NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C. L. 2000/I-072

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| BETWEEN | ISLAND LIFE INS. CO. LTD. | CLAIMANT |
| AND | HUNTLEY MANHERTZ | 1st DEFENDANT |
| AND | YVONNE MANHERTZ | 2ND DEFENDANT |

CONSOLIDATED WITH

CLAIM NO. C. L. 2001/ M-225

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| BETWEEN | HUNTLEY MANHERTZ | 1ST CLAIMANT |
| AND | YVONNE MANHERTZ | 2ND CLAIMANT |
| AND | ISLAND LIFE INS. CO. LTD. | DEFENDANT |

Mr. Ransford Braham and Mrs. Susan Risden-Foster instructed by Livingston, Alexander & Levy for Island Life Ins. Co. Ltd.

Mrs. Marvalyn Taylor-Wright and Mr. Winston Taylor instructed by Taylor-Wright & Company for Mrs. Yvonne and Dr. Huntley Manhertz

**Heard: September 19, 20, 21, 22, 23, 26, 27; December 12, 13, 14, 15, 16, 20, 2005 and March 17, 2006**

**Sinclair-Haynes J (Ag.)**

Dr. Huntley Manhertz and Mrs. Yvonne Manhertz (mortgagors) obtained a loan of $4,500,000.00 from Island Life (mortgagees) in January 1995. The loan was secured by property situated at 12 Gordon Town Road, Kingston 6 and was to be repaid in five years by monthly installments of $168,447.86. Payments were to be made the first day of

each month. The Manhertzs failed to pay the installments as agreed and at times when payments were made their cheques were dishonoured. Island Life wrote several letters to them about the arrears and requested settlement. The Manhertzs, in response to these letters made various proposals to pay which did not materialize. Two letters of demand were sent in January 1998. They failed to respond. Consequently, a statutory notice was sent to them in May 1998 for the sum of $7,953,690.64.

Ms. Donna Marie Stephenson, on behalf of Island Life, instructed D. C. Tavares & Finson Realty Company Limited to sell the mortgaged property by public auction. The property was advertised on five occasions in **The Daily Gleaner** and a public auction was held on July 9, 1998. No bids were received at that auction.

On October 12, 1998, Dr. Manhertz wrote to Island Life seeking confirmation whether it would accept the sum of $3,600,000.00 in full and final settlement. By letter dated November 3, 1998 Island Life agreed to accept $3,600,000.00 instead of $7,953,590.64 which was claimed in the statutory notice. Dr. Manhertz informed Island Life that he had found a purchaser for the property. By letter dated 25th November 1998 Island Life requested from the Manhertzs' attorney-at-law a copy of the signed agreement and their undertaking to pay Island Life the sum of $3.6 million. The request was never granted and the sum of $3,600,000.00 was never paid. Consequently, a further statutory notice demanding the sum of $8,691,593.49 dated February 11, 1999 was issued to the Manhertzs. Island Life was still not paid and on May 4, 1999 Island Life wrote to the Manhertzs demanding $8,856,495.22 and threatened legal action.

On June 10, 1999 another statutory notice was issued. The sum Island Life sought to recover was $9,717,766.88. The sum was not paid. As a result it instructed

D C Tavares & Finson Realty Company Limited to advertise the premises for sale by public auction. The property was duly advertised in **The Daily Gleaner** on four occasions.

A second public auction was held on the 12th August 1999. One Mr. McFarlane made a bid of $5,500,000.00 but he was unable to provide the deposit. The sale therefore failed.

On the 20th September 1999 the defendant's attorneys, Mesdames Taylor, Deacon & James wrote to Island Life, apologized on behalf of the Manhertzs for their inability to act on the negotiated arrangements and offered to pay the sum $5,500,000.00 instead of the $3,600,000.00 previously offered. The letter indicated the manner in which they proposed to make the payments. This offer was rejected by Island Life which informed them that the debt was then $14,707,764.60. Island Life then engaged the services of Easton Douglas & Company to prepare a valuation report. A report dated September 30, 1999 was obtained from Easton Douglas & Company. The property was valued at $8,700,000.00 with a reserve price of $6,960,000.00.

Island Life received an offer from Mr. Clement Stevens to purchase the property for $6,200,000.00.

On September 22, 1999 the Manhertzs' obtained an interim injunction to stop Island Life from selling the property. The injunction was extended to October 12, 1999. On October 21, 1999, Mr. Stevens increased his offer from $6,200,000.00 to $7,000,000.00. On October 28, 1999 Island Life's attorneys, Livingston, Alexander & Levy wrote to Mesdames Taylor, Deacon & James and advised them that Island Life would exercise its rights as mortgagee.

Dr. and Mrs. Manhertz wrote to Livingston, Alexander & Levy on October 29, 1999 and offered $6,000,000.00 to settle the debt. The letter informed that the sum of $2,000,000.00 was available. This sum was however, never received by Island Life.

On November 16, 1999 Livingston, Alexander & Levy responded to the Manhertzs and indicated to them that Island Life would accept $10,000,000.00 in full and final settlement.

On November 16, 1999, Mesdames Taylor-Wright & Company then representing the Manhertzs responded to Island Life with a counter offer of $7,000,000.00 which their client promised to pay within 30 days. By letter dated December 21, 1999 Island Life rejected the offer.

Mesdames Taylor-Wright & Company, on December 31, 1999 wrote to Livingston Alexander & Levy and offered to pay $10,000,000.00 over a period of six months.

On February 8, 2000 Island Life received an offer from Mr. Clement Stevens for $8,000,000.00. On February 9, 2000, Dr. Manhertz wrote the president of Island Life, beseeched him not to sell to Mr. Stevens and reminded him of the Strata Plan which was sent to him. He also informed him that he was in the process of applying for Strata Title which would increase the value of the property.

On February 14, 2000, Island Life wrote to Dunn Cox (Mr. Stevens' attorney) and accepted Mr. Stevens' offer of $8,000,000.00. On the said day the Manhertzs' attorney wrote to Island Life and informed it that they had a purchaser, Mr. Barrington Stennett who was offering $8,000,000.00. An enquiry was made as to whether the

property was advertised for sale at private treaty. Legal action was threatened if the property was sold at an inordinately low price.

On February 15, Mr. Stevens increased his offer to $9,000.000.00 and on March 16, 2000 he increased it to $9,500,000.00

On the 19th February 2000, Livingston Alexander & Levy wrote to Mesdames Taylor Wright & Company and requested the following:

a. A copy of the approval to issue Strata Title;

b. a copy of the Strata Title;

c. copies of the agreement of sale between the Manhertzs and the purchasers;

d. the number of shops which were ready for sale and the sale price.

In response to these requests only the names of three persons were supplied to Island Life's attorneys on the 21st February 2000.

The property was sold to Mr. Stevens on the 3rd March 2000 for the sum of $9.500,000.00.

On May 8, 2000, Island Life wrote to Mr. Stennett's attorney and advised him that his offer of $8,000,000.00 was not acceptable.

**Island Life's case**

Island Life's claim is that as at 1st October 1999, the Manhertzs were in arrears to Island Life in the sum of $14,707,764.60 being principal and interest. Upon the sale of the property for $9,500,000.00, the amount which remains outstanding is $8,037,437.18. This sum includes outstanding water rates, property taxes, auction expenses, one-half stamp duty, one-half registration fee plus interest at 36% for 19 days.

**The Manhertzs' case**

The Manhertzs contend that Island Life represented to them that it would accept $3,600,000.00 in full and final settlement of the debt. In reliance of its representation they altered their positions and acted to their detriment by pursuing the approval of an application to effect Strata Title, concluded pre-contract agreements to enter into formal sale agreements with prospective purchasers and collected deposits totalling $3,150,050.00 pursuant to the pre-contract agreements. Island Life, has sold the property to Mr. Clement Stevens thereby exposing them to the threat of legal action. Island Life has refused to disclose the names of the purchasers and the conditions of the offer it received thus preventing them from making a similar offer. It failed to obey an order of the court to disclose the sale price. Strata approval for the property had been obtained and the market value was about $24,000,000.00, yet Island Life sold it for $9,500,000.00.

The purchaser was not an independent purchaser. He had a close relationship with Island Life and was a relative of a senior business executive in the banking industry. Island Life failed to contact three purchasers whose names where given to it and who were ready, willing and able to purchase the shops situated on the mortgaged property.

Island Life failed to render a true account of the proceeds of sale and failed to pay them the balance of the purchase price less the debt of $3,600,000.00.

The contract of sale between Mr. Stevens and was not bona fide. It was achieved by impropriety, fraud and or collusion between the parties to sell at an undervalue.

The Manhertzs' claim is for the sum of $5,500,000.00 which is the difference between $15,000,000.00 they claimed to be the market value and $9,5000,000.00, the sum for which the property was sold. Interest is also claimed at a commercial rate.

Both claims have been consolidated.

**First Issue: Whether Island Life waived its right to claim a sum in excess of $3.6 million**

I am thankful to Counsel for their thorough research of this matter and for the numerous authorities presented to the court. My failure to refer to some of these authorities is simply with a view of shortening my decision. No disrespect is intended.

The first issue to be determined is whether Island Life's acceptance of the Manhertzs' offer to pay the sum of $3,600,000.00 binds Island Life. Has Island Life waived its right to claim a sum in excess of $3,600,000.00? Is it estopped from claiming the full debt?

Mr. Ransford Braham argues that the insurance company expected to receive the payment of $3,600,000.00 as a lump sum. The lump sum became due and payable immediately. The insurance company was under no obligation to afford the Manhertzs' reasonable time at Common Law. He submits that the Manhertzs have provided no consideration which would bind Island Life. He relies on **Foakes v Beer, D & C Builders Limited v Rees** (1996) 2 QB 617, **re Selectmove** (1995) 1 WLR 474, **Chitty on Contracts** 29th Edition Volume 1, **The Law of Contract** by Sir Guenter Trietel, 11th Edition.

**Waiver at Common Law**

Sir Guenter Trietel author of **the Law of Contract** 11th Edition at page 102 said:

> *"At Common Law where a party promises to relinquish some or all of his rights under a contract he is sometimes said to have "waived" those rights the word 'waived'...covers a variety of situations different in their legal nature...."*

**Chitty on Contracts** 29th Edition volume 1 at paragraph 3:115 states:

> *"At common law the general rule is that a creditor is not bound by a promise to accept part payment in full settlement of a debt. An accrued debt can be discharged by the creditors promise only if the promise amounts or gives rise to an effective accord and satisfaction. A counter promise by the debtor to pay only part of a debt provided no consideration for the accord, as it is merely a promise to perform part of an existing duty owed to the creditor. And the actual payment is no satisfaction under the rule in Pinnel's case "that payment of a lesser sum on the day in satisfaction of a greater sum cannot be satisfaction for the whole."*

This rule in **Pinnel's** case was approved by the House of Lords in **Foakes v Beer** (1884) A C page 605 .

In **D & C Builders Limited v Rees** (1966) 2 QB Danckwert L J said at page 617:

> *"Foakes v. Beer (1884) an Appeal case 605 ... settle definitely the rule of law that payment of a lesser sum than the amount of debt due cannot be a satisfaction of the debt, unless there is some benefit to the creditor added so there is an accord and satisfaction."*

The principle enunciated in **Foakes v Beer** was applied by the Court of Appeal of the United Kingdom in **re Selectmove** (1995) 1 WLR 474. A company owed taxes and insurance contributions to the Inland Revenue. Its Managing Director promised to pay a tax collector future liability as they fell due and the arrears in monthly installments of £1,000.00. The collector informed the Managing Director that he would have to obtain the permission of his supervisor for approval of the agreement and if it was not

acceptable he would inform the Managing Director. The company sold work in progress and dismissed its employees in order to meet the monthly installments. It made two payments of £1,000.00. The company failed to make a payment when it became due and the Revenue insisted on payment of the arrears and served a winding up petition on the company based on the arrears.

It was held that the employee had no authority to convey the Inland Revenue's acceptance of the offer by silence. It was also held that the company provided no consideration. Peter Gibson L J said at page 479:

> *"The judge held that the case fell within the principle of Foakes v Beer .... In that case a judgment debtor and creditor agreed that in consideration of the debtor paying part of the judgment debt and costs immediately and the remainder of installments, the creditor would not take any proceedings on the judgment. The House of Lords held that the agreement was nadum pactum, being without consideration and did not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest on the judgment."*

At page 481 he said:

> *"In my judgment the judge was right to hold that if there was an agreement between the company and the revenue it was unenforceable for want of consideration."*

In the instant case Island Life's acceptance of $3.6 million did not amount to accord and satisfaction as they received no additional benefit by way of consideration. **(See Ferguson v Davis** (1997) 1 All ER 315)

In any event Dr. Manhertz was unable to act on the agreement. He apologized to Island Life for not being able to pay the $3,600,000.00 million and made a fresh offer. At that point it was clear that he himself, regarded that agreement as no longer binding as a consequence of his failure to pay.

**Waiver in Equity**

Mrs. Taylor-Wright argues in the alternative, that there was a waiver in equity which does not require consideration. Such a waiver is a voluntary forbearance or indulgence which suspends temporarily the rights of the mortgagee. The Manhertzs, in reliance on the forbearance acted to their detriment. In the circumstances, equity, she argues, will not allow Island Life to resile from its promise unless reasonable notice of its intention to do so was given to the Manhertzs.

She contends that they relied on the waiver by:

1. focusing on securing approval instead of paying the installments.
2. commencing work on the car park
3. seeking financing to complete the structure
4. seeking buyers for the shops
5. placing listing with realtors
6. entering formal agreements with the purchasers

It is her contention that Island Life intended to receive the sum of $3,600,000.00 within a reasonable time. In the circumstances thirteen weeks was not a reasonable period within which to pay a loan of $3,600,000.00. Four months would have been a reasonable period in all circumstances. Island Life is estopped from resiling from its promise unless reasonable notice of its intention to do so is given.

**The Law**

The learned author of **Chitty on Contracts** 29th Edition Volume 1 regards the term waiver, as a synonym for forbearance. At paragraph 22-041, waiver is defined as follows:

> *"Waiver or forbearance, where one party voluntarily accedes to a request by the other that he should forbear to*

*insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of waiver by estoppel, rather than waiver by election) may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of contract to be performed or observed by the other party, and the other party acts in reliance on that representation."*

The party granting the forbearance can generally retract it. However, he must give reasonable notice of his intention to do so to the party for whose benefit it was granted. (See **Banning v Wright** (1972) 1 WLR 972).

The following questions arise for consideration. Was the thirteen week period unreasonably short so as to be considered inequitable in the circumstances? Did the mortgagee accept the offer of $3,600,000.00 on the understanding that the Manhertzs would first have to convert the building into Strata shops? Was Island Life aware that Dr. Manhertz needed to obtain Strata approval? Did the Manhertzs in reliance on the agreement act to their detriment by not paying the installments and focusing instead on obtaining approval to effect Strata Titles, constructing parking lot and entered into contract and final sale agreement to their detriment?

At the expiration of thirteen weeks, the Manhertzs failed to pay the sum of $3,600,000.00, and Island Life demanded payment. Island Life accepted the offer by the Manhertzs to pay $3,600,000.00 on the 3rd of November 1998. Dr. Manhertz indicated to Island Life that he had found a willing purchaser. Island Life, through its attorneys, wrote on November 25, 1998 to Dr. Manhertz requesting a copy of the signed agreement and their undertaking to pay the mortgagee, the sum of $3,600,000.00. The agreed sum

of $3,600,000.00 was not paid, nor was the signed agreement and undertaking provided. On the 11th February 1999 a second statutory notice was issued. A letter of demand was sent to the Manhertzs. A third statutory notice was sent on the 10th June 1999. On August 12, 1999, the property was put up for public auction. A bid was received but the sale fell through.

Dr. Manhertz in his witness statement stated that Island Life accepted his offer of $3,600,000.00 million because of his earlier proposal to convert the premises into Strata shops. He stated that the sale of two shops would realize the $3,600,000.00 and the company knew the process had begun and there was no obstacle preventing him from securing the approval. Miss Donna Stephenson, however, refutes the claim that the acceptance was premised on his obtaining Strata Titles.

In his letter dated 9th February 2000 he referred to the fact that his attorneys had sent the Strata Plan to the president of Island Life, however, apart from his *ipsit dixit*, he has provided no proof of such an agreement. On a balance of probabilities I find that there was no such agreement.

In his witness statement he also stated that the car park was to be graded and to be facilitated by an adjacent lot of land owned by him. Under cross examination he said that in order to obtain stratification approval, lot 2a had to be included in the application. It is noteworthy that the adjacent lot of land was not mortgaged to Island Life. Island Life had no entitlement to it.

Dr. Manhertz hoped to obtain a mortgage to make his vision a reality and in order to pay Island Life the sum of $3,600,000.00. Island Life was not obliged to allow him time to obtain a mortgage.

The English case of **Silven Properties Limited and Another v Royal Bank of Scotland Plc. and Others** (2004) CLC 359 is instructive. At page 368 Lightman J who delivered the judgment on behalf of the Court of Appeal adumbrated as follows:

> *"In our judgment there can according be no duty on the part of a mortgagee, as suggested by the claimant, to postpone exercising the power of sale until after the further pursuit (let alone the outcome) of an application for planning permission or the grant of a lease of the mortgaged property, though the outcome of the application and the effect of the grant of the lease may be to increase the market value of the mortgaged property and the price obtained on sale. A mortgagee is entitled to sell the property in the condition in which it stands without investing, money or time in increasing its likely sale value. He is entitled to discontinue efforts already undertaken to increase their likely sale value in favour of such a sale."*

In the absence of an agreement, Island Life had no duty to allow the Manhertzs time to seek finances to complete the structure. Indeed it would have been most unreasonable in light of the protracted period over which it had been trying to recover the debt.

Assuming the Manhertzs were indeed given the assurance by Island Life that it could proceed to expand the building, the question is whether the Manhertzs acted to their detriment by relying on Island Life's waiver.

Dr. Manhertz claims that in reliance on the agreement he changed his financial strategy and instead of focusing on paying the loan installments, he concentrated on obtaining the approval for Strata Titles which resulted in him incurring considerable costs.

There is no evidence before the court as to what detriment the Manhertzs suffered in attempting to secure building approval. In fact the evidence is that they had

commenced their application before Island Life agreed to accept the sum of $3,600,000.00. In fact Island Life demanded payment of the full sum before the Manhertzs offered to pay the sum of $3,600,000.00. Therefore the claim that it affected their monthly payments is unsustainable.

Further, there is no evidence that the Manhertzs commenced work on the complex as a consequence of any agreement with Island Life. Indeed it seems foolhardy that they were in a predicament to find $3,600,000.00 to pay Island Life and yet they embarked on such a project.

There is no evidence of any detriment suffered by entering into the agreements with the purchasers. The purchasers were aware that their agreements with the Manhertzs were predicated upon the Manhertzs obtaining permission to sell the shops and that if the Manhertzs failed to obtain the necessary permission their deposits would be refunded. The argument that the Manhertzs were in jeopardy of having legal action brought against them as a consequence is therefore untenable.

**Second Issue: Whether the mortgagees exercised its powers of sale properly**

The next issue is whether the mortgagees exercised its powers of sale properly.

Mrs. Taylor-Wright contends forcefully that the mortgagees did not. It is her submission that they were negligent in exercising their powers of sale by:

a. failing to advertise the property to potential purchasers for sale by Private Treaty. Consequently, it failed to expose the property to a wider market. She relies on **Gardiner & International Trust & Merchant Bank** SCCA 111 of 2001 handed down March 30, 2004

and **Joan Adams v Workers Trust & Merchant Bank Limited** (1992) 29 JLR 447.

b. describing the property as having six instead of eight shops. This mis-description limited the purchasers who would be attracted.

c. failing to have regard to the building permission and Strata Plans in the valuation obtained.

d. attempting to sell the property at an undervalue

e. acting in collusion with Mr. Clement Stevens.

**The Law**

**Halsbury's Law of England** 4th edition reissue volume 32 at paragraph 316 states the scope of the mortgagee's duties in exercising its power of sale:

> *"The duty of the mortgagee on the exercise of power of sale.... A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. He is not obliged to exercise the power of sale even if advised to do so, or if the asset is depreciating, however advantageous a sale might be to the mortgagor. He is not obliged to delay in the hope of obtaining a higher price, or if redemption is imminent. He can decide if and when to sell on the basis of his own interests. He owes a duty in equity to exercise the power in good faith for the purpose of obtaining repayment and to take reasonable precautions to secure a proper price. This duty is owed to the mortgagor, subsequent mortgagees, and a surety but not to others such as beneficiaries under a trust of the mortgage property. The duty cannot be replaced or supplemented by a liability in negligence. It can, however, be excluded by agreement.*
>
> *If the mortgagor seeking relief promptly, a sale will be set aside if there is fraud or if the price is so low as to be in itself evidence of fraud but not on the ground of under value alone and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale. Or if it would be meaningful as between the mortgagor*

*and the purchaser for the sale to be set aside. However, if the mortgagee does not sell with proper precaution, he will be charged in taking the account with any loss resulting from it."*

The law applicable was stated by Cross L J in **Cuckmere Brick Company Limited and Another v Mutual Finance Limited and Mutual Finance Limited v Cuckmere Brick Limited and Others** (1917) 2 All ER page 633 at page 646.

*"A mortgagee exercising a power of sale is in an ambiguous position. He is not a trustee of the power for the mortgagor for it was given him for his own benefit to enable him to obtain repayment of his loan. On the other hand, he is not in the position of an absolute owner selling his own property but must undoubtedly pay some regard to the interests of the mortgagor when he comes to exercise his power. Some points are clear. On the one hand, the mortgagee, when the power has risen can sell when ever he likes even though the market is likely to improve if he holds his hand and the result of an immediate sale maybe that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it. On the other hand, the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at."*

Our Court of Appeal in **Moses Dreckett v Rapid Vulcanizing Company Limited** (1998) 25 JLR 132 followed **Cuckmere Brick Company Limited v Mutual Finance Limited** (1971) 2 All ER 633. It appears that the law with regards to a mortgagee exercising its power of sale is now quite settled in Jamaica. Cooke J.A. in **Dianne Jobson v Capital Credit Merchant Bank Limited and Donald Taylor** SCCA 113/2002 Court of Appeal 2005 Judgment which was handed down on the 29th July 2005 said as follows at page 11:

*"This court in Moses Dreckett v Rapid Vulcanizing Company Limited (1988) 25 JLR 132 adopted and followed Cuckmere Brick Company Limited v Mutual Finance Limited . Therefore the guiding principle is that a*

*mortgagee in exercising the power of sale owes a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decided to sell. It would seem to be that if the land was sold at a true market value, then the question of whether or not the mortgagee took reasonable precautions to achieve that result becomes academic."*

I will first assess the evidence to determine whether Island Life obtained a current valuation. The valuation report purportedly done by Easton Douglas & Company on December 30, 1999 which valued the property for $8,700,000.00 with a reserve price of $6,960,000.000.00 was six months old as the property was sold on March 31, 2000.

Mrs. Taylor-Wright submits that a six month valuation is not considered current for a sale by Private Treaty. She relies on **Joan Adams v Workers Trust & Merchant Bank Limited** 29 JLR 447.

The opinion of Mr. Justice Cooke in the case of **Diane Jobson v Capital & Credit Merchant Bank and Others** SCCA No. 113/2002 at page 15 renders Mrs. Taylor-Wright's submission that a six month old valuation is not current, untenable:

*"...it is true that immediately prior to the sale the mortgagee did not obtain a valuation specifically for that exercise. The valuation which the applicant challenged was done for the purpose of granting the mortgage. This was in September 1989. The report of C D Alexander Company said that the valuation was good for six months. By my calculations the property was sold in the eight month after the valuation. Accordingly, it was submitted, there was no valid valuation at the time of sale. I regard this submission as somewhat pedantic. There was no evidence to indicate that in respect of the land there were any factors arising between the sixth and the eighth month which could cast doubt on the validity of the September 1989 valuation. It is my view that bearing in mind the valuation which the mortgagee had in hand it was not imprudent on its part in not obtaining a current valuation."*

Mrs. Taylor-Wright also submits that the report was not current because it was not valid for the following reasons:

a. It was signed by Mr. Easton Douglas' daughter, Mrs. Jacqueline Douglas-Brown who was not a licenced valuator;

b. Mr. Clement Sutherland who conducted the investigations was also not a licenced valuator.

The 1999 report, she submits, was not in accordance with the legal requirements which meant it was not a valuation at all.

Mr. Ransford Braham, however, objects to any challenge to the validity of the report. He submits that his client was called upon to answer whether the report was current, not valid, lawful or incompetent. He relies on upon the **Concise Oxford Dictionary, the Compact Oxford English Dictionary and the American Heritage Dictionary of English Language** 4th edition 2000 which define "current" as "happening now."

In support of his contention he cites Lord Woolfe's comments in **McPhilemy v Times Newspaper Ltd.** (1999) 3 ALL ER 775 at page 793:

> *"Pleadings are still required to make out the parameters of the case being advanced by each party."*

He submits that the defendant did not bargain for a challenge which went to the root of the valuation. It is his contention that the submission that valuation report is not valid or competent and is materially inconsistent with the case pleaded and ought not to be taken into account as it raises a separate and distinct case. It is so radical a departure from the case pleaded that an amendment ought not to be granted.

He relies on **Gloria Moo Young and Another v. Gregory Chung and Others** SCCA No. 17/99 unreported judgment of March 23, 2000 in which the Court of Appeal held that amendments which were granted at the trial were prejudicial to the appellants, inconsistent with the facts pleaded and raised a new defence. He also relies on the case of **Roberts v Dorman Long & Company Limited** (1953) All ER 428.

This court is of the view that both cases are distinguishable. In the case of **Roberts v Dorman Long & Company Limited,** to have allowed evidence at the trial that some seat belts were on site was radically different from the pleadings which stated that the seat belts were half mile away.

Mr. Douglas testified that his daughter is an architect and she was not licensed to do valuations. It is his evidence that he was in active politics in 1999.

It is Mr. Douglas' evidence that the actual inspection of the building, investigative research, analysis and valuation were done by other persons employed to the firm. Mr. Clement Sutherland conducted the inspection and it is his evidence that he is not a licenced valuator. It was only after an adjournment and after he discovered he was relying on a report that was not in fact his, but his daughter's, that he produced another report which was signed by him.

Mrs. Taylor-Wright contends that he had nothing to do with the report because he was at that time in active politics. The report is a product of persons not legally empowered to do valuations. Mrs. Taylor-Wright's cross-examination of Mr. Douglas must be pertinent as it is the Manhertzs' case that the report is not current.

The persons who conducted the inspection and signed the report were neither qualified nor licenced to do so. He merely visited to inspect before the issuance of the report.

Cross-examination as to whether the report is valid is within the parameters of the Manhertzs' case that the report in not current. The propriety and competence of the report must be relevant to the issue of the valuation. If the report is not valid in law it follows that there was no report upon which the mortgagees could have relied. It is Mr. Douglas' evidence that a valuation report cannot be regarded as reliable if the actual valuator is not competent or qualified. I am of the view that the challenge to the validity of the report is not a departure from the case pleaded. In any event Island Life was afforded ample opportunity to respond as there was a long adjournment in the matter.

Mr. Ransford Braham also submits that Rule 20 (4)(1)(2) of the CPR 2002 states:

> 1. *"An application for permission to amend a statement of case may be made at the case management conference.*
>
> 2. *The court may not give permission to amend a statement of case after the first management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change in the circumstances which became known after the date of that case management conference."*

The discovery that the report was signed by his daughter was made during the trial and after the case management conference. It is however, the finding of the court that the challenge to the validity of the report was not a departure from the case pleaded. I have found Mr. Douglas less impressive a witness than Mr. Down and Mr. Stair in certain respects. However, it is not necessary to compare their evidence and to state my

findings in that regard since the report was not signed by Mr. Douglas and since it my finding that the validity of the report has been severely impugned.

Although it is my finding that the report is not current for the foregoing reasons, this is not the end of the matter The actual question is whether the price of $9,500,000.00 was representative of the true market value of the property.

**Re: Complaint that Island Life was negligent by failing to advertize prior to selling at Private Treaty**

Mrs. Taylor-Wright submits that Island Life was negligent in that it failed to advertise the property to potential purchasers for sale by Private Treaty. As a result it failed to expose the property to a wider market.

Mrs. Taylor-Wright relies on the case of **Joan Adams v Workers Trust & Merchant Bank Limited** 29 JLR 447. In that case the claimant had fallen into arrears of her mortgage payments. Attempts were made to sell the property at an auction. Anthony and Pamella Gutzmore offered to purchase the property for $400,000.00 and then reduced the offer to $395,000.00. A deposit was made but no agreement was signed. The plaintiff advertised the property and informed the mortgagees that they had a purchaser who agreed to pay $480,000.00. The defendant responded to the plaintiff that they had already accepted a prior offer in writing and they had collected a deposit. The plaintiff's attorney wrote to the defendant and made clear their intention to sue if they sold the property for $395,000.00.

The defendant was informed that a purchaser who was willing to pay $500,000.00 was found.

James J. found that the defendant's failure to advertise together with its mistaken view that there was a binding agreement with the Gutzmores "fell short of the standard of duty of care owed to the plaintiff."

In the instant case the property was advertised to be sold at auction. Numerous advertisements were place in the newspaper.

On the first occasion there were no bidders. On the second occasion there was one purchaser who was willing to pay $5,000,000.00. The sale was aborted as the purchaser was unable to pay the deposit. I must agree with Mr. Brahams' submission that at that time there was a lack of interest in property.

Would any greater interest have been generated had the property been advertised before it was sold at Private Treaty? It is Mr. Stair's evidence that there were depressed periods in the 1990s for properties except for residential properties. Financial crises affected the value of properties, especially commercial properties. In determining the value of the property he found no sale in Papine of similar properties. It is not unreasonable to conclude that the market was not at that time excited about properties in Papine.

It would have been prudent to advertise the property. However, the crux of the matter is whether a proper price was obtained. It is helpful to reiterate the opinion of the Court of Appeal as expressed by Cooke J A in **Diane Jobson v Capital Credit Merchant Bank Limited.**

> *"It would seem to be that if land was sold at a true market value, then the question of whether or not the mortgagee took reasonably precautions to achieve that becomes academic."*

Dr. and Mrs. Manhertz contend that Island Life failed to obtain a true market value for the property because it failed to indicate in its advertisement that building permission for the construction of four additional shops was obtained and approval for Strata Plan. Counsel on their behalf relies on **Cuckmere.** According to the evidence of Dr. Manhertz, he was pursuing the application. The process of obtaining Strata approval was incomplete. However close the Manhertzs came to obtaining permission they still had no permission. Island Life could not advertise or sell the property as having obtained planning permission as it was only the process that had begun. The outcome was unknown.

Building permission was however, obtained. In the English Court of Appeal decision of **Silven Properties Limited and Another v Royal Bank of Scotland plc and others** at page 368 Lightman J. said:

> *"A mortgagee is under a duty to take reasonable care to obtain a sale price which reflects the added value on the grant of planning permission and the grant of a lease of a vacant property and (as a means of achieving this end ) to ensure that the potential is brought to the notice of prospective purchasers and accordingly taken into account in their offers: see Cuckmere. But that is the limit of his duty."*

The failure to state in advertisements that building permission was obtained in my opinion did not affect the interest that was generated in the property as generally, the market was lukewarm to properties in Papine.

**Re: Complaint that property was mis-described**

The mortgagors complain that the property was mis-described as containing six shops instead of eight in the Easton Douglas' report and consequently, it limited the purchasers who would be attracted to purchase the building.

Mr. Down of D.C. Tavares & Finson Realty Company Limited in his report stated that he made a cursory visit to the property. He also stated that the property consisted of "six or possibly eight shops."

Mr. Condell Stair of Allison Pitter & Company (the Manhertzs' witness) in his valuation report stated that the building was "designed and built as eight shops ... being used as six." Under cross-examination, he consulted his notes and a diagram he drew which revealed that he recorded seven shops. He testified that one shop was being used as two as the partition was removed and one was used as storage. It is his evidence that it is immaterial whether it is advertised as six, seven or eight shops. What is important is the accurate stating of the gross area of the property. He further testified that the main criterion which determines value of the building is its size as the owner can configure it as he wishes in accordance with the plans.

Dr. Manhertz would have been more intimately acquainted with the property, having read the report which he obtained from Easton Douglas & Company in 1994 which stated that the property consisted of six shops accepted the accuracy of the report and conveyed the said report to Island Life for their reliance on that fact. Dr. Manhertz under cross examination testified that in 1994 he never considered it material to affect the value. However, when asked whether in 1999 it affected the value he said he could not answer because he couldn't agree.

I accept the evidence of Mr. Stair that it is the gross area of the property that matters, not the number of shops. The square footage of the property was accurately advertised by D C Tavares & Finson Company Limited on behalf of Island Life.

**Whether property was sold at an undervalue**

The learned authors of **Fisher & Lightwood's Law of Mortgage** Australian edition stated at page 462:

> *"Many of the reported cases involved under value simpliciter. This is easy for the mortgagor to alleged, but difficult to prove, if the mortgagee has obtained proper professional advise. Often, however, an alleged undervalue will merely be the difference in the opinions of the respective valuers concerned: Sinfield v Sweet (1967) 3 All ER 479. Property valuation is not an exact science and differences in opinions and professional valuers is not necessary evidence of any failure on the part of the selling mortgagee: see National Commercial Banking Corp of Australia v Solariowski (1984) NSW Conv R 55-194.*

In **Harris v Minister of Public Works** (1972) Volume X11 149 Pring J stated:

> *"It should, I think, always be borne in mind that no absolute value can be placed on any piece of land . Its value depends entirely on the opinion of experts who may very easily regard it from different points of view. No one piece of land is exactly similar to any other, and in this respect land differs from every other thing which is the subject of sale. There is no difficulty in ascertaining the value of a ton of tea, sugar, or any other trade commodity, because one ton of the same kind is just as good as another so that where a tribunal is attempting to ascertain the value of a piece of land it is necessary to test the opinion of experts and other witnesses by every possible means ...*
>
> *...In the case land there cannot for the reasons which I have already alluded to, be the same exactitude as in the case of ordinary trade commodities. But we know not only from this case but from experience in other resumption cases that estate agents largely based their estimate of the value of a particular piece of land on prices which have been paid for similar land in the same locality. And that would seem to be a common sense practice. No doubt as no two pieces of land are exactly alike, different estate agents will draw conclusions from the premises; but why are the jury, who have to determine the case, not merely on the evidences of witnesses, but by the application of their*

*own common sense, and business ability, to be debarred from using the same guide which witnesses have used?"*

In this matter, the property was sold for $9,500,000.00. It was valued at $8,700,000.00 by Easton Douglas & Company with a reserve price value of $6,960,000.00.

D.C. Tavares & Finson Realty Company Limited valued the property at $9,800,000.00 - $10,000,000.00 with a forced sale value of $8,000,000.00.

Allison Pitter & Company valued the property at $10,500,000.00 - $11,000,000.00 with a forced sale value of $9,900,000.00. To arrive at its valuation of $10,500,000.00 - $11,000,000.00, it is Mr. Stair's evidence that he utilized two main methods:

a. the income capitalization method;

b. market comparison method

As regards the market comparison method, research and investigation are conducted to ascertain what price similar properties would fetch in similar or comparable business locations. He compared 12 Gordon Town Road to five locations which he considered comparable and made the adjustments for location and size. The comparable properties he found were:

1. Parkington Plaza
2. Princeville Commercial Centre
3. Kings Plaza
4. Savannah Plaza

These plazas are all to be found on Constant Spring Road except Parkington

Plaza that is on Half Way Tree Road. Mr. Stair admitted that Constant Spring Road is more prestigious than Gordon Town Road and properties along that road would be more valuable than Gordon Town Road.

It is Mr. Stair's testimony that he found no sale in Papine of similar properties. There is no evidence from Mr. Stair as to any adjustments he made in light of his admission that those properties were in a more prestigious location. Further, Mr. Stair was unaware of the fact that:

1. the property was to put up for auction on two occasions;
2. on the first occasion there was no bidder;
3. on the second occasion there was one bidder but the sale proved abortive;
4. an adjacent lot, lot 12a was included in the plan and without which Strata approval might not have been obtained.

His evidence is that if the property was advertised and went to auction it would be a sale under adverse conditions. Had he been aware of the foregoing at the time of valuation would his valuation have changed? It is his evidence that in arriving at his conclusion he took no adverse condition into account.

He insists that D C Tavares & Finson Realty Company Limited valuation of $9,800,000.00 to $10,000,000.00 is low but that it was within a reasonable range. He insisted that the fact that property was sold at Private Treaty, it ought to have been advertised. However, he told the court that distressed sale occurs in circumstances where a mortgagee calls in its mortgage. Island Life had called in its mortgage. It was therefore a sale under distressed conditions.

It is his evidence that to arrive at a forced sale value, 80% or 90% of the market value is used. Whether 80% or 90% is used is dependent on the marketability of the property. At time, the property certainly was not highly marketable. In the circumstances I am of the view that the figure of 80% was more appropriate. Eighty percent of $10,500,00.00 is $8,400,000.00. Mr. Stair applied 80% of $11,000,000.00. Eighty percent of $9,800,000.00 is $7,840,000.00. Assuming the property ought not to have been sold at forced sale rate because it was sold at Private Treaty, is $9,500,000.00 so low a price as to be cause for concern.

D C Tavares Finson & Realty Company Limited in its valuation report stated that in comparing the two market value prices i.e. Easton Douglas and Allison Pitter they found a disparity between 17% and 25% which although it is not desirable, it is not unusual in valuing Real Estate. A desirable range would be, according to D C Tavares & Finson Company Limited and supported by Allison Pitter within the range of 10% - 15%. The sum of $9,500,000.00 is certainly within the 15% range of Allison Pitter's $10,500,000.00. I therefore find that Island Life obtained a fair market value for the property.

In any event on the 14th February 2000, Dr. Manhertz' attorney informed Island Life's that Dr. Manhertz had secured a purchaser who was willing to purchase the property for $8,000,000.00. Island Life in that correspondence was warned against selling the property at an inordinately low price. Dr. Manhertz and his attorney therefore did not regard the sum of $8,000,000.00 as being low. As a matter of fact he told the court that the property "could have been sold to Mr. Stennett for $8,000,000.00." The property was sold for $9,500,000.00.

**Re: Mrs. Taylor-Wright's submission that the property was sold in disobedience of an injunction**

Mrs. Taylor-Wright submits that the sale of the property was effected in breach of an injunction which prevented its sale. Short shrift can be made of this submission as the sale was effected after the injunction had expired and no application to renew was made.

In any event, the Manhertzs made no payment or tender to Island Life in respect of the loan. They were therefore not in any position to deprive Island Life of its power of sale. (See **Duke et al v Robson et al** (1973) 1 All ER 481 and **SSI Cayman Limited v International Marabella Club** SCCA Court of Appeal decision handed down on the 6th February 1987).

**Re: Island Life's alleged collusion with Mr. Stevens**

It is Mrs. Taylor-Wright's submission that the Island Life colluded with the purchaser, Mr. Clement Stevens. She unleashes a plethora of accusations at Island Life. She submits that Clement Stevens had offered to buy the two shops he rented from the Manhertzs for $5,000,000.00. He later purchased the entire building for $9,500,000.00. The reasonable inference is that confidential information as to the state of Dr. Manhertz' account that the property was the subject of a forced sale was available to Mr. Stevens through his brother-in-law and business partner Mr. Samough. Mr. Stevens' information about properties which were endangered resulted in him reneging on his offer to purchase the two shops from the Manhertzs and he negotiated instead with Island Life for the sale of the entire building. The property, she argues was not advertised for sale by Private Treaty and therefore was not exposed to the public. She finds it quite sinister

that in the circumstances Mr. Stevens was able to make an offer to Island Life. According to her a number of questions arise:

1. How did Mr. Stevens know that Island Life was selling at Private Treaty?
2. How did Mr. Stevens know what price to bid? He made an offer of $6,200,000.00 which was in keeping with the valuation of 1999.
3. Why did Ms. Donna Marie Stephenson concentrate only on Mr. Stevens when Mr. Stennett had made an offer of $8,000,000.00 while Island Life was considering Mr. Stevens' offer?
4. Why did Miss Stephenson deny that she prepared an agreement for sale for $7,000,000.00 to Mr. Stevens?
5. Why did she allow him to pay his deposit in installments?
6. Why did not Miss Stephenson contact the other interested purchasers?
7 What accounted for Mr. Stevens' letters which contained his offers being directed to Miss Stephenson personally? This indicates that the transaction was not at arms length as required. There was no transparency as the property was not advertised for sale by Private Treaty.
8. What accounted for the refusal to disclose the sale price to the Manhertzs? She argues that if a current valuation was undertaken that would ensure that a fair price was obtained.
9. What caused Mr. Stevens to increase his offers which were accepted by Island Life? She submits that it is worthy to note that although Island Life accepted his offer of $7,000,000.00 he increased it to $8,100,000.00. He further increased his offer from $8,100,000.00 to $9,000,000.00. His offer

of $9,000,000.00 was accepted on 14th February 2000 yet he increased his offer to $9,500,000.00 on 15th February 2000. This is disquieting as on the 14th February 2000 the Manhertzs' attorney wrote to Island Life, informed it of Mr. Stennetts' offer of $8,000,000.00 and threatened legal action if the property was sold at an undervalue. This is a clear indication that Mr. Stennett had information from Island Life.

The evidence, she submits, points to collusion. She relies on the proposition enunciated in **Cuckmere** that the purchaser must be an independent purchaser in order for the sale to be bona fide. She submits that Mr. Stevens was not an independent purchaser.

**Submissions by Mr. Ransford Braham**

It is Mr. Ransford Braham's submission that the Manhertzs have not established collusion. He relies on the definition of "collusion" as given by **Blacks Law Dictionary** 6th Edition at page 264 and **Words and Phrases Legally Defined** 2nd Edition at page 28. He cites the un-reported Court of Appeal case of **International Trust & Merchant Bank Limited v Gilbert Gardiner** which was delivered on the 30th March 2004 and submits that the Manhertzs have failed to established collusion as contemplated by the facts of that case. Further, he submits, that they have not identified the type of fraud they have alleged in their pleadings and the elements of fraud required to establish fraud at Common Law have not been proven. I will not tarry on the claim of fraud as no evidence was led to support this claim. Therefore it was never an issue.

**Assessment of the evidence**

Was there collusion between Island Life and Mr. Stevens? The facts of **International Trust & Merchant Bank Limited v Gilbert Gardiner** provide a helpful guide on the issue of collusion. In that case **Gilbert Gardiner** attended an auction at which his property was put up for sale. There he saw a lady and gentleman. They sat at a table and spoke in low tones. The lady enquired of him whether he was present for the auction and he told her he was. She gave him a form to fill in. The man left and stated he would return. The lady began preparing to leave the room when Mr. Gardiner enquired whether the sale was late and she did not answer. He informed her he was the owner of the property and she told him it was sold to the man for $1,900,000.00. The property was valued at $4,500,000.00. It was discovered that the lady was the auctioneer and that she made two unauthorized auctioneer's bids during the course of the auction. Bingham J A. stated that while her bids did not affect the validity of the sale, the manner in which the auction was conducted resulted in the sale being effected by Private Treaty and not by public auction. The mortgagee, he opined, was under a duty to carry out a current valuation of the property in order to ensure that the property was sold at the best price that could be obtained. Further, he said that the property ought to have been properly advertised in order to attract potential purchasers. The sale of the property ought to have been carried out so as to obtain the best price that could reasonably be obtained for the property. At page 16 he said:

> *"It follows that the findings of learned trial judge can be supported on two grounds:*
>
> 1. *In relation to collusion his acceptance of the respondent's account of the events relating to the conduct of the sale.*

2. *The admitted absence of any right being reserved to the auctioneer to make bids."*

In the instant case, reasonable steps were taken to obtain a current valuation. The fact that the valuation cannot be relied upon because its validity has been seriously impugned does not indicate collusion between Island Life and Mr. Stevens. There is no evidence that Island Life was privy to any breach of the law regarding the valuation report. The flaw in the report was discovered during the trial of the matter.

The property was not advertised prior to being sold at Private Treaty but it was properly and extensively advertised to be sold at public auction. The case of **International Trust & Merchant Bank** is distinguishable as that property was advertised as single dwelling house when in fact it was a duplex house on two lots of land with a land area of 6020 sq. ft. In the instant case the size of the property was properly described in the advertisement. Dr. Manhertz clearly did not consider the property being described as having six shops as important, because in 1994 he obtained a valuation report from Easton Douglas & Company which described the property as having six shops. He read the report and took it to Island Life for it to rely on. Mr. Stair's evidence is that whether the property is described as having six or eight shops is not significant. However, in the case of **International Trust & Merchant Bank v. Gardiner,** the mis-advertisement of the property as being one dwelling instead of two would fail to arouse the interest of potential bidders who would be interested in purchasing two houses for that price.

In the instant case, the property was advertised several times in **The Daily Gleaner** as being up for sale by public auction. There was evident disinterest in the

property. Potential purchasers were therefore well aware that the property was up for sale. There was nothing clandestine about the sale of the property. Shortly after and out of desperation, as it is the evidence of Miss Donna Stephenson, Island Life entered into negotiations with Mr. Stevens. Mr. Stevens was interested in purchasing the property as he was in negotiation with Dr. Manhertz. The fact that he decided to purchase directly from Island Life in order to obtain the property at a lower price is not indicative of collusion.

There is no evidence on which the court can rely that a Mr. Samough supplied Mr. Stevens with information and even if he (Mr. Samough) did there is no evidence that he colluded with Island Life.

Mrs. Taylor-Wright submits that the fact that Miss Stephenson ignored Mr. Stennett's offer of $8,000,000.00 and considered Mr. Stevens' offer of $7,000,000.00 indicates collusion. It is Ms. Stephenson's evidence that Island Life was anxious to recover its money as it had been "struggling with the Manhertzs for years and "FINSAC had come into the company." It should be noted that Mr. Stennett's offer of $8,000,000.00 was conveyed to Island Life by Dr. Manhertz' attorney-at-law. At that point Island Life clearly had lost faith in Dr. Manhertz' promises as his several offers failed to fructify. In the circumstances I do not find Island Life's failure to consider Mr. Stennett's offer of $8,000,000.00 to be collusive.

The fact that Miss Stephenson prepared an agreement for $7,000,000.00 cannot be evidence of collusion. The debt was long outstanding and Island Life was anxious to recover its money. Mr. Stevens' increased offers even though Island Life accepted his offers are not evidence of collusion. He appeared to be determined to purchase the

property. Having negotiated with Island Life, he was aware of the fact that the Manhertzs had threatened and instituted proceedings. On the 29th December 1999, Island Life wrote to Dunn Cox, Mr. Stevens' attorneys concerning his offer of $7,000,000.00 and informed them that the Manhertzs had instituted legal proceedings against it. On the 6th December 1999, Dunn Cox wrote to Livingston, Alexander & Levy and enquired what stage the proceedings had reached. Mr. Stevens was therefore well aware of the fact that the Manhertzs was challenging the sale. It is not unreasonable to find that because he was determined to acquire the property he increased his offers in order to prevent the Manhertzs from successfully alleging that he purchased the property at an undervalue. At that stage of the negotiations it cannot be said to be collusion even if someone at Island Life kept him abreast of the Manhertzs' complaints and challenges. The fact that he increased his offer the day after the Manhertzs threatened legal action is in my view, merely evidence of his tenacity.

Miss Stephenson's indulgence of Mr. Stevens by allowing him to pay the deposit in installments does not in the circumstances indicate collusion. Island Life had found an "over anxious and persistent purchaser" who was willing to increase his offer and Island Life was desperate to collect and FINSAC had come into the company.

I cannot accept Mrs. Taylor-Wright's submission that Island Life's failure to contact three purchasers whose names and addresses had been supplied by Dr. Manhertz is evidence of collusion. If those purchasers were serious they could have contacted Island Life. Island Life requested the details of the sale agreements between the Manhertzs and the said purchasers. The Manhertzs could not provide the agreements as

the said agreements could not be formalized without the consent of Island Life and Strata approval was not obtained.

The Court of Appeal in the case of **International Trust & Merchant Bank v Gardiner** did not give a definition of collusion. However, **Black's Law Dictionary** 6th Edition defines collusion as follows:

> *"An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose, a secret combination, conspiracy or concert of action between two or more persons for fraudulent or deceitful purpose."*

The authors of **Words and Phrases Legally Defined** 2nd Edition Volume 1 at page 2 defines collusion as follows:

> *"To be a "collusive" sale it must have some secret term or aspect designed for the purpose of deceiving or imposing upon the mortgagors or the person entitled to redeemed and defeating his interest in some way ... under other legal systems collusion has been defined as a fraudulent arrangement between two or more persons to give a false or deceptive appearance to a transaction to which they engage."*

I find that the Manhertzs have failed to provide any evidence which suggests any secrecy between Island Life and Mr. Stevens. There is no evidence that Island Life behaved in a manner designed to defeat the Manhertzs of their interest nor is there any evidence of deception. There is therefore no evidence advanced to support the contention that the sale was not conducted at arms length and was not bona fide.

**Whether Island Life had the competence to compound interest**

The next issue to be determined is whether Island life had the competence under the mortgage deed to compound interest.

**Submissions by Mrs. Taylor-Wright**

Mrs. Taylor-Wright submits that it had no competence under the mortgage deed. According to her, clause 2a of the Mortgage deed sets out the method of payment which she argues ought to be the reducing balance method, which is payable in the monthly sums of $168,447.86.

She further submits that clause 3b does not admit any certain power which allows for compound interest to be charged. The law, she contends, leans against compound interest unless there is a special agreement. In the absence of any special agreement, only simple interest can be charged; she relies on **Daniell v. Sinclair** (1881) 6 AC 181 pc. Clause 3b is capable of the following four meanings which renders it ambiguous:

**Firstly**

That the outstanding interest when capitalized is added to the original principal of $4,500,000.00 thereby immediately effecting a permanent change in the interest rate originally payable on the principal amount, that is, a change from 38% to 36% for the life of the mortgage

**Secondly**

That the outstanding interest is added to the original principal of $4,500,000.00 when then becomes a separate principal balance

repayable at the rate of 36% per annum while the original principal of $4,500,000.00 continues to attract interest separately at the rate of 38%.

**Thirdly**

That there is what is referred to as the capitalized arrears of interest which is separate and stands on its own as interest being constantly capitalized and accruing interest at 36% without any addition to the original principal balance, while the original principal continues to attract interest at 38% per annum.

**Fourthly**

That the interest rate of 36% was to be charged on the arrears of the monthly installments.

Clause 3b she submits is too vague for any certain meaning. Consequently, it is unenforceable. She relies on **Scammel v Ouston** (1994) A C 251, **Brown v Gould** (1972) C L page 57, **Negril Holdings Limited et al v C & B Consolidated Suits** CLN 8891 and CLN 89 of 1999.

The evidence of Mrs. Vinnate Hall and Miss Donna Stephenson support the contention that the clause is ambiguous. Mrs. Vinnate Hall, Island Life's accountant applied the first suggested meaning. The method applied by Mrs. Vinnate Hall is different from that applied earlier by the mortgagee. It is also at variance with the method used in the amended Statement of Claim. Island Life has used two of the above interpretations. Method No. 4 was used most often. This, she states is evidenced by the following:

(1) Letter dated 24th April 1995, from Carl Aldridge, Island Life's Director of Investments to Dr. Manhertz which contained a Statement of his account as at April 1995.

(2) Letter dated July 6th 1995 from Allan Lewis, the Vice President of Island Life which contained a Statement of his account as at July 6th 1995.

(3) Letter from Kimberly Thomas, Investment Accountant dated December 1995, which contained a Statement of his account as at November 5th 1995 and

(4) Letter from David Barnes Senior Investment Analyst dated April 9th 1996, which contained a Statement of account as at April 9th 1996.

She submits that the method 2 or 3 was applied in calculating the sum demanded by Miss Donna Stephenson in the letters of demand to the Manhertzs dated 26th January 1998, 2nd March 1998, and the 24th March 1998, either of these interpretations allows for the regular installments to continue at 38%. Those methods are different from the method employed by Mrs. Vinnate Hall whose method merges the interest with the original principal to form one principal on which interest is charged at 36%.

Mrs. Vinnate Hall admitted that, there were two other methods, apart from hers which were used by Island Life during the life of the mortgage. She admits that the Manhertz paid interest on the principal or part thereof throughout the mortgage using two different rates which resulted in double counting and unjust enrichment on the part of Island Life. This is supported by the fact that Mrs. Hall stated on the cross examination that 36% had been applied to the arrears on the installment which included

the principal portion of the monthly payments and at the same time 38% was used to arrived at the monthly installments. She stated that the interpretation of clause 3b was different from the method she applied which was interest payable at a rate of 36% per annum on the arrears of interest compounded for the full life of the mortgage. Mrs. Taylor-Wright submits that the result has been chaotic and there is no certainty as to what their intentions were. This she submits is further supported by:

1. Miss Vinnate Hall insistence that her method is correct, that is, the application of the rate of 36% per annum on the interest portion of the arrears of installments which created a new capital which was added to the old capital on each occasion.
2. Miss Donna Stephenson insistence that the method used by Island Life during the life of the mortgage was correct.

Mrs. Taylor-Wright submits that both interpretations cannot be correct therefore the clause is inherently uncertain. She submits that reasonable certainty must be shown that the intention was such as is suggested. She relies on **Chitty on Contracts.**

**Submissions by Mr. Ransford Braham**

Mr. Ransford Braham submits that there is no ambiguity in the language of clause 3b. It gives an express, clear and unequivocal right to the mortgagees to capitalize interest on arrears of unpaid interest. The court is obliged to give effect to the intention of the parties as expressed in clause 3b and construe the words in their ordinary meaning. He relies on the following statements made by Lord Wenslenydale in **Grey v Pearson** cited by Kim Lewinson in **Interpretation of Contract** at page 65:

> *"In construing all written instruments, the grammatical and ordinary sense of the words is to be adhered, to unless*

*that would lead to some absurdity, or some repugnance or inconsistence with the rest of the instruments, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further."*

At page 66 of the same text the author continues:

*"The ordinary meaning of a word is its meaning in plain ordinary and popular sense although that maybe a sense among a particular group of persons."*

The words of clause 3b must be given its ordinary and natural meaning and should be interpreted as follows:

(a) any unpaid interest (first);

(b) shall be capitalized and added to the principle money received;

(c) interest at 36% (second interest) should be charged on the unpaid first interest;

(d) if any further interest, that is the second interest remains unpaid too should be capitalized and attract further interest at 36%.

**Conclusion**

Mrs. Taylor-Wright's submission that Island Life is not entitled to compound interest is untenable. There is no challenge that Island Life is a financial institution empowered to grant loans and mortgages.

In the case of **Financial Institution Services Limited v Negril Negril Holdings Limited and Negril Investment Company Limited,** the Privy Council held that in the absence of a clause entitling the bank to compound interest it could be implied from local banking customs that banks in Jamaica were entitled to do so. In this case, the right to compound interest is an expressed term, i.e. clause 3b. A similar

position obtained in **Hew v National Commercial Bank Jamaica Limited.** In light of the Privy Council's decision in both cases, I reject Mr. Leonard Condells' evidence that it is the simple interest that is applicable to the loan.

In **Lloyd v Lloyd** (1837) 2 My and Cr 1992 Cottenham L C said:

> *"The and universal principle ought to be applied: namely, that (an agreement) ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intention."*

Clause 3b states:

> *"If any interest or any interest payable on arrears of interest capitalized under this present clause shall remain unpaid after the day on which the same ought to be paid then and in every such case the interest so in arrear shall be capitalized and considered as from the day on which the same ought to be paid as an addition to the principal money hereby secured and shall henceforth bear interest at the rate specified in item B of the schedule hereto and on the days aforesaid and all the covenants and provisions herein contained and all powers and remedies conferred by law or by this mortgage in relation to the principal money and the interest thereon shall equally apply to such capitalized arrears of interest and to interest on such arrears and all such capitalized arrears of interest and the interest on such arrears shall be charged on the mortgaged hereditaments and shall to all intents and purposes be within the scope of and operations of this security and shall be payable by the mortgagor upon the same being demanded by the mortgagees provided always that the provisions of this clause shall in no way prejudiced or affect the right of mortgagee to enforce payment of any interest in arrear under any of the covenants or provisions herein contained."*

There can be no misunderstanding that Island Life intended to compound interest. Clause 3b gives a clear right to Island Life to do so. Throughout the life of the mortgage, interest has been compounded. Dr. Manhertz who is an economist has

never complained prior to this claim about that fact. On a balance of probabilities it is reasonable to infer that he accepted that Island Life was entitled to do so. The argument that he requested on account from Island Life amounts to a challenge of its right to compound interest is untenable.

It is indisputable that throughout the life of the mortgage there has been no consistency regarding the method of calculation applied by island Life and it has been subject to erroneous calculations. The fact that the method of calculation was opened to several interpretations cannot render the entire clause which clearly confers on Island Life the right to capitalize, unenforceable.

However, I have found Mrs. Vinnate Hall to be a reliable witness. I accept her calculations as accurate. Mr. Leonard Condells (the Manhertzs' witness) cannot be relied upon, his calculations were inaccurate. He failed to credit the Manhertzs with four payments.

Island Life's claim is for $8,037,437.18. This figure includes interest at 36% for 19 days which amounts to $296,480.40. I have disallowed this portion of the claim.

Accordingly, judgment to Island Life in the sum of $7,740,956.70.

Costs to be agreed or taxed.