[2013] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 87/2011

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**CAPITAL & CREDIT MERCHANT BANK LIMITED**	**APPELLANT**
AND	**THE REAL ESTATE BOARD**	**RESPONDENT**

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO 150/2011

BETWEEN	**THE REAL ESTATE BOARD**	**APPELLANT**
AND	**JENNIFER MESSADO & CO**	**RESPONDENT**

Mrs M Georgia Gibson-Henlin and Miss Taneisha Brown instructed by Henlin Gibson Henlin for Capital and Credit Merchant Bank Ltd

Dr Lloyd Barnett and Miss Gillian Burgess for the Real Estate Board

Miss Carol Davis for Jennifer Messado & Co

20, 21, 22 June, 30, 31 July 2012 and 19 July 2013

MORRISON JA

Introduction

[1] The Real Estate Board ('the Board') was established by section 4(1) of the Real Estate (Dealers and Developers) Act ('the Act'), which was enacted in 1987. By section 5 of the Act, the Board is responsible for the regulation and control of the practice of real estate business, the disposition of land in development schemes, as defined in the Act, and the operation of such schemes.

[2] Section 2 of the Act defines 'developer', 'development' and 'development scheme' as follows:

> "'developer' means a person who carries on, whether in whole or in part, the business of development of land;
>
> 'development' means the carrying out of building, engineering, or other operations in, on, over or under any land, or the making of any material change in its use or in the use of any buildings or other land for the purpose of disposal of such land or any part thereof in a development scheme;
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> 'development scheme' means a scheme or intended scheme for the development of land the sub-division or proposed sub-division of which is subject to the provisions of the Local Improvements Act or the Town and Country Planning Act;..."

[3] Development schemes are specifically dealt with in Part IV of the Act, and these consolidated appeals, which are from a judgment of Mangatal J given on 8 June 2011,

are primarily concerned with the interpretation and effect of the provisions of the Act, with particular reference to a development scheme located at Mountain Valley, Stony Hill, in the parish of St Andrew ('the Mountain Valley scheme').

[4] The appellant in the first appeal (SCCA No 87/2011) is Capital and Credit Merchant Bank Ltd ('CCMB'), which is a limited liability company incorporated under the Companies Act. It was at the material time an authorized financial institution within the meaning of the Act, engaged in the business of merchant and investment banking and the provision of loans to customers. The respondent to this appeal is the Board, which has also filed a counter-notice of appeal, by which it too challenges an aspect of the judgment of the learned trial judge. The Board is also the appellant in the second appeal (SCCA No 150/2011), to which the respondent is Jennifer Messado & Co ('JM & Co'), a firm of attorneys-at-law. Mrs Jennifer Messado ('Mrs Messado') is the senior partner in JM & Co.

The relevant provisions of the Act in outline

[5] Although it will in due course be necessary to make detailed reference to some of the provisions of the Act, it may be helpful at the outset, before setting out the relevant background to the appeals, to give a brief description of the regime created by the Act for the regulation of development schemes. The central concern of Part IV is the protection of purchasers under 'prepayment contracts' in such schemes. A prepayment contract is any contract (or connected contract) under which, at the time it is entered into, moneys are payable by the purchaser to the vendor, in respect of obligations to be

fulfilled in the future by the vendor, relating to the construction of roads, buildings and works and the carrying out of engineering or other operations on any land.

[6] No person may enter into a prepayment contract as a vendor of land under a development scheme unless that person is registered by the Board as a developer (section 26(1)(a)). If this is done, the purchaser may within a reasonable time withdraw from the contract and recover from the vendor any moneys paid to him under the contract, with interest. Breach of this provision may also expose the vendor to criminal sanctions (section 26(2)). Land in respect of which a prepayment contract is entered into must also be free from any mortgage or charge (other than a mortgage or charge in favour of an authorized financial institution securing repayment of moneys advanced by that institution in connection with the construction of any buildings or works on the land) (section 26(1)(b)).

[7] Sections 29-31 of the Act are at the heart of the regime created by the Act. Moneys received by a vendor from a purchaser under a prepayment contract in a development scheme must without delay be paid by the vendor into a trust account maintained by him with an authorized financial institution (section 29(1)). Such moneys, together with any interest earned thereon, are required to be held in trust in the account until completion or rescission of the contract (section 30). They may not be sooner withdrawn, save (i) for payment by the vendor of stamp duty and transfer tax payable in respect of that contract, and (ii) in partial reimbursement of material and labour costs incurred in the construction of any building or works which is the subject of

the contract (not to exceed 90% of the amount certified by a qualified and independent quantity surveyor or architect as being properly due, and unpaid, for work done and materials supplied in the course of the construction (section 31(3)(a)).

[8] As a condition of such withdrawal, the owner of the land upon which the construction is taking place must have executed and lodged with the Registrar of Titles a charge on the land (deemed to be, and enforceable as, a mortgage) in favour of the Board to secure repayment by the vendor of all amounts received by him pursuant to the contract which may become payable by him on a breach of contract (section 31(4) - the form and the terms of the charge are prescribed by regulation 20 and set out in Form F of the schedule to the Real Estate (Dealers and Developers) Regulations, 1988). The Board's charge ranks in priority to all other mortgages and charges on the land, save any statutory charge thereon in respect of unpaid rates or taxes; however, a mortgage or charge created on the land in favour of an authorized financial institution to secure moneys advanced in connection with construction of any buildings or works thereon will rank *pari passu* in point of security with the charge created in favour of the Board (section 31(5)). A loan or advance made by an authorized financial institution will *prima facie* be taken as so connected if it is stated so to be in the instrument creating the mortgage or charge in favour of that institution (section 31(6)).

[9] Finally, section 44 deals with offences and prescribes penalties, subsection (3) making it an offence for any person to (a) enter into a prepayment contract without having registered with the Board as a developer; (b) fail to pay any money received by

him as a vendor under a prepayment contract into a trust account; and (c) withdraw any moneys paid into a trust account otherwise than as permitted by section 31.

The facts

[10] The summary of the unchallenged affidavit evidence which follows is substantially based, with gratitude, on Mangatal J's summary at paragraphs 1-22 of her admirable judgment in the court below.

[11] The property on which the Mountain Valley scheme was to be undertaken ('the property') was originally registered at Volume 733 Folio 75 and Volume 733 Folio 76 of the Register Book of Titles, but it is now registered at Volume 1389 Folio 338 and Volume 1389 Folio 436. Up to 1 May 2006, it was owned by Mrs Zoe McHugh ('Mrs McHugh'), but on that date it was transferred to KES Development Company Limited ('KES'), a limited liability company incorporated under the Companies Act and involved in the business of real estate development and construction.

[12] On 20 May 2005, nearly a year before the transfer of the property by Mrs McHugh to it, KES applied to the Board for registration as a developer in respect of the Mountain Valley scheme. Evidence was given on behalf of the Board that the application was granted (see the affidavit of Sandra Watson, sworn to on 27 January 2010, para. 5), though the only documentary evidence of this appears to be a notation on the last page of the application itself (exhibit 'SW1' to Ms Watson's affidavit), under the rubric, "For the official use of the Real Estate Board", which indicated that the application was considered by the Board on 21 June 2006 and a registration number

"DU/0635" assigned. Mangatal J treated it as an undisputed fact that the application was granted on 21 June 2006.

[13] Between February and June 2005, Mrs McHugh and KES each entered into a number of contracts with potential purchasers of units in the Mountain Valley scheme. In respect of each unit, the purchasers entered into two agreements, one with Mrs McHugh for the sale and purchase of a lot of land, part of the property ('the sale of land agreement'), and the other with KES, whereby KES undertook to build a town house on the lot in accordance with agreed specifications ('the construction agreement'). Both contracts were entered into at the same time and the sale of land agreements made completion conditional upon the completion of the town houses. Both the sale of land and the construction agreements named JM & Co as the attorneys-at-law having carriage of sale.

[14] Pursuant to these agreements, various sums of money were paid over by purchasers to and collected by JM & Co on behalf of Mrs McHugh/KES, on account of both the sale and the construction agreements. In a letter dated 5 May 2005, JM & Co advised CCMB that there were signed contracts for all but two of the units in the Mountain Valley scheme and that a total of over $30,000,000.00 was payable as second deposits within 90 days. JM & Co then gave the firm's "irrevocable unconditional undertaking to pay to [CCMB] the said sum of Twenty Five Million Dollars [$25,000,000.00], from all the second deposits on or before 31st August 2005". On the instructions of Mrs McHugh/KES, all moneys collected by JM & Co on their behalf were in fact paid over to them and JM & Co's evidence was that no moneys paid to it by

purchasers in the Mountain Valley scheme remained with the firm. To her second affidavit sworn to on behalf of the firm on 17 February 2011, Mrs Messado attached a schedule of the amounts received by the firm "and the payments made". By a Deed of Indemnity dated 23 May 2006, made between Mrs McHugh and KES, KES acknowledged that all moneys paid by the purchasers in respect of sale agreements "were paid to KES and/or to the Attorneys-at-Law having carriage of sale…for the account of KES" and that Mrs McHugh had received no part of the consideration for the sale of the lots. KES therefore agreed to indemnify Mrs McHugh against all claims made or actions brought by the purchasers.

[15] On 18 September 2006, mortgage no 1431296 was registered on the certificates of title to the property, whereby the property was charged in favour of the Board "in respect of all moneys received under prepayment contracts pursuant to the provisions of section 31 of the [Act]".

[16] By a loan agreement dated 8 August 2005, CCMB had agreed to advance an amount of up to $146,000,000.00 to KES, $120,000,000.00 of which was for the purpose of providing financing for four construction projects in separate locations, including the Mountain Valley scheme. A further $6,000,000.00 was for the purpose of completing the purchase of a property known as the Cambridge Hill Farm Property, while the balance of $20,000,000.00 was to provide lease financing in respect of certain commercial motor vehicles and equipment.

[17] Section 2.06(c) of article II of the loan agreement stipulated that payments received by CCMB under the agreement should be applied to the payment of amounts due for (i) interest on the loan or reimbursement of expenses incurred by CCMB in connection with, among other things, the negotiation, preparation and implementation of the loan agreement; (ii) any past due and unpaid interest and late charges; (iii) any current interest then due; (iv) past due and unpaid principal; and (v) principal then due.

[18] Among various conditions precedent to disbursement of funds under the loan agreement, the following appeared in article IV, section 4.06(viii):

> "The establishment of an escrow account at CCMB or at a mutually acceptable financial institution in the name[s] of K.E.S. and CCMB, in which all moneys received from the purchase of lots in the Projects, shall be placed in this escrow account and shall be used:- (aa) in repayment of the Loan as set out herein and (bb) for the purpose of the Project in accordance with the cash flow projections provided by K.E.S. to CCMB PROVIDED HOWEVER THAT ANY WITHDRAWAL FROM THIS ACCOUNT SHALL (A) BE UNDER THE SIGNATURE OF BOTH PARTIES TO THE ACCOUNT AND (B) SHALL BE VERIFIED AND APPROVED BY A QUANTITY SURVEYOR ACCEPTABLE TO CCMB."

[19] As it was required to do by the loan agreement, KES executed a debenture ('the debenture') and a Mortgage Collateral to Debenture ('the mortgage'), both dated 8 August 2005, as security for the amount advanced by CCMB. By virtue of the mortgage, KES mortgaged four parcels of land (including the property, comprised in certificates of title registered at Volume 733 Folio 75 and Volume 733 Folio 76, and two others, part of Cambridge Hill Farm, registered at Volume 1076 Folio 431 and Volume 1391 Folio 678 respectively) to CCMB. On 16 March 2006, the debenture and the

mortgage were registered in the Register of Charges at the Companies Office of Jamaica and on 1 February 2007 the mortgage was duly registered on the certificates of title (mortgage no 1433819).

[20] On 4 May 2007, the mortgage was up-stamped to cover a further advance of $90,000,000.00 and the up-stamping was recorded in the Register of Charges on 10 December 2008.

[21] The development initially proceeded with KES having control of the project in the normal way. During this period, KES would request and CCMB would make disbursements in accordance with the loan agreement, with some advances being made directly to KES, while in other cases advances were made to suppliers of goods and services on its behalf. In some instances, cheques disbursed to KES were for lump sums to cover work on the Mountain Valley scheme as well as other developments being carried out by KES on other properties. However, copies of the cheques would show the specific proportion of each cheque allocated to each project. Copies of cheques totalling $116,109,325.10 were produced in evidence at the trial.

[22] KES did not complete the Mountain Valley scheme and the development failed. Accordingly, in August 2007, CCMB took over the project and began expending money on the construction of buildings and works on the property. Payments made by purchasers in the project were not refunded and KES defaulted on the loan from CCMB. Under cover of a letter dated 10 June 2008, CCMB's attorneys-at-law served notice of default on the mortgage on KES, pursuant to section 105 of the Registration of Titles

Act. The statement of account attached to the notice showed the total amount outstanding from KES to CCMB as at 19 May 2008 to be $86,078,331.70. The only payments shown on this statement of account as having been made by KES to CCMB since 20 May 2005 were seven interest payments totaling $1,540,473.01. A subsequent statement of account dated 20 October 2010 showed a total sum due from KES to CCMB for principal and interest as at that date of $147,797,529.43. On 30 December 2008, CCMB was notified by Mr Kenneth Tomlinson that he had been appointed liquidator of the company by special resolution passed on 10 December 2005.

[23] On 4 September 2008, representatives of CCMB attended a meeting at the offices of the Board at the Board's request (conveyed by a letter dated 7 August 2008), "to discuss the Board's charge on title [sic] of the land for [the Mountain Valley scheme]". At that meeting, and subsequently more than once in writing, CCMB advised the Board that it did not know who the purchasers of units in the Mountain Valley scheme were and that it had not received deposits from any of them. Following on from the meeting, there was a series of correspondence between the Board and CCMB, concerning in particular the latter's plans to exercise its powers of sale over the mortgage on the property. By letter dated 17 January 2010, CCMB advised the Board that it had received an offer of $90,000,000.00 to purchase the property and that offer was in due course accepted. However, that transaction was aborted in April 2010.

The Board files suit

[24] In an action filed by fixed date claim form on 28 January 2010, the Board sought a declaration that, pursuant to section 31 of the Act, the charge registered on the

property on its behalf on 18 September 2006 in respect of all moneys paid under the prepayment contracts ranked in priority to CCMB's mortgage registered on the property on 1 February 2007. The Board also sought consequential orders, (i) for payment over to it, with interest, of all amounts received by Mrs McHugh/KES, CCMB and JM & Co under prepayment contracts in respect of the Mountain Valley scheme; (ii) that CCMB and JM & Co account for all monies received by them in respect of the Mountain Valley scheme; and (iii) for an injunction to prevent CCMB from proceeding with the sale of the property or any of the individual units without the Board's prior approval.

[25] By an ancillary claim form filed on 16 March 2010, CCMB claimed a declaration that the Board's charge was void as against it, or, alternatively, a declaration that the Board's interest was in the proceeds of sale and fell to be apportioned in accordance with the provisions of the Act. CCMB contended that the Board's charge was void as against it because (a) the contracts with the purchasers in the Mountain Valley scheme, having been entered into by KES (in contravention of section 26(1)(a) of the Act) before it was registered by the Board as developer, were not prepayment contracts within the meaning of the Act; and/or (b) the Board's charge was not registered under section 93(1) of the Companies Act, which requires the registration of certain charges created by a company with the Registrar of Companies as a condition of their validity against a liquidator or subsequent chargee. On this basis, CCMB therefore maintained its entitlement to exercise its powers of sale under its mortgage registered against the property.

[26] The issues canvassed before the learned trial judge were therefore (i) whether the Board's charge was a valid charge; (ii) assuming that the Board's charge was a valid charge, whether it ranked in priority to CCMB's mortgage, in the light of the proviso to section 31(5) of the Act; (iii) whether the Board was entitled to an order that Mrs McHugh/KES, CCMB and JM & Co pay over to it a sum equivalent to all amounts received by them under prepayment contracts in respect of the Mountain Valley scheme, with interest; and (iv) whether the Board was entitled to an order for an account against CCMB and/or JM & Co.

What the judge found

[27] In a lucid and characteristically thorough judgment given on 8 June 2011, Mangatal J found for the Board on the first and second issues. As regards the first, she held that the Board's charge was a valid charge, on the basis that (a) the contracts entered into by KES with the purchasers remained prepayment contracts within the meaning of the Act, notwithstanding that KES was not yet a registered developer when the contracts were made; and (b) the Board's charge was created by operation of law (and only deemed to be a mortgage), and not by KES within the meaning of section 93(1) of the Companies Act, and was therefore analogous to a vendor's lien. Accordingly, it did not require registration with the Registrar of Companies.

[28] On the second issue, the learned judge considered that CCMB's mortgage did not fall within the proviso to section 31(5) of the Act because it did not secure sums advanced exclusively for the purposes of the Mountain Valley scheme, but also secured

advances made for the benefit of several other development projects concurrently being undertaken by KES. Accordingly, CCMB's mortgage did not rank *pari passu* with the Board's charge, which therefore ranked in priority to it.

[29] On the third issue, the learned judge declined to make the order for payment over of all amounts received under prepayment contracts in respect of the Mountain Valley scheme, with interest, against CCMB and JM & Co. The learned judge was of the view that neither the statements of case nor the evidence in the case, as she put it (at para. 95) "sufficiently flesh out the issues, or provide the frame upon which the Court could make a pronouncement that [CCMB] or [JM & Co] are Trustees De Son Tort or caught by [the] handling of trust funds". However, the order sought was made against KES.

[30] However, on the fourth issue, the learned judge made an order for an account to be taken against CCMB and JM & Co, despite acknowledging (at para. 100) that, in the case of CCMB, it had "consistently maintained that [it had] never received deposits from the purchasers".

[31] In the result, the learned judge granted the declaration sought by the Board that its charge registered on 18 September 2006 in respect of moneys received under prepayment contracts ranked in priority to CCMB's mortgage registered on 1 February 2007, and made the following orders in consequence:

> "2. …that KES Development Company Limited (in Liquidation) pay to the Claimant a sum equivalent to all amounts received by them under pre-payment contracts with respect

to the Mountain Valley Development Scheme carried out on the property registered at Volume 733, Folios 75 and 76 of the Register Book of Titles, and known as Mountain Valley Hotel, together with interest at such rates as are provided for in section 26(2) of the Act. The Board is to provide evidence of the relevant Rates of interest at the hearing of the Accounts and Enquiries before the Registrar of the Supreme Court referred to below.

3. …that an account be taken of all monies received by the 3rd Defendant under or in respect of pre-payment contracts in respect of the said development scheme. All necessary accounts, and inquiries and directions in relation [sic] the 3rd defendant and to the Accounts previously provided by the 4th Defendant in the affidavit of Mrs. Jennifer Messado filed on the 17th of February 2011, are to be taken and made by the Registrar of the Supreme Court. The costs of such accounts and inquiries are to be borne by KES Development Co. Ltd (in Liquidation) to be taxed if not agreed. It is ordered that the 3rd and 4th Defendants do pay such sums, if any, as may be found to be due upon the taking of such accounts and the making of such inquiries including interest as aforesaid.

4. …that the KES Development Company Limited (in Liquidation) render an account of all monies received by KES under or in respect of pre-payment contracts in respect of the said development scheme and for all necessary accounts and inquiries and directions to be taken and made by the Registrar of the Supreme Court. The costs of such accounts and inquiries are to be borne by KES Development Company Limited (in Liquidation) to be taxed if not agreed. It is ordered that KES Development Company Limited (in Liquidation) do pay such sums as may be found to be due upon the taking of such accounts and the making of such inquiries including interest as aforesaid.

5. 75% costs on the Claim to the Claimant against the 3rd Defendant and KES Development Company Limited (in Liquidation), to be paid directly by KES Development Company Limited (in Liquidation). 20% costs on the Claim to the 4th Defendant, to be paid by KES Development Company Limited (in Liquidation).

6. Liberty to Apply."

[32] On the ancillary claim by CCMB, the learned judge ordered that (i) CCMB was entitled to exercise its powers of sale in accordance with mortgage no 1433819, subject to the duty to account to the Board as first mortgagee; (ii) the proceeds of sale should be apportioned in accordance with the Act and section 107 of the Registration of Titles Act; and (iii) there should be no order as to costs.

The appeal

[33] None of the parties to this appeal was entirely satisfied by Mangatal J's judgment. By its amended notice of appeal in SCCA No 87/2011 dated 19 July 2011, CCMB challenges the judgment on the following grounds:

> "a. The learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion granting the orders for accounts and inquiries such as to amount to a miscarriage of justice:
>
> i. The learned judge misdirected herself on the facts and in law in ordering the Respondent to account for amounts received under prepayments contracts:
>
> a. having found that the Appellant has consistently denied receiving monies from the purchasers;
>
> b. there is no evidence other than the mere assertion of the Respondent that the Appellant received monies from the purchasers.
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> ii. On the other hand the learned judge erred in refusing to accept submissions on behalf of the Appellant that an accounting exercise as contemplated by the general scheme

of the Act would do more justice between the parties in determining the amounts due rateably between them than to change the priorities as contemplated in s 31(5) by importing a requirement of "exclusivity" of purpose.

b. The learned judge misdirected herself on the law and/or failed to accept submissions on behalf of the appellant tending to show that the Respondent's charge was devoid of efficacy under the Real Estate (Dealers and Developers) Act in terms of what it is intended to secure. The Respondent's charge secures moneys paid to a vendor under pre-payment contracts as contemplated by section 2, 26(1), 31, and 29 of the Act and it is in that context that the it was argued that the charge lacked efficacy because:

i. There are no prepayment contracts within the meaning of the Act.

ii. The contracts in question were entered into in contravention of s. 26(1) of the Act.

iii. The amounts secured by its charge or protected under the scheme of the Act and to be repaid are monies paid under pre-payment contracts and secured within the terms of or in compliance with the relevant provisions of the Act.

iv. Where sections 2, 26(1), 29 and 31 are not complied with the purchasers' and the Respondent's remedy must be under s. 26(2) and s. 44(3) respectively and not s.33.

c. The learned judge therefore erred in not accepting submissions on behalf of the Appellant that in these circumstances the Respondent's charge could not be enforced against the land or in priority to the Appellant's valid charge which was duly registered under the Companies Act and/or contemplated by s. 26(1)(b) aforesaid. This is because the remedy as trustee for purchasers under pre-payment contracts is not available to the Respondent which also means that it has no basis for setting up its mortgage

against the Appellant. The purchaser's remedy as against the 2nd Defendant is pursuant to s. 26(2) of the Act.

d. The learned judge erred in finding that the Respondent's charge, a charge '*executed*' by the owner of the land in question and lodged with Registrar of Titles is not a charge created by a company within the meaning of the Companies Act and as such fell into further error when she found that the Respondent's charge was not void against the Appellant for non-registration prior to the liquidation of the company (the 2nd Defendant KES Development Company Limited) on the 10th December 2010.

e. The learned judge erred as a matter of law in treating [the] charge created by the company (2nd Defendant – KES Development Company Limited) as being analogous to a vendor's lien, the latter being purely a creation of law.

f. In any event the Appellant's charge is still a prior charge under the Companies Act and the Respondent's charge is yet to be registered. The 2nd Defendant was sued in liquidation, this status of the 2nd Defendant on the distribution of the proceeds of sale cannot be ignored.

g. No orders for costs should be made against the Appellant. The Respondent did not carry out its duty under the Act resulting in the defaults alleged; further the default is of the 2nd Defendant the interpretation of the statute is otherwise necessary in the public interest."

[34] On the strength of these grounds, CCMB seeks orders (i) that the Board's mortgage no 1433819 is void against it; (ii) setting aside the order against it for an account of moneys paid under prepayment contracts; and (iii) for costs in the court below and in this court.

[35] By its amended counter-notice of appeal in this appeal dated 12 June 2012, the Board challenges the learned judge's finding that it was not entitled to relief against

CCMB or JM & Co on the basis that they were trustees *de son tort* or caught by the handling of trust funds, on the following grounds:

> "a) [T]he learned judge erred in fact and in law when she found that the evidence did not support a finding that the Bank and the fourth Defendant are trustees De Son Tort or caught by the handling of trust funds in light of the uncontradicted evidence that the Bank and the 4th Defendant intermeddled in the trust funds
>
> b) The learned trial judge erred in law in failing to attach sufficient weight to the fact that the Bank knowingly entered into arrangements which breached the statutory trust and such actions have criminal penalties under the Act."

[36] But the Board also contends that the decision of the judge should be affirmed on the following additional grounds not relied on by her:

> "a) That the Board's charge was registered earlier in time and therefore ranks in priority to [CCMB's] subsequent charge
>
> b) The provision of s. 31 (5) of [the Act] does not apply to the mortgage registered February 1, 2007 in favour of [CCMB] on the basis that the monies advanced in respect of this loan were intermingled with other projects and purposes."

[37] In SCCA No 150/2011, the Board repeats its challenge to the judge's finding that it was not entitled to relief against JM & Co on the basis that the firm was a trustee *de son tort*, amplifying the grounds as follows:

> "a) [T]he learned judge erred in fact and in law when she found that the evidence did not support a finding that the Bank and the 4th Defendant are trustees De Son Tort or caught by the handling of trust funds in light of the uncontradicted evidence that the 4th Defendant, knowingly received moneys paid under prepayment contracts which fall

> under the statutory trust and entered into arrangements to pay the trust moneys over to third parties in contravention of the express requirements under the Act.
>
> b) The learned trial judge erred in law in failing to attach sufficient weight to the fact that the 4th Defendant being Attorneys-at-Law would be aware that breaches of the statutory trust have civil and criminal penalties and therefore it is not a sufficient defence to such a claim to say that the funds were paid out in accordance with the 2nd Defendant's instructions.
>
> c) The learned trial judge erred in law in failing to find that the 4th defendant are [sic] constructive trustees by virtue of their receipt possession or control of the trust funds which they from time to time disbursed to various persons in breach of the statutory trust."

[38] On this basis, the Board seeks an order that JM & Co pay over to it a sum equivalent to all amounts received by them under prepayment contracts with respect to the Mountain Valley scheme.

[39] By a counter-notice of appeal dated 5 January 2012, JM & Co, for its part, challenges the judge's finding that, in addition to CCMB, the firm should also provide the requested accounting. The grounds of this challenge are as follows:

> "a. The Learned Trial Judge erred in finding that the legal considerations by which an Attorney-at-law, not being a stakeholder, holds funds on behalf of a client are different in relation to prepayment contracts and development schemes and/or [the Act].
>
> b. The Learned Trial Judge erred in ordering the 4th Defendant to provide an account and/or that the Registrar of the Supreme Court take all necessary accounts and enquiries, and/or that the 4th Defendant pay such sums, if any, as may be found to be due on the taking of such accounts and the making of such enquiries.

c. The Learned Trial Judge wrongly exercised her discretion in not ordering the 4th Defendants [sic] and/or the % thereof to be paid by the [Appellant] herein."

The issues on appeal

[40] On the basis of the grounds filed by the parties to this appeal, the issues that arise for consideration appear to me to be as follows:

i. Whether the learned trial judge erred as a matter of fact and/or law and/or wrongly exercised her discretion by making orders for accounts and inquiries against CCMB and JM & Co ('the accounting issue').

ii. Whether the learned trial judge erred as a matter of law in her interpretation of the proviso to section 31(5) of the Act, in particular by importing a requirement of exclusivity of purpose into the language used in the statute ('the exclusivity issue').

iii. Whether the learned trial judge erred in failing to find that the Board's charge lacked efficacy, because there were no prepayment contracts within the meaning of the Act, the contracts in question having been entered into in contravention of section 26(1)(a), and that in these circumstances the only remedy available to purchasers in the Mountain Valley scheme was under section 26(2) of the Act ('the prepayment contracts issue').

iv. Whether the learned trial judge erred in failing to find that the Board's charge could not be enforced against the land or in priority to CCMB's charge because (a) CCMB's charge was duly registered under the Companies Act and/or contemplated by section 26(1)(b) and (b) the Board's charge was not

registered in accordance with the provisions of the Companies Act ('the registration of charges issue').

v. Whether the Board's charge was in any event registered on the certificates of title to the property earlier in time to CCMB's mortgage and ought therefore to rank in priority to it ('the prior registration issue').

vi. Whether the evidence justified a finding that CCMB and JM & Co were trustees *de son tort* or caught by the handling of trust funds ('the trustee *de son tort* issue').

vii. Whether any order for costs should have been made against CCMB ('the costs issue').

i. The accounting issue

[41] On this issue, Mrs Gibson-Henlin for CCMB submitted that Mangatal J was wrong to grant relief to the Board under this head, because, first, there was no statement in the affidavit evidence or in any pleading to support the claim for an account; second, CCMB's evidence that it had not received any money from purchasers was uncontradicted; third, the relationship between CCMB and the Board was not such as to give rise to an obligation to account; and lastly, at common law, an action for an account lies only in aid of a legal or equitable right, in cases in which a defendant has money or other property for the claimant in respect of which the claimant calls for an account. In the circumstances, CCMB had no duty in law to account to the Board and the judge erred in ordering it to do so. Miss Davis for JM & Co also challenged the judge's order that her client should provide an account, submitting that, since the firm

of attorneys-at-law was not a trustee under the Act, it owed no duty to the Board and could not therefore be compelled to provide an account.

[42] For the Board, on the other hand, Dr Barnett submitted that the learned judge had correctly exercised her jurisdiction to order accounts and inquiries of CCMB. While the judge did record in her judgment her understanding of CCMB's position that it had not received deposits from purchasers in the Mountain Valley scheme, this was not a finding that it had never received moneys under prepayment contracts. There was in fact sufficient evidence for the judge to have made a finding on a balance of probabilities that CCMB did receive moneys under prepayment contracts and in all the circumstances of the case she was fully justified in making the order which she made. There was therefore no basis upon which this court could interfere with the learned judge's exercise of her discretion in this regard.

[43] Mrs Gibson-Henlin referred us to a number of authorities on this point. The first is Snell's Principles of Equity, 28th edn, in which the following appears at page 620:

> "At common law an action of account lay in certain cases, but the procedure was very unsatisfactory, and when the Court of Chancery began to assume jurisdiction in matters of account, the remedy at law gradually fell into disuse. The superiority of the equitable remedy arose mainly from the facts that the Court of Chancery could compel the defendant to make discovery on his oath, which the common law courts could not do, and that its machinery and administrative powers were better adapted for taking accounts than those of the common law courts."

[44] The learned authors of Snell go on to state (at pages 620-621) that the jurisdiction of the Court of Chancery to order an account was of a twofold character:

firstly, in aid of a purely equitable right (as, for example, a *cestui que trust* from a trustee, a mortgagor from a mortgagee who had entered into possession and a remainder man from a tenant for life in certain circumstances); and secondly, in aid of a legal right (for example, in cases concerning principal and agent or mutual accounts, in cases "where there were circumstances of special complication rendering the taking of the account difficult at law", and as an incident of the grant of an injunction to prevent violation of a legal right). However, the authors also point out, the effect of the Judicature Act 1873 was that "an action for an account can be brought in any case in which equity or the common law formerly had jurisdiction to order an account".

[45] Mrs Gibson-Henlin also referred us to two extracts from Halsbury's Laws of England (2007 on line edition, volume 2, paras 114 and 222), in order to demonstrate that, in the specific instances of agency and auctions, the agent and the auctioneer respectively may in certain circumstances be liable to a claim for an account. We were also referred to an extract from The Law of Mortgages, by Edward F Cousins and Sidney Ross, in which it is said (at page 440) that, as between mortgagor and mortgagee, "[t]he court directs an account only in actions for redemption, foreclosure, judicial sale, or for the recovery of moneys resulting from the exercise of a power of sale". What these instances have in common, it was submitted, is that they involve situations in which the defendant has money or other property for the claimant, who is calling on him to account for it.

[46] By way of contrast, Mrs Gibson-Henlin referred us to and relied heavily on the decision in ***Halifax Building Society v Thomas and Another*** [1995] 4 All ER 673.

That was a case in which T, a rogue, obtained a 100% mortgage from a building society to finance the purchase of a flat, on the basis of fraudulent misrepresentations as to his identity and creditworthiness. After making some payments on the mortgage, T fell into arrears and the building society in due course exercised its powers of sale under the mortgage, which it discharged from the proceeds of the sale, leaving a surplus. The building society subsequently commenced action seeking a declaration that it was entitled to retain the surplus for its own use and benefit. On appeal from the trial judge's dismissal of the action, the Court of Appeal held that the law did not afford a restitutionary remedy by a secured creditor, such as the building society, which had elected not to avoid the mortgage when it fell into arrears, but had affirmed it and successfully exercised its powers of sale as mortgagee. There was in these circumstances an inconsistency between a mortgagee being a secured creditor and yet claiming more than its contractual entitlement, which it had already recovered. The fact that the mortgage advance had been obtained by fraud did not in itself allow the mortgagee to require the mortgagor to account for it.

[47] It is in this context that, in the passage upon which Mrs Gibson-Henlin relies, Peter Gibson LJ said this (at page 679):

> "But in any event is the claim for an account in the circumstances of the present case a valid one? Mr. Waters frankly acknowledges that there is no English authority that goes so far. Indeed he accepts that there is no English authority to support the proposition that a wrongdoing defendant will be required to account for a profit which is not based on the use of the property of the wronged plaintiff."

[48] Dr Barnett's comment on these authorities was that they do not seek to provide an exhaustive list of the circumstances in which an account may be ordered, but rather provide examples of cases in which such an order can be made. I entirely agree. In none of the authorities to which we were referred was there any suggestion that the power of the court to order an account was limited to the particular circumstances of the case. Nor do I find ***Halifax Building Society v Thomas and Another***, which was, on its facts, an unusual case by any measure, of particular assistance in resolving this issue. That case decided no more than that, in a case of a mortgage fraud, there was no basis upon which the mortgagee, who was misled by the fraudster's fraudulent misrepresentations into making a mortgage advance, could, in addition to enforcing its rights as a secured creditor to sell the mortgaged property and recover what was owed to it, lay claim to any surplus on the sale after the discharge of the mortgage. It is in response to the proposition (described by Glidewell LJ at page 682 as not "obviously persuasive") that the mortgagor could in these circumstances be required to account to the mortgagee for the surplus that Peter Gibson LJ made the observation set out in the foregoing paragraph. The case is certainly not authority, in my view, for any broad generalisation as to the circumstances in which an account will be ordered.

[49] Indeed, as an illuminating article on the history of the common law action of account (referred to by Snell in a footnote to the passage quoted at paragraph [43] above) demonstrates, the action at a relatively early stage of its development evolved from its beginnings (as early as 1200) from being a specific remedy available only as an

incident of certain kinds of relationship, into "a general principle … a principle of accountability, applicable to all manner of agents and fiduciaries" (S J Stoljar, 'The Transformation of Account', (1964) 80 LQR 203, 204). Thus, in time, the action came to be available in not only cases in which there was a direct relationship between plaintiff and defendant, but also in cases in which the defendant was technically a stranger to the plaintiff. As Stoljar (ibid, page 211) put it:

> "To be able to sue, P had to have some standing with regard to the sum involved: he had to be able to say that the money retained by D was really his (P's), that the money 'belonged' to him. This point, furthermore, gives a particularly clear indication of the general theory that had come to underlie account. The theory essentially was that a person became accountable for a sum of money to which, as regards the particular plaintiff, he himself could maintain no firm title or proprietary right."

[50] Despite having shown great adaptability on what Stoljar described (at page 215) as "the substantive side", the common law action of account was nevertheless beset by considerable procedural defects. Snell's view that over time the equitable remedy came to be regarded as superior because of the unsatisfactory features of the common law procedure certainly seems to be the conventionally accepted explanation for the decline in use of the common law action (although Stoljar himself doubted whether this was the only explanation – see page 222). Thus, in ***Tito v Waddell (No 2)*** [1977] 3 All ER 129, 248-9), Megarry V-C observed that "the procedure in Chancery, and in particular the machinery for taking accounts, was so superior that by the 18th century the common law action for an account had come to be superseded by equitable

proceedings for an account" (see also Halsbury's Laws of England, 4th edn, Vol 37, para. 84).

[51] But now, of course, as Snell also points out (at page 621), with the concurrent administration of law and equity, "an action for an account can be brought in any case in which equity or the common law formerly had jurisdiction to order an account" (and see the Judicature (Supreme Court) Act, section 48). Hence the following passage from Atkin's Encyclopaedia of Court Forms in Civil Proceedings (2nd edn, Vol 1, 1978 issue, page 403), to which we were referred by Dr Barnett:

> "Accounts are taken, in the course of litigation, to ascertain the ultimate amount which, on consideration of a number of debits and credits, one litigant owes to another, and arise most frequently in actions for the administration of trusts, or of the estates of deceased persons, for the foreclosure of mortgages, for the dissolution of partnerships or for specific performance. Such actions are each of a special character, and the exact form the equitable relief takes in those cases is not considered in this title. There remain many other actions, however, based on varying causes of action, in which the substantial relief sought is an account..."

[52] The learned editors of Bullen, Leake & Jacob's Precedents of Pleadings (13th edn), while also noting that at common law the action of account had fallen into disuse by reason of some of the matters that I have already mentioned, state the position in similar terms (at page 3):

> "Today however the seeking of an account is often a valuable and a convenient course for a litigant where there are a series of transactions between the parties and it is desired to ascertain the ultimate amount owed by one party to the other.

> It is often the case that the facts necessary to ascertain that ultimate amount are in the knowledge of the defendant alone. It is in such circumstances that the claim for an account is particularly valuable…
> …It is necessary first to identify the relationship between the plaintiff and the defendant that is said to entitle the plaintiff to an account. Thus, the defendant (the 'accounting party') may for example be a trustee, an agent or a mortgagee in possession."

[53] It therefore seems to me that, while cases involving agents, mortgages, trusts and the like may be more readily amenable, because of the nature of those relationships, to an action for an account, they are but examples of the operation of a wider principle of accountability in certain circumstances. There is no suggestion in any of the authorities to which we were referred that the established categories of cases in which an account may be ordered are closed (see Equity – Doctrines and Remedies, by R P Meagher QC, W M C Gummow and J R F Lehane, 2nd edn, in which the authors make this point at para. 2504).

[54] In considering whether an order for an account should be made against CCMB and JM & Co in the instant case, Mangatal J said this (at paras 97-100):

> "97. I now turn lastly to the relief sought at Item (4) for an accounting. The functions of the Board are wide and one of its main duties is to regulate and control the operation of development schemes and the disposition of land within them. By virtue of section 5 the Board has wide powers, amongst which are the power to monitor the activities of developers, to make enquiries, and collect such information as it may consider necessary or desirable for the purpose of carrying out its functions.

98. I have noted that in his Affidavit evidence, Mr Martin, indicated that the Bank in the second stage 'took over the residential development project on the land and began expending money on the construction of buildings and work on the land.'

99. Further, under Section 4.06(a)(viii) of the Loan Agreement the following was a condition precedent to the Bank's obligations:

'(viii) The establishment of an escrow account at CCMB or at a mutually acceptable financial institution in the name of KES and CCMB, in which all moneys received from the purchase of lots in the projects, shall be placed in this escrow account and shall be used:- (aa) in repayment of the Loan as set out herein and (bb) for the purpose of the Project in accordance with the cash flow projections provided by KES to CCMB PROVIDED HOWEVER THAT ANY WITHDRAWAL FROM THIS ACCOUNT SHALL (A) BE UNDER THE SIGNATURE OF BOTH PARTIES TO THE ACCOUNT AND (B) SHALL BE VERIFIED AND APPROVED BY A QUANTITY SURVEYOR ACCEPTABLE TO THE CCMB.'

100. In relation to the 4th Defendant, it is clear that large sums of money were paid to her by the purchasers in respect of sales of land under the Mountain Valley Housing Scheme. I appreciate that the Bank have consistently maintained that they have never received deposits from the purchasers. However, in all the circumstances, it seems to me that both the Bank and the 4th Defendant ought to provide the accounting requested and so I am prepared to order the taking of accounts and enquiries."

[55] In my respectful view, this analysis cannot be faulted. Section 29(1) of the Act provides as follows:

"Subject to such conditions as may be prescribed, every person who as a vendor under any prepayment contract relating to any land which is, or is intended to be, the subject of a development scheme, receives any money from the purchaser pursuant to such contract, shall without delay pay such money into a trust account to be maintained by

> him with an authorized financial institution and held and applied in accordance with the provisions of this Act."

[56] Section 33(a) provides that, upon default by a vendor under a prepayment contract amounting to a failure of the scheme, "the Board shall…require the financial institution with which the trust account is maintained pursuant to section 29 to pay over to the Board all money (including interest) standing at credit of the trust account". Thereafter, section 33(b) mandates the Board to enforce its charge on the land "either by the sale of the land…or by such other action", as it thinks fit, and section 33(c) provides that, if it sells the land, it must –

> "(i) apply the proceeds of such sale (after deducting the expenses thereof) in satisfaction rateably of the amount due to the Board under such charge and of the amount due to any authorized financial institution under any mortgage or charge ranking *pari passu* with the charge in favour of the Board; and
>
> (ii) thereafter apply the balance of such proceeds of sale together with the moneys received by the Board out of the trust account pursuant to a requirement made under paragraph (a) rateably to the person legally entitled thereto pursuant to the prepayment contracts under which moneys were received by the vendor and deposited in the trust account."

[57] Section 34(1) imposes a duty on an authorized financial institution with which a trust account is maintained pursuant to section 29 "to take reasonable measures to ensure that withdrawals are not made from such trust account save in compliance with [the Act]", and to comply with any requirement made by the Board. Section 34(2)

provides that the Board may if necessary recover all moneys payable to it pursuant to such a requirement as debt due to it.

[58] There is no dispute that JM & Co, acting on behalf of KES, received moneys from purchasers in the Mountain Valley scheme and paid over those moneys directly to, or on the instructions of, KES. Had those moneys been paid into a trust account with an authorized financial institution, as they should have been, the Board would therefore have been obliged to exercise its powers under sections 33 and 34, by requiring payment over to it by the financial institution of all such moneys, including any interest earned and, in due course, applying those moneys in repayment of the purchasers under the prepayment contracts.

[59] But, by virtue of section 4.06(a)(viii) of the loan agreement, KES was contractually required (as a condition precedent to CCMB's obligations to it) to operate in a manner directly contrary to the clear provisions of the Act. So, instead of paying the moneys received from the purchasers into a trust account for their ultimate protection, as the Act mandated it to do, section 4.06(a)(viii) required KES to pay those moneys into an escrow account, basically for its own benefit and that of CCMB (see also, to the same general effect, section 2.06(c) of article II of the loan agreement, referred to at para. [17] above, which stipulated the manner in which payments received by CCMB under the agreement should be applied).

[60] In these circumstances, it seems to me to be eminently sensible, notwithstanding CCMB's position that it received no deposits from purchasers, that it

should be required to render an account formally. The need for an account arose, in my view, precisely because of the uncertainty created by the provisions of the loan agreement when juxtaposed with the obligations of the parties under the Act. It is only by this means of the taking of an account that the Board will be able to satisfy itself, given its general supervisory jurisdiction over the operation of development schemes and its responsibility to the purchasers, that KES and CCMB governed themselves by the requirements of the Act and not by the provisions of the loan agreement. In any event, as Dr Barnett pointed out, CCMB's own statement of account as at 19 May 2008 (see para. [22] above) showed payments of $1,540,473.01 credited to interest on the loan. The only way to determine whether the source of these funds was the deposits paid by purchasers in the Mountain Valley scheme would be by way of an account.

[61] As regards JM & Co, while it is true, as Miss Davis submitted (leaving on one side for the moment the question of trustee *de son tort*, to which I will come in due course), that the firm was not a trustee under the Act, the undisputed fact, as the judge found, was that "large sums of money" were paid to it by purchasers in respect of prepayment contracts. These moneys were collected on behalf of Mrs McHugh/KES, who would in this context plainly be accounting parties, and it is common ground that they were not paid into an account to be held on trust for the benefit of the purchasers in accordance with the Act. In these circumstances, it seems to me that the learned judge was entirely correct to order the firm to account formally, so that the Board can be satisfied that there are no moneys remaining in the firm's hands or under its control, as agent for Mrs McHugh/KES, which ought to have been placed into a trust account. In any

event, to the extent that the firm has on its own evidence already sought to provide some kind of account (albeit, as Miss Davis characterised it, "on a voluntary basis"), it seems to me that compliance with the judge's order should not be an onerous undertaking for the firm.

[62] My conclusion on this issue is therefore that Mangatal J's order that accounts should be provided by CCMB and JM & Co was a proper exercise of her discretion in the circumstances and should not be disturbed.

ii. The exclusivity issue

[63] The resolution of this issue turns on the true meaning and effect of the provisions of the all important section 31 of the Act, which prescribes the authorized dealings with moneys deposited in a trust account pursuant to section 29. Although the proviso to section 31(5) is particularly relevant, it may perhaps be best to set out the section in full:

> "31- (1) Subject to subsections (2) and (3) moneys deposited in a trust account pursuant to section 29 and any interest earned thereon shall not be withdrawn from the account until the completion or rescission, as the case may be, of the contract under which the moneys were received by the vendor.
>
> (2) Moneys so deposited in a trust account may be withdrawn and deposited in another trust account with another authorized financial institution subject to such conditions as may be prescribed and the provisions of this Act shall apply to that other account and the moneys held therein as they apply to the original account.
>
> (3) Moneys so deposited in respect of a prepayment contract may be withdrawn from the account

prior to the completion or rescission of the contract and applied by the vendor in the payment of stamp duty and transfer tax payable in respect of that contract and in partial reimbursement of the costs of materials supplied and work done in the construction of any building or works which is the subject of the contract, subject to the undermentioned conditions, that is to say –

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

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

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

(5) Such charge shall rank in priority before all other mortgages or charges on the said land except any charge created by statute thereon in respect of unpaid rates or taxes, and shall be enforceable by the Board by sale of the said land by public auction or private treaty as the Board may consider expedient:

Provided that where a mortgage or charge of the said land has been duly created in favour of an authorized financial institution to secure repayment of amounts advanced by that financial institution in

> **connection with the construction of any buildings or works on the said land the charge created by this section shall rank *pari passu* in point of security with the mortgage or charge in favour of that authorized financial institution.**
>
> (6) For the purposes of subsection (5) a loan or advance by an authorized financial institution shall *prima facie* be taken to be made in connection with the construction of any building or works if it is expressed in the instrument creating the mortgage or charge securing the repayment of that loan or advance that the loan or advance was so made.
>
> (7) A charge executed pursuant to this section shall be deemed to be a mortgage under the Registration of Titles Act and shall be enforceable accordingly but shall be exempt from registration fees under that Act, transfer tax under the Transfer Tax Act and stamp duty under the Stamp Duty Act." (Emphasis mine)

[64] As has been seen, the loan agreement between CCMB and KES covered an initial indebtedness of $146,000,000.00 (later up stamped to cover a further $90,000,000.00). In addition to the Mountain Valley scheme, KES was at the time involved in three other development projects and $120,000,000.00 of the CCMB loan was for the purpose of financing all four projects. On the face of it, the Board contended in the court below, at least $26,000,000.00 of the CCMB loan was not referable to the construction projects and, of the $120,000,000.00 that was stated to be so referable, there was no indication of how that amount was apportioned as between the four projects. Neither was there any requirement that the funds disbursed by CCMB should be used exclusively for construction purposes. In these circumstances, the Board maintained, CCMB could not avail itself of the protection given by the proviso to section 31(5) of the Act to a

mortgage taken by an authorized financial institution in connection with construction of a development project.

[65] Mangatal J agreed (at para. 75):

> "75. In my judgment, although the proviso does not use the word 'exclusively' in relation to the fact that for the Bank's mortgage to rank pari passu with the Board's charge it must be to secure repayment of amounts advanced in connection with the construction of any buildings or works on the said land, it seems to me that that is the natural and ordinary meaning of the section, and indeed intendment of the Act. (My emphasis). To determine otherwise, would mean that a mortgage could rank pari passu where some of the sums advanced to the owner or vendor on the security of the land were not used for the improvement or development of the land. In my judgment, the Act does not contemplate the purchasers and the Board getting embroiled in a massive accounting exercise to determine what subset of a multipurpose loan was attributable to sums advanced in connection with construction and works on the relevant land only. The purchasers and the Board are not to be required to wade through this sea of intermingled funds, in order to ascertain what portion was spent on developing the land in which the purchasers have invested. In my judgment, the priority of the security is itself affected as the security cannot be truncated into portions ranking pari passu, and portions ranking subordinate to the Board's charge. In my view, the Board's charge does therefore rank in priority to the Bank's charge. The Bank's charge does not fall within the proviso, and hence does not rank pari passu with the Board's charge."

[66] Mrs Gibson-Henlin submitted that, on the evidence, CCMB's mortgage comes within the proviso to section 31(5) and that there is nothing in the language of the section to suggest a further requirement that that mortgage needs to be exclusively in connection with the construction of buildings or works on the lands in question, in this case, the property. The requirement of exclusivity ignores commercial realities and

instead punishes CCMB for its efficiency in making a single facility available to KES for the development of its various projects. In these circumstances, it was submitted, the judge erred in not holding that the Board's charge and the mortgage ranked *pari passu* in point of security, as provided for in section 31(5).

[67] Dr Barnett submitted that the learned trial judge was correct to read a requirement of exclusivity of purpose into the proviso to section 31(5) of the Act, because, on a proper interpretation of the section, only sums of money advanced in connection with the construction of works on the property can be considered. In the instant case, it was submitted, not only is the mortgage instrument silent as to the purpose of the loan, but, on its face, the mortgage deals with moneys to be used other than for the purpose of construction of buildings or works on the land. While the proviso did not use the word 'exclusively', it is clear that in order for the moneys referred to in it to rank *pari passu* with the Board's charge there must be a sum or an amount which is proved to be in connection with the construction of buildings or works on the property. In the instant case, CCMB did not pay out the amounts advanced by it on account of the Mountain Valley scheme against the certificate of an independent quantity surveyor, as the Act requires, and it is the court that is now being asked to determine from the material supplied whether the various advances were made for the construction of buildings and works on the property. It was accordingly submitted that Mangatal J had been correct in her conclusion on this point (see para. [65] above).

[68] The question for the court's determination is therefore whether the language of the proviso to section 31(5), taken against the context of the scheme of the Act as a whole, justifies Mangatal J's conclusion that the section imports a requirement of exclusivity. This is, it seems to me, entirely a matter of construction of section 31(5), in respect of which it may be well to bear in mind Lord Diplock's caution, albeit in a wholly different context, in ***Baker and Another v R*** (1975) 13 JLR 169, 174:

> "Where the meaning of the actual words used in a provision of a Jamaican statute is clear and free from ambiguity, the case for reading into it words which are not there and which, if there, would alter the effect of the words actually used can only be based on some assumption as to the policy of the Jamaican legislature to which the statute was intended to give effect. If, without the added words, the provision would be clearly inconsistent with other provisions of the statute it falls within the ordinary function of a court of construction to resolve the inconsistency and, if this be necessary, to construe the provision as including by implication the added words. But in the absence of such inconsistency it is a strong thing for a court to hold that the legislature cannot have really intended what it clearly said but must have intended something different. In doing this a court is passing out of the strict field of construction altogether and giving effect to concepts of what is right and what is wrong which it believes to be so generally accepted that the legislature too may be presumed not to have intended to act contrary to them."

[69] As has been seen, section 31 as a whole is concerned to circumscribe the manner in which moneys deposited in a trust account and held in trust pursuant to sections 29 and 30 may be dealt with before completion or rescission of a prepayment contract. Moneys so deposited may only be withdrawn from the trust account prior to completion or rescission for the purpose of (i) deposit into another trust account with

another authorized financial institution (section 31(2)); (ii) payment of stamp duty and transfer tax and reimbursement of the costs of materials supplied and work done in the construction of any building or works which is the subject of the contract, subject to (a) the moneys so withdrawn not exceeding 90% of the amount certified by an independent quantity surveyor or architect as being properly due for work already done and materials supplied in the construction of the building or works (and not previously paid for); and (b) the owner of the land on which the building or works is being constructed having executed and lodged with the Registrar of Titles a charge in favour of the Board (section 31(3)), to secure repayment of all amounts received by the vendor pursuant to the contract "which shall become repayable by him upon breach by him of a contract" (section 31(4)).

[70] Section 31(5) provides that the Board's charge, which is enforceable by it by sale of the land by public auction or private treaty (at the Board's option), ranks in priority to all other mortgages or charges on the land, save any charge created by statute on the said land in respect of unpaid rates or taxes. So the primary rule under the Act is that the Board's charge on the land takes priority over any others. The clear effect of the proviso, in my view, is that the only circumstance in which the priority of the Board's charge can be displaced in favour of another mortgage or charge of the said land is where that mortgage or charge has been created in favour of an authorized financial institution, for the purpose of securing repayment of amounts advanced by that financial institution in connection with the construction of any buildings or works on the

said land. In that circumstance, the Board's charge will rank *pari passu* with the mortgage or charge in favour of the authorized financial institution.

[71] So the question is whether CCMB's mortgage satisfies these criteria. It is certainly strongly arguable, it seems to me, that that mortgage is not a mortgage of "the said land", since, as has already been seen, in addition to the property, there are two other properties also covered by the same instrument (see para. [19] above). It is also clear that the amounts advanced by CCMB, repayment of which the mortgage was intended to secure, were not solely in connection with the construction of any buildings or works on "the said land", since the CCMB loan was on its face for the purpose of providing financing for the Mountain Valley scheme and three others, as well as the acquisition of a seemingly unrelated parcel of land (see para. [16] above). In relation to the $20,000,000.00 allocation from the loan amount for the purpose of lease financing in respect of certain commercial motor vehicles and equipment, while I would be inclined to accept that the acquisition of vehicles and equipment would ordinarily be necessary for the purpose of construction of buildings and works, it is equally difficult to determine, on the basis of the documentation subscribed to by the parties, whether the vehicles and equipment acquired by way of the CCMB loan were connected to the Mountain Valley scheme ("the said land").

[72] For these reasons, in agreement with Mangatal J, I find it impossible to say in the instant case that CCMB's mortgage was created "to secure repayment of amounts advanced…in connection with the construction of any buildings or works on the said

land…" While I accept that, as Mrs Gibson-Henlin submitted, this conclusion may have the potential to create some commercial inconvenience to financial institutions, it is in my view the inevitable consequence of what I take to be the policy of section 31(5), which is to protect the rights of purchasers through the mechanism of the Board's charge, while at the same time preserving a balance in favour of lenders, where it can be shown that moneys advanced by them have been applied to the enhancement of the value of the very property in which the purchasers have acquired an interest under contract. To determine otherwise would mean, as the learned judge observed (at para. 75), "that a mortgage could rank pari passu where some of the sums advanced to the owner or vendor on the security of the land were not used for the improvement or development of the land". Far from compelling such a conclusion, it seems to me that the language of section 31(5) as a whole, in its natural and ordinary meaning, supports the judge's view that, because (i) the CCMB loan was not solely in connection with the construction of buildings and works for the Mountain Valley scheme, and (ii) it is not possible on the loan documentation to disaggregate those portions of the loan attributable to the Mountain Valley scheme from those attributable to the other projects covered by the loan agreement, the proviso to the section does not apply.

[73] Despite the fact that there was some evidence of how some of the funds advanced by the bank were allocated (see para. [21] above), I consider, again in full agreement with the learned judge, that it could not have been the intention of the legislature that, for the purpose of determining whether a particular mortgage or charge fell within the proviso to section 31(5), the purchasers and the Board should

become "embroiled in a massive accounting exercise to determine what subset of a multi-purpose loan was attributable to sums advanced in connection with the construction and works on the relevant land only".

iii. The prepayment contracts issue

[74] This issue invites attention to section 26(1) and (2) of the Act, which, so far as is relevant for present purposes, provides as follows:

> "26. (1) A person shall not enter into a prepayment contract as a vendor in connection with any land which is or is intended to be, the subject of a development scheme to which section 35 applies unless –
>
> (a) the vendor under the prepayment contract is a registered developer;
>
> (b) such land is free from any mortgage or charge securing money or money's worth (other than a mortgage or charge in favour of an authorized financial institution referred to in the proviso to subsection (5) of section 31);…
>
> (2) Where a contract is entered into by a vendor in contravention of subsection (1) the purchaser or any person succeeding to the rights of the purchaser under the contract may within such time as may be reasonable in the circumstances of each case, withdraw therefrom and recover from the vendor any moneys paid to him under the contract together with interest thereon computed from day to day at the prime lending rate of commercial banks in Jamaica for the time being prevailing as certified by the Bank of Jamaica, but without prejudice however to the provisions of section 44(3) (relating to the penalty for contravention of subsection (1) of this section)."

[75] Before the learned trial judge, CCMB contended that, because both the sale of land agreements and the construction agreements entered into by Mrs McHugh and KES respectively predated the latter's registration with the Board as a developer, the contracts were entered into in breach of section 26(1)(a) of the Act, which stipulates that a vendor must be so registered before entering into prepayment contracts. There were therefore no prepayment contracts within the meaning of the Act. As a result of this, CCMB submitted, the purchasers' remedy lay under section 26(2), which was the section applicable in the case of a contract entered into in breach of section 26(1), and there was no basis upon which the Board could enforce its charge against the land or in priority to CCMB's mortgage.

[76] Mangatal J accepted that, in so far as KES was not yet an approved developer for the purposes of the Mountain Valley scheme at the time it entered into the construction agreements, it had acted in contravention of section 26(1) of the Act. However, she rejected the submission that there were, as a consequence, no prepayment contracts within the meaning of the Act, observing (at para. 54) that -

> "…it seems plain to me that the fact that a person has entered into a prepayment contract as a vendor in contravention of s. 26(1)(a) in that the vendor was not yet registered as a developer, does not cause the contract to cease to be a prepayment contract. There is nothing in the Act, particularly given the definition of prepayment contract in section 2, to suggest such a construction or interpretation. If a contract falls within the definition set out in section 2, then it is a prepayment contract."

[77] By way of parenthesis, I should add that Mangatal J had arrived at the same conclusion on this point in her earlier decision in ***Jamaica Redevelopment***

Foundation Inc. v The Real Estate Board and the Registrar of Titles (Claim No HCV 5152/2009, judgment delivered 12 May 2011). An appeal from that judgment was subsequently allowed by this court in its decision in ***The Real Estate Board v Jamaica Redevelopment Foundation Inc and The Registrar of Titles*** [2012] JMCA 35, which was handed down on 20 July 2012, less than two weeks before the conclusion of the hearing of the arguments in the instant case. The single issue in that appeal was whether the charge lodged in favour of the Board pursuant to the Act ranked in priority to a prior registered mortgage not connected to the development of the land. This court held, disagreeing with Mangatal J's conclusion to the contrary, that it did and that section 31(5) of the Act was to be given its clear and unambiguous meaning (see the judgment of Brooks JA, with which the other members of the court agreed, at para. [66]). However, there was no appeal from the aspect of Mangatal J's decision referred to in the previous paragraph.

[78] In challenging Mangatal J's decision on this issue, CCMB put its argument, as I understood it, in the following way. The Act requires a person who enters into a prepayment contract as a vendor to be registered with the Board as a developer (section 26(1)(a)). In the instant case, each purchaser entered into two separate contracts, the sale of land agreement with Mrs McHugh and the construction agreement with KES. As regards Mrs McHugh, she was not a developer under the Act and was not a vendor under a prepayment contract as defined in section 2 of the Act. The sale of land agreements, which were all entered into in 2005, are ordinary land sale contracts, enforceable in the ordinary way by action and not entitled to protection under the Act.

Therefore the Board's charge does not secure amounts paid to Mrs McHugh. As regards KES, although its application to be registered as a developer was considered by the Board on 21 June 2006, there is no evidence that it was ever approved. In any event, the construction agreements were entered into before 21 June 2006. The contracts in question were accordingly entered into in contravention of section 26(1)(a) of the Act, there were no prepayment contracts within the meaning of the Act and the Board was therefore not in a position to set up its charge in priority to CCMB's 'proper' charge. The purchasers' remedy, if any, was to be found under section 26(2), which permitted the purchaser under a contract entered into by the vendor in breach of section 26(1) to withdraw from the contract and to recover from the vendor, with interest, any moneys paid to him under the contract, and not by way of action by the Board under section 33, which was only applicable upon default in a contract for the sale of land.

[79] The Board's position on the other hand was that, in the light of the unchallenged affidavit evidence before her that the Board had approved KES' application to be registered as a developer, the judge was correct in so finding. The judge had also correctly found that payments made under the sale of land and the construction agreements, which were clearly connected contracts, were amounts paid on account of prepayment contracts and there was nothing in the Act to support the proposition that non-compliance with section 26(1) made the agreements anything other than prepayment contracts. Dr Barnett submitted that the purchasers under such contracts, as the class of persons in whose protection section 26(1) is intended to operate, ought

not to be negatively affected by the illegality of the other party to the contracts, particularly when that other party is the very person against whom the protection of the statute is sought (relying on this point on ***Kiriri Cotton Co Ltd v Ranchhoddas Keshavji Dewani*** [1960] 2 WLR 127 and ***Nash v Halifax Building Society and Another*** [1979] 2 WLR 184). There was therefore no reason to treat the Board's charge as lacking in efficacy or the purchasers' remedy as limited to that provided for in section 26(2).

[80] Firstly, as regards the question whether KES' application to be registered as a developer was ever approved by the Board, I have already made reference to the evidence proffered on behalf of the Board that the application was approved at a meeting of the Board which took place on 21 June 2006 (see para. [12] above). It appears to be clear from Mangatal J's reference to that approval as an "undisputed fact" that, as Dr Barnett submitted, the litigation in the court below was conducted on the uncontested basis that the application had in fact been approved. There is nothing in the material that was placed before this court to suggest otherwise and I therefore consider that the learned judge was fully entitled in the light of the unchallenged evidence produced by the Board to approach the matter on this basis.

[81] As has already been seen, section 2 of the Act defines a prepayment contract as any contract, or connected contract under which, at the time it is entered into, there are to be performed by one party for the benefit of the other party, obligations, expressed or implied, with respect to the construction of buildings, roads and works,

"and under which moneys are payable by the party to benefit from the performance and discharge of such obligations prior to the performance and discharge thereof". Section 2 defines a connected contract in relation to land as "any one of two or more contracts which provides for disposition of the land or for building thereon…on terms, whether expressed or implied, whereby the completion of any such contract is conditional upon completion of any other such contract". There can be no doubt, in my view, that the sale of land and construction agreements were connected contracts within the meaning of section 2: the former governed the terms upon which purchasers were to acquire the realty for the purpose of constructing thereon the town houses in accordance with the latter and completion of the former was tied to completion of the latter.

[82] The definition of a prepayment contract is unqualified by any reference to section 26(1)(a), which proscribes the entry by any person as vendor into a prepayment contract unless that person is a registered developer. While, as Mangatal J found, KES acted in contravention of this provision by entering into the construction agreements before it had secured approval from the Board as a developer, and thus rendered itself (but not the purchasers) liable to prosecution under section 44(3)(a), it seems to me that the learned judge was entirely correct in her conclusion that there is nothing in the Act to suggest that a contract which otherwise conforms with the statutory definition of a prepayment contract is invalidated, or becomes something other than a prepayment contract, by reason of a breach by the vendor of section 26(1)(a). As the learned judge also observed (at para. 55), section 26(2), which gives to the purchaser an option to

withdraw from the contract (within such time as may be reasonable in the circumstances of each case) and to recover moneys paid under it with interest in such circumstances, is plainly premised on the continuing validity of such a contract, notwithstanding the vendor's breach.

[83] My strong inclination to the view that the learned trial judge was correct in her conclusion on this point, based on a reading of the provisions of the Act itself, also derives support, it seems to me, from the two cases cited by Dr Barnett on the effect of illegality in these circumstances, notwithstanding Mrs Gibson-Henlin's sweeping dismissal of them in her written reply as "irrelevant to the arguments in respect of s. 26(1)". In the ***Kiriri Cotton Co Ltd*** case, a decision of the Privy Council on appeal from the Court of Appeal for Eastern Africa, a landlord of rent controlled premises asked for and received from the tenant a premium (described in the evidence as "key money"), contrary to the provisions of the governing legislation, as a condition of the grant of a tenancy to the tenant. The relevant section of the statute made it an offence for the landlord to ask for, solicit or receive a premium in consideration of the letting, punishable by a fine and/or imprisonment. The tenant brought an action against the landlord to recover the illegal premium and the question was whether it was irrecoverable by him, as the landlord contended, on the ground that he and the landlord were both *in pari delicto*. It was held, affirming the decisions of the courts below, that the duty of observing the law was firmly placed by the legislation on the shoulders of the landlord for the protection of the tenant and the parties were therefore not *in pari delicto* in receiving and paying respectively the illegal premium, which the tenant was

therefore entitled to recover. Delivering the judgment of the Privy Council, Lord Denning observed (at pages 133-4) that the relevant section of the Rent Restriction Ordinance "was enacted so as to protect tenants from exploitation…[t]his is apparent from the fact that the penalty is imposed only on the landlord or his agent and not upon the tenant".

[84] In ***Nash v Halifax Building Society***, the issue was whether the defendant building society was entitled to recover money advanced under a mortgage transaction prohibited by statute and to enforce the security which had been given for its repayment. It was accepted by the court that the relevant provision of the statute in question had been passed for the protection of the building society, so as to prevent the society's funds being advanced on inadequate or potentially inadequate security. In holding that the building society could in these circumstances maintain an action, the learned judge (Browne-Wilkinson J, as he then was) said this (at page 186):

> "Although, as a general rule, no action can arise from a prohibited and illegal act, if a plaintiff can show that he is a member of the class for whose protection the statutory prohibition was imposed, then as an exception such a person can enforce rights or recover property transferred under the illegal transaction."

[85] The fact that section 26(2) "exempts the purchaser from the consequences of being a party to the illegal contract by allowing the purchaser to withdraw from the contract within a reasonable time and recover moneys paid by him", as Mrs Gibson-Henlin put it, does not in my view, in the absence of any language in the section to this effect, limit the purchaser's remedy to that provided for in section 26(2). To the

contrary, the language of the section is plainly permissive ("the purchaser…may…withdraw") and there is nothing in it to suggest that the purchaser is by virtue of that provision disqualified from reliance on the general proposition that, in the case of an illegal transaction, a member of the class for whose protection a statutory prohibition has been enacted can in appropriate circumstances enforce rights under that transaction. Neither does the fact that the Act, in addition to setting up mechanisms for the protection of purchasers, also provides protection to other stakeholders, such as authorized financial institutions in certain circumstances, diminish the breadth of the protection available to purchasers, as Mrs Gibson-Henlin appeared to suggest.

[86] It accordingly seems to me, on the basis of both the provisions of the Act and the general law, that the rights of the purchasers under the construction agreements (the prepayment contracts) in the instant case, as the class of persons for whose protection section 26(1) was plainly enacted, remain unaffected by the fact of KES' non-compliance with the requirement of section 26(1)(a). They are therefore fully entitled to all the protections of the Act, including that provided for by section 33(b), which empowers the Board to enforce any charge in its favour executed pursuant to section 31 "either by the sale of the land subject to the charge or by such other action, consequent on the charge, as the Board thinks fit".

iv. The registration of charges issue

[87] Section 93(1) of the Companies Act provides as follows:

"93 – (1) Every charge created after the appointed day by a company registered in the Island, being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the original or a copy certified in the prescribed manner of the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the Registrar for registration in the manner required by this Act prior to the commencement of the winding up of the company, but without prejudice to any contract or obligation for repayment of the money secured; and when a charge becomes void under this section, the money secured thereby shall immediately become payable.

(2) Where –

(a) a charge to which subsection (3) applies is registered within twenty-one days of its creation, that charge shall for the purposes of priority (and subject to any agreement altering priorities) rank in priority to any charge created after it;

(b) a charge to which subsection (3) applies is created and is not registered until after twenty-one days after its creation, that charge shall for purposes of priority (and subject to any agreement altering priorities) be deemed to have been created on the date of registration.

(3) This section applies to the following charges-

(a) a charge for the purpose of securing any issue of debentures;

(b) a charge on uncalled share capital of the company;

(c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;

(d) a charge on land, wherever situated, or any interest therein but not including a charge for any rent or other periodical sum issuing out of land;

(e) a charge on book debts of the company;

(f) a floating charge on the undertaking or property of the company;

(g) a charge on calls made but not paid;

(h) a charge on a ship or any share in a ship;

(i) a charge on goodwill, on a patent or a licence under a patent, on a trade mark or on a copyright or a licence under a copyright."

[88] Mrs Gibson-Henlin submitted on the first limb of this issue that KES' debenture created on 8 August 2005 in CCMB's favour and registered at the Companies Registry on 16 March 2006 was a charge contemplated by section 26(1)(b) of the Act, was therefore protected in point of priority under section 31(5) and thereby entitled to rank *pari passu* with the Board's charge. However, because of the matters already canvassed in relation to the prepayment contracts issue, it was submitted, the Board's charge lacked efficacy and could not therefore be set up against CCMB's charge.

[89] In response to these submissions, in addition to his submissions generally on the prepayment contracts issue, Dr Barnett submitted that the prior charges contemplated by section 26(1)(b) were charges against land, which would have to be registered under the Registration of Titles Act in order to secure priority. The Act does not therefore contemplate a charge which is only registered under the provisions of the Companies Act.

[90] I have already indicated my view on the prepayment contracts issue and I need not repeat them in this context. However, as regards Mrs Gibson-Henlin's submission

based on section 26(1)(b), I agree with Dr Barnett that the registration at the Companies Registry of KES' debenture in favour of CCMB could not give it priority over the Board's charge, which was duly registered as a mortgage under the Registration of Titles Act. Section 26(1)(b) provides that a person shall not enter into a prepayment contract as vendor in connection with any land which is subject to a development scheme, unless "such land is free from any mortgage or charge securing money or money's worth (other than a mortgage or charge in favour of an authorized financial institution referred to in the proviso to subsection (5) of section 31)". As has already been seen, the proviso to section 31(5) addresses the situation where a mortgage or charge of land has been created in favour of an authorized financial institution. It is, in my view, clear from the plain language of both provisions that the mortgage or charge contemplated by those sections is a mortgage or charge of land, which, in accordance with the provisions of the Registration of Titles Act, derives its effect as a security by virtue of its registration pursuant to section 105 of that Act.

[91] I come therefore to the more substantial aspect of Mrs Gibson-Henlin's complaint against Mangatal J's judgment on this issue, which is that the Board's charge was a charge which required registration under section 93 of the Companies Act. The upshot of section 93(1), (2) and (3) is that, unless the prescribed particulars of a registrable charge created by a company are delivered to the Registrar of Companies within 21 days of the creation of the charge, it will be void against the liquidator or any creditor of the company. Section 93(10) specifically provides that "the expression 'charge' includes mortgage".

[92] It is common ground that the Board did not register its charge pursuant to section 93. Before Mangatal J, Mrs Gibson-Henlin argued that the consequence of non-registration of the Board's charge under section 93(1) of the Companies Act was that the Board lost its security, which was therefore unenforceable against the liquidator and all creditors with charges registered prior to the commencement of the liquidation. The learned judge held that the Board's charge did not require registration under section 93(1), in that it was not created by the company, but arose by operation of law. She observed, firstly (at para. 57, emphasis in the original), that:

> "…whilst the charge is created by the owner in the sense of the formal instrument or physical document constituting a charge, and therefore no charge exists unless and until such an instrument is prepared, executed, lodged and registered, it is the Act which creates the legal concept and the legal relationship of a charge."

And secondly (at paras 60-61):

> "…It is therefore my judgment that the Board's charge in this case is truly a hybrid in that, although it is not complete and effective simply by reason of the provisions of the Act creating it, this does not change the fact that the legal concept of a charge, as opposed to the instrument which is to be executed by the vendor, is created by the Act.
>
> In my judgment, the Board's charge as a legal concept is created by operation of law, by virtue of the provisions of the Act, and is not created by KES within the meaning of the Companies Act. The Instrument of Charge does not come into being as a result of any contractual agreement between the purchasers and KES, or the Board and KES. The Act mandates the owner to execute the charge in order to be able to draw down on the trust funds. It is analogous to a vendor's lien…The Board's charge is a charge on the land, it

> is specially crafted by the Act. It is only deemed to be a mortgage, and this is for the purposes of enforcement."

[93] Before us, Mrs Gibson-Henlin repeated the argument she had made in the court below and submitted that, in the result, the Board ranked as no more than an unsecured creditor as against CCMB and all other persons registered in priority to it under section 93(1). The failure to register the Board's charge under section 93(1) rendered the charge void and, though the obligation remains, the security is unenforceable against the liquidator and all creditors who registered their charges prior to the commencement of the liquidation. Further, it was submitted, the judge erred in treating the Board's charge as being analogous to a vendor's lien, which is a creature of equity arising by operation of law and requiring no further action on the part of the party entitled to the benefit of it, unlike the Board's charge, which is a charge created by the company and requires registration. Dr Barnett, on the other hand, submitted that the learned judge correctly treated the Board's charge as being created by operation of law and not as a charge created by the company by the usual *inter partes* agreement. The vendor's lien is merely an example of a situation in which a charge does not have to be registered under the Companies Act because it is not created by the company, but is a creature of law. The Act not only creates the charge, but prescribes its form and mandates the vendor to execute it. It was accordingly submitted that the learned judge had come to the correct conclusion, for the reasons she gave.

[94] In ***Capital Finance Ltd v Stokes and Another*** [1968] 3 All ER 625, upon which Mrs Gibson-Henlin relied, the owner ('the vendor') of a plot of land sold it to a company, on terms by which 25% of the purchase price was paid by the company to the vendor and the balance was to be secured by a first mortgage on the property. The property was in due course conveyed by the vendor to the company for the total consideration and the company, by an instrument bearing the same date as the conveyance, charged the property by way of legal mortgage with payment to the vendor of the unpaid balance of the purchase price, plus interest. Particulars of the charge were never delivered to the registrar of companies for registration in accordance with the statutory equivalent of section 93(1) (then the Companies Act, 1948, section 95). The vendor remained in possession of the property and the title deeds. The company subsequently issued a debenture charging all its undertaking, property, assets and rights in favour of the debenture holder. The question then arose whether the vendor could, on the basis of an unpaid vendor's lien, properly resist the demand by the receiver appointed under the debenture for delivery up of the title deeds to the property.

[95] In the ensuing winding up proceedings, the Court of Appeal held, in agreement with the judge in the court below, that the charge, not having been registered, was avoided against the liquidator and the creditors, although it remained a good debt provable in the winding up. As regards the question of the vendor's lien, Harman LJ said this (at page 629):

> "The remaining and most serious question is whether the first defendant did not have an unpaid vendor's lien. Such a lien arises in the ordinary course in favour of a vendor who has not received the purchase money and it is the creature of the law and does not depend on contract or possession. It depends on the fact that the vendor has a right to specific performance of his contract. The existence of the lien, however, depends on the terms of the bargain between the parties and on the surrounding circumstances and may be excluded, as is pointed out in Snell's Principles Of Equity (26th Edn) at pp 490, 491, para 2 and para 3:
>
> > 'As soon as a binding contract of sale is made, the vendor has a lien on the property for the purchase-money and a right to retain the property until the money is paid … 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 a 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. Moreover, the nature of the contract may exclude the vendor's lien, as where the existence of a lien would prevent the purchaser from selling the property, or where the intention of the parties is that the purchaser shall resell or mortgage the property and pay off the vendor out of the proceeds …'"

[96] In the result, it was held that, the vendor having accepted the legal charge in his favour and completed the sale in terms of the contract for sale, the lien was extinguished.

[97] ***Burston Finance Ltd v Speirway Ltd*** [1974] 1 WLR 1648, also cited by Mrs Gibson-Henlin, is to the same effect. In that case, although a legal charge given by a company over property to secure moneys lent to assist in its acquisition was duly registered at the lands registry, it was not registered under the equivalent of section 93.

Walton J accepted that the charge was as a result void, observing (at page 1652) that registration under the Companies Act was necessary "for the purpose of preserving [the charge's] validity as against the liquidator or any creditor of the company".

[98] These cases undoubtedly demonstrate the strength of section 93 in cases in which the court is called upon to deal with charges created by a company. However, purely as a matter of language, it seems to be clear from the actual terms of section 93(1) that the section is only intended to apply to charges that are actually created by the company, a point in respect of which there appears to be a clear consensus among the textbook writers. This is how Professor Paul Davies puts it in Gower and Davies' Principles of Modern Company Law, 8th edn, para. 32-25, for example:

> "…a charge that is not created by the company is valid even if not registered (unless it is an existing charge on property acquired by the company). This means that proprietary interests that arise by operation of law (e.g. solicitor's liens, or vendor's liens), rather than consensually, do not need to be registered."

(To the same effect are (i) Company Law, by Brenda Hannigan, 2nd edn, para. 21-51, footnote 109: "As the charge must be created by the company, security interests arising by law, such as liens and pledges, are excluded from the registration requirements"; (ii) Pennington's Company Law, 7th edn, page 636: "…it is only mortgages and charges which the company creates voluntarily under contracts entered into by it which are registrable. Charges imposed on a company's property by operation of law, such as a charge obtained by a judgment creditor on goods which he has seized, or a vendor's lien on land for unpaid purchase money or the lien over goods or documents enjoyed

by a person who has provided services, are not created by the company, and are therefore not registrable"; and (iii) Buckley on the Companies Acts, 14th edn, page 248: "A right given under the general law, such as a vendor's or a solicitor's lien is not a charge 'created' by the company and does not therefore require registration".)

[99] Dr Barnett referred us to ***London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd*** [1971] 1 All ER 766, in which Brightman J (as he then was) applied Harman LJ's dictum in ***Capital Finance Ltd v Stokes and Another***, holding (at page 779) that "an unpaid vendor's lien is the creature of the law…[it] does not depend on contract…[but] on the fact that the vendor has a right to specific performance of his contract". Accordingly, it was not registrable under the equivalent of section 93.

[100] ***South-Eastern Drainage Board (South Australia) v The Savings Bank of South Australia*** (1939) 62 CLR 603, a decision of the High Court of Australia, was also cited to Mangatal J in the court below. At the material time, land registration in South Australia was governed by the Torrens system. The Real Property Act 1886 accordingly provided that the title of every registered proprietor of land was indefeasible, subject only to such encumbrances as might be notified on the certificate of title and to certain other qualifications set out in the Act. The registered proprietor of a mortgage therefore took priority over all other estates and interests in the land not notified on the certificate of title, save in the exceptional cases mentioned in the Act. The South-Eastern Drainage Act of 1931 imposed certain rates on land for the purpose

of defraying the cost of cleaning and maintaining drains and drainage works in a proper state of efficiency, the relevant section providing that "all rates shall be a first charge upon land in respect of which they are due, and such charge may be enforced by the [drainage] board as if it were a mortgagee under the Real Property Act 1886". The issue which arose was whether the charge so created took priority over a mortgage of land which had been registered on the title some years before the creation of the drainage board's charge.

[101] The court held unanimously that the statutory first charge prevailed over the mortgage, even in the absence of registration of the former. Latham CJ observed (at page 617) that "the charge is created quite independently of registration...[it] is not created by or dependent upon the existence of any instrument", while Starke J said this (at page 622):

> "Charges are created which depend for their efficacy upon the provisions of the South-Eastern Drainage Acts. The statute declares that the apportioned costs and rates shall be first charges. The charges do not depend upon registration nor upon the execution or entry of any instrument. They are complete and effective by reason of the provisions of the Acts creating them. No room so far is left for the operation of the Real Property Act 1886, and the explicit and express provisions of the Drainage Acts must prevail. The charges are made first charges over the land and all interest therein and have priority over all other charges."

[102] Finally on this point, I would mention ***In re Overseas Aviation Engineering (G B) Ltd*** [1962] 3 WLR 594, to which Dr Barnett referred us. This was a case in which a creditor recovered judgment against a company which had a leasehold interest

in registered land. Under a new procedure introduced by the Administration of Justice Act, 1956 ('the 1956 Act'), the judgment creditor then obtained a charging order nisi, which was subsequently made absolute, whereby the company's interest in the land stood charged with the amount of the judgment and the costs of the application. The judgment creditor protected the charging order by registering a caution at the land registry under the Land Registration Act, 1925, but the charging order was not registered with the Registrar of Companies under section 95 of the Companies Act. In a subsequent creditors' voluntary liquidation, the question arose whether the judgment creditor was entitled to rank as a secured creditor by reason of the charging order. The liquidators successfully took the point before Pennycuick J that the charging order was void for non registration within 21 days of its creation, as required by section 95.

[103] The Court of Appeal was unanimously of the view that the learned judge had erred on this point and that registration under section 95 was not necessary to give the charging order validity against the company. Lord Denning MR considered (at page 598) that, the 1956 Act having "revolutionised the whole law relating to the enforcement of judgments against land", it was necessary to resolve the issue by reference to the provisions of that Act. The learned judge observed (at page 599) that, to anyone reading the 1956 Act by itself, it would have appeared that the only form of registration with which the judgment creditor was expected to comply was, in the case of registered land, that prescribed under the Land Registration Act, 1925: "[h]e would not imagine that he would in addition have to register his charging order under section 95...[s]urely if the legislature had intended him to do so, it would have mentioned it

expressly." And further (page 600), the legislature would not "have made a change affecting companies and no other debtors except by an amendment of the Companies Act, 1948". This last point also impressed Harman LJ, whose comment (at page 605) on the submission that the charging order required registration under section 95 was that, if this were so, "it seems that the legislature has put upon a creditor of a limited company a hindrance to enforcing his judgment which did not apply to a natural person…[t]his can hardly have been intended". Russell LJ observed (at page 607) that "section 95 refers only to charges created by the company, which cannot be said of the charge created by the charging order".

[104] These cases are therefore examples of instances in which apparently mandatory statutory registration requirements have been treated as overridden by rights or interests deriving their efficacy otherwise than by virtue of registration, either, as in the case of the vendor's lien, by operation of law or, in the other cases referred to, by virtue of some other statutory provision. It is true that, as Mangatal J recognised, the analogy they provide to the instant case is qualified by the fact that, in order for the Board's charge to take effect, section 31(3)(b) requires it to be "executed and lodged with the Registrar of Titles" by the owner of the land (or, as the learned judge put it at paragraph 56 of her judgment, "[t]he Board's charge is not complete and effective by reason of the provisions creating it"). However, as Brooks JA pointed out in ***Real Estate Board v Jamaica Redevelopment Foundation Inc and the Registrar of Titles*** (at para. [28]), "[a]lthough section 31(3)(b) speaks to the owner of the land lodging the charge, the *proviso* to section 31(5) speaks to 'the charge

created by this section'". Brooks JA therefore considered "that Parliament intended that a charge, lodged pursuant to section 31(3)(b) was a statutory charge". And further (at para. [52]), "once the document has been filed, the charge becomes a statutory charge and its effect is the same as if it had been automatically imposed".

[105] Thus, despite whatever element of volition the language of section 31(3)(b) might imply, it is clear that vendors of land subject to prepayment contracts cannot access moneys deposited in trust accounts for the purposes of meeting inescapable obligations to the revenue for stamp duties and transfer tax, or to provide working capital during the construction period, without executing and lodging as a necessary precondition the charge in favour of the Board referred to in section 31(3)(b) of the Act. To this extent, it seems clear that the Board's charge is, as Mangatal J concluded, mandated by statute. In the case of a charge created by a company, it certainly cannot be said, in my view, to be a charge created voluntarily by the company under a contract entered into by it.

[106] So, the question remains, is the validity of this charge nevertheless dependent upon its registration under section 93(1) of the Companies Act? In considering this question, I have found it helpful to have in mind the objects of the registration requirement under that section. Professor Davies identified three possibilities (Gower and Davies, *op cit*, paras 32-22):

> "First, and most obvious, the aim might be to give potential lenders to the company more accurate information about the company's apparent wealth by revealing the true extent of

> any earlier secured lending that may rank ahead of their own contemplated advances. Such information may also be of interest to credit analysts, insolvency practitioners appointed upon the company's insolvency, shareholders and investors. Secondly (and for reasons aligned with the first objective), registration might be treated as an essential part of the process whereby a person obtains a security interest against the company. Without registration, the security interest would be void, and could not be relied upon as against the unsecured creditors of the company in the latter's insolvency. The usual terminology is that registration is necessary for the 'perfection' of the security. Thirdly, registration might determine priority among secured creditors. For example, priorities among secured creditors could be determined simply by the date of the registration of the security (and not, for example, by reference to the date of creation of the security, or by whether the later taker of a security knew of the earlier one): such a system is generally referred to as a system of 'notice filing'."

[107] As regards the first objective, it seems to me that the requirement in section 31(3)(b) of the Act that the charge executed in favour of the Board must be lodged with the Registrar of Titles will usually suffice to ensure that a potential lender to the vendor will have notice of the existence of a prior charge. Indeed, in the case of a non-corporate owner of land subject to a development scheme, to which section 31(3) applies in the same way as it applies to a corporate entity such as KES, this is the only publicly accessible means by which the objective will ordinarily be fulfilled. In my view, in the context of the entirely new regime for the governance of the real estate development sector that the Act introduced for the first time in 1987, had the legislature intended, additionally, that, in the case of a corporate owner of land, the Board's charge would require registration pursuant to section 93(1) of the Companies Act, it would have so stipulated in section 31(3).

[108] The second objective evokes a similar response. On the face of it, the only steps required in order to perfect the Board's charge are the execution of the charge prescribed by regulation 20, and set out in Form F of the schedule to the Real Estate (Dealers and Developers) Regulations, 1988, and the lodging of that charge with the Registrar of Titles. The Board's charge, which is deemed by section 31(7) of the Act to be a mortgage under the Registration of Titles Act, therefore attracts upon registration under that Act all the usual incidents of such a mortgage, as set out in sections 103-125 of that Act, including, hardly least of all in the instant context, the power of sale in case of default under section 106. Again, I would have expected that, had it been the intention of the legislature to prescribe an additional registration requirement in the case of companies, it would have said so.

[109] And finally, as regards the third objective, the determination of priorities, it is clear that in this context that subject is intended by the legislature to be governed by section 31(5) of the Act, under which, as this court has now confirmed, the Board's charge ranks in priority to all other mortgages or charges on the land save for those created by statute in respect of unpaid rates or taxes. In the light of the plain language of section 31(5), it seems to me that an additional requirement of registration under section 93(1) of the Companies Act, applicable only to corporate owners of land subject to a development scheme, would, from the standpoint of priorities at any rate, clearly be otiose.

[110] There is therefore nothing in the rationale traditionally advanced for the registration regime under section 93 of the Companies Act to suggest that the clear and

unambiguous provisions of section 31 of the Act should, in the case of companies, be read subject to section 93. I agree with Mangatal J that the Board's charge, albeit executed by the company in point of form, is in essence a charge created by section 31 of the Act (as the proviso to section 31(5) in fact characterises it) and not by the company. In these circumstances, it seems to me that the learned judge correctly regarded the Board's charge as analogous to a vendor's lien in terms of its effect, that is, as an interest deriving its efficacy by virtue of the operation of law (that is, the provisions of the Act) and not from any action of the company. In my judgment, therefore, it is not a charge created by the company within the meaning of section 93 of the Companies Act and is not required to be registered under the provisions of that Act.

v. The prior registration issue

[111] This issue arises from the contention in the Board's amended counter-notice of appeal dated 12 June 2012 that the learned judge's decision can also be supported on the basis that "the Board's charge was registered earlier in time and therefore ranks in priority to [CCMB's] subsequent charge". (The Board's charge, it will be recalled, was registered on the certificates of title on 18 September 2006, while CCMB's mortgage was registered on 1 February 2007.)

[112] It seems to me to be clear that, once it is accepted that the Board's charge is valid and enforceable and that the proviso to section 31(5) does not apply, as I have held to be the case, the Board's contention on this issue is, in the light of the clear

provision of section 59 of the Registration of Titles Act, irresistible. That section provides that "instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the time of registration, and not according to the date of the instrument". But it also seems to me to be a purely academic question, in the light of the decision of this court in ***Real Estate Board v Jamaica Redevelopment Foundation Inc and the Registrar of Titles*** that, applying section 31(5) of the Act, the Board's charge also ranks in priority to a pre-existing mortgage not connected with the development of the land. Parliament therefore intended, as Brooks JA put it (at para. [67]), "that the usual order of priorities established by the [Registration of Titles Act] should be altered in this respect".

vi. The trustee *de son tort* issue

[113] The issue on appeal arises from Mangatal J's conclusion (at para. 95) that there was no basis, either in the statements of case or the evidence, "upon which the Court could make a pronouncement that [CCMB] or [JM & Co] are Trustees De Son Tort or caught by [the] handling of trust funds". The Board's challenge to this finding in its amended counter-notice of appeal therefore gives rise to an issue of pleading and a question of the sufficiency of evidence.

[114] We were referred by Dr Barnett and Miss Davis to a number of authorities on this issue and it may be helpful to start with some legal considerations. There is no contest between the parties as to what the concept of a trustee *de son tort* entails.

Stroud's Judicial Dictionary of Words and Phrases (3rd edn, page 3108) defines a trustee *de son tort* as "one who acquires the possession of or dominion over trust property, or to whom such property comes and who chooses to take upon himself the business of a trustee in relation to such property: he cannot, for his own benefit, say that he had no right to act as a trustee". And Halsbury's (Laws of England, 4th edn, volume 48, para. 597) offers the following:

> "**597. Intermeddling with trust**. A person who, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee makes himself a trustee de son tort, that is a trustee by virtue of his own wrongdoing, or, as such a person is also called, a constructive trustee. The responsibility which attaches to a trustee may extend in equity to a person who is not properly a trustee, if he either makes himself a trustee de son tort or actually participates in any improper conduct of a trustee to the injury of the beneficiaries.
>
> A person who is employed as solicitor or agent for trust property may become a constructive trustee or trustee de son tort by intermeddling with the performance of the trust, or by dealing with the property in a manner not warranted by the terms of his employment or agency, or in a manner inconsistent with the performance of trusts of which he is cognisant. A person does not, however, become a constructive trustee merely by acting as the solicitor or agent of trustees in transactions within their legal powers, even though the transactions may be of a character of which a court of equity would disapprove, unless he receives and becomes chargeable with some part of the trust property, or unless he dishonestly assists in a breach of trust on the trustees' part."

[115] Dr Barnett cited a pair of 19th century cases to illustrate the operation of the principle. In ***Lee v Sankey*** (1873) L R 15 Eq 204, a firm of solicitors who had been

employed by the trustees of a will to receive the proceeds of the testator's real estate, which had been sold to a railway company, paid over the money to one of the trustees without the receipt or authority of the other. The money so paid over was lost to the estate by the insolvency of the trustee to whom it was paid. In an action commenced against the firm by the surviving trustee and her children, who were the beneficiaries of the estate, the question was whether the solicitors were personally liable for the loss to the trust estate that had resulted from the improper payment out of the money. It was held that the receipt of one trustee was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two and that they were accordingly personally liable to make good the loss to the trust. Sir James Bacon, V C said this (at page 211):

> "It is well established by many decisions, that a mere agent of trustees is answerable only to his principal and not to *cestuis que trust* in respect of trust moneys coming to his hands merely in his character of agent. But it is also not less clearly established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognizant, is personally liable for the consequences which may ensue upon his so dealing."

[116] In ***Soar v Ashwell*** [1893] 2 QB 390, a trust fund was held by trustees under a will in trust for two persons in equal shares for their respective lives and, after the death of each, in trust as to his share for his children. The fund was entrusted by the trustees to a solicitor employed by them as solicitor to the trust, who invested it, together with other moneys belonging to different trusts, on an equitable mortgage by deposit of title deeds, in his own name. In due course, the mortgagor paid off the

mortgage and the solicitor distributed one moiety of the moneys received, one of the tenants for life having died, among his children who by his death had become absolutely entitled to his share. The solicitor did not account for the other moiety to the trustees, but retained it in his own hands. In an action by the surviving trustee under the will against the executrix of the solicitor, claiming an account of the moiety of the moneys which had been retained by him, the point was successfully taken at trial that the action was statute-barred, it having been filed some 12 years after the mortgage moneys had been repaid.

[117] The surviving trustee appealed successfully against this decision, the Court of Appeal holding that the solicitor fell to be considered as an express trustee of the moneys, in which event the lapse of time did not act as a bar to the action. Lord Esher MR and Bowen LJ based their decision on the ground that the solicitor had received the moneys in a fiduciary relation and as trustee for his clients, the trustees. Lord Esher MR observed (at page 394) that –

> "…where a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his cestui que trusts for all such money or property without regard to lapse of time."

[118] Bowen LJ distinguished between an express and a constructive trustee, stating (at page 396) that "[a]n express trust can only arise between the cestui que trust and his trustee", while "[a] constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour". However, the learned judge went on to say (at page 397), "a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property". The solicitor received the moneys from the trustees, to whom he stood in a fiduciary relation, on the strength of which he received property from them under a trust to them and was therefore bound under a direct trust to them.

[119] Various other examples of the operation of the doctrine of trustee *de son tort* may be found in the authorities cited by Halsbury's for the statement of the law quoted at para. [114] above, and Miss Davis helpfully referred us to two of them, both involving the actions of solicitors. In ***Barnes v Addy*** (1874) 9 Ch App 244, in a much quoted dictum, Lord Selbourne LC said this (at page 251):

> "It is equally important to maintain the doctrine of trusts which is established in this Court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them.
>
> Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind

> throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust.* But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

[120] ***Mara v Browne*** [1896] 1 Ch 199, in which ***Barnes v Addy*** was cited with obvious approval, was also a case in which it was sought to make a solicitor liable for breach of trust. The solicitor invested trust funds in certain mortgages, several of which were found by North J at first instance to be speculative and risky and therefore not such as could be justified as proper investments by a trustee. North J found the solicitor liable to make good the loss which had resulted from the improper investments of the trust moneys, on the basis that the moneys had been laid out by him upon his own responsibility, and not as an agent, and he was therefore liable as a trustee *de son tort*. The Court of Appeal took a different view of the facts and allowed the solicitor's appeal, holding that he had acted only in his character of solicitor for the trustees and therefore could not be held liable as a trustee *de son tort*. A L Smith LJ stated the applicable principle as follows (at page 209):

> "Now, what constitutes a trustee de son tort? It appears to me if one, not being a trustee and not having authority from

> a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong – i.e., a trustee de son tort, or, as it is also termed, a constructive trustee."

[121] Halsbury's also mentions ***Williams-Ashman v Price & Williams*** [1942] 1 All ER 310, in which Bennett J at first instance applied both ***Barnes v Addy*** and ***Mara v Browne***, describing the latter (at page 313) as "a decision that an agent in possession of money which he knows to be trust money, so long as he acts honestly, is not accountable to the beneficiaries interested in the trust money unless he intermeddles in the trust by doing acts characteristic of a trustee and outside the duties of an agent".

[122] Miss Davis also referred us to two cases dealing with the liability of solicitors for alleged breaches of trust. ***Carl Zeiss Stiftung v Herbert Smith & Co and Another*** [1969] 2 Ch 276 was a by-product of litigation between East German and West German foundations, both bearing the name 'Carl Zeiss Stiftung', in which the East German foundation claimed that all the assets and property of the West German foundation belonged to or were held on trust for it. While the action remained pending, the East German foundation brought proceedings for an account against the West German foundation's solicitors, alleging that they had received money from their client and that by reason of so acting they knew all the facts and matters averred and proved or to be proved in the main action and that they had notice that their client's money belonged to the East German foundation. However, no allegation was made against the solicitors' integrity and honesty. The solicitors for their part admitted receiving moneys from the West German foundation, their client, on account of fees, costs and disbursements in

the main action and also admitted that they knew from time to time the averments made against their client by the East German foundation.

[123] Pennycuick J's dismissal of the action against the solicitors was upheld by the Court of Appeal (albeit on a different ground from that relied on by the judge). It was held that a solicitor acting honestly in his capacity as a solicitor for his client was in no different position from any other agent acting for his principal and was not to be imputed with knowledge of a trust merely because, in acting for his client, he knew that it was claimed against his client that there was a trust and such knowledge could not be notice of a trust or notice of misapplication of trust funds. Accordingly, since the solicitors had no notice of a trust or that they had received trust funds from their client, they were not accountable to the East German foundation for the moneys which had come into their hands on account of fees, costs and disbursements. Sachs LJ went on to say this (at page 298):

> "It does not, however, seem to me that a stranger is necessarily shown to be both a constructive trustee and liable for a breach of the relevant trusts even if it is established that he has such notice. As at present advised, I am inclined to the view that a further element has to be proved, at any rate in a case such as the present one. That element is one of dishonesty or of consciously acting improperly, as opposed to an innocent failure to make what a court may later decide to have been proper inquiry. That would entail both actual knowledge of the trust's existence and actual knowledge that what is being done is improperly in breach of that trust – though, of course, in both cases a person wilfully shutting his eyes to the obvious is in no different position than if he had kept them open."

[124] Edmund-Davies LJ (as he then was) considered (at pages 300-301) that some element of "want of probity" is a connecting feature of the cases of constructive trust to which the court was referred and (at pages 303-304) that the following propositions represent the law:

> "(A). A solicitor or other agent who receives money from his principal which belongs in law or in equity to a third party is not accountable as a constructive trustee to that third party unless he has been guilty of some wrongful act in relation to that money. (B). To act 'wrongfully' he must be guilty of (i) knowingly participating in a breach of trust by his principal; or (ii) intermeddling with the trust property otherwise than merely as an agent and thereby becomes a trustee de son tort; or (iii) receiving or dealing with the money knowing that his principal has no right to pay it over or to instruct him to deal with it in the manner indicated; or (iv) some dishonest act relating to the money."

[125] In ***Twinsectra Ltd v Yardley and Others*** [2002] 2 AC 164, a firm of solicitors ('Sims'), acting on the instructions of their client, but in breach of an undertaking given by them to a financial institution as a condition of having been paid loan money on his behalf, paid out the money to Mr Leach, another solicitor who also acted for the client. Mr Leach took no steps to ensure that the money was applied to the purpose for which they had been advanced and simply paid it out on the client's instructions. A substantial portion of the money having been used by the client for other purposes, Sims went bankrupt, the loan was not repaid and the financial institution sued all the parties involved, including Mr Leach. The case against him was based, among other things, on the allegation that he had dishonestly assisted in Sims' breach of trust. The trial judge dismissed the action, on the basis of his findings that (i)

Mr Leach had not been dishonest, although he had deliberately shut his eyes to the implications of the undertaking given by Sims, and (ii) that the undertaking had not created a trust. The Court of Appeal reversed both findings and gave judgment against Mr Leach for the proportion of the money which had been misapplied by the client.

[126] Mr Leach's appeal to the House of Lords succeeded. Their Lordships were unanimously of the view that the Court of Appeal had been correct in concluding that the money received by Sims in exchange for the undertaking was held in trust. However, by a majority (Lord Millett in vigorous dissent), it was held that the Court of Appeal had erred in reversing the trial judge's finding that Mr Leach had not been dishonest and substituting their own finding to the opposite effect. Lord Hutton (with whom Lords Slynn, Steyn and Hoffmann agreed), stated (at para. 38) that a finding of liability against Mr Leach as an accessory to a breach of trust could only be made if "it were established on the evidence that he was dishonest". In coming to this conclusion, Lord Hutton expressly applied the general principle of accessory liability laid down by Lord Nicholls of Birkenhead in the decision of the Privy Council in ***Royal Brunei Airlines Snd Bhd v Tan*** [1995] 2 AC 378, 392:

> "***The accessory liability principle***
>
> Drawing the threads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is

> acting dishonestly. 'Knowingly' is better avoided as a defining ingredient of the principle…" (Emphasis as in the original)

[127] Lastly among the cases, I should mention ***Ellis v Goulton*** [1893] 1 QB 350, to which we were also referred by Miss Davis. In that case, on the sale of premises by auction, the purchaser paid a deposit to the vendor's solicitor as agent for the vendor, under terms which stipulated that it was paid "in part payment of the purchase-money on account thereof". The sale went off through the default of the vendor and the purchaser brought an action to recover the deposit from the solicitor. It was held that the purchaser could not recover the deposit from the solicitor, who was neither his agent nor a trustee of the money for him. Payment to the solicitor was in these circumstances equivalent to payment to his principal. Bowen LJ said this (at pages 352-3):

> "When a deposit is paid by a purchaser under a contract for the sale of land, the person who makes the payment may enter into an agreement with the vendor that the money shall be held by the recipient as agent for both vendor and purchaser. If this is done, the person who receives it becomes a stakeholder, liable, in certain events, to return the money to the person who paid it. In the absence of such agreement, the money is paid to a person who has not the character of stakeholder; and it follows that, when the money reaches his hands, it is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal. If so, it is impossible to treat money paid under these circumstances and remaining in the hands of the agent as there under any condition or subject to any trust in relation to the payer. The solicitor of the vendor is, unless the contrary has been agreed on, the agent of the vendor to receive a deposit on his behalf."

[128] This position is confirmed by Halsbury's (4th edn reissue, volume 42, para. 86), which states that "[i]f the payment is not made to the solicitor as stakeholder he receives it as agent for the vendor".

[129] Under the heading 'Personal liability of third parties involved in a breach of trust', Snell's Equity (31st edn, para. 28-36) distinguishes between cases in which a person receives trust money "beneficially for his own use or merely handled it in a ministerial capacity on behalf of another person". In the former case, the person receiving trust moneys is generally liable to a claim for 'knowing receipt' and is required to make restitution of the amount received. However, in the latter case, where the trust moneys are received in a ministerial capacity, "the defendant is made liable to restore the amount of money initially received by him or the amount which he pays away after he has become aware that the payment would be in breach of trust". Because the primary duty of a person who acts in a ministerial capacity is to comply with the instructions of his principal, "[a] higher degree of fault is required to make a person liable who handles money in a ministerial capacity…[since he] should not be required to breach those instructions unless he is substantially at fault". That higher duty was said in the old cases to be "that the agent must be cognizant of the breach of trust", which "may be tantamount to requiring the defendant to be dishonest in his dealing with the money" (citing ***Lee v Sankey*** – see para. [115] above).

[130] Snell puts a person who dishonestly assists a trustee in committing a breach of trust into a separate category. Applying ***Royal Brunei Airlines v Tan***, his liability is

based on his being an accessory to the trustee's wrong and does not depend on his having received any trust property. Though it is not necessary for the primary breach of trust to have itself been dishonest, the accessory's liability is based on dishonesty and mere negligence will not suffice.

[131] On the basis of this highly selective survey of some of the relevant authorities, I would therefore conclude that, generally speaking, the position appears to be as follows:

1) A person who, not being a trustee and not having authority from a trustee, takes it upon himself to intermeddle with trust matters, or to do acts characteristic of the office of trustee, makes himself a trustee *de son tort*, or a trustee by virtue of his own wrongdoing.
2) A person who is employed as an attorney-at-law or agent for trust property may become a trustee *de son tort* by intermeddling with the performance of the trust, or dealing with the trust property in a manner inconsistent with the performance of the trust of which he is cognisant.
3) A person who receives trust moneys in a ministerial capacity on behalf of another person will be liable to restore the amount of money initially received by him or the amount which he pays away after he has become aware that the payment would be in breach of trust.

4) A person who acts in a ministerial capacity may also incur liability to restore the trust moneys if he dishonestly procures or assists in a breach of trust or fiduciary obligation by the trustee.
5) An attorney-at-law who receives funds on behalf of the vendor in a conveyancing transaction is generally, unless the payment is made to her as stakeholder, the agent for the vendor and payment to her is in effect payment to the vendor.

The pleading point

[132] Against this extended background, I come firstly to the question whether the doctrine embodied in the phrase trustee *de son tort* was sufficiently pleaded in the instant case. For the Board, Dr Barnett submitted that the failure to use that phrase in the fixed date claim form is not fatal to the claim. The court must resist a purely formalistic approach to pleadings and is required to look, not only at the claim form, but also at all the material filed in support of the claim. On this basis, it was accordingly submitted that all the material facts which make up the cause of action arising from an interference with trust funds, for which the phrase 'trustee *de son tort*' is no more than a label, were sufficiently pleaded.

[133] Responding on behalf of JM & Co, Miss Davis submitted that there was nothing in the Board's statement of case (which did not necessarily include the affidavits) to alert JM & Co to the fact that an allegation of a breach of trust was being made against the firm. Further, there was no suggestion that the firm acted improperly or was aware that what was done in this case was in breach of the Act.

[134] In ***Karsales (Harrow) Ltd v Wallis*** [1956] 1 WLR 936, 941, a case which involved a claim for breach of contract, Denning LJ (as he then was) said this:

> "The only real difficulty that I have felt in the case is whether [the] point is put with sufficient clarity in the pleadings. It is not put as clearly as one could wish. Nevertheless, I have always understood in modern times that it is sufficient for a pleader to plead the material facts. He need not plead the legal consequences which flow from them. Even although he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded."

[135] In similar vein, in ***Letang v Cooper*** [1964] 3 WLR 573, 580, Diplock LJ (as he then was) observed that "[a] cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". The learned judge went on to recall that, in the days before the Judicature Act, 1873, causes of action were divided into categories, depending on the factual situation in a particular case, according to the 'form of action' by which the remedy was obtained. But, he concluded, "that is legal history, not current law".

[136] Finally on this point, I would refer to ***In re Vandervell's Trusts (No 2)*** [1974] Ch 269, 321, where Lord Denning MR remarked "[i]t is sufficient for the pleader to state the material facts…[h]e need not state the legal result", and ***Medical and Immuniodiagnostic Laboratory Ltd v Johnson*** [2010] JMCA Civ 42, para. [53], where Phillips JA, citing ***Karsales (Harrow) Ltd v Wallis***, stated that, "[o]nce the facts establishing the cause of action have been pleaded, it is not fatal that the claimant has not identified the cause of action".

[137] Rule 2.4 of the Civil Procedure Rules 2002 ('CPR') defines a statement of case as –

> "(a) a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and
>
> (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court."

(Part 34 deals with requests for information.)

[138] The formal requirements of the rules are that a fixed date claim form must state, among other things, the question which the claimant wants the court to decide; or the remedy which the claimant is seeking and the legal basis for the claim to that remedy; and, where the claim is being made under an enactment, what that enactment is (rule 8.8(a), (b) and (c)). Under the rubric, "Claimant's duty to set out case", rule 8.9(1) requires the claimant to include in the claim form or in the particulars of claim a statement of all the facts on which he relies and rule 8.9(2) stipulates that "[s]uch statement must be as short as practicable".

[139] Authoritative guidance on the role of pleadings in the post CPR dispensation was given by Lord Woolf MR in ***McPhilemy v Times Newspapers Ltd and Others*** [1999] 3 All ER 775, 792-3:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness

> statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."

[140] These observations were expressly approved by the House of Lords in ***Three Rivers District Council v Bank of England (No 3)*** [2001] UKHL 16; [2001] 2 All ER 513 (see especially per Lord Hope of Craighead at para. [50]) and by the Eastern Caribbean Court of Appeal in ***Eastern Caribbean Flour Mills Ltd v Boyea*** (Civil Appeal No 12 of 2006, judgment delivered 16 July 2007). In the latter case, in a notable judgment written by Barrow JA, the court also approved (at para. [50]) the following submission on the role of a statement of case by one of the respondents' leading counsel (Mr Sydney Bennett QC):

> "The purpose of a statement of case is to present the opposite party with a claim stated in sufficient detail to allow that party to understand the factual basis of the allegations being made against him thereby enabling him to respond to the claim by admitting or denying the specific facts and allegations on which that claim [is] based. It is also required to clarify for the Court the facts and assertions underpinning the dispute thereby identifying the issues to be decided by the Court."

[141] However, in ***Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Seebalak*** [2010] UKPC 15, in which ***McPhilemy v Times***

Newspapers Ltd was also cited, the Board made the point (at para. 16) that "a detailed witness statement or a list of documents cannot be used as a substitute for a *short* statement of all the facts relied on by the claimant…[t]he statement must be as short as the nature of the case allows".

[142] I would accept these statements as being equally applicable to a case commenced by fixed date claim form supported by affidavits. In my view, firstly, the pleader is required to set out a short statement of the material facts relied on in support of the remedy sought, sufficient to reveal the legal basis for the claim, but not the legal consequence which may flow from those facts. Secondly, once the claim form itself is generally in compliance with the rules, full details of the claim may be supplied by the affidavit or affidavits filed in support of it (together with any accompanying documents upon which the claimant relies), provided that the documentation, taken all together, is sufficient to enable the defendant to appreciate the nature of the case against him, and the court to identify the issues to be decided.

[143] In the fixed date claim form filed on 28 January 2010, the Board sought, among other remedies, an order that McHugh, KES, CCMB and JM & Co pay over to the Board "a sum equivalent to all amounts received by them under pre-payment contracts". The order thus sought was distinct from the further or alternative remedy prayed for, which was that an account be taken of all monies received under prepayment contracts in respect of the development scheme and that "the Defendants do pay the Claimant such sums as may be found to be due upon the taking of such

accounts…" In other words, while the primary order sought was for payment over of a sum equivalent to all amounts received under prepayment contracts, the order sought in the alternative was for payment of such amounts as may be found to be due after the taking of accounts. The significance of the distinction is, it seems to me, that the latter sum could theoretically be less than the former, after deduction of any amounts that may be found on the taking of the account to be legitimately due to the accounting party, in this case CCMB and/or JM & Co.

[144] Among the grounds relied on by the Board in the fixed date claim form were the following:

> "(1) The First Defendant entered into Agreements for Sale of five lots in the development scheme in the sub-division known as Mountain Valley, Stony Hill, St. Andrew being part of the land comprised in Certificate of Title registered at volume 733, Folios 75 and 76 of the Register Book of Titles with the intent that the purchasers would enter into Construction Agreements with the Second Defendant for the building of townhouse units on the said lots for the said purchasers.
>
> (2) The purchasers paid over various sums of money in respect of the Agreements for Sale and Construction Agreements to the Fourth Defendant who collected the said sums only on behalf of the First and/or Second Defendants.
>
> (3) The Act provides that all amounts received on pre-payment contracts in development schemes must be by virtue of the Act be [sic] held on trust for the benefit of the purchasers from whom the amounts are received and the First Defendant as owner of the land on which the buildings or works are being constructed must lodge a charge on the said land in favour of the Claimant charging the land with the repayment of all amounts received under such pre-payment contracts;

(4) The Fourth Defendant acting on behalf of the First and Second Defendants collected over US$475,000.00 and J$16,332,644.81 under pre-payment contracts in respect of the said development scheme at Old Stony Hill Road, in the parish of Saint Andrew and has not repaid these amounts to the purchasers or paid them over to the Claimant; but has entered into arrangements to pay them over to various persons, including the First, Second and Third Defendants;"

[145] The fixed date claim form was supported by an affidavit sworn to by Ms Sandra Watson, the Board's general manager, on 27 January 2010. In paras 4 – 16 of that affidavit, Ms Watson stated the following:

"4. On May 20, 2005, the Second Defendant applied to the Board for registration as a developer for the purposes of a development scheme at Mountain Valley Hotel, Stony Hill, in the parish of Saint Andrew. A copy of the application marked SW1 is attached hereto.

5. The Board granted the application for registration for this development scheme.

6. Between January 23, 1997 and May 28, 2007 the Second Defendant was engaged in carrying out at least thirteen development schemes at various locations.

7. The Act provides that all amounts received on pre-payment contracts in development schemes must be held on trust for the benefit of the purchasers from whom the amounts are received and by virtue of the Act, the First Defendant as owner of the land on which the buildings or works are being constructed must lodge a charge on the said land in favour of the Claimant charging the land with the repayment of all amounts received under such pre-payment contracts.

8. On September 18, 2006 a mortgage was registered on the Certificate of Title at Volume 733, Folios 75 and 76 for the said land in favour of the Board in respect of all monies received under prepayment contracts pursuant to the provision of section 31 of the Act. On February 1, 2007 a

mortgage was registered in favour of the Third Defendant on the said title. A copy of the Certificate of Title marked SW2 is attached hereto.

9. The Board was provided by the Second Defendant with a signed copy of a Deed of Indemnity dated May 23, 2006 between the First and Second Defendants which indicates that they were acting together in procuring pre-payment contracts for the said development. A copy of the said Deed of Indemnity marked SW3 is attached hereto.

10. On the 13th day of September, 2006 the Second Defendant provided the Board with copies of several sets of prepayment contracts relating to the said Development Scheme.

11. The Fourth Defendant was named in the Agreements for Sale and Construction Agreements as the Attorneys-at-Law having the carriage of sale. Copies of the said Agreements marked SW4 are attached hereto.

12. Based on the information supplied by the purchasers and the Defendants to the Board the following amounts have been collected by or on behalf of the First, Second and Fourth Defendants from the following purchasers in the said Development Scheme:

	US$	J$
Patrick Thelwell	$68,850.00	
Sheryl & Debra Phillibert	-	500,000.00
Janet Edwards	$93,000.00	
West Indies Trust Co. Ltd	$636,750.00	
Herman White	$79,230.89.00	5,100,000.00
Peter & Janet Green	$3,136,500.00?	
Sharonette Lewis	$3,927,500.00?	
Gordon Tewani	-	
Ruddy & Joy McHugh	$6,606,060.00?	

Rosemarie Wright-Pascoe $17,018.90.00 $7,920,351.30

Suzette & Alice Watson $8,500.00.00

John & Althea Saddler $4,812,900.00?

13. From in or around July 2007 the Board began to receive reports that the development scheme was not progressing in accordance with the construction contracts entered into with the several purchasers by the second Defendant and the lots had not been transferred to the purchaser by the first Defendant.

14. The Third Defendant in purported exercise of its power of sale under its said mortgage has been engaged in selling the housing units in the development scheme.

15. The construction of the housing units came to a halt in or around June 2007 and the Board being of the opinion that the default of the first and second Defendants was substantial as to the [sic] amount to a failure of the scheme has been endeavouring to obtain payment of the amounts collected from the purchasers.

16. The Board has been advised that the Third Defendant has received and accepted an offer to sell the property."

[146] In a supplemental affidavit filed on 16 March 2010, Ms Watson produced the certificates of title to the property, showing the mortgages endorsed thereon in favour of the Board and CCMB. She also exhibited a copy of (a) a valuation report dated 24 November 2008, which assessed the open market value of the property to be $145,000,000.00 and the forced sale value to be $116,000,000.00; and (b) a letter from CCMB's attorneys-at-law dated 17 January 2010, which indicated that CCMB had received and accepted an offer of $90,000,000.00 for the purchase of the property.

[147] In his submissions on this point, Dr Barnett also referred to matters disclosed in other affidavits (such as those filed on behalf of CCMB and by Mrs Messado herself). While this additional material was obviously a critical part of the body of evidence which the trial judge had to consider in the final analysis, I will confine my consideration for present purposes to the material provided by the Board in the claim as filed against CCMB and JM & Co. It appears to be clear that, at the very minimum, that material disclosed that the Board in its claim against both these defendants was advancing the following:

1) KES was a registered developer under the Act for the purposes of the Mountain Valley scheme.
2) The Act provides that all moneys received on prepayment contracts in development schemes must be held on trust for the benefit of the purchasers from whom they are received.
3) On 18 September 2006, pursuant to the Act, a mortgage was registered on the certificates of title to the property in favour of the Board in respect of all moneys received under the prepayment contracts.
4) JM & Co, acting on behalf of Mrs McHugh and KES, collected over US$475,000.00 and $16,332,644.81 from purchasers in respect of prepayment contracts in the Mountain Valley scheme, a development scheme.
5) These amounts were not repaid to the purchasers or paid over to the Board and JM & Co entered into arrangements to pay them over to various persons, including Mrs McHugh, KES and CCMB.

6) The housing units in the development scheme have not been transferred to the purchasers and the scheme has failed.

7) CCMB has been engaged in the sale of the housing units in the said development scheme in purported exercise of its powers of sale under its mortgage and has in fact received and accepted an offer to sell the property.

8) The Board's charge ranks in priority to CCMB's mortgage.

[148] On these grounds, the Board sought orders against CCMB and JM & Co for payment over to it of "a sum equivalent to all amounts received by them" under the prepayment contracts. On the face of it, in my view, the claim for payment over of these amounts was plainly being put forward on the footing that (a) moneys received from purchasers under prepayment contracts in a development scheme are statutorily required to be held on trust for the benefit of the purchasers; (b) JM & Co had collected substantial amounts of moneys pursuant to prepayment contracts from such purchasers, but had arranged to pay or had paid them over to third parties, including CCMB, other than for the benefit of the purchasers; (c) in these circumstances, either CCMB or JM & Co, or both of them, had acquired possession of or dominion over the moneys which ought to have been placed in trust for the benefit of the purchasers and had dealt with them otherwise than in accordance with the statutory trust; and (d) CCMB and/or JM & Co should therefore be ordered to restore these amounts to the trust.

[149] Although the label 'trustee *de son tort*' appears nowhere, the matters of fact which were set forth in the Board's statement of case were, in my view, sufficient to attract the legal consequence which it sought, that is, that either CCMB or JM & Co, or both of them, were liable as trustees *de son tort* or constructive trustees of the prepayment amounts on behalf of the purchasers. (I would add, by way of a footnote to this conclusion, that it is clear, from its first response to the fixed date claim form and Ms Watson's first affidavit, that JM & Co had a ready appreciation from the outset of the Board's case that the prepayment moneys had been dealt with otherwise than in accordance with the statutory trusts. In her first affidavit dated 29 March 2010, Mrs Messado observed, at para. 6, in response to Ms Watson's assertion that the Act provides that prepayment amounts should be held on trust, that "I verily believe that pursuant to s. 31 of the said Act monies may be withdrawn from the trust fund on certain conditions"; and, at para. 11, in response to Ms Watson's statement of the amounts collected by the firm from purchasers, "the 1st and 2nd Defendants [Mrs McHugh and KES] requested that the monies received by my firm be paid to them, and we carried out their instructions".) My conclusion on this point is therefore that it was open to the judge on the pleadings to consider whether, on the evidence, the Board was entitled to the orders which it sought against CCMB and JM & Co.

Should the judge have made the orders sought by the Board?

[150] As regards the question of evidence, Dr Barnett pointed out that it was not in dispute that JM & Co had received large sums of moneys paid under prepayment contracts and that the moneys were paid over to third parties otherwise than in

accordance with the statutory mandate that such funds should be deposited in a trust account and dealt with only in the manner prescribed by the Act. Thus, it was submitted, the only issue that remained for consideration was whether JM & Co could escape liability for wrongful dealings with trust property on the ground that it was acting as agent for and on the instructions of KES. As attorneys-at-law, JM & Co must be deemed to be aware of the provisions of the Act and, by acting in contravention of its clear provisions, the firm had intermeddled with the performance of the trusts and dealt with trust funds in a manner inconsistent with the trusts.

[151] Miss Davis in response emphasised JM & Co's position as an agent, submitting that in this circumstance an agent in receipt of trust moneys does not become a constructive trustee unless he knowingly participates in a breach of trust and, in paying out the trust moneys, acted with a lack of probity or in some manner dishonestly. It was submitted that merely to say, as the Board had done in this case, that JM & Co had received moneys in respect of prepayment contracts, was not sufficient to show that the attorneys-at-law were aware that they were acting in breach of the Act in paying out those moneys on the client's instructions. As attorneys-at-law, JM & Co were in fact bound on general principle to hand over the funds received to the client or to pay them at its direction. It was further submitted that the Act places no obligation on an attorney-at-law acting in the scope of her profession with regard to implementation of the provisions of the Act and that that obligation rested with the Board. Had this been the intention of the legislature, it would have said so clearly, so that attorneys-at-law could be clear as to their responsibilities. Accordingly, it was submitted, Mangatal J had

correctly declined to make any finding against JM & Co on the basis that the firm was a trustee *de son tort*.

[152] In relation to CCMB, Mrs Gibson-Henlin submitted that there was no evidence that it had received any moneys paid under prepayment contracts and there was therefore no basis for this court to disturb the judge's finding in favour of CCMB on the trustee *de son tort* point.

[153] As Dr Barnett observed, there is no question that JM & Co collected prepayment moneys from purchasers in the Mountain Valley scheme. On its own accounting, the firm collected some $73,479,343.00 from various purchasers in the scheme (see the schedule attached to Mrs Messado's second affidavit dated 17 February 2011, referred to at para. [14] above). There is also no question that JM & Co paid out all of the moneys collected to KES, or to third parties on its instructions (in fact, the same schedule indicated that the amounts thus paid to or on KES' instructions exceeded the sum collected from the purchasers by several million dollars).

[154] In considering whether in these circumstances Mangatal J ought to have found CCMB and/or JM & Co liable as trustees *de son tort*, it may be helpful to recall the terms in which the Act creates the statutory trust in relation to moneys received under prepayment contracts. Section 29(1) requires the vendor of the land subject to a development scheme to pay all moneys received from a purchaser under a prepayment contract "into a trust account to be maintained by him". Section 29(3) requires all moneys so deposited, together with the interest earned thereon, to be held in the trust

account and, subject to section 31, to be paid to, or for the benefit of, "the persons entitled thereto in accordance with the provisions of this Act". Section 30, again subject to section 31(3), declares that the moneys received from a purchaser under a prepayment contract and deposited in a trust account pursuant to section 29, "shall be held in trust in such account…until completion or rescission". Section 31 delineates the closely defined boundaries within which dealings with trust moneys in trust accounts are permitted.

[155] It is clear from these sections of the Act that it is the vendor under a prepayment contract who has the statutory responsibility to (a) pay all moneys received by him from a purchaser into a trust account and (b) hold those moneys in trust for the persons entitled to them, in accordance with the provisions of the Act. In short, the vendor is the trustee of the funds held under the statutory trust and, by virtue of that, the person primarily responsible to see to it that the trust funds are dealt with as the Act mandates. The imperative nature of this obligation is underscored by section 44(3)(b) and (c) of the Act, which makes it a criminal offence for a person to fail to pay any money received by him as vendor under a prepayment contract into a trust account, as required by section 29(1), or to withdraw any such moneys in contravention of section 31. The moneys received under the prepayment contracts in the instant case having been dealt with otherwise than in accordance with the Act, it is no doubt on this basis that Mangatal J had no hesitation in making the order against KES for payment over of all moneys received under the prepayment contracts.

[156] Unlike KES, the alleged liability of CCMB and/or JM & Co for failing to deal with the prepayment moneys is derivative rather than direct. On the basis of the authorities, their liability will depend, it seems to me, on (i) whether they can be said to have, without the authority of the trustee and with knowledge of the trust, intermeddled with the trust moneys and thus made themselves trustees *de son tort*, in which event an order for payment over of all the moneys received by them pursuant to the prepayment contracts would be appropriate; or (ii) whether, acting purely as agents of KES as the trustee, their role in the matter was limited to that of accessories to KES' breach of the statutory trust, in which case their liability to restore the funds lost to the trust as a result will depend on proof that they acted dishonestly.

[157] The second of these questions is more easily disposed of, since there has been absolutely no allegation, far less evidence, of dishonesty against either CCMB or JM & Co in this matter. The Board's case on this issue has always been and rests squarely on the complaint that moneys paid pursuant to prepayment contracts were received by JM & Co and paid out to various persons in breach of the statutory trust. Any liability to repay these amounts must therefore rest on the resolution of the first question posed in the previous paragraph.

[158] Although the Board also seeks by its counter notice of appeal an order against CCMB under this head, I think it is fair to say that Dr Barnett's energies on this aspect of the appeal were primarily concentrated on the claim against JM & Co. While, as I have already concluded (see para. [62] above), I consider that Mangatal J's order that

CCMB should render an account was in all the circumstances a proper exercise of her discretion, particularly given the conflicting obligations of KES under the Act and the loan agreement with CCMB, I do not think that a positive case has been made out to support the conclusion that CCMB has intermeddled with trust funds. In coming to this conclusion, I have not lost sight of the Board's contention that the learned trial judge failed "to attach sufficient weight to the fact that the Bank knowingly entered into arrangements which breached the statutory trust and such actions have criminal penalties under the Act". However, in the absence of direct evidence of what sums were received by CCMB in respect of purchasers' deposits on prepayment contracts, I would decline to make the order sought against CCMB. It seems to me that the Board's position is adequately protected by the order which the judge made for an account to be taken and for payment over of any sum found to be due upon the taking of the account.

[159] As regards JM & Co, I do not think it can seriously be maintained, that the firm was unaware of the obligations imposed by the Act on vendors in relation to payments made pursuant to prepayment contracts. By early 2005, the Act had been in force for close to 18 years and JM & Co, as attorneys-at-law having carriage of sale in respect of a development scheme, must be taken, in my view, to have been aware of the provisions of the Act, particularly in relation to the protection of purchasers under prepayment contracts. Indeed, in her first affidavit sworn to on 29 March 2010, Mrs Messado essayed an interpretation of section 31, which, although incomplete, at any rate confirmed some passing familiarity with it. I think that it is also fair to note that, in

her oral submissions, Miss Davis accepted that JM & Co ought to have known that the purchasers' deposits were trust funds, although she continued to question whether the firm was also aware that KES was acting in breach of trust. The court is therefore bound to approach this issue, in my view, on the basis that JM & Co knew, or at the very least, ought to have known, that KES, as vendor, had a statutory obligation to deal with the purchasers' deposits in accordance with sections 28-31 of the Act, and not otherwise.

[160] JM & Co's defence was that, as it was obliged to do by the general law of vendor and purchaser, it paid over the purchasers' deposits in the Mountain Valley scheme to KES or to KES' order, as it was instructed to do. As has been seen, Mangatal J, in a view which is challenged by JM & Co, considered (at para. 95) that, in the light of the regime created by the Act, the legal position may well be different "in relation to prepayment contracts and development schemes". Miss Davis, on the other hand, maintains that if Parliament had intended to change the law of vendor and purchaser in relation to the responsibilities of attorneys-at-law in respect of deposits paid by purchasers on account of prepayment contracts in development schemes, it would have said so in so many words. There is much to be said, in my view, in support of both positions. If Mangatal J is wrong, then it seems to me that there might clearly be, as Dr Barnett in fact submitted, a danger that the terms of the Act might be circumvented "by the paying of the trust moneys over to the vendor's agent who then pays it over to a third party consequence free". On the other hand, it is clear from the way in which the requirement to place the prepayment moneys in a trust account is structured that

the intention of the legislature was to impose the statutory obligation on the vendor personally (and the liability to criminal consequences for failing to comply is that of the vendor – see section 44(3)(b)). In these circumstances, I do not think it unreasonable to suppose that, if Parliament had intended to widen the scope of this obligation to include attorneys-at-law, in a manner contrary to the existing law, it would have done so expressly.

[161] But be that as it may, it is certainly beyond dispute that JM & Co came into possession of moneys, albeit on behalf of KES, that the Act required to be lodged in a trust account. So the question remains whether in these circumstances, by paying out these moneys to KES or to KES' order, on the instructions of KES, the firm incurred liability as a trustee *de son tort*. As Halsbury's puts it (para. [114] above), a trustee *de son tort* is a person who intermeddles with trust matters, "not being a trustee, **and not having authority from a trustee**" (emphasis mine). In general, the cases that I have been able to consider all reflect situations in which the defendant's position is in some way adverse to that of the trustees. Thus, for example, in ***Lee v Sankey*** (para. [115] above) the solicitors were sued by the surviving trustee in respect of loss to the trust estate that had resulted from the improper payment out of trust money by the deceased trustee. ***Soar v Ashwell*** (para. [116] above) was an action by the surviving trustee under the will against the executrix of the solicitor, claiming an account of the moiety of the trust moneys which had been retained by him. In ***Mara v Browne*** (para. [120] above), the solicitor's appeal was allowed because the Court of Appeal

considered that he had acted only in his character of solicitor for the trustees and therefore could not be held liable as a trustee *de son tort*.

[162] Similarly in the instant case, it seems to me, on the evidence, that because JM & Co acted at all times purely in its character of attorneys-at-law for KES, there is no basis upon which to hold the firm liable to the Board as a trustee *de son tort,* since, as Sir James Bacon VC observed in ***Lee v Sankey***, "[i]t is well established by many decisions, that a mere agent of trustees is answerable only to his principal and not to *cestuis que trust* in respect of trust moneys coming to his hands merely in his character of agent".

[163] I would therefore conclude on this issue that no order should be made against CCMB and JM & Co on the basis of the doctrine of trustee *de son tort.*

vii. The costs issue

[164] In ground g, CCMB contends that no order for costs should be made against it, as the "defaults alleged" in this case stem from the Board's failure to carry out its duty under the Act. In her written submissions to this court, Mrs Gibson-Henlin also advances the argument that "this is a public interest matter based on the interpretation of a novel statute" and that the usual rule that costs follow the event should accordingly be displaced and no order for costs made against it. Dr Barnett points out that this is the first time that any allegation has been made in the proceedings of a failure by the Board to carry out its statutory duty, but submits in any event that this is irrelevant to the issues to be determined. CCMB brought the appeal in its own interest and,

although the decision in the case may be of interest to the public, this does not make it a public interest matter.

[165] No authority was cited by Mrs Gibson-Henlin in support of this ground. I agree with Dr Barnett that it is clear that CCMB had a considerable commercial interest in advancing its case for priority of its own charge over the Board's charge. The appropriate order for costs in these proceedings was clearly a matter for the discretion of the learned trial judge and no reason has been shown to suggest why the general rule that the unsuccessful party must pay the costs of the successful party should not have been applied (CPR rule 64.6(1)).

[166] JM & Co, by its counter notice of appeal, also challenged the order for costs made in respect of it in the court below, which was that JM & Co should receive "20% costs on the Claim…to be paid by [KES]". The ground of appeal was that the learned judge "wrongly exercised her discretion in not ordering costs to be paid to [JM & Co] and/or the % thereof to be paid by [the Board]". It was submitted that JM & Co "was largely the successful party" in the court below and that the general rule set out in rule 64.6(1) of the CPR ought therefore to have applied. JM & Co also questioned the order that its costs should be paid by KES, observing that KES had made no claim and could not be described as the unsuccessful party.

[167] As regards the percentage of the costs awarded, rule 64.6(4) mandates the court, in deciding who should be liable to pay costs, to have regard to "whether a party has succeeded on particular issues, even if that party has not been successful in the

whole of the proceedings" (rule 64.6(4)(b)). The two remedies sought by the Board against JM & Co that directly affected the firm were (a) an order that the firm pay to the Board a sum equivalent to all amounts received by it under prepayment contracts, and (b) an order for an account and the payment of any sums thus found to be due. The learned judge made the latter order, but not the former.

[168] Unusually, no reasons were given by Mangatal J for the orders she made on this aspect of the matter. While the court is naturally – and on longstanding authority - loath to disturb an order for costs made in the exercise of the clear discretion given by the rules to the judge trying the case, it nevertheless seems to me that the learned judge erred in not awarding a greater proportion of its costs to JM & Co, to reflect the relative degree of success achieved by it in the case. I would therefore allow JM & Co's appeal on this point and increase the percentage of costs payable to it to 50%.

[169] As regards the order that JM & Co's costs should be paid by KES, this court is again at the disadvantage of not knowing the judge's thinking on the matter. However, it is necessary to bear in mind rule 64.6(3), which provides that "[i]n deciding who should be liable to pay costs the court must have regard to all the circumstances". In this instance, it appears that the court may have wanted to reflect its view that KES was ultimately responsible for obliging JM & Co to defend itself in these proceedings and should therefore pay its costs of doing so. In the absence of any reason being advanced to suggest that she was wrong in exercising her discretion in this way, I would not disturb the judge's order.

Conclusion

[170] In the result, I would dismiss CCMB's amended notice of appeal and the Board's counter notice of appeal in SCCA No 87/2011. I would also dismiss the Board's notice of appeal in SCCA 150/2011. I would allow JM & Co's counter notice of appeal in SCCA No 150/2011 in part and substitute for the order as to costs in the court below an order that JM & Co should have 50% of its costs in that court, to be agreed or taxed, and to be paid by KES.

[171] Finally, with respect to the costs of the appeal, I would invite written submissions from the parties within 21 days of the date of the court's judgment in this matter.

PHILLIPS JA

[172] I have read in draft the judgment of my brother Morrison JA. I agree with his reasoning and conclusion and have nothing to add.

McINTOSH JA

[173] I too have read the draft judgment of Morrison JA and agree with his reasoning and conclusion.

MORRISON JA

ORDER:

(a) SCCA No 87/2011

The appeal and the counter notice of appeal are dismissed.

(b) SCCA No 150/2011

The appeal is dismissed. The counter notice of appeal is allowed in part. The order for costs in the court below is varied by substituting an order that the respondent should have 50% of its costs, such costs to be paid by KES Development Company Limited.

(c) The parties are to make written submissions on the costs of the appeal within 21 days of the date of this order.