IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2013CD00098

BETWEEN	**DORRETT WONG SAM**	**CLAIMANT**
AND	**JAMAICAN REDEVELOPMENT FOUNDATION, INC**	**DEFENDANT**

IN OPEN COURT

Mr Kent Gammon and Ms Chemell Wright instructed by Kent Gammon and Associates, Attorneys-at-Law for the Claimant

Mrs Sandra Minott-Phillips QC and Mr Lithrow Hickson instructed by Myers Fletcher & Gordon, Attorneys-at-Law for the Defendant

19th, 20th, 26th February and 23rd March 2018

Mortgage – Whether exercise of statutory power of sale is subject to the Limitation of Actions Act

Evidence – Without prejudice communication – Principles - Whether communication containing clear admission of debt excluded

Witness statement – Whether witness who does not identity her purported witness statement may be permitted to give viva voce evidence

LAING J

[1] This Claim concerns four parcels of land (collectively "the Properties"). The Properties were pledged by the Clamant and Ms Clara Douglas as security for loans made by Workers Savings and Loan Bank Limited ("WSL") and National Commercial Bank Jamaica Limited ("NCB") (collectively "the Loans"). The Loans

were made to Sips Lounge Limited and Wong Sam's 24 Hrs. Limited, businesses with which the Claimant is associated.

[2] The Claimant is a company incorporated in the United States of America ("USA"). The Claimant purchased the Claimant's debts which arose from the Loans together with the underlying security and had mortgages registered in its name on the Certificates of Title in respect of the Properties (collectively "the Mortgages").

[3] By this Claim the Claimant seeks an accounting of every loan which the Defendant asserts is owing to it, a declaration that the Loans are statute barred, discharges of the Mortgages, the return of the Certificates of Title in respect of the Properties, damages for the unlawful detention of the Properties and an injunction to restrain the Defendant or its servants or agents from disposing of the Properties.

[4] The Claimant's statement of case is based on a multi-pronged challenge to the Defendants right to exercise its powers of sale as contained in the Mortgages and it is necessary to explore these in turn. However, before doing so, in keeping with the sequence of events at the trial, I will first address a preliminary issue which arose for determination.

The issue of admissibility of without prejudice communication

[5] Prior to the trial, the Claimant filed a notice of application seeking an order prohibiting the Defendant from using and adducing evidence in respect of a letter dated 21st September 2012 from Garth E. Lyttle & Co., Attorneys-at-law, which was sent to the Manager of the Defendant (the "21st September Letter"). The Claimant also sought to prohibit the introduction into evidence, of an email dated 22nd October 2012 at 7:42 pm from Jason Rudd of the Defendant to Mr Anthony Levy the then legal representative of the Claimant (the "Rudd 7:42 pm e-mail"). Flowing naturally from the desire to exclude the 21st September Letter, the Claimant also sought to have paragraph 16 of the witness statement of Mr John

Jordan filed on 8th December 2017 struck out on the ground that it referred to the 21st September Letter. The Application was adjourned to the trial and was heard as a preliminary point.

[6] It is helpful to set out the 21st September Letter in its entirety hereunder:

> *Attention: Mr. John Jordon*
>
> *Dear Sir,*
>
> *Re: Outstanding Loans Nos. 10207387, 10202709 and 10202710*
>
> *Creditor: Dorrett Wongsam*
>
> *We refer to yours of the 15th May, 2012 and also our meeting on the 18th instant, with representatives of Mrs. Wongsam and your good self.*
>
> *Arising from the discussions our client has instructed me to advise you she is prepared to pay you within ninety days (90) eighty Five Thousand U.S. Dollars (US$85,000.00) as full and final payment to liquidate the mortgage loans on two properties namely:-*
>
> *Residential premises situated at Hampton Green District, St. Catherine; and*
>
> *Commercial property situated at Ffrench Street, Spanish Town in the parish of St. Catherine.*
>
> *Our client further advises that she has no difficulty in authorizing the sale of the other two properties to liquidate the balance owing under the other two mortgages.*
>
> *Kindly acknowledge the receipt of this letter by signing and returning to us the enclosed cover letter.*
>
> *Yours faithfully,*
>
> *Garth R. Lyttle & CO,*

[7] The Rudd 7:42 pm email reads as follows:

> *WITHOUT PREJUDICE*
>
> *Mr. Levy,*

After we spoke, I talked to our account officer who is handling this account. He indicated that he had reached an agreement two weeks ago with Garth Lyttle, who was representing the debtor at the time. At that time your client agreed to pay US$85K within 90 days in exchange for the release of two of the properties released, and agreed that JRF would be allowed to sell remaining two properties and accept net proceeds as settlement for the rest of the debt.

I am not sure what has changed with your client in the last two weeks, or if you had been made aware of our agreement.

Jason

Sent from my iPhone

[8] In **Rush & Tompkins v Greater London Council and another 1988 3 All ER 737** at page 739j-740c, Lord Griffiths explained the basis for the rule as follows:

"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in Cutts v. Head [1984] Ch.290,306:

> *'That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in Scott Paper Co. v. Drayton Paper Workers Ltd. (1927) 44 R.P.C. 151, 156, be encouraged freely and frankly to put their cards on the table… The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court to trial as admissions on the question of liability.'*

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on

> *the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."*

[9] It should be noted that the 21st September Letter did not contain the words without prejudice whereas the Rudd 7:42 pm e-mail did. However neither counsel made an issue of this in clear recognition that the rule may be engaged in appropriate cases whether or not the relevant communication is expressed to be without prejudice.

[10] It was submitted by Mr Gammon that the 21st September Letter was merely seeking information which did not result in an agreement and furthermore it was not written on the instructions of the Claimant. Accordingly counsel submitted that it is clothed with the without prejudice protections and he relied on the case of **Winston Finzi and Another v Mahoe Bay Company Limited and Another [2016] JMCA Civ 34.** In that case the Jamaican Court of Appeal carried out an extensive review of the law relating to without prejudice communication and reaffirmed the applicability of cases such as **Rush & Tompkins Ltd v Greater London Council and Anor** (supra) and **Bradford and Bingley plc v Rashid** [2006] All ER (D) 145 (Jul).

[11] In response, Counsel for the Defendant submitted that in the 21st September Letter the Claimant did not dispute the debt but merely set out the terms on which she was willing to pay it. Counsel relied on the case of **Bradford and Bingley** (supra) and in particular the statement of Lord Hope of Craighead at para [33] as follows;

> *"[33] How then do the letters of 26 September 2001 and 4 October 2001 stand up to examination? Neither of them contained the words 'without prejudice', so the issue is whether they are protected by the public policy rule. It seems to me that the first letter does two things. It contains a clear admission that there is a balance of debt that is still outstanding and then there is a request for the time to pay. The Court of Appeal ([2005] EWCA*

> *Civ 1080, [2005] All ER (D) 330 (Jul)) agreed with the judge that it was written as part of an attempt to negotiate. But there is no suggestion in this letter that the amount of the debt itself was open to compromise. The only issue that was being opened up for compromise was how that debt was to be paid off. In my opinion there is nothing in this letter that entitles the respondent to the without prejudice privilege. The second letter, on the other hand, contains both an admission and an offer to compromise. The admission is that there is an amount which is still outstanding. The offer is to pay £500 in full and final settlement of it. But it does not contest the outstanding amount. On the contrary, it is based on what the respondent can offer to pay, not on what he believes to be due. In my opinion this too is not an offer of the kind that attracts the without prejudice privilege on public policy grounds."*

[12] Counsel also placed reliance on Lord Mance's statement which represents a similar reasoning at paragraph 76.

> *"[76] In short, therefore, some acknowledgments will indeed attract without privilege protection. But these will be cases where the extent of the liability is genuinely in dispute and the parties are attempting to settle that difference. Had Mr. Rashid, for example, in fact been seeking to question the sufficiency of the sum obtained from the mortgagee's sale of the property and had the correspondence been devoted to resolving that particular issue, without prejudice protection might well have applied. But that simply was not the case. The correspondence treated the debt as an undisputed liability and dealt only with weather, when and to what extent Mr Rashid could meet that liability. The question before your Lordships is whether in those circumstances the without prejudice rule should be extended at the expense of the statutory provision for acknowledgments. For the reasons given I would hold not."*

[13] In the Court's opinion, the analysis conducted by Lord Hope of Craighead at paragraph [33] of **Bradford and Bingley** (supra), applies equally to the 21st September Letter in that it is evident that, "... *it contains both an admission and an offer to compromise. The admission is that is that there is an amount which is still outstanding."* The offer in the instant case which is being made by the Claimant's Attorney-at-Law is to pay US$85,000.00 within 90 days in full and final settlement of the mortgage loans in respect of two of the properties plus the proceeds of sale of the two remaining properties in satisfaction of balance owing on those related mortgages. The 21st September Letter does not contest the

outstanding amount. There is therefore a firm basis for this Court having similarly concluded, as the Court in **Bradford & Bingley** did, that this is not an offer of the kind that attracts the without prejudice privilege on public policy grounds.

[14] The Court notes that when viewed in the context of the instant claim, the case of **Bradford v Bingley** must be treated with caution. This is because in that case the Court was primarily concerned with the extent to which a written acknowledgement of a debt (which could start time running afresh under the English Limitation Act 1980) could gain the protection of the without prejudice rule and be deemed to be inadmissible. Their Lordships unanimously held the communication to be admissible but differed in their opinions as to the reasons.

[15] Notwithstanding some difference in analysis and reasons, as the head note in **Bradford and Bingley** confirmed, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood and Lord Mance were all in agreement that there was no dispute to be compromised since the correspondence treated the debt as an undisputed liability and the debtor was simply asking for a concession but was not giving one.

[16] The Rudd 7:42 pm e-mail essentially repeated the terms of the 21st September Letter and indicated that an agreement had been reached by the parties. Notwithstanding the fact that it was headed "*without prejudice*" the Court has formed the view that it was admissible for the same reasons that the 21st September Letter was so determined to be.

[17] The Court considered the allegation that Mr Lyttle had no instructions to make the offer contained in the 21st September Letter. These are very serious allegations made against a member of the bar who is an officer of the Court, by way of what was really a bald assertion unsubstantiated by any detail. The assertion by the Claimant's then Counsel Mr Levy, that the Claimant had made that representation to him is clearly self serving and consequently of little evidential value, if any. Having particular regard to the precise terms of the offer

that was communicated in the 21st September Letter, the Court was not convinced that Mr Lyttle, Attorney-at-Law, embarked on a frolic of his own in committing his client to the terms outlined therein without instructions. Accordingly the Court found that this assertion was unsubstantiated and without merit.

The issue of the Claimant's witness statement

[18] Prior to the Claimant being sworn, the Court observed that the document filed as the Claimant's witness statement commenced with the words "*Dorrett Wong Sam will state that*..." Anticipating that if the Claimant identified and confirmed the truth of the witness statement it would stand as her evidence in chief, the Court suggested that "*states*" would be preferable to "*will state*". Counsel agreed. The Court allowed that amendment, since it was minor and purely as to form, without any objection. That might be considered to have been an omen based on what transpired thereafter.

[19] After the Claimant was sworn and gave the usual preliminary information, she was shown the document which was filed and served purportedly as her witness statement. To the apparent shock and consternation of her Counsel Mr Gammon, she testified that she did not recognize the document and that it was not her signature which was affixed to it. Counsel then made an application for her to give *viva voce* evidence in chief, in lieu of her witness statement. This application was strenuously objected to by opposing Queen's Counsel Mrs Minott-Phillips.

[20] Learned Queen's Counsel referred to the case management conference orders which provided for witness statements to be filed and exchanged on Friday 8th December 2017 and to teh Civil Procedure Rules, 2000 ("CPR") part 29.8 which provides as follows:

> *29.8 (1) Where a party –*
>
> *(a) has served a witness statement or summary: and*

> *(b) wishes to rely on the evidence of the witness who made the statement, that party must call the witness to give evidence unless the court orders otherwise or it puts the statement in as hearsay evidence.*
>
> *(2) Where a witness is called to give oral evidence under paragraph (1), his or her witness statement shall stand as evidence in chief unless the court orders otherwise.*

Learned Queen's Counsel submitted that the CPR provided for the Claimant's evidence to be by witness statement, and in the absence of a witness statement which could properly stand as the Claimant's evidence in chief, and its admission as a hearsay statement being out of the question, the Claimant ought not to be permitted to give *viva voce* evidence.

[21] This issue appeared to be novel one and the Court was not provided with, nor did the Court identify any case law authority which could be of assistance. However applying general principles, in the Court's opinion, since there had been no case management orders for the witnesses' statements to stand as the witnesses' evidence in chief at trial, it was open to the Court to permit *viva voce* evidence if the justice of the situation allowed for it. The Court concluded that preventing the Claimant from giving *viva voce* evidence would have been an unduly strict and harsh position to adopt in the circumstances.

[22] The Court considered that one of the obvious benefits of allowing a witness' witness to stand as his evidence in chief is the significant time saving achieved. This efficiency would be lost by allowing viva voce evidence, however, although undesirable, the delay would not have been significant having regard the generous allocation of time that had been allowed for the trial.

[23] The Court also considered the fact that one of the purposes of exchanging witness statements before trial is to provide each litigant with the written evidence which will support his opponent's case. This serves to, *inter alia*, focus Counsel's mind on the significant areas of dispute which will require cross examination. The Defendant would have prepared its case on the basis that the purported witness statement would have stood as the witness' evidence in chief.

For this reason the Court was of the view that if the *viva voce* evidence was confined to the purported witness statement, then no prejudice would be faced by the Defendant. In order to balance the scales of justice, the Court tried to ensure that on the one hand the Claimant as witness would not be unreasonably restricted, but that on the other hand the Defendant would not be taken by surprise. With this objective in mind, the Court ruled that if the Claimant wished to go outside the bounds of her purported witness statement, the Court would allow an application to be made for that to be done in a manner similar to that of an application to amplify a witness statement.

The issue of the alleged irregularity in the execution of the Mortgage documents

A. *Instrument of Mortgage No. 783500 dated 16th September 1993*

[24] The Claimant asserted in her statement of case that this mortgage over lands comprised Certificate of Title registered at Volume 1111 Folio 830 of the Register Book of Titles ("65 Hampton Green") was executed by the Claimant and Clara Douglas to secure a loan of $150,000.00 by WSL to Sips Lounge Limited. However, the Claimant asserted that Andrea Wong Sam took the instrument of Mortgage which had been prepared by WSL to Clara Douglas in New York, USA, where Ms Douglas executed it. Notwithstanding this fact, Winston McKenzie on the probate at the back of the document swore that the witnessed Clara Douglas sign it.

B. *Instrument of Mortgage No. 841730 dated 7th December 1994*

[25] This Mortgage was executed by the Claimant and Clara Douglas over land comprised in Certificate of Title registered at Volume 194 Folio 36 of the Register Book of Titles ("40 Ffrench Street") to secure a loan of $1,100,000.000 by NCB. The Claimant asserted that Clara Douglas executed the instrument of Mortgage in New York, USA in the presence of Marykim Nichols, Notary Public of Westchester, New York. The Claimant asserted that notwithstanding this, an Attorney-at-Law in Jamaica affixed his signature to the legal advice clause

confirming that he had explained the contents of the document to Clara Douglas, that she appeared to understand the purport of the document and signed it of her own free will and accord. Alvin Alston an official of the Bank also swore as attesting witness to the execution by Clara Douglas.

C. *Instrument of Mortgage No. 900755 dated 2nd October 1995*

[26] This mortgage was executed by the Claimant and Clara Douglas over lands comprised in Certificate of Title registered at Volume 414 Folio 7 ("Lot 17 Hampton Green") to secure a loan by WSL to Wong Sam's 24 Hrs Limited in the amount of $2,000,000.00. The Claimant asserted that the mortgage was executed by Clara Douglas in New York in the presence of Girish Patel a Notary Public. The Claimant argued that despite this, Justin Martin swore to a probate attached to the instrument of mortgage claiming that he was present and saw the Claimant and Clara Douglas sign the instrument of mortgage.

D. *Instrument of Mortgage No 900796 dated 2nd October 1995*

[27] This was a second mortgage over 65 Hampton Green executed by the Claimant and Clara Douglas to secure a loan of $2,000,000.00 granted to Wong Sam's 24 Hrs Limited. The Claimant asserted that Clara Douglas executed the instrument of Mortgage in New York in the presence of Marykim Nichols but nevertheless, Elaine Fletcher of 25 Adelaide Street in the parish of St Catherine swore to a probate clause on the instrument of mortgage confirming that she witnessed the execution of the instrument of mortgage by Clara Douglas.

[28] The Claimant argued that the assertion by the various persons in Jamaica that they witnessed Clara Douglas executing the various instruments of Mortgage in Jamaica were false and amounted to perjury. It was submitted that but for these false declarations the mortgages could not have been registered under the Registration of Titles Act ("RTA").

The Defendant's response

[29] Learned Queen's Counsel placed reliance on section 71 of the RTA which provides as follows:

> *71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.*

[30] The Court accepts the submissions of learned Queen's Counsel that the fraud referred to in section 71 of the RTA, is fraud on the part of the person taking the transfer from the proprietor of the registered mortgage. Accordingly in the absence of any allegation of fraud on the part of the Defendant, the section provides a complete shield against the allegations of fraud made by the Claimant against the former proprietors of the Mortgages.

The Moneylending Act

[31] It is not contested that the Loans were acquired in 2002. The Defendant relied on **The Moneylending (Exemption) (Jamaica Redevelopment Foundation Inc.) Order, 2002** which came into operation on the 30th day of January 2002. The Order provided that:

> *Loans or contracts entered into or security given for repayment thereof, being loans made or acquitted by Jamaican Redevelopment Foundation Inc. or contracts entered into thereby or security given thereto (respectively) within one (1) year from and including that date, are hereby declared to be exempt from provisions of the Moneylending Act*

Similar orders were also made subsequently.

[32] The Court also accepts the submissions of learned Queen's Counsel relying on **Michael Levy v The Attorney General of Jamaica and Jamaican Redevelopment Foundation Inc** [2012] JMCA Civ. 47, that having regard to the exemption order referred to above any claim premised on section 10 of the Moneylending Act as against the Defendant is unsustainable.

Statute of limitation bar

[33] Mr Gammon submitted that the Loans were repaid in full and this was denied by the Defendant. The Claimant argued that in any event the evidence before the Court proved that no monies had been paid to the Defendant or its predecessors in title, in respect of the Loans, since 1999, which is for a period in excess of 12 years. It was submitted that as a consequence the Defendant's rights to recover the debts associated with the Mortgages is statute barred. Mr Gammon went further and submitted that not only is the right to recover the debts statute barred, but the Defendant is also precluded from taking any step or embarking on any activity in respect of the Properties including exercising a power of sale. Mr Gammon relied primarily on sections 30 and 33 of the Limitation of Actions Act which provide as follows:

> *30. At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.*
>
> *33. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgement of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceedings shall be brought but within twelve years after the last of such payment or acknowledgement, or the last of such payments or acknowledgments if more than one, was given.*

[34] Counsel cited the case of **Lewis v Plunkett** [1937] 1 Ch D 306 as an example of the operation of the principle, the headnote of the case reads as follows:

> *"Where the owner of a legal estate in fee simple in land executes a mortgage and hands over the mortgage and other title deeds to the mortgagee, but fails to pay any interest on the mortgage or to give any acknowledgment of the mortgage debt for more than twelve years, the mortgagee loses all title to the land and the mortgagor can recover possession of the mortgage and other title deeds."*

In **Lewis v Plunkett** the Court ordered that the title deeds which were handed over by the Plaintiff as mortgagor to the Defendant who was the Mortgagee should be returned to the Mortgagor. This was because the Mortgagor had not made a payment or acknowledged the mortgaged debt in over 12 years. The debt was therefore caught by the provisions of the Statute of Limitations. The Court found that the Defendant at the time of the claim had ceased to have any interest in the property and therefore the title deeds could not have been of any use to her.

[35] Mr Gammon conceded that the case of **Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited** [2015] JMSC Civ 242 was not in his client's favour. In **Dagor** my learned brother Mr Justice Batts held that the **Limitation of Actions Act** does not apply to the exercise of a Mortgagee's statutory power of sale. The learned Judge's reasons for reaching this conclusion are condensed in paragraph 12 of the judgement which I reproduce below:

> *[12] Actions to recover possession whether by the mortgagee or purchasers from the mortgagee may be met with any applicable limitation defence. In this regard the mortgagee seeking possession is in law in no better possession than for example one joint owner claiming possession against another. The limitation bar it has been held applies in such circumstances see* ***Wills v Wills [2003] UKPC 84.*** *A mortgagor in possession for the requisite 12-year period, in circumstances where the mortgagee's right to possession has accrued, is entitled to rely on section 3 and 7 of the Limitation of Actions Act. It therefore behoves purchasers of land to enquire as to the status of those in possession, and it matters not whether the land is purchased from a mortgagee. The possessory title can defeat the title of the registered owner and hence his ability to give a valid title. In the matter at bar however the registered owner is in possession. He cannot defeat his own title. The Registration of Titles Act*

> *allows the mortgagee to transfer that title by way of sale. The sale is only one of several methods to enforce his security. The others are: (a) an action on the debt (b) appointment of a receiver (c) re-entry and possession (d) foreclosure. The Limitation of Actions Act applies to the making of an entry and the bringing of actions, see generally Fisher & Lightwoods's Law of Mortgage (2nd Australian edition) pages 384, 392 et seq.*

[36] Mr Gammon has confronted **Dagor** head on. He respectfully submitted that Batts J was plainly wrong in his conclusion and may not have received the assistance that he ought to have from Counsel. Mr Gammon submitted that there are a number of English authorities which have held that the statutory power of sale is similarly subject to a limitation period and had the learned Judge considered these authorities he would have come to a different conclusion. Many of the English cases to which Mr Gammon referred considered section 8 of the English Real Property Limitation Act, 1874 but there is no disputing that it is in *pari materia* with section 33 of out Limitation of Actions Act. The foundation of Mr Gammon's challenge to **Dagor** rests substantially on the case of **Sutton v Sutton** [1882 S. 1188] (1882) 22 Ch. D 511 and the following words of Jessel MR at page 516:

> *"...Now the words that are material are, "No action suit, or other proceeding shall be brought to recover any sum of money by any mortgage". It is impossible to say that those words do not include this sum of money. It is a sum of money secured by a mortgage. Those who say that these words are not to be read literally must shew some reason why they should not. What they say is that it does not mean to recover any sum of money secured by a mortgage, but that it means to recover the money so far as it can be recovered by a sale of the land of by the receipts of the rents: that is to say, so far as you can get it out of the land. That construction puts words there which are not to be found in the sections; and more than that, it gives no meaning to words which are to be found in the section, because you could not get that money as against the land at the period when this Act was passed except by a suit in the Court of Chancery. You could not have brought an action at law for that purpose. There is another reading which makes it much plainer, and that is that the words "at law or in equity" belong to the words "action or suit," because the words "at law" have no particular meaning when you have got the words "charges upon any land" and therefore it is probable that the words are not put in their right position. But independently of that, when you consider that a proceeding at law is called "an action" and proceeding in equity is called "a suit," and when you get the two words "action" and "suit" together, it is plain to my mind that those who framed*

> *that section meant any proceeding in which any sum of money secured by a mortgage might be recovered."*

[37] Mr Gammon also sought to rely on **Fearnside v. Flint** Ch. D 579 which he submitted followed **Sutton v Sutton** (supra) and in which the Court held at page 582 as follows:

> *"The present proceeding was taken more than twelve years after the last payment of interest and after that acknowledgment. Assuming therefore, that the letter operated as an acknowledgment, and that the debt was a just debt of George Flint at that time, it appears to me the present claim is barred by the statute. Consequently, I dismiss the summons with costs."*

[38] Counsel also placed reliance on the case of **Mazelie v Prescott** [1959] 1 WIR 358, a case from the appellate jurisdiction of the Supreme Court of Trinidad and Tobago. In that case, the respondent brought an action against the appellant for the recovery of the certain lands. The Court found that the respondent's claim was based on a purported conveyance from a mortgagee whose title had been extinguished about six years before by operation of the before that purported conveyance and as a consequence there was nothing which could have been conveyed hereby. The Mortgagee's title had been extinguished by virtue of the Appellants' occupation.

Defendant's submissions

[39] Learned Queen's Counsel submitted that the apparent divergence between the judgment of Batts J in **Dagor** and the cases on which Mr Gammon placed reliance is easily understood when one contrasts the evolution of the law in England with what occurred in Jamaica. Noteworthy is the commencement date in Jamaica of the RTA on 1st October 1889, approximately 8 years after the coming into force of the Limitations of Actions Law on 1st July 1881. Queen's Counsel further submitted that one key distinguishing feature of the form of a mortgage under the RTA is that it involves no ownership of the land which is the subject of the Mortgage. This is substantially different from what obtained with a common law mortgage in which the mortgagor's legal estate was conveyed to

the mortgagee subject to a proviso for redemption and usually with the mortgagor remaining in possession.

[40] Learned Queen's Counsel submitted that the "*other proceeding*" in section 33 of the Limitations of Actions Act must be construed *ejusdem generis* with the preceding words "*No action or suit*". As a consequence the Mortgagee in Jamaica exercising his power of sale will not be caught within the ambit of section 33 because of his ability to enforce his power of sale without first initiating any action, suit or other court proceedings. Queen's counsel submitted that because of this fundamental distinction between the proceedings in Jamaica, a jurisdiction which has embraced the Torrens system of land registration, on the one hand, and England, which has not, on the other hand, caution must be exercised when considering the English cases on which Mr Gammon sought to rely. It was further submitted that on a detailed analysis none of the cases presented by Mr Gammon are of any assistance in supporting the Claimant's position.

[41] Learned Queen's Counsel invited the Court to note that in the case **Sutton v Sutton** the relevant issue is captured by Jessel MR at page 515 as follows:

> *The sole question that we have to decide is whether when no principal or interest in respect of a mortgage debt has been paid, and no acknowledgement in writing has been given for the space of twelve years, an action on the covenant contained in the mortgage deed is maintainable or not. That question depends for its decision upon the true construction of the 8th section of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57).*

Accordingly, Queen's Counsel submitted that there is no basis for asserting that it supports the Claimant's case since it is concerned with an action on the covenant contained in the mortgage.

[42] As it relates to the case of **Chadburn v Winfield** [1922] 2 Ch. D 413, Queen's Counsel again invited the Court to note the issue as identified by Sargant J at page 417 as follows:

> *The question here is how far the rights of a mortgagee have been barred under the Real Property Limitation Act of 1833 as amended by the Act of 1874 with reference to a mortgage on a mixed fund arising from the proceeds of real and personal property.*

This was a case in which the son of a testator had mortgaged his one-seventh share of his father's estate which consisted of personality and realty. An issue arose as to whether the mortgage debt was enforceable against the realised proceeds of the realty, after the limitation period had passed and where there had been no acknowledgement of the mortgage debt. Queen's Counsel submitted that **Chadburn v Winfield** was wholly dissimilar to the instant case which concerns a mortgagee seeking to enforce its statutory right of sale and accordingly that case provides no assistance.

[43] The case of **Ashe v National Westminster Bank plc** [2007] EWHC 494 (Ch) was brought under the English Civil Procedure Rules Part 8 which permits the Court to make declarations on matters which do not involve a substantial dispute of fact. The Claimant sought a declaration that a charge had been extinguished by operation of sections 15 and 17 of the Limitation Act 1980. Section 15 is entitled "*Time limit for actions to recover land*" and sub-section (1) provides as follows:

> *(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right to action accrued to him or, if it first accrued to some person through whom he claims, to that person..*

[44] Paragraph 29 of the judgment states as follows:

> *[29] The Claimant's claim may be simply stated. The Claimant contends that:*
>
> *(1) the Defendant's right of action to recover the Property accrued either on 21 January 1992 when the Defendant demanded repayment from Mr Babai or on 4 June 1992 when it made formal demand relying upon the Mortgage;*
>
> *(2) either way, the right of action accrued more than twelve years ago;*

> *(3) accordingly, the right of action is statute barred by virtue of s 15(1) of the 1980 Act; and*
>
> *(4) it follows that the Defendant's charge has been extinguished by s 17 of the 1980 Act.*

[45] At paragraph 46 the learned Judge referred to Megarry and Wade, the Law of real property (6th Ed, 2000) where in the chapter on "adverse Possession and Limitation" under the heading "Mortgages" the authors stated that:

> *"21-036(b) Mortgagee's right to enforce the mortgage. The mortgagee's rights to foreclose, to sue for possession, and to sue for the principal all become statute barred12 years from the day when repayment became due under the mortgage; and his title is then extinguished…..*

[46] At paragraph [50] the learned judge refers to an academic authority on the point and I reproduce it below:

> *[50] Fisher and Lightwood's Law of Mortgage (12th ed, 2006) states under the general heading "Limitation of claims" (again omitting footnotes):*
>
> *"POSSESSION"*
>
> *Period of Limitation*
>
> *26.40 Section 15(1)of the Limitation Act 1980 provides that no claim shall be brought by any person to recover land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. By s 38(7), a right of action to recover land includes a right to enter into possession of land. Accordingly the right of a mortgagee to enter upon the mortgaged land or to bring a claim for possession will be barred 12 years after the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person....*

[47] The submissions of Queen's Counsel relating to the case of **Ashe** were consistent with her earlier submissions. That expressed position was that the case of **Ashe** was not applicable to the case before the Court.

[48] Queen's Counsel submitted that, contrary to what has been submitted by the Claimant, in **Dagor** Batts J was cognisant of all the relevant issues to be addressed and in fact considered a number of authorities in the line of those on

which the Claimant sought to rely. These cases were not necessarily referred to but this is demonstrated in the learned Judge's reference to **Mazelie v Prescot (1959) 1 WIR 358** at paragraph 7 of his judgment as follows:

> *[7] The Claimant supports his submission by reference to* ***Mazelie v Prescott (1959) 1 WIR 358****. In that case the Respondent (a transferee from the mortgagee) sought possession of the mortgaged premises. It was held that the mortgagee's right and title had been extinguished by virtue of the Limitation of Action Statute and therefore he had no interest to convey. The Respondent was therefore not entitled to possession. Chief Justice Gomes said,*
>
> > ***"The real question to be determined is whether under the provisions of the Real Property Limitation Ordinance the mere passage of time extinguishes a mortgagee's right and title. The answer is to be found in s. 22 which is as follows:***
> >
> > ***"At the determination of the period limited by the Ordinance to any person for making an entry or distress, or bringing any action or suit, the right of title of such person to the land or rent for recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished."***
> >
> > ***It is clear that the words "any person" in that section include a mortgagee, for otherwise section 12 would not have been enacted."***

Analysis

[49] Section 106 of the RTA provides as follows:

> *If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon*

> *production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.*

[50] This statutory power of sale permits the mortgagee to pass the ownership of the mortgaged interest to a bona fide purchaser. Although the Mortgage instrument may contain an express contractual power of sale, sections 105 and 106 of the RTA provide assistance to the Mortgagee by way of an independent power of sale. This was recognised by the Court in **SSI (Cayman) Limited v International Marabella Club** (SCCA No. 57/1986, judgment delivered 6 February 1987) where at page 25 the Court stated as follows:

> *"This is particularly so when the consequences are implied by statute see sections 105 and 106 of the Registration of Titles Act and sections 22 and 23 of the Conveyancing Act which gives the Mortgagee the power of sale part from any term in the deed."*

[51] It is the ability of the Mortgagee to exercise this independent power of sale without recourse to the Court which in my view prevents the operation of the Limitation of Actions Act since the process of sale is not an "*action suit or other proceeding*" within section 33 of that act. The mortgagee's execution of a transfer to the purchaser derives its force and effect from section 106 of RTA which allows him to "*make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale*..."

[52] I accept the submissions of learned Queen's Counsel that none of the cases on which the Claimant sought to rely support the Claimant's position which is that the exercise of the power of sale in this case would be prevented by the Limitations of Actions Act. In fact, one of the cases seems to suggest quite the contrary. In **Ashe** the Court addressed a number of points which were not disputed and interestingly at paragraph 31 noted the following:

> *[31] The first is that the Defendant's personal claim against Mr Babai for the debt he owes is statute barred by virtue of s 20(1) of the 1980 [Limitation] Act. This does not in itself affect the Defendant's security*

> *under the Mortgage however. The debt remains owing, and unless the charge has been extinguished by s 17, the Defendant can enforce its security against the property and thereby recover the outstanding amount.*

Conclusion and disposition

[53] In the absence of any legal authority capable of supporting the Claimant's position to the contrary, I entirely agree with the reasoning and conclusion of my learned brother Batts J in **Dagor**, that the Limitation of Actions Act does not apply to the exercise of a Mortgagee's statutory power of sale. As a consequence the Defendant is entitled to enforce its security by an order for sale.

[54] As it relates to the Claim for an accounting in respect of the Loans, that has been provided and the issue as to whether the Claimant would have been entitled to receive it had it not been provided is a matter of academic interest only which this court does not propose to address.

[55] For the reasons stated herein the Court makes the following order:

1. The Court refuses to make the declarations and orders sought by the Claimant and judgment is awarded in favour of the Defendant.

2. Costs of the claim are awarded to the Defendant to be taxed if not agreed.