[**2018**] **JMSC COMM 15**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017CD00281

IN THE MATTER of **THE ESTATE of DONALD ALWYN TANNER** late of 215 Blake Street East Listowel Ontario, Canada N4W2V7.

AND

IN THE MATTER of an equitable mortgage over all that parcel of land part of CONSTANT SPRING in the parish of SAINT ANDREW being the Lot numbered ONE on the Plan of part of Constant Spring of the shape and dimensions and butting as appears by the Plan thereof and being all the land comprised in Certificate of Title registered at Volume 1444 Folio 556 of the Register Book of Titles being the premises known as No 13 Rockhampton Drive, Stony Hill in the parish of Saint Andrew.

AND

IN THE MATTER of S. 103 of the Registration of Titles Act and S. 28(2) of the Conveyancing Act.

AND

IN THE MATTER of S. 48 of the Judicature Supreme Court Act.

BETWEEN	**MARY ELAINE TANNER (Executrix of the Estate of Donald Tanner)**	**CLAIMANT**
AND	**KARLENE MAX BROWN**	**1ST DEFENDANT**
AND	**SOPHIA BROWN**	**2ND DEFENDANT**
AND	**KARL ANTHONY BROWN**	**3RD DEFENDANT**
AND	**RADCLIFFE BROWN (aka RAUL RADCLIFFE BROWN)**	**4TH DEFENDANT**
AND	**JENNIFER MESSADO & Co.**	**5th DEFENDANT**

Probate – Executrix overseas-Locus standi to bring claim –Affidavit evidence-Whether hearsay and inadmissible- Whether equitable mortgage valid –Whether promissory note enforceable-Interpretation of promissory note-Whether "on or before" sufficiently certain- Whether promise made by testator prior to his death enforceable against estate – Whether debt discharged –Whether equitable mortgage enforceable against non-parties to the loan- Whether equitable mortgagors estopped- Undertaking-Whether attorney at law in breach.

Mr. Gordon Robinson, Mesdames Stephanie Williams and Nicola Richards instructed by Henlin Gibson Henlin for the Claimant.

Messrs. Conrad George and Andre Sheckleford instructed by Hart Muirhead & Fatta for the 1st to 4th Defendants.

Mesdames Kristina Excell and Jevaughnia Clarke instructed by Bailey Terrellonge & Allen for the 5th Defendant.

Heard: 29th – 31st January, 2018; 1st February 2018; 1st March, 2018 & 27TH April 2018

In Chambers

Coram: Batts J.

[1] This matter was commenced by Fixed Date Claim. By order of the Honourable Mr. Justice Laing made on the 6th July 2017, with the concurrence of all parties, a trial in Chambers was fixed for the 29th January 2018. On the 19th January 2018 the Hon. Miss. Justice Carol Edwards ordered, among other things, that certain applications were to be heard as preliminary points at the trial and that some evidence was to be taken by video link.

[2] It is apparent from a perusal of the affidavits filed in this matter that several factual issues are involved. Furthermore, although commenced by an estate, the proceedings involve issues of contract and do not relate to the interpretation of a testimonial instrument. I intend no criticism of my brother Judge however, parties are to be reminded that it is in the public interest that trials be in open court. The fact that a claim is commenced by Fixed Date Claim Form does not preclude a court, in appropriate circumstances, from adjourning into open court for trial. I declined to do so in this case because arrangements had already been made for video link in the hearing room. To adjourn to open court would have involved loss of at least one trial day.

[3] Virtually present in Chambers on the first morning of hearing were Ms. Anna Sergeant (a licensed paralegal and court reporter) Mrs. Mary Elaine Tanner (the Claimant), and Mr. John Schenk (an attorney at law and the Claimant's witness). Counsel indicated that the Claimant wished the video link to continue for the entirety of the proceedings. Mr. Schenk was however released until it was his time to be cross-examined on his Affidavit.

[4] At the commencement of proceedings Mr. Gordon Robinson, counsel for the Claimant, candidly indicated that he was not fully prepared to deal with the several preliminary applications , one of which was filed on the morning of trial. Mr. Robinson elected to proceed because his client did not want any further delay of the matter. This election, as it turned out, was fully justified.

[5] There were several applications:

(i) Notice to Object filed on the 24th January 2018 (p. 148 of trial Bundle)

(ii) Notice of Application, filed on the 25th January 2018, for Security for Costs of the 1st to 4th Defendants.

(iii) Amended Notice of Application ,filed on the 26th January, 2018 to strike out.

(iv) Notice of Application, filed on the 29th January, 2018, for Security for costs of the 5th Defendant.

(v) Notice of Application, filed on the 29th January 2018, to strike out.

(vi) An oral application .

When asked, Mr. Conrad George indicated that the Claimant's counsel had not been alerted about the intended oral application. Mr. Robinson again indicated his desire to proceed. I decided to hear all the applications together, rather than seriatim.

[6] The Defendants' counsel made submissions supportive of the various applications. Having heard and considered those submissions, as well as the submissions in response by Mr. Gordon Robinson, I dismissed all the applications. I promised at that time to state my reasons in the course of this judgment. I now do so. There was some overlap in the points articulated in each application so, for convenience, I will address the points made rather than each application.

[7] The first point was jurisdictional and related to the *locus standi* of the Claimant to bring this action. It was submitted that there was no grant of probate exhibited by the Claimant ,nor even a death certificate. There was also no evidence that any probate granted in Canada had been resealed here in Jamaica. Reliance was placed on Section 3 of the Probate (Re-Sealing) Act. The 1st to 4th Defendants' counsel submitted that the claim ought therefore to be dismissed. The 5th Defendant's counsel submitted that, in the absence of a grant of probate, even if

not dismissed, the claim should be stayed pending its production. In his reply Mr. Gordon Robinson urged that the Defendants had waived any right to challenge jurisdiction when they filed acknowledgements of service, affidavits and when they made other applications and participated at Case Management. My reasons for refusing to strike out the claim on this ground were:

(i) The preliminary point was unsupported by evidence. The Claimant has said in her affidavit (Para 2) that she is the executrix of the estate. That is the evidence. The affidavits in response did not challenge that assertion. Unless and until she is cross-examined the statement remains unchallenged.

(ii) The Claim may in any event proceed if an undertaking, to produce probate before the end of the matter, were to be offered. To the extent that I have a discretion, I will accept such an undertaking, if proffered, and allow the matter to proceed. I will then rule on the issue of jurisdiction after all the evidence is in.

(iii) The interests of any creditors to the estate, or persons who may otherwise be interested, can be protected by a conditional Order. So that if the Claimant were to be successful the court could order that enforcement of the judgment is subject to production of a Resealed Probate.

(iv) The duties of an executor commence immediately on death. This is unlike the administrator who owes his authority to the grant of Letters of Administration. The executor can act immediately to protect the estate as it is the will which grounds his authority.

[8] The second preliminary point was that the Claim was vague and that the affidavit in support contained hearsay, without sources of information or belief being stated. It was also submitted that the promissory note, as worded, could not be

sued on. In consequence, the submission went; the claim ought to be dismissed. In my view the claim was sufficiently stated to alert the Defendants to the issues. In a matter commenced by Fixed Date Claim, it is the affidavit in support which particularises the claim. In this regard the Claimant left no doubt as to her position. Her assertions, contrary to the Defendants' submission, were vouched by letters, emails and other documents all attached as exhibits. The fact that she did not use the hallowed words "I am advised by ..... and do verily believe," is not fatal. It is clear that her assertions were premised on, and supported by, documentation which revealed the source of that information. Finally, the assertion that the promissory note could not be sued on because it had no "expiration date," also fails. This is because firstly, the claim is not brought on the promissory note. The note really is evidence of the existence of an equitable mortgage or charge. Secondly, the promissory note used words "on or before 360 days from the expiration hereof" and it will be an issue of mixed fact and law as to how it is to be construed. The construction of the note, in such circumstances, is best done at the end of trial not as a preliminary point.

[9] The third preliminary issue had to do with the 3rd and 4th Defendants. It was submitted that there was no consideration moving from the Claimant to these Defendants or vice versa. Therefore the mortgage and the promissory note were unenforceable against them. It was also contended that, as they were children of the 1st and/or 2nd Defendants, they ought to have had independent legal advice. My reasons for dismissing this aspect were that, in the first place, as the children were now all adults, and there was no evidence of reliance or undue influence, there was no warrant for independent legal advice. The Defendants, on the evidence, were all represented by an attorney at law. Secondly, the issue of estoppel clearly arises given that the Defendants all signed the relevant documents and are alleged, through their attorney, to have represented/acknowledged that the security was being transferred to property of which they were part owners. These issues could only be determined after considering the evidence at a trial.

[10] The fourth preliminary point was that the statement of case had insufficient averments because no details, as to the interest in land or the source of indebtedness, were stated in the Claim Form. The 5th Defendant contended that there were insufficient allegations against the firm to ground a cause of action. I dismissed these submissions because, as stated earlier, all parties elected to continue this matter as a fixed date claim. There were no statements of case in the form of Particulars of Claim. It does not therefore, at this eleventh hour, lie in the mouth of the Defendants to take points of pleading. The affidavits stand as Statements of Case and contain an abundance of evidence and/or allegations of fact to make out a cause of action against all Defendants. The 5th Defendant is alleged to be the attorney who acted for all parties in the transactions involved; and is alleged to have given and not honoured an undertaking. Clearly factual issues arise and there is no warrant to ask for dismissal at this preliminary stage .Furthermore if, as the Claimant contends, the equitable mortgage is validly granted the origin or source of the debt is irrelevant. .The extent of the interest in land claimed must, as in any mortgage, be to the extent of the debt. That quantum is clearly stated.

[11] The fifth preliminary point was orally argued. It was submitted that the Claimant's affidavit had not been notarized. Upon Mr. Robinson pointing out that the affidavit was sworn in Canada, and that Canada is a Commonwealth country, the challenge was promptly, and correctly, withdrawn.

[12] The sixth preliminary point concerned Mr. Schenk's affidavit. It was submitted that the affidavit contained only hearsay evidence and was out of time. I decided to allow the affidavit to stand because no prejudice could be pinpointed consequent on its lateness. The affidavit was vouched by documentation most of which was already in the possession of the 5th Defendant. The 5th Defendant had been the attorney for the 1st to 4th Defendants in the several transactions involved. The affidavit makes assertions primarily aimed at the 5th Defendant. One week was, to my mind, more than adequate time for the Defendants to

respond to the assertions in the affidavit. I nonetheless granted the Defendants time, until the 31st January, 2018, to respond to it if so advised. The hearsay objection failed because the exchanges reported were primarily between the witness and the 5th Defendant. The documentation exhibited reveals the source of information and belief required whenever hearsay is permitted in affidavit evidence.

[13] The other preliminary matter related to applications for Security for Costs. The Claimant being resident overseas ought, it was submitted, to pay security for the Defendants' costs. There was no explanation proferred for the late filing of the applications. There had been Case Management and other dates at which such an application could have been pursued. The claim is brought by the elderly executrix on behalf of the estate of her deceased husband. She had stated her address very clearly in the Fixed Date Claim. An adjournment now, which any order for security for costs would almost certainly necessitate, would cause obvious hardship and, given her age, possible irremediable consequences. In the circumstances of this case, it would be unjust to entertain such an application on the morning of trial, or even 4 days before when the application was first filed. Furthermore the Defendants do not deny the existence of a debt. The issue revolves mainly around the enforceability and/or validity of the alleged charge on land and whether there should be a set off. The applications for security for costs were therefore dismissed.

[14] It is appropriate also to state that on the morning of the 30th January 2018, when the trial commenced, Claimant's counsel produced to the court a certified copy of the Canadian equivalent to a Grant of Probate. This was eventually put before the court with an affidavit of Nicola Richards filed on the 21st February 2018. Mr. Robinson, although maintaining that there was no need to reseal, nevertheless indicated that the resealing process had begun. The Claimant, he said, had no objection to any order made by the court being "subject to" the resealing. On that morning the persons present via video link were: Anna Sergeant (a licensed

para-legal/court reporter), Mrs. Mary Tanner (the Claimant) and Mr. Scott Tanner (her son). There was no objection to the presence of Mr. Scott Tanner.

[15] The Claim, as we have seen, is brought by the executrix of the Estate Donald Alwyn Tanner. He, it is said, was an equitable mortgagee. The 1st - 4th Defendants are alleged to be the mortgagors. The 5th Defendant is a firm of attorneys at law which handled the transaction and, it is alleged," undertook and did take and keep the title deeds... ." that Defendant, it is further alleged, refused and/or neglected to deliver up title deeds so as to allow for enforcement of the Claimant's mortgage. The mortgage is alleged to be in respect of a loan of US $300,000 with interest. The relief sought in the Fixed Date Claim is as follows:

1. A Declaration that the Claimant holds an equitable mortgage in the sum of Three Hundred Thousand Dollars (US$300,00.00) which amounts to approximately Twenty Five Million Eight Hundred Thousand Dollars ($25, 800,00.00) specified in the promissory note with interest thereon at the rate of 8% in respect of all that parcel of land part of Constant Spring in the parish Saint Andrew being the lot numbered One on the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being all land comprised in Certificate of Title registered as Volume 1444 Folio 556;

2. An order that the 1st 2nd, 3rd and 4th Defendants are indebted to the Claimant in the sum of Three Hundred Thousand Dollars (US$300,000.00) plus interest in the sum of $8,945,376.00 to the 10th March 2017 and that interest continues to accrue on the principal sum at the rate of eight (8) per centum per annum until payment.

3. The Defendant's interest in the land shall be sold to recover the total sums outstanding and secured by the equitable mortgage together with legal fees costs and expenses.

4. An order that the sale shall be by public auction or in the event of that method failing, by private treaty;

5. The Registrar of the Supreme Court shall appoint a reputable valuator from a list of three (3) provided to her by the mortgagee for the purpose of valuing the land;

6. The costs of the valuator is to be borne in equal shares by the parties hereto;

7. The Registrar of the Supreme Court shall fix the reserve price for the sale by auction and shall appoint a reputable auctioneer from a list of three (3) provided by the Claimant for the purpose, of conducting the sale of the Defendants' interest in the land;

8. The Registrar of the Supreme Court shall sign any and all documents necessary to give effect to these orders;

9. The 5th Defendant do deliver up the Duplicate Certificate of Title registered at Volume 1444 and Folio 556 of the Register Book of Titles;

10. The net proceeds of the sale shall be paid into court together with an accounting of the amount due to the Claimant mortgagee, legal fees, expenses and costs;

11. Liberty to apply

12. Costs;

13. Such further and other reliefs as this Honourable Court may deem just.

Neither Particulars of Claim nor Defence were filed. Instead, and as is the common practice with Fixed Date Claims, affidavit evidence was utilised.

[16] The first witness called was the Claimant, Mary Elaine Tanner (Executrix of the Estate Donald Tanner). Her affidavit is dated the 1st May 2017. Eighteen exhibits are attached to it, some of which involve multiple documents and correspondence. Most, if not all, the facts asserted in the affidavit are gleaned from the documentation attached. The affidavit is a matter of record and I do not propose to repeat in this judgment the entirety of its contents.

[17] The Claimant states that, in his lifetime, Mr. Donald Tanner (now deceased) sold the Emerald Escape Hotel, being land registered at Volume 1104 Folio 188 of the Register Book of Titles (which I will hereinafter refer to as "the hotel property") to the 1st and 2nd Defendants. A part of the purchase price, being US $300,000, was secured by an equitable mortgage. This was evidenced and/or protected by caveat No. 1512753 lodged on the 8th January 2008 to the title to the said hotel property. The fifth Defendant, she says, acted as attorneys at law in the entire transaction. In or about the year 2011 the equitable mortgage was transferred from the hotel property to another property owned by the 1st, 2nd, 3rd and 4th Defendants. That other property is registered at Volume 1444 Folio 556 of the Register Book of Titles and is hereinafter referred to as the "Rockhampton property". A caveat No 1741445 dated 10th January 2012 was lodged on the title to the Rockhampton property. The caveat on the hotel property was withdrawn.

[18] The Claimant contends that the transfer of the equitable mortgage to the Rockhampton property was done by, and on the representations and/or advice, of the 5th Defendant. It is alleged that at all material times the 5th Defendant acted for Mr. Donald Tanner as well as for the 1st to 4th Defendants. The representations and/or advice of the 5th Defendant were as follows:

a. That the hotel property was to be developed and that the transfer of the mortgage was to facilitate that development.

b. That Mr. Donald Tanner would be repaid and the transfer of the mortgage to the Rockhampton property would not adversely affect the security for US $300,000 owed.

c. That, in Order to secure the loan, the 5th Defendant would request and keep the title for the Rockhampton property.

[19] The Claimant contends also that the indebtedness was further secured by a promissory note signed by the 1st to 4th Defendants for US $300,000. The Claimant alleges that the 1st to 4th Defendants have defaulted on their legal obligations and the US $300,000 remains unpaid. The 5th Defendant's retainer was terminated on the 5th February 2017 and the title to the Rockhampton property and files requested. That Defendant has, it is contended, failed, neglected and/or refused to deliver up the title.

[20] The Claimant was extensively cross-examined. I will reference only such parts of her oral evidence, and indeed the evidence of all other witnesses, as is necessary to explain my decision. The Claimant admitted that the hotel property was owned by a company Bluefields Ltd. It was Bluefields Ltd. that sold the hotel property to the 1st and 2nd Defendants. She acknowledged that Mr. Donald Tanner during his lifetime had been a businessman and "real estate landlord." He was, she said, held in high esteem. She was aware that there had been a mis-description at the time of the sale of the hotel property to the 1st and 2nd Defendants. She said Mr. Tanner would not take advantage of that. She stated:

"Q: Consistent with his demeanour when he realised they suffered loss from his mis-description to offer to put them right.

A: that's right."

[21] The Claimant stated that Mr. Tanner had settled things with the Defendants. She asserted:

> **"Q: Certainly if he had not settled it with her it would be unconscionable to enforce this Claim**
>
> **A: of course."**

And later,

> **"Q: They realised their loss when they were reselling.**
>
> **A: of course**
>
> **Q: Around 20th November 2011**
>
> **A: Yes**

And later:

> **"Q: As at the 1st November 2011 the promissory note for US $300,000 had already been signed**
>
> **A: yes"**

Much later, and in answer to the court, she said,

> **"J: Do you have documentary support for your statement that Mr. Tanner had settled**
>
> **A: No, just his word.**
>
> **Mr. Robinson: No questions arising**
>
> **Mr. George:**

Q: Was he precise in telling you what he had done

A: very, he was going to help her recoup the loss.

Q: he confirmed he had done so.

A: Yes sir – he did.

Q: How did he say

A: Financially. His actual quote, he wanted to make things right with her"

[22] The Claimant's second witness was Mr. John William Schenk. He is a barrister and solicitor in Ontario Canada. His affidavit is dated the 18th January, 2018. In it he stated that his first involvement in this matter was in early November 2011. Mr. Donald Tanner consulted him in respect of correspondence received from the 5th Defendant. I will quote this aspect of the Affidavit:

> **"2. ..... Ms. Messado was writing on behalf of the "Max Brown family" in the matter of the Emerald Escape Hotel at Montego Bay (the hotel). Bluefields Ltd. had sold the hotel to the Max Brown family four years previously in 2007 and he had forfeited Corporate Property Act FCPA back (sic) a promissory note secured by a mortgage against the title to the hotel for the sum of US $300,000 which was used as a part of the consideration. Attached hereto and marked Exhibit A to this my Affidavit is a true copy of the letter that Donald Tanner had received from Jennifer Messado."**

[23] The letter from the 5th Defendant to Mr. Donald Tanner is dated the 19th September 2011 and reads as follows:

> **"Re: Emerald Escape Hotel now known as Satori Resort and Spa Montego Bay St. James.**

As you are aware the Max Brown family is entering into a partnership for the development and prosperity of the hotel. This will necessitate new financing which will mean that your caveat will have to be removed to another duplicate Certificate of Title. This is a very good move as the future laid forward from the refinancing will enhance Mrs. Max Brown's ability to satisfy all her financial obligations.

This proposal for your approval is that the Caveat be placed on the free and clear Certificate of Title that she holds for Stillwell Road. You will recall that this was the property that will be subdivided into individual lots for sale in Stony Hill as soon as the subdivision is duly approved. We enclose a copy of the Certificate of Title duly registered at Volume 1444 Folio 556 of the Register Book of Titles.

Please do not hesitate to contact the writer if you have any queries as the entire purpose of the exercise is to make the bank debt servicing more affordable to enable the hotel to move forward."

[24] One important feature of that letter is that it represents to Mr. Tanner that the hotel will remain the Max Brown's ongoing concern. It will later be the submission of counsel for the Claimant that at no time was Mr. Tanner informed that the hotel property was being sold.

[25] Mr. Schenk's affidavit goes on to indicate that by letter dated 1st November 2011, to Mr. Tanner , the 5th Defendant enclosed a new promissory note signed by the 1st to 4th Defendants. The letter stated in part,

> **"This will be endorsed on the Certificate of Title for this property [no. 13 Rockhampton Drive Stillwell Road] as a first legal mortgage in the amount of Three Hundred Thousand United States Dollars (US$300,000) with interest to replace the caveat being held on the certificate of title for the Satori Hotel now.**
>
> **We also acknowledge that interest is due and owing to you and same will be paid as this transaction progresses satisfactorily.**
>
> **Please finalise your instructions so we can move forward."**

[26] It is important to note that the 5th Defendant, who at this trial denies acting as attorney for Mr. Tanner is, in that letter addressed to Mr Tanner, asking for "instructions" to be finalised.

[27] Mr. Schenk in paragraph 4 of his affidavit indicates that by letter dated 2nd November 2011 he wrote to the 5th Defendant seeking clarification of some aspects of the matter. That letter begins,

> **"I am a lawyer acting for Mr. Donald Tanner. Mr. Tanner has consulted me in regard to two letters that he has received from you dated October 25th and September 19th 2011."**

In his letter Mr. Schenk goes on to make some pertinent enquiries one of which was as follows:

> **"In this regard it is also appropriate that we ask whether you intend to act on behalf of Donald Tanner and to look after his interests as well as those of the Browns. That is, are you prepared to certify to Mr.**

Tanner that he holds a good and valid registered interest in the property."

[28] Mr. Schenk at paragraph 5 of his affidavit references the 5th Defendant's reply. That letter is dated the 8th November 2011, I will quote it in its entirety:

> **"We have your letter dated the 2nd November 2011 and are very happy to respond to all the queries of your client on behalf of the Maxbrown family.**
>
> **The property at No. 13 Rockhampton Drive is 2½ acres of land with a great house on the property that is in need of repairs which will restore same to its former beauty. It is in a very high class area of Kingston with wonderful views of the city and the hills.**
>
> **We are prepared to satisfy Mr. Tanner as to the proper validity of his charge over the property and by copy of this letter we are asking Mrs. Brown to physically deposit the actual Duplicate Certificate of title with us for safe custody and good order in protection of Mr. Tanner's interest.**
>
> **The option of having a charge on the hotel property does not make the partnership work as there has to be a free and clear certificate of title to move forward with renovations and investment in the property.**
>
> **The increase (sic) revenue from the hotel will ensure that Mr. Tanner's mortgage loan can be properly serviced.**
>
> **We must be able to now finalise this transaction."**

It is to be noted that in that letter there was no direct answer to the question whether the 5th Defendant would act as Mr. Tanner's attorney at law.

[29] Mr. Schenk also references and attaches an email dated the 10th November 2011 from the 5th Defendant. In that document further details are given as to the reason for the transaction and the advantages to Mr. Tanner. It ends with the following –

"Also, it is useful for you to note that this new note at Rockhampton embraces the entire Maxbrown family while the other one, only the mother and daughter."

Attached to that email was a "new" Promissory Note undated but with the four Defendants' signatures affixed. The Note was for US $300,000. It was to be:

"repaid in full in United States currency to the said Donald Tanner on or before the expiration of Three Hundred and Sixty (360) days from the expiration hereof."

The note continued:

"We do HEREBY CHARGE PART OF ALL THAT parcel of land part of CONSTANT SPRING in the parish of SAINT ANDREW being the lot numbered One on the plan of part of Constant Spring of the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being all that land comprised in Certificate of Title registered at Volume 1444 Folio 556 of the Register Book of Titles being premises known as No. 13 Rockhampton Drive Stony Hill Saint Andrew."

The email suggests that a signed mortgage was attached. The Promissory Note was the only attachment, and it purports to charge the subject property.

[30] Mr. Schenk in his affidavit outlines the instructions he received from Mr. Tanner to advise the 5th Defendant that the proposal was acceptable. Mr. Tanner was, he said, prepared to release his mortgage on the hotel property and accept a mortgage on the Rockhampton property. Mr. Schenk sent a letter to the 5th Defendant dated 11th November 2011. The letter said in part:

"This authority is given on the understanding that you will look after Donald Tanner's interests in this matter as well as

those of the MaxBrown's and that you will confirm to him that he holds a good and valid registered interest in the property at 13 Rockhampton Drive Stony Hill Saint Andrew Jamaica and that you will be able to report to him in this regard by the end of November."

A letter, dated 20th October 2011 signed by Mr. Tanner and addressed to the 5th Defendant giving Mr Tanner's "authority and instructions", was enclosed along with copy Certificate of Title and signed Promissory Note (see pages 125 and 126 of Trial Bundle).

[31] At paragraph 8 of his affidavit Mr. Schenk references the 5th Defendant's response which was an email dated 16th November, 2011. It read as follows:

"We have now finalized the transaction and withdrawn the caveat against the hotel for its future development with a company called Island Creations Ltd.

The promissory note on the property at Stony Hill is now being stamped and registered on the Certificate of Title. The original Certificate of Title will be held by the writer in accordance with the undertakings given for the satisfaction of your client's security."

This communication is very important to the resolution of issues related to the 5th Defendant's defence and, in particular, the denial that an undertaking was given in this matter.

[32] Paragraphs 8, 9 and 10 of Mr. Schenk's affidavit detail further correspondence between himself and the 5th Defendant. In that exchange Mrs Jennifer Messado, among other things, admits to an error and sent documentation to be re-executed. This was done by Mr Tanner and forwarded to the 5th Defendant by Mr Schenk see paragraph 12 of Mr. Schenk's affidavit which references an email dated the 20th December 2011 from the 5th Defendant. It attaches another fully executed and stamped promissory note (page 132 Trial Bundle). That note also has a charging clause, and is signed by the 1st to 4th Defendants. It states in part:

> **"The principal indebtedness will be repaid in full at the expiry date of the Promissory Note."**
>
> It was to be repaid,
>
> **"On or before the expiration of three hundred and sixty (360) days from the expiration hereof."**

The note bears the date 20th November 2011.

By email dated 20th December 2011 Mr. Schenk thanked the 5th Defendant for her assistance to Mr. Tanner and expressed an understanding that the registration of Mr. Tanner's interest in the property was completed.

[33] On the 26th January 2012 Mr. Schenk received an email from the 5th Defendant confirming that a caveat had been lodged and that Mr. Tanner's interest was protected (page 144 of trial bundle). That email reads,

> **"please see the attached document evidencing that Caveat No. 1741445 has been lodged against Certificate of Title registered at volume1444 Folio 566 to protect the interest of your client Donald Tanner."**

[34] Mr. Schenk asserts, at paragraphs 16 and 17 of his affidavit, that the 5th Defendant was well aware that both himself and Mr. Tanner relied on Jennifer Messado of the 5th Defendant firm to ensure that Mr. Tanner's interest was protected. The 5th Defendant, it is alleged, undertook to secure Mr Tanner's interest in the Rockhampton property. It is asserted that it was the 5th Defendant's representative who instructed that the documentation be undated and that she would date them. This latter fact is evidenced by an exchange of email dated the 23 rd November 2011 [p 147 Trial Bundle]. The 5th Defendant's email reads:

> **"Don't date anything, I will do it. Thank you."**

[35] Mr. John William Schenk was cross examined by video link. He indicated that he knew Mr. Tanner for **'probably 30 years'** and it had been a purely professional relationship. Para 5 of the Affidavit of Karlene Max Brown [which alleged that Mr. Tanner had failed to disclose the existence of a 99 year lease and that there was no right of access to the beach] was put to him. Mr. Schenk responded as follows:

> **"That probably was a voluntary arrangement, lease or agreement. I believe that took place before Mr. Tanner. I have seen a document with a little piece lease or easement to allow neighbours access to water. That document created long before Mr. Tanner bought the Emerald. I presume anyone looking at title would have been aware of it."**

[36] When shown the lease dated 15th January 2000 [p. 81 Trial Bundle] Mr. Schenk admitted it was granted by Bluefields Ltd. a company owned by Mr. Tanner. When shown Paragraph 9 of Karlene Max Brown's affidavit, and told that in cross examination Mrs. Tanner had agreed to its truth, Mr. Schenk responded:

> **"A: I don't believe what you just said**
>
> **Q: you know anything about this**
>
> **A: I can say Mr. Tanner never mentioned to me anything about this little piece of property on corner. All people involved were aware of it. He never told me he had misrepresented anything.**
>
> **Q: Look at Para 9 (iv) [p 76 Trial Bundle]**
>
> **A; Mr. Tanner never said anything like that to me. He expressed concern that they were not making payments"**

[37] When cross examined by Ms. Excell (counsel for the 5th Defendant) Mr. Schenk did not deviate from his affidavit in any material respect. When pressed with a suggestion concerning his role as Mr. Tanner's attorney, he said:

"Q: As Mr. Tanner's attorney at law you ensured that the documents were in accordance with his interest or did you not

A: your question is not taking into account I ..... but if someone in whom I try to help. I was trying to help him but that does not mean I have the expertise in Jamaica. I said to Mrs. Messado she had to ensure his interest was protected."

[38] The case for the Claimant was then closed. Ms. Karlene Max Brown the 1st Defendant was the Defendants' first witness. Her affidavit [p.75 of Trial Bundle], at paragraph 4 states:

> **"I am advised by my attorneys and verily believe that:**
>
> **i. There is no equitable mortgage over the property in question and**
>
> **ii. on the true construction of the promissory note relied upon by the claimant, the debt claimed is not yet payable, and so the proceedings herein are premature."**

[39] She asserts in Para 5 that, in his offer to sell the land, Mr. Tanner had materially misrepresented the extent of the property being sold :

> **".....He neglected to tell us that he had leased for 99 years the tennis courts, which were a significant part of the property, it being a resort hotel, nor did he mention that the land being sold did not include the lot immediately adjacent to and running along the length of the beach, which meant the property had no actual right of access to the beach.**
>
> **6. Neither of these defects could have been ascertained by inspection of the property.**
>
> **7. The same misdescription of the property was used by Mr. Tanner to us in negotiating the terms of the purported mortgage. The description of the property upon which we relied having been false, I am advised by our attorneys and verily believe that the mortgage is unenforceable in equity."**

[40] Further elements of the defence are stated at Paragraph 8 of the affidavit:

> **"8 . I refer to paragraph 13 of Mrs. Tanner's affidavit. She is incorrect when she says that the promissory note of 20th November 2011 was payable 360 days after it was entered into. The note states that it will be payable "360 days from the expiration [of the note]," and also that "the principal indebtedness will be repaid in full at the expiry date of the promissory note."**
>
> **In the circumstances I am advised and verily believe that it is not possible to say that the note is payable as yet."**

[41] The affidavit asserts that herself and Mr. Tanner had several conversations after she realised he had misrepresented the description to her. She says in paragraph 9 that he acknowledged and understood that he had misrepresented the extent of land holding being sold, that he understood she had relied on the misrepresentation and that she had made a huge loss on the resale. She had also spent alot on refurbishing. The amount spent she calculated at U$750,000 and she said she purchased the land for U$2.3 million and sold it for U$ 2.1 million. Paragraph 9 ends with the statement that Mr. Tanner acknowledged and understood:

> **"(iv) that he did not wish me to suffer this loss which he had caused, and told me that he would compensate me fully-see me right.**

[42] Ms. Karlene Max Brown was permitted to give further oral evidence in chief. She was asked whether she had received anything in relation to the promise made by Mr. Tanner and she answered in the negative. The witness was then extensively cross-examined by Mr. Gordon Robinson. This was revealing. In the first place she said it was Mrs. Jennifer Messado, of the 5th Defendant, who was the attorney acting in the purchase of the hotel from Mr. Tanner's company. This transaction was in 2007. The 5th Defendant ,she suggests, acted for both Mr. Tanner's company and the Max Brown's:

" Q: The first purchase of the hotel in 2007 who acted for vendor.

"A: I don't know of anyone acting for him. He came in Mrs. Messado's office to sign the papers."

[43] The circumstances surrounding the Max Brown's resale of the hotel were also revealing. The evidence, you will recall, was that the 5th Defendant told Mr. Tanner that the shifting of the security was necessary to facilitate investment in the hotel. In fact Mrs. Max Brown in cross examination spoke of her dealing with the hotel thus:

"Q: You wanted to sell it

A: I had to because we never knew highway that was going to be built. There was a spring and every time they could not finish highway in Reading. Put a median affected ability to earn. I got behind with the bank. Forced to sell."

[44] As regards the alleged misrepresentation by Mr. Tanner, and when she became aware, the following evidence was given:

"Q: In 2007 between signing agreement and signing transfer were you aware of any misrepresentation

A: No.

Q: when aware

A: I should have pressed it but realised there was a gate from my property to over where was leased. So is when Mr. Allen who was buying did his due diligence came up with it I called Mr. Tanner."

This suggests that the Defendants were aware of the matter prior to their decision to sell, however due to the access by way of a gate, they did not "**press it**."; meaning either no complaint was made to Mr Tanner or that the complaint

was not pursued. The purchaser, Mr. Allen, did his due diligence and "**came up with**" or in other words found out about it .It was then she called Mr Tanner.

[45] As regards the alleged promised compensation from Mr. Tanner the witness answered thus:

> **"Q: Not until new highway and problems you discover**
>
> **A: After we found out that we come. I was making payments. I have pink slips but they are faded. He did not say he would right off debt but would compensate me. We did not come to any figure before he died. He called 3 months before he passed he said he had bone cancer and he was coming and we would talk about it. I was totally shocked."**

When pressed on the matter of her obligation to repay the witness said:

> **"Q: Look at page 76 [Bundle] paragraphs 8 [of Affidavit] you seem to be saying that you were of the view money was not to be repaid**
>
> **A: Never of that view. I was of the view the debt would be reduced not that I would never pay anything to him"**

[46] The witness in cross examination goes on to explain that the purpose of the transfer of the security was to enable the hotel to be sold. The proceeds of sale were not enough to cover the bank debt as well as Mr. Tanner's. So Mr. Tanner's interest was transferred to Rockhampton. When asked who advised her she said it was the 5th Defendant. She stated that the 5th Defendant represented the 1st to 4th Defendants at all times. She indicated that the 5th Defendant knew the reason she had to sell the hotel. She had no difficulty with the 5th Defendant telling Mr. Tanner the reasons. The witness stated that she told Mr. Tanner the reasons herself.

[47] There was no cross examination of this witness by counsel for the 5th Defendant. On the morning of the 1st July 2018 Mr. Robinson asked to further cross examine the 1st Defendant. It was agreed that the 5th Defendant's case would commence

and that the 1st Defendant, would be further cross-examined when she was again available.

[48] Mrs Jennifer Messado swore affidavits dated the 4th July 2017 and 31st January 2018 on behalf of the 5th Defendant. The Affidavit of 4th July 2017 is to be found at page 99 of the Judges Bundle. Paragraph 3 of that affidavit appears entirely irrelevant to this claim. At paragraph 6 the affiant admits acting `on behalf of the 1st to 4th Defendants in the transaction. She continues:

> **"... the deceased Donald Tanner had overseas Counsel acting on his behalf, specifically Mr. John W. Scheck. I do not recall giving the deceased Donald Tanner an undertaking to take physical custody of the title deeds as alleged."**
>
> She admits, in paragraph 7, to doing the legal work to facilitate the "interest/ charge" of Mr. Tanner being transferred from the hotel property to the Rockhampton property.

At paragraph 9 she said,

> **"We additionally requested that the 1st Defendant deposit the title deeds for the property registered at Volume 1444 Folio 556 with us but that was never done, we are therefore not in possession of the title."**

[49] In paragraph 10, Mrs Messado explains the content of her email dated 16th November 2011, by stating that her undertaking was that:

"there was no existing charge on [the Rockhampton property] and that his interest would be noted on it."

The affidavit ends with a denial that she acted for Mr. Tanner.

[50] In her second affidavit, dated 31st January 2018, she responds to Mr. Schenk's affidavit. In paragraph 7 the affiant explains her request that Mr Schenk not date the documents by saying that it was a matter of practice and **"**...**not an assertion of control over the entire transaction".** Her affidavit was otherwise unremarkable.

[51] The 5th Defendant's counsel requested, and was granted, permission to lead further evidence in chief. This went as follows:

"Q: Refer to page 122 of Judge's Bundle, [the email dated 10th November 2012 to John Schenk from Jennifer Messado and Co.] Can you comment on context.

A: The promissory note and the charge to Mr. Tanner was on the hotel property in Montego Bay that the Max Browns purchased from Mr. Tanner. They, the Max Browns, had a large mortgage on it to RBC. I was worried the bank would act under powers of sale and unseat the caveat."

[52] Cross-examination of Mrs Messado , by Mr. Robinson, was illuminating. The witness stated that she is an experienced attorney, having been called to the Bar in June 1974. She does mostly conveyancing and real estate development. She stated that when the Max Browns purchased the hotel the agreement for sale was prepared by her. It was a split contract, chattels and land. The vendor was Bluefields Ltd, but the mortgagee was Mr. Tanner. An interesting exchange, which I will quote, occurred in relation to the reasons the Max Browns sold:

"Q: Do you agree that your instructions were that the Max Browns who bought were forced to sell hotel for various reasons

A: Absolutely

Q: Some reason included fact that business affected by new highway.

A: Also because of problem with beach

Q: But Mrs. Max Brown said they did not know of beach issue until they were selling

A: Don't know when she knew. Knew what I knew.

Q: One reason was downturn in business

A: And over leverage

Q: Was there a threat that bank would sell

A: Most certainly a threat, Bank helped us find a purchaser.

The 5th Defendant admitted that what Mr. Tanner had was a caveat lodged and not a mortgage. When confronted with her letter dated 1st November, 2011 [page 35 of Bundle] and her words **"first legal mortgage"** she said, **"I should not have used the words mortgage or legal."**

[53] The 5th Defendant's explanation for writing to Mr. Tanner, rather than to the attorney she says he had acting for him, was that it was on the Max Browns' instructions. Her explanation for not informing Mr Tanner of the real reason for the sale of the hotel was equally unconvincing. She said at one point that **"there was a lot going on at the time**."

[54] Eventually she admitted doing work on Mr. Tanner's behalf:

"Q: On which client's behalf were you acting when you wrote letter of 8th November 2011.

A: Both of them Max Brown and Mr. Tanner."

As regards that letter the witness endeavoured to explain that she had made no promise to collect, or made any representation that she had collected, the relevant title. She could not recall if she asked the Max Browns for the title. It is noteworthy that in further cross examination, on the 1st February 2018, Mrs. Max Brown said she was never asked for the title by Mrs Messado.

[55] With regard to the promissory note the 5th Defendant admitted that the first note [page 46-47 Judge's Bundle] became due on the 13th December 2008. She made the very important admission that the second promissory note was not intended to change that:

"Q: Suggest to you that the subsequent transaction the transfer of the mortgage was not intended to and did not affect the indebtedness it was mainly to provide a different security.

A: Correct."

[56] On the afternoon of the 1st February 2018 Mrs Messado was asked whether she had located documentation, which in the course of cross examination she said was on a file at her office. Her response is .intriguing:

"Q: Did you find any of the two agreements.

A: I find whatever my lawyers say I can find.

Q: Does that include agreement for sale of the original hotel to the Max Browns.

A: I have it. Unfortunately the back page is not signed. The back page is missing from my file."

This document was tendered and admitted as **Exhibit 1**.

[57] Also produced by this witness in cross-examination was the agreement the Max Browns signed when they sold the hotel. This was **Exhibit 2**. It is dated the 17th August 2011. The transfer with respect to that sale is noted on the title on the 29th November 2011[p.28 Trial Bundle].

[58] The cross examiner put to the witness, and she agreed, that by email on the 16 November 2011 to Mr Scheck she was still suggesting that the transaction was for the "future development" of the hotel, rather than a sale. The witness' response:

"Because island was not throwing out the Max Browns completely."

Island is a reference to Island Creations Limited the entity that purchased the hotel from the Max Browns. The 5th Defendant's witness also admitted that,

contrary to the information in that email, the caveat protecting Mr. Tanner was not lodged to the Rockhampton property until the 10th January 2012:

> **"Q: Realistically in between the 20th November and 10th January 2012 Mr. Tanner had no security on any property.**
>
> **A: The documents were signed and at stamp office and Mrs. Messado was on holiday**
>
> **Q: Between 20th and 29th and 20th November 2011 everything done to accommodate the sale of hotel to Island Creations including withdrawal of Tanners caveats**
>
> **A: Sale finished at ending of November**
>
> **Q: No simultaneous lodging of Mr. Tanners caveat**
>
> **A: Mr. Tanner's things were signed.**
>
> **Q: Nothing for two months to prevent property at Stony Hill being dealt with without Mr. Tanner's knowledge.**
>
> **A: Nobody was dealing with the property."**

The witness explained that there was an error on the promissory note .and it had to be redone.

[59] Mrs Messado was also challenged on her representation, to Mr Tanner, that the addition of the Max Brown children was to his advantage:

> **"Q: Mr. Tanner never loaned a dollar to Karl or Radcliffe.**
>
> **A: ... Karl and Radcliffe are embracing their mother and sisters indebtedness.**
>
> **Q: As a lawyer looking after Mr. Tanner's interest what would be position if Karl and Radcliffe say caveat fraudulent as they borrowed nothing from Mr. Tanner.**
>
> **A: They would need a new lawyer. Matter fully discussed and agreed by entire family except ex-husband.'**

The witness admitted that in the sale between the Max Browns and Island Creations Limited she represented both parties .Incidentally, the agreement describes the vendors as “Karlene Yvonne Brown and Sophia Brown”, the name “Max” does not appear. Nothing turns on this however as it is common ground the they are the 1st and 2nd Defendants. When asked, about the rate of exchange at the time of sale, Mrs Messado was understandably unable to say. Mr. Robinson at that juncture applied for and obtained permission to file an affidavit with the Bank of Jamaica’s statistics on exchange rates. I also granted permission to the Defendants to cross examine and to file an affidavit in answer if required .There was no cross examination of Mrs. Messado by the attorneys for the 1st to 4th Defendants; nor indeed was there any re-examination.

[60] The matter was adjourned to the 1st Mach 2018 for oral submissions. The parties were directed to file and exchange written submissions on or before the 16th February 2018, in the event there was no request for cross-examination in relation to the statistical evidence.

[61] By affidavit, dated and filed on the 2nd February 2018 and sworn to by Ms Nicola Richards, an extract from the Bank of Jamaica’s Statistics was placed before the court. On the 6th February 2018 the 1st Defendant filed an affidavit to which was exhibited a table of consumer price indices .No cross-examination was requested of either affiant. The Claimant’s counsel filed skeleton submissions on the 19th January 2018 and a bundle of authorities on the 20th January 2018. They also filed closing submissions on the 16th February 2018. The 1st to 4th Defendants filed skeleton submissions and authorities on the 23rd January 2018 and closing submissions on the 19th February 2018. The 5th Defendant filed skeleton submissions and a list of authorities on the 24th January 2018. They filed written Submissions on the 16th February 2018. I am grateful to all concerned for the submissions, both written and oral.

[62] I have gone in some detail into the evidence in order to demonstrate that, at the end of the day, the factual issues were not difficult to resolve. Those who gave

evidence, with the possible exception of the 5th Defendant, impressed me as persons endeavouring to assist the court with their best recollections of past events. The 5th Defendant's witness was in an invidious position. Her firm had control of virtually all the legal transactions the subject of this matter. She had, on her admission, acted at least in part for all parties in each transaction. Her reluctance to disclose some of the documents and her insistence that all was well notwithstanding the challenges is, I suppose, understandable. She was however candid enough to admit making errors. The documentary evidence, and in particular the correspondence, spoke for itself .My findings of fact are:

(a) Bluefields Ltd sold the hotel property to the 1st and 2nd Defendants in or about the year 2007.

(b) Mr. Tanner (now deceased) loaned a part of the purchase price (U$300,000) to the 1st and 2nd Defendants to facilitate the sale by Bluefields Ltd.

(c) The loan is evidenced in writing by a promissory note

(d) The loan was secured by an equitable mortgage and protected by caveat on the title to the hotel property.

(e) Subsequent to the purchase of the property the 1st and 2nd Defendants discovered that the tennis court did not form a part of the hotel property as it had been leased for 99 years. They also discovered that the title did not include a right of access to the beach.

(f) Notwithstanding this discovery they, as Mrs. Max Brown admitted, did not do anything about it. They were content because there was access to the beach.

(g) The 1st and 2nd Defendants fell into difficulty for reasons connected to the construction or intended construction of a new highway. This adversely affected their ability to operate the hotel at a profit.

(h) In consequence they had problems with their bankers and faced the prospect of a forced sale by the bank.

(i) The 1st and 2nd Defendants entered into an agreement to sell the hotel property on the 17th August 2011(see Exhibit 2)

(j) In the course of doing their due diligence Island Creations Limited (the purchaser) "discovered" the existence of the lease and that there was no beach front land on the title. That they could do so suggests, and I so find, that the1st and 2nd Defendant's ought to have done so when they purchased it.

(k) This discovery occasioned a discussion between the 1st Defendant (Mrs. Max Brown) and Mr. Tanner who promised "to do right" by the 1st and 2nd Defendants.

(l) Mr Tanner conveyed this intention to his wife, the Claimant. He intended to meet with Mrs. Max Brown in order to come to some agreement. He never did and died before an agreement was arrived at or any compensation paid.

(m)Neither Mrs. Max Brown nor Mr. Tanner thought it necessary to disclose their discussions to any of the attorneys involved in the transaction. This indicates, and I so find, that whatever "doing right" meant, it did not mean forgiveness of the debt of U$300,000 with interest thereon. This latter finding flows also from the fact that, for the period September 2011 to January 2012, Mr. Tanner and Mr. Schenk on the one hand and, the 1st to 5th Defendants on the other, were consumed with securing the debt of U$300,000 plus interest.

Promissory notes and other documentation were signed by them with that purpose in mind.

(n) The 5th Defendant embarked on a course of deception and half truths to persuade Mr. Tanner that transferring the security was in his best interest. She told Mr Tanner that a joint venture or partnership was involved and that in order to raise finance the caveat had to be lifted. This partnership she said was for the benefit of the hotel and would therefore facilitate repayment of the sums due to Mr Tanner. In fact, at all material times and certainly since the 17th August 2011, the 1st and 2nd Defendants had decided to, and had in fact entered into an agreement to, sell the hotel property. Furthermore they were, to the 5th Defendant's knowledge, selling it at a price that would not allow for the discharge of both the bank's debt and Mr Tanner's. The other bit of deception was the promise by Mrs Messado to secure the title to Rockhamton and keep it in her possession. This was never done. The Title was never even requested from the 1st and 2nd Defendants.

(o) The 5th Defendant obtained filed and registered a promissory note executed by the 1st to 4th Defendants .A caveat was also lodged on the Rockhampton title. This was intended to give effect to an equitable mortgage in Mr Tanner's favour

(p) The 1st to 4th Defendants had knowledge of, and consented to, the transfer of the equitable mortgage from the hotel to Rockhampton . This was done, to their knowledge, in order to secure the debt of U$300,000 with interest .They were aware that it was represented to Mr. Tanner that the amount owed to him was to be secured by a pledge or mortgage of the Rockhampton property. Mr Tanner acted on that representation by releasing his caveat on the hotel property.

(q) The hotel was sold and the proceeds of sale were not used to discharge the debt to Mr. Tanner.

(r) The 1st to 4th Defendants have neither paid the debt nor cooperated with the Claimant, who desires to exercise powers of sale over the Rockhampton property, so as to liquidate the sums owed.

[63] These being my findings of fact the conclusion can be shortly stated. The 1st to 4th Defendants' effort to deny liability, because of Mr. Tanner's promise to do right by them, must fail. Such a promise is too vague to be enforced. What does it mean? The Defendants say it means that Mr Tanner's estate must pay them any loss suffered on the resale plus the amounts they spent to refurbish the hotel property. On their accounting this comes to a total of U$950,000, an amount in excess of the sum due to the estate, (see paragraph 51 Closing Submissions of 1st to 4th Defendants). It seems unlikely that it was the intent either of Mr Tanner or of the 1st to 4th Defendants to set off the entire debt. Mrs Karlene Max Brown, as we have seen at paragraph 45 above, admitted that a reduction not the elimination of the debt was contemplated. If not the entirety then how much is sufficient to "do right by" the Defendants? The Defendants' assertion of a loss is questionable. The hotel property was purchased by them in 2007 for US$1,625,000 (Exhibit 1) and sold in 2011 for US$ 2,100,000 (Exhibit 2).They establish a loss by inviting this court to take into account an agreement for the sale of chattels, valued at US$675,000, entered into in 2007. There is no reference to chattels in the 2011 agreement .It would therefore be wrong for a court to combine the price for chattels with the price for the land in order to determine if the Defendants suffered a loss on the resale of the property. To do so would suggest that the sale of chattels in 2007 was a device to evade revenue payable on the consideration for the sale of the land. There is no basis on the evidence before me to come to that conclusion. It would, in any event, be an illegally which the court could not countenance.

[64] It is also significant that, even after the sale was completed in November 2011, the parties through their attorneys, continued to focus on securing the entire U$300,000 debt plus interest. Certainly one may ask, if there was a binding agreement with Mr. Tanner why not demand that he write off or significantly reduce the debt or the amount to be secured on Rockhampton. It is far more probable that the promise made by Mr. Tanner was not an enforceable contract and was not intended or understood to be. Neither is the statement a representation of fact .It is, at best, a statement of intent with respect to future conduct. It is neither so clear, nor sufficiently certain, as to be given effect either at law or in equity. There is no suggestion, in any event, that the Defendants acted in reliance or to their detriment on the promise made by Mr Tanner.

[65] I also agree with Mr Robinson's submission that there is no evidence of an actionable misrepresentation by Mr. Tanner at the time the hotel property was sold by Bluefields Limited. Caveat emptor is a hallowed principle in these matters. When one is treating with registered land, the title speaks for itself. There is no duty in law on a vendor of land to point to deficiencies in the property he is selling, just as there is no duty in a purchaser to point to any peculiar attractions in the land he is purchasing. It is for the purchaser to investigate and inspect the land and its title. This is particularly true of land falling under the Torrens system, as did the hotel property. The 1st Defendant candidly admitted a failure of due diligence, in her reference to her not doing a valuation. There is no evidence as to whether or not a surveyor's identification report was done by the 1st and 2nd Defendants, however it is safe to assume it was not.. There is evidence that Island Creations Limited's own due diligence disclosed the problems. These were not, let me be clear, problems affecting the validity of the title or the ability of the vender to make good title. There is no suggestion of fraud by Mr Tanner. Mr. Tanner was, to my mind, not liable in law for anything done at the time of the sale to the 1st and 2nd Defendants. He may have felt, and did express, a moral compunction to do right by them, but it was not due to any legal liability or obligation.

[66] The 5th Defendant was the attorney who acted for both vender and purchaser when the 1st and 2nd Defendants bought from Bluefields Ltd. If they have suffered loss, due to a want of due diligence or due even to Bluefield's failure to disclose, it may be that they need to ask the 5th Defendant some questions. Bluefields Ltd., was the vendor. To the extent Mr Tanner had conversations or was involved in negotiations, he would have been acting for a disclosed principal. There is therefore no legal connection between the loan by Mr. Tanner, to assist the purchase, and any misrepresentation allegedly made on behalf of the vendor, or its representative, in the process of the sale.

[67] The Defendants allege that the promissory note is unenforceable due to its being vague and/or because there was no consideration moving to the 3rd and 4th Defendants. Neither contention can succeed.. If construed in the manner contended for by the 1st to 4th Defendants the promissory note would epitomise an absurdity. Mr. Tanner will have agreed to never being able to collect his debt or, at best, to an indefinite postponement of its collection. I am satisfied that the fair-minded observer, and the parties themselves if asked at the time the note was signed, would have said, "of course it falls due 360 days after the date of the note." I so hold. This finding is supported by the evidence of the 5th Defendant discussed at paragraph 55 above. It also flows from an approach to the construction of contractual documents which takes into account background information reasonably available to the parties, **Investors Compensation Scheme Ltd v West Bromwich Building Society et al [1998] 1 WLR 896.** In construing the promissory note the relevant background includes not only the loan made to assist with the purchase in 2007, but also the earlier promissory note and, the fact that it supported an equitable mortgage which was being transferred.

[68] The Defendants contend also that the promissory note is unenforceable because payment is expressed to be "on or before" and therefore offends the requirement of certainty. Reliance is placed on the decision of the English Court of Appeal in

Williamson v Rider [1962] 2 All E.R. 268. The court in that case by majority decision held that the document was not a promissory note within the meaning of the Bills of Exchange Act(UK).Importantly however, the court decided that the contractual term requiring payment "on or before" a certain date meant that, although the borrower has an option to discharge the debt at an earlier date, no obligation to repay arose before that date. The words do not make the contract void for uncertainty it just takes the contract outside the Bills of Exchange Act.

[69] The Defendants argue further that if the document, for the reasons adverted to above, is not a Promissory Note within the meaning of the Bills of Exchange Act then consideration is required to make it enforceable. Since therefore the 3rd and 4th Defendants provided no consideration the contract is unenforceable against them. Assuming that the majority decision of the English court referenced above is correct, as to which I have my reservations, this submission also fails .This is because this is not an action brought on the promissory note. The document, to use a neutral term, is adduced as evidence to support the fact that an equitable mortgage has been granted. It evidences the charge on land, the quantum of the loan and, the date it became due. There is no claim before me on a promissory note or for breach of contract..

[70] There is another reason why the fact that no consideration flowed, from the 3rd and 4th Defendants to the Claimant, is of no great moment in this matter. The parties agreed to charge their property at Rockhampton with a debt due to Mr Tanner .The promissory note is evidence of that agreement. The charge was also to be supported. by delivery up of title deeds and the lodging of a caveat. These are the essentials for the creation of an equitable mortgage. Mr. Tanner was induced to act to his detriment, by releasing his security (the hotel), because of representations or promises made to him on behalf of the 1st to 4th Defendants by the 5th Defendant .The Defendants are therefore all estopped from denying the validity of the equitable mortgage and the documents they executed to give it effect. Furthermore equity treats as done that which ought to

be done. In this regard the title documents ought to have been delivered to the 5th Defendant as part of a clear and unambiguous agreement for transfer of the security.. The promise or undertaking to secure the title deeds for his protection was entered into by the 5th Defendant on behalf of the 1st to 4th Defendants. The execution of the promissory note (with its statement of a charge) and the consent to the caveat being lodged, prove, on a balance of probabilities, that the 1st – 4th Defendants agreed to an equitable mortgage being granted on the Rockhampton property. Equity will bind them to this compact. It therefore matters not whether the promissory note is supported by consideration. The equitable mortgage is valid and this court will lend its coercive power to see to its enforcement. If authority is needed, as to the approach of a court of equity in such matters, I reference **Theodore v Mistford Pty Ltd & Anor [2005] HCA 45**, a case helpfully cited by Mr Gordon Robinson.

[71] There were other peripheral issues raised but I do not find it necessary to entertain them. The Claimant has a valid and enforceable equitable mortgage over the Rockhampton property. The debt not having been repaid, the Claimant is entitled to recover it by enforcing its mortgage against the property owned by the 1st to 4 Defendants.

[72] The disposal of the Claim against the 5th Defendant now falls for consideration. The 5th Defendant, as I have found, does not have the title to Rockhampton in its possession. The firm has also, on my findings, ultimately created an enforceable security and successfully transferred it to the Rockhampton property. There has been a breach of an undertaking, to request and secure the title to the Rockhampton premises, however no loss to the Claimant flowed directly from this. The Claim against the 5th Defendant is therefore dismissed.

[73] The dismissal of the Claim against the 5th Defendant is not a reflection of the serious way this court views an attorney's responsibilities, particularly as it relates to undertakings. The practice of law and the reputation of that honourable profession, require that attorneys honour undertakings they have given .It is for

this reason, that I have directed the Registrar of the Supreme Court to send a copy of this Judgment to the Chairman of the General Legal Council, so that such action may be taken as the Council may deem fit.

[74] On the matter of costs, the court cannot ignore the fact that much of the conundrum in this matter flows from the conduct of the 5th Defendant. The firm acted for all parties. The wording of the promissory note and the transfer of the security was its responsibility. The 5th Defendant's failure to collect and keep the title on behalf of Mr. Tanner, as it had undertaken to do, made enforcement of the equitable mortgage difficult. It is for these reasons that, although the claim against it is dismissed, I decline to award any costs in favour of the 5th Defendant .If I am wrong on this a Bullock Order, for the payment of the 5th Defendant's costs by the 1st to 4th Defendants, would have been appropriate .In the result however there will be no order for costs in favour of the 5th Defendant.

[75] I therefore make the following Orders and grant the following Declarations:

1. It is Declared that the Claimant holds an equitable mortgage in the sum of Three Hundred Thousand Dollars (U$300,000) with interest thereon of 8% per annum in respect of all that parcel of land part of Constant Spring in the parish of Saint Andrew being the lot numbered one on the plan of part of Constant Spring of the shape and dimensions and butting as appears by the plan thereunto annexed and being all the land comprised in Certificate of Tile Registered at Volume 1444 Folio 556 of the Register Book of Titles.

2. Subject to the filing in this court, and service on the Defendants' legal representative, of a resealed Grant of Probate the Claimant is at liberty to sell the said land described in paragraph 1 above in order to recover the

amounts due and owing and an Order for Sale is made accordingly.

3. The Claimant's attorney at law shall have carriage of the sale.

4. The sale shall be by public auction and in the event that method fails by private treaty.

5. The 1st Defendant is ordered to deliver up the Duplicate Certificate of title registered at Volume 1444 Folio 556 of the Register Book of Titles on or before the 4th May 2018 to the attorneys at law representing the Claimant.

6. The Registrar of the Supreme Court shall appoint one valuator from among lists of valuators to be provided by the Claimant and the 1st to 4th Defendants.

7. The said lists are to be submitted to the Registrar within 30 days of the service of the Resealed Grant, in accordance with paragraph 2 above, failing which the Registrar shall nominate any valuator.

8. The Registrar of the Supreme Court shall appoint an auctioneer who shall be someone other than the selected valuator. The auctioneer is to be selected from a list or lists of auctioneers to be provided by the Claimant and the 1st to 4th Defendants.

9. The said lists are to be submitted to the Registrar within 30 days of the service of the Resealed Grant, in accordance with paragraph 2 above, failing which the Registrar shall nominate any auctioneer.

10. All professional fees costs and charges incurred in the carrying out of this Order shall be borne by the Claimant and each of the 1st to 4th Defendants equally.

11. The Registrar of the Supreme Court shall fix a reserve price for the sale by auction having due regard to the recommendations made in the valuation.

12. In the event any party fails neglects and/or refuses to sign any document necessary to give effect to the decision and Orders of this court the Registrar of the Supreme Court is hereby authorized to sign any such document in that party's stead.

13. The net proceeds of sale shall be paid into court along with a statement of account detailing the amount due to the Claimant, and the amount due to the 1st to 4th Defendants after the payment of all relevant professional and other fees, duties, taxes, outgoings and costs.

14. The Registrar of the Supreme Court shall consider and take an account and certify the balance accordingly.

15. The amount so certified as being due to the Claimant shall be paid out accordingly.

16. The amount so certified as being due to the 1st to 4th Defendants shall be paid out accordingly.

17. Liberty to apply.

18. Costs of the claim to the Claimant against the 1st, 2nd, 3rd and 4th Defendants.

19. The claim against the 5th Defendant is dismissed with no order for costs.

David Batts

Puisne Judge