



[2017] **JMCC** Comm 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2017CD00073

BETWEEN	ROSH DEVELOPMENTS LIMITED	CLAIMANT
AND	CAYJAM DEVELOPMENT LIMITED	FIRST DEFENDANT
AND	PROLINE DEVELOPMENT CORP	SECOND DEFENDANT

IN CHAMBERS

Conrad George and Andre Sheckleford instructed by Hart Muirhead and Fatta for the claimant

Clyde Williams for the first defendant

Keith Bishop instructed by Bishop and Partners for the second defendant

October 5 and 6, 2017

**EQUITABLE MORTGAGE, EXISTENCE OF – WHETHER LEGAL MORTGAGE PAID
IN FULL**

SYKES J

Rosh's declarations

[1] Rosh Developments Limited ('Rosh') wants the court to declare that it is an equitable mortgagee with an interest in property in St Catherine. It also wants to declare that it has the right to exercise its power of sale which it claims it has under the equitable mortgage between itself and Cayjam Development Limited ('Cayjam') and it also wants a declaration that it can exercise any other remedy that it may have. In addition to that Rosh wants it declared by this court that its interest in the property stands in priority to that of Proline Development Corporation (Proline). It is seeking an order, as well, that the Registrar of Titles be directed to cancel the discharge entered by Rosh which indicated that the mortgage it was owed was discharged.

[2] Rosh claims that it lent US\$3,770,000.00 to Cayjam. The loan was secured by legal mortgage over property in St Catherine. The mortgage was dated November 1, 2013. It is common ground that the interest rate was 25% per annum. There is no evidence that compound interest was ever applied in any circumstance. There is no evidence of capitalisation of the interest thereby creating a higher starting principal for each succeeding month if the interest was not paid in any given month.

[3] At some point Cayjam wanted to sell the land. According to Mr Ravi Rochlani, who swore two affidavits on behalf of Rosh, consent was given for the sale provided that Rosh's mortgage was paid out. Mrs Jennifer Messado, one of Jamaica's, if not, the Caribbean's most experienced conveyancers with at least 35 years of practice, was engaged to act on behalf of Rosh and she was tasked by Mr Rochlani with the job of ensuring that all the sums payable on the mortgage was paid over. Rosh says that payments totalling US\$4,650,000.00 were made. Rosh makes the claim that US\$5,100,000.00 was the accurate sum owed on the mortgage. In effect, Mr Rochlani makes the unmathematical claim, since it was, clearly, not based on the rate of interest for the loan, that there was a shortfall of US\$444,000.00.

[4] Mr Rochlani states that he met with Mr Peterson, the principal of Cayjam, and discussed the shortfall. He makes the claim that both he and Mr Peterson agreed that an additional sum of US\$350,000.00 was to be paid and that this sum was to be secured by the property in question. This, as the details will make clear, was arrived at after Proline's lawyers paid and Roch's lawyers received the sum identified as the total needed to pay off Cayjam's mortgage. There was even a document called a 'Discharge of Mortgage' signed by Rosh and witnessed by Rosh's lawyers in which Rosh acknowledged that the debt was repaid in full.

[5] One of the flabbergasting features of this case is that Mr Rochlani swears that he knew that his own lawyer, Mrs Messado, and the lawyer for Proline, thought that sum actually owed was less than it actually was, that is to say, that he knew that when the lawyers agreed that the sum to be paid was US\$4,650,000.00, he knew that that figure was incorrect. Based on the sum that was said to be owed the lawyers were adrift by US\$450,000.00. Most rational persons would think that Mr Rochlani would have contacted his lawyer and point out the error. Oddly enough, he does not say that he contacted his own lawyer, the very experienced Mrs Messado, to query the calculations.

[6] The court has read, reread and reread Mr Rochlani's two affidavits for any sign that he spoke to his own lawyer about her error. Neither affidavit has any such thing. Let not the court speak for Mr Rochlani. It is always better to hear from the deponent himself. At paragraphs 7 – 11 of his affidavit, dated January 30 2017, in support of Rosh's fixed date claim form he has these words:

*7. Jennifer Messado and Company was engaged to act as our attorneys **to ensure that all the sums payable on our mortgage was (sic) in fact paid over.** (emphasis added)*

8. Payments were made in relation to the mortgage to our attorneys as follows ... totalling ...(US\$4,656,000.00).

9. That based on my calculations what was due and payable to the claimant to clear the mortgage as at September 2014 was ...(US\$5,100,000.00).

10. However, I in the interest of ensuring that the claimant recovered the full amount due to it refused to sign the release and discharge and thereafter met with the principal Director of the 1st defendant Mr Howard Peterson.

11. I discussed the issue of the shortfall and after discussing same a lesser sum of [US\$350,000.00] was agreed upon as the amount to be paid to clear the mortgage. It was further agreed that this balance was to be secured by the property. I am aware that this fact was **eventually communicated to the attorneys who acted for the 2nd defendant in its dealings with the 1st defendant in relation to this property...** (emphasis added)

[7] Let us pause here to pick up another part of the narrative that explains how it is that Proline and Rosh are the protagonists with Cayjam sitting in the gallery. Mr Rochlani is short on these details. For that we turn to the affidavit of Mr Courtney Hamilton attorney at law. This affidavit is dated July 7, 2017. He tells us that he is the senior partner of the firm Hamilton and Hamilton and that he has the authorisation from Proline to swear to this affidavit. He states that Cayjam bought land registered at volume 987 folio 289 and became the registered proprietor. On or about November 1, 2013, Rosh was granted a mortgage over the same land by Cayjam in the amount of US\$3,770,000.00. Cayjam was required to repay this mortgage on or before 90 days at 25% interest per annum. He adds, and this is not disputed, that Mrs Messado of Jennifer Messado and Company was the attorney at law for Rosh.

[8] At some point it was understood and agreed that Proline would repay the total mortgage as well as interest. In proof of this arrangement there is a letter dated September 20, 2013 from Mrs Messado to Mr Hamilton which states:

We understand that you act on behalf of the proposed lender to this development who would repay Mr Rochlani as per the signed legal mortgage document.

We hold the said duplicate certificate of title for the Lime Portmore lands for and on behalf of the mortgagee Mr Ravi Rochlani.

In order to bring you up to date we enclose the following regarding the amount payable to redeem the loan as follows: -

- 1. statement of account dated May 29, 2013 from Jennifer Messado & Co.,*
- 2. notice – memorandum of monies owing on mortgage*

This includes all the costs and expenses together with the principal sum in the amount of ... \$4,195,625.01.

[9] Although there is no reference to United States of America currency in the letter it is common ground that the sum referred to was denominated in that currency. There is no evidence from Mr Rochlani that Mrs Messado did not have authority to enter into this final arrangement and surely within the ambit of her instructions she, exercising professional judgment, would be entitled to write this letter to give effect to the agreement.

[10] According to Mr Hamilton, on May 1, 2014, there was a meeting at his chambers attended by Mrs Messado who still represented Rosh. Mr Howard Peterson of Cayjam was also present. The final figure agreed was US\$4,650,000.00 and on the same day and date the sum of US\$300,000.00 was given to Mrs Messado as a deposit. There is no evidence saying otherwise from Mr Rochlani.

[11] According to Mr Hamilton, his calculation of interest on the initial loan of US\$3,770,000.00 at 25% from November 1, 2013 through to May 1, 2014 assuming no interest was paid from the inception of the loan would be US\$467,376.71 which would give a total balance (principal plus interest) of US\$4,237,376.71. He says that the negotiated amount of US\$4,650,000.00 was arrived at and it 'covered any other additional fees or claims.'

[12] He adds that on May 13, 2014 an undertaking was given for the balance of US\$4,350,000.00. The letter from Mr Hamilton to Mrs Jennifer Messado begins with these important words:

Please accept our irrevocable undertaking to pay to your firm the amount of ...US\$4,350,000.00 on presentation of the original duplicate certificate of title ... registered in the name of Cayjam Development Limited, together with the following:

(a) letter of possession

(b) copies of mortgage discharge documents

(c) ...

(d) ...

(e) ...

[13] As is patent, Mr Hamilton and Mrs Messado were proceeding on the basis that they were making arrangements for Cayjam's mortgage to be paid off completely by Proline. Do recall that Mr Rochlani said he was aware of the error being made by Mrs Messado and presumably also by Mr Hamilton but Mr Rochlani does not say when he became of the error. But assuming it was before May 2014 why did he not speak to his attorney? Why would a rational businessman permit his lawyer to persist in an error that would see him underpaid by US\$450,000.00? There is no evidence that he was not aware of these developments but in any event, Mrs Messado was his agent for the purposes of the transaction and so it really does not matter whether he knew minutiae.

[14] There is a letter, dated July 10, 2014, from Mr Hamilton to Mrs Messado stating that he enclosed a cheque for US\$3,660,000.00 as requested in Mrs Messado's email of July 3, 2014 and another cheque of US\$690,000.00 for the firm of Jennifer Messado and Company. These cheques were said to have discharged the undertaking previously given by Mr Hamilton.

[15] The last paragraph of that letter of July 10, 2014 reads:

These enclosed cheques are specifically being sent to you, with the understanding that they be held in escrow by your firm pending receipt by us of the duplicate certificate of title registered in the

name of Cayjam Development Limited with the endorsed mortgage discharge.

[16] The cheques have been exhibited and all were made payable to Jennifer Messado and Company. Mr Rochlani has not alleged that he did not receive the money from these cheques. Despite the fulfilment of the undertaking, Mrs Messado did not send the documents to Mr Hamilton in the time expected. Understandably, he wrote her a sharp letter dated August 20, 2014. His August 20, 2014 ends with this paragraph:

We also want you to know that Cayjam's obligations under the mortgage was (sic) satisfied when these funds were sent to you last month and we therefore ask that both Rosh and yourself be so guided.

[17] Thus the lawyer for Proline was asserting to the lawyer for Rosh that the obligations were met, that is to say, the total mortgage was paid off. It appears that the letter of August 20, 2014 did not produce the desired result and so Mr Hamilton wrote again on September 1, 2014 in which he said, among other things, that the entire sum of US\$4,650,000.00 plus accumulated interest was to be sent back to him (Hamilton) no later than September 8, 2014. It should be clear by now that Mr Hamilton's pen was quite busy in the period May to September of 2014.

[18] He writes again on September 5, 2014 asking that Mrs Messado accepts the letter as confirmation that all debts, principal debts, interest charges, legal fees and other related costs incurred by Cayjam in regards to their mortgage indebtedness to Rosh Development.

[19] This letter did the trick. On September 10, 2014 Mrs Messado is writing to Mr Hamilton in the following terms:

In accordance with the undertakings given for completion of this transaction we now enclose signed land cancellation agreement as approved by you for the 11 acres of land.

The monies have now been transferred to Mr Ravi Rochlani and/or his nominee in accordance with the terms and conditions under which the cheques were sent.

You already have the said duplicate certificate of title herein so all obligations are fully satisfied. The actual use of the certificate of title is fully authorised upon the receipt of the discharge of mortgage.

[20] Roch's lawyer is saying here that (a) the monies were turned over to Mr Rochlani and/or his nominee; (b) Mr Hamilton was already in possession of the duplicate certificate of title and (c) upon receipt of the discharge of mortgage use could be made of the certificate of title. Mr Rochlani has not said that he did not know of these developments and he has not said that his attorney acted outside of his instructions.

[21] Mr Hamilton exhibits a document headed 'Agreement' signed by Mr Ravi Rochlani in his personal capacity, signed by Mr Ravi Rochlani on behalf of Rosh, signed by Mr Howard Peterson in his personal capacity and by Mr Howard Peterson for and on behalf of Cayjam. The document is dated August 2014, that is to say, after the cheques were sent by Mr Hamilton to Mrs Messado. The preamble says among other things:

That in consideration of the repayment of the said loan now having been repaid together with all costs and interest as agreed, the parties now wish to confirm termination of the original agreement on the terms and conditions as delineated in this agreement. (emphasis added)

[22] The first part paragraph of the operative parts of the agreement says:

- 1. The parties acknowledge and agree that Cayjam has fulfilled its obligations under the original agreement by the repayment in full of the loan, all costs and interests to Rosh as stipulated therein.*** (emphasis added)
- 2. Rosh agrees to accept from Cayjam the sums paid in full and final settlement of all debts due to Rosh by Cayjam, and in consideration thereof Rosh shall fully relinquish and discharge its first legal mortgage over the mortgaged***

lands hereinbefore described [as land registered at volume 987 folio 289 of the Register Book of Titles]

3. ...

4. *That within 21 days of the execution of this agreement, the attorney at law for Rosh will deliver to Cayjam or its designated agent the duplicate certificate of title registered at volume 987 folio 289 of the Register Book of Titles together with the said Discharge of Mortgage No 1852859 duly recorded thereon; and a receipt/acknowledgment of full and final payment of debt and confirmation that Rosh has no further interest of any kind in the mortgaged lands.*

...

8. *This agreement constitutes the entire understanding between the parties concerning the subject matter of this agreement and supersedes all other agreements, arrangements and understandings, written or oral, concerning such subject matter. Any modification of or amendment of this agreement must be made in writing. The same applies to any agreement waiving the written form.*

[23] From this, the lawyers for Cayjam and Rosh were not leaving anything to chance. All bases were covered ... or at least so they thought. Unknown, it appears, to either Mr Hamilton or Mrs Messado, Mr Rochlani took the view that he was short paid. He claims that he and Mr Peterson met and had a discussion and somehow both men came to the conclusion that the amount owned was not US\$4,650,000.00 but US\$5,100,000.00. The agreement of August stipulated that any modification of the agreement must be made in writing. Presumably in recognition of this condition a letter of September 16, 2014 said to be from Mr Peterson was exhibited. It reads:

Dear Mr Roshlani

This letter serves as our commitment to pay the difference of US\$350,000.00 which was due to cover cost at the closing of our

loan with Rosh Development on the Portmore lands registered at volume 987 folio 289 of the Register Book of Titles. This amount will be paid from Cayjam Development's first tranche of funds or at the discharge of the West Indies Mortgage loan currently in progress, whichever comes first.

[24] The court, as was communicated to Mr George during the hearing, was very sceptical of the validity of this letter and its purported power to bind Cayjam. This private arrangement is so at odds with the known pattern of behaviour, in this case. All along the lawyers were dealing with the matter. Letters were carefully framed. Contracts and other documents drafted by lawyers and tailored to meet the needs of the client. Mr Rochlani was quite aware of what his lawyer was doing. Why would he not include the lawyer in this arrangement especially Mr Hamilton who was acting on the premise that US\$4,650,000.00 would discharge Cayjam's liability?

[25] As can be clearly seen there is no mention in the September 16, 2014 letter of any land being used as security for the additional sum of US\$350,000.00. Mr Rochlani also relies on an email which he says is an email sent from Mr Peterson to Proline's attorneys at law. The document claiming to be the email of Mr Peterson does not actually indicate from whom it was from. There is no header or footer on it. In fact, the document is incomplete because at the end of the single page exhibited it is obvious that the document continues on to another page which was not exhibited to Mr Rochlani's affidavit filed in support of the fixed date claim form.

[26] During the delivery of judgment Mr George directed the court to Mr Hamilton's affidavit of March 12, 2015 which itself was exhibited to an affidavit of Ms Morse, dated February 7, 2017, who swore her affidavit on behalf of Proline. Counsel thought that that which was exhibited to Mr Hamilton's March 12, 2015 affidavit. After the delivery of the oral judgment the court examined the document more closely. This was what was revealed. The page following what was said to be or thought to be the third page of the April 1, 2015 email is not the page that should be page three of the April 1, 2015 email. The last sentence of the document said to be the April 1, 2015 email reads:

I understand the last loan from WIM to Cayjam was US\$5.5Million (sic) and the loan was structured as follows:

[27] One would expect to see the structure of the loan on the very next page. What is there is a document saying it is page 2 of 2. The single page from the April 1, 2015 email stated that it was page 2 of 3. The bottom of the page which was thought to be the next succeeding page of the April 1, 2015 email actually has the date August 22, 2014. It reads:

There should be no issue of the discharge of the lien as all financial obligations on our part has (sic) been fulfilled. If we are at default with our loan, there was a financial penalty, and this was addressed in the total of repayments made out to your lawyer.

We hope that this does not become a public issue, but be amicably resolved.

We are therefore asking for this matter to be resolved today or we will have no option but to report the situation to the relevant authorities in Jamaica on Monday.

[28] It purports to be from Mr Howard Peterson of Cayjam. It is not clear from that document to whom it was addressed but if it is referring to the mortgage in dispute then Mr Peterson is actually in harmony with Mr Hamilton that the loan was paid off in full.

[29] The email dated April 1, 2015 reads in relevant parts:

There seems to be a matter of great concern and discomfort regarding a caveat that was placed on the property by Mr Rosh. While I did not know this was being done, I only found out the real reason two weeks ago when I saw him and asked him to remove it.

It you will recall that there was a discrepancy with him on the settlement between you and Mrs Messado and the lack of communication on the final settlement prior to me meeting him in September to get the signed mortgage discharge. He had refused to sign the mortgage discharge because he did not see his money even up to that time. When we discussed the settlement as I understand it then and based on the communication I had from you

at the time, both of us was (sic) of the belief that US\$5.1 million was the final settlement. The settlement of US\$4.65m therefore represent a short in his opinion and what he had spent. Your statement to me that the US\$4.65m agreed between you and Ms Messado was NET (sic) settlement. Meaning that costs were handled differently. It was not until I got your letter dated September 4, 2014 to Ms Messado confirming that the US\$4.65m represent a full and final payment to Rosh Development of all of Cayjam debts to him.

By then, and in order to get the mortgage discharge (sic) I negotiated down an amount to US\$350k instead of the US\$450k he was looking for and to pay him that amount from our main funding proceeds when it happens. In addition and in return, he agreed to come on board as a major client of the development for supermarket space in the shopping mall which is part of the development.

I did not have the problem paying this to him at such time because if he was short paid, then when the final statement for Cayjam-West Indies Mortgage (sic), then there would have to be an adjustment to that effect.

I did not receive a US\$350k loan from Mr Rosh. However, we received notice in the mail of the caveat earlier this year by him for the amount of US\$350k.

Cayjam has a loan agreement to pay WIM US\$7.8m which includes 15% interest. When I met with Mr Morse he said that it was actually US\$7.5M. However my loan agreement which we still have not received is for US\$7.8M. In revising the numbers, we are finding some discrepancies:

I understand that the last loan from WIM to Cayjam was US\$5.5M and the loan structure as follows:

[30] The main point though is that even in April 2015 there is no statement in this email said to be from Mr Peterson that it was agreed that there would be an equitable mortgage with the land being the security. Thus the reduction to writing that Mr Rochlani speaks of had absolutely no statement that the land was to be security for any

additional sum of US\$350,000.00 whether that writing is September 16, 2014 letter or the April 1, 2015 email.

[31] At paragraph 29 of these reasons for judgment, significant portions of the April 1, 2015 email is stated. The second paragraph from the cited passages refers to a discrepancy between Mrs Messado and Mr Rochlani. It is not entirely clear what discrepancy Mr Peterson is referring to in this email since all the correspondence between Mr Hamilton and Mrs Messado have no indication of any such discrepancy. On the contrary, all the letters from Mr Hamilton after the May meeting at his chambers at which Mr Peterson was present are consistent with the assertion by Mr Hamilton that US\$4,650,000.00 was the agreed sum to discharge Cayjam's full liabilities. The August 2014 agreement, signed by Mr Rochlani and Mr Peterson, does not reflect any discrepancy or any dispute about the final amount that would satisfy the debt. Mr Peterson also says in this April 1, 2015 email that it was not until he received Mr Hamilton's letter of September 4, 2014 to Mrs Messado confirming that the final sum was US\$4,650,000.00 that he was aware that that was the case. However, this could not be the case because Mr Hamilton is adamant (and the court accepts his evidence without question because it makes sense, it is internally consistent, explains fully the background and context of the transaction, consistent with all the other important evidence in the case, consistent with the documentation and provides a rational explanation for the entire sequence of events) that Mr Peterson was present when the final amount was arrived at.

[32] In the April 1, 2015 email, Mr Peterson seeks to say that he, personally, did not receive any loan of US\$350,000.00 from Mr Rochlani. In other words, if there is money outstanding then the liability is Cayjam's. Put another way, after Cayjam and Rosh had signed the August 2014 agreement agreeing that Rosh was paid in full, after the cheques were received and presumably encashed by Rosh, after the discharge of mortgage was signed by Mr Rochlani as the human face of Rosh and witnessed by his own attorney, after the attorneys completed the transaction, after Mr Roshlani knew of

his attorney's error and said nothing and did nothing to inform his attorney, somehow Cayjam is still liable on the mortgage because of an alleged equitable mortgage.

[33] The court should point out that there is no affidavit from Mr Peterson being relied on in these proceedings. All Rosh has is the unsupported affidavits of Mr Rochlani. His narrative does not derive support from any letter written by his lawyer. His affidavits are inconsistent with the documentation in the case and by comparison with Mr Hamilton's evidence the court has no hesitation in concluding that Mr Hamilton's evidence was vastly superior in every possible aspect.

[34] The looming conundrum for Mr George was to explain why would a businessman give up his secured position as a secured creditor and step down to a lesser form of security when he had the opportunity to seek legal advice before taking such an unusual position? The difficulty for Mr Rochlani was compounded by his assertion that on his understanding the lawyers had made a significant error on their calculation and yet he said nothing to them and never raised the alarm until the transaction was completed.

[35] Mr Bishop contends that there was and is no equitable mortgage in this case and for that he relies on a chain of correspondence in September 2014. He relies on the affidavit of Ms Marlene Morse, a director of Proline, dated February 2, 2017. To that affidavit is exhibited an affidavit of Mr Courtney Hamilton, attorney at law for Proline around the relevant time. This affidavit, dated May 12, 2015, was sworn in another claim, namely, **Rosh Development Limited v Proline Development Corp** Claim No 2015CD00039. Mr Hamilton says in his affidavit that Cayjam bought land and was registered as the proprietor on June 21, 2013. He states that on November 6, 2013, Rosh lent money to Cayjam and Cayjam gave a mortgage over the property. He states that at all material times Mrs Messado was the attorney at law for Rosh. The court will repeat significant parts of Mr Hamilton's affidavit of May 12, 2015 for this reason: it shows that the core of the July 2017 affidavit of Mr Hamilton was stated from as far back as two years ago in a claim in which Rosh was the claimant and so Mr Rochlani

would have been fully aware of the allegations being advanced by Proline and yet two years later he was not able to refute a single material assertion made on behalf of Rosh.

[36] According to Mr Hamilton, it was the understanding that Proline would repay the mortgage and interest. In keeping with this understanding Proline paid over cheques totalling US\$4,650,000.00.

[37] There is a letter from Mrs Messado to Mr Hamilton dated September 20, 2013 in which Mrs Messado states that her firm held the title to the land in question 'for and on behalf of the mortgagee Mr Ravi Rochlani.' Her letter acknowledged that Mr Hamilton acted on behalf of the proposed lender (which would have been Proline). The letter closed by stating all the amounts outstanding. There was a statement of account showing that the amount owed was US\$4,195,625.01 as of September 2013. The cheques were made payable to Mrs Messado's firm.

[38] From Mr Hamilton's perspective something had gone wrong. The tone and content of his letter of August 20, 2014 makes that plain. He closed that letter by saying:

We also want to know that Cayjam's obligations under the mortgage was satisfied when these funds were sent to you last month and we therefore as that both Rosh and yourself be so guided.

[39] There is another letter of September 1, 2014 to Mrs Messado from Mr Hamilton. In that letter he noted that Mrs Messado had agreed that 'if Cayjam fails to have the amount due to West Indies Mortgage on Thursday, September 4, 2014, then the entire amount of US\$4,650,000.00 plus the accumulated interest be sent back to us in escrow no later than Monday September 8, 2014.'

[40] Mr Hamilton wrote another letter of September 5, 2014 to Mrs Messado. It was asking Mrs Messado to accept the US\$4,650,000.00 sent to her in escrow as 'settlement of all outstanding principal debts, interest charges, legal fees and other related costs incurred by Cayjam in regards to their (sic) mortgage indebtedness to Rosh Development,'

[41] Mrs Messado eventually responded by letter dated September 10, 2014. The important paragraphs are as follows:

The monies have now been transferred to Mr Ravi Rochlani and/or his nominee in accordance with the terms and conditions under which the cheques were sent.

You already have the said duplicate Certificate of Title herein so all obligations are fully satisfied. The actual use of the Certificate of Title is fully authorised upon the receipt of the Discharge of Mortgage.

[42] Mr Hamilton speaks of a letter of September 16, 2014 in which Mr Peterson wrote to Mr Roshlani telling him of 'our commitment to pay the difference of US\$350,000 which was due to cover cost at the closing of our loan with Rosh Development' and that the amount would be paid 'from [Cayjam's] first tranche of funds or at the discharge of the West Indies Mortgage loan currently in progress, whichever comes first.' Mr Hamilton states that when Mr Peterson was asked about this letter Mr Peterson stated that the loan was a personal arrangement between himself and Mr Rochlani. If this explanation from Mr Peterson was correct then it explains why the September 16, 2014 letter and the April 1, 2015 email did not make any reference to the land being used as security for an equitable mortgage.

[43] Mr Hamilton states that at all material times his law firm acted for Proline. It is in that context that the confrontation between Mr Peterson and Mr Hamilton over the September 16, 2014 letter is to be seen. What is clear is that Mr Hamilton had the lawful authority to act on Proline's behalf. No one has contended otherwise. Mrs Messado was acting on behalf of Roch. The lawyers, as agents of the respective parties, had arrived at a position regarding the US\$4,650,000.00. It was clearly regarded a full payment of the mortgage owed by Cayjam and that it was paid by Proline.

[44] There is an email dated April 1, 2015 from Mrs Messado to Mr Hamilton. It reads:

We will do so once you note that this was an arrangement between Peterson and Mr Rochlani directly after our arrangement and that

same was prepared by Peterson and nothing to do with the mortgage loan.

[45] In other words, Roch's lawyer is saying that the arrangement was a private one between Mr Peterson and Mr Rochlani and has nothing to do with the mortgage loan.

[46] Mr Hamilton exhibits an email from Mrs Messado dated May 1, 2014 which reads:

Mrs Messado is asking you to approve the wording below:

"This is to confirm that the negotiated sum of US\$4,650,000.00j will be accepted in full settlement of the release of the mortgage loan and the actual duplicate Certificate of Title registered at Volume 987 Folio 289.

As the 1st May 2014 the firm of Jennifer Messado & Co will receive the sum of US\$300,000.00 as a goodwill payment against these sums to be held in escrow pending the delivery and release of the security and the relevant security documentation regarding Cayjam Development Limited."

[47] This is a very revealing correspondence. It is Roch's lawyer writing to Proline's lawyers asking that they approve a particular form of words and in particular that the sum of US\$4,650,000.00 will be accepted in full settlement. This was written as early as May 2014.

[48] There is the document headed 'Discharge of Mortgage' signed by Rosh in the presence of its attorney at law Mrs Messado. This Discharge of Mortgage was sent by cover letter dated September 9, 2014 from Mrs Messado and that letter said 'we now enclose hereto the signed discharge of mortgage by Rosh Development Ltd.'

[49] To repeat it would have been noted that there is some degree of repetition in the evidence. In particular, the evidence of Mr Hamilton. This was deliberately done in order to show that Proline had exhibited Mr Hamilton's affidavit from the other claim and so made clear that it intended to rely on Mr Hamilton's version of events. This affidavit of

Ms Morse was filed from February 8, 2017 which meant that Rosh has full notice of what the defence to the claim was going to be yet there is no evidence from Rosh contradicting the core of Mr Hamilton's evidence. Equally, there was no attempt to challenge Mr Hamilton's evidence in his July 2017 affidavit which was filed on October 3, 2017.

[50] The court was attracted to that part of Mr Hamilton's July 17, 2017 affidavit that stated the principal sum borrowed by Cayjam of US\$3,770,00.00 at 25% running from November 1, 2013 to May 1, 2014 would attract interest at US\$467,376.71. The court did its own calculation on the premise that the loan ran for one year. The maximum total interest due would have been US\$942,500.00 which would mean that if the money were being paid at the end of the one year the total sum payable (principal with interest added) would be US\$4,712,500.00. Even if the interest were calculated for the entire year it does not bring the total up to US\$5,100,000.00. The point was to test the assertion of Mr Rochlani that the it was discovered by him and Mr Peterson that the true sum owed was US\$5,100,000.00. Even with bad arithmetic this sum could not possibly be the sum owed on a mortgage of US\$3,770,000.00 at 25% per annum after six months. Mr Rochlani did not explain his calculations to show how he came up with this figure and neither was there any evidence from Mr Peterson explaining why he agreed with this figure if indeed there was any such agreement. This is why the court said earlier that the sum claimed is unmathematical since it could not have been based on known information, namely, principal, rate of interest and time, the only ingredients needed to calculate simple interest. And so in the absence of some other reasonable explanation there is no basis for the court accept the unexplained, unsupported and unsubstantiated assertion that US\$5,100,000.00 was the sum owed on the mortgage.

[51] The court also wishes to note that there is no rational explanation coming from Mr Rochlani explaining why he would have signed the discharge document (a document that would become part of the publicly accessible records of dealings with the land in question) which it was the case that the mortgage was paid off.

[52] Mr George submitted that this was perhaps a case of two businessmen seeking to work out their problems on their own without their attorneys and did what in hindsight may seem irrational to us but to them, at the time they acted and the circumstances they were in, was quite sensible. Mr George is asking this court to accept that an arrangement was made between, Mr Rochlani and Mr Peterson, Rosh and Proline, that the additional sum of US\$350,000.00 was agreed as still outstanding and secured as an equitable mortgage between Rosh and Proline. This is after the conclusion of not only negotiations but a signed agreement which stated that Cayjam was no longer indebted to Rosh. Yet neither Mr Rosh nor Mr Peterson saw it fit to bring such a far reaching oral agreement initial oral to the attention of their lawyers. Indeed, Mrs Messado's letter of September 9, 2014 made it plain that the monies were transferred to Mr Rochlani or his nominee 'in accordance with the terms and conditions under which the cheques were sent.' What were those conditions? That the payment of US\$4,650,000.00 represented full and final settlement of the mortgage that had been granted by Cayjam. Put another way, Mrs Messado is saying that she gave her client the cheques and told him that they were full and final settlement of Cayjam's mortgage. It is clear that Mr Rochlani accepted the cheques on that footing. The reason he accepted the cheques and signed the Discharge of Mortgage is that he knew that as a matter of mathematics the payments were correct, that is covered the sum that would have been outstanding at as the time of payment. This is the best explanation for his signature on the Discharge of Mortgage document. To repeat, Mr Rochlani has not said in either of his two affidavits that Mrs Messado acted improperly, without instruction, did not bring to his attention the cheques and the basis upon which they were paid first to her and then to him. The court does not accept Mr George's submissions.

[53] The court will now state its affirmative findings of fact. This court makes the affirmative finding the mortgage was discharged by the payment of the cheques from July 2014. The court also finds that that fact was accepted by Rosh and Cayjam and that is evidenced by the agreement in August 2014. The court finds that Mr Rochlani, as the human mind of Rosh, signed the Discharge of Mortgage document because the lawyers' calculations were correct and he knew that. As a matter of mathematics it is

impossible for the interest on the loan of US\$3,770,000.00 to have attracted interest to bring the total sum payable to US\$5,100,000.00 at the end of one year to say nothing of six months. The court finds as a fact that based on the sum loaned and the interest rate of 25% there was no shortfall of any kind and this was known to Mr Rochlani and explains why he signed the Discharge of Mortgage. Mr Rochlani has not presented any evidence to show how he and Mr Peterson arrived at this alleged shortfall. The court finds as fact that Rosh was paid in full and as a matter of fact and law the mortgage was completely discharged by the end of July 2014.

[54] The court also finds as a matter of fact and law that there was and is no equitable mortgage in existence between Rosh and Cayjam at the time of Laing J's order that Proline's mortgage was to be registered subject to the caveat said to be on Rosh's equitable mortgage.

[55] Much has been made of an order of Laing J made in another claim (**Rosh Developments Ltd v Proline Development Corp** Claim no 2015CD00039) in which by consent it was agreed between Rosh and Proline that Proline's mortgage is to be endorsed on the title subject to Rosh's caveat and Cayjam's caveat.

[56] The submission from Mr George was that that consent order was an acknowledgment that Proline accepted the factual assertion that Rosh was an equitable mortgagee. The court cannot draw such an inference from that order. There are a variety of reasons why consent orders are made. There is no evidence that in that claim Laing J was asked to determine whether there was in fact an equitable mortgage in existence. Mr Bishop's position was that the consent order was a holding position pending final resolution of the matter. He submitted that it was always Proline's position that there was no equitable mortgage between Rosh and Cayjam because Proline had paid the mortgage in full. There is no evidence that that claim involved an examination of the kind required by this case. In fact, the issue of res judicata has not been raised in this present claim which suggests to this court that Laing J made no findings of fact regarding the existence of an agreement between Rosh and Cayjam that could be called an equitable mortgage.

[57] So Mr George is right to say that an order made by court stands until set aside. This court is not setting aside Laing J's order. It is simply adjudicating on the issue of whether there is fact an equitable mortgage in existence between Rosh and Cayjam. Laing J was not asked to or required to make such a finding in light of the consent order presented to the court.

[58] Mr George submitted that the court cannot order the removal of the caveat because Proline has not made an application under section 140 of the Registration of Title Act. Mr George took the technical point that the claim was brought by caveator and not in an action brought against the caveator.

[59] The court cannot agree with this contention. The proceedings were begun by fixed date claim form in which Rosh was seeking named remedies. In my view the respondent or defendant are entitled to ask for remedies that they want without the need to file their own fixed date claim form. The essential point is that section 140 permits an action to be brought against the caveator for the removal of the caveat but that is not the same thing as saying that that is the only manner and form by which a caveat can be removed. In this case the caveator was already before the court since it is Rosh which initiated the court proceedings. The section is permissive and tells the challenger to the caveator how he may seek to have the caveat removed. On close reading the provision is simply a natural justice provision telling the challenger that he must notify the caveator of the challenge and summon him before the court. In this case the summoning has been done in the sense that Rosh, the caveator, put itself before the court when it initiated these proceedings and thus relieved the challenger of that initial natural justice step.

[60] In light of the court's findings of fact the court need not determine whether Mr George's submissions on the rights of an equitable mortgagee.

Conclusion

[61] The court does not accept that there was any equitable mortgage between Cayjam and Roch allegedly executed between Mr Rochlani and Mr Peterson. The court declines to grant the declaration that Rosh is an equitable mortgagee. The court refused the declaration that the claimant has any power of sale over the property.

[62] The court expressly finds that the mortgage was paid off fully and Rosh has no interest of any kind whatsoever over or in land registered at volume 987 folio 289 of the Register Book of Titles.

[63] It follows from this that the caveats have no legal or factual foundation. The caveats filed by Rosh and Mr Peterson allegedly on behalf of Cayjam should be removed by the Registrar of Titles and Proline should have its mortgage fully registered without being subject to any caveat of either Rosh or Cayjam. Costs to the first and second defendants to be agreed or taxed. Leave to appeal refused.