage numbered 640513 had been registered in favour of Life of Jamaica Limited "LOJ", which was registered on the Certificate of Title to secure a sum of $147,005.43. This mortgage was later assigned to the Jamaica National Building Society "JNBS" and the transfer was noted on the Certificate of Title as Transfer No. 1300569.

5. Mr. Clarke defaulted on mortgage number 908276 which had been acquired by JRF.

6. In or around 2003, the Defendant Capital Solutions Limited "Cap-Sol" was approached by Mr. Clarke who was then its employee. Mr. Clarke requested a loan facility. At this time the Certificate of Title for the property which was to stand as security for the loan from Cap-Sol was endorsed with the two mortgages, viz. mortgage

number 640513, acquired by JNBS, and mortgage number 908276, acquired by JRF.

7. By letter dated July 30th 2003, Cap-Sol wrote to Dennis Joslin Jamaica Limited "Dennis Joslin", JRF's loan servicer, enclosing a cheque in the sum of $375,625.88, which Cap-Sol claimed was being sent in full and final settlement of Mr. Clarke's loan accounts and requested a duly executed Discharge of Mortgage.

8. By letter dated September 23 2003 Dennis Joslin returned the cheque to Cap-Sol on the basis that it was not able to discharge the mortgage for that amount.

9. Cap-Sol paid the amounts outstanding on mortgage No. 640513 acquired by JNBS. By letter dated 4th November 2004 , copied to Dennis Joslin, and addressed to Cap-Sol, JNBS indicated that mortgage No. 640513 was discharged , the loan secured by this mortgage having been repaid in full. Under cover of this letter JNBS forwarded to Cap-Sol the Duplicate Certificate of Title along with the duly executed Discharge of Mortgage on the following understanding:

   (a) That Cap-Sol would have JNBS's Discharge endorsed on the Duplicate Certificate of Title.

   (b) Cap-Sol upon completion of the registration of its loan would forward the title to JRF's loan servicer Dennis Joslin.

10. By letter dated February 23 2005 Dennis Joslin wrote to Cap-Sol requesting the forwarding of the Certificate of Title as had been required of Cap-Sol by JNBS.

11. Initially, by letter dated March 2 2005 Cap-Sol apologized for the delay and requested further time in which to send the Certificate of Title. However, by letter dated March 22 2005 Cap-Sol appears to have changed its stance and now indicated that it had <u>purchased</u> mortgage No. 640513 from the JNBS and that they were in the

process of registering their second interest of $747,723.00 as a third mortgage(my emphasis). They indicated that as Mr. Clarke had not cleared the facility in respect of the JNBS mortgage which Cap-Sol claimed to have purchased, Mr. Clarke was not entitled to have the first mortgage discharged from the title.

12. Cap-Sol registered mortgage number 136448 on the 2nd of August 2005 to secure monies in the said mortgage stamped to cover the sum of $747, 723.11.

JRF'S CLAIM

13. JRF now seeks the following relief against Cap-Sol:

a. A Declaration that mortgage numbered 908276, registered on the 24th of November 1995 on Certificate of Title registered at Volume 1389 Folio 627 of the Register Book of Titles ranks in priority to all subsequent mortgages currently registered or entitled to be registered including mortgage numbered 1346448 registered in favour of Cap-Sol on the 2nd day of August 2005 and Mortgage numbered 640513 in favour of JNBS registered on the 14th of June 2004.(the mortgage was registered in favour of LOJ on the 11th October 1990 and transferred to JNBS on the 14th June 2004).

b. A Declaration that mortgage numbered 640513 registered on the 11th of October 1990 in favour of LOJ is wholly discharged.

c. A Declaration that JRF is entitled to possession of the Duplicate Certificate of Title registered at Volume 1389 Folio 627 of the Register Book of Titles.

d. An order that Cap-Sol deliver forthwith to JRF the said Duplicate Certificate of Title.

e. An order permitting JRF to serve this order on the Registrar of Titles for her to give effect to the terms of this order that Cap-Sol register the Discharge of Mortgage in respect of Mortgage numbered 640513 registered on the 11th of October 1990 on Certificate of Title registered at Volume 1389 Folio 627 in favour of LOJ and that the Registrar of the Supreme Court is empowered to execute all necessary documents to effect the discharge if Cap-Sol fails or refuses to do so.

f. Damages.

CAP-SOL'S DEFENCE AND CASE

14. Cap-Sol claims to be beneficially entitled to the rights and privileges attached to Mortgage Number 1300589(Mortgage No. 640513) noted on the Duplicate Certificate of Title registered at Volume 1389 Folio 627 of the Register Book of Titles in favour of JNBS on the 11th October 1990. This beneficial entitlement is claimed by virtue of loan facilities extended by Cap-Sol to Mr. Clarke, the registered proprietor of the property.

15. Pursuant to a request from Mr. Clarke for their respective balances to close, JNBS and JRF both furnished their payout balance. JRF provided its statement under "without prejudice cover". In reliance on both confirmations, Cap-Sol extended credit facilities to Mr. Clarke and forwarded to both JNBS and JRF its cheques representing full and final settlement in exchange for their respective discharge of mortgage.

16. Whereas JNBS honoured its statement to close and forwarded the Duplicate Certificate of Title along with their discharge of mortgage, JRF responded by providing a previously undisclosed

balance also under "without prejudice" cover and returned Cap-Sol's cheque.

17. Cap-Sol's beneficial entitlement arose from extending a full value loan facility to the registered proprietor Mr. Clarke while JRF claims a beneficial entitlement that is undisclosed on the face of the Duplicate Certificate of Title and for an undisclosed consideration.

18. Cap-Sol by way of Counterclaim seeks the following relief:

    (a) A Declaration that JRF's action has grossly prejudiced both Cap-Sol's mortgagor, Mr. Clarke, as well as Cap-Sol.

    (b) A Declaration that Cap-Sol's interest in mortgages # 1300589 and #1346448 rank in legal and /or equitable priority to any other mortgage endorsed on the face of the Duplicate Certificate of Title registered at Volume 1389 Folio 627 of the Register Book of Titles.

    (c) A Declaration that in the event that JRF can establish a beneficial entitlement to the mortgage interests as claimed, the registered proprietor Mr. Clarke and Cap-Sol are entitled to rely on JRF's statement to close of July 23, 2003, and such interest as may be deemed to have accrued thereto to rank inferior to Cap-Sol's claim.

    (d) That Cap-Sol be at liberty to exercise the Powers of Sale contained in its mortgage registered at #1346448 and that the proceeds of sale be distributed in accordance with the interests as declared by this Honourable Court.

    (e) Damages.

THE ISSUES TO BE DETERMINED

19. In my view, the issues that fall for determination are as follows:

(a) Whether JRF is beneficially entitled to the rights and privileges of mortgage number 908276?

(b) Whether Mortgage number 640513 acquired by JNBS by virtue of transfer number 1300569 has been discharged and the effect of the discharge of the said mortgage?

(c) Whether Mortgage number 908276 registered on the 24th of November 1995 ranks in priority to Mortgage Number 1346448 registered on the 2nd of August 2005?

(d) Which of the parties are entitled to hold the Duplicate Certificate of Title?

The First issue: Whether JRF is entitled to the rights and privileges of Mortgage Number 908276?

(20) The First Affidavit of Janet Farrow, the Chief Executive Officer of the Jamaican branch of JRF, filed on the 22nd of May 2008, and the attached exhibits, indicate that by Deed of Assignment dated the 30th January 2002 JRF acquired from Refin Trust, amongst other assets described in an attachment to the Deed, the loans and banking facilities originally granted by NCB to Mr. Clarke. The assignment included the securities for the loans, that is, Mortgage Number 908276 in respect of the property owned by Mr. Clarke and registered at Volume 1389 Folio 627 of the Register Book of Titles.

(21) The Mortgage Instrument contains a clause by which Mr. Clarke agreed to pay all sums "all moneys" due and owing to the mortgagee.

(22) Janet Farrow's First Affidavit and accompanying exhibits, traces the lineage of the debt and assignment, and states that the debt attributable to Mr. Clarke was first assigned by NCB to Recon Trust by Form of Assignment dated 1st February 1998. Thereafter, by Form of Assignment dated the 8th of February 1998, the debt was assigned from Recon Trust to Refin Trust.

(23) In his written as well as his oral submissions, Mr. Dunkley, who appeared for Cap-Sol sought to argue that JRF is not the registered mortgagee and as such has no locus standi to exercise mortgagee rights. I agree with Mr. Manning's submission, which he made in relation to a number of contentions that Mr. Dunkley sought to advance, that this type of locus standi issue is really one to be raised, (if it arises to be raised at all), by the debtor, the principal debtor Mr. Clarke, and not by Cap-Sol. It is really Cap-Sol that has no legal or proper basis upon which to challenge the Assignment of Mr. Clarke's indebtedness which occurs as between Mr. Clarke and JRF. Mr. Manning conceded that perhaps a guarantor of Mr. Clarke's loan could also make such enquiries and posit such objections, and I think that is a correct concession. However, Cap-Sol is not a guarantor in relation to Mr. Clarke's indebtedness and thus does not by this route acquire the necessary standing either.

(24) In addition, it does appear as if Cap-Sol is seeking to approbate and reprobate, adopting a "blow hot, blow cold" posture. On the one hand, Cap-Sol claims that they relied on the statements given by JRF to Mr. Clarke to their detriment, because on this basis they paid their cheque to JRF as representing the amount to pay out the mortgage. Yet on the other, they argue that JRF must establish its beneficial entitlement to Mortgage Number 908276. Further, although there is no Affidavit from Mr. Clarke, a point to which I will later return, it is clear from the Affidavit of Melanie Spicer-Hamilton, Credit Officer of Cap-Sol, that the debtor Mr. Clarke was

aware that the debt and mortgage had been assigned and were now held by JRF since Cap-Sol claims that Mr. Clarke represented to them that he requested balances to close from JRF.

(25) Mr. Dunkley also argued that the assignment of debt to JRF was a "bulk" assignment, that there ought to have been some specific assignment in relation to Mr. Clarke's indebtedness. He referred to the list of assets attached to the Deed of Assignment from Refin Trust to JRF as being merely a list of abscured names and numbers to include that of Howard Clarke and bears no nexus to mortgage number 908276 registered on the Title. He argued that assignment of the debt is to be distinguished from the assignment of the mortgage and that the purported assignment of the registered mortgagee's interest, along the chain of assignments, down to the assignment from Refin Trust to JRF cannot be a proper assignment of a mortgage for which the mortgagor has certain rights including that of equitable redemption. He cited the case of **Thomas Walker v. Amber George Jones** (1865-67) L.R. 1 P.C. 50.

(26) I agree with Mr. Manning that no authority was cited by Mr. Dunkley to demonstrate that the type of assignment carried out by Refin Trust to JRF was ineffective or to show in what way individual assignment of Mr. Clarke's indebtedness would have benefited him. It is also accepted by the Court that there was a complete list of debtors listed and attached to the Deed of Assignment in question and that the obscuring or blotting out of the other names is merely in the interests of protecting the privacy of the other persons whose names may be listed. As regards the question of the equity of redemption, I agree with Mr. Manning that the facts of this case do not allow for the application of this principle, which Mr. Dunkley referred to in Halsbury's 4th Edition, Volume 32, paragraph 598, because there is no evidence of any

statutory notice being issued to Mr. Clarke, nothing to trigger the mortgagor's right to redemption. Again, it is plain that this is a point, if it is to be raised at all, by the mortgagor Mr. Clarke, and not by Cap-Sol. In these commercial transactions Cap-Sol is a mortgagee, just as JRF is, and has no proper basis for making assertions which could only properly be raised by the mortgagor.

(27) Mr. Dunkley argued that the general principle is that if a registrable instrument is not registered, it is void against a purchaser of the land charged, including a subsequent mortgagee or chargee. He submitted that none of the documents which have been exhibited by JRF is a Transfer of Deed of Mortgage which is required to convey the interest in the mortgaged property to JRF.

(28) Mr. Manning early in his submissions referred to **The Judicature (Supreme Court) Act** subsection 49(f) which provides as follows:

> *49 (f) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or thing in action, shall be entitled and be deemed to have been effectual in law(subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or thing in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor;*
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> *Provided always that if the debtor, trustee, or other person liable in respect of such debt or thing in action, has had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting*

claims to such debt or thing in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may if he thinks fit pay the same into the Supreme Court under and in conformity with the provisions of the laws for the relief of trustees.

(29) It is not a matter of dispute that Mr. Clarke was in fact notified of the assignment to JRF. Indeed, that is borne out by the requests for loan balance directed to JRF that I infer were made by him; he would hardly be requesting such information from JRF if he did not know of the assignment. Indeed, Cap-Sol relies upon the letter from JRF to Mr. Clarke as being a statement made by JRF as to the amount to close the mortgage indebtedness. There is no assertion by Cap-Sol, and indeed given the reliance placed by Cap-Sol on the statement from JRF to Mr. Clarke, it would be difficult to see how such an assertion could be maintained, that the debtor Mr. Clarke was not notified of the assignment to JRF.

(30) There is also no challenge to the authenticity of the Deed of Assignment or Forms of Assignment. In my judgment, the terms of sub-section 49(f) of the **Judicature (Supreme Court) Act** make it clear that JRF is entitled to assert its interest in relation to the indebtedness of Mr. Clarke on the basis of the Deed of Assignment dated the 30th of January 2002. I agree with Mr. Manning that Cap-Sol in any event has no standing to maintain that JRF must establish its claim to be beneficially entitled; as regards the mortgage 908276 and its assignment, Cap-Sol is a stranger to JRF and its predecessors in title. The Mortgage was made with Mr. Clarke and Cap-Sol has no proper basis to question JRF's arrangements with its debtor Mr. Clarke or the underlying basis therefore. Further, even if it lay in the mouth of Cap-Sol to say that JRF must establish their entitlement to the indebtedness, such a

claim could not be maintained, in the face of sub-section 49(f), unless there was a claim that there was no proper document/ Deed of Assignment, or that there was no notice to Mr. Clarke of the assignment. There is no such true contention here on the pleadings, or on the evidence, whatever the submissions put forward on behalf of Cap-Sol may be.

(31) However, I think that Mr. Dunkley is in fact correct that there is a distinction between assignment of a debt and assignment of a mortgage, which is an interest in land, under the registration of Titles Act. Sections 63, 88 and 89 of the Registration of Titles Act are relevant:

> *s. 63. Effect of registration or non-registration of instruments affecting lands brought under this Act.*
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> *When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be effective to pass any estate or interest in such land, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the Instrument or by this Act declared to be implied in instruments of a like nature....*
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> *s. 88. Transfer of Registered Land.*
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> *The proprietor of land, or of a lease, mortgage or charge, or of any estate, right or interest, therein respectively, may transfer the same, by one of the Forms A, B, or C in the Fourth Schedule hereto,....Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the*

transferee, and such transferee shall thereupon become the proprietor thereof, and whilst construing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, or the original lessee, mortgagee or annuitant.

s. 89. Effect of such Transfer.

By virtue of every such transfer as herein mentioned, the right to sue upon any mortgage or other instrument, and to recover any debt, sum of money, annuity or damages, thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity or damages, shall be transferred so as to vest the same at law <u>as well as in equity</u> in the transferee thereof.

Provided always that nothing contained shall prevent a court from giving effect to any trusts affecting such debt, sum of money, annuity or damages, in case the transferee shall, as between himself and any other person hold the same as trustee. (my emphasis).

(32) In the Australian Text, **On Equity**, **Young, Croft, Smith**, at page 686, paragraph 10.20, the learned authors state:

Where land is under the operation of the Torrens system, the creation or transfer of a legal interest in the land requires:

(a) the execution of a transfer in registrable form by the creator or by the registered proprietor of the interest, and

(b) its registration...(reference ..to Statutes)

It is the registration of the transfer which in fact creates or transfers the interest. As Barwick CJ explained in ***Breskvar v. Hall****: (1971) 126 CLR 376 AT 385-386)*

The Torrens system of registered title....is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.

33. In my view sub-section 49(f) of the Judicature Supreme Court Act applies to choses in action, and not to interests in real property such as mortgages. At paragraph 10.30, at page 686-687, and at page 691, paragraph 10.80, the learned authors state:

> *10.30. Personal property is classified as either choses in possession, such as chattels, or choses in action....., the distinguishing characteristic of choses in possession is that they are capable of actual physical possession, whereas choses in action are not. The term "chose in action" is the name given to "all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession"* ***Torkington v. Magee*** *[1902] 2 K.B.427 AT 430.*
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> *10.80. Generally speaking, choses in action could not be assigned at common law, though there were some exceptions: ....The Court of Chancery, on the other hand, recognized their assignment. One of the Judicature Act reforms made choses in action assignable at law.....*

34. The learned authors then go on to discuss section 25(6) of the Judicature Act 1873, which they describe as today being the Law of Property Act 1925 (UK) s 136 (1) as well as the relevant provision in New South Wales, Australia, i.e. the Conveyancing Act 1919 (NSW) s 12. Section 12 is in terms materially the same as our subsection 49 (f). Then at paragraph 10.170, where the authors are about to discuss the nature of equitable assignment, they state as follows:

> *10.170. As explained above (at [10.20] – [10.40]), the common law prescribes certain formalities for the assignment of interests in property but, in the past, did not recognize the assignment of choses in action. Statutory reforms were introduced which provided for the assignment of both legal and equitable choses in action : see [10.80].*

35. I have also found **Volume 32, Halsbury's** 4th Editon, dealing with the subject Mortgages, in particular paragraph 641 instructive. It states:

> *641.* ***Form of Transfer.*** *A transfer of a mortgage is usually made by deed, and this is essential in order to pass the mortgagee's legal estate in freehold or leasehold property, or to obtain the benefit of provisions as to the operation of transfers contained in the Law of Property Act 1925.* ***As regards the mortgage debt, however, an assignment under hand only is effectual, notwithstanding that it was created by deed; and an assignment under hand is effectual to pass any equitable interest property which is vested in the mortgagee.*** (My emphasis).

(36) In my judgment, JRF holds the beneficial interest in the legal mortgage which NCB as the registered owner of the mortgage, holds in trust for JRF. The assignor holds the property of the mortgage in trust for the assignee JRF, JRF being the beneficial

owner. Until the transfer of mortgage is registered, JRF are not entitled to assert that they are the legal owner of the mortgage, but in the meantime JRF is entitled to assert its rights on the basis of its beneficial entitlement to the mortgage. These are not proceedings in which JRF is seeking to recover, or has sued for, the judgment debt, in which event JRF would have to have the transfer of the mortgage registered before it could take action. In these proceedings JRF is asking the Court for remedies which of necessity require the Court to determine simply whether JRF is beneficially entitled to Mortgage No. 908276. I therefore disagree with Mr. Dunkley's submission that since JRF is not registered on the Certificate of Title as mortgagee, that it has no locus standi to claim a beneficial interest in the registered mortgage and nor does the non-registration of a transfer to JRF cause the Mortgage No. 908276 to lose its standing.

37. Before leaving this issue, I think it is convenient to deal with Mr. Dunkley's submissions regarding the question of accounting. There were a number of variations on this theme of accounting, but in substance it was submitted that JRF has a duty to give a full accounting to Mr. Clarke and to Cap-Sol of all monies alleged by JRF to be owed in respect of the relevant property at issue. Further, that such accounting must be in respect of each and every loan advance made to Mr. Clarke for which he has pledged the property as security and several particulars which it is argued are required are set out in the submissions. Cap-Sol's position is that all of these various ingredients must be established before JRF can properly proceed against Mr. Clarke. This point can be disposed of fairly swiftly; JRF is not in these proceedings seeking to proceed against Mr. Clarke. Further, none of these matters are issues that stand properly to be raised by Cap-Sol. It is plainly not Cap-Sol's place to raise these issues about settled balances being

required; Cap-Sol is not Mr. Clarke's agent, and nor is Mr. Clarke, Cap-Sol's agent in relation to any of the transactions or business relationships between the parties. Cap-Sol cannot via a sidewind seek to raise issues which Mr. Clarke the principal debtor has not raised or sought to raise and then to attempt to piggyback on these non-existent hurdles. A number of the cases cited in relation to these issues I therefore considered irrelevant to the issues at hand and so I do not intend to refer to them.

THE SECOND ISSUE: Whether Mortgage number 640513 acquired by JNBS by virtue of Transfer Number 1300569 has been discharged and the effect of the discharge of the said mortgage?

(38) This is a very interesting point. As Mr. Manning indicated in his submissions, a mortgage may be discharged in a number of ways. One of the ways is by merger. The principle of merger may apply when a mortgage is paid off. In such cases the payment may discharge the mortgage or it may keep the mortgage alive but transfer it to the person making the payment, depending on the intention of the person paying the money. This intention may appear from the documents, the surrounding circumstances, or the evidence of the person himself, or it may be presumed from considering which result will be to the advantage of the person making the payment.-See **Whitely v. Delaney** [1914] A.C.132.

(39) At paragraph 658 of **Halsbury's Volume 32,** 4th Edition, it is stated:

(40) ***658. Equitable rights of person paying mortgage debt.*** *Although there has been no actual transfer of the mortgage, a person who advances money for the purpose of paying it off, and whose money is thus applied, becomes an equitable assignee of the mortgage and is entitled to keep it alive for his benefit. Similarly, an*

assignee of the mortgaged property is a trustee for the person who finds the money to pay off the mortgage. If he advances the money at the mortgagor's request in order to prevent the equity of redemption from being fortified, this result is assisted on the ground of salvage, and he is subrogated to the mortgagee's rights; but the doctrine is not confined to such cases. Although there is no question of salvage, and even though the mortgagor is not a party, ***a stranger who pays off a mortgage is presumed to intend to keep it alive for his own benefit, and effect is given to this intention. The result is the same notwithstanding that he contemplated taking a different security, in which case he is entitled to the benefit of the old mortgage until the new security is given,*** *and even though he has actually taken a mortgage of part of the property, as the remedy given by this later mortgage is not co-extensive with that given earlier. In such a case there is no merger of the mortgage in the charge.* (My emphasis).

(41) In the footnotes to the paragraph set out above, there was reference made to two decisions which I found instructive; **Butler v. Rice** [1910] 2 Ch. 277 and **Ghana Commercial Bank v. Chandaram** [1960] 2 All E.R. 865. I set out part of the headnote of the **Ghana** case, which is a decision of the Privy Council, and I also make reference to the incisive guidance of Lord Jenkins at page 871 C-G.

> ....
>
> *Held :*
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> *....(ii) The presumed intention of the G. bank on paying to the B. Bank on October 27, 1954, the amount secured by the equitable mortgage of July, 1954, was to keep that mortgage alive for the benefit of the G. bank until replaced by an effective legal mortgage, and, as the legal mortgage of October 27, 1954 was null and void by virtue of the Ghana Supreme*

Court (Civil Procedure) Rules, 1954, Order 43, r. 11, the prior equitable mortgage of July, 1954, continued on foot for the benefit of the G. bank conferring the same priority for the amount thereby secured as had theretofore been enjoyed by the B. bank.

Lord Jenkins at page 871 C-G:

The case then turns on the question whether the payment by the Ghana Bank to Barclays on October 27, 1954 of the amount then owing on the security of Barclay's equitable mortgage had the effect of entitling the Ghana Bank to the benefit of the equitable mortgage with the like priority over the purchaser's interest as it had possessed in the hands of Barclay's at the date of such payment off. ***It is not open to doubt that where a third party pays off a mortgage, he is presumed , unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit; see Butler v. Rice.***

In the present case, it has been contended that the execution of the abortive legal mortgage sufficed to negative such intention. Their Lordships cannot agree. While not disputing that the Ghana Bank's intention was to substitute the legal mortgage for the equitable charge, they find it impossible to accept the view that the Ghana Bank intended the equitable charge to be extinguished in the event of the legal mortgage proving for any reason to be invalid or ineffective. In other words, their Lordships take the intention of the Ghana Bank to have been to replace the equitable charge by a valid and effective legal mortgage, but to keep it alive for their own benefit, save in so far as it was so replaced. See Butler v. Rice and Chetwynd v. Allen.

(42) Mr. Dunkley, as is his style, was very candid with the Court as to the intentions of Cap-Sol. He stated that it was never Cap-Sol's intention to take over the LOJ/ JN mortgage. The intention was to pay off and clear off all the other mortgagees and then to have its mortgage registered, as the only mortgage remaining on the Title. It was in an effort to protect itself that Cap-Sol did not discharge the JN mortgage after it became aware that JRF were taking the position that their mortgage could not be discharged for the sum offered by Cap-Sol under cover of its letter dated July 30 2003.

(43) Without more, I think that Cap-Sol would have been able to pray in aid the principle that where a stranger pays off a mortgage, he is presumed to intend to keep it alive for his benefit unless the contrary appears. This is so because, even though the original intention was to pay off the other mortgages and then register their mortgage, and it was not to "purchase" the JN mortgage, that does not prevent Cap-Sol from asserting that the JN mortgage which they have paid off remains alive when they discover that JRF, who is the Second Mortgagee, is not about to discharge their mortgage for the sum offered by Cap-Sol to close. In my judgment this is akin to what happened in the **Ghana** case. The intention, in other words, was always to be the first mortgagee, albeit the initial intention was not only to be the first mortgagee, but also the only mortgagee.

(44) I have thought long and hard about the fact that as far as JN and Cap-Sol's course of dealings and combined contemplation went, there was never any intention for Cap-Sol to be substituted for JN. This is made clear by the fact that Cap-Sol tendered its cheque to JN in exchange for a discharge of mortgage (see paragraph 3 of the Defence) . An intention to secure a discharge of mortgage obviously tends to negate, or point in the opposite direction from an intention to keep the mortgage alive. In addition, the terms of JN's

letter to Cap-Sol dated November 4 2004 also supports JRF's position that there was no sale or acquisition of JN's mortgage by Cap-Sol. Indeed, Mr. Mannings submissions at paragraphs 18 and 19 of his written submissions are correct that JN in fact executed the Discharge of Mortgage. There was express reference to Cap-Sol registering its own loan, clearly evidence that both parties contemplated that Cap-Sol would be entering into an entirely new security with the debtor Howard Clarke. The word used in the letter is the word "understanding", intended to connote the same meaning as agreement. It was a commercial transaction and I agree with Mr. Manning further that it could not have been the intention of the Securities Supervisor of JNBS to leave Cap-Sol open with options as to what to do with the Certificate of Title, having regard to the responsibility of JN to ensure the Title was forwarded to JRF as successors of the second mortgage endorsed on the Title. I agree that strictly speaking, it was Cap-Sol's duty, if it was of a different "understanding" or if it was unable to comply with the terms issued by JN, to return the Duplicate Certificate of Title and the discharge. However, until the Discharge of Mortgage is registered the security remains alive. See S. 88 of the Registration of Titles Act and in Douglas Whalan's well-known Text **The Torrens System in Australia**, at page 185 it is stated:

> ...***DISCHARGE OF MORTGAGE, CHARGE OR ENCUMBRANCE***
>
> *All eight jurisdictions provide a statutory means of discharge of a mortgage, encumbrance or charge either wholly or partially and, upon registration of the discharge, the mortgaged, encumbranced or charged estate or interest ceases, either wholly or partially, to be charged with the monies secured by the mortgage, encumbrance or charge .*

Until registration of the discharge, it is not effective to discharge the security.

See also Young, Croft, Smith **ON EQUITY** ch. 9, page 677. The learned authors make the further point that the memorandum of discharge will be effective on registration even if it is a forgery and state that in certain circumstances, the register may be corrected in the event that a memorandum of discharge is registered in error. Cases are cited for all of these propositions.

(45) On the other hand, it is clear that it is Cap-Sol that has expended the money required to satisfy the amount due to JN in respect of the indebtedness secured by the mortgage. It is not JRF that has paid out this sum in order, for example to elevate its position from that of second mortgagee to first mortgagee. In a sense, if Cap-Sol were substituted as the first mortgagee then JRF would be in no worst position, or more deserving a position , than it would have been if the indebtedness was not discharged and JN remained the first mortgagee. In respect of the indebtedness secured by JN's first mortgage, JRF is really a " volunteer who has given no consideration for the new priority which he is claiming"- see page 144 of the judgment in **Whitely v. Delaney** per Viscount Haldane L.C. Akin to the situation in the **Ghana** decision, it could be argued that it could hardly have been Cap-Sol's intention that the monies which they expended to clear off the first mortgage, would be secured only by a third mortgage, ranking after a second mortgage, in the event that for whatever reason they were unable to have the second mortgage discharged. It really is a difficult question, and is in my view close to the borderline.

(46) I daresay that Mr. Dunkley has made a valiant attempt as Counsel to rescue Cap-Sol from less than prudent business practices with regard to JRF and its then employee, Mr. Clarke. However, I think

that when all the circumstances are closely examined, Cap-Sol has on a balance of probabilities to be taken as evincing an intention contrary to keeping the JN mortgage alive. This is so for the following reasons:

(a) The correspondence between Cap-Sol and JN all suggest that the monies tendered to JN by Cap-Sol were in exchange for a Discharge of Mortgage. It is clear that at the date when Cap-Sol paid the sum to close due under JN's mortgage, the intention was to achieve a discharge of that mortgage, and not an acquisition or purchase of it by Cap-Sol.

(b) Although in its letter dated March 22, 2005, Cap-Sol claims that it purchased mortgage No. 640513 from JNBS on July 30 2003, that is really nothing but a bare assertion and there has been no hard evidence, for example documentation, or indications of any conversations to this effect, and all the correspondence and documentation available does point in the opposite direction (My emphasis). Although I appreciate that the relevant intention is that of Cap-Sol as the party providing consideration, certainly as far as JN is concerned, the relationship between themselves and Cap-Sol did not and does not involve the mortgage No. 640513 remaining alive. There is no evidence of an agreement between Cap-Sol and Mr. Clarke or between Cap-Sol and JN to show an intention for Cap-Sol to stand in the shoes of JN. There has been no indication that Cap-Sol have sought or succeeded in renegotiating or changing the nature of the business transacted with JN. It is in any event quite plain that at the date when Cap-Sol paid to JN

the sum to close, the intention was to discharge the mortgage and there was no intention to keep the mortgage alive for the benefit of Cap-Sol.

(c) Even though Cap-Sol received notification from JRF's agents Dennis Joslyn from as far back as by way of letter dated September 23 2003 that JRF were returning the cheque because they were not able to discharge the mortgage to which they were beneficially entitled on the basis of that payment, Cap-Sol nevertheless was writing to JN in October 2004, and receiving correspondence from JN dated November 4 2004, and documentation designed to secure a discharge, as opposed to an acquisition, purchase or assignment of JN's mortgage to Cap-Sol. In other words, over a year passed between the return of Cap-Sol's cheque by Dennis Joslyn and the letter from JN enclosing discharge of mortgage.

(d) The legal owner of the Mortgage, JN has executed the Discharge of Mortgage, and sent the Certificate of Title to Cap-Sol on the express understanding that Cap-Sol would

(a) Have JN 's Discharge of Mortgage endorsed on the Duplicate Certificate of Title ;

(b) On completion of the registration of Cap-Sol's security, forward the Title to Dennis Joslyn.

At no time did Cap-Sol reject this understanding, or seek to negate, change or clarify it or in any other way seek to release itself from the terms imposed upon it by JN.

(c) By letter dated March 2 2005, in response to Dennis Joslyn's letter dated February 23 2005,

seeking the forwarding of the Certificate of Title, Cap-Sol requested a further 60 days to complete. It did not deny its duty to give the Title to JRF, and indeed apologized for the delay in forwarding the Title. Therefore, even at this stage, over 18 months later, Cap-Sol was still operating on the basis that the JN Mortgage was to be discharged and the Title forwarded to JRF. It does appear that unfortunately Cap-Sol did not transact this business with the degree of care and attention to detail that was required to protect its interests from beginning to end.

(e) Under cover of letter dated March 2, 2006, from Cap-Sol to JRF, Cap-Sol set out its loan balances with regard to borrower Mr. Clarke. The starting loan balance is said to be $786,003.54. In its letter dated March 22 2005 to Dennis Joslyn, Cap-Sol advised that it had purchased the JN Mortgage and was registering its second interest of $747,723.00 as a third mortgage. In the Loan Balance Statement, it is recorded that an amount of $ 576, 280.43 was paid to JN. In the Affidavit of Melanie Spicer-Hamilton, paragraph 10, it is stated that a cheque in the sum of $209, 723.11 was paid to JN in discharge of their mortgage. If indeed the total starting loan balance was $786,003.54, then if Cap-Sol are legally entitled to secure as a third mortgage the sum of $ 747,723.11, it is difficult to see how they would also be entitled to keep the security of the JN mortgage alive, and of course, one cannot keep portions of a security alive. Also, if the starting loan balance includes sums paid out to JN in respect of the mortgage, and amounts to

$786,003.54, whether one takes the sum paid out to JN as $209,723.11 or $576, 280.43, it is difficult to see how Cap-Sol would have the right to register a third mortgage to cover $747, 723.11 with interest, and also have the right to maintain that the JN mortgage remains alive and for its benefit.(my emphasis). In other words, to keep the JN mortgage alive at the same time as maintaining a third mortgage for $747,723.11 would seem to amount to an overlapping of some portion of the indebtness, by and within both securities, if indeed the starting loan balance was $786,003.54.

(47) In all the circumstances therefore, at the end of the day, Cap-Sol must be taken as expressing an intention contrary to keeping the mortgage alive. No amount of hindsight and wishful thinking, especially having regard to the registration of the 3rd mortgage in their favour and in the sums claimed, can now change that, unfortunate though it may be for Cap-Sol. I am therefore of the view that for all intents and purposes, the debt secured by the JN mortgage has been extinguished, and it is now a matter of the formal Discharge of Mortgage which has already been executed being registered on the Title so that the discharge can take effect.

The Third Issue: **Whether the Mortgage No. 908276 registered on 24th November 1995 ranks in priority to the Mortgage No. 1346648 registered on 2nd August 2005?**

(48) It is quite clear that under the Torrens system registration determines both title and priority. Indefeasibility is the foundation of the Torrens system and is given expression to in section 70 of the Registration of Titles Act. However, indefeasibility applies not

only to the holder in fee simple of land, but also to the owner of a mortgage. In section 4 of the Registration of Titles Act, proprietor is defined to mean " the owner ... whether in possession, remainder, reversion expectancy or in tail or otherwise, of land, or of a lease, mortgage or charge..."

(49) See again the dicta of Barwick CJ in **Breskar v. Wall** (1971) 126 CLR 376 at 385-386 referred to above at paragraphs 31 and 32..... *It is the title which registration itself has vested in the proprietor.* (my emphasis). Also reference should be made to section 63 of the Registration of Titles Act.

(50) I agree with Mr. Manning where at paragraph 26 of his written submissions he states that further, in order to have its mortgage registered on the Duplicate Certificate of Title , Cap-Sol was obliged to have its encumbrance stand subordinate to Mortgage No. 908276. As stated by author E.A.Francis, in **The Law and Practice Relating to Torrens Title in Australia**, 1972 , page 300, "Because of the nature of the estate or interest in land created by the Statute on the registration of a mortgage, any number of successive mortgages may be registered in respect of the one registered estate or interest in land. In each of them it would be necessary to disclose, as an encumbrance, each mortgage having priority".

(51) This is where Cap-Sol's argument about detrimental reliance comes into play. Cap-Sol says that they and Mr. Clarke have been grossly prejudiced by their reliance on the balance to close which was contained in letter dated July 23 2003 and which was subsequently revised upwards. Although Cap-Sol places reliance on the letter from Dennis Joslyn to Mr. Clarke dated July 23 2003, there really is no misrepresentation on the face of the document; it refers specifically to a particular loan, i.e. loan # 10310452, and it does not state that the amount stated due was the amount

required to extinguish all of Mr. Clarke's indebtedness and discharge the mortgage. The mortgage expressly covers all monies owed by Mr. Clarke to the mortgagee at any time or of whatever nature. Both parties agree that there is no documentary evidence before the Court as to what was the exact request or enquiry made by Mr. Clarke of Dennis Joslyn. Indeed, one would have expected that there would be Affidavit evidence from Mr. Clarke to support that position and others taken by Cap-Sol in relation to these issues. I further agree with Mr. Manning that Cap-Sol is really relying on hearsay evidence to prove a substantial part of their claim, i.e. Cap-Sol is saying that the debtor Mr. Clarke told them that JRF told him/ indicated to him that this was the final amount to clear the mortgage(see paragraph 8 of Mrs. Spicer-Hamilton's Affidavit and paragraphs 3 and 5 of the Defence).

(52) In any event, I agree with Mr. Manning that though misrepresentation has not been pleaded, and the word "estoppel" has not been expressly used, even if there was any misrepresentation, there was no evidence to show that such misrepresentation was made by JRF to Cap-Sol, as opposed to Mr. Clarke. There is also no evidence that JRF knew that Cap-Sol was relying on the letter and loan amount stated in it as a balance to close. Even if there was some sort of misrepresentation that would not without more entitle Cap-Sol to a real property interest.

(53) There is another reason why it seems to me that Cap-Sol cannot rely upon this notion of detrimental reliance, to raise an estoppel by representation or otherwise. There is no representation flowing directly from JRF to Cap-Sol. In the fourth paragraph of JRF's letter to Cap-Sol dated November 27 2006, exhibited to CapSol's Defence, Miss Farrow makes the following prudent observation:

> " It is unfortunate that standard business practices weren't followed on this transaction and that Capital Solutions relied

on the representations of Mr. Clarke instead of requesting a statement from JRF(or DJJ) directly on its undertaking to pay the debt in exchange for a discharge of mortgage".

That this was standard business practice has not been refuted by Cap-Sol. Had such a practice been observed, Cap-Sol would then have been better placed to say that a representation of a kind adverse to its interests was made by JRF to it. It seems probable that if such a practice, which seems a sensible one, had been observed, the present legal problem may not have occurred.

(54) On a balance of probabilities, I am therefore of the view that the Mortgage No. 908276 registered on the 24th November 1995 and in respect of which JRF is the beneficial owner ranks in priority to Cap-Sol's Mortgage No. 1346448 registered on the 2nd August 2005.

Issue Number 4 : Which of the parties are entitled to hold the Duplicate Certificate of Title?

(55) By its letter of November 4 2004, JN sent the Duplicate Certificate of Title to Cap-Sol on terms, amongst others, that it would after registering its mortgage, forward the Title to JRF. Cap-Sol has registered its third mortgage on the Title(on 2nd August 2005). I have already indicated that Cap-Sol's submission that the mortgage No. 640513 remains alive for its benefit, fails. In the circumstances, Cap-Sol can no longer justify retaining the Duplicate Certificate of Title, which, in its letter to JRF of March 22 2005, Cap-Sol promised to forward. In all the circumstances I am of the view that the Title falls to be delivered to JRF.

(56) I am therefore satisfied that the relief sought by JRF in the Fixed Date Claim Form is substantially appropriate and meets the justice

of this case and that Cap-Sol is not entitled to the Orders sought in the CounterClaim. I grant the following on the Claim:

(a) A Declaration that mortgage numbered 908276, registered on the 24th of November 1995 on Certificate of Title registered at Volume 1389 Folio 627 of the Register Book of Titles ranks in priority to mortgage numbered 1346448 registered in favour of the Defendant on the 2nd August 2005.

(b) The Defendant is to forthwith deliver up to the Claimant the Duplicate Certificate of Title in respect of property located at 6 Mimosa Avenue, Kingston 11 and registered at Volume 1389 Folio 627 of the Register Book of Titles.

(c) A Declaration that mortgage # 640513 is to be discharged and the Defendant is to forthwith deliver up to the Registrar of Titles the formal instrument of Discharge of Mortgage No. 640513 already duly executed by the Jamaica National Building Society.

(d) The Claimant is to serve this order on the Registrar of Titles for her to give effect to the terms of this Order that the Defendant register the Discharge of Mortgage in respect of Mortgage No. 640513. The Registrar of the Supreme Court is empowered to execute all necessary documents to effect the discharge if the Defendant fails or refuses to do so.

(e) Liberty to Apply.

(57) The Counterclaim is dismissed.

(58) Costs are awarded to the Claimant and I will hear further from the parties as to the basis upon which costs stand to be awarded (The Claimant has requested costs to be paid by the Defendant on a solicitor and client basis).