



1/11/11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2010 HCV 02855

BETWEEN	FARREN LLOYD BROWN	CLAIMANTS
AND	VICTORIA BROWN	
AND	MANDOLIN INVESTMENT GROUP LLC	1ST DEFENDANT
AND	METRO FUNDING CORP	2ND DEFENDANT

Mr. Harold Brady and Ms. Indera Persaud instructed by Brady and Co. for the Claimants.

Mr. Mark Jennings and Ms. Marlene Uter instructed by Alton Morgan and Co. for the First Defendant.

Mr. Patrick Foster and Mr. Weadon Daley instructed by Hart Muirhead Fatta for the Second Defendant.

Heard: 14th and 16th December 2010 and 20th September 2011

**VENDORS' MORTGAGE – PRIORITY OF MORTGAGES –
REGISTRATION – EQUITABLE MORTGAGE – MEANING OF
“ALL MONIES” CLAUSE IN MORTGAGE – RIGHTS OF
FORECLOSURE, POSSESSION, REDEMPTION**

MANGATAL J:

[1] This is an application by way of Fixed Date Claim Form by which a number of different Declarations are sought.

[2] The Claimants seek:

1. A Declaration that the Agreement for Sale dated the 26th day of February 2007 for the property registered at Volume 1345 Folio 939 between the Claimants and the Defendant is valid and subsisting.
2. A Declaration that the said Agreement provides the following payment terms which are valid and binding on the Defendant.

An initial payment of One Hundred and Ninety Five Thousand Five Hundred United States Dollars (\$ 195,000.00) apportioned as follows:

- (i) The sum of US \$ 130,000.00 shall be the deposit.
- (ii) The sum of US \$20,000.00 is hereby acknowledged as paid to the Vendor by the Purchaser.
- (iii) The sum of US \$ 45,500.00 shall be a further payment on account of the Purchase Price.
- (iv) The sum of US \$ 654,500.00 payable on completion less monies payable for outstanding utilities, taxes and balance due to discharge mortgage noted on the Certificate of Title.
- (v) The sum of US \$50,000.00 payable on or before three (3) weeks after completion. Balance Purchase Money of Four Hundred Thousand United States Dollars (US \$400,000.00) shall be secured by a Vendor's Mortgage in favour of the Vendor payable within three (3) years of the date of the Agreement for Sale with interest at the rate of four percent (4%) per annum. The Vendor's mortgage is subject to the first legal mortgage in favour of Metro Funding Corporation and as such the first legal mortgage has priority in registration and discharge in relation to Vendors' mortgage.

3. A Declaration that there is in existence a valid Vendors' mortgage of US \$ 400,000.00 which matures and became due and payable on or before the 26th day of February 2010.
4. A Declaration that to date the Defendant has made no payments under the mortgage and the full amount of US\$400,000.00 with the interest rate of 4% per annum remains unpaid and the mortgage remains undischarged.
5. A Declaration that the Claimant is entitled to redeem any prior mortgages and to foreclose on the said property and/or is entitled to possession of same.

THE PARTIES

[3] The Claimants Farren and Victoria Brown "the Browns" were the owners of a hotel known as Paradise View in Negril, Westmoreland "Paradise View" registered at Volume 1345 Folio 939.

[4] The First Defendant Mandolin Investment Group LLC "Mandolin" is an overseas company re-registered in Jamaica and trading as "The Palms - Beachside Resort".

[5] The Second Defendant Metro Funding Corporation "MFC" is a corporation incorporated under the laws of the State of New Jersey, in the United States of America and carries on the business of lending.

[6] The grounds upon which the Browns seek these declarations are stated to be as follows:

1. The Browns were the vendors and registered proprietors of the property known as Paradise View, Negril, in the Parish of

Westmoreland which operated as a Hotel/Resort and registered at Volume 1345 Folio 939 pursuant to an Agreement for Sale dated the 26th day of February 2007 for a purchase price of United States One Million, Three Hundred Thousand (US\$1,300,000.00).

2. It was agreed and understood that Mandolin would finance the purchase price by obtaining a loan of United States Nine Hundred Thousand Dollars (US\$900,000.00) from a lending institution, MFC, and the Claimants would grant to Mandolin a Vendor's mortgage in the amount of United States Four Hundred Thousand Dollars (US \$400,000.00).
3. Pursuant to the terms of the Agreement for Sale, the Browns granted to Mandolin a Vendor's mortgage in the amount of United States Four Hundred Thousand Dollars (US\$400,000.00) payable on or before February 26, 2010.
4. To date the Browns have received United States Twenty Thousand (\$20,000.00) from Mandolin, and the sum of United States Dollars (US \$175,000.00) from MFC making a total amount of United States One Hundred and Ninety Five Dollars (\$195,000.00) and the Browns acknowledge that the sum of United States Two Hundred and Ninety Five Thousand One Hundred and Fifty Three Dollars and Fourteen Cents (US \$295,153.14) being the outstanding mortgage which they had on the property was paid out to Bank of Nova Scotia to discharge their mortgage and release the title.
5. Notwithstanding that, the property was transferred to Mandolin, and possession was granted sometime in 2007, to facilitate refurbishment

of the hotel. MFC has registered its mortgage on the property and it has refused to pay any further amount from the mortgage loan proceeds on the grounds of a boundary discrepancy.

6. To date, notwithstanding demands for payment of the balance of the purchase price, MFC has failed to liquidate its indebtedness under the Vendor's mortgage to the Browns.
7. There is evidence that indicates that Mandolin is in receivership in the State of Maryland in the United States of America and is therefore unable to pay its debts.
8. That the proceeds of the mortgage loan from MFC are being unlawfully withheld, aided and abetted by Mandolin.
9. Mandolin is in receivership and is unable to complete the sale by securing the mortgage proceeds from the lending institution and to liquidate its indebtedness under the Vendor's mortgage.
10. In the premises the Browns are entitled to redeem the mortgage from MFC and foreclose on the Vendor's mortgage.

FACTUAL BACKGROUND

[7] On the 26th of February 2007 the Browns and Mandolin entered into an Agreement for Sale of Paradise View for United States One Million Three Hundred Thousand Dollars (US \$1,300,000.00).

[8] Amongst other terms, the Agreement provided for the following:

HOW PAYABLE

An initial payment of One Hundred and Ninety Five Thousand United States Dollars (US \$195,500.00) apportioned as follows:

- (i) The sum of US \$130,000.00 shall be the deposit.*
- (ii) The sum of US \$20,000.00 is hereby acknowledged as paid to the Vendor by the Purchaser.*
- (iii) The sum of US \$45,000.00 shall be a further payment on account of the Purchase Price.*
- (iv) The sum of US \$654,500.00 payable on completion less monies payable for outstanding utilities, taxes and balance due to discharge mortgage noted on the Certificate of Title.*
- (v) The sum of US \$50,000.00 payable on or before three (3) weeks after completion. Balance Purchase Money of Four Hundred Thousand United States Dollars (US \$400,000.00) shall be secured by a Vendor's Mortgage in favour of the Vendor payable within three (3) years of the date of the Agreement for Sale with interest at the rate of four percent (4%) per annum. The Vendor's mortgage is subject to the first legal mortgage in favour of Metro Funding Corporation and as such the first legal mortgage has priority in registration and discharge in relation to the Vendor's Mortgage.*

.....

COMPLETION:

On or before February 28, 2007 on the Transfer of Certificate of Title registered at Volume 1435 Folio 939 of the Register Book of Titles to the Purchaser and/or nominee and on the registration of First Legal Mortgage to Metro Funding Corporation of One Kalisa Way, Suite 310, Paramus, New Jersey 07652, United States of America....and the registration of the Vendors' Mortgage by the Purchaser in favour of the Vendor.

.....

ENCUMBRANCES

Free from encumbrances save and except the restrictive covenants and easements (if any) endorsed on the Certificate of Title for the said property. “

[11] The Agreement also contained the following special conditions:

“5. The Purchaser shall obtain a Commissioned Land Surveyor’s Report prior to completion at its own expense on (and) the completion of this Agreement by the Purchaser is conditional upon the report being favourable, and the Vendors shall be under a duty to remedy any effect (defect) in title revealed by this report.....

8. On the signing of this Agreement for Sale;

- i) The Vendors attorneys-at-Law shall give the Purchaser a written undertaking to register the Purchasers’ name on Certificate of Title, registered at Volume 1345 Folio 939 in exchange for the sum of Six Hundred and Fifty Four Thousand Five Hundred United States Dollars (US\$654,500.00) or the balance remaining after outstanding utilities, taxes and balance due to discharge mortgage noted on Certificate of Title paid.*
- ii) The Purchaser shall give the Vendors Attorneys-at-Law a written commitment to pay the sum of Six Hundred and Fifty Four Thousand Five Hundred United States Dollars (US\$654,500.00) or the balance thereof on receipt of Certificate of Title registered at Volume 1345 Folio 939 with the Purchasers and/or nominee registered thereon.*
- iii) The Purchaser shall give written undertaking to the Bank of Nova Scotia Jamaica Limited in respect of Mortgage No. 1177945 the*

balance due to discharge the mortgage in exchange for executed discharge of Mortgage and Duplicate Certificate of Title registered at Volume 1345 Folio 939. The Purchaser shall forward both Discharge of Mortgage and Duplicate Certificate of Title registered at Volume 1345 Folio 939 to the Vendors Attorneys-at-Law. The balance due to discharge the aforesaid mortgage is to be deducted from the sum of six hundred and forty five thousand five hundred United States Dollars (US \$645,500.00)."

[9] MFC applied for and on September 23rd 2010, obtained an order allowing it to be added as a party to these proceedings. MFC's interest in the proceedings arises from its mortgage registered on the Certificate of Title for property registered at Volume 1345 Folio 939.

[10] MFC's Mortgage No. 1479614 was registered on the 8th of August 2007 in the sum of One Million Four Hundred Thousand United States Dollars (US \$1,400,000.00). On the 27th of June 2008 the mortgage was upstamped to cover a further indebtedness of Three Hundred and thirty thousand United States Dollars (US\$330,000). The Mortgage in addition to the total principal sum of US\$ 1,730,000.00 covers interest.

[11] The Browns on the 2nd of September 2008 lodged a caveat claiming an estate as "Purchaser under Agreement for Sale". In argument, Mr. Brady, Counsel for the Browns, in response to my query, confirmed that the word "purchaser" was really there in error and it ought to have read "Vendor under Agreement for Sale".

[12] An amount of Seven Hundred and One Hundred Thousand Nine Hundred and Seventy Two United States Dollars (US \$701,972.00) has to

date been disbursed by MFC to facilitate the transfer of title and registration of mortgage to MFC.

[13] Mandolin and MFC have refused to pay the balance mortgage proceeds of United States One Hundred and Ninety Eight Thousand and Twenty Eight dollars (US \$198,028.90) on the basis that the Title is defective.

[14] In a Table provided by Brady & Co., it was indicated that the amounts due and owing were as follows:

Due to MFC at September 8, 2010	
(See letter dated Sept 8, 2010)	US \$2,783,740.82
Daily interest @ US \$1,201.39 to 23/9/10	US \$ 18,020.85
Due to the Browns from Metro	US \$ 198,000.00
Due to the Browns on Vendors' mortgage	US \$ 400,000.00
(Interest to date at 4% per annum)	US \$ 5,733.10
TOTAL	US \$3,405,494.77

[15] The defect in Title which grounds Mandolin and MFC's refusal to pay further sums concerns an abandoned road which forms part of the property known as "The Palms Beachside Resort" formerly known as "Paradise View Hotel", but which is not comprised in the Certificate of Title for the land. This is depicted in a Sketch Plan dated 30th August 2005 by Andrew Bromfield, Commissioned Land Surveyor.

[16] Cassandra Nelson and her husband John Nelson are managing directors of Mandolin. In paragraph 13 of her Affidavit sworn to on the 25th August 2010, Mrs. Nelson states, that up to the date of signing of the

Agreement, the Browns had assured Mandarin that there were no encumbrances on the property.

[17] However, the Browns' position with regard to the defect in title is that firstly, at the time of executing the Agreement for Sale, Mandarin well knew of the encroachment and that this was why the Agreement included special condition 5. Further, that approval was granted by the Westmoreland Parish Council in letter dated February 18, 2009, for the sale of the land known as the abandoned Parochial Road at Long Bay, Negril to Mandolin for the sum of Two Million Three Hundred Thousand Jamaican Dollars. In paragraphs 7 and 8 of Farren Brown's Affidavit sworn to on the 9th September 2010, the Browns say that the sum of J\$2,300,000.00, which equated to approximately US\$25,000.00, was to be deducted from the purchase price. The Browns contend that Mandarin has failed to advance this purchase price although it held the sum of US\$198,020.90 in escrow for them.

[18] On the other hand, MFC's posture is that the parties agreed that the balance payable by MFC under the mortgage would be disbursed upon the abandoned road being obtained by the Browns, duly endorsed that Mandolin is the registered owner, and with MFC's mortgage endorsed upon the Certificate of Title for it. Reference is made by MFC to two letters from its Attorney-at-Law Ms. Tracey Long, Partner at Hart, Muirhead Fatta, dated respectively 13th June 2007 and 17th September 2008 to Attorneys-at-Law for the Browns and Mandolin and to Ms. Verleta Green, an Attorney-at-Law for the Browns.

[19] The letter dated February 18th 2009 from the Secretary/Manager of the Parish Council to Mandolin c/o Hart Muirhead Fatta states the following:

...

I am directed by the Parish Council of Westmoreland to advise you that approval has been granted for the sale of land known as the Abandoned Parochial Road at Long Bay, Negril to Mandolin Investment Group Limited in the sum of ...\$2,300,000.00 subject to the following conditions:

1. Mandolin Investment Group will underwrite the cost of the transfer of the title to include transfer tax, Stamp Duty and Registration Fee.

2. The Council's lawyer, Mr. Delford Morgan is instructed to prepare the Agreement for Sale.

3. The sale cost is to be paid to the Westmoreland Parish Council in full and all other related costs to the Attorney, Mr. Delford Morgan.

4. The land measures 413 square metres.

[20] The letter dated 13th June 2007 upon which MFC relies, and so far as material, reads as follows: -

Dear Michael and Trevor,

**Re: Loan of US\$1.4 M to Mandolin Investment Group LLC by
Metro Funding Corporation LLC**

I am writing to you both in an attempt to bring some resolution to this matter.

My instructions are to disburse US \$400,000.00 once my client's mortgage has been registered on the Certificate of Title registered at Volume 1345 Folio 939 of the Register Book of Titles. I am to disburse the balance proceeds once title to the abandoned road (which is part of the hotel property) has been (i) issued under the Registration of Titles Act; and (ii) transferred to Mandolin Investment Group, LLC and (iii) mortgaged to my client.

I have given an undertaking to you Trevor, for the payment to you of US\$653,188.50 (please see my letter to you of March 23, 2007). I suggest that you release me from this undertaking and I will:

(a) send a letter to ...BNS undertaking to pay BNS the sum due to it (estimated at approximately US \$300,000.00) once the Certificate of Title registered at Volume 1345 Folio 939 has been transferred to Mandolin Investment Group, LLC and the mortgage to Metro Funding endorsed on the said title;

(b) pay to you each US \$50,000.00 less your share of the immediate cash costs payable, once the transfer to Mandolin and the mortgage to Metro has been endorsed on the title. I estimate the sum due to Trevor's clients from the US \$50,000 to be US \$36,845.59 arrived at as follows:

<i>Sum due</i>	<i>\$50,000.00</i>
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Less

Sum to settle outstanding

<i>water & cable bills</i>	<i>\$10,000.00</i>
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½ registration fee on

<i>Transfer (est)</i>	<i>\$ 3,154.41</i>	<i>13,154.41</i>
	<i>=====</i>	<i>=====</i>
		<u><i>\$36,845.59</i></u>

And the sum due to Michael's client from the US \$50,000.00 to be US \$46,845.59 arrived at as under:-

<i>Sum due</i>	<i>\$50,000.00</i>
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Less

½ registration fee on

Transfer (est)
3,154.41

\$

=====

\$46,845.59

(c) pay over the balance due once title to the abandoned road has been obtained and mortgaged to my client.

[21] Also exhibited to the Affidavits filed on behalf of MFC is the page of the letter where the Attorneys at Law for both the Browns and Mandolin indicated their acceptance of the terms proposed by MFC in the letter of June 13, 2007.

[22] The letter to Ms. Green is also exhibited and indicated that Hart, Muirhead Fatta were holding US\$198,028.90 which would be paid either to Mr. Trevor Ruddock (to whom the undertaking was given) or to the Browns or their order, as soon as the Browns produced a duplicate Certificate of Title for the abandoned road duly endorsed in the name of Mandolin. It was also indicated that an application had to be made to bring the land under the Registration of Titles Act as it was presently unregistered. The proposal was that MFC pay the Browns US\$50,000.00 in exchange for MFC being released from the obligation to pay any further sums to the Browns. In doing so, MFC would undertake the responsibility to apply for title and bear the attendant costs and risks. It was indicated that a Notice of Sale had been served on Mandolin and that MFC would shortly be taking steps to auction the property. Messrs. Hart Muirhead Fatta closed their letter by indicating that they would await hearing from Ms. Green on behalf of the Browns.

[23] The Browns deny that they agreed to the terms of the letter dated June 13, 2007.

[24] It is perhaps regrettable that there was no cross-examination, particularly in relation to the issue of encroachment and clarifying whose fault it is that the Agreement has not been concluded. However, given the nature of the relief sought in the Fixed Date Claim Form, I am not called upon to decide which party is at fault (despite what may have been argued in Counsel's submissions on behalf of the Browns).

[25] On or about the 21st of August 2008 Hart Muirhead Fatta served a Notice of Sale on Mandarin. According to paragraph 14 of the Affidavit of Ms. Long, sworn to on the 14th of October 2010, MFC was well advanced in its steps to exercise its power of sale as mortgagee, when Mandarin obtained Chapter 11 bankruptcy protection in the United States of America. MFC has obtained advice that whilst Mandarin enjoys bankruptcy protection, it cannot exercise its powers as mortgagee of the land. Further, that MFC intends to exercise its rights, powers and entitlements as mortgagee in realizing its security as soon as is permissible.

THE ARGUMENTS

THE BROWNS' SUBMISSIONS

[26] The Browns' Attorneys-at-Law have indeed, as MFC's Attorneys have commented in their written submissions, argued a number of points which are not referred to in their pleadings. In particular, in the Fixed Date Claim Form and Affidavit in Support, it has been pleaded and declarations are being sought, that the Browns have a "Vendor's mortgage" to secure the balance purchase price of US \$400,000.00. However, in the oral and written submissions, Counsel for the Browns has proceeded on the basis that the

Browns have a lien for the balance purchase price and reliance is placed upon the **Vendors and Purchasers Act**. Although not pleaded, I think that I do have to consider the legal question (as indeed candidly conceded by Mr. Foster Q.C. Counsel for MFC) as to whether the Browns have a vendor's mortgage or a lien.

[27] As I understand the Browns' submissions, they are positing the following:

- (a) That an unpaid vendor of land has an equitable lien for the purchase price even where there has been completion of the transaction. Reliance has been placed on the decision in **London and Cheshire Insurance Company Limited v. Laplagrene Property Co. Ltd.** [1971] Ch. 499. The lien continues to exist even where the vendor agrees to accept a mortgage to secure the balance purchase price. A lien existed in favour of the Browns from the date of execution of the contract and can only be defeated if the Browns have not fully performed under the Agreement for Sale.
- (b) The Browns have a Vendors' mortgage in the sum of US \$400,000.00 with interest at the rate of 4 % per annum. This loan matured on February 25, 2010, i.e. 3 years from the date of the Agreement for Sale. The Vendor's mortgage is endorsed on the Title by Caveat No. 1556206 lodged on September 2, 2008. Whilst MFC's mortgage in the sum of US \$1,300,000.00 ranks in priority to the Browns' vendor's mortgage, the upstamped amount of US\$300,000.00 does not.
- (c) It is just and equitable for the Browns to be granted possession of the property to put them in a position to protect their rights under the

Vendors and Purchasers Act and under their Vendor's mortgage, pursuant to section 109 of the Registration of Titles Act.

(d) The Browns have an enforceable lien on Paradise View by operation of law and by an express term of the Agreement for Sale, and therefore:-

(i) The amount of US \$198,028.90 is immediately due and owing to the Browns and should be paid forthwith with interest from the time of the MFC mortgage being endorsed on the Title, that is, from August 8, 2007.

(ii) The Browns should be granted possession of the property.

(iii) The Browns are entitled to either an order for sale or foreclosure and to apply the proceeds of sale in accordance with section 107 of the Registration of Titles Act as follows:

(A) Costs and expenses incidental to the sale;

(B) Payment of US\$1,300,000.00 to MFC with interest;

(C) Payment of US \$400,000.00 to the Browns with interest
; and

(D) Payment to MFC of US \$300,000.00 with interest.

Very late in the day, indeed, after the Defendants had made their submissions, Counsel for the Browns sought to rely upon the authority of **In re Stucley, Stucley v. Kekewich** [1906] 1 Ch. 67. I granted the parties permission to file further written submissions, all by the 14th of January 2011. The Attorneys for Mandolin filed further submissions in respect of **In re Stucley**.

MANDOLIN'S SUBMISSIONS

[28] Whilst Mandolin admits that it has not paid the sum of US\$400,000.00 to the Browns, it is its submission that the Browns have failed to fulfill fundamental obligations under the Agreement for Sale which have resulted in it being registered as proprietors of a defective title, and which caused Mandolin to suffer significant loss and damage. In the circumstances, Mandolin contends that it is entitled to withhold the remaining sum due and owing in order to offset the losses suffered.

[29] Mandolin also argues that the two mortgages registered on the Certificate of Title in favour of MFC rank in priority to any claim by the Browns and Mandolin agrees with MFC that MFC is the only party with any legal authority to seek possession of the land pursuant to the Registration of Titles Act and its mortgages.

MFC'S SUBMISSIONS

[30] MFC contends that the Browns are not entitled to a declaration that they are entitled to redeem prior mortgages and to foreclose on the Land and/or are entitled to possession of the Land. If granted, Counsel submits, such a declaration would prejudice MFC's rights as first mortgagee, including MFC's right to possession of, and power of sale over the land as conferred by virtue of the Registration of Titles Act and by the mortgage.

[31] MFC submits that the Browns have no registered mortgage, and that MFC's registered legal mortgage has priority over any unregistered or equitable interest that the Browns may have pursuant to the provisions of the Registration of Titles Act. Further, that any vendor's lien in favour of the

Browns ceased to exist once they agreed to secure the outstanding purchase monies by way of mortgage. In any event, the submission continues, having regard to the terms of the Agreement for Sale, in particular, Clause v of "HOW PAYABLE", it was the clear intention of the Browns and Mandolin that whatever equitable interest it had in the land, whether by way of Vendor's mortgage, lien or otherwise, would be postponed in favour of and be subject to the rights of MFC as the first legal mortgagee.

[32] MFC also submits that the loan of US\$330,000 the upstamped amount, is also secured by the mortgage and is covered by an "all monies" clause in its mortgage. It was submitted that the clear intention of the parties, i.e. Mandolin and MFC, to be gleaned from the provisions of the mortgage, was that the mortgage would secure all present and future debts.

RESOLUTION OF THE ISSUES

Declarations 1 and 2

[33] In my judgment, the Browns are entitled to Declaration 1. It is clear that the Agreement still subsists and that the terms in paragraph 2 of the Declaration as sought do exist. Mandolin's Attorneys responded to these applications simply by saying that (paragraph 17 of their first set of written submissions) " Pursuant to section 7 of the Vendors and Purchasers Act, the Claimants are not entitled to seek declarations (i) to (iii) and as a result commencing the action by way of Fixed Date Claim Form is improper and erroneous." In my view, the Browns' are entitled to Declaration 1 quite separate and apart from the Vendors and Purchasers Act. These particular matters are matters in respect of which there are no substantial disputes as to

fact, and thus fall to be brought before the Court by way of Fixed Date Claim Form in accordance with Rule 8.1 (4)(d) of the Civil Procedure Rules 2002 "the CPR". However, I am not minded to make Declaration 2. In the first place, it is covered under Declaration 1. In the second place, I do not think it would be just to expressly declare only the particular clauses in the Agreement for Sale set out under the heading "How Payable" to be valid and binding on Mandolin in isolation from the rest of the Agreement. For example, it seems to me that equally valid and subsisting is the Special Condition in the Agreement for Sale which makes completion of the Agreement by Mandolin conditional upon the Surveyor's report being favourable, and which places the Browns under a duty to remedy any defect in title revealed by this report. As stated before, the claim as formulated, is not a claim for breach of contract, or for specific performance. Declaration 2 is therefore refused.

DECLARATION 3 – That there is in existence a valid Vendors' Mortgage of US\$400,000.00 which matures and became due and payable on or before the 26th day of February 2010; and

DECLARATION 4 – That to date the Defendant has made no payments under the mortgage and the full amount of US\$400,000.00 with the interest rate of 4% per annum remains unpaid and the mortgage remains undischarged.

IS THERE A VENDOR'S MORTGAGE?

[34] There are a number of points that must be considered under this issue. Firstly, what is the status of the caveat lodged by the Browns? In my judgment, the caveat lodged on the 2nd of September 2008 does not constitute, and cannot be regarded in law as the registration of a mortgage.

The caveat is simply notice to the world that the Browns were claiming an interest in the property. It is not itself a Mortgage, or Mortgage instrument and there is no evidence that any written document was ever signed by the Browns and Mandolin rendering the land security for the balance purchase proceeds(separate and apart from a reference to the vendor's mortgage in the Agreement for Sale). Further, section 103 of the Registration of Titles Act speaks to a registered proprietor having the capacity to mortgage his land "by signing a mortgage thereof in the form in the Eighth Schedule". The words "... and as such the first legal mortgage has priority in registration and discharge" in Clause (v) of the Agreement, under the heading "How Payable", suggests that not only was it agreed that the MFC mortgage was to have priority, but also that it was contemplated that a Vendor's mortgage in favour of the Browns would be executed and registered on the Certificate of Title.

[35] However, it does seem to me, that in accordance with equitable principles, an agreement for a mortgage would be treated as as good as a mortgage. In other words, equity looks upon as done that which ought to be done along the lines of the principle in **Walsh v. Lonsdale** (1882) 21 Ch. D. 9. The Browns have not, however, sought an order from the Court to have a mortgage executed by Mandolin (for specific performance of the agreement to execute a mortgage), and thus in my judgment, on the facts as they presently exist, the Browns are entitled to a declaration only as to an equitable mortgage. This is also not a law suit in which the Browns are seeking to, or have sued to recover the mortgage debt. The Browns would have to first seek an order from the Court requiring Mandolin to execute a mortgage and in

order to enforce the mortgage as a security the Vendors' Mortgage would have to be registered.

WHETHER VENDOR'S LIEN

[36] In **London and Cheshire Insurance Co. Ltd. v. Laplagrene Property Co. Ltd.**, upon which the Browns' Counsel rely, it was held, among other matters, that an unpaid vendor's lien arises as soon as a binding contract for the sale of land is entered into for the purchase money and the vendor also has the right to remain in possession of the property until payment is made. The unpaid vendor's lien is a creature of the law, and it does not depend upon contract but on the fact that the vendor had a right to specific performance of his contract.

[37] In **Re Stucley**, upon which the Browns also rely, the principle regarding the unpaid vendor's lien for unpaid purchase money was held to extend to personal property which is the subject matter of the sale. In this case, as in others, it was held that even if the vendor executes an absolute conveyance and parts with possession of both the property and of the title deeds to the purchaser, he still has an equitable lien on the property in respect of any part of the purchase money which may not have been paid; and the lien is not even excluded because of the fact that the receipt of the purchase money is acknowledged in the purchase-deed.

[38] However, in **In re Bernstein**, [1925] Ch. 12, 17, Lawrence J. remarked upon the fact that there is a difference between a mortgage and a vendor's lien. He stated:

There is, in my opinion, an essential distinction between a mortgage and a vendor's lien: the former is a security upon real or

personal property for the payment of a debt, or for the performance of an engagement, created by contract between the parties; whereas the latter is a charge arising by operation of law.

[39] The learned authors of **Snell's Principles of Equity**, 27th Edition, at paragraph 4 on page 446, discuss some of the circumstances in which a lien may be excluded as follows:

4. Exclusion of the lien. *Occasionally, however, the vendor will have no lien. If he receives all that he bargained for, e.g. if he sells the property in consideration of the purchaser giving him a promissory note or a bond to pay him an annuity, and the promissory note or bond is duly given, there will be no lien on the property sold, even though the note is not met at maturity or the annuity is not paid. Similarly, the lien is lost where the vendor takes a mortgage for the money, even if the mortgage later becomes void against successors in title for want of registration.* (Underlining emphasis mine).

[40] The points are well discussed in the English Court of Appeal's decision in **Barclays Bank Plc. v. Estates & Commercial Ltd.** [1997] 1 W.L.R. 415. This case makes it clear that the lien is excluded where its retention would be inconsistent with the provisions of the contract for sale or with the true nature of the transaction as disclosed by the documents. The test is an objective one (page 420, paragraphs B and F). At page 421 E and 422 B and 422 G, Millett L.J. stated:

Page 421 E and 422 B:

....the intention of the parties is to be objectively ascertained from the documents they have executed and ...what is required to exclude, the lien is

that there should be a clear and manifest inference that it was the parties' intention to exclude it.

.....

Page 422 G:

All these cases show that the lien arises by operation of law unless its exclusion can be objectively inferred from the terms of the documents and the nature of the transaction.

[41] In my judgment, when one looks at the Agreement for Sale and its terms as entered into between the Browns and Mandolin, there was objectively a clear and manifest inference that the parties intended to exclude a vendor's lien. This is clear from the fact that the parties intended to have the balance of US\$400,000.00 secured by having a Vendor's mortgage in favour of the Browns entered into with Mandolin. In my judgment, the Browns' claim in their submissions that they are entitled to a vendor's lien in respect of the balance purchase price therefore fails.

[42] However, as stated previously, equity looks on that as done which ought to be done, and the Browns are entitled to :-

- A Declaration that there is in existence a valid Vendors' Equitable Mortgage of US\$400,000.00 which matured and became due and payable by the 26th day of February 2010; and

- A Declaration that to date the Defendant has made no payments under the equitable mortgage and the full amount of US\$400,000.00 with the interest rate of 4% per annum remains unpaid and the mortgage remains undischarged.

It should be noted that I have not dealt with the issue of whether Mandolin is entitled to set off this sum off against losses or damage that it claims to have suffered because of the defect of title. I have not dealt with this question of set-off or counterclaim, nor have I given judgment to the Browns in respect of the mortgage debt because these issues were not before me.

DECLARATION 5 – That the Claimant is entitled to redeem any prior mortgages and foreclose on the said property and /or is entitled to possession of same.

[43] MFC has issued a Notice of Sale to Mandolin and has begun the steps necessary for the exercise of its power of sale arising under the Registration of Titles Act and under the clear terms of its mortgage. Mandolin's mortgage in the sum of US\$1,400,000.00 was registered on the 8th of August 2007. By virtue of section 70 of the Registration of Titles Act and the clear terms of the Agreement for Sale, MFC's mortgage in the sum of US\$1,400,000.00 being the first legal mortgage, would have priority over any unregistered equitable mortgage to which the Browns may be entitled. Amongst the rights and powers that MFC has as first mortgagee are the power of sale in case of default, the power of entry and foreclosure, and the power to appoint a receiver.

[44] In those circumstances, it would seem that the Browns cannot foreclose or obtain possession of the property unless they could prove they had a prior interest (which they cannot) or that MFC are consenting (which they plainly are not). Paragraphs 778 and 782 of the **Halsbury's Laws of England**, Volume 32, suggest that the second or any subsequent mortgagee may only foreclose against the mortgagor or any incumbrancers subsequent

to himself. I agree with Mr. Foster that any rights that the Browns have are postponed in favour of MFC's rights.

[45] The Browns concede that the mortgage of US\$1,400,000.00 ranks in priority to their interest. However, they submit that the amount of US\$330,000.00, upstamped 27th June 2008, should rank after their interest.

[46] The upstamping was registered. To date there is no Vendor's mortgage registered on the Title in favour of the Browns, and even the caveat, which I have indicated is not a mortgage, was lodged after the upstamping. On the basis of sections 70 and 71 of the Registration of Titles Act alone, I take the view that the sum of US\$330,000.00 also takes priority as a security ahead of the Browns' equitable mortgage.

[47] In any event, I shall go on to consider the status of this upstamped amount in light of the fact that MFC's mortgage contains what is known as an "all monies" clause. The clause provides:

"The Secured Indebtedness" means the credit facilities and all indebtedness and obligations of the mortgagor outstanding from time to time under the Loan Agreement or otherwise in connection with the Loan, including, without limitation, all principal, interest, commitment fees, expenses, damages and any additional amount payable in respect thereof and all obligations of the Mortgagor under any of the Securities to which it is a party or by which it is bound;

"Securities" includes where the context permits, this Mortgage, the Note, the Guarantee and any other instrument or agreements which may be entered into by the Mortgagor or any other Security Party as security for the Secured Indebtedness and "Security" means one of the Securities ;

"The Security Parties" includes the Mortgagor, the Guarantors and any other person who at any time becomes obliged (whether as principal obligor or surety) to repay the whole or any part of the secured indebtedness.

"Permitted Charge" means the Vendors' mortgage granted by the mortgagor to or in favour of Farren Brown and Victoria Brown as security for the mortgagor's indebtedness of Four Hundred Thousand Dollars United States Currency (US\$400,000) ranking at all times subject and subsequent to the Securities. (My emphasis)

[48] The Mortgage also contains the following upstamping clause:

This Mortgage shall be impressed in the first instance with stamp duty covering an aggregate indebtedness of the Jamaican currency equivalent of ONE MILLION FOUR HUNDRED THOUSAND UNITED STATES DOLLARS (US\$1,400,000.00) but the Lender shall be and is hereby empowered at all time and times hereafter (without any further licence or consent of the Mortgagor) to impress additional stamp duties hereon covering any sum or sums by which the Secured Indebtedness or the Jamaican currency equivalent of the Secured Indebtedness at the material time may exceed the amount for which this Mortgage is stamped, it being the intent of these presents that the Mortgage hereby created shall be a continuing security and shall cover indebtedness to any aggregate which may exist from the Borrowers to the Lender under or in connection with the Loan Agreement and the Securities. (My emphasis)

[49] I agree with the submission by Queen's Counsel Mr. Foster on behalf of MFC that when the courts seek to enforce or interpret commercial agreements, they seek to ascertain and give effect to the intention of the

parties. The construction of an “all monies” clause is no exception and the question of the type of indebtedness covered by it depends on the language of the clause, construed in the context of the instrument as a whole, the surrounding circumstances known to the parties when executed, and the apparent purpose and object of the transaction - **Olympic Holdings Pty Ltd. v. Windslow Corporation** [2008] WASCA 80, and **Overseas Chinese Banking Corporation Ltd. v. Malaysian Kuwaiti Investment** [2003] VSC 495.

[50] There are situations in which additional disbursements by a mortgagee to a mortgagor do not have the same priority as the first disbursement and this is known as tacking. Without more, in my judgment, the proper interpretation of the MFC Mortgage, in particular the “all monies” clause, applying the principles I have just enunciated, would lead to the conclusion that the parties intended that the mortgage should secure present and future debts, including the US\$330,000.00 plus interest. What makes the question particularly interesting in this case is the fact that the Agreement for Sale entered into between the Browns and Mandolin, to which MFC was not a party, expressly contemplated MFC’s Mortgage ranking in priority to the Browns’ Vendors mortgage. However, at that time the sum involved in MFC’s Mortgage was \$1,400,000.00 and did not involve the subsequently upstamped amount. Meanwhile, the MFC mortgage, to which the Browns were not parties, makes the matter explicit in saying that the Browns Vendors’ mortgage ranks at all times, subject and subsequent to the Securities.

[51] If the Browns’ Vendors mortgage had been registered after MFC’s First Mortgage sum, but before the upstamping, the question would have been a

vibrant one. However, in light of the fact that the Torrens system of Land registration accords priority by registration, and is a system of Title by registration, and not registration by Title, the point is in this case largely academic. MFC's Registered Mortgage, including the upstamped amount, has priority over any unregistered equitable interest that the Browns have.

[52] It is to be noted that the Browns have also asked for a declaration that they are entitled to redeem MFC's mortgage. A subsequent incumbrancer can, claiming under the mortgagor, redeem a prior mortgage. However, in my judgment, where as here, MFC's position is that it will not relinquish its rights, and where it has taken steps to enforce the power of sale, it would not be appropriate to declare that the Browns have a power to redeem. Further, the Browns have not given any evidence of their ability to pay the considerable sum which MFC says is due to them. Nor have the Browns sought from this Court the terms upon which an order for redemption might be made, for example, that they be permitted to pay to MFC the principal debt with interest due. Also that they will be responsible to pay all proper costs, charges and expenses incurred by MFC in relation to the mortgage security, the costs of any litigation properly undertaken by MFC in respect of its security, and the mortgagee MFC's costs of the redemption claim. See paragraphs 506 and 525 of the Halsbury's Laws, Vol. 32.

[53] Pursuant to an order made by my brother Brooks J. on the 17th of August 2010 requiring evidence as to the current value of the property, the Browns obtained a Valuation Report of the value of the property as at September 13, 2010. The Report was prepared by Mr. Trevor Blythe and states the market value then as being JA\$200,985,000.00 or US

\$2,364,530.00. This value is below the amount claimed by MFC to be outstanding, and is certainly below the combined sums claimed by MFC and the Browns. According to Paragraph 773 of the Halsbury's, a sale is directed in Foreclosure proceedings where the property is worth more than the amount secured by the mortgage, so as to enable a mortgagor who cannot raise the sum required to redeem to get the benefit of the surplus. However, in this case, there is no such benefit to be had by Mandarin. In any event, for the other reasons previously indicated, the Browns are not entitled to redeem MFC's mortgage or to foreclose or to possession of the property.

[54] I therefore grant the following relief:

1. It is Declared that the Agreement for Sale dated the 26th day of February 2007 for the property registered at Volume 1345 Folio 939 between the Claimants and the First Defendant is valid and subsisting.
2. It is Declared that there is in existence a valid Vendors' Equitable Mortgage of US\$400,000.00 which matured and became due and payable by the 26th day of February 2010; and
3. It is Declared that to date the First Defendant has made no payments under the Equitable Mortgage and the full amount of US\$400,000.00 with the interest rate of 4% per annum remains unpaid and the mortgage remains undischarged.
4. It is declared that Mortgage No. 1479614 registered on 8th August 2007 as well as the upstamping thereof by Miscellaneous No. 1545333 on the 27th of June 2008, both rank in priority to the Vendors' Equitable Mortgage.

5. The Claimants are entitled to $\frac{3}{4}$ costs, to be paid by the 1st Defendant.
6. Costs to the 2nd Defendant to be borne equally between the Claimant and the 1st Defendant.
7. Special Costs Certificate for two Attorneys-at-Law.
8. 2nd Defendants Attorneys-at-Law to prepare file and serve the Formal Order.