



[2015]JMCC Comm 1

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
COMMERCIAL DIVISION
CLAIM NO. 2012 CD00092**

BETWEEN	GLENFORD CHRISTIAN	1ST CLAIMANT
AND	MARVA CHRISTIAN	2ND CLAIMANT
AND	WESTSTAR INTERNATIONAL LTD	1ST DEFENDANT
AND	RYLAND T. CAMPBELL	2ND DEFENDANT
AND	WINSTON FINZI	3RD DEFENDANT
AND	FIRSTCARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED	4TH DEFENDANT
AND	WESTSTAR GROUP LIMITED	5TH DEFENDANT
AND	WESTSTAR FINANCE LIMITED	6TH DEFENDANT
AND		
BETWEEN	WESTSTAR INTERNATIONAL LTD	1ST ANCILLARY CLAIMANT
AND	WESTSTAR GROUP LIMITED	2ND ANCILLARY CLAIMANT
AND	WESTSTAR FINANCE LIMITED	3RD ANCILLARY CLAIMANT
AND	WINSTON FINZI	1ST ANCILLARY DEFENDANT
AND	FIRSTCARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED	2ND ANCILLARY DEFENDANT

AND

BETWEEN	WINSTON FINZI	ANCILLARY CLAIMANT
AND	RYLAND T. CAMPBELL	1ST ANCILLARY CLAIMANT
AND	WESTSTAR INTERNATIONAL LTD	2ND ANCILLARY DEFENDANT
AND	WESTSTAR FINANCE LIMITED	3RD ANCILLARY DEFENDANT
AND	WESTSTAR GROUP LIMITED	4TH ANCILLARY DEFENDANT

AND

BETWEEN	WESTSTAR GROUP LIMITED	1ST ANCILLARY CLAIMANT
AND	WESTSTAR FINANCE LIMITED	2ND ANCILLARY CLAIMANT
AND	WESTSTAR INTERNATIONAL LTD	ANCILLARY DEFENDANT

Mr. Hugh Small Q.C. and Ms. Marlene Utter instructed by Alton E Morgan and Company for the 2nd Defendant.

Mr. Paul Beswick, Ms. Georgia Buckley, Ms. Carissa Brady and Mr. Kayode Smith instructed by Ballentyne Beswick and Company for the 3rd Defendant.

Mrs. Julianne Mais-Cox instructed by Dunncox for the Interested Party.

HEARD: November 13, 2014 and January 13, 2015

CIVIL PROCEDURE-APPLICATIONS FOR COURT ORDERS-APPLICATIONS MADE PURSUANT TO A LIBERTY TO APPLY CLAUSE IN A CONSENT ORDER-WHETHER APPLICATION FOR DISCLOSURE AND VERIFICATION OF SUMS A VARIATION OF THE CONSENT ORDER-NO REQUIREMENT FOR DISCLOSURE OR VERIFICATION IN THE RELEVANT PARAGRAPH OF THE CONSENT ORDER-WHETHER THE LIBERTY TO APPLY CLAUSE MAY BE USED FOR SUCH APPLICATIONS-NO FRAUD, MISREPRESENTATION OR CHANGE OF CIRCUMSTANCES.

EDWARDS, J

The Applications

[1] Before this Court are two applications. The parties in these applications represent three of the parties to a Consent Order. The Consent Order was made between Weststar International Limited, Ryland T. Campbell, Winston Finzi, Weststar Group Limited and Weststar Finance Limited. After the parties entered into the agreement, they sought the sanction of the Court and on November 27, 2013, Mrs. Justice Sinclair-Haynes signed the order, with liberty to apply.

[2] Subsequently, the Consent Order became the subject of a dispute. These applications bear testament to that fact. At the centre of this dispute is paragraph 8(c) of the Consent Order, whereby it was agreed that a mortgage debt on a property registered to Mr. Ryland Campbell would be settled in full. At the heart of the Consent Order is the distribution of funds to the parties to the agreement. The Consent Order provided that DunnCox, a law firm, would hold the funds in escrow, as agent, for the purpose of disbursement in the manner set out in the agreement.

[3] The first application was brought by Mr. Ryland Campbell (Mr. Campbell) who sought, inter alia, an order compelling DunnCox, to comply with paragraph 8(c) of the Consent Order by transferring Five Million (5,000,000) Jamaica Money Market Brokers (JMMB) shares to Jamaica Money Market Brokers

Merchant Bank Limited (JMMBMB) from the funds it holds in escrow, in full and final settlement of the mortgage debt for the property registered to Mr. Campbell and which was identified in the Consent Order. The application also sought to have the transfer of these funds done within seven (7) days of the granting of this order.

[4] The second application was brought by Mr. Winston Finzi (Mr. Finzi) seeking an order from this Court directing that Mr. Campbell provide information and specifically documentary evidence of the exact sums it is claimed that he owes to JMMB and which are allegedly secured by mortgage over the property at Volume 1095 Folio 873. In essence Mr. Finzi sought orders directing Mr. Campbell to provide, *inter alia*:

1. Documents creating his indebtedness secured by the mortgage duly stamped by the stamp commissioner;
2. A stamped mortgage deed;
3. Any document creating a lien or encumbrance on the property in question, in favour of JMMB and which is duly stamped by the Stamp Commissioner.

[5] The application also sought an order that compliance be done within seven (7) days of the order, failing which DunnCox be permitted to proceed with paragraphs 8(d) and 8(e) of the Consent Order without regard to 8(c).

[6] The Consent Order contained a "Liberty to Apply" paragraph applicable to all the parties as well as DunnCox and Mr. Finzi's application was purportedly made pursuant to this paragraph. DunnCox appeared at the hearing as an interested party in the proceeding and who, as trustee of the funds, will be directly affected by whatever order this Court makes.

The Submissions

[7] The Court heard both sides. Counsel for Mr. Campbell argued firstly, that Mr. Finzi's application could not be made under the liberty to apply paragraph. Secondly, counsel argued that the Consent Order bore no ambiguity and should be complied with as per the agreed terms. It was submitted that the Consent Order bore no requirement for verification of the mortgage debt and granting any such order would, in effect, vary the terms of the agreement arrived at between the parties. Counsel for Mr. Campbell further submitted that upon a proper reading of the Consent Order, there was no requirement to disclose evidence of the mortgage debt to Mr. Finzi. Counsel urged the Court to restrict the words of paragraph 8 (c) to their ordinary meaning and effect.

[8] Notwithstanding this, Mr. Campbell provided documents to the Court, purportedly evincing the mortgage debt owed to JMMB by him. Amongst those documents were letters of commitment, unstamped mortgage documents and promissory notes. All these documents were executed between Mr. Campbell and the bank (reflected in the documents as Capital and Credit Merchant Bank to which JMMBMB is the successor).

[9] Counsel for Mr. Campbell further submitted that his debt to JMMB was a mortgage debt which complied with the Registration of Titles Act and therefore, the mortgage debt was an enforceable debt which was within the contemplation of paragraph 8 (c) of the Consent Order. Counsel further submitted that the Consent Order made no mention of a legal mortgage, a registered mortgage or a registered mortgage debt. As I understand the submissions advanced by counsel, the Consent Order simply and plainly spoke of a mortgage debt and therefore, insofar as there was either a legal or equitable mortgage over the concerned property, the debt was capable of falling within the ambit of paragraph 8(c).

[10] Counsel also claimed that the act of handing over the certificate of title to the property in question as security for the debt was further evidence which established that a mortgage was executed between the parties. He argued that in the circumstances, the orders being sought by Mr. Finzi was a variation of the terms of the Consent Order which ought not to be permitted.

[11] Counsel for Mr. Finzi on the other hand, submitted that the orders sought are necessary for a number of reasons. Firstly, with the Consent Order being in place, checks were made which revealed that the certificate of title for the property in question disclosed that, at the date of the Consent Order, there was no endorsement indicating there was a mortgage over the property between Mr. Campbell and JMMBMB. In fact, counsel asserted that Mr. Finzi had consistently sought to ascertain from Mr. Campbell the existence of and balance said to be owed on the mortgage through DunnCox but Mr. Campbell failed to provide any such evidence.

[12] It was submitted further that in March 2014 JMMBMB wrote to DunnCox indicating that they held a lien over the property in question by virtue of an undischarged and unregistered mortgage. Counsel for Mr. Finzi alleged that no documentary evidence was, however, provided in support of these assertions. Counsel submitted that it was interesting that the only legal mortgage registered on the title was with respect to Eagle Merchant Bank. It was further argued that the mortgage debt to Eagle Merchant Bank could not be relied on by Mr. Campbell to satisfy paragraph 8(c) as it would be statute barred, unless payments were still being made on account of it.

[13] JMMBMB by letter dated April 2014 to DunnCox, indicated it was prepared to accept five million (5,000,000) JMMB shares in full and final settlement of the debt in the name of Ryland Campbell. Consequently, counsel for Mr. Finzi argued that Mr. Campbell was obliged, under the terms of the Consent Order, to provide the documentary evidence requested. He contended

that paragraph 8(c) must be read in a manner which established that there was a requirement for proof of the existence of a mortgage debt and the amount.

[14] In response to the documents provided to the Court by Mr. Campbell, Counsel for Mr. Finzi urged the Court to reject the documents on the basis that they have not been stamped and could not be taken as evidence of any debt, let alone a mortgage debt. Counsel further submitted that a mortgage deed must be stamped as required by the Stamp Duty Act and any such unstamped document could not be taken as evidence. It was also submitted that these documents bore other disabilities including being undated, pages un-initialed as customary and were also unnumbered. Counsel submitted that these factors led to only one conclusion; that the documents have failed to establish the existence of a mortgage debt.

[15] Counsel further urged the Court to order that proof of the mortgage debt be provided and the sums be verified. Counsel submitted that this position was supported by the repeated references to independent verification throughout the Consent Order. Counsel further submitted that it was within the spirit, and the letter of the agreement, that there be independent verification before payments were made. In the circumstances, and particularly where paragraph 8(c) contemplated only a valid and enforceable legal mortgage debt, Mr. Campbell ought to provide proof of not only the existence of such a debt but also the amount.

The Issues

[16] Both applications raise a number of issues which must be addressed by the Court in resolving the dispute herein. The issues, as I see them are as follows:

1. Whether the matters raised by Mr. Finzi, properly fall within the scope of the liberty to apply paragraph;

2. Whether paragraph 8(c) of the Consent Order contemplated a specific type of mortgage debt;
3. Whether the debt owed to JMMBMB by Ryland Campbell is capable of falling within the mortgage debt which paragraph 8(c) contemplated;
4. If so, whether Ryland Campbell is obliged to provide proof of this debt and the amount?

Issue 1-Whether the Matters Raised by Mr. Winston Finzi Properly Fall Within the Scope of the Liberty to Apply Paragraph

[17] It is settled law that, as a general rule, where there is a final order arrived at by and with the consent of the parties to an action, where in effect it embodies or evidences a real contract which is the conclusion of negotiations between the parties, the Court will give effect to it and will not vary it (per Anderson J in **Stockhausen v Willis** Claim No. HCV 2920 of 2004). Where however, it is foreseen that it may become necessary, after the final order is agreed, to make a subsequent application to the Court for directions, it is usual for the parties to insert a liberty to apply clause into the agreement (see **Causewell & Causewell v. Clacken & Clacken**, SCCA 129/2002).

[18] The principle which was stated in **Christel v. Christel** [1951] 2 All ER, was applied by Straw J in **Rosehall Limited v Charles Farmer & Judith Farmer** CL 1999/ R 096, delivered June 12, 2007. In **Christel** the court had this to say about a liberty to apply clause:

“...the words ‘liberty to apply’ in an order meant that when the order was drawn up, its working out might involve matters on which it might be necessary to obtain a decision of the court; they did not confer any right to ask the court to vary the order”.

Straw J concluded that both parties were entitled to have the consent order enforced but variations could only be made if it was necessary for the working

out of the order and could not be made if they would fundamentally alter the agreement.

[19] The parties are bound by the terms in so far as there are no factors, such as fraud, misrepresentation or non-disclosure of material facts, which may invalidate the Consent Order. The Consent Order represents a true and binding contract with the added fortification of the court's approval. Importantly however, despite the Consent Order containing a paragraph for 'liberty to apply', this does not grant to the Court unreserved nor unrestricted access or power to recreate or restructure the agreement entered between the parties except, as opined by Smith JA in **Causewell**, "on proof of changes in circumstances". Might I also add that the Court should be particularly hesitant where the parties have been represented by counsel, prior to, during negotiations and subsequent to the agreement arrived at. No Court should be quick to intervene and or alter such an agreement but instead should seek to enforce the agreement.

[20] A liberty to apply provision in a Consent Order is intended to supplement the main order in form and convenience so that the main orders can be carried out and should not be used to seek to vary the substantive terms of the order. Importantly, also, a Consent Order must be read in its entirety and in the proper context in order to arrive at its correct reach and effect.

[21] In this particular case, the parties entered into a binding agreement by way of consent. The intentions of the parties are reflected in the various terms of the agreement, which also included the method by which those intentions would be effected. Such an order is binding and may only be set aside if consent was obtained by fraud, misrepresentation, non-disclosure of material facts or any other ground which may invalidate an agreement. I will borrow the words of Mangatal J in **Richardson v Richardson** [2012] JMSC Civil 12, which I cannot improve upon, where the learned judge stated:

"In this case the Consent Order represents a true binding contract between the parties commanded by and bearing the imprimatur of a judge. The fact that the order contained the term "liberty to apply" does not provide the Court with carte blanche to recreate or restructure what the parties have agreed. These words inserted in this type of Consent Order do not enable the Court to deal with matters that do not arise in the course of the working out of the judgment. They do not give the court power to alter the agreement and to reopen the question of the parties' respective entitlement to the property. The Consent Order was not rendered any less final because of the inclusion of the words "Liberty to Apply".

[22] The question then is whether what is being requested by Mr. Finzi in his application is necessary for the working out of the agreement or whether it is a variation of the order as submitted by Counsel for Mr. Campbell. Mr. Finzi's application is for documentary proof of the exact sum owed by Mr. Campbell to JMMBMB secured by a mortgage on his property, including the security documents; any document(s) showing that there is a registered mortgage in favour of JMMBMB over Mr. Campbell's property and an order for DunnCox to proceed to implement the provisions of paragraph 8(d) and 8(e) of the Consent Order if Mr. Campbell failed to provide the documentary proof within 7 days.

[23] In my view the matters requested in Mr. Finzi's application cannot be achieved under the liberty to apply paragraph. The matters raised are prima facie a variation of the Consent Order, which does not require documentary proof before payment is made (see **Poisson & Woods v Robertson and Turvey** [1902], 86 L.T. 302; Digest practice, 678, 2903 cited in **Christel**). However, underlying the application is an issue which prima facie may entitle any of the parties, including the escrow agent, to seek the decision of the court in working out the agreement. Underpinning the application by Mr. Finzi is a dispute as to the interpretation of a paragraph which the Court may be induced to resolve one way or the other, so that the agreement can be carried into effect.

With that, I will therefore move on to what I see as the larger issue of whether the Consent Order contemplated the existence of a legal mortgage in paragraph 8 (c).

Issue 2: Whether Paragraph 8(c) of the Consent Order Contemplated a Specific Type of Mortgage Debt

[24] Paragraph 8(c) of the Consent Order states:

"The sums and shares distributed to Campbell as a shareholder of Group, Arland Investments Limited, Kimbell Trading Company and Columbus Car Rentals Limited be distributed and paid by DunnCox in order as follows:

- (a)
- (b)
- (c) *The mortgage debt on Campbell's house being property registered at Volume 1095 Folio 873 of the Register Book of Titles to be paid to Jamaica Money Market Brokers Merchant Bank Limited in full and final discharge of the same."*

[25] The language of the paragraph is clear. It makes no reference to a legal or registered mortgage but only a mortgage debt on an identifiable property. The court cannot fill in the gaps to read into the agreement what is clearly not there; so that the only interpretation to be given to those words is that there must be a mortgage debt and that debt must be referable to the property stated.

[26] The starting point in resolving this issue therefore, is to identify what amounts to a mortgage debt. A mortgage debt is essentially a debt secured by the mortgaged property. Bearing this in mind, the definition of a mortgage pronounced by Lindley MR in **Santley v Wilde** [1899] 2 Ch 474 is instructive. There he stated that;

"A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given."

[27] Traditionally, the features necessary to constitute a mortgage are threefold. Firstly, there must be a promise by the alleged mortgagor to repay money to the alleged mortgagee or to perform some other obligation. Secondly, as security for repayment of such monies or performance of such obligation, the alleged mortgagor must transfer or assign his estate and interest in property, real or personal, to the mortgagee. The third feature of a mortgage is the distinction between an absolute transfer of title and a mortgage, wherein with a mortgage, the transfer or assignment must be subject to a proviso that, if and when the alleged mortgagor makes repayment or performs the obligation imposed upon him, the mortgagee will retransfer or reassign the property to the mortgagor. Importantly, in **Handevel Pty Ltd v Comptroller of Stamps (Vic)** [1985] 157 CLR 177 at 192, the High Court noted that conveyance may be either in equity or at law and while the mortgage usually secures a money debt, it is not always so.

[28] In sum, the most important elements of a mortgage are:

1. The conveyance of a legal or equitable interest in property;
2. A provision for redemption, that upon repayment of a loan or the performance of some other obligation, the conveyance shall become void or the interest shall be re-conveyed.

Essential to all this, is the loan or benefit which the mortgagor derives from this transaction. This loan or benefit is the mortgage debt and is the debt upon which, if liquidated, the mortgagor's security will be returned.

[29] Upon close examination of the Consent Order, and particularly paragraph 8(c), it is unmistakable that there is no mention of the type of mortgage which existed over the property in question or any specific type contemplated by the agreement itself. This fact is important as the parties had not only been represented by counsel but also entered upon the order by consent. The parties

negotiated the terms of the Consent Order and agreed upon its final terms. This must be balanced with the fact that there was a mortgage registered on the Certificate of Title. The parties were free to make the necessary enquiries into not only the status of this registered mortgage but also enquiries into whether any other mortgage existed, of whatever variant. Importantly, the parties were free to explicitly state whether the payment to be made under 8(c) referred to either a legal mortgage debt or an equitable one.

[30] The parties having benefitted from negotiations and thereafter arriving at a final agreement, this Court must restrain itself from intervening by bringing to life, that which was or should have been carefully negotiated between the parties but was not. The terms in the Consent Order must be given their ordinary meaning and where this would lead to absurdity, a purposive interpretation must be applied. It appears that, whether the ordinary meaning is taken or a purposive approach is applied, paragraph 8(c) refers simply to a mortgage debt and does not envision a particular type of mortgage debt; whether legal or equitable. This Court, therefore, finds that the mortgage debt referred to in paragraph 8(c) is any mortgage debt over the property in question owed to JMMBMB. It matters not, whether the mortgage giving rise to this debt is a legal or equitable one.

Issue 3- Whether the Debt Owed to JMMBMB is Capable of Falling Within the Mortgage Debt Contemplated by Paragraph 8 (c)

[31] It is also important to note that there can either be a legal or an equitable mortgage. The form of a mortgage is often dependent on whether the property is registered or unregistered land. Needless to say, however, absent it being reduced to writing, the parties may not stand on solid footing with an oral agreement.

[32] Section 103 of the Registration of Titles Act (ROTA) directs that the proprietor of land may mortgage that land by signing a mortgage document in a form authorised by one of three specified schedules of the ROTA. Unlike a mortgage of land which is not under the ROTA, a mortgage of registered land (of which this case is one) does not operate as a conveyance of the interest in that land. The registration of a mortgage under the ROTA does, however, provide security to the mortgagee by way of a charge on the land. Registration grants the mortgagee specific powers provided by the ROTA. These powers are in addition to any powers contained in the mortgage document itself. In those circumstances, the parties would have executed a legal mortgage.

[33] Where however, the mortgagor executes a document purporting to create a charge over his land, and this document does not satisfy the requirements of the ROTA, issues will arise as to what effect the document has, if any. Where parties have failed to create a legal mortgage because of non-compliance with specific statutory provisions, an equitable mortgage may have been created. An equitable mortgage may be created "by the delivery to the lender of the title deeds relating to the borrower's land, accompanied by a demonstrably clear intention to treat the land as security for the monies (or benefit) advanced" (see *Graham-Perkins J (as he then was) in Fitzritson v Administrator General* [1969] 11 JLR 288.

[34] In fact, in *Cradock v Scottish Provident Institution* [1893] 69 LT 380, at p. 382, Romer J said:

"To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security."

In those circumstances, it must be abundantly clear, that the mortgage debt would be the monies (or other benefit) advanced and the parties intended to execute a mortgage.

[35] Guidance on the effect of creating an equitable mortgage may further be gleaned from **Fisher and Lightwood's Law of Mortgages** – 2nd Australian Ed. at paragraph 1.28. Perhaps most apt is the assertion that:

"An equitable mortgage is a contract which operates as a security and is enforceable under the equitable jurisdiction of the court. The court carries it into effect either by giving the creditor immediately the appropriate remedies or by compelling the debtor to execute a security in accordance with the contract."
(See **Ashton v Corrigan** [1871] LR 13 Eq 76 and **Hermann v Hodges** [1873] LR 16 Eq 18).

[36] Equitable and legal mortgages may therefore have the same effect. The important common thread woven between and which binds both types of mortgage is an intention on the part of the mortgagor to create a mortgage. Attendant to both types are mortgage debts. There needs to be no specific words to that effect as long as there has been no clause excluding the necessary intent or requirement. Therefore, a mortgagee who receives a title as a means of security has the same rights as a legal mortgagee. (See **Birch v Ellames and another** [1794] 2 Anst 427; 145 ER 924. In that case Macdonald CB said, at page 431:

"The deposit of title deeds as security for a debt, is now settled to be evidence of an agreement to make a mortgage, and that agreement is to be carried into execution by the Court, against the mortgagee or any who claim under him with notice, either actual or constructive, of such deposit having been made."
(See also the Bahamian case of **Barclays Bank PLC v Clarke and others** BS 1998 SC 126).

[37] In **Jamaica Redevelopment Foundation INC v Anthony Everalld Ferguson** (Unreported) 2010 HCV 03288 delivered July 22, 2011, Brooks J (as he then was) relied on the Court of Appeal's decision in **Barclays Bank DCO v Administrator General for Jamaica and another** [1973] 12 JLR 1223, where the Court of Appeal accepted that a borrower from the appellant bank had "executed an equitable mortgage by way of charge and deposited as security a duplicate certificate of title registered"... (Per Fox JA, at page 1225 F). In **Barclays Bank**, where the issue was one of priorities, Fox JA relied on the case of **Lloyds Banking Co. v Jones** where the "deeds had been deposited with the bank prior to the creation of trust by the proprietor of the leaseholds, since deceased and the deeds had been allowed to remain in the custody of the bank. In this way the deeds became available as securities for the equitable mortgage."

[38] In the said **Barclays Bank** case Robinson J.A. (A.g.) (as he then was) described the case as one concerning rival equitable claimants. In referring to the position of one of the equitable claimants, the learned judge of appeal described the circumstances as that "Reid executed an equitable mortgage by way of charge with the bank, by deposit of the duplicate certificate title charging the same land."

[39] Based on the authorities therefore, there are two principles which are applicable to the facts of this case. Firstly, an equitable mortgage may be created in circumstances where the formalities of creating a legal mortgage have not been complied with. In those circumstances, the intention of the parties must be ascertained to determine if an equitable mortgage was executed. Where title to the property in question has been deposited, this is good evidence upon which it can be inferred that an equitable mortgage was created. Secondly, the equitable mortgage may have the same effect as the legal mortgage and may give the same rights to the parties.

[40] The affidavit evidence of Trudy-Ann Bartley filed May 16, 2014 on behalf of JMMBMB indicated that the bank had an equitable mortgage against the certificate of title registered at Volume 1095 Folio 873. The affidavit of Ryland T. Campbell exhibited a number of copy documents purporting to support the existence of such a mortgage. The originals of these documents were being held by the bank and were graciously tendered for the Court's perusal. These documents include; three letters of commitment, two stamped Promissory notes, one unstamped instrument of Mortgage under the Registration of Titles Act and a letter from JMMB Merchant Bank Limited to Alton E. Morgan & Co.

The Effect of the Documents Being Unstamped

[41] The Stamp Duty Act makes it mandatory for certain documents to be stamped. Section 36 of the Act renders such documents inadmissible in evidence for non-compliance with the requirements for stamping. Section 36 states:

"No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court of proceeding for the enforcement thereof."

In this case Mr. Campbell is not seeking to enforce the documents in these court proceedings. The requirement for enforcement proceedings before section 36 can be invoked was recognized in **Lloyd Bent v Maurice Fong** [1995] 32 JLR 67.

[42] In **Brown-Young v Vernon** [1984] 21 JLR 348, an unstamped agreement was admitted into evidence on the basis it was relevant and probative of the issues raised in the case. It was also found to be confirmatory of what the defendant admitted in his pleadings.

[43] I will now determine whether, on the evidence presented and submissions made, the actual debt owed by Mr. Campbell to JMMBMB is capable of falling within the ambit of a mortgage debt as defined in the authorities. There is no gainsaying that the debt owed by Mr. Campbell would fail to establish a legal mortgage. This is so, as there is no mortgage registered on the certificate of title in favour of JMMBMB or its predecessor. The court must therefore, look to see if the circumstances created an equitable mortgage. The first step is to determine the effect of depositing the certificate of title with JMMBMB or its predecessor. The guidance given in **Birch v Ellames and Another** is instructive in this regard. Therefore, I would hold that the deposit of the certificate of title as security for a debt over the property in question would be prima facie evidence of Mr. Campbell's intention to execute a mortgage.

[44] Is there sufficient evidence from which the Court could find that there was a demonstrably clear intention to treat the property in question as security for the benefit advanced? (see **Fitzritson v Administrator General**). In the circumstances, there can be no doubt that Mr. Campbell intended to use the property in question as security for a benefit received. In fact, on examination of the documents provided to this court, it is unmistakable that Mr. Campbell and the bank sought to execute a mortgage. In this case, evidence was provided of a debt from two stamped promissory notes in particular sums denominated in Jamaican and United States Dollars, respectively. There was also tendered, two unstamped, what I will call mortgage documents, which only probative value is to show that they intended to create a mortgage and to treat the property as security for the mortgage debt.

[45] Admittedly, the documents have disabilities which would stymie the creation of a legal mortgage. Since Mr. Campbell is not relying on the existence of a legal registered mortgage, the unstamped mortgage document is of little or no value to the issue to be determined except, as I have said, as further evidence of the intention of the parties. Importantly, since neither Mr. Campbell

nor anyone else is attempting to enforce the unstamped document, then, section 36 is irrelevant. Despite or perhaps in spite of this, the Court must have regard to the act of depositing the title to the property, the intention to be inferred from the parties' conduct and the documents executed and hold that an equitable mortgage was created.

[46] There is now no doubt that the act of depositing a certificate of title by a borrower is prima facie evidence of an intention to create a mortgage (see **Jamaica Redevelopment Foundation INC v Anthony Everalld Ferguson and Barclays Bank DCO v Administrator General for Jamaica and Anor.**) I find that there is sufficient for a Court to find that it was Mr. Campbell's intention to create a Mortgage at the time he deposited his certificate of title with the bank. Further, there can be only one intention derived from the conduct of Mr. Campbell and the bank as well as from the documents presented, despite their disabilities. It seems clear to this Court that Mr. Campbell obtained a loan and deposited the title to the property in question to be used as security for this loan. In such circumstances, a Court would be empowered and so minded to find that there was an equitable mortgage executed and that the debt attendant on that mortgage would be a mortgage debt. Having accepted that the debt in question is a mortgage debt, and having regard to the Court's posture on the previous issue, I have no difficulty in holding that this mortgage debt is capable of falling with paragraph 8(c) of the Consent Order.

Issue 4-Whether Mr. Campbell is Obligated to Provide Proof of the Debt and the Amount

[47] In respect to the issue of whether the matters raised fall within the liberty to apply provision, this court must at the outset bear the guidance of Anderson J in **Stockhausen v Willis**. This court must not and will not seek to vary or restructure the terms of the Consent Order. Indeed, as said earlier, this court is hesitant in the absence of fraud and misrepresentation or change of circumstances or any other vitiating factor, to intervene, considering that the

parties have benefitted from most experienced counsel in arriving at the agreement.

[48] Is Mr. Finzi at liberty to now seek proof of a mortgage debt? Is there, explicitly stated or implicit in the Consent Order, the need for verification of a mortgage debt and its quantum? The answers to these questions appear to be in the negative. It appears to me that verification of the amount of the mortgage debt which is the subject of a paragraph of the Consent Order ought to have been explicitly stated, if so required. The parties, as it is oft said, were well represented and had the opportunity to agree upon the terms of the Consent Order. Paragraph 8(c) does not contain any explicit requirement for verification for the disbursement and neither does the preamble to paragraph 8. I have noted too that Mr. Finzi benefitted under paragraph 8 (a) and (b) which also did not require any sort of verification of the sums to be paid.

[49] It is surprising that Mr. Finzi is insisting at this stage that such verification is necessary when the Consent Order in paragraphs 5-7 explicitly indicated which aspects of it required verification. In fact in paragraph 4 it mandates DunnCox to distribute certain balances in accordance with paragraphs 5, 6 and 7, which require verification by auditors before any payments could be made. Paragraph 8 dealt with a separate distribution and if it had required verification, then I have no doubt that the Consent Order would have said so.

[50] By applying to the Court for proof of the mortgage debt and for paragraph 8 (c) to be set aside, if no such proof is given, Mr. Finzi is effectively applying to vary the Consent Order. Now, a Consent Order may be varied if there is a material change in the circumstances or position of one of the parties. Mr. Finzi claimed that he discovered that there was no mortgage registered on the title in respect of JMMMBMB and that there was an old mortgage registered on the title. He claimed that in discussions he was made to believe that Mr. Campbell's

debt was a registered mortgage. This begs the question as to whether, if Mr. Finzi's claim is true, this would amount to a change in circumstances sufficient to result in a variation of the agreement. The obvious answer must be no. If there had been such a discussion prior to the agreement which (in its entirety is well drafted and which terms are detailed and specific in its paragraphs) and the effect was that Mr. Finzi would not consent unless it was a registered legal mortgage, then I have no doubt that paragraph 8 would so state.

[51] It is also clear from the evidence that the issue of the amount of the debt became a non-issue by the time the order was signed, as the parties, including Mr. Finzi had agreed to the mortgage debt being paid subject only to a separate agreement on a cap of the amount of fifty four million dollars (\$54,000,000.00). Mr. Finzi's only concern therefore, should be that the amount of the debt does not exceed the agreed cap. In any event the issue is moot as Mr. Campbell has now provided proof to the Court and to Mr. Finzi, which appears to have still not satisfied him, in any event.

[52] As to the concern raised by counsel for Mr. Finzi, that a failure to enquire into the amount of the debt and to provide proof of debt would be tantamount to open season, in that Mr. Campbell and indeed JMMBMB could claim any amount; I would only say that is what the escrow agent is for. It is its duty to secure confirmation of the amount of the debt from JMMBMB before payment. In this case consequent upon the application by Mr. Finzi, JMMBMB has provided proof of an equitable mortgage. The Court has not been provided with any accounting as to monies paid down on the mortgage debt. JMMMB claims there is a balance owing in a certain sum for which it is willing to be paid in shares held in escrow on behalf of Mr. Campbell. The Consent Order requires no verification of these sums by an auditor, by a court of law or by the escrow agent. In any event the amount to be paid is way below the cap agreed by the parties.

[53] However, in my view, the escrow agent has the duty to payout under the agreement upon receipt of the statement of the balance of the said debt from the mortgagee and the manner in which it is prepared to accept payment to discharge such debt. Neither this Court nor the escrow agent has any right or duty to audit the mortgage account to verify the sums. This is not part of the agreement.

[54] I understand Mr. Finzi's position, as oft stated by his counsel. He believes that if paragraph 8 (c) fails, the amount which would have been paid under that paragraph would fall into the residual paragraph from which he would take 60% to Mr. Campbell's 40 %. In light of my findings, I do not have to determine that issue.

Disposition

[55] The orders sought by the 3rd Defendant Mr. Winston Finzi in paragraph 2, 3 and 4 of the Notice of Application for Court orders filed May 16, 2014 cannot properly be brought under the "Liberty to Apply" paragraph contained in the Consent Order agreed to by the parties on the 27th November 2013. That application in substance, seeks to vary the terms of the agreement and no fraud, misrepresentation or change of circumstances exists since the order was made to justify a variation.

[56] The Notice of Application for Court Orders filed April 22, 2014 by the 2nd Defendant Mr. Ryland Campbell, paragraph 1 and the submissions in support thereof, taken together with the application filed by Mr. Finzi and the submissions in support thereof, raised issues surrounding the use of the term "mortgage debt" in paragraph 8 (c) of the Consent Order which the Court considered it necessary to determine for the proper working out of the agreement. This I did under the "Liberty to Apply" paragraph contained in the Consent Order.

[57] The mortgage debt contemplated in paragraph 8 (c) could either be a legal mortgage or an equitable mortgage debt. The debt owed by Mr. Campbell to JMMBMB (successors to Capital and Credit Merchant Bank) is a mortgage debt as contemplated by the terms of paragraph 8 (c) of the Consent Order.

[58] The Court therefore makes the following orders:

1. Pursuant to paragraph 8 (c) of the Consent Order dated November 27, 2013 DunnCox, Attorneys-at-Law as escrow agent, is hereby authorized to proceed to comply with the distribution and payment as agreed in paragraph 8.
2. Pursuant to paragraph 1 of the Notice of Application for Court Orders filed April 22, 2014, DunnCox, Attorneys-at-Law is authorized to transfer five million (5,000,000) JMMB shares to JMMBMB from the shares it holds in escrow on behalf of Ryland T. Campbell, in full and final settlement of the mortgage debt for which property registered at Volume 1095 Folio 873 of the Register Book of Titles is held as security by JMMBMB.
3. The said transfer of shares shall be effected within seven (7) working days of the date of this judgment.
4. Each party is to bear their own costs of these applications.

