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JUDGMENT

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2010 HCV 00381**

BETWEEN	REAL ESTATE BOARD	CLAIMANT
AND	ZOE MCHUGH	1ST DEFENDANT
AND	KES DEVELOPMENT COMPANY LIMITED (IN LIQUIDATION)	2ND DEFENDANT
AND	CAPITAL AND CREDIT MERCHANT BANK LIMITED	3RD DEFENDANT
AND	JENNIFER MESSADO & CO.	4TH DEFENDANT

IN CHAMBERS

Dr. Lloyd Barnett and Ms. Gillian Burgess for the Claimant.

Mrs. Georgia Gibson-Henlin and Ms. Faith Hall instructed by Henlin, Gibson-Henlin for the 3rd Defendant.

Ms. Carol Davis for the 4th Defendant.

Heard : 22nd, 23rd February, 27th May 2011, and 8th June, 2011

**REAL ESTATE (DEALERS AND DEVELOPERS) ACT-PREPAYMENT
CONTRACTS-PRIORITY BETWEEN BOARD'S CHARGE AND BANK'S
MORTGAGE-PREPAYMENT CONTRACTS VOID OR VOIDABLE-
WHETHER BOARD'S CHARGE VOID AGAINST BANK AND OTHER
CREDITORS- WANT OF REGISTRATION UNDER COMPANIES ACT-
DEVELOPER IN LIQUIDATION-WHETHER BANK'S MORTGAGE PARI
PASSU WHEN LOAN FOR MULTIPLE PURPOSES-ACCOUNTING**

Mangatal J :

THE PARTIES AND SUBJECT PROPERTY

1. The Claimant, the Real Estate Board, "the Board" is a statutory body established under section 4 of the **Real Estate (Dealers and Developers) Act** "the Act".
2. The Board's primary functions are to regulate and control the practice of real estate business, and the operation of development schemes and the disposition of land within them.
3. The development scheme the subject of this claim is in respect of parcels of land comprised in certificates of title registered at Volume 733 Folio 75 and Volume 733 Folio 76 of the Register Book of Titles. New Titles were issued for these properties and the new Titles are registered at Volume 1389 Folio 338 and Volume 1389 Folio 436.
4. The 1st Defendant Zoe Cecile McHugh "McHugh" was the registered proprietor of the property until it was transferred to the 2nd Defendant KES Development Company Limited "KES" on the 1st of May 2006.
5. KES is the registered proprietor and developer of the residential units on the property. KES is a limited liability company incorporated under the Companies Act of Jamaica and was involved in the business of development schemes and construction. On the 10th of December 2008 KES went into liquidation. The liquidator was Mr. Kenneth Tomlinson.
6. The Third Defendant Capital and Credit Merchant Bank Limited "The Bank" is a limited liability company incorporated under the Companies Act of Jamaica and is licensed under the Financial Institutions Act. It engages in the business of merchant and investment banking including the provision of loan facilities to its customers.
7. The 4th Defendant Jennifer Messado & Co. is a law firm in which Mrs. Jennifer Messado is the principal partner.
8. At the commencement of the hearing, Counsel for the Board indicated to me that McHugh was not served. The firm of Dabdoub & Dabdoub are on

the record for KES. Although at the case management hearing on the 22nd September 2010 at which this hearing date was fixed, a representative of that firm, as well as the then liquidator Mr. Paul Desnoes were present, noone has attended this hearing on behalf of KES.

UNDISPUTED FACTS AND MATTERS

9. On May 16, 2005, KES applied to the Board for registration as a developer for the purposes of a development scheme at Mountain Valley, Stony Hill, St. Andrew.
10. McHugh and KES entered into pre-payment contracts with the purchasers named in the Affidavit in support of the claim sworn to by Ms. Sandra Watson, the Board's General Manager, filed January 28, 2010. Relevant Agreements for Sale and Construction Agreements are exhibited. There are also Affidavits filed by a number of these purchasers. These pre-payment contracts were entered into over a period February-June 2005.
11. In August 2005 KES borrowed money from the Bank. This is evidenced by a loan agreement dated and signed the 8th August 2005 whereby the Bank agreed to advance up to \$146,000,000 to KES. KES provided the Bank with security for the loan in the form of a mortgage and a debenture both dated and signed 8th August 2005.
12. The Board granted the application by KES to be registered as a developer on the 21st June 2006.
13. The pre-payment contracts were entered into by KES prior to the mortgage between KES and the Bank, and prior to the Bank's debenture/charge.
14. The Board was provided by KES with a signed copy of a Deed of Indemnity dated May 23 2006 between KES and McHugh which indicates that they were acting together in entering into prepayment contracts for the development.
15. The Act provides that all amounts received as a vendor on pre-payment contracts from purchasers in development schemes must without delay be

placed in a trust account with an authorized financial institution and held and applied in accordance with the provisions of the Act.

16. The Act also requires that moneys deposited in the trust account cannot be withdrawn except subject to certain conditions. These include that the owner of the land on which the building or works is being constructed must first have executed and lodged with the Registrar of Titles a charge on the land in favour of the Board, charging the land with the repayment of all amounts received by the vendor pursuant to the prepayment contract which would become repayable to the purchasers in the event the vendor breaches the contract.
17. On September 18 2006 the Board's charge was registered on the Certificates of Title. By virtue of the Act the charge is deemed to be a mortgage under the Registration of Titles Act and is enforceable accordingly. The mortgage number by which the Board's charge was noted is 1431296.
18. Between January 23, 1997 and May 28, 2007 KES was engaged in carrying out a number of development schemes at various locations.
19. The Bank's mortgage was registered on the Titles on the 1st February 2007 as mortgage Number 1433819. The loan agreement, mortgage and charge were noted in the Register of Charges at the Companies Office of Jamaica on the 16th of March 2006.
20. The Bank's Mortgage was upstamped to cover a further advance of \$90,000,000 on the 4th of May 2007. The upstamping of the Bank's mortgage was recorded in the Register of Charges on the 10th of December 2007.
21. Having entered into the various pre-payment contracts agreeing to sell to the purchasers the lots into which the property would be subdivided and to build townhouses on the lots, KES went into liquidation on the 10th of December 2008.
22. KES failed to complete the townhouses and the development has failed. KES has also failed to honour the terms of the loan. The Bank enforced its

debenture in August 2007 and is now proceeding/seeking to exercise its powers of sale under the mortgage and the Registration of Titles Act in order to sell the properties.

THE BOARD'S CLAIM

23. The Board claims against the Defendants for the following relief:

- (1) A declaration that the charge registered in September 2006 on the Certificate of Title, Volume 733, Folios 75 and 76 in favour of the Board in respect of all monies received under pre-payment contracts with respect to the Mountain Valley Development, pursuant to the provisions of section 31 of the Real Estate (Dealers and Developers) Act ranks in priority to the mortgage registered on February 1, 2007 in favour of the Bank;
- (2) An order that the Defendants pay to the Claimant a sum equivalent to all amounts received by them under pre-payment contracts with respect to the Mountain Valley Development Scheme carried out on the property registered at Volume 733, Folios 75 and 76 of the Register Book of Titles, and known as Mountain Valley Hotel, together with interest at such rates as are provided for in section 26(2) of the Act.
- (3) An order that the Bank and the 4th Defendant furnish an account of all monies received by them which purported exercise of powers of sale under a mortgage or otherwise together with interest at such rates as are provided for in section 26(2) of the Act.
- (4) Further or alternatively, an order that an account be taken of all monies received by the Defendants under or in respect of pre-payment contracts in respect of the said development scheme and for all necessary inquiries and directions to be taken and made and that provision be made for the costs of

such accounts and inquiries and for an order that the Defendants do pay the Board such sums as may be found due upon the taking of such accounts and the making of such inquiries including interest as aforesaid.

- (5) An injunction to prevent the Bank from proceeding with the sale of the property, the development scheme or any of the units without the prior approval of the Board.
- (6) All such further or other accounts, inquiries, directions and relief as shall be just.

24. The stated grounds upon which the Board seeks this relief are as follows:

- 1. McHugh entered into Agreements for Sale of five lots in the development scheme in the sub-division known as Mountain Valley, Stony Hill, St. Andrew being part of the land comprised in Certificate of Title registered at Volume 733, Folios 75 and 76 of the Register Book of Titles with the intent that the purchasers would enter into Construction Agreements with KES for the building of townhouse units on the lots for the said purchasers.
- 2. The purchasers paid over various sums of money in respect of the Agreements for Sale and Construction Agreements to the 4th Defendant who collected the said sums only on behalf of McHugh and/or KES.
- 3. The Act provides that all amounts received on pre-payment contracts in development schemes must by virtue of the Act be held on trust for the benefit of the purchasers from whom the amounts are received and McHugh as the owner of the land on which the buildings or works are being constructed must lodge a charge on the said land in favour of the Board charging the land with the repayment of all amounts received under such pre-payment contracts.

4. The 4th Defendant acting on behalf of McHugh and KES collected over US \$475,000 and J \$16,332,641.81 under pre-payment contracts in respect of the said development scheme at Old Stony Hill Road, in the Parish of Saint Andrew and has not repaid these amounts to the purchasers or paid them over to the Board; but have entered into arrangements to pay them over to various persons, including McHugh, KES and the Bank.
5. The Bank has been engaged in the sale of the housing units in the said development in purported exercise of its power of sale under the said mortgage.
6. The Board's charge ranks in priority to the Bank's charge.
7. The housing units in respect of which the amounts were paid under the pre-payment contracts have not been delivered or transferred to the purchasers who paid money under the pre-payment contracts and the development scheme has failed.
25. The Bank has filed an Ancillary Claim Form and Particulars of Claim seeking Declarations that the Board's Mortgage is void against the Bank, or alternatively, that the interest of the Board in the proceeds of sale is to be apportioned in accordance with the provisions of the Act. This relief is sought on the stated grounds that:

 - i. The Board's charge is void as against the Bank.
 - ii. The Bank is entitled to exercise its powers of sale in accordance with its mortgage number 1433819.
 - iii. Alternatively, the proceeds of sale are to be apportioned in accordance with the Act and s.107 of the Registration of Titles Act.
26. As Mrs. Gibson-Henlin points out in her written submissions on behalf of the Bank, the Ancillary Claim takes direct aim at the efficacy of the Board's claim because it contends that the Board's mortgage is void. If this

is correct then the issues raised on the Board's claim in relation to the Bank's mortgage would be otiose. I agree that this is an issue that logically ought to be dealt with first.

WHETHER THE BOARD'S CHARGE IS VOID AGAINST THE BANK

27. There are two broad heads under which the Bank's attack on the Board's charge is launched, and these are, that the purchasers' remedy is under s. 26(2) of the Act, and that the Board's Mortgage is not registered under the Companies Act.

The Purchaser's Remedy is under s. 26(2) of the Act

28. It is the Bank's submission that the contracts entered into between KES/McHugh predate registration with the Board. This is propounded on the basis that KES the borrower/developer applied to be registered as a developer under the Act on the 16th May 2005. The application was approved by the Board on the 21st June 2006. These contracts were entered into over a period of February -June 2005.
29. KES created charges in favour of the Bank which Mrs. Henlin submits would be a charge contemplated by s. 26(1)(b) of the Act and which is protected in point of priority under s. 31(5). It would rank *pari passu* with the Board's charge.
30. However, Mrs. Henlin submits, that this assumes that the Board's charge has efficacy under the Act in relation to what it claims to secure. The amounts secured by the Board's mortgage or protected under the scheme of the Act and to be repaid are monies paid under prepayment contracts within, as opposed to, in contravention of the Act. She submits that there are no prepayment contracts within the meaning of the Act and that the contracts in question were entered into in contravention of the Act. This is because s. 26 dictates that a vendor must be registered as a developer with the Board before entering into prepayment contracts.
31. The submission continues that the Board therefore has no basis on which to enforce its charge as against the land or in priority to the Bank which has a valid charge in relation to the land in question duly registered under

the Companies Act and contemplated by section 26(1)(b). As a result, the remedy of trustee for the purchasers is not available to the Board and this also means that the Board has no basis for setting up its mortgage against the Bank. The purchasers' remedy as against KES is pursuant to s.26(2) of the Act.

The Board's Mortgage is not Registered under the Companies Act

32. KES is a limited liability company incorporated under the Laws of Jamaica. Charges were created by KES in favour of the Bank. Section 93(1) of the Companies Act requires that certain charges be registered. This includes a charge for securing any issue of debentures, a charge on land, and a floating charge on the undertaking or property of a company. Section 93(10) stipulates that for the purposes of the section and that Part of the Act, the definition of "a charge" includes a mortgage.
33. It is the Bank's contention that the Board's charge is void because, unlike the Bank, the Board has failed to register its charge in accordance with the Companies Act. A failure to register the charge with the Registrar of Companies prior to the commencement of the winding up of the company renders the charge void against the liquidator or any creditor of the company on a winding up. The consequence of non-registration is that the charge loses its security- **Gower and Davies, Principles of Modern Company Law (4th Edition, Sweet & Maxwell) 1182.**
34. The submission is that the company's obligation remains but the security is unenforceable as against the liquidator and all creditors that registered their charge prior to the liquidation commencing on the 10th December 2008. This does not affect the obligation of the company to pay the money which becomes due immediately because of the charge being rendered void.
35. The Bank relied upon the English Court of Appeal decision in **Capital Finance Co. Ltd.v. Stokes** [1968] 3 All E.R. 625 where no particulars of the relevant legal charge were ever delivered to the registrar of companies nor was it registered in accordance with either s.95 and s.97 of the Companies

Act 1948 which are in similar terms to s.93 and 95 of our Companies Act 2004. It was held that the charge was a charge on land and thus fell within s.95 and therefore on winding up the charge, not having been registered, was avoided as against the liquidator and against the creditors although it remained a good debt provable in a winding up.

36. Mrs. Gibson-Henlin also referred to Burston Finance Ltd. v. Speirway Ltd. [1974] 1 WLR 1648, where the claimants agreed to lend the defendants monies to assist them in the purchase of certain properties. It was a condition of the agreement that a legal charge was to be created over the properties to secure the loan. This legal charge was duly registered under s.26 of the Land Registration Act 1925; however, no registration of the charge was effected under s.95 of the Companies Act 1948. The defendants went into voluntary liquidation and the liquidator took the position that because of non-registration the charges were void against himself and creditors. The court held that the liquidator was correct and found that the legal charge became void for want of registration. Mrs. Henlin submits that it is important to appreciate that this case goes further than just the registration of the charge with the Registrar of Companies. She submits that it also covers the situation in the instant case where the charge was also to be registered at the Land Registry. The payouts have to be in accordance with the priority of charges on liquidation.
37. It is in this context that the Bank contends that the Board ranks as no more than an unsecured creditor as against the Bank but also as against all parties that are registered in priority to the Board's charge under the Companies Act. These other parties are evidenced by the charges register.

The Board's Response as to Whether Board's Charge Void For Want of Registration Under the Companies Act

Whether Purchaser's Remedy is limited to s. 26(2) of the Act and Whether Prepayment Contracts are not Pre-Payment Contracts within meaning of the Act therefore Rendering Board's Charge Void

38. It was submitted by Dr. Barnett on behalf of the Board that "prepayment contract" is defined by section 2 of the Act, and that the contract does not cease to be a prepayment contract because the vendor has acted in breach of s.26(1).
39. He further responded by pointing out that s.26 (1) prohibits the entry into prepayment contracts by the vendor who is not a registered developer. The prepayment contract is voidable at the instance of the purchaser. This is an option that the purchaser has but there is nothing in the Act that can properly be construed to say that the prepayment contracts are thereby rendered void.

Whether Board's Charge not being registered under the Companies Act renders it Void

40. Dr. Barnett submitted that the reasoning in the Capital Finance and Burston cases upon which the Bank relies is not applicable for the following reasons:
 - a. The Claimant's charge is a statutory charge created by s. 31. It is dependent on the terms of the legislation for its efficacy and there is no requirement in that legislation for registration under the Companies Act or general rules of devolution in insolvency to guarantee priority.
 - b. The claimant's charge is not created by virtue of the usual inter partes instrument of mortgage. What the Act does is to give the Claimant the powers of a mortgagee.
 - c. The English system of registration of charges is different from that which obtains in Jamaica.
41. The submission continues that section 31(5) of the Act provides that except for the special instances stated therein the charge created by that section ranks in priority to all other charges. The Bank's contention is that

the Companies Act s. 93 makes the charge void as against them. The issue therefore is whether s. 93 of the Companies Act amends the Act to destroy the priority under s. 31(5) by implication.

42. The Board submits that the charge is a statutory one depending for its efficacy upon the provisions of the Act and does not depend for its efficacy upon the Companies Act. The case of South Eastern Drainage Board v. Savings Bank of South Australia (1939) 62 C.L.R. is cited in support and the submission continues that but for the Act, the charge would not exist. The case of London and Cheshire Insurance v. Laplagrene Property [1971] W.L.R. 257 was also referred to.
43. The Court was also asked to compare the fact that in the cases cited on behalf of the Bank, the system in England merely provides for registration in order to allocate priorities and the parties do not derive title by virtue of registration of their interest.
44. The Board's Attorneys submit that the two statutes are not so repugnant that they cannot live together. Further, that each statute should be left to operate in its own sphere. In Horvath v. Commonwealth Bank of Australia [1998] VSCA 51 the Supreme Court of Victoria, the Court of Appeal was concerned with the interpretation of the Real Property Act and the Supreme Court Act s. 49.
45. Ormiston JA in paragraph 34 stated that "There is a strong presumption that Parliament does not intend to contradict itself but rather intends both relevant Acts to operate within their given spheres... No earlier statutory provision is to be treated as repealed or derogated from by a later enactment unless an intention to do so must necessarily be implied, and ordinarily there must be a very strong basis supporting any such implication, for the Parliament is generally presumed to intend both provisions to operate without there being any such implicit repeal or derogation..."(My emphasis).
46. The Board's Attorneys also submit that the principle of *generalia specialibus non derogant* should apply. The Act provides for a special subject matter

while the Companies Act deals with charges in general. Reference was made to Seward v. "Vera Cruz" (1884-85) App. Cas. 59, 68.

Bank's Submissions Denying that the Board's Charge is a Statutory Charge

47. The Bank submits that the South Eastern Drainage and London and Cheshire cases, do not support the Board's case that its charge is a statutory charge. Reference was made to page 622 of the South Eastern Drainage case, where Starke J. stated:

The charges do not depend upon registration nor upon the execution or entry of any instrument. They are complete and effective by reason of the provisions of the Acts creating them.

48. Mrs. Gibson-Henlin submitted that the same approach or interpretation as to the nature of a statutory charge is to be found in the London and Cheshire Insurance case.
49. It was further submitted that the charge under the Act depends for its efficacy on the "owner" of the land executing and lodging the charge with the Registrar of Titles. It is not complete and effective by virtue of the Act. It is a charge created by the company within the Companies Act.

Horvath v. Commonwealth Bank of Australia

50. Mrs. Gibson-Henlin further submitted that there is no inconsistency between the Act and the Companies Act. The provisions of the Act recognise the rights of prior mortgagees or chargees by prohibiting the entry into "pre-payment" contracts if there is a prior mortgage or charge. The exception is where that prior mortgage or charge is one contemplated by the Act. It was further submitted that the recognition of this prior mortgage is based on the assumption that the construction of the development scheme is carried out within the scheme of the Act. The inference is that neither the prior charge nor the purchasers would be worst off by the failure of the development in which they would have jointly invested. The remedy where there is a contravention it was submitted is clearly set out in s.26(2). It says the purchaser may withdraw from the contract. Mrs. Gibson-Henlin submitted that the significance of

the point made that the Board's mortgage cannot be enforced is in the section itself. S. 26 reserves further penalty to s. 44(2) and not s.33 of the Act which triggers the sale of the land.

51. As regards the Horvath case, it was contended that this case is more consistent with the Bank's proposition that if the underlying agreement to borrow fails, then the related mortgage must likewise fail and cannot be enforced. This is borne out by the authorities and the fact that the charge is a condition precedent to being able to draw from a trust account set up under the Act. The account was to be set up for monies collected within the terms of the Act. If a developer acted in contravention of the Act, the penalties are in criminal law. Mrs. Gibson-Henlin submitted that the Act is not such as to deprive a prior mortgagee or chargee of their security and this is confirmed by the fact that it is a contravention of the Act to enter into pre-payment contracts where there are prior mortgages or charges. If this prohibition and the consequences flowing from it were ignored, the rights of chargees not just the Bank's would always be at risk of an unscrupulous developer. It was submitted that it would turn the provisions of the Companies Act relating to charges generally and their priorities on liquidation on their head. Further, the charges register would become useless. Commercial lending arrangements relying on it would not only be at risk but would be rendered uncertain since a lender who has properly registered their charge could lose priority simply by a company creating a charge "in breach" of the Act and not even registering it.

The Law

52. The following sections of the Act are particularly relevant to the issues. In section 2 of the Act, prepayment contract is defined as follows:

A prepayment contract is defined in section 2 of the Act as follows:

"prepayment contract" means any contract under which at the time of entering into the contract, there are to be performed or discharged by one

~~party for the benefit of the other party, or for the benefit of a party to a connected contract, obligations, expressed or implied, with regard to-~~

- ~~(a) the building of roads or the carrying out of engineering or other operations in, on, over or under any land the subject of the contract or any connected contract; or~~
- ~~(b) the carrying out of any building operations, including, but not limited to, the construction or completion of any house, townhouse, or apartment in a condominium building, and of the structures or works for use in connection therewith upon any such land,~~

~~and under which moneys are payable by the party to benefit from the performance and discharge of such obligations prior to the performance and discharge thereof; and in relation to any such contract "vendor" means the person who is to perform and discharge the said obligations and "purchaser" means the person for whose benefit they are to be performed and discharged.~~

Part IV-Development Schemes

26-(1) A person shall not enter into a prepayment contract as a vendor in connection with any land which is, or is intended to be, the subject of a development scheme to which section 35 applies unless-

- ~~(a) the vendor under the prepayment contract is a registered developer;~~
- ~~(b) such land is free from any mortgage or charge securing money or money's worth (other than a mortgage or charge in favour of an authorised financial institution referred to in the proviso to subsection (5) of section 31);~~
- ~~(c) all approvals required by or pursuant to any law for the carrying out of the development scheme and for the carrying out of the vendor's obligations under the prepayment contract have been obtained and where any such approvals have been obtained subject to conditions unless-~~
 - ~~(i) all the conditions have been complied with; or~~

(ii) if any condition has not been complied with that condition is one which cannot or is not, by the terms thereof, required to be complied with prior to entering into the contract; and

(d) the vendor under the prepayment contract has deposited with the Board copies of all approvals given under the Local Improvements Act and the Town and Country Planning Act together with all plans, drawings and specifications referred to in such approvals, authenticated in such manner as may be prescribed.

(2) Where a contract is entered into by a vendor in contravention of subsection (1) the purchaser or any person succeeding to the rights of the purchaser under the contract may, within such time as may be reasonable in the circumstances of each case, withdraw therefrom and recover from the vendor any monies paid to him under the contract together with interest thereon computed from day to day at the prime lending rate of commercial banks in Jamaica for the time being prevailing as certified by the Bank of Jamaica, but without prejudice however to the provisions of section 44 (2) (relating to the penalty for contravention of subsection (1) of this section.).

28. A signed copy of every prepayment contract shall be forwarded to the Board by the vendor within fourteen days from the signing of the contract by the parties thereto.

29. -(1) Subject to such conditions as may be prescribed, every person who as a vendor under any prepayment contract relating to any land which is, or is intended to be, the subject of a development scheme, receives any money from the purchaser pursuant to such contract, shall without delay pay such money into a trust account to be maintained by him with an authorised financial institution and held and applied in accordance with the provisions of this Act.

(2) Upon every payment of moneys into a trust account pursuant to subsection (1) the person making such payment shall furnish to the Board

~~a report of such payment specifying the contracts to which the moneys comprised in such payment relate, and such other particulars as may be prescribed.~~

(3) All monies deposited in a trust account pursuant to subsection (1) and all interest earned thereon shall, subject to section 31, be held in such account and paid to, or applied for the benefit of, the persons entitled thereto in accordance with the provisions of this Act.

30. It is hereby declared that, subject to subsection (3) of section 31, the moneys received by a vendor under a prepayment contract in connection with land in a development scheme and deposited in a trust account pursuant to section 29 shall be held in trust in such account, or any other account substituted therefore pursuant to subsection (2) of section 31, until completion or rescission, as the case may be, of the contract under which such moneys were received, to be paid to the persons legally entitled thereto pursuant to the terms of the contract upon completion or rescission of the contract.

31. -(1) Subject to subsections (2) and (3) moneys deposited in a trust account pursuant to section 29 and any interest earned thereon shall not be withdrawn from the account until the completion or rescission, as the case may be, of the contract under which the moneys were received by the vendor.

(2) Moneys so deposited in a trust account may be withdrawn and deposited in another trust account with another authorised financial institution ~~subject to such conditions as may be prescribed and the~~ provisions of this Act shall apply to that other account and the moneys held therein as they apply to the original account.

(3) Moneys so deposited in respect of a prepayment contract may be withdrawn from the account prior to the completion or rescission of the contract and applied by the vendor in the payment of stamp duty and transfer tax payable in respect of that contract and in partial

reimbursement of the costs of materials supplied and work done in the construction of any building or works which is the subject of the contract, subject to the undermentioned conditions, that is to say-

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

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

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

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

Provided that where a mortgage or charge of the said land has been duly created in favour of an authorised financial institution to secure repayment of amounts advanced by that financial institution in connection with the construction of any buildings or works on the said land the charge created by this section shall rank pari passu in point of security with the mortgage or charge in favour of that authorised financial institution.

(6) For the purposes of subsection (5) a loan or advance by an authorized financial institution shall *prima facie* be taken to be made in connection

~~with the construction of any building or works if it is expressed in the instrument creating the mortgage or charge securing the repayment of that loan or advance that the loan or advance was so made.~~

(7) A charge executed pursuant to this section shall be deemed to be a mortgage under the Registration of Titles Act and shall be enforceable accordingly but shall be exempt from registration fees under that Act, transfer tax under the Transfer Tax Act and stamp duty under the Stamp Duty Act.

.....

s.33. Where a vendor defaults in completing any prepayment contract for the sale of land in a development scheme in accordance with the terms and conditions of such contract and the Board is satisfied that such default (together with any default by the vendor in the completion of other prepayment contracts for the sale of land in that scheme) are of such a substantial nature as to amount to a failure of the scheme, the Board shall-

- (a) require the financial institution with which the trust account is maintained pursuant to section 29 to pay over to the Board all money(including interest) standing at credit of the trust account; and
- (b) enforce any charge in favour of the Board executed pursuant to section 31 either by the sale of the land subject to the charge or by such other action, consequent on the charge, as the Board thinks fit; and
- (c) if it sells the land-

- (i) apply the proceeds of such sale (after deducting the expenses thereof) in satisfaction rateably of the amount due to the Board under such charge and of the amount due to any authorised financial institution under any mortgage or charge ranking pari-passu with the charge in favour of the Board; and

- (ii) thereafter apply the balance of such proceeds of sale together with the moneys received by the Board out of the trust account pursuant to a requirement made under paragraph (a) rateably o the person legally entitled thereto pursuant to the prepayment

contracts under which moneys were received by the vendor and deposited in the trust account.

.....

Part VII-Further Offences, Penalties and Sanctions

44-(3) Any person who-

(a) as the vendor enters into a prepayment contract in contravention of subsection (1) of section 26; or

(b) fails to pay any money received by him as vendor under a prepayment contract into a trust account in contravention of subsection (1) of section 29; or

(c) withdraws from a trust account in contravention of section 31, any moneys paid therein by him pursuant to section 29,

shall be guilty of an offence and shall be liable-

(i) on conviction on indictment in a Circuit Court to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment;

(ii) on summary conviction in a Resident Magistrate's Court to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Sections 93 and 95 of the **Companies Act 2004** in so far as relevant state as follows:

PART III-REGISTRATION OF CHARGES

Registration of Charges with Registrar

93. -(1) *Every charge created after the appointed day by a company registered in the Island, being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the original or a copy certified in the prescribed manner of the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the Registrar for registration in the manner required by this*

Act prior to the commencement of the winding up of the company, but without prejudice to any contract or obligation for repayment of the money secured; and when a charge becomes void under this section, the money secured thereby shall immediately become payable.

(2) Where-

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

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

(3) This section applies to the following charges-

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

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

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

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

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

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

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

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

(i) a charge on goodwill, on a patent or a licence under a patent, on a trademark or on a copyright or a licence under a copyright.

.....

(10) In this Part the expression "charge" includes mortgage.

.....

95. -(1) *It shall be the duty of a company to send to the Registrar for registration the particulars of every charge created by the company and of the issue of debentures of a series requiring registration under section 93, but registration of any such charge may be effected on the application of any person interested therein.*

(2) *Where registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the Registrar on the registration.*

(3) *If any company makes default in sending to the Registrar for registration the particulars of any charge created by the company, or of the issues of debentures of a series requiring registration as aforesaid, then, unless the registration has been effected on the application of some other person, the company and every officer of the company who is in default shall be liable to a default fine not exceeding fifty thousand dollars.*

(My emphasis)

Resolution of the Issue Whether the Board's Charge is Void

Whether Purchaser's Remedy is limited to s. 26(2) of the Act and Whether Prepayment Contracts are not Pre-Payment Contracts within meaning of the Act therefore Rendering Board's Charge Void

53. I accept that the pre-payment contracts were entered into by KES with the purchasers over the period February-June 2005. The pre-payment contracts therefore were entered into prior to the creation of the Bank's charge in August 2005, and prior to the Bank's registration of its charge in March 2006. I therefore reject the Bank's submission that its charge is a charge contemplated by s. 26(1)(b). I find that KES did not act in contravention of s. 26(1)(b), for the reason that KES did not enter into the pre-payment contracts at a time when there was already a charge in favour of the Bank securing money or money's worth. However, I find that in so far as KES was not approved as a developer by the Board until the 21st of June 2006, KES acted in contravention of s.26(1)(a) of the Act.

54. However, it seems plain to me that the fact that a person has entered into a prepayment contract as a vendor in contravention of s. 26 (1)(a) in that the vendor was not yet registered as a developer, does not cause the contract to cease to be a prepayment contract. There is nothing in the Act, particularly given the definition of prepayment contract in section 2, to suggest such a construction or interpretation. If a contract falls within the definition set out in section 2, then it is a prepayment contract .
55. In my judgment Dr. Barnett is correct that the fact that the vendor may have entered into prepayment contracts at a time when it was not a registered developer does not render the prepayment contract void. Rather, s.26(2) allows the purchaser the option to withdraw from the prepayment contract, and there is further a stipulation that the withdrawal must be within a reasonable time. S. 44(3) of the Act which seeks to punish the vendor expressly speaks to the fact that it is a vendor who enters into prepayment contracts in contravention of s.26(1), and not a purchaser, that is guilty of an offence. The prepayment contracts are not void, but are voidable at the instance of the purchaser. In my recent decision in Claim No. HCV 5152 of 2009, Jamaican Redevelopment Foundation Inc. v. The Real Estate Board and the Registrar of Titles, judgment delivered 12th May 2011, at paragraphs 40, and 41, I made this same finding and I sought to draw an analogy to term contracts referred to and discussed in Voumard's *The Sale of Land*, 3rd Edition, Chapter XVI, pages 500-516. At paragraph 49 I pointed out that the converse of the purchaser exercising the option to avoid the contract, is that the purchaser, if he knows of the breach, can still choose to go ahead with the contract but would then take the risks attendant on proceeding in those circumstances. The purchaser may also simply not know of the breach and in those circumstances also the contract is not void.

Whether Board's Charge not being registered under the Companies Act renders it Void

56. At paragraphs 47 and 51 of my judgment, I did indicate that I was of the view that the Charge is created by the property owner in the sense that the Act places an obligation on the owner to execute and lodge the charge with the Registrar of Titles. In paragraph 48 I also expressed the view that although s. 31(4) provides that the charge shall be a charge on the land, it is a hybrid because the owner is required to execute and lodge the charge with the Registrar of Titles. The Board's charge is distinguishable from the charge in the Southeast Drainage case because the charge here does depend upon registration and execution or entry of an instrument. The Board's charge is not complete and effective by reason of the provisions creating it.
57. However, I have now also had the opportunity to look in even closer detail at this issue because of the way in which the matter arises for consideration in a somewhat different way in this case. In that regard, the analysis of the law set out in the London and Cheshire Insurance case, which was not as far as I can trace, cited to me in the Jamaican Redevelopment case, has proved helpful. This case has placed an emphasis on the concept and precise meaning of "creation". This case has assisted me in coming to the view that whilst the charge is created by the owner in the sense of the formal instrument or physical document constituting a charge, and therefore no charge exists unless and until such an instrument is prepared, executed, lodged and registered, it is the Act which creates the legal concept and the legal relationship of a charge.
58. In London v. Cheshire, it was held, amongst other matters, that an unpaid vendor's lien in respect of purchase proceeds not received was the creature of the law; that it did not depend on contract but on the fact that the vendor had a right to specific performance of his contract and that, accordingly, it was not registrable under section 95 of the English Companies Act of 1948. It was decided that the vendor's lien was not void

against chargees in favour of whom the company had charged the land prior to a winding up order being made, and whose charge had been registered under section 95. At pages 269-270, Brightman J. made reference to Brunton v. Electrical Engineering Corporation [1892] 1 Ch. 434, where the status of a solicitor's lien in relation to deeds and documents of a company for professional work done by him was discussed. In that case the company had issued certain debentures. The debentures were secured by a floating charge, which provided that the company should not be at liberty to "create any mortgage or charge" in priority to the debentures. Kekewich J. held, first, that "mortgage or charge" in the debenture did not include a lien of the kind which there existed; secondly, that the solicitor's lien was not "created" by the company. At page 441 he stated:

Looking at this clause in the debenture, I think that the words 'mortgage or charge' do not include a lien of this kind. But even supposing it is a 'mortgage or charge', is it a mortgage or charge 'created by the company'? In my opinion, it is not. The clause in the debenture points to something done by the company so as to create, by their own act, an incumbrance upon their property which, but for this provision, would take priority of the debentures. I do not think it applies to a mortgage or charge given by the general law, and arising through the company carrying on its business in the ordinary course. So long as the company are acting in the ordinary course of business and not so as to give their solicitor any advantage by their own direct act, but are merely allowing him, in the ordinary course of business, to acquire that lien which the law gives him, I think they are not creating a mortgage or charge in his favour. ..

59. At pages 271C-D, H-272A-C in London Cheshire Brightman J. discussed the issues thus:

In a powerful argument, Mr. Lightman, for the chargees, submitted that an unpaid vendor's lien was "created" by the purchaser; that it was therefore registrable if the purchaser were a company to which

section 95 applied; that it would be consistent with the policy of the Act to treat such a lien as registrable, since the policy was that any person dealing with the company should know what charges existed; and that there is no decided case which precludes my holding that such a lien is registrable under section 95. He pointed out that the textbooks do not speak clearly or in unison.

...

Mr. Lightman distinguished the Brunton case from the present case on the valid ground that it was the solicitor who brought the lien into existence by doing the professional work in respect of which the lien arose, while in the case of the sale of land, it is the purchasing company which brings the lien into existence by contracting to purchase.

If the field had been completely open, I might have been more tempted to accept Mr. Lightman's submission. But the enactment in question has been in force since the Companies Act 1908, and no one has suggested to me that it is the practice for a vendor to register an unpaid vendor's lien merely because he is selling to a company. If such a lien is registrable, the time for registration would expire 21 days after the exchange of contracts for sale, because it is at that date that the lien is created; it is not created on completion because the purchase price is unpaid, but is discharged on completion to the extent that the purchase money is paid: *In re Birmingham*, dec'd. [1959] Ch. 523. In most cases, the 21-day period would expire well before completion, because contracts for sale of land are not usually completed in three weeks. It would be a profound inconvenience, therefore, if every vendor to a company were compelled as a matter of course to register an unpaid vendor's lien on the exchange of contracts, on the off chance that circumstances might arise in the future which would render it desirable for the vendor to be able to rely on an unpaid vendor's lien. For my part, I am content to rely on the dictum of Harman L.J. in the *Capital Finance* case [1969] 1 Ch. 261, 278 that an unpaid vendor's lien is the creature of the law; and that it does not depend upon contract, but upon the fact that the vendor has a right to specific performance of his contract.

60. — So the question that arises is whether the company KES can be said to have created the charge as referred to in sections 93 and 95 of the Companies Act. I note that in the proviso to s.31(5), the Board's charge is described as "created by this section". S. 31(7) also refers to the charge "executed" pursuant to the section (as opposed to created), being deemed to be a mortgage. It is therefore my judgment that the Board's charge in this case is truly a hybrid in that, although it is not complete and effective simply by reason of the provisions of the Act creating it, this does not change the fact that the legal concept of a charge, as opposed to the instrument which is to be executed by the vendor, is created by the Act.
61. In my judgment, the Board's charge as a legal concept is created by operation of law, by virtue of the provisions of the Act, and is not created by KES within the meaning of the Companies Act. The Instrument of Charge does not come into being as a result of any contractual agreement between the purchasers and KES, or the Board and KES. The Act mandates the owner to execute the charge in order to be able to draw down on the trust funds. It is analogous to a vendor's lien, as discussed in London Cheshire. The Board's charge is a charge on the land, it is specially crafted by the Act. It is only deemed to be a mortgage, and this is for the purposes of enforcement. However even then, it is accorded a special status because it is exempt from registration fees, transfer tax, and stamp duty-31(7). The Board's charge did not therefore have to be registered with the Registrar of Companies and it is not void against the liquidator or the Bank or any creditor on a winding up. In light of my reasoning on this point, I do not find it necessary to refer to or decide upon the authorities dealing with the issue of whether the two Acts are repugnant to each other. Implicit in my judgment is a finding that the two Acts are not repugnant to each other and that the Companies Act does not necessarily derogate from the Act. It also follows that I disagree with Mrs. Henlin that this interpretation will turn the Companies Act in relation to charges and priorities on liquidation on its head, since the

charge as a legal concept has been created by the legislature and not by the company KES.

The Board's substantive claim

62. In written submissions filed February 3rd 2011, the Board's Attorneys submit that a number of questions must be answered in order to determine the issues involved in the case. What I intend to do is to deal with the issues relating to the status of the Bank's mortgage and the issue of priority as between the Board's charge and the Bank's mortgage first, before turning to deal with the other issues which involve the claim for payment over of sums and accounting from all the Defendants.

Whether the Board's Charge ranks in priority to the Bank's Mortgage?

63. Under this head, the Board raises the following questions:
- a. Whether s.31(5) of the Act was intended to apply to an authorised financial institution which has a subsequent mortgage or charge?
 - b. Whether by reason of the loan made by the Bank, it has "a mortgage or charge of the said land, which has been duly created in favour of an authorised financial institution to secure repayment of amounts advanced by that financial institution in connection with the construction of any buildings or works on the said land" within the meaning of s.31(5) in light of the fact that the loan was made for a multiplicity of purposes?
 - c. Is the subsequent presentation of copies of cheques issued by the Bank to KES sufficient to place it within the ambit of s. 31(5) without the proof that the said sums correlate to actual expenditure on construction or works on the land particularly in circumstances where the sums advanced outstrip the value of the land significantly?

- d. (not in fact argued before me by any of the parties).
- e. If, the bank's mortgage ranks *pari passu* to the Board's charge, would either party require the other's prior consent in order to realize its security?

(a) Application of s.31 (5)

- 64. The Board claims a Declaration that its charge ranks in priority to the Bank's mortgage. Under the Torrens system priority is granted to the mortgagee who registers first in time. In this case it is clear that the Board's charge was registered first.
- 65. The Board's charge also has by virtue of s.31 (5) priority unless the Bank can fit its mortgage into the proviso. The proviso creates exceptions for the rule that the Board's charge ranks in priority to all other charges.
- 66. It is the Board's submission that the Act must be read as a whole, and when so read, the proviso to s.31(5) ought to be interpreted to mean the prior mortgages referred to in section 26(1)(b) of the Act.
- 67. In my judgment, the proviso applies to all mortgages whether existent in relation to the land before or after the entry into prepayment contracts which are to secure sums advanced in connection with development. The rationale seems to be that once the mortgage is for the purpose of construction of buildings or works on the land, since the purchasers under the prepayment contracts are also in the position of providing sums for development and improvement of the land, both the contractual mortgage and the Board's charge protecting the purchasers should rank equally.

(b) and(c) Whether bank's Charge really does fit within the proviso-multiplicity of purposes and proof

- 68. The loan agreement between the Bank and KES covers the sum of \$146,000,000. It was later upstamped to cover a further indebtedness of \$90,000,000. This sum was secured against several developments including the Mountain Valley Project.
- 69. The preamble to the Loan Agreement Clause A, states that :
WHEREAS

A. KES is in the business of real estate development and is desirous of procuring financing for the purpose of completing the Projects (as is hereinafter defined) and for the Purpose (as is hereinafter defined)

70. Article 1 of the Loan Agreement defines "the KES Loan", "Indebtedness", "Projects", "Properties" and "Purpose" as follows:

"the KES Loan" means the outstanding principal amount of up to J\$146,000,000.00 to be disbursed by CCMB hereunder and shall be made up of:

- a. A term loan of \$120,000,000.00 to provide construction loan financing for the Projects as is hereinafter defined to be repaid on the Completion Date (as defined herein);
- b. An Annuity loan of \$6,000,000.00 to complete the purchase of the Cambridge Hill Farm Property (as is defined herein); and
- c. Lease financing of up to \$20,000,000.00 with respect to certain commercial motor vehicle and equipment the particulars of which are set out in the Schedule to the Debenture of even date herewith given by KES to CCMB.

"Indebtedness" means, with respect to KES, any obligation created, issued, incurred, or assumed by KES for borrowed money.....

"Projects" mean

- (a) the construction of residential housing units on the Iter Boreale Property (as hereinafter defined);
- (b) the construction of residential townhouse units at the Jacks Hill Property (as hereinafter defined) to be known as Emerald Point;
- (c) the construction of residential units at the Mountain Valley property (as hereinafter defined) to be known as Mountain Valley Estates.
- ~~(d) The construction of residential townhouse units on the Tavistock Property (as hereinafter defined) to be known as Skycastle Estates.~~

"Properties" mean any property which is being taken by CCMB as security for the indebtedness of KES.

"Purpose" means the purpose of the KES loan as is more particularly set out in the CCMB Loan Facility letter and shall mean and include the provision of

working capital assistance in relation to the construction of four residential development projects in relation to the Jacks Hill Road Property (as hereinafter defined), the Mountain Valley Property (as is hereinafter defined), the Tavistock Property (as is hereinafter defined), the Iterboreale Property (as is hereinafter defined), to complete the purchase of the Cambridge Hill Farms Property (as is hereinafter defined), and the provision of lease financing of commercial motor vehicles and equipment.

(My emphasis).

71. The Board's Attorneys submit that it can easily be seen that the mortgage endorsed on the relevant Certificates of Title is not exclusively in connection with the construction of any buildings or works on the land. At least \$26,000,000.00 they submit is not referable to the projects. The \$120,000,000.00 remaining on the loan is to be related to four different projects with no *indicia* as to the apportionment of the amount, nor any requirement that the funds be used exclusively on the construction of the units. The Board's Attorneys also submit that the sums advanced to KES from the Bank include \$13,600,000.00 which was used by KES to purchase the land which is the subject of the charge. This resulted in a change of ownership after the purchasers had entered into an Agreement for Sale of the Land with McHugh.
72. The Board submits that monies so advanced cannot be in priority, or share in the Board's priority. They submit that there was no safeguard to ensure that the amount of the sums advanced to KES bore any relationship with the value of the land or any works thereon. Further, that although CCMB has issued cheques totalling \$116,109,325.00, the land and works are only valued at \$108,500,000.00 according to a valuation by David Delisser and Associates, this being the valuation that the Bank is using to inform the sale price.

The Bank's Response to Questions (a), (b) and (c)

73. Mrs. Gibson-Henlin made reference to s. 31(6) which provides that a loan or advance by an authorised financial institution shall *prima facie* be taken

to be made in connection with the construction if it is so expressed in the instrument of mortgage or charge securing repayment. She submits that the Bank is an authorised financial institution whose instrument creating the charge sets out that the advance is to be used for the purchase of the land and for the purpose of construction of residential units and development of the land.

74. Whilst Mrs. Gibson-Henlin correctly conceded that there are other projects and purposes mentioned in the Loan Agreement, she submits that this does not cause the Bank's mortgage to fall outside of the ambits of the proviso and that the matter really only goes to a question of accounting after sale in relation to what amounts the Bank can recover under its mortgage, as opposed to the ranking of the mortgage itself.

Resolution of Questions (a), (b) and (c)

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

the Board's charge. In my view, the Board's charge does therefore rank in priority to the Bank's charge. The Bank's charge does not fall within the proviso, and hence does not rank *pari passu* with the Board's charge.

Questions (d)(e)

76. (d) not pursued.

77. As regards, question (e), given my finding that the Bank's mortgage does not rank *pari passu* with the Board's charge, it is not necessary for me to decide upon the matter of whether prior consent of either would be required in order to realize the security. However, in the event that I am wrong on this question of ranking, I indicate that I am not convinced that the reasoning in the Sunitabala case cited by the Board, reported at [1919] UKPC 46, is entirely apposite since there the Privy Council was concerned with a single mortgage in favour of two mortgagees. In any event, if I had held that the Bank's mortgage ranks *pari passu* with the Board's charge, my view would be that the Board's consent is required, given its general priority status and the fact that it is said to be a charge on the land.

Board's Claim at paragraphs 2-4 of Fixed Date Claim Form- seeking payments and accounting

78. I now turn to a consideration of the other aspects of the Board's claim for relief, and this is aimed at all the Defendants. This has to do with the Board's claims under items 2-4(inclusive) of the Fixed Date Claim Form. In relation to these matters, the Board in written submissions filed February 3rd 2011, argues that the following questions arise for determination:

- (f). What are the sums collected by all the Defendants in relation to the purchasers' deposits?
- (g). Of the sums collected by the Defendants, how much of it is repayable on breach of the contract by the vendor?

(h). What rate of interest is applicable to the sums collected under the prepayment contracts pursuant to s. 26(2) of the Act?

79. In relation to the duty to account, the Board's Attorneys refer to ss. 29, 30 and 31 of the Act and state that once monies are collected in relation to the prepayment contracts, these sums are to be paid into a trust account and are not to be withdrawn except in the circumstances and for the purposes listed at s.31(3)(a).

THE EVIDENCE

80. In her Affidavit in support of the Fixed Date Claim Form, Ms. Sandra Watson, the Board's General Manager, sworn to on the 27th of January 2010, at paragraphs 11-15 states:

- "11. The Fourth Defendant was named in the Agreements for Sale and Construction Agreements as the Attorneys-at-Law having the carriage of sale.
12. Based on the information supplied by the purchasers and the Defendants to the Board the following amounts have been collected by or on behalf of the First, Second and Fourth Defendants from the following purchasers in the said Development Scheme.....
13. From in or around July 2007 the Board began to receive reports that the development scheme was not progressing in accordance with the construction contracts entered into with the several purchasers by the second defendant and the lots had not been transferred to the purchasers by the First Defendant .
14. The Third Defendant in purported exercise of its power of sale under its said mortgage has been engaged in selling the housing units in the development scheme.

15. The construction of the housing units came to a halt in or around June 2007 and the Board being of the opinion that the default of the first and second defendants was substantial as to amount [to] a failure of the scheme has been endeavouring to obtain payment of the amounts collected from the purchasers."
81. In his Affidavit sworn to on the 16th of March 2010, Mr. Curtis Martin, the Bank's President and Chief Executive Officer indicates that at meetings held with the Board's representatives and in numerous correspondence, the Bank indicated that it did not receive deposits from the purchasers.
82. In his Further Affidavit sworn to on the 2nd of November 2010 at paragraphs 6-10, Mr. Martin states:
- " 6. That the development proceeded in two stages -first of all the 2nd Defendant had control of the development in the normal course of the business between the parties and as expected by the Claimant and the 3rd Defendant. The second stage came after the project however failed and in August 2007 the Bank took over the residential development project on the land and began expending money on the construction of buildings and works on the land.
7. That under stage one the 2nd Defendant would request and the Bank would make disbursements in accordance with the loan facility which included the development and construction of Mountain Valley.....
8. That in some instances the cheques disbursed to the 2nd Defendant were for lump sums to cover multiple development projects on different properties, however the specific proportion of that sum that was allocated to meet the expenses of construction on the said land is written onto the copies of the cheques exhibited herein.

9. That under stage two that is from August 2007 the 3rd Defendant Bank also expended money on the construction of buildings and works on the land.
 10. That the 2nd Defendant has not disputed the 3rd Defendant's account that it has expended the monies for the purposes agreed that is for the development and construction expenditure arising from work on the said land. "
83. In her Affidavit sworn to on the 29th March 2010, Mrs. Jennifer Messado, the principal of the 4th Defendant, indicates that the duties under the Act in respect of placing funds on a trust account and in respect of registering a charge in favour of the Board are obligations placed on the owner and/or vendor of the land. She further states that she verily believes that pursuant to s. 31 monies may be withdrawn from the trust fund on certain conditions as being properly due for work already done or materials already supplied in the construction of the building or works and not previously paid for. She states that from her knowledge construction did proceed on the project at Mountain Valley. She indicates that she believes that KES carried out twelve development schemes between January 23, 1997 and May 28, 2007.
84. At paragraphs 10 and 11 Mrs. Messado states:
- "10. With regard to paragraph 11 of the said (Watson) Affidavit I say that my firm was named in the agreements as Attorneys-at-Law with carriage of sale. However our retainer was terminated by both the 1st and 2nd Defendants, such that we ceased to have carriage of sale on or about September 2007.
-
- Messrs. Rattray Patterson became the new Attorneys-at-Law for both the 1st and 2nd Defendants.
11. With regard to paragraph 12 of the said affidavit, I say that on behalf of the 4th Defendant I have provided to the Board a full account prepared by Chartered Accountants Bogle & Co. of all payments received with respect to the sales for the

land at Mountain Valley, and payments made to the 1st and 2nd Defendants. All monies received with respect to the said sales were paid out to the 1st and 2nd Defendants on their instructions. In particular, the Agreements for Construction of Townhouse, between the 2nd Defendant and the respective purchasers, provided at paragraph 17 that the 2nd Defendant was authorised to use the deposits paid under the Agreement for purpose of construction of the respective townhouses. Further the 1st and 2nd Defendants requested that the monies received by my firm be paid to them, and we carried out their instructions.”.

85. In her 2nd Affidavit filed on the 17th February 2011, just before the hearing, Mrs. Messado attached a schedule of the amounts received by her firm and the payments made. It was not conceded that the Board was entitled to this accounting. She stated that the schedule exhibited was part of a larger account prepared by Chartered Accountants Bogle & Co. She also indicated that the work on the project at Mountain Valley was monitored and supervised by the managerial section of the Bank, and particularly Mr. Richard Dyche. Mrs. Messado avers that he operated with a professional team of architects, quantity surveyors and engineers, and she believes that they provided detailed reports of the progress of the project.

THE BANK’S SUBMISSIONS

86. In her submissions on behalf of the Bank, Mrs. Henlin has raised the issue in relation to the ancillary claim form as to whether the Bank is entitled to exercise its powers of sale in accordance with its mortgage No. 1433819. I agree that the Bank is entitled to exercise its power of sale under its mortgage by virtue of s. 106 of the Registration of Titles Act and arising out of its rights under the debenture. KES has defaulted on the loan and has been served with the relevant Notice. As second mortgagee, since I have ruled that the Board’s charge ranks in priority, and the Act deems

the Board's charge a mortgage, the Bank could not transfer the property free of the Board's charge unless it first discharges the amounts due under the Board's charge. The proceeds of sale fall to be distributed in accordance with section 107 of the Registration of Titles Act. That section sets out that the proceeds of sale are to be provided firstly, by paying the expenses of and incidental to such sale, secondly in payment of monies due under the mortgage, thirdly by payment of money due and owing in respect of any subsequent charge in the order of priority and then the surplus to the mortgagor. S. 33 of the Act requires the Board to apply the proceeds of sale rateably in respect of the amount due to the Board under the charge.

87. In relation to the Board's claim at item 3, that the Bank furnish an account of all monies received by them in respect of purported exercise of the power of sale, the Bank submits that the claim is premature as the submission is that there is no evidence that the Bank has identified a purchaser or if there is a sale. Further, that the Bank only comes under a duty to account when the sale is complete as provided for in section 107 of the Registration of Titles Act.

THE 4TH DEFENDANT'S SUBMISSIONS

88. In her submissions on behalf of the 4th Defendant, Ms. Davis has quite correctly identified that the aspects of the relief claimed by the Board which concern the 4th Defendant are items 2 and 4. Having cited sections 26, 29, 30 and 31 of the Act, Ms. Davis referred to Halsbury's Volume 42 Paragraph 86 and Ellis v. Goulton[1893]Q.B.D. 350. She submits that payment made to an Attorney-at -Law under a contract of sale, which is not made to the Attorney-at -Law as stakeholder, is received by the Attorney as the agent for the vendor. Such monies cannot be recovered from the Attorney personally.
89. Reference was also made to Halsbury's Laws of England Volume 41 paragraph 126 in support of the contention that since monies received by an Attorney-at -Law are received on behalf of the Vendor, the Attorney is

- required to pay over to the Vendor any monies received on demand from them.
90. Ms. Davis submits that the Board is not entitled to an order that the 4th Defendant pay to it a sum equivalent to all amounts received by them under prepayment contracts. In the instant case, the 4th Defendant received no monies as stakeholders. In the case of the Agreements for Sale of Land, deposits and further payments were to be paid to the 4th Defendant, but Ms. Davis submits that it was not a part of the contract that the monies were to be paid to them as stakeholders. Ms. Davis further submits that such monies were required to be paid out by the Attorneys on the instructions of the stated vendor, McHugh.
91. The Agreement for Construction of a House provided (at Clause 11), for payments to the builder. Ms. Davis submits that therefore even if payments were received by the 4th Defendant, they would have been required to pay same over to the builder(KES) on their instructions and did indeed do so. Ms. Davis therefore submits that the Board's right to recover the said monies (if any) can only be against McHugh or KES.
92. It was further submitted that the provisions of the Act imposing restrictions on entry into the prepayment contracts, and the duty regarding placement of monies on trust accounts, is a matter for the vendor. It was submitted that the 4th Defendant was not the vendor in any of the contracts before the court and as such the provisions of the Act are not applicable to her.
93. As regards the claim at Item 4, Ms. Davis submitted that the 4th Defendant has voluntarily provided an account of monies received and paid by her.
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- However, she submitted that this account was not in respect of prepayment contracts, but rather related to monies received by the 4th Defendant from the purchasers in the project, and paid out to McHugh and KES on their instructions. She submitted however that the Board is not entitled to any account from the 4th Defendant.

94. Dr. Barnett in responding to the submission by Ms. Davis, submitted that her submissions had not responded to the claim and complaint of the Board that the 4th Defendant received the amounts on behalf of KES, where KES was the principal and the 4th Defendant was the agent. He submitted that we are not here dealing with a standard vendor and purchaser contract. Rather we are dealing with prepayment contracts in relation to development schemes which are carefully regulated by the Act. Dr. Barnett submitted that anyone dealing with the sums due under the prepayment contracts was dealing with trust money and should know, and has a liability not to act in contravention of the clear and specific requirements of the Act. Reliance is being placed by the Board upon general principles and it was argued that the Act covers anyone dealing with the trust funds. Dr Barnett relies upon the principles of Trustee De Son Tort, although Ms. Davis rightly indicated that this claim was not specifically pleaded.
95. I agree with the principles outlined in the cases cited by Ms. Davis when the contract under consideration is an ordinary contract between vendor and purchaser. However, I think that different considerations may well apply in relation to prepayment contracts and development schemes, given the backdrop of the Act and the regulatory framework that it seeks to achieve in protection of purchasers from underhand developers. However, in my view, the Board is not entitled to the relief sought at (2) as against the Bank and the 4th Defendant. I do not think that the Statements of Case and/or evidence in the case sufficiently flesh out the issues, or provide the frame upon which the Court could make a pronouncement that the Bank or the 4th Defendant are Trustees De Son Tort or caught by handling of trust funds. There was also no evidence as far as I can recall as to interest rates. In my judgment, the Board is entitled on the evidence before me to the order only as against KES.
96. In my judgment, the Board is not entitled to the order sought at (3) as it is premature and the Bank's duty to account in respect of monies received

pursuant to the exercise of powers of sale does not appear on the evidence to have yet arisen. However, it is clear that there would be such a duty in the event of exercise of the Bank's power of sale.

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

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

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

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

100. In relation to the 4th Defendant, it is clear that large sums of money were paid to her by the purchasers in respect of sales of land under the Mountain Valley Housing Scheme. I appreciate that the Bank have consistently maintained that they have never received deposits from the purchasers. However, in all the circumstances, it seems to me that both the

Bank and the 4th Defendant ought to provide the accounting requested and so I am prepared to order the taking of accounts and enquiries.

101. In relation to the orders for costs, I have exercised my discretion because there has been partial success for some of the parties and in different proportions. I have had to bear in mind the fact that to some extent, the parties were really asking for the Court's interpretation of the Act and treating with novel points of law. Also, in relation to the 4th Defendant, I bear in mind that by the time of the hearing she had already provided the requested accounting to the Board and the case as pleaded, and presented was not wide enough to encompass some of the Board's claims against this Defendant. Further, I bear in mind that the claims in this case have materialised because of the massive default by KES. I am therefore making a Sanderson order for costs in relation to the 4th Defendant.

102. I make the following orders on the Claim:

1. A declaration that the charge registered in September 2006 on the Certificate of Title, Volume 733, Folios 75 and 76 in favour of the Real Estate Board in respect of all monies received under pre-payment contracts with respect to the Mountain Valley Development, pursuant to the provisions of section 31 of Real Estate (Dealers and Developers) Act ranks in priority to the mortgage registered on February 1, 2007 in favour of Capital and Credit Merchant Bank Limited.
2. An order that KES Development Company Limited (in Liquidation) pay to the Claimant a sum equivalent to all amounts received by them under pre-payment contracts with respect to the Mountain Valley Development Scheme carried out on the property registered at Volume 733, Folios 75 and 76 of the Register Book of Titles, and known as Mountain Valley Hotel, together with interest at such rates as are provided for in section 26(2) of the Act. The Board is to

provide evidence of the relevant Rates of interest at the hearing of the Accounts and Enquiries before the Registrar of the Supreme Court referred to below.

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

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

103. I make the following orders on the Ancillary Claim Forms:-

- i) The Bank is entitled to exercise its powers of sale in accordance with its mortgage number 1433819, subject to the duty to account to the Board as First Mortgagee.
 - ii) The proceeds of sale are to be apportioned in accordance with the Act and s. 107 of the Registration of Titles Act.
 - iii) No order as to Costs.
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