[2021] JMCA Civ 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 100/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN	**DARNEL FRITZ**	**APPELLANT**
AND	**JOHN COLLINS**	**RESPONDENT**

Captain Paul Beswick and Angel Beswick-Reid instructed by Ballantyne Beswick and Co for the appellant

B St Michael Hylton QC and Shanique Scott instructed by Hylton Powell for the respondent

18 and 19 December 2019 and 15 January 2021

BROOKS JA

Introduction

[1] On 30 September 2016, Batts J dismissed Ms Darnel Fritz's claim against Mr John Collins for fraud, misrepresentation and/or undue influence, and an alternative claim for breach of contract. Batts J also found in favour of Mr Collins, on Mr Collins' counterclaim for the sum of US$159,805.00 plus interest thereon. Ms Fritz has appealed from that decision. The source of the dispute between them is the validity and enforceability of two mortgages registered in favour of Mr Collins on Ms Fritz's title for her house.

[2]

Background

[3] Ms Fritz is a business woman and owner of Darnel Fritz Enterprise, an entity that buys goods from various international vendors and sells them in Jamaica. Mr Collins is a freight forwarder who operates International Freight Consolidators (Ja) Ltd (IFC). Ms Fritz used IFC's services for sending her goods from Miami to Jamaica. As their business relationship developed, Ms Fritz eventually started purchasing goods through Mr Collins, instead of directly from some of the international vendors.

[4] Mr Collins asserts that in or about 2003, he granted Ms Fritz a credit facility for US$40,000.00. He did so, he says, through IFC. He says that Ms Fritz and her mother, Ms Celeste Brown, who were joint proprietors of premises located at 4 Meadowland Drive, Kingston 19, in the parish of Saint Andrew (the property), provided security for the facility by granting a mortgage of the property. This mortgage, he asserts, was registered on the certificate of title for the property. He further asserts that between 2008 and 2010, he and Ms Fritz agreed that he would order goods from Proveedora Jiron Inc (Proveedora Jiron), an international supplier, on her behalf. Goods were supplied by this method, Mr Collins says, but Ms Fritz has not paid for all of the goods.

[5] By October 2010, he asserts, Ms Fritz owed him the original sum of US$40,000.00 and interest thereon as well as monies for goods supplied through their arrangement concerning Proveedora Jiron. He contends that in that month Ms Fritz had ordered two more shipments from Proveedora Jiron, for which, she wished him to pay.

They agreed, he said, that the amount that she owed him, including the amount for the two shipments, would be US$128,000.00. He said, that she agreed to grant him a second mortgage in the sum of US$88,000.00, which together with the first mortgage of US$40,000.00 would secure the debt. By this time, he asserts, Ms Fritz's mother had died and in due time the death had been noted on the title for the property. In pursuance of their agreement and after correspondence between his, then, attorney-at-law, Mr Raymond Clough, and Ms Fritz, the second mortgage was registered on the certificate of title for the property.

[6] There is no dispute that the second mortgage included security for the two shipments in October 2010. The parties, however, dispute the value of the shipments and whether the sums had been repaid. Mr Collins insists that these shipments had a total value of US$54,504.59, which allowed him to calculate the amount to be used for the second mortgage.

[7] Ms Fritz contends that the mortgages were in respect of two separate credit facilities. She accepts that security was required under both these credit facilities, but alleges that, in each case, she only signed a document entitled 'a schedule', in order to obtain the credit. She contends that she was not aware that mortgages were registered on her title until one of her then attorneys-at-law checked the records at the National Land Agency. This check revealed two mortgages on the certificate of title: mortgage no 1226300 for US$40,000.00 registered 20 March 2003 and mortgage no 1700296 for US$88,000.00 registered 12 April 2011, both in favour of Mr Collins. Both mortgages

refer to the statutory power of sale given to a mortgagee by the Registration of Titles Act (ROTA), as being exercisable by Mr Collins.

[8] She asserts that she was told by Mr Clough that in order to receive the second credit facility she needed to note her mother's death on the certificate of title for the property. Having had the death noted she said, she received both shipments mentioned above. She said that they cost less than the figures that Mr Collins asserts that he used to calculate the amount for the second mortgage. She is adamant that she fully repaid Mr Collins for all the goods that she bought through the credit facility. She denies having received the full credit line of US$88,000.00 and she denies owing Mr Collins anything.

[9] Ms Fritz, in her witness statement, stated that her mother did not sign any document, as is alleged by Mr Collins, as, at the time of the alleged signing, her mother was bedridden and suffering from Alzheimer's disease.

[10] The parties were unable to resolve their dispute. Mr Collins threatened to sell the property and, on 15 January 2016, Ms Fritz filed a claim in the Supreme Court seeking:

i. An injunction to prevent Mr Collins from dealing with, or disposing of, the property;

ii. A declaration that Mr Collins has no mortgage over the property;

iii. An order that Mr Collins provides an account of the monies paid under both mortgages;

iv. An order that Mr Collins executes a discharge of mortgage for both mortgages;

v. An order that Mr Collins surrenders and delivers to Ms Fritz the duplicate certificate of title for the property; and

vi. An order that the Registrar of the Supreme Court be empowered to sign any relevant documents that Mr Collins refuses to sign.

[11] Mr Collins filed a defence and counterclaim on 4 April 2016. He disputed Ms Fritz's claim, and by way of the counterclaim, sought relief, including the payment of the sum of US$159,805.00 plus interest, late fees and costs.

[12] It was against that background, and on those issues, that Batts J ruled in favour of Mr Collins.

The appeal

[13] Ms Fritz's further amended grounds of appeal state:

"i. The Learned Judge erred in his interpretation of the facts and as such arrived at the wrong conclusions of both fact and law;

ii. The Learned Judge erred in law in that he failed to appreciate that mortgage No. 1226300 is unenforceable as he erred in his interpretation of the provisions of Sections 30 and 33 of the Limitation of Actions Act and its resultant finding that the statutory powers of sale was not a proceeding within the confines of the act, and this led to the Learned Judge disallowing [Ms Fritz] from amending her Particulars

of Claim to include the limitation defence as the learned judge summarily concluded that there was no defence available pursuant to sections 30 and 33 of the Limitation of Actions Act;

iii. That the learned judge erred in law as he misinterpreted the facts and failed to take into consideration the true value of the mortgaged [sic] amounts and the fact that [Ms Fritz] had paid over US$42,345.00 since November 30, 2010 and had fully or substantially paid for the goods received plus interest by 2014;

iv. Having accepted the evidence of Hazel Edwards Senior Director of Legal Affairs at Jamaica Customs Agency, that the duties and values for the containers were assessed and the custom entries and invoices presented accepted by Customs, that it was not open to the learned judge to ascribe any other value for the goods, especially in light of the fact that the invoices accepted by the learned judge, were prepared by [Proveedora Jiron] and no evidence was brought to authenticate the validity and further to invalidate the invoices presented by [Ms Fritz].

v. The Learned Judge failed to recognize that the issue of the authenticity of the Customs Invoices should have been squarely placed before the Witness from Jamaica Customs and direct evidence should have been brought to substantiate the allegations as he failed to recognize that the agreed documents allegedly created by Proveedora Jiron are hearsay as no supporting evidence has been produced to substantiate their authenticity. Additionally the invoices all indicate full payment and no balance owing to [Mr Collins].

vi. That the Learned judge failed to recognise that the documents related to the claim not being made available to [Ms Fritz] by [Mr Collins] and Proveedora Jiron raises questions of credibility and good faith.

vii. The Learned Judge failed to recognize that the various attorneys on record for [Ms Fritz] were not her agents and could not have acknowledged the

> debt but merely responded to the allegations against [Ms Fritz] based on their instructions."

[14] The following issues arise from these further amended grounds of appeal:

a. the enforceability of the first mortgage;

b. the learned trial judge's choice of invoice value;

c. the true value of the mortgage debts;

d. the authenticity of invoices and the repayment of the debt;

e. the inaccessibility of Proveedora Jiron's invoices and questions of credibility and good faith; and

f. the acknowledgment of the debt.

a. The enforceability of the first mortgage

[15] This issue has two distinct aspects, namely:

i. the effect, if any, of the Limitation of Actions Act (LAA) on the first mortgage; and

ii. the validity of the execution by Ms Fritz's mother.

i. the effect, if any, of the LAA on the first mortgage

[16] This first aspect arose when Captain Beswick, appearing at the trial on behalf of Ms Fritz, before his closing submissions, applied to amend her statement of case to include a claim that the first mortgage was unenforceable due to the expiration of the limitation period. He also sought to amend her defence to counterclaim, to include the allegation that the mortgage was statute barred, and thereby unenforceable. The

learned trial judge granted the application in relation to the amendment of the defence to counterclaim, since the entire loan was due at the time of default, and the counterclaim was filed outside of the limitation period. The learned trial judge however refused the application to amend the claim on the basis that "the *ejusdem generis* rule precludes 'other proceeding' [as used in section 33 of the LAA] being interpreted to include a statutory power of sale". Accordingly, he found that the exercise of the statutory power of sale was not hindered by the LAA (see paragraphs [5]-[10] of the judgment).

[17] The term "e*jusdem generis*", used by the learned trial judge, is defined in Black's Law Dictionary as meaning, "of the same kind, class or nature". The *ejusdem generis* rule is a rule used in interpretation of documents, particularly legislation. Under the rule, where wide, genus-indicating words are used, which are connected to more limited words, the wide words are to be limited to the same character of the limited words (see Halsbury's Laws of England (2018), Volume 96, at paragraph 815).

[18] In this court, Captain Beswick, on behalf of Ms Fritz, argued that the statutory power of sale given to a mortgagee by the ROTA, is subject to the LAA. He submitted that sections 30 and 33 of the LAA applied to this case. Learned counsel argued that the term "other proceeding" as used in section 33 of the LAA includes the statutory power of sale. He further submitted that if a contrary interpretation were applied, that would mean a mortgagee could indefinitely sit on his or her right, which is not the intention of Parliament. He insisted that Parliament intended to limit all

unacknowledged and unserviced debts. Accordingly, he argued that, the learned trial judge incorrectly held that the *ejusdem generis* rule does not allow the statutory power of sale to be included in the term "action, suit or other proceeding". Learned counsel contended that the purpose of the LAA is to extinguish debts and if the statute is not applicable to every debt, then it is nugatory.

[19] Captain Beswick also submitted that there was no valid mortgage between the parties for the following reasons:

a. The first mortgage was not serviced since 2003 and is therefore unenforceable, by virtue of the LAA;

b. Mr Collins, in bringing the counterclaim, brought an action, which, by virtue of section 33 of the Act, is unenforceable;

c. Ms Fritz's mother, who suffered from Alzheimer's disease at the time of signing, was not competent to execute a mortgage; and

d. There was no evidence that the document signed by Ms Fritz was a mortgage.

[20] Ms Scott, on behalf of Mr Collins, argued that section 33 of the LAA applies to the recovery of money, but, she argued, it does not apply to the power of sale created by the ROTA. She argued that it was section 33 of the LAA that is relevant to these proceedings, and not section 30, as Mr Collins sought to recover the debt secured by

mortgage. She further submitted that the LAA only prevents mortgagees from instituting "any action, suit or other proceeding" to recover any debt. She contended that the power of sale would not be considered a proceeding by virtue of the *ejusdem generis* rule or the literal rule of interpretation. Learned counsel relied on, for support, the first instance cases of **Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited** [2015] JMSC Civ 242 and **Gerogics Investments Limited v JMMB Merchant Bank Limited** [2018] JMCC Comm 19 and a decision from this court, **Aspinal Nunes v Jamaica Redevelopment Foundation Inc** [2019] JMCA Civ 20.

[21] In examining these contending positions, it must first be noted that a mortgage under the common law is an entirely different creature from a mortgage under the ROTA, which utilises a Torrens-style system of registration. A mortgage at common law is a conveyance of the mortgaged property to the mortgagee, who is entitled to possession of the property. The mortgagor has the right to redeem the property if he or she satisfies the debt owed to the mortgagee. A mortgage under the ROTA, on the other hand, is a charge on the property. The difference must be borne in mind when considering the decided cases.

[22] It must also be noted that the LAA, having been promulgated in 1881, is older than the ROTA and the Conveyancing Act, both of which were enacted in 1889. Although the LAA would have contemplated a power of sale contained in a mortgage, at common law, it did not, by virtue of its vintage, contemplate the statutory power of sale

given to a mortgagee. Section 30 of the LAA was amended in 1979 by The Law Reform (Landlords and Tenants) Act, but the amendment is not material for these purposes.

[23] Section 7 of the LAA specifies a limitation period of 12 years within which a mortgagee may make an entry, or bring an action or suit to recover land, which is the security for a mortgage, after the last payment of the principal money or interest. Section 7 states:

> "It shall and may be lawful for any person entitled to or **claiming under any mortgage of land to make an entry, or bring an action or suit to recover such land**, **at any time within twelve years next after the last payment of any part of the principal money or interest secured by such mortgage**, although more than twelve years may have elapsed since the time at which the right to make such entry or bring such action or suit shall have first accrued." (Emphasis supplied)

[24] A literal reading of section 7 would not allow an interpretation that it precludes a mortgagee's power of sale. The literal interpretation seems to be aimed at preventing an entry or bringing an action or suit to recover the land. However, the section does preclude the power of sale at common law because of the contractual nature of that power. At common law, that contractual power may only be enforced by court action. This is explained by the learned authors of Baalman, The Torrens System in New South Wales, second edition. In addressing the issue of the mortgagee's power of sale, they state, in part, at page 282:

> "Mortgagees and encumbrances under the [relevant real property act in that state], being merely chargees, have no inherent power to pass ownership of the estate or interest mortgaged or encumbered. To be able to do so they need

> some assistance outside their instrument of charge. [The statutory provisions similar to sections 105 through 108 of the ROTA] give them that assistance. Although a mortgage or encumbrance of Torrens title land might itself contain an express power of sale, in the absence of specialised legislation the rights arising under that power would be contractual, only [sic] requiring Court assistance for implementation. An express power could not *in itself* enable a mortgagee for encumbrance to execute a registrable transfer of an estate in fee. **His ability to do so is entirely the creature of the statute, dependent on occurrence of default under a memorandum of mortgage or encumbrance 'registered under this Act'**: [equivalent of section 105]." (Emphasis supplied)

[25] Section 33 of the LAA, which deals with the recovery of money, is also relevant for this analysis. The section confirms the inability of any creditor, in this case, a mortgagee, after 12 years, to bring any action, suit or proceedings, to recover monies that are secured by a mortgage. This period is extended where a part of the principal sum or interest has been paid, or where the debt has been acknowledged, in writing and signed by the mortgagee or his agent. Where this is done, the action, suit or proceeding can only be brought within the 12 years after the last part payment or written acknowledgment. Section 33 states:

> "**No action or suit or other proceedings shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable, out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same**, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgement of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to

> the person entitled thereto, or his agent; **and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgement,** or the last of such payments or acknowledgements if more than one, was given." (Emphasis supplied)

[26] The English equivalent of section 33 of the LAA was enacted in section 8 of the Real Property Limitation Act (UK) 1874 (37 and 38 Vict c 57). Section 8 of that Act is in identical terms to section 33 of the LAA. The English provision was considered by the Court of Appeal of that country in **Sutton v Sutton** (1882) 22 Ch D 511. In that case, the plaintiff sued for principal and interest under a common law indenture. The defendant asserted that the action was barred by section 8 of the Limitation Act of 1874. He contended that the indenture was an indenture of mortgage and that there had been no payment of either principal or interest for over 12 years.

[27] In analysing the issues in that case, Jessel MR identified that the question that the court had to decide is whether "when no principal or interest in respect of a mortgage debt has been paid, and no acknowledgement in writing has been given for the space of twelve years, an action on the covenant contained in the mortgage deed is maintainable or not".

[28] In the course of his judgment, Jessel MR emphasised that prior to the passing of the section 8 provision, the relevant principle at common law was that "[a]fter the lapse of twenty years without any payment having been made, it was said that it must be presumed that the debt had been satisfied". The common law was further developed, he said, to the extent that "if the mortgagor remained in possession for twenty years,

and did not give any acknowledgement the mortgage would be presumed to be satisfied. He found that the statutory provisions did not "cut down the old right to presumption of payment" but instead gave "legislative authority to that which had previously rested on judicial decision only" (all references are at page 515). The learned judge went on to explain that the statutory provision prevented "any proceeding in which any sum of money secured by a mortgage might be recovered" (see page 516). He answered the question posed for the court by concluding that the "action is barred as well as regards the covenant as the right to sue" (page 518).

[29] Undoubtedly, therefore, in circumstances which satisfy the requirements of section 33 of the LAA, it operates to prevent any action to enforce a power of sale contained in a mortgage, because, as mentioned above, at common law, that power had to be enforced with the assistance of the court. The relevant provisions of the LAA affects both the action against the land as well as, insofar as the common law is concerned, the personal covenants contained in a mortgage.

[30] The right to enter or bring action or suit for the recovery of land, to which section 7 of the LAA refers, expires at the end of 12 years. This is explained at section 30, which states:

> "At the determination of the period limited by this Part [which includes sections 7 and 33] to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, **for the recovery whereof** such entry, action or suit respectively might have been made or brought within such period, shall be extinguished." (Emphasis supplied)

For the present purposes, section 30 affects the rights to which section 7 is concerned. Section 30, therefore, for these purposes, extinguishes any right or title, which the right to bring an action, suit or proceeding to enter upon or recover land secured, where that action, suit or proceeding had not been brought within the relevant period. The important words for that interpretation, are "for the recovery whereof". Section 30 also extinguishes the right to recover any sum of money secured by any mortgage charged upon or payable, out of any land or rent, at law or in equity, to which section 33 refers. Although the terms "land" and "rent" are defined in section 2 of the LAA, those definitions do not assist the present analysis. Undoubtedly, however, a mortgage, at common law, and even under the ROTA, must be considered an interest in land.

[31] There is no doubt, on any interpretation of the sections, that a mortgagee is precluded by section 7 of the LAA, where it applies, from an entry unto the land, or suit or action to recover the land. Reference also may be made, for these purposes to **Mazelie v Prescott** (1959) 1 WIR 358, which was cited by Batts J, in **Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited**.

[32] In **Mazelie v Prescott**, the Court of Appeal of Trinidad and Tobago, in examining legislative provisions, which were almost identical to sections 7 and 30 of the LAA, said, at page 362, of a mortgagee's right to enter land:

> "It is quite clear that the words 'any person' in [the equivalent to section 30] include a mortgagee, for otherwise [the equivalent to section 7] would not have been enacted. [The equivalent to section 7] expressly extends, in the case of a mortgagee, the normal time after the expiration of which an action would be barred by providing that, where

> payment of the principal or interest is made, time shall begin to run from the date of the last payment, although more than [the limitation period in that legislation] have elapsed from the date of the mortgage."

The land in **Mazelie v Prescott** was comprised in a common law title and the mortgage was by virtue of a common law conveyance.

[33] Whereas, thus far, the present analysis demonstrates that, at common law, a power of sale contained in a mortgage would be extinguished by the operation of the LAA, the question remains as to the effect, if any, that the LAA would have on the mortgagee's statutory power of sale created by section 106 of the ROTA.

[34] Section 106 states:

> "If such default in payment [of the principal sum, interest or annuity secured, or any part thereof], or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, **the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit**, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an

> unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power." (Emphasis supplied)

[35] This power enables the mortgagee to sell the mortgaged property, or any part of it, where there has been a default in payment, or a non-performance of covenants, and at least one month has passed since the service of the notice to correct the breach.

[36] In **Dagor Limited**, Batts J addressed the issue of the statutory power of sale and its relation to the LAA. He ruled, at paragraph [11] of his judgment, that there is no time limit on the exercise of the statutory power of sale in the ROTA. He said that it would be strange for the mortgagee to lose his right to his security because he chose to rely on the security of the registered interest as opposed to litigation. He distilled the point that in order to recover the mortgage debt, the mortgagee may:

a. sell;

b. bring an action on the debt;

c. appoint a receiver;

d. re-enter and take possession; and

e. foreclose.

(For completeness, it should be stated that the mortgagee may use any combination of those methods of recovery, except for foreclosure, which may not be pursued simultaneously with any other method (see Australian Land Law in Context, at paragraph 12.4.1).)

[37] It is also instructive to note that in **Public Trustee v O'Donoghue** (1944) 46 GLR 346; [1944] NZLR 687, Finlay J stated that the right to exercise the power of sale given by the relevant statute (the Mortgages Extension Emergency Regulations 1940), is independent of, and separate from, the right to enter into possession. Although not specifically addressing a limitation on the power of sale, he said, in part, at page 346 of the former report:

> "**Any consideration of the questions involved must, it seems to me, proceed upon an appreciation of the fact that the right of entry into possession under a mortgage and the right to exercise a power of sale in a mortgage are mutually independent and separate rights**….
>
> This view of the complete independence of the two rights is consistent with the historical development of each. It is emphasised by the fact that a mortgagee may remain in possession indefinitely without being in any way constrained to exercise the power of sale." (Emphasis supplied)

[38] That view is consistent with the approach by Batts J, who found that the LAA applies to the making of an entry and the bringing of actions (see paragraph [12] of the judgment of **Dagor Limited**), but does not apply to the power of sale (see paragraph [14] of the judgment of **Dagor Limited**). Paragraph [11] of Batts J's judgment in that case, merits reproduction, in part, here:

> "The Defendant is I believe on firmer ground with her construction of the [LAA]. **There is, it appears, no time limit on the exercise of the statutory power of sale contained in the [ROTA].** The mortgage is a charge on the land. This is notified to the entire world. At anytime [sic] at which the premises are sold the mortgagee is entitled to be discharged in priority to all others even the mortgagor. It would be odd indeed if in such circumstances a mortgagee

> could lose its right to be paid merely because he elected to rely on the security of a registered interest (or charge) rather than pursue litigation or force a sale of the premises. There may after all be many good reasons why the sale is postponed: market conditions, sympathy with the mortgagor or satisfaction with the security held…." (Emphasis supplied)

For the reasons stated in **Sutton v Sutton**, the reasoning of Batts J must be confined to the context of the ROTA. The Conveyancing Act also creates a power of sale, but this analysis does not consider the effect, if any, that the LAA has on that power of sale.

[39] In **Gerogics Investments Limited**, Edwards J, as she then was, heard an application for specific disclosure and, at paragraph [32], ruled that although a claimant is barred from claiming on the debt by limitation of time or court order, this does not extinguish the debt, the claimant is merely unable to claim it by way of court proceedings. Edwards J also found that a claimant is not prevented from exercising any other rights, which are not affected by the limitation period or court order. She went further, at paragraph [34], to state that the mortgagee has certain rights, and the power of sale, being one such right, may be exercised without bringing an action to recover the debt. She approved and relied, for support, on **Dagor Limited**.

[40] Morrison P, in **Aspinal Nunes**, a decision of this court, noted, at paragraph [48] that Batts J's judgment in **Dagor Limited** was "highly persuasive" and added that the statutory power of sale does not require an entry or court action by the mortgagee. Importantly, Morrison P stressed the statutory power of sale created by section 106 of the ROTA. He said, in part:

> "…However, section 106 of the [ROTA] empowers the mortgagee to sell the mortgaged land, upon default in payment or performance or observance of covenants for a period of one month, without more…."

[41] The ROTA, being a later statute than the LAA, without more, does not have the statutory power of sale created by section 106 restricted by sections 7, 33 or 30 of the LAA. Those provisions of the LAA affect the common law rights created and implied by the mortgage, but the statutory power is an entirely different creature and without a statutory provision, section 106 remains unrestricted.

[42] Captain Beswick's invitation to utilise the *ejusdem generis* rule in interpreting section 33 to include the power of sale, may now be addressed. An examination of the respective terms, as used in sections 7, 30 and 33, may be helpful in determining the intent of the section. It is helpful to bear in mind that sections 7 and 30 restrict "entry, [and bringing] an action or suit to recover…land", while section 33 restricts the time period for "action or suit or other proceedings…brought to recover any sum of money".

[43] An 'action', according to Words and Phrases Legally Defined, Volume 1, Third Edition, at page 31 is:

> "...any civil proceedings commenced by writ or in any other manner prescribed by rules of court. It has a wide signification as including any method prescribed by those rules of invoking the court's jurisdiction for the adjudication or determination of a...legal right or claim or any justiciable issue, question or contest arising between two or more persons or affecting the status of one of them. **In its natural meaning 'action' refers to any proceeding in the nature of a litigation between a [claimant] and a defendant.** It includes any civil proceedings in which there

> is a [claimant] who sues, and a defendant who is sued, in respect of some cause of action..." (Emphasis supplied)

[44] A 'suit' is defined in Volume 4 of Words and Phrases Legally Defined, (cited above), at page 256, as, "...an action in the courts..."

[45] Words and Phrases Legally Defined, (cited above), in Volume 3, at page 429, defines 'proceedings' in this way:

> "...For this purpose 'proceedings' means an interlocutory proceeding and not after final judgment, and it has no reference to execution. (37 Halsbury's Laws (4th edn) para 35)."

[46] In the present case, the category of words indicated by Parliament, in the context of the sections of the LAA cited above, suggests a reference to any matter advanced in court.

[47] That statutory power of sale, created by section 106, does not obviously fall within such a category.

[48] A "power of sale" is defined by the learned editors of Black's Law Dictionary, Ninth Edition, at page 1289 as:

> "A power granted to sell the property that the power relates to. The power's exercise is often conditioned on the occurrence of a specific event, such as the nonpayment of a debt."

[49] A "power" is defined by the learned editors, at page 1288, as:

> "1. The ability to act or not act; esp., a person's capacity for acting in such a manner as to control someone else's responses....
>
> 3. The legal right or authorization to act or not act;..."

[50] Accordingly, Captain Beswick's invitation to utilise the *ejusdem generis* rule to include a power of sale in the terms "action", "suit" or "other proceeding" cannot be accepted. Batts J's finding that the statutory power of sale does not fall within the ambit of the term "other proceeding", in the context of section 33, with respect, is correct.

[51] In the present case, therefore, despite the expiration of the 12-year limitation period, the first mortgage is still enforceable, but the debt cannot be recovered by bringing an action, suit or proceeding. The principle that the debt is still valid, despite the expiration of the limitation period, was distilled by Fry LJ in **Curwen v Milburn** (1889) 42 Ch. D. 424) where he said at page 434 that, "statute-barred debts are due, though payment of them cannot be enforced by action". The debt on the first mortgage was therefore due and could be enforced by the power of sale.

ii. the validity of the execution by Ms Fritz's mother

[52] The other aspect to be analysed in respect of the validity of the first mortgage is Ms Fritz's assertion that, at the time of signing the "schedule" her mother, Ms Celeste Brown, was bedridden and did not possess the mental capacity to execute a mortgage. The result would be, whether because Ms Brown did not sign, or did not have the mental capacity to execute a document, that the mortgage, on which Mr Collins relies, would be invalid.

[53] Captain Beswick contended that Ms Fritz's mother, Ms Brown, was suffering from Alzheimer's disease at the time she signed the document, which resulted in her being incompetent, and consequently, the mortgage is unenforceable. He argued that there was evidence, including a medical report, indicating that Ms Brown was diagnosed with the disease in December 2002. He argued that this is a progressive and irreversible disease, as stated by Dr Cecile Greaves (see page 34 of the notes of evidence). In light of this, he submitted, she would still have been affected by the disease in 2003 and was not competent to sign a mortgage. Learned counsel argued that the evidence from Dr Greaves is not hearsay evidence because an authorised officer for a company can give evidence of what the company did, despite not having signed the document.

[54] Ms Scott submitted that there was no expert evidence demonstrating that Ms Brown was incompetent at the time she signed the mortgage. She argued that the expert evidence, advanced through Dr Greaves, on behalf of Ms Fritz, was a patient information form, which is hearsay evidence and Dr Greaves can only speak to the state of the hospital records, as she did not treat Ms Brown. She further submitted that if the court accepts the medical records, the learned trial judge had the right to find in favour of Mr Collins. Additionally, she argued that the issue of the mental incapacity must be pleaded and Ms Fritz did not plead it.

[55] Alternatively, she submitted that even if Ms Brown suffered from Alzheimer's disease, there was no evidence indicating the progression of the disease in February 2003. It was submitted that if she was lucid at the time of executing the agreement, it

would still be valid. She further contended that contracts made by persons who were not competent to do so are voidable, if the other contracting party knew of the incapacity.

[56] The learned judge found, based on the oral evidence presented to him, that Ms Fritz collected the mortgage document from, and returned it, executed, to, the office of Mr Heywood, who was then Mr Collins' attorney-at-law.

[57] Although the parties referred to the law concerning hearsay in respect of Ms Brown's medical condition, it is unnecessary to consider that concept. The learned trial judge utilised a practical, irrefutable approach to this issue. He considered the evidence in the medical report that Ms Brown was suffering from Alzheimer's disease. However, he found that Ms Fritz, having arranged the execution of the document in order to secure the first mortgage, and being the sole surviving joint tenant, could not rely on Ms Brown's incapacity to avoid liability under that mortgage (see paragraph [35] d) of the judgment).

[58] The learned trial judge also found that, even if Ms Brown was not competent at the time of execution, Ms Fritz would need to answer to any allegations of fraud. He so found, in view of the fact that she permitted her mother to execute a document, have it authorised by a justice of the peace, knowing her mother to be incompetent. She should not, he ruled, benefit from her own wrong (see paragraph [35] c) of the judgment). The learned trial judge went further to say that when the document was executed, it was attested by a justice of the peace and there is no evidence

undermining this authentication, Ms Fritz cannot deny the validity of the mortgage (see paragraph [35] e) of the judgment).

[59] The learned trial judge's findings of fact and his reasoning cannot be faulted. It is a fundamental presumption of contract law that the parties contracting are of sound mind. If a party contracts with a person who is of unsound mind, there is no *consensus ad idem*, that is, no meeting of the minds. A person cannot allege their own unsoundness of mind to avoid a contract he has entered, unless the other party was aware of the mental incapacity (see **Hart v O'Connor** [1985] AC 1000).

[60] Additionally, an agreement signed by a party suffering from a mental incapacity may still be valid, if, at the time of executing the agreement, the contracting party was lucid. This was distilled by Sir William Grant MR in **Hall v Warren** [1803-13] All ER Rep 57 (see also Halsbury's Laws of England, Volume 75 (2013) at paragraph 614).

[61] In the instant case, Ms Fritz alleges that Ms Brown was suffering from Alzheimer's disease, prior to the execution of the document. There was, however, no evidence that Mr Collins was aware of her incapacity. Ms Fritz cannot successfully raise this issue at this stage to avoid the enforcement of the mortgage. This is especially so as Ms Brown signed at Ms Fritz's instance.

[62] Ms Scott's submissions about Ms Brown signing during a lucid interval are based on pure speculation, as there is no evidence in that regard. The point need not be analysed. Captain Beswick's submissions on this point must fail.

b and c. The true value of the invoices and the mortgage debts

[63] The second and third issues turn largely on the value of the goods imported in October 2010. The total of these shipments is what Mr Collins says that he used to help calculate the value of the second mortgage. That value, he contended, had three components:

a. the sum of US$40,000.00 from the first mortgage, against which, Ms Fritz had paid nothing;

b. the sum of US$33,000.00, which he paid to Proveedora Jiron on Ms Fritz's behalf; and

c. the sum of US$55,000.00 being the approximate value of the two shipments that Ms Fritz had ordered from Proveedora Jiron in October 2010.

The total of US$128,000.00, he said, is an agreed discounted figure, arrived at after negotiations between him, Ms Fritz and her daughter.

[64] Mr Collins insists that the two shipments were respectively valued at US$31,356.80 and US$23,147.79, with a total value of US$54,504.59. He contended that Ms Fritz's lower values for the shipments resulted from the fact that she used false invoices with deflated prices and quantities to the Jamaica Customs Agency (JCA) when she cleared the goods.

[65] Ms Fritz insists that the two shipments cost US$15,033.95 and US$9,680.68, respectively, totalling US$24,714.63. She produced invoices and evidence from the JCA to support her assertions on this issue.

[66] The learned trial judge, having considered the divergent evidence of Ms Fritz and Mr Collins, preferred Mr Collins' evidence. He found, at paragraph [38] j-m, that the parties had agreed that Ms Fritz owed Mr Collins US$128,000.00:

> "j. In or about October 2010 the Claimant asked the Defendant to finance two more shipments from Proveedora. One for US $31,318.80 and the other for US $23,147.79.
>
> k. At this juncture the Claimant's total liability to the Defendant inclusive of the first mortgage, the payments made on her behalf and the two (2) shipments of October 2010, totalled US $138,974.00.
>
> l. It was agreed between both the Claimant and the Defendant that her total liability would be settled at US $128,000 and that a further mortgage of US $88,000, over the same premises, would be granted in order to secure the sums due and owing.
>
> m. In other words, the total due of US $128,000 would be secured by both mortgages."

[67] The learned trial judge indicated, at paragraphs [36] and [37] of the judgment, that he preferred the evidence of Mr Collins, in relation to the value of the shipments. He indicated at paragraph [37] that he accepted the amount that the mortgage secured. He said:

> "It is not part of my task, nor particularly relevant to my enquiry, to determine whether there was a fraud on the revenue or if so who was responsible. **The evidence of Mr. Collins, and which I accept, is that he paid for goods supplied to Miss Fritz of a certain value. Proof of that is supplied by invoices submitted to her. Proof of her liability to him is contained in the two mortgages and if necessary, supported by her several overtures to settle and promises of payment**." (Emphasis supplied)

[68] Ms Fritz criticizes these findings as being unreasonable. Captain Beswick submitted that it is Ms Fritz's position that the document she signed was a schedule to receive a line of credit valued at US$88,000.00, not a mortgage and she did not obtain independent legal advice. He contended that she did not receive the sum of US$88,000.00 and asserted that the learned trial judge misinterpreted the true value of the imported goods. He argued that Ms Fritz received two shipments valued at a total of US$24,714.63, which, he submitted, was confirmed by the witness from the JCA, Ms Hazel Edwards, the JCA's Senior Director of Legal Affairs. This evidence, learned counsel contended, should have been accepted, as the JCA is a government authority, which would provide independent expert opinion on the value of the two shipments.

[69] Learned counsel also contended that Ms Fritz produced receipts, in her possession, of payment to Mr Collins valued at US$42,345.00. He argued that, from the invoices, which were unrebutted evidence, it shows that she settled all the invoices that were outstanding to Mr Collins and made excess payments. He further argued that there were invoices which indicated that items were billed to and shipped to Ms Fritz, which were direct purchases by her from the supplier and that Mr Collins cannot rely on those invoices to prove any debts owed by Ms Fritz. He contended that the learned trial judge erred in relying on these invoices.

[70] Ms Scott asserted that the learned trial judge arrived at his finding of fact as to the true value of the debt by assessing the evidence and the witnesses' demeanour in the witness box. She submitted that this court will only set aside a trial judge's findings

of fact in exceptional circumstances. She further submitted that this court should not interfere with the learned trial judge's ruling as none of the exceptional circumstances arise in this case and there was evidence that Ms Fritz did not satisfy, in full, the debt owed to Mr Collins.

[71] It is well established that this court will not lightly disturb a trial judge's finding of fact. It will only disturb the finding of fact if it is not supported by the evidence or if the advantages that a trial judge possesses, of being able to assess the credibility of the witnesses or the evidence, do not explain or justify that judge's findings (see the Privy Council decision of **Industrial Chemical Co (Ja) Limited v Owen Ellis** (1986) 23 JLR 35, which was cited by this court in **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7).

[72] The principles by which an appellate court should operate, in respect of findings of fact, were again confirmed by the Privy Council in **Bahamasair Holdings Ltd v Messier Dowty Inc (Bahamas)** [2018] UKPC 25. Their Lordships said, in part, in this regard, at paragraphs 35 and 36:

> "…the Judicial Committee of the Privy Council has the power to review factual findings. It will, however, review findings of fact based on oral evidence with great caution, and will not normally depart from concurrent findings of fact reached by the courts below.
>
> 36. The basic principles on which the Board will act in this area can be summarised thus:
>
> > 1. '… [A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and

> in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere …' - *Central Bank of Ecuador v Conticorp* SA [2015] UKPC 11; [2016] 1 BCLC 26, para 5.
>
> 2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination - *Anderson v City of Bessemer* [(1985) 470 US 564], cited by Lord Reed in para 3 of [McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477].
>
> 3. The principles of restraint 'do not mean that the appellate court is never justified, indeed required, to intervene.' The principles rest on the assumption that 'the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities.' Where one or more of these features is not present, then the argument in favour of restraint is reduced - para 8 of *Central Bank of Ecuador*."

[73] In the present case, there is evidence to support the learned trial judge's findings of fact. Mr Collins presented evidence in which he compared the prices of goods included in the two shipments in 2010 on the invoices presented to the JCA by Ms Fritz (see pages 181 and 182 of the record of appeal), and the invoices submitted to her by his company (see pages 180 and 190 of the record of appeal). He also went further to compare the prices of these goods set out in invoices from previous years and later years in an effort to suggest that the figures on the invoices presented to the JCA, were incorrect (see exhibit 5).

[74] The issue for resolution by the learned trial judge was whether the documents asserted by Ms Fritz, or those produced by Mr Collins, were the appropriate documents for ascertaining the value of the debt. In his assessment of the evidence the learned trial judge found that Ms Fritz was not a truthful witness on a number of issues, including whether she had only signed a "schedule" and not a mortgage. He found that her evidence was inconsistent and incredible (see paragraphs [29] and [30] of the judgment). He also said, at paragraph [31] of the judgment that, in relation to Mr Collins' evidence:

> "...He was admirably able to explain the details of the account notwithstanding extensive cross-examination. I was generally impressed with his evidence and where it conflicted with [Ms Fritz's] preferred his account."

The learned trial judge confirmed this view at paragraph [36] of the judgment in dealing with the invoices. He said: "I accept the account of Mr. Collins as to the invoices he delivered to [Ms Fritz]".

[75] This was a question of credibility. Accordingly, there is no basis for this court to disturb the learned trial judge's finding of fact as to the value of the invoices or the value of the mortgages.

d. The authenticity of invoices and the repayment of the debt

[76] Captain Beswick argued that the fact that the invoices purportedly prepared by Proveedora Jiron, being admitted into evidence, does not mean that Ms Fritz accepted them. He relied on **Desmond Robinson and Another v Brenton Henry and Another** [2014] JMCA Civ 17 in support of this submission.

[77] He also argued that it was wrong for the learned trial judge to accept the invoices submitted by Mr Collins. The only reason, he argued, that Ms Fritz made steps to secure money to pay Mr Collins, was because Mr Collins' attorney-at-law told her that she owed money. Captain Beswick contended that Ms Fritz attempted to secure the money because she was afraid to lose her house. He submitted that this cannot be used as proof that she owed the money alleged by Mr Collins. He also argued that section 28 of the Civil Procedure Rules (CPR), dealing with disclosure of documents, is not applicable in this instance.

[78] Ms Scott contended that the invoices relied on by Mr Collins were included in the list of documents filed on 25 August 2016 and also in the agreed bundle of documents. She further contended that Ms Fritz did not file a notice requiring Mr Collins to prove the documents at trial, and so, pursuant to rule 28.19 of the CPR, the invoices are deemed to be authentic.

[79] An analysis of this issue may properly start with rule 28.19 of the CPR, which provides that a party is deemed to admit the authenticity of documents in certain circumstances. It states:

> "1) A party shall be deemed to admit the authenticity of any document disclosed to that party under this part unless that party serves notice that the document must be proved at trial.
>
> 2) A notice to prove a document must be served not less than 42 days before the trial."

[80] By virtue of this rule, in the absence of a notice to prove, the invoices are deemed to be authentic. The learned trial judge considered the documents presented by both parties and "accepted the account of Mr Collins". He cannot be faulted for doing so. The documentation submitted by Mr Collins revealed that Ms Fritz had not repaid the debt to Mr Collins.

[81] In **Desmond Robinson**, Panton P, at paragraph [27], stated that the fact that a diagnostic report was agreed between the parties to be admitted into evidence, did not mean the judge was obliged to accept the report. In the instant case however, the parties, by virtue of rule 28.19, agreed to the admission of the invoices from Proveedora Jiron and, importantly, the learned trial judge accepted their contents and Mr Collins' explanation of them.

e. The inaccessibility of Proveedora Jiron's invoices and questions of credibility and good faith

[82] Captain Beswick submitted that Ms Fritz attempted to obtain a copy of her file from Mr Collins, but did not receive same, yet Mr Collins relied on documents from Proveedora Jiron, which suggested that the invoices that she presented to the JCA were incorrect. Learned counsel argued that Mr Collins is either negligent or grossly incompetent for his assertion that he did not have invoices for the goods he shipped. He added that this raised questions of credibility and good faith on the part of Mr Collins.

[83] Ms Scott submitted that the documents were disclosed to Ms Fritz, by way of the list of documents and the agreed bundle of documents.

[84] Ms Scott is on good grounds with these submissions. The documents were submitted in the list of documents and agreed bundle of documents. Accordingly, Ms Fritz had the opportunity to access these documents to make the necessary calculations. In these circumstances, no questions of credibility and good faith arise.

f. The acknowledgment of the debt

[85] Captain Beswick asserted that even if the first mortgage of US$40,000.00 was valid for the purposes of an exercise of the power of sale, the LAA would render Mr Collins' counterclaim unenforceable. This is because, learned counsel submitted, on Mr Collins' account, Ms Fritz's last date of service of the mortgage was in 2003.

[86] Ms Scott submitted that the LAA may affect the counterclaim for the debt but it would not cause the debt to be unenforceable.

[87] The counterclaim is an "action" and is subject to the restrictions imposed by the LAA. The counterclaim may, however, succeed, provided there was an acknowledgment of the debt, which operates to revive it.

[88] The learned trial judge found that Ms Fritz, or her agent, acknowledged the debt, pursuant to section 33 of the LAA. The total balance agreed for the second mortgage, being an amount exceeding the first mortgage, acknowledged the first mortgage and its debt (see paragraphs [41] and [42] of the judgment).

[89] Captain Beswick conceded that where the mortgagor or his agent acknowledges a debt, it is not extinguished. He, however, takes issue with the fact that Mr Collins did

not address the issue of acknowledgment before the court. This, he argued, would be more important since it is Mr Collins' position that Ms Fritz made no payments on the first mortgage, since its signing in 2003, which would make the limitation defence live. Additionally, Captain Beswick submitted that Mr Collins should have stated this position, in keeping with his duty of disclosure.

[90] He argued that the letter dated 22 March 2010, from Ms Linda M Wright, attorney-at-law, which was sent to Mr Collins, on behalf of Ms Fritz, acknowledged a debt of US$33,000.00 owed to Proveedora Jiron, not Mr Collins. This, he submitted, was not an acknowledgment of a debt owed to Mr Collins by Ms Fritz's agent. Letters were also written by Mr Raymond Clough, Mr Collins' attorney-at-law, stating debts owed, however, he submitted that these letters do not constitute an acknowledgment as Mr Clough was acting on behalf of Mr Collins, not Ms Fritz.

[91] Ms Scott submitted that Ms Fritz and her agents acknowledged the debt. These acknowledgments included letters from her previous attorneys-at-law as well as emails from various family members. She also argued that Mr Clough wrote letters to various financial institutions, at her request, which made him her agent.

[92] As indicated above, section 33 of the LAA provides that where a portion of the principal sum or the interest is paid or there is an acknowledgment, in writing and signed by the mortgagor or his agent, to the mortgagee or his agent, then there is a restarting of the limitation time, from the date of the last payment or acknowledgment. The mortgage document outlines that the principal sum should have been paid on 25

February 2008, however, the interest on the unpaid sum was to be paid from 25 February 2003 and to continue until the mortgage was fully paid. The relevant portion of the first mortgage states:

> "FIRSTLY: To pay to the mortgagee the Principal sum of Forty Thousand United States Dollars (US$40,000.00) on the 25th day of February 2008.
>
> SECONDLY: To pay to the mortgagee so long as the said principal sum or any part thereof shall remain unpaid, interest on the said sum, or on so much thereof as shall for the time being remain unpaid, interest on the said sum at the rate of ten per centum per annum (10%) by equal monthly payments of $333.33 from the 25th day of February 2003 such payment to continue on the 25th day of each month and every subsequent month until the said mortgage has been fully paid and satisfied."

[93] It is unclear when the last payment was made under the first mortgage, if any was made. It is Ms Fritz's evidence that she did not keep proper records of the transactions between them (see paragraph 35 of Ms Fritz's witness statement). Mr Collins' evidence is that Ms Fritz never paid any sums toward the first mortgage (see paragraph 14 of his witness statement and page 62 of the notes of evidence). Additionally, there were no receipts tendered covering this period, to prove payment. On Mr Collins' evidence, Ms Fritz was in breach from 25 February 2003, when the first interest payment was due, but not paid. The limitation period being 12 years, the time started running from 25 February 2003, being the date the contract was broken. This principle was enunciated by K Harrison JA in **Medical and Immuniodiagnostic**

Laboratory Limited v Dorett O'Meally Johnson [2010] JMCA Civ 42. He stated, at paragraph [5], that:

> "The general rule in contract is that the cause of action accrues not when the damage is suffered but when the breach occurred. Consequently, the limitation period runs from the time the contract is broken and not from the time that the resulting damage is sustained by the plaintiff."

[94] Accordingly, the end of the recovery period of the debt would be February 2015.

[95] Prior to the end of the 2015 limitation period, First Global Bank wrote a letter, dated 19 March 2010, to Mr Collins' freight forwarding company indicating that they were instructed by Ms Fritz to advise him that she has sought financing from their institution. The letter, which is at page 160 of the record of appeal, states:

> "…
>
> At the request of captioned, we write to confirm that she has approached us for financing in the amount of One Million, One Hundred Thousand Dollars ($1,100,000.00).
>
> Her application is being favourably considered at this time and we expect to complete processing within the next fourteen days.
>
> This letter is not an undertaking by First Global Bank to pay any monies on behalf of [our] Client. We are therefore not obliged to pay over any funds unless directed by our Client so to do.... "

[96] Strictly speaking, one would need to imply an acknowledgment as there is no mention of an amount due and that a debt is owed to IFC or Mr Collins. A more reassuring acknowledgment is gleaned from the letter of Ms Fritz's then attorney-at-law, Ms Linda Wright, dated 22 March 2010, addressed to IFC, attention Mr Collins,

indicating that the sum of US$33,000.00 was owed and arrangements would be made to settle the debt. It appears at page 161 of the record of appeal and reads:

> "...
>
> Attention: Mr John Collins
>
> Dear Sir:
>
> **RE: MONIES OWED TO PROVEEDORA JIRON INC.**
>
> **I act for and on behalf of Mrs Dawn (sic) Fritz** for caption.
>
> I am advised that **the sum of USD. $33,000.00 is owed**. My client has made arrangements to pay her debts. I have enclosed letter from First Global Bank indication (sic) my client will be the recipient of a loan within 14 days. My client is undertaking to pay the sum of USD$6,000.00 on the receipt of that loan and a further payment of USD$5,000.00 by April 30, 2010.
>
> Further arrangements will be made in respect of the balance owed during the month of April.
>
> My client anticipates your cooperation...." (Emphasis supplied)

[97] Captain Beswick argued that Ms Fritz's attorneys-at-law were not her agents. This argument cannot be accepted. The learned editors of Halsbury's Laws of England, 2008, Volume 1, 5th edition, at paragraphs 29 and 30 explain the nature of the relation of agency as follows:

> "The terms 'agency' and 'agent', in popular use, have a number of different meanings, but in law the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. **The relation of agency arises whenever one person, called the 'agent', has authority to act on**

> **behalf of another, called the 'principal', and consents so to act.**
>
> The authority of the agent may be derived expressly from an instrument, either a deed or simply in writing, or may be conferred orally. Authority may also be implied from the conduct of the parties or from the nature of the employment. It may in certain cases be due to the necessity of circumstances, and in others be conferred by a valid ratification subsequent to the actual performance. In addition, a person may appear to have given authority to another, and acts within such apparent authority may effectively bind him to the third party." (Emphasis supplied)

[98] The learned editors of Halsbury's Laws of England clearly state that authority may be implied or the appearance of authority may bind a person to the third party. In this case, Ms Wright expressed that she acted for and on behalf of Ms Fritz. Ms Fritz has not denied that Ms Wright was acting on her behalf. She has even stated in her witness statement that she hired attorneys to negotiate and end the matter (see paragraph 28 of Ms Fritz's witness statement). This is sufficient to bind Ms Fritz. Ms Wright was therefore Ms Fritz's agent for these purposes.

[99] At first glance, this letter does not appear to be an acknowledgment but if it is taken in its appropriate context, its true identity is revealed. The arrangement which existed between the parties at that time was that Mr Collins would order goods from Proveedora Jiron, on behalf of Ms Fritz. This is admitted by Ms Fritz. She notes this at paragraphs 17 and 18 of her particulars of claim. She stated:

> "17. **All goods received by [Ms Fritz] from Providora (sic) were shipped solely through [Mr Collins'] company**, International Freight Consolidators (Jamaica) Limited as he was the buyer and the freight forwarder.

18. **Between February 2008 and February 2010**, [Ms Fritz] received several shipments from Providora (sic) through [Mr Collins]." (Emphasis supplied)

[100] These assertions were repeated in her witness statement at paragraphs 15 and 16. She added, however, at paragraph 17, that whenever she received goods from Proveedora Jiron, she paid for the goods and received a receipt. However, Ms Wright wrote to Mr Collins, by letter dated March 2010, on the premise that Ms Fritz owed monies to Proveedora Jiron. In this context, it is clear that the letter from Ms Wright, constituted an acknowledgment of the debt of US$33,000.00, a debt owed to Mr Collins. This debt arose from the 2008-2010 period, the 12 year limitation period had not expired at the time Mr Collins filed his counterclaim on 4 April 2016. The claim for US$33,000.00 is, therefore, valid.

[101] There were also other letters written by Ms Fritz's attorneys-at-law, such as one dated 29 August 2014 from Mr Tom Tavares-Finson. The letter is addressed to Mr Clough and appears at page 258 of the record of appeal. It states:

> "**Re: Darnel Fritz- Mortgaged Premises- 4 Meadowland Drive, Kingston 19 in the parish of Saint Andrew- 1018 Folio 159 to Mr. John Collins c/o International Freight Consolidators Inc.**
>
> Please be advised that **we have been retained to represent Miss Darnel Fritz in relation to the above-mentioned**.
>
> We would be obliged if you could forward to us a full account to **facilitate settlement in this matter**.
>
> Awaiting your timely response...." (Emphasis supplied)

[102] This letter describes the property as a mortgaged property and indicates that Tom Tavares-Finson is representing Ms Fritz, thereby making him her agent, however, it does not specifically acknowledge that a debt is owed. This letter is more akin to an attempt at negotiation.

[103] The learned trial judge however fell into error when he found, at paragraph [41] that the execution of the second mortgage was an acknowledgment of the first mortgage. He said:

> "I am satisfied that [Ms Fritz] or her agent had acknowledged the debt in writing within the meaning of Section 33 of the Limitation of Actions Act. The execution of the second mortgage is an acknowledgment of the pre-existing debt. This is because, by agreeing a total balance as at that date, and that the second mortgage was to secure the amount over and above that secured by the first mortgage, [Ms Fritz] was acknowledging the validity in 2010, of the 1st mortgage and the debt thereby secured."

[104] This finding by the learned trial judge is not supported by the evidence. The learned trial judge accepted Mr Collins' evidence on this issue. However, on Mr Collins' evidence, the sum secured by the second mortgage consists of a debt of US$33,000.00 and the sums for the two shipments. It was therefore not an acknowledgment of the first mortgage. The evidence, at pages 44-45 of the notes of evidence is:

> "Q: That 1st mortgage of US$40,000. Are you saying in 2010 she obtained the [US$]88,000 in relation to 2 shipments [?]
>
> A: Partially correct. The money to the shipment amounted to [US$]50 something and a [US$]33,000 outstanding which came to [US]$88,000
>
> Q: Where [US$]33,000 came from

A: She owed provideera [sic]...[US]$33,000"

[105] Mr Collins testified, once more, that the US$33,000 owed to Proveedora Jiron was included in the second mortgage. He said that he paid that sum to Proveedora Jiron. This is recorded at page 51 of the notes evidence:

"Q: So you paid [US]$33,000 to Proveedora Jiron

A: Yes

Q: You have the receipt

A: I am not sure have to look for it

Q: That [US$]33,000 is part of [US$]88,000

A: Yes"

[106] And again at page 68 of the notes of evidence:

"Q: Suggest…she did not owe you [US]$88,000

A: When we add the fees with containers 55 and 33 and to providoora [sic] which I took care of came to [US$]88,000..."

[107] This US$33,000.00 cannot be attributed to the first mortgage as Mr Collins, in explaining a statement of Ms Fritz's account (pages 342-343 of the record of appeal), noted that there was a balance of US$40,000.00 secured by the first mortgage, which was never repaid (see page 58 of the notes of evidence).

[108] Accordingly, the signing of the second mortgage was not an acknowledgment of the first mortgage, and the learned trial judge erred in treating it as such.

[109] In the circumstances, the counterclaim, being an action, with no part payment or acknowledgment, is restricted by section 33 of the LAA. Judgment for Mr Collins on the counterclaim has to be in the amount that has not been extinguished, i.e., the sum claimed, less US$40,000.00. This results in the sum of US$119,805.00 being actionable on the counterclaim, which is necessary if Mr Collins was unable to recover the sums from the sale of the property.

[110] In relation to the exercise of his statutory power of sale, however, Mr Collins is entitled, from the proceeds of sale of the property, to all the sums, including interest, due to him in accordance with the instruments of mortgage.

Conclusion

[111] In light of the foregoing, Mr Collins is entitled to exercise his statutory power of sale to recover the sums due to him under the mortgage instruments, as it is not affected by the LAA. In the event that the statutory power of sale does not recover the sum of US$119,805.00, however, Mr Collins is only entitled to that sum, with interest at the rate of 2%, as stipulated by the learned judge, in accordance with the restriction of the LAA.

[112] Although the rate of interest stipulated in the second mortgage is 15% per annum, the learned trial judge awarded interest on the judgment at 2% per annum. There has been no appeal against that order and therefore that rate will be retained.

[113] Accordingly, the appeal must be allowed, in part, and it is proposed that the following orders be made:

1. The appeal is allowed in part.
2. Paragraphs 1 and 4 of the order of Batts J made on 30 September 2016 are affirmed.
3. Paragraph 2 of the said order is varied to read as follows:

    (i) Judgment for Mr Collins against Ms Fritz on the counterclaim in the sum of US$119,805.00.

    (ii) Mr Collins is entitled, from the exercise of the mortgagee's statutory power of sale of all that parcel of land comprised in certificate of title registered at Volume 1018 Folio 159 of the register book of titles, to all the sums, including interest, due to him in accordance with the instruments of mortgage in respect thereof.

4. Paragraph 3 of the said order is varied to read as follows:

    Interest on the sum of US$119,805.00 at the rate of 2% per annum from 15 May 2016 until the date of payment.

5. Unless submissions are filed to the contrary within 14 days of the date hereof, costs of the appeal are awarded to Mr Collins to be agreed or taxed.
6. Should a contrary submission be received from either party within the time limited above, the other party is to reply in writing within a further period of 14 days.
7. The court will give its decision on costs in writing after receiving the parties' submissions.

MCDONALD-BISHOP JA

[114] I have read, in draft, the comprehensive judgment of Brooks JA, and I agree with his reasoning, conclusion and the orders that he has proposed. There is nothing that I could usefully add.

SINCLAIR-HAYNES JA

[115] I too have read in draft the judgment of my learned brother, Brooks JA. I agree with his reasoning and conclusion.

BROOKS JA

ORDER

1. The appeal is allowed in part.
2. Paragraphs 1 and 4 of the order of Batts J made on 30 September 2016 are affirmed.

3. Paragraph 2 of the said order is varied to read as follows:

    (i) Judgment for Mr Collins against Ms Fritz on the counterclaim in the sum of US$119,805.00.

    (ii) Mr Collins is entitled, from the exercise of the mortgagee's statutory power of sale of all that parcel of land comprised in certificate of title registered at Volume 1018 Folio 159 of the register book of titles, to all the sums, including interest, due to him in accordance with the instruments of mortgage in respect thereof.

4. Paragraph 3 of the said order is varied to read as follows:

    Interest on the sum of US$119,805.00 at the rate of 2% per annum from 15 May 2016 until the date of payment.

5. Unless submissions are filed to the contrary within 14 days of the date hereof, costs of the appeal are awarded to Mr Collins to be agreed or taxed.

6. Should a contrary submission be received from either party within the time limited above, the other party is to reply in writing within a further period of 14 days.

7. The court will give its decision on costs in writing after receiving the parties' submissions.