



[2025] JMCC Comm 3

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. SU2024CD00057**

<b>BETWEEN</b>	<b>P &amp; L LENDER LLC</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>P &amp; L HOLDINGS LIMITED</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Mrs Alexis Robinson and Mr Jamaiq Charles instructed by Myers Fletcher and Gordon for the claimant**

**Mr Ruel Woolcock instructed by Ruel Woolcock & Co. for the defendant**

**Heard: April 30, 2024, May 28, 2024, July 11, 2024, July 22, 2024; September 18, 2024; October 30, 2024; and January 20, 2025**

***Mortgages - Whether claimant permitted to exercise power of sale over land excluded from the mortgage – Section 106, 68 and 71 of Registration of Titles Act – Section 63 of the Trust Act***

**CORAM: JARRETT J**

**Introduction**

[1] This is a mortgage claim brought by the claimant, mortgagee, seeking the court's permission to exercise its power of sale. No issue arises whether the power of sale has arisen in respect of the mortgaged property. The issue is whether the power can be exercised over property excluded from the mortgage ('the excluded

property’) but which has not been subdivided from the parent title. The defendant mortgagor contends that that is legally impermissible. As required by CPR 66, the claim is brought by fixed date claim form supported by affidavit. The relevant background facts are largely undisputed and are set out below. The affidavit in support of the claim is that of Kevin Wolfer filed on February 13, 2024. The affidavit of Donald Lawson in response, was filed on April 18, 2024.

### **Background facts**

- [2] On October 27, 2020, the claimant and the defendant entered into a Loan Agreement by which the claimant loaned to the defendant USD\$1,400,000.00 (“the loan”), evidenced by a Promissory Note of the same date. The loan was secured by a mortgage over part of land known as MILK PEN AND SCOTTS OR ORRS, located in the parish of Clarendon and owned by the defendant. On October 27, 2020, the parties also executed a Mortgage Deed (‘the mortgage instrument’), under the provisions of the Registration of Titles Act (“ROTA”).
- [3] The mortgaged property is described in the schedule to the mortgage instrument as:

“ALL THAT parcel of land known as MILK PEN AND SCOTTS OR ORRS in the parish of CLARENDON containing One Thousand One Hundred and Sixteen point One Two Four One (1,116. 1241) Hectares and being land formerly comprised in Certificate of Title registered at Volume 65 Folio 90 SAVE AND EXCEPT that Bath Land (2A) and the portion transferred by Transfer Nos. 6623(5A),48673 (15A,1R 3P), 68628(3A 36.5P) 79952 (1A 3R 22.9P) and 91487 (3A 2R 11P) AND BEING all the land comprised in the Certificate of Title registered at Volume 1461 Folio 791 in the Register Book of Titles, **SAVE AND EXCEPT LOTS 4A, 5,6, and 7A totalling only 329.91 acres of land which shall be removed from the Parent Title as set out in Surveyor ID Report by M.D. Issacs Commissioned Land Surveyor dated the 2<sup>nd</sup> February 2020.**” [ Emphasis added]

The mortgage is endorsed on Certificate of Title registered at Volume 1461 Folio 791 as mortgage No 2285167 with its registration date being November 13, 2020.

- [4] As of January 1, 2022, the defendant was in default in its repayment of the loan. By that time, it had made payments amounting to USD\$ 206,733.33. Partial payments were made after default, totalling USD\$ 36,000.00, however since September 22, 2022, no payments have been made. A demand letter dated October 12, 2022, sent to the defendant by the claimant, remained unanswered. Another demand for payment was sent by letter dated December 20, 2022, from the claimant's attorneys-at-law. As of December 20, 2022, the defendant owed the sum of USD \$ 1,704,277.78, inclusive of interest of USD \$ 304,277.78.
- [5] The claimant attempted to sell by public auction all the land comprised in the Certificate of Title registered at Volume 1461 Folio 791 to satisfy the outstanding amounts owed to it by the defendant. It sought the services of Gordon Langford to do a valuation and to prepare a valuation report. In a report dated April 12, 2023, he valued all the land comprised in the Certificate of Title at USD\$14,650,000.00. The auction was however aborted when the defendant's attorneys-at-law indicated by letter, that the mortgaged property did not comprise of all the land in the Certificate of Title.
- [6] In a second valuation done by Gordon Langford at the request of the claimant, he valued the mortgaged property at USD\$9,300,000.00, and the excluded property at USD \$ 5,350,000.00. This valuation report is dated May 2023.
- [7] It is not disputed that the defendant was the party to have obtained subdivision approval and splinter titles for the excluded property. This was not done. The defendant however obtained its own valuation from Gordon Langford and sought to obtain subdivision approval from the Clarendon Municipal Corporation based on a survey plan which was different from that prepared by M.D. Issacs Commissioned Land Surveyor, dated the February 2, 2020, which was the basis on which the excluded lots were defined in the mortgage instrument. The claimant

refused to give its consent to the subdivision based on this new survey plan, as it contends that it will significantly affect the value of its security. The defendant however says the difference in the two survey plans amounts only to 46 acres being taken from the lands forming the mortgaged property, with lot 7A on the sketch plan prepared by M.D. Issacs, being changed to lot 9. The valuation prepared for the defendant by Gordon Langford places a value of USD \$36,2010,000.00 on all the land comprised in the Certificate of Title.

### **The pleadings**

**[8]** In its fixed date claim form filed on February 13, 2024, the claimant seeks the following orders: -

“1. The Claimant is empowered to exercise its power of sale contained in Instrument of Mortgage dated October 27, 2020, registered as mortgage no 2285167 (“the Mortgage”) and pursuant to section 106 of the Registration of Titles Act in respect of all that parcel of land known as Milk Pen and Scotts or Orrs in the parish of Clarendon containing One Thousand , One Hundred and Sixteen point One Two Four One ( 1,116.124) (sic) Hectares and being all the land comprised in the Certificate of Title registered at Volume 1461 Folio 791 in the Register Book of Titles, and not just the Mortgaged Premises set out as Item 1 of the Schedule to the Instrument of Mortgage (“the Property”).

2. The Property shall be sold on the open market, whether by auction or private treaty, by the registered mortgagee of the Mortgaged Property, P & L Lender, LLC, as vendor, pursuant to the power of sale contained in the Instrument of Mortgage and section 106 of the Registration of Titles Act.

3. The Claimant’s Attorneys-at-law shall have carriage of sale of the Property and their Attorneys’ fees and the reasonable expenses incidental to the sale, including those already expended on the aborted auction, shall be first charges on the proceeds of sale.

4. The sale price of the Property shall be determined in accordance with the valuation report of Gordon Langford, Commissioned Land Surveyor, dated May of 2023 (“the 2<sup>nd</sup> Valuation”); however the Claimant is authorised to seek the best price available on the market at the time of sale notwithstanding that such price may be significantly lower than the Valuation.

5. The Claimant is hereby authorised to keep an appropriately pro-rated portion of the net proceeds of sale in order to satisfy (insofar as it may be able) the outstanding loan and interest secured by the Mortgage.

6. The other pro-rated portion of the net proceeds of sale and the balance of the net proceeds of sale (if any) shall be paid to the Defendant within 21 days of the completion of the sale of the Property.

7. The costs of this claim are awarded to the Claimant to be taxed if not agreed.

8. Such further and other relief as this Court may think fit.”

**[9]** The pleaded grounds are in summary that; a) the claimant is the registered mortgagee; b) the excluded property was not subdivided from the parent title; c) the defendant has been in default on the loan; and d) it is entitled to exercise its power of sale over the mortgaged property by virtue of clause 4.1. of the mortgage instrument and section 106 of the ROTA.

## **Submissions**

### *The claimant*

**[10]** The claimant’s submissions are a smorgasbord of legal propositions. Mrs Alexis Robinson’s first salvo focused on the grounds in the claim. She argued that since the defendant did not obtain splinter titles for the excluded property and has defaulted on the loan, the only just and fair order is to permit the claimant to sell all the property and account to the defendant for the value of the excluded property.

Learned counsel submitted that the claimant has lost faith in the defendant's promises to pay. She complained that the defendant proceeded to apply for subdivision approval with a survey plan other than that which was agreed. According to her, the court should order that the sale be based on the valuation done by Gordon Langford dated May 2023.

**[11]** In response to Mr Woolcock's submission that section 106 of the ROTA does not allow a mortgagee to exercise its power of sale on anything but mortgaged property, Mrs Robinson made the following arguments to justify the orders sought:

- a) The mortgage endorsed on the title does not make any reference to the excluded property. Therefore, by virtue of sections 68 and 71 of the ROTA, the claimant is entitled to sell the entire property as a legal mortgage exists over the entire property. It is not permissible to look behind the endorsement on the Certificate of Title, as it is conclusive evidence that the claimant's mortgage interest over the entire property is unassailable.
- b) The mortgage was conditional on the subdivision and splintering of titles for the excluded property, based on the survey plan of M.D. Issacs. Since the defendant failed to have the excluded property splintered, what now exists is a legal mortgage over the entire property comprised in the Certificate of Title. Until the excluded property is splintered, the mortgage intended by the parties cannot be said to exist.
- c) Having not splintered the title, the defendant is beneficially entitled only to the value of the excluded property and not the excluded property, as there is no title to it. The claimant is therefore approaching the court as trustee, holding the value of the excluded property on trust for the defendant. Had the claimant exercised its power of sale over the entire property as it is entitled to do, it would hold an appropriate portion of the sale proceeds on trust for the defendant. Under section 63 of the Trust Act, the court has the jurisdiction to authorise the claimant to keep a prorated portion of the sale

proceeds to satisfy the outstanding loan and pay the other prorated portion to the defendant.

- d) Alternatively, if the court finds that a legal mortgage does not exist, it is entitled to find that an equitable mortgage exists over the entire property comprised in the Certificate of Title. This is because the defendant deposited the Certificate of Title with the claimant, which is evidence of the parties' clear intention that the claimant would have a power of sale over the entire property until the subdivision of the excluded property. Given the defendant's default, the Claimant has properly applied to the court to exercise its power of sale over the entire property.

[12] The claimant's further submission that the court should exercise its inherent jurisdiction to grant the orders sought, was abandoned by Mrs Robinson in oral arguments. In its written submissions, Mrs Robinson relied on the court of appeal decision in **Paul Chen Young & Ors v Eagle Merchant Bank & Ors [2018] JMCA App 7**, to make the point that the court should exercise its inherent jurisdiction to make the order that gives effect to the most just outcome. With this argument being abandoned, I will give no consideration to it.

*The defendant*

[13] Mr Ruel Woolcock, counsel for the defendant said his client accepted the responsibility to subdivide the excluded property and to obtain splinter titles, but the process has been slow. He conceded that the defendant deviated from the agreed survey plan and accepted that it has provided no explanation for it in the affidavit in response of Donald Lawson. According to him, the deviation has not compromised the claimant's security. He questioned the valuations done by Gordon Langford, given that he has provided two different valuations with markedly different values within a relatively short period of time.

[14] Mr Woolcock's core argument is that since the claimant relies on section 106 of the ROTA to ground its claim, it is only the mortgaged property, referred to in the

mortgage instrument and endorsed on the Certificate of Title which can be sold in the exercise of its power of sale. He says that section 68 of the ROTA refers to the indefeasibility of a certificate of title, and section 71 provides that fraud is an exception. These provisions are therefore not relevant to the claim. According to him, the mortgage endorsement on the Certificate of Title cannot exist in a vacuum, and regard must be had to the mortgage instrument. He cites the decision of McDonald Bishop J (as she then was) in **Patvad & others v Jamaica Redevelopment Foundation Inc. Claim No 2006HCV01377**.

[15] With respect to the claimant's argument that an equitable mortgage exists, Mr Woolcock submitted that the parties' intention is critical where an equitable mortgage is said to exist. According to learned counsel, it is clear from the evidence that it was never the parties' intention that the excluded property would at any time, become the subject of an equitable mortgage.

[16] As to the claimant's reliance on the court's inherent jurisdiction, Mr Woolcock said, that in **Paul Chen Young**, it is clear from the leading judgment of Morrison P, that the court's inherent jurisdiction is part of procedural law, not substantive law. That jurisdiction could not be invoked to allow a mortgagee to exercise its power of sale over land that is not part of the mortgaged property. The only proper exercise of the court's inherent jurisdiction in this case, argued Mr Woolcock, is to direct the completion of the subdivision process within a prescribed time, failing which the claimant is empowered at the defendant's costs to have the titles splintered.

[17] On the question of the claimant being trustee of the proceeds of sale, Mr Woolcock argued that this would only arise on a sale, and until then, the mortgagee is not a trustee of the proceeds of sale.

### **Analysis and discussion**

[18] It is common ground that the defendant has defaulted on the Loan Agreement and, because it did not obtain subdivision approval for the excluded property, the claimant is stymied in exercising its power of sale over the mortgaged property.



The question is whether it is legally permissible for the court to order the claimant to sell the entire property and account to the defendant for the value of the excluded property.

**[19]** What is very evident from the claimant's arguments in response to the defendant's submission that the ROTA does not allow for the power of sale to be exercised on anything but the mortgaged property, is that those arguments were not foreshadowed in the pleadings. CPR 8.8(1)(b) states that the fixed date claim form: 'must' state the remedy which the claimant is seeking as well as the legal basis for the claim. By virtue of CPR 8.8(1)(c), where the claim is made under an enactment, the fixed date claim form 'must' state the enactment. The only statutory enactment pleaded by the claimant is section 106 of the ROTA, which deals with a mortgagee's power of sale over mortgaged property. The claimant neither pleaded sections 68 and 71 of the ROTA, nor section 63 of the Trust Act, and the legal bases for its reliance on these statutory provisions. The alternative argument of the existence of an equitable mortgage; or the argument that a legal mortgage came to exist over the entire property upon the defendant's failure to subdivide the excluded property, were also not pleaded.

**[20]** The mandatory nature of the above-mentioned provisions of the CPR, reflect the seminal legal principle, that a defendant must know the case it is called upon to answer. Strictly speaking therefore, the claimant ought not to be allowed to rely on the statutory provisions and the legal bases for the claim which were not pleaded. Nevertheless, given the significant time spent in arguments on both sides, and with the opportunity given to the defendant to file additional submissions to address the new matters raised by the claimant in arguments, I will consider them. I start however with the pleaded claim.

*Can the entire property be sold under section 106 of the ROTA*

**[21]** It is obvious that the present claim is the result of the claimant's acknowledgment that the mortgaged property did not include the excluded property and so it could

not proceed to auction the entire property contained in the Certificate of Title. Section 106 of the ROTA, which is the statutory basis on which the claimant seeks the orders in the claim, provides as follows: -

“106. If such default in payment, 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.”

**[22]** On any reading of this provision, it is plain that a mortgagee’s power of sale is in relation to property which is the subject of a mortgage. Notwithstanding the defendant’s irrefutable default on the loan, and its acknowledged delinquency in not subdividing the excluded property and obtaining splinter titles for it, I agree with Mr Woolcock, that section 106 of the ROTA cannot avail the claimant. I find

therefore that with the excluded property not being part of the property subject to the mortgage, the claimant cannot exercise its power of sale over it.

*Is the mortgage endorsed on the Certificate of Title, a mortgage over the entire property by virtue of sections 68 and 71 of the ROTA*

**[23]** Mrs Robinson's very creative argument is that since the endorsement on the Certificate of Title, does not state that the mortgage excludes the excluded property, it follows *ipso facto*, that on the defendant's failure to subdivide the excluded property, the mortgage became a legal mortgage over the entire property. According to learned counsel, the authority for this proposition, is sections 68 and 71 of the ROTA. It is helpful to examine these statutory provisions.

**[24]** Section 68 of the ROTA is well known. It provides that a certificate of title is conclusive evidence of title. It reads as follows: -

“68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.”

**[25]** Section 71 is equally well known. It provides protection for persons dealing with a registered proprietor: -

“71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered

land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

**[26]** I confess to finding it difficult to understand how these two provisions provide authority for Mrs Robinson’s submission. The actual endorsement of the mortgage on the Certificate of Title is a good starting point. Exhibit KW1 to the affidavit of Kevin Wolfer is a copy of the Certificate of Title registered at Volume 1461 Folio 791 of the Register Book of Titles. The endorsement of the mortgage reads: -

“Mortgage No. 2285167 registered in duplicate on the 13<sup>th</sup> day of November 2020 to P & L Lender LLC at 930 Sylan Avenue, Suite 110, Englewood Cliffs, New Jersey 07632, United States of America to secure One Million Four Hundred Thousand Dollars United States Currency with interest.”

A copy of the registered mortgage instrument is Kevin Wolfer’s Exhibit KW2. It has a notation on the top right-hand corner signifying the stamp duties paid and written along the right-hand side is the following number: “2285167”. This number is also written on the document’s backing, and is the same number assigned to the mortgage which is endorsed on the Certificate of Title.

**[27]** As stated earlier, the schedule to the mortgage instrument describes the mortgaged property and it is clearly stated that lots 4A, 5, 6, and 7A (the excluded property) do not form a part of the mortgaged property. I agree with Mr Woolcock (without hesitation I might add), that the endorsement on the Certificate of Title cannot be read in a vacuum, and that it must, of necessity and logic, relate to the mortgage instrument to which it clearly refers. In **Patvad Holdings Limited & Ors**

**v Jamaica Redevelopment Foundation Inc & Anor, Claim No 2006HCV01377, delivered on March 9, 2007;** Mc Donald-Bishop J (as she then was), had to consider whether a mortgagee's power of sale ought to be interfered with by injunction. The learned judge saw it necessary to consider the principles applicable to the exercise of a mortgagee's power of sale and in doing so, she addressed the legal effect of an instrument of mortgage at paragraph 17: -

“17. It is from the mortgage instrument that the mortgagee derives his rights, duties and obligations and so it is to this instrument that one must first look to ascertain the rights of the defendants over the mortgaged property in question.”

[28] Sections 68 and 71 of the ROTA has been judicially interpreted as establishing the indefeasibility of a certificate of title, “subject to the subsequent operation of any statute of limitations”.( See for example, **Chisholm v Hall [1959]3 WLR 391** , **Recreational Holdings Ltd v Lazaruz & Anor [2014]JMCA Civ 34** and **George Mobray v Andrew Joel Williams [2012] JMCA Civ 26** ) The effect of these sections on the registration of the instrument of mortgage in the present case, is that the endorsement on the Certificate of Title is conclusive evidence of the existence of the legal mortgage over the property described in the schedule, which does not include the excluded property. I therefore reject Mrs Robinson's proposition that by virtue of these provisions, the claimant is entitled to sell the entire property in the exercise of its power of sale because the mortgage exists over the entire property. I find that the mortgage that exists is a legal mortgage over the property described in the schedule to the mortgage instrument and excludes the excluded property.

*Was the mortgage conditional on the excluded property being subdivided*

[29] When Mrs Robinson submitted in oral arguments that the mortgage was conditional on the subdivision, I asked her whether this meant that since there is no subdivision, there is no mortgage. Unsurprisingly, her response was that that is

not the case. I have carefully read both the Loan Agreement and the mortgage instrument. Both documents are extremely detailed and in neither document is any such condition expressed or implied. For the same reasons I advance with respect to the effect of the registration of the mortgage instrument, I reject this proposition.

*Is the claimant holding the value of the excluded property on trust for the defendant*

**[30]** Section 63 of the Trust Act provides that: -

“A trustee may apply to the Court for directions as to how he should or might act in any of the affairs of the trust, and the Court may make such order as it thinks fit.”

Since there has been no auction sale, I cannot see how it can be said, that the claimant is a trustee holding the value of the excluded property or any funds on trust for the defendant as beneficial owner. I therefore do not see the relevance of section 63 of the Trust Act to the present claim.

*Does an equitable mortgage exist*

**[31]** The claimant’s argument is that if the court finds that a legal mortgage does not exist, then it should find that an equitable mortgage exists, because the Certificate of Title was deposited with it. As determined earlier in this judgment, the mortgage endorsed on the Certificate of Title is a legal mortgage, the endorsement being conclusive evidence of its existence. This alternative argument is therefore unnecessary, and I will consequently not address it further.

*The valuations of Gordon Langford*

**[32]** Given my findings, it is unnecessary to consider the arguments advanced by the parties in relation to the valuations of Gordon Langford.

**Summary of findings and conclusion**

- [33]** I now summarise my findings and conclusions.
- [34]** The statutory power of sale under section 106 of the ROTA is only exercisable in respect of property the subject of a mortgage. As the excluded property is not the subject of a mortgage, the claimant cannot exercise its power of sale over it.
- [35]** The mortgage endorsed on the Certificate of Title does not exist in a vacuum. It relates to the mortgage instrument which defines the mortgaged property. The description of the mortgaged property in the mortgage instrument, clearly excludes the excluded property. Sections 68 and 71 of the ROTA provides for the indefeasibility of a certificate of title. These provisions do not entitle the claimant to sell the entire property on the basis contended by it , that the legal mortgage exists over the entire property, because the endorsement does not refer to the excluded property.
- [36]** There is no express provision in either the Loan Agreement or the mortgage instrument making the mortgage conditional on the excluded property being subdivided, and no such condition can be implied. A legal mortgage exists over the mortgaged property as reflected in the mortgage instrument and the endorsement on the Certificate of Title.
- [37]** Section 63 of the Trust Act is irrelevant on the facts of the claim as the claimant does not hold the value of the excluded property or any property as trustee for the defendant.
- [38]** With my finding that a legal mortgage exists in accordance with the endorsement on the Certificate of Title, the alternative argument of an equitable mortgage does not arise.

## **Orders**

- [39]** I should indicate that I invited both counsel to consider whether they would be amenable to the court making an order directing the defendant to subdivide the excluded property and obtain splinter titles in accordance with the agreed survey

plan of M.D. Issacs. While Mr Woolcock was open to such a course, the proposal was met with strong objection from Mrs Robinson.

**[40]** In the result I make the following orders

- a) The fixed date claim form is dismissed
- b) Costs to the defendant to be agreed or taxed

**A Jarrett**  
**Puisne Judge**