

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 5152 OF 2009

BETWEEN	JAMAICAN REDEVELOPMENT FOUNDATION INC	CLAIMANT
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AND	THE REAL ESTATE BOARD	1ST DEFENDANT
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AND	THE REGISTRAR OF TITLES	2ND DEFENDANT
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IN CHAMBERS

Mr. Maurice Manning and Miss Tavia Dunn instructed by Nunes Scholefield,
DeLeon & Co. for Claimant.

Dr. Lloyd Barnett and Miss Gillian Burgess for the 1st Defendant.

Heard : 12th October 2010, and 12th May 2011.

**THE REAL ESTATE (DEALERS AND DEVELOPERS) ACT OF 1987-
PREPAYMENT CONTRACTS- ENTERED INTO IN BREACH OF
PROVISION LAND TO BE FREE OF MORTGAGE NOT CONCERNED
WITH CONSTRUCTION OR BUILDING-WHETHER PREPAYMENT
CONTRACT VOID OR VOIDABLE-WHETHER CHARGE IN FAVOUR
OF BOARD VOID- WHETHER MORTGAGOR REQUIRED TO
COMPENSATE PURCHASERS BEFORE EFFECTING TRANSFER
UNDER POWER OF SALE- PRIORITY OF MORTGAGE/CHARGE**

Mangatal J:

1. This is a claim by the Claimant Jamaican Redevelopment Foundation Inc. "JRF" for certain declarations and orders. The application was

opposed by the 1st Defendant the Real Estate Board “the Board”. Though the 2nd Defendant the Registrar of Titles was served, that officer did not take any part in these proceedings, no doubt being content to abide their outcome and the court’s ruling.

2. The relief sought is as follows:

- 1) A declaration pursuant to section 106 of the Registration of Titles Act that the Claimant is entitled to transfer property registered at Volume 1324 Folio 686 of the Register Book of Titles pursuant to the exercise of its power of sale.
 - 2) A declaration that the charge endorsed as Miscellaneous No. 1453150 on Certificate of Title registered at Volume 1324 Folio 686 of the Register Book of Titles in favour of the Real Estate Board is null and void and not binding on the Claimant.
 - 3) An order that the miscellaneous entry No. 1453150 be cancelled and struck off the Certificate of Title registered at Volume 1324 Folio 686 of the Register Book of Titles by the 2nd Defendant.
 - 4) Costs.
 - 5) Such further and/or other relief as this Honourable Court deems just.
3. This case raises some very important issues for real estate business and for development schemes. It involves interpretation of certain provisions of the **Real Estate (Dealers and Developers) Act of 1987** “the Act” and its interplay with the **Registration of Titles Act**. I am grateful to the Attorneys on both sides for their invaluable submissions and assistance.

UNDISPUTED FACTS

4. Some of the material facts that are not in issue are as follows:

- a. New World Development Corporation Limited, the mortgagor, “NWDC” received several loans from Horizon Merchant Bank and Horizon Building Society, security for which was all that land comprised in

Certificate of Title registered at Volume 1266 Folio 801, “the parent title”. This included all that land numbered Lot 4 comprised in the now splintered issued Certificate of Title registered at Volume 1324 Folio 686 of the Register Book of Titles.

- b. Mortgages in favour of Horizon Merchant Bank and Horizon Building Society were accordingly registered on August 25, 1994, June 20, 1995 and January 24, 1996. The mortgages were transferred to Refin Trust limited on October 1, 1999. Refin Trust thereafter transferred these mortgages to JRF on the 29th October 2003.
- c. NWDC defaulted in the repayment of the loans. On or about September 25, 2006 notices were sent by JRF to NWDC and its guarantors demanding payment of the sums outstanding and threatening legal action for recovery of the debt if no payment was made.
- d. The Board is a body established under the Act and its principal functions are to regulate and control the practice of real estate business, and the operation of development schemes and the disposition of land within them.
- e. On the 7th of February 2007 a charge which JRF now challenges was entered on the Registered Title to Lot 4 in favour of the Board “in respect of all monies received under prepayment contracts pursuant to the provisions of section 31 of the Real Estate (Dealers and Developers) Act 1987.”
- f. The Charge Instrument stated that the land “is subject to the incumbrances, if any, set out in the Third Schedule hereto”. The Third Schedule sets out the incumbrances to which the lands are subject, such

incumbrances being the mortgages which have been transferred to JRF.

- g. No payment was made and JRF exercised its power of sale under the mortgage. Valuations were obtained for the various lots which had originally formed part of the lands comprised in the parent title and sale was attempted by way of public auction on February 8, 2007 and subsequent dates. In March of 2007 an offer to purchase above the reserve price was made in respect of Lot 4 registered at Volume 1324 Folio 686. This was accepted by JRF, a sale agreement was concluded and a transfer executed and lodged with the Registrar of Titles on November 13, 2007.
- h. JRF indicates, in paragraph 11 of the Affidavit of Janet Farrow, sworn to on the 29th September 2009, the then Chief Executive officer of the Jamaican branch of JRF, that the Registrar of Titles refused to register the transfer. The refusal was on the basis that the Board's consent is required as the Board's charge ranks in priority to any other mortgages pursuant to section 31 of the Act. Mrs. Farrow indicated that it was only at that time that JRF learnt of the charge in favour of the Board.
- i. There were two other properties subject to the same charge in favour of the Board, that have been subsequently transferred by the Registrar of Titles to new proprietors after exercise by JRF of its powers of sale under one of the relevant mortgages. These properties are the parcels of land registered at Volume 1324 Folio 698 and Volume 1304 Folio 721 respectively.

- j. There is no complaint being made as to JRF's exercise of its power of sale. However, the Board has indicated to JRF in respect of Lot 4 that it is unwilling to remove the charge or consent to the transfer unless the JRF makes arrangements to compensate the purchasers under the prepayment contracts.

OTHER FACTS AND EVIDENTIAL CONSIDERATIONS

5. According to the Affidavit of Sandra Watson, the Board's General Manager, the Board received an application dated March 17, 1994. It was from "NWDC" to be registered as a developer for the purposes of a development scheme at Pleasant Valley, Belvedere, in the Parish of Saint Andrew.
6. The application form indicated that there were no mortgages on the title. The application was approved. In paragraph 8 of her Affidavit, Ms. Watson states that an applicant who has entered into prepayment contracts is mandated to lodge the money he receives in connection with the contract into a trust account. That money should not be withdrawn from the trust account until completion or rescission unless the applicant does a number of things, including lodging a charge in favour of the Board.
7. In paragraphs 9, 11 and 12 of her Affidavit Ms. Watson states:
 9. *From information received from the registered proprietor, it entered into prepayment contracts with respect to the land in the development. Lot 4, the subject of the claim, was sold to Ms. Debbie Gibson who resides in the United States of America. A copy of the Sale Agreement is exhibited hereto and marked "SW2" for identification. Receipts indicate that some of these prepayment contracts were signed prior to the Claimant's mortgage.*
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 - 11...*the land contained in Certificate of Title registered at Volume 1304 Folio 721 was purchased by Ms. Barbara Ellis. A copy of the Agreement for Sale is exhibited*

hereto and marked "SW 3" for identification. Ms. Barbara Ellis has sent us receipts that pre-date the mortgage assigned to the Claimant. Copies of the receipts are exhibited hereto marked "SW4" for identification.

12. I am shown receipts from New World Developments drawn in favour of Raymond Jones in respect of Lot #3. I exhibit hereto and mark "SW5" copies of those receipts.

8. Mr. Manning contended that paragraph 9 of Ms. Watson's Affidavit contains hearsay statements. He also submitted that Ms. Watson's Affidavit has serious omissions in relation to matters that need to be established in order to show that there are prepayment contracts. He further submitted that the evidence put forward by the Board fails to demonstrate that these contracts predated JRF's mortgages.

The Issues

9. The main issue joined between JRF and the Board is whether the charge placed on the Certificate of Title purportedly by virtue of the Act, was lodged in accordance with its provisions and whether the Board's charge ranks in priority to JRF's mortgages duly registered under the Registration of Titles Act prior to the charge.

10. JRF also asks the Court to determine whether such a charge is permissible in the present circumstances and what are the ramifications as it relates to JRF's ability to pass title to its purchaser and the obligations of JRF if any to the purchasers under the prepayment contracts.

The Law

11. The following sections of the Act are particularly relevant to the issues.

In section 2 of the Act, land is defined to include:

...all estates and interests, whether freehold or leasehold, in real property including (where appropriate) an estate or interest comprised in a strata title under the Registration (Strata Titles) Act.

A prepayment contract is defined in section 2 of the Act as follows:

“prepayment contract” means any contract under which at the time of entering into the contract, there are to be performed or discharged by one party for the benefit of the other party, or for the benefit of a party to a connected contract, obligations, expressed or implied, with regard to-

- (a) the building of roads or the carrying out of engineering or other operations in, on, over or under any land the subject of the contract or any connected contract; or*
- (b) the carrying out of any building operations, including, but not limited to, the construction or completion of any house, townhouse, or apartment in a condominium building, and of the structures or works for use in connection therewith upon any such land,*

and under which moneys are payable by the party to benefit from the performance and discharge of such obligations prior to the performance and discharge thereof; and in relation to any such contract “vendor” means the person who is to perform and discharge the said obligations and “purchaser” means the person for whose benefit they are to be performed and discharged.

“development scheme” means a scheme or intended scheme for the development of land the sub-division of which is subject to the provisions of the Local Improvements Act or the Town and Country Planning Act;

.....

Part IV-Development Schemes

26-(1) A person shall not enter into a prepayment contract as a vendor in connection with any land which is, or is intended to be, the subject of a development scheme to which section 35 applies unless-

- (a) the vendor under the prepayment contract is a registered developer;*
- (b) such land is free from any mortgage or charge securing money or money’s worth (other than a mortgage or charge in favour of an*

authorised financial institution referred to in the proviso to subsection (5) of section 31);

(c) all approvals required by or pursuant to any law for the carrying out of the development scheme and for the carrying out of the vendor's obligations under the prepayment contract have been obtained and where any such approvals have been obtained subject to conditions unless-

(i) all the conditions have been complied with; or

(ii) if any condition has not been complied with that condition is one which cannot or is not, by the terms thereof, required to be complied with prior to entering into the contract; and

(d) the vendor under the prepayment contract has deposited with the Board copies of all approvals given under the Local Improvements Act and the Town and Country Planning Act together with all plans, drawings and specifications referred to in such approvals, authenticated in such manner as may be prescribed.

(2) Where a contract is entered into by a vendor in contravention of subsection (1) the purchaser or any person succeeding to the rights of the purchaser under the contract may, within such time as may be reasonable in the circumstances of each case, withdraw therefrom and recover from the vendor any monies paid to him under the contract together with interest thereon computed from day to day at the prime lending rate of commercial banks in Jamaica for the time being prevailing as certified by the Bank of Jamaica, but without prejudice however to the provisions of section 44 (2) (relating to the penalty for contravention of subsection (1) of this section.).

28. A signed copy of every prepayment contract shall be forwarded to the Board by the vendor within fourteen days from the signing of the contract by the parties thereto.

29. –(1) *Subject to such conditions as may be prescribed, every person who as a vendor under any prepayment contract relating to any land which is, or is intended to be, the subject of a development scheme, receives any money from the purchaser pursuant to such contract, shall without delay pay such money into a trust account to be maintained by him with an authorised financial institution and held and applied in accordance with the provisions of this Act.*

(2) Upon every payment of moneys into a trust account pursuant to subsection (1) the person making such payment shall furnish to the Board a report of such payment specifying the contracts to which the moneys comprised in such payment relate, and such other particulars as may be prescribed.

(3) All monies deposited in a trust account pursuant to subsection (1) and all interest earned thereon shall, subject to section 31, be held in such account and paid to, or applied for the benefit of, the persons entitled thereto in accordance with the provisions of this Act.

30. *It is hereby declared that, subject to subsection (3) of section 31, the moneys received by a vendor under a prepayment contract in connection with land in a development scheme and deposited in a trust account pursuant to section 29 shall be held in trust in such account, or any other account substituted therefore pursuant to subsection (2) of section 31, until completion or rescission, as the case may be, of the contract under which such moneys were received, to be paid to the persons legally entitled thereto pursuant to the terms of the contract upon completion or rescission of the contract.*

31. –(1) *Subject to subsections (2) and (3) moneys deposited in a trust account pursuant to section 29 and any interest earned thereon shall not be withdrawn from the account until the completion or rescission, as the case may be, of the contract under which the moneys were received by the vendor.*

(2) Moneys so deposited in a trust account may be withdrawn and deposited in another trust account with another authorised financial institution subject to such conditions as may be prescribed and the provisions of this Act shall apply to that other account and the moneys held therein as they apply to the original account.

(3) Moneys so deposited in respect of a prepayment contract may be withdrawn from the account prior to the completion or rescission of the contract and applied by the vendor in the payment of stamp duty and transfer tax payable in respect of that contract and in partial reimbursement of the costs of materials supplied and work done in the construction of any building or works which is the subject of the contract, subject to the undermentioned conditions, that is to say-

(a) the moneys withdrawn shall not exceed ninety percent of the amount certified by a qualified quantity surveyor or architect or other person having such qualification as the Board may prescribe for the purposes of this section (not being a person in the employment of, or having an interest in, the business of, the vendor or the developer) as being properly due for work already done and materials already supplied in the construction of the building or works and not previously paid for; and

(b) the owner of the land on which the building or works is being constructed has executed and lodged with the Registrar of Titles a charge upon the land in accordance with subsection (4).

(4) The charge mentioned in paragraph (b) of subsection (3) shall be a charge upon the land on which the building or works in question is being constructed in favour of the Board charging the land with the repayment of all amounts received by the vendor pursuant to the contract which shall become repayable by him upon breach by him of the contract.

(5) Such charge shall rank in priority before all other mortgages or charges on the said land except any charge created by statute thereon in respect of unpaid rates or taxes, and shall be enforceable by the

Board by sale of the land by public auction or private treaty as the Board may consider expedient:

Provided that where a mortgage or charge of the said land has been duly created in favour of an authorised financial institution to secure repayment of amounts advanced by that financial institution in connection with the construction of any buildings or works on the said land the charge created by this section shall rank pari passu in point of security with the mortgage or charge in favour of that authorised financial institution.

(6) For the purposes of subsection (5) a loan or advance by an authorized financial institution shall prima facie be taken to be made in connection with the construction of any building or works if it is expressed in the instrument creating the mortgage or charge securing the repayment of that loan or advance that the loan or advance was so made.

(7) A charge executed pursuant to this section shall be deemed to be a mortgage under the Registration of Titles Act and shall be enforceable accordingly but shall be exempt from registration fees under that Act, transfer tax under the Transfer Tax Act and stamp duty under the Stamp Duty Act.

JRF's Submissions

12. Mr. Manning on behalf of JRF submitted that since section 26 states that a person "shall not", there is no discretion for a person to enter into prepayment contracts once the stipulated conditions are not fulfilled.
13. There is no express provision in the mortgages that were assigned to JRF to indicate that the mortgages were granted to secure repayment of amounts advanced in connection with the construction of any buildings or works on the land. JRF contends that the mortgages were offered and accepted as security for the monies borrowed by the

mortgagor and there was no granting of the mortgage for the purpose of construction or carrying out works on the property.

14. Reference was made to clause 1(k) of the mortgage instruments which provide that the Mortgagor covenants “Not to create or permit to subsist any mortgage pledge charge encumbrance lien or security in the mortgaged property other than this security or the prior encumbrances referred to in the schedule hereto.” Mr. Manning submits that this clause would specifically prohibit the creation of a subsequent charge without the mutual consent of the parties.
15. The submission continues that the developer entered into prepayment contracts in breach of the covenants contained in the existing mortgages and in contravention of section 26 of the Act which expressly prohibits the formation of such contracts with respect to land that is not free from any mortgage or charge securing money or money’s worth. The exception is where such mortgage or charge on the land has been duly created in favour of an authorised financial institution to secure repayment of amounts advanced by that financial institution in connection with the construction of any building or works on the land. The JRF mortgages prima facie do not fall within the exception created by section 26.
16. The Board, JRF submits, had notice of JRF’s mortgages prior to lodging the statutory charge. The argument continues that the Board’s charge was therefore wrongly endorsed on the title to the land as it was entered pursuant to a contract which was void, the land not being a proper security as required by the Act.
17. Mr. Manning submitted that the charge, as lodged, does not provide the statutory protection and/or priority that the Board contends it has as it specifically states that the charge is subject to the mortgages that have been transferred to the JRF. The charge does not therefore fall within the ambit of the provisions of section 31 of the Act.

18. Section 31(3)(b) of the Act requires the owner of the land to execute and lodge a charge with the Registrar of Titles in accordance with subsection 4. It was argued that the charge is therefore one that relies on the execution of an instrument by the owner of the land and the lodging of that instrument with the Registrar of Titles. By virtue of section 63 of the Registration of Titles Act, the instrument so lodged when registered is effective subject to the conditions and encumbrances stated in the instrument.
19. JRF submit in conclusion that the transfer, represented to the Registrar as being made pursuant to a power of sale conferred by section 106 of the Registration of Titles Act, ought to be effected. That in these circumstances the Board's charge does not rank in priority to JRF's mortgages as this charge was not validly entered on the certificate of title. Further, that the JRF is under no obligation to compensate the purchasers under the prepayment contracts.

THE BOARD'S SUBMISSIONS

20. The Board has set out its arguments in its written submissions under a number of heads. The first of these is as follows:

STRIKING OFF THE 1ST DEFENDANT'S CHARGE

21. The Board is the registered proprietor of a mortgage in relation to the land in dispute. In Jamaica we practice the Torrens system of land ownership. Dr. Barnett on behalf of the Board submitted that section 161 of the Registration of Titles Act outlines the circumstances under which a claim may be brought against the registered proprietor. Reference was made to **Fraser v. Walker** [1967] 1 A.C. 569, where the Privy Council decided that the protection afforded to a registered proprietor extends to a mortgagee. The submission continued that as JRF have not alleged that any of the exceptional circumstances set out in section 161 exist, then the claim for declarations that the Board's charge be struck off the Register Book of Titles should be dismissed.

**WHETHER THE CLAIMANT IS ENTITLED TO TRANSFER
THE PROPERTY**

22. It is the Board's position that it is the first mortgagee and that JRF is the second mortgagee. As second mortgagee at common law JRF would be entitled to transfer the property subject to the Board's charge, (and **Manser v. Dix** 44 E.R. 561 was referred to). The Board is of the view that if the JRF wishes to sell the property free of the Board's charge it must discharge the charge prior to or at the time that it presents the transfer.

**WHETHER THE COVENANT BETWEEN JRF AND NWDC,
THE MORTGAGOR, VOIDS THE BOARD'S CHARGE**

23. It was argued that the breach of covenant by NWDC is a matter of contract between JRF and NWDC and cannot void the Board's statutorily authorized charge.

**WHETHER S.26 OF THE ACT PROVIDES THAT A
PREPAYMENT CONTRACT ENTERED INTO IN
CONTRAVENTION OF THE TERMS OF S.26 IS VOID AND
THEREFORE THAT THE BOARD'S CHARGE IS VOID**

24. Dr. Barnett further submitted that under the Torrens system of land registration it is the act of registration itself that makes the Board's charge a legal charge and not compliance with the statutory provisions. It is a system of title by registration not a system of registration by title.
25. Reference was made to the Privy Council's decision in **Assets Company v. Roihi** [1905] A.C. 176, where it was held that even if a transfer is obtained under a void instrument that does not mean that the registered proprietor has not acquired an indefeasible interest, subject to certain exceptions, for example actual fraud, and that fraud must be on the part of the registered proprietor himself. The case was considered and approved in **Frazer v. Walker**.
26. Reference was made to our Court of Appeal's decision in **Horace Linton Nunes(Executor of the estate of Lionel Coke et al) v Roy**

Williams et al (1985) 22 J.L.R. 339, where the applicant sought relief which in essence sought cancellation of an instrument of transfer. The basis for this claim was that the **Land Development and Utilization Act**, section 20, restricts the disposition of the land without approval. Section 20 provides :

An owner or occupier of, or any other person having an interest in, any land comprising or included in an agricultural unit shall not without the approval in writing of the Commission –

- a. sell, lease or let the land or any part thereof,*
- b. transfer or assign his interest therein or in any part thereof,*

and any such sale, lease, letting, transfer or assignment shall not have effect unless and until it is approved by the Commission.

At page 351 E-G, Campbell J.A., in considering the effect of registration, stated:

...the line of cases mentioned culminating in Frazer v. Walker, supra, established that whatever the cause resulting in the contract and /or instrument of transfer being rendered void or otherwise invalid, be it due to irregularity in execution or due to breach of statutory provisions the fact of the registration of any such instrument of transfer creates in the person in whose favour the instrument is executed an indefeasible title to the land referred to in the instrument in the absence of fraud. This is so because as has been said by Lord Wilberforce at p.652 in Frazer v. Walker supra the inhibiting effect of certain sections of the New Zealand Land Transfer Act eg. Sections 62,63 (which correspond to sections 70 and 161 of our Registration of Titles Act) and the probative effect of others, eg. Section 75 (which corresponds to our section 68) in no way depend on any fact other than actual registration as proprietor. "It is in fact the registration and not its antecedents which vests and divests title".

27. The Court of Appeal held that registration gave the registered proprietor an indefeasible title. The Board's Attorneys submit that in **Nunes**, the words of the statute in question were much stronger than

in the instant case. The statute there provided that the Agreement for Sale was to have no legal effect whereas there is no similar provision in the Act. The Board's charge being endorsed and registered on the Certificate of Title registered at Volume 1324 Folio 686, that is conclusive evidence that the Board's charge is legal.

28. The Board's Attorneys submit further or in the alternative that there is no basis in law or in the Statutes themselves to support the argument that the prepayment contracts entered into are void. The prepayment contracts are voidable at the instance of the purchaser.

WHETHER THE BOARD'S CHARGE RANKS IN PRIORITY TO THE CLAIMANT'S MORTGAGE

29. The Board's position is that its charge is a statutory one. It was submitted that it is well established that where a statutory charge is on "the land" as distinct from the estate or interest of the registered proprietor for the time being, then it confers priority over existing and future encumbrances. Reference was made to **Westminster Council v. Haymarket Publishing** [1981] 1 W.L.R. 677, **Paddington Borough Council v. Finucane** [1928] Ch 567, **South-Eastern Drainage Board v. The Savings Bank of South Australia** (1939) 62 C.L.R. 603, and **Halsbury's Laws of England**, 4th Edition 2005 Reissue paragraph 492.
30. In **Westminster**, the English Court of Appeal was concerned with a charge under the General Rate Act ss. 17A and 17B. A company acquired certain premises in January 1974 and it was charged by way of legal mortgage in favour of a bank to secure all monies and indebtedness, present and future, owing by the company to the bank. Under section 17A the rating surcharge which became payable was to be a "charge on the land comprised in the hereditament". It was held by the Court of Appeal, amongst other matters, that on its true construction, the words "charge on the land" in section 17B meant a charge on all the estates and interest in the land, and, accordingly, the

charge took priority over the mortgage debt owing to the bank-Lord Denning M.R. pages 680-681.

31. By virtue of section 31(4) of the Act, the Board's charge is "a charge upon the land". The Attorneys submit that the position is made even clearer by the fact that in section 2 of the Act "land" is defined to include all estates and interests. Further, in section 31(5), the Act expressly provides that the Board's charge ranks before all other mortgages and charges except charges created by statute in relation to rates or taxes.
32. It was argued that the words are clear and unambiguous and it must be presumed that Parliament does not legislate in vain. If the intention of Parliament was for the Board's charge to rank in priority only to those mortgages registered subsequently to that of the Board, then that is adequately provided for in the Registration of Titles Act and s.31(5) would therefore have been totally unnecessary.
33. The submission continues that prior to the Act the purchasers who entered into prepayment contracts would have had only an equitable interest in the land and therefore a vendor causing a subsequent interest to be registered could defeat this interest. Parliament sought to cure this mischief by providing that the vendor shall register a charge in favour of the Board and that this charge should rank in priority to all others, subject to the exceptions and proviso in the Act itself. In short, the Act is protecting the purchaser from the vendor.

RESOLUTION OF THE ISSUES

WHETHER JRF MORTGAGES PREDATE THE PREPAYMENT CONTRACTS

34. Mr. Manning contended, correctly in my view, that paragraph 9 of Ms. Watson's Affidavit contains hearsay statements and I have borne this in mind in considering this aspect of the evidence. The Agreement in relation to Ms. Gibson is undated and there is no clause in it which

authorises the release of any funds in relation to works or construction, or to do any development works on the land for the benefit of the purchaser. The Agreement also appeared to involve a cash sale as there was no mortgage mentioned-see page 9, Schedule 1 . Importantly there are no receipts in relation to any payment or pre-payment by Ms. Gibson. One cannot have a prepayment contract without a prepayment before construction or building or development.

35. As regards the receipts SW4 in relation to Mrs. Ellis, none of these receipts predate 1994. Further, the Lot that Mrs. Ellis was buying, relates to the property at Volume 1304 Folio 721 and this property was in fact transferred to a third party in February 2008 pursuant to JRF's exercise of its power of sale.
36. As regards the receipts exhibited in relation to Mr. Raymond Jones, these appear to be the only ones that contain any evidence of payment predating the JRF mortgages, for example, one dated 18th July 1994. However, as Mr. Manning indicated, on the face of them the receipts do not appear to relate to the property the subject of this claim as they speak to a Lot 216 in Smokeyvale, whereas the property here in issue is in Belvedere and is in relation to forty Lots.
37. I also note that although NWDC applied to be registered as a developer in March 1994, and by way of its application, and in accordance with the Act, agreed to submit to the Board copies of all prepayment contracts within 14 days of signing, the Board's charge was not registered until February 2007. This was after JRF gave statutory notices of default on the loans. This means that if these prepayment contracts had really predated the JRF's mortgages nothing was in place in respect of them for some 11-13 years. In all of the circumstances, and on the evidence before me, it is in my judgment clear that the vendor NWDC has breached the terms of section 26 of the Act in that it entered into prepayment contracts at a time when the land was not free from JRF's mortgages and these mortgages were not

created in respect of any amounts advanced in connection with the construction of any building or works on the land.

38. I note that in Ms. Watson's Affidavit, at paragraph 8, she speaks about "the charge herein being duly lodged by the registered proprietor". (My emphasis). I must comment that it seems to be a misuse of the description "duly" to say that a charge lodged over a decade after prepayment contracts were allegedly entered into was duly lodged. I also note that in her Affidavit, although Ms. Watson speaks of the duty of the vendor to open a trust account and lodge the moneys received in connection with the prepayment contracts to that account, she does not say whether in fact the developer did inform the Board, or whether a trust account was opened. She has also not said when the Board received copies of the prepayment contracts in respect of which the charge was lodged, or what indeed, if any, steps the Board has taken in relation to securing funds in any trust account that should have been opened by NWDC-section 33 of the Act. The Board has as part of its mandate a duty to monitor, supervise and regulate the activities of developers. It has powers and functions pursuant to section 5 of the Act and other sections, to make enquiries and collect information through Inspectors and otherwise, enabling it to carry out its functions properly. It has a duty to protect the mutual interests of persons entering into land transactions, and that includes the interests of purchasers entering into prepayment contracts with developers. In my view, the Board ought to have assumed a more commanding and assertive posture. They ought to actively ensure that they monitor whether developers are carrying out the proper accounting and duties mandated by the Act.

EFFECT OF COVENANT

39. I agree with Dr. Barnett that the breach of covenant by NWDC is a matter of contract between JRF and NWDC and does not void the Board's statutory registered charge.

WHETHER PREPAYMENT CONTRACTS VOID OR VOIDABLE

40. Although section 26 expressly prohibits the formation of prepayment contracts in these circumstances, I agree with Dr. Barnett that the prepayment contracts are not rendered void, but rather, section 26(2) of the Act allows the purchaser the option to withdraw from the contract, and there is further the stipulation that the withdrawal must be within a reasonable time. This therefore means that the prepayment contracts are not void, but are voidable at the instance of the purchaser. Prior to the passing of this Act, where the property in relation to which the prepayment contract was entered into was subject to a mortgage, the purchaser was placed in an invidious position. This is because the purchaser was exposed to the risk that the vendor might default under the mortgage and of the mortgagee thereupon exercising its remedies against the land. Notwithstanding this risk, the purchaser was required to continue to pay instalments to the vendor under the contract even though the purchaser would not in turn be able to compel the vendor to give him any protection against the results of a possible default under the mortgage. At the same time, even after default had been made under the mortgage and the preliminary steps necessary to the exercise of the mortgagee's power of sale had been taken, the purchaser was not entitled to rescind the contract because it was still even at that stage possible for the vendor to prevent the forced sale of the property by paying off the mortgage. That left it within the vendor's power to carry out his contract with the purchaser. This is a danger faced by purchasers who enter into prepayment contracts that are not faced to the same degree by purchasers under a cash sale. This is because the purchaser under the cash sale would usually have paid a deposit which would actually represent a small amount in relation to the whole purchase price, and usually the purchaser would become entitled to possession and to title a relatively short time after entering into the contract. Whereas the purchaser under a prepayment contract

will have paid off a major part of the purchase price before acquiring legal title to the land.

41. That is why, firstly, the Act prohibits the vendor entering into prepayment contracts where there is a mortgage such as JRF's mortgages, and secondly, the Act makes the prepayment contract voidable at the instance of the purchaser within a reasonable time. In my judgment, prepayment contracts are either analogous, or are indeed a category of terms contract. I found the analysis of the problems encountered in Victoria, Australia in relation to terms contracts prior to the passing of their Sale of Land Act 1962, "Terms Purchaser Problems" discussed in **Voumard's The Sale of Land**, 3rd Edition, Chapter XVI, pages 500-516, useful. In Victoria the Torrens system of registration of Title is used. The Sale of Land Act of Victoria defined a terms contract as one, amongst other things, which is an executory contract for the sale and purchase of land in which the purchaser is obliged to make two or more payments to the vendor after execution of the contract and before he is entitled to a conveyance or transfer of the land. The Act sought to restrict the sale on terms of land subject to a mortgage and also to restrict the mortgaging of land after it had been sold on terms. It also prohibited the sale of subdivided land before the plan of subdivision had been approved by the Registrar of Titles. It provided that any terms contract entered into in contravention of the Act's provisions in relation to certain matters, including mortgages, was voidable by the purchaser at any time before the completion of the contract and that the vendor would be guilty of an offence under the Sale of Land Act. I had asked the Attorneys in this case whether they had been able to find any authorities, local or otherwise, where provisions similar to those in the Act had been considered. Knowing the diligence and thoroughness of the Attorneys for both parties, I accept that they were not able to find any such decisions. However, I did find it helpful to reason by analogy in

relation to terms contracts and prepayment contracts since they, at the very least, have some common features.

WHETHER THE BOARD'S CHARGE IS NULL AND VOID

42. In my judgment, Dr. Barnett is correct that the fact of registration of the Board's charge endorsed on the Certificate of Title registered at Volume 1324 Folio 686 is conclusive evidence that the charge is legal, as none of the statutory exceptions to indefeasibility, for example fraud, has been alleged by JRF.
43. The fact that the developer breached section 26 of the Act, and that the prepayment contracts were voidable, does not affect the validity of the charge as a charge. This is because whatever the cause of irregularity or whether the contracts were voidable (even if they were void) due to breach of statutory provisions, the fact of the registration of the charge effects its validity- Assets Company v. Roihi, Frazer v. Walker ,and Nunes v. Williams .
44. As a consequence, in my judgment JRF are not entitled to a declaration that the Board's charge is null and void or to an order that it be cancelled and struck off.

WHETHER THE BOARD'S CHARGE RANKS IN PRIORITY TO JRF'S MORTGAGES

45. However, it seems to me that the rationale for the Act expressly providing an option to the purchaser to withdraw where the vendor has entered into the prepayment contract in circumstances where there is a mortgage on the land, so that the land is not free from a mortgage that was not concerned with construction of building or works on the land, is so that the purchaser can decide whether to abort the contract in those circumstances. One of the reasons is because the mortgagee in respect of that pre-existing mortgage will have rights in priority to that of the purchaser under the prepayment contract and hence, the land is as a security subject to an interest that will take precedence over that of

the purchaser in the event of breach or default on the part of the vendor.

46. I appreciated, and initially was very much attracted by, the very logical argument advanced on behalf of the Board, that if Parliament's intention was for the Board's charge to rank only in priority to the mortgages registered subsequently, then there would have been no need for s. 31(5) because that situation would be adequately provided for by the Registration of Titles Act. However, in looking at the matter in depth, I think that this reasoning is not applicable. This is because the Act does not provide for, indeed, it prohibits, and hence does not contemplate, the entry by the vendor into prepayment contracts in circumstances where there is a pre-existing mortgage in respect of advances to the vendor not connected to development. It is in fact a contravention of the Act for a developer to enter into prepayment contracts where there are prior mortgages or charges not related to development.
47. So that in my judgment, where the Act speaks of the Board's charge ranking in priority before all other mortgages and charges it does mean mortgages or charges registered subsequently to entry into the prepayment contracts, because the Board's charge only comes about because of the provisions of the Act requiring its creation by the vendor and its registration. It is only deemed to be a mortgage because of section 31(7). In other words, the Act is spelling out and according to the Board's charge, what would have been the status of a usual registered mortgage which comes into existence as a mortgage or charge on the basis of the nature of the contractual relations and Instruments entered into between mortgagor and mortgagee, or between charger and chargee. In the case of the Board's charge, protecting as it does what would prior to the Act only have been equitable interests of the purchaser, these are not natural and normal consequences. They have to be delineated and defined by the Act and

its deeming provisions. The Board's charge is not an interest in land capable of alienation. As pointed out in the Board's written submissions, before the passing of the Act, since the purchasers who entered into prepayment contracts would have had only an equitable interest in the land, then the vendor could have caused a subsequent legal interest to be registered that would have defeated their interest. The effect of section 31(5) is to ensure that there is no subsequent mortgaging of the land(not being in connection with the construction of any building or works which is dealt with in the proviso as ranking *pari passu*) that can affect the purchasers' interests. In my judgment, the language of section 31 is in this context wide enough to encompass giving the Board's charge priority to mortgages or charges which were not in existence at the time of entry into the prepayment contracts, which were created subsequently, but were registered before the Board's charge. Such a situation would not have been adequately provided for by the Registration of Titles Act which gives priority on the basis of time of registration.

48. The Board's charge is distinguishable from the charge in the **Southeast Drainage** case, because there the charge was a first charge on the land which was not dependent on the creation or existence of any instrument. There was also no provision requiring registration of the charge. The drainage authority's charge was secured by the legislature for the recovery of public monies expended under the relevant Drainage Acts. As Latham C.J. stated at page 622, "they are complete and effective by reason of the provisions of the Acts creating them". At page 632 Evatt J stated:

The statute declares the priority of its charge; first means first; there is no room for a registration of the charge under the Real Property Act, and therefore no room for the charge being defeated by registration of a subsequent interest in the same land.

I therefore agree with Mr. Manning that the Board's charge is a sort of hybrid, because although it requires registration, it is a charge on the land. In the Westminster case, the charge on the land was also in respect of surcharges due to the public coffers. In neither Southeast Drainage nor in Westminster was there a prohibition in the statutory provisions under consideration of entry by the vendor/owner into contracts with private third parties where prior mortgages or charges existed. Nor was there the affording of a right to third parties to avoid a contract entered into in contravention of statutory provisions. The factual substratum being considered was altogether different, involving as these cases did sums of money due to the public coffers in respect of which land was charged. The courts did not have under scrutiny the difficult consideration of the respective rights of innocent private parties in applying the proper construction to statutory provisions.

49. Although the prepayment contracts are not automatically void because of the vendor's breach of section 26 of the Act, it does not follow that there is in those circumstances of breach of the statutory provision any interference with the general rights of mortgagees to priority based on time of registration pursuant to the Registration of Titles Act. This is why the Act has bestowed upon the purchaser the right to avoid the contract and recover his moneys with commercial interest. The purchaser can still choose to go ahead with the contract, but in my judgment if he chooses to do so, then he takes the risk that the mortgagee's rights become exercisable in priority to his own rights if the vendor does not pay out the mortgage. It would seem to me that a purchaser under a prepayment contract, as is the case with any purchaser, would still be expected to carry out a proper investigation as to the state of the vendor's title and thus in relation to the existence of mortgages prior to entry into the contract. He would have a duty to himself to at least ascertain the position.

50. So indeed, it may well be more appropriate to say that the provision of the purchaser's option conferred by section 26(2) to avoid the contract would have been unnecessary if indeed section 31(5) did contemplate the Board's charge ranking in priority even to pre-existing mortgages. If the purchaser had priority in relation to all prior mortgages why would he need to be afforded a right to avoid the contract when that prior mortgage could not affect his right to recover his monies in the event of default by the developer? This priority would exist whether the purchaser knew or did not know of the pre-existing mortgage. So what is the mischief that this provision would be designed to cure?
51. Mr. Manning's submission that the charge is not created by the statute, but rather is created by the property owner is correct in the sense that the Act places an obligation on the vendor to execute and lodge the charge with the Registrar of Titles. Until the charge is executed and lodged and registered, then there is no charge on the land, and nothing for the Act to deem to be a mortgage. However, in my judgment, it is not the fact that the vendor has stated in the Instrument creating the charge that the charge is subject to the JRF mortgages that makes it so; rather it is the proper construction of the Act that so dictates.
52. In my judgment, JRF's mortgages rank in priority to the Board's charge in accordance with the general provisions of the Registration of Titles Act. The Board's charge has been entered in respect of prepayment contracts where the developer NWDC has breached the express provisions of the Act and in my view it is plain that the Act is not intended to deprive a prior mortgagee or chargee of its security. This is confirmed by the fact that it is a contravention of the Act for a developer/vendor to enter into such a contract in those circumstances and this contravention carries consequences for the vendor in the criminal law. The words of Section 31(5) must be construed in light of the wording of the entire Act, including Section 26(2), and not in isolation.

53. The rationale of section 31 (5) of the Act was indeed to allow for priority to the Board's charge which is for the purpose of charging the land with repayment of all amounts received by the vendor in the event that he breaches the contract. However, the reason for the priority was because this money from the prepayment contracts would, unlike ordinary sale agreements, result in substantial development, improvement, and increased value of the land. Similarly, this is why the exception exists for loans made by financial institutions for the purpose of carrying out development being allowed to rank *pari passu* with the Board's charge, because such loans ought also to result in an increased value of the land. However, all of this protection was to occur when the land was not already burdened as security for a non-development- related mortgage.

54. I note that there has been no evidence advanced on behalf of the Registrar of Titles, and neither JRF nor the Board has produced any evidence as to why the Registrar of Titles allowed the transfers in respect of the two properties registered at Volume 1324 Folio 698 and Volume 1304 Folio 721 to go through without taking the objection that was raised in this case, even though those two properties were subject to the same charge in favour of the Board that exists in respect to the subject property registered at Volume 1324 Folio 686. This appears to be an inconsistent approach. Clearly, however, the court must declare what the correct legal position is on the claim as formulated, irrespective of whatever positions the Registrar of Titles may have taken previously. It does seem that the correct position was initially taken by the Registrar of Titles. The failure to take that same posture in relation to the subject property has had the effect of the transfer being delayed for a number of years. That is unfortunate.

RELIEF TO WHICH JRF ENTITLED

55. In my view, JRF is entitled to a declaration that it is pursuant to section 106 of the Registration of Titles Act entitled to transfer property

registered at Volume 1342 Folio 686 of the Register Book of Titles pursuant to the exercise of its power of sale. The Registrar of Titles is required to effect the transfer.

56. The JRF is the First Mortgagee and the Board's charge is deemed to be a mortgage, a Second Mortgage. Therefore JRF must exercise its power of sale with the usual duties to account to the subsequent mortgagees and the mortgagor in respect of the proceeds of sale, and in particular in relation to any surplus over the amount required to satisfy JRF's mortgages. The proceeds of sale fall to be applied in accordance with section 107 of the Registration of Titles Act.
57. JRF are not obliged, and have no legal liability to compensate the purchasers under the prepayment contracts. However, for practical reasons, I am concerned that, as Mr. Manning pointed out in his written submissions, although the Board had asked JRF to make arrangements to compensate the purchasers, it has not advised JRF what sums are required to do so. Clearly the Board will have to have accurate and reliable information and accounting in order to enforce its charge in the event that the proceeds of sale exceed the amounts due to satisfy JRF's mortgages. Indeed, broadly speaking, section 33 of the Act stipulates that the Board must require the financial institution with which the trust account was maintained pursuant to section 29 to pay over to the Board all money including interest in that account where the Board is satisfied that there has been failure of the development scheme. The Board has a responsibility to apply any proceeds of sale rateably in relation to the purchasers. It may be that the Board will itself have to seek assistance or declarations from the Court in order to sort the matter out. However, that is not before me at this time and I am not to be taken as so deciding.

58. JRF has succeeded on some of the issues raised and is entitled to at least some portion of its costs.

59. I make the following Declarations:

(i) (a) Pursuant to section 106 of the Registration of Titles Act the Claimant is entitled to transfer property registered at Volume 1324 Folio 686 of the Register Book of Titles pursuant to the exercise of its powers of sale.

(b) That the Claimant JRF's Mortgages Numbers 826623, 871222, 915285 endorsed on the Certificate of Title registered at Volume 1324 Folio 686 of the Register Book of Titles, rank in priority to the 1st Defendant the Real Estate Board's Charge endorsed as Miscellaneous Number 1453150.

(ii) Two-thirds Costs to be taxed if not agreed to the Claimant JRF to be paid by the 1st Defendant, the Board.