



[2023] JMCC COMM. 33

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

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. 2018CD00603**

<b>BETWEEN</b>	<b>SKYROCK CAPITAL LIMITED</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MINETT LAWRENCE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>LOWELL LAWRENCE</b>	<b>2<sup>ND</sup> DEFENDANT</b>

Mrs Terri-Ann Guyah Tolan and Aisha Thomas, instructed by Guyah Tolan & Associates, Attorneys-at-law for the Claimant

Dr. Mario Anderson, Attorney-at-law instructed by Barbican Law Clinic for the Defendants

**IN OPEN COURT**

**Heard: 17<sup>th</sup>, 18<sup>th</sup> April, 26<sup>th</sup> May and 20<sup>th</sup> July, 2023**

**BREACH OF CONTRACT - PROMISSORY NOTE- SECTIONS 35, 36 AND 50 OF THE STAMP DUTY ACT - WHETHER SUMS ADVANCED AMOUNT TO A LOAN OR DEPOSIT ON ACQUISITION OF SHARES IN COMPANY - WHETHER PROMISSORY NOTE VALID AND ENFORCEABLE - WHETHER EQUITABLE MORTGAGE CREATED**

**STEPHANE JACKSON-HAISLEY J.**

## **BACKGROUND**

- [1]** The Claimant Skyrock Capital Limited (hereafter Skyrock), a company incorporated under the Laws of Jamaica was desirous of acquiring a stake in the telecommunications industry in Jamaica. The directors, Mr Winston Finzi and Ms. Marcellas James, were acquainted with the Defendants Minette and Lowell Lawrence, wife and husband who were company secretary and director and chief executive officer respectively of a company known as Symbiote Investments Limited (hereafter Symbiote). The Defendants were also shareholders in Symbiote. Symbiote had recently acquired telecommunications licences to provide telecommunication services to the general public. Skyrock wanted a piece of this pie and so commenced discussions with the Defendants about acquiring shares in Symbiote.
- [2]** Prior to having discussions with the Defendants, Skyrock was in discussions with the directors of Symbiote. Arising from these discussions, on July 3, 2017 Skyrock and the directors of Symbiote and two other companies entered into an Agreement called a Non-Disclosure, Non-Circumvention and Non-Competition Agreement (hereafter the Non-Disclosure Agreement). This was followed by the signing of other documents by the parties in this matter.
- [3]** On the 30<sup>th</sup> day of August, 2017, the parties signed an Agreement for the sale of 39.001% of the shares in Symbiote. That Agreement was to come into effect upon certain pre-conditions being satisfied. On the same day, the parties also executed a Promissory Note in relation to the sum of Thirty-Eight Million, Five Hundred Thousand Jamaican Dollars (J\$38,500,000.00).
- [4]** It is the Claimant's case that pursuant to the terms of the Agreement supported by the Promissory Note it loaned, the sum of Thirty-Eight Million, Five Hundred Thousand Jamaican Dollars (J\$38,500,000.00) to the Defendants. Thirty-Six Million Jamaican Dollars (J\$36,000,000.00) was paid to NCB for the purpose of settling an outstanding mortgage on the Defendants' property located at Constant

Spring in the parish of Saint Andrew and registered at Volume 1355 Folio 834 of the Register Book of Titles. The balance of Two Million Five Hundred Thousand Jamaican Dollars (J\$2,500,000.00) was paid into the Defendants' joint account.

- [5] In furtherance of the execution of the Agreement, the National Commercial Bank sent the Duplicate Certificate of Title for the property registered at Volume 1355 Folio 834 in the name of Minett Palmer and the Discharge of Mortgage to the Claimant's Attorneys-at-law which remain in their custody.
- [6] On the 24<sup>th</sup> October, 2018, a Notice of Material Breach of Agreement and Intention to File Civil Court Proceedings and Final Notice of Demand was served on the Defendants by electronic mail indicating the balance owed and requiring same to be paid. The original document was also served on the Defendants. Despite repeated requests, the Defendants did not properly execute and deliver the Share Transfer Certificates and are in breach of the Agreement and have failed to pay the sums due under the Promissory Note. In the circumstances, the Agreement for Sale of Shares was terminated on the 28<sup>th</sup> August, 2018.
- [7] The Claimant is claiming the sum of Sixty Million, Eight Hundred and Thirty-Two Thousand, Three Hundred and Seventy-Six Jamaican Dollars (J\$60,832,376.00) plus interest at a rate of 19% per annum or Thirty-One Thousand, Six Hundred and Sixty-Six Dollars and Seventeen Cents (JMD\$31,666.17) per diem from the 17<sup>th</sup> July, 2019 to the date of payment.
- [8] The Claimant also claims to hold an equitable mortgage over the Defendants' property and seeks an order for sale of the said property to recover their mortgage proceeds with interest and expense.
- [9] The Defendants in their Defence have denied that they borrowed any money from the Claimant for their personal benefit and asserted that the parties executed a letter of intent for the sale of shares in the Defendants' company pursuant to which

the Claimant was liable to pay the Defendants a deposit in the sum of United States One Million Five Hundred Thousand Dollars (US\$1,500,000.00). It was further asserted that the parties agreed that the sum of Thirty-Eight Thousand, Five Hundred Thousand Jamaican Dollars (J\$38,500,000.00) would be disbursed on the Defendants instructions. They averred that the Promissory Note was fully satisfied in accordance with its terms which stipulated that same would be satisfied on execution of the agreement for the sale of shares. Further, that the parties intended and used the Promissory Note as interim security to cover the disbursement by the Claimant and that the Claimant knew at all material times that it was for the sole purpose of protecting its interest until the Agreement for Sale of Shares was executed.

- [10] They expressed that the sums disbursed represent a partial settlement of the sums due to the Defendants as a deposit under the Agreement for Sale of Shares and was never intended as a loan unless the Defendants failed to execute the agreement. They pleaded that it was the Claimant that was in default of its payment obligations under the Share Purchase Agreement.

## **EVIDENCE OF THE CLAIMANT**

- [11] The evidence for the Claimant came from the sole witness, Marcellas James. Mr. Winston Finzi was unable to give evidence and did not provide a witness statement. In her evidence Ms. James stated that she was the common law spouse of Winston Finzi and director of Skyrock. Ms. James stated that Skyrock had a long desire to acquire a stake in the telecommunication industry in Jamaica and there had been previous discussions with other directors of Symbiote with a view to acquiring the shares. She further stated that Symbiote did not have the organization, structure and staffing to properly respond to enquiries as to the financial or legal state of the company, as a result of which, the discussions did not go further as information needed to properly assess the company was not forthcoming.

- [12] Ms. James stated that in 2017, another director of Symbiote provided an assurance that an accountant could provide the necessary paperwork and that all questions should be directed to Mrs. Lawrence who was an Attorney-at-law as well as Symbiote's Company Secretary.
- [13] Ms. James indicated that based on those assertions, a meeting was held in 2017 at an intermediary's house to enquire into the true state of the company particularly whether the telecommunications licences were in jeopardy. She further stated that the understanding reached at the time was that the requested information would be provided, the share price would be fixed and once the documentation was in order, the acquisition process would commence.
- [14] Ms. James further indicated that Mrs Lawrence informed Mr. Finzi that she was in a desperate situation and was on the verge of losing her house. She pleaded for assistance to pay out the mortgage. The matter was discussed and both she and her common law husband decided to lend her and Mr. Lawrence the money since the ultimate plan was to buy out her shares in Symbiote. The necessary documentation was prepared and forwarded to Mrs. Lawrence for review. The documents were finalized and eventually signed on August 30, 2017.
- [15] The money was paid over to the bank and in the joint account for Minett and Lowell Lawrence and the mortgage, discharge of mortgage and the Certificate of Title for the property sent to Ballantyne Beswick & Co. Upon submitting the documents to commence due diligence, it became evident that the Defendants did not have any shares to sell as less than two months after the August 30, 2017 agreement was executed, 85,000 shares held in Narysingh Limited, the majority shareholder in Symbiote were transferred to a company known as Involution Limited. This represented 90% of their holdings in Symbiote. Furthermore, it became obvious that they would have failed due diligence because Symbiote had been embroiled in legal matters culminating in a decision of the Court of Appeal to cancel their

licence to operate. Ms. James stated that on that basis, instructions were given to serve Notice of Material Breach of Agreement and Notice of Failure of Due Diligence on 28<sup>th</sup> August, 2018.

[16] Ms James gave further evidence indicating that the sums advanced represented a short-term loan but they were not interested in shares because there were no shares for them to get and so they made a loan supported by the Title. In cross-examination Ms. James indicated that they were in discussions about the acquisition of Caricel and shares in Symbiote when Mrs Lawrence called and spoke frantically that she was about to lose her house and that based on what she said about the sale of the shares and being ready to move ahead they decided to advance the sum. Her understanding was that the loan would be repaid when they were purchasing the shares by a deduction from the amount. Despite this indication, she insisted that the money sent to the bank did not form part of the entire transaction to purchase the shares. She explained that that was why they did the side letter. She however agreed that the transactions were all connected however insisted that they helped Mrs Lawrence out of a difficult situation when they were in the process of negotiating the purchase of her shares.

[17] She insisted throughout that the agreement was contingent on due diligence being done which the Defendants never complied with. She said it was because they never followed the required steps why Skyrock was not able to proceed.

## **EVIDENCE OF THE DEFENDANTS**

[18] The two Defendants gave evidence in support of the Defendants' case. Mrs. Lawrence stated that she knew Mr. Finzi for in excess of thirty (30) years and in 2017, there was a meeting regarding purchasing shares in Symbiote. At that time, Mr Finzi informed her that he had already commenced discussions with other persons connected with the company but wanted support as he was getting nowhere despite signing documents and expending funds.

- [19]** Mrs Lawrence stated that Mr. Finzi disclosed that he had commenced making arrangements to fund an investment in Symbiote which included a payment to her of Twenty Million Jamaican Dollars (J\$20,000,000.00) however, during cross-examination, Mrs. Lawrence disagreed that she made that statement.
- [20]** Subsequent to that meeting, there were follow-up meetings regarding the sale of shares where it was made clear that the Title to the property at 2 Long Lane, Kingston 8 would not be encumbered in any way as security for the immediate disbursement. She stated that she and her husband, Lowell Lawrence, refused to sign a Promissory Note and Transfer of Mortgage documents that would entitle the Claimant to assume rights of a mortgage over her home and proposed that the Claimant amend the Promissory Note so that it would be rendered unenforceable once the sale of shares agreement was executed. She further stated that the Agreement for Sale of Shares, the Transfer of Shares Form and the Escrow Agreement were signed on the 1<sup>st</sup> September, 2017 and the documents were scanned and emailed to Mr. Beswick. In cross-examination Mrs. Lawrence admitted that the original inked documents were not sent as she was awaiting the Escrow Agreement.
- [21]** Mrs. Lawrence asserted that not all discussions had with Mr. Finzi culminated into the agreement between the parties on the basis that not all agreements were signed. The first agreement confirming the sale of the shares was signed but not the other documents. Other documents exhibited demonstrate that the Escrow Agreement, the Share Purchase Agreement and the Rescission Agreement were signed only by the two Defendants and not by Skyrock. The Transfer of Shares Document bears only one signature which appears to be that of Mrs. Lawrence. In a letter dated January 14, 2018 addressed to Mr Beswick, Mrs Lawrence referred to Escrow Agreement, the Share Purchase Agreement and the Letter of Interest indicating that it was an absolute necessity that the documents be signed in order

to proceed and for the payment of Thirty-Eight Million, Five Hundred Thousand Jamaican Dollars (\$38,500,000.00) to be treated as part payment of the deposit.

- [22]** Mrs. Lawrence stated that Mr. Finzi assured her on multiple occasions that he had no interest in her home and due to the many years of friendship, he was willing to make the NCB payment even before he was in a position to pay the remainder of the deposit on the share purchase. She further stated that Mr. Finzi agreed that the sum of Thirty-Eight Million Five Hundred Thousand Jamaican Dollars (J\$38,500,000.00) would be disbursed and that was done on 31<sup>st</sup> August 2017, however, the balance of the deposit was not disbursed which was due to delays with NCB Capital Markets.
- [23]** Mrs. Lawrence stated that the Promissory Note represented interim collateral security between the disbursement of funds and the execution of the agreement for sale of shares. It was explained that since the sale price for the shares was more than sufficient to cover the NCB payment there was no need to request a mortgage. She further asserted that as a result of extensive delay and inactivity on the Claimant's part, other commercial decisions had to be made in order to protect the company's assets and licence. She stated that the company continues to have substantial equity in its customer contracts and its LTE broadband networks and its value is well in excess of United States Fifty Million Dollars (US\$50,000,000.00).
- [24]** Mrs. Lawrence asserted that although the Claimant failed to pay the balance of the deposit, instructions were given to the Company's Finance manager on the 23<sup>rd</sup> February, 2018 to engage in due diligence inquiries as requested and the Claimant was informed in writing however in cross examination she stated that she did not cause the audited financials to be prepared as she is not a Director but the company secretary.
- [25]** In his evidence Mr. Lowell Lawrence reiterated that sometime in 2017 he and his wife met Mr. Winston Finzi who arranged a meeting through an intermediary to



discuss his interest in purchasing shares in a company in which he and his wife are shareholders. He asserted that in discussing the proposed purchase of shares, Mr. Finzi disclosed that he had commenced making arrangements to fund an investment in his company and that the third party had insisted on making a payment of Twenty Million Jamaican Dollars (J\$20,000,000.00). He asserted that a decision was taken to sell some of the jointly held shares in order to discharge an outstanding debt to NCB and redeem the Title.

**[26]** Mr. Lawrence's evidence simply repeated much of the evidence of Mrs. Lawrence and highlighted that although an agreement for the sale of shares was executed between the parties, it was a short-term loan that expired upon the execution of the share transfer agreement. He further stated that there was no agreement to borrow monies from the Claimant or pay interest at 19% or any other rate.

**[27]** During cross-examination Mr. Lawrence stated that he did not enter into any personal agreement with Mr. Finzi. He also stated that the documents properly executed reflected what the parties discussed. Mr. Lawrence agreed that there is a Return of Allotment of 1,000 shares of which 500 shares were allotted to a third party. Mr. Lawrence agreed that he signed a Letter of Intent which required that there be no change or increase of shareholders.

## **SUBMISSIONS ON BEHALF OF THE CLAIMANT**

**[28]** Mrs. Terri-Ann Guyah Tolan submitted that the issues for determination by the Court are:

- a. What is the meaning and intent of the documents signed by the parties, being the Agreement, Promissory Note and supporting documentation?
- b. Whether there has been a breach of the Agreement by either party?
- c. Is the Agreement capable of performance?

d. Is the Claimant entitled to the reliefs as sought?

[29] Counsel submitted that it is important that the Court examine the documentation signed by the parties as they touch and concern how the court is to treat with the monies paid by the Claimant. Counsel stated that it is undisputed that the Claimant wanted to purchase a significant stake and controlling interest in Symbiote. It is against this background that discussions and negotiations were entered into with all connected parties as referenced in the Non-Disclosure, Non-Circumvention and Non-Competition Agreement executed on the 3<sup>rd</sup> of July, 2017 over a month and a half prior to the Agreement between the parties.

[30] Counsel submitted that in assessing the credibility of a witness the Court should examine not only the demeanour but the substance of the evidence which is generally approached with reason, logic and common sense. Counsel relied on **Faryna v. Chorny** [1952] 2 D.L.R. 354, 4 W.W.R. (N.S.) 171, where Mr. Justice O'Halloran J.A. opined that:

*“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”*

[31] Counsel also relied on paragraph 16, 17 and 18 of **Barrington Clarke v. Kimesha Notice** [2021] JMSC Civ. 12 where the Court found that:

*“[16] There is a rebuttable presumption that where a contract has been reduced to writing, the Court ought not to look to parol evidence to qualify, add to, alter or contradict the terms of the agreement unless it can be shown that the written agreement does not form the entire contract. This principle is known in law as the parol evidence rule and was explained in the Halsbury Laws of England 5th Edition Volume 22 para 21 as follows:*

*“Where the intention of the parties has in fact been reduced to writing, under the so-called 'parol evidence rule' it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show that intention, or to contradict, vary or add to the terms of the document, including implied terms. This rule is not confined to oral (parol) evidence, but also excludes earlier extrinsic written matter, such as earlier drafts, preliminary agreements and prior correspondence”*

[32] Counsel submitted that the Parol Evidence rule should apply in this matter to bar extrinsic evidence, including prior or contemporaneous written agreements that contradict or create a variation of a term in writing that the parties intended to be completely integrated. She further submitted that based on the wording of the Agreement, it was intended to contain the final and complete statement of their agreement based on clause 14 of the Agreement which was referred to in paragraph 17 that stipulates that the Agreement constitutes the entire agreement between the parties and supersedes all prior discussions, arrangements and negotiations.

[33] Counsel argued that the Defendants failed to execute and return the documents to the Attorney-at-Law for the Claimant who acted as the Escrow Agent in breach of Clause 13 of the Agreement and further breached Clause 14 (d) of the Agreement which prohibited the increase or change or alteration of the share capital of the company without the expressed consent of Skyrock in writing.

[34] She also submitted that Symbiote failed due diligence by virtue of the ruling from the Court of Appeal in **Symbiote Investments Limited v Minister of Science and Technology** [2019] 1 JMCA App 8 resulting in the decision by the Government of Jamaica to cancel their license to operate being affirmed. The Defendants warranted and represented in the Agreement that:

*“7. That Symbiote Investments Limited owns, amongst other licences, a 700 MHz. national licence to provide telecom services (mobile, telephone, internet, video and any other services technologically possible) which is unencumbered and valid for a period of fifteen (15) years.”*

- [35] Counsel submitted that the Claimant is entitled to recover the sums invested, being Thirty-Eight Million Five Hundred Thousand Jamaican Dollars (J\$38,500,000.00) plus interest at a rate of 19% per annum, 15% collection fees and attorney's fees as agreed in the Promissory Note and the Agreement and so is entitled to an equitable relief over the subject property. In support of her argument, she relied on the authority of **Karin Murray v Brilliant Investments Limited and Others** [2022] JMSC Civ 67, wherein Nembhard J discussed the principles in relation to an equitable mortgage and found that "*whenever a disposition of an estate or interest is originally intended as a security for money, whether this intention appears from the deed itself, from any other instrument or from oral evidence, it is considered as a mortgage and redeemable.*"
- [36] Counsel argued that there is a sound basis on which a court may find that an equitable mortgage exists in favour of the Claimant as it is quite clear that the Defendants intended to treat the property as security for the sum of money that is owed to the Claimant.
- [37] She further contended that the Claimant has been out of pocket in excess of six (6) years to the sole benefit of the Defendants who have enriched themselves personally and have at the Claimant's expense acquired a Title free from any encumbrances or liens without the Claimant receiving any benefit or equity that was contemplated under the Agreement for the sale of their shares. For this reason, it is argued that the Defendants' defence should fail and the Claimant is entitled to the reliefs as sought.

## **SUBMISSIONS ON BEHALF OF THE DEFENDANTS**

- [38] Dr. Mario Anderson submitted that the Defendants are not in breach of the Agreement and instead argued that it is the Claimant who has breached the Agreement. Counsel also contended that there was no loan agreement with the

Claimant and any sums advanced for their benefit was pursuant to an agreement to purchase their shares in a company which is a part of the required United States One Million, Five Hundred Thousand Dollars (US\$1,500,000.00) deposit to purchase the shares.

**[39]** Dr. Anderson submitted that the issues that the Court should consider are:

- a. Whether the sole witness was competent or merely a witness of convenience?
- b. Whether the promissory note was valid and whether it should be entered into evidence?
- c. Whether the promissory note in any event based on its terms ceased to have any effect?
- d. Whether the agreement came into effect and if not whether the intention of the parties can be ascertained by other means?
- e. Whether an equitable mortgage was created in favour of the Claimant?

**[40]** Dr. Anderson submitted that the sole witness is best described as a “witness of convenience” who had no direct knowledge and involvement in the transaction. It was further submitted that aside from a bald assertion that she had been a director from the inception of the company, the Claimant’s offered no proof to substantiate the witness’ position as a director. Dr. Anderson asserted that the sole witness was not present at the various meetings, had her knowledge from conversations she overheard and that the evidence presented is in variance with the documents. It was submitted that on that basis the witness should be treated as one lacking credibility in all material respects.

**[41]** Dr. Anderson raised the point that the Promissory Note should have been stamped within seven (7) days of being executed on 30<sup>th</sup> August, 2017 pursuant to section

35 of the Stamp Duty Act, however, the document was not stamped until April 2018. Counsel relied on the Court of Appeal case of **Garth Dyche v Juliet Richards et al [2014] JMCA Civ 23** where Phillips, JA affirmed that noncompliance with Section 35 would result in the promissory note not being admitted into evidence in order to recover on or enforce it. He noted Phillips JA's finding that Section 50 of the Stamp Duty Act would allow that on payment of the required stamp duty and penalty, the promissory note could be used as corroborative evidence but submitted that there is no evidence that the penalty was paid therefore the Promissory Note is invalid and cannot be entered into evidence.

**[42]** Counsel submitted that it is the Claimant who has not provided any evidence that it has complied with the conditions precedent for the Agreement to come into force. Further it did not attempt to do the due diligence exercise, nor appoint any auditor to review the relevant documents nor pay the full deposit of United States One Million, Five Hundred Thousand Dollars (US\$1,500,000.00). It is submitted that the Claimant would be in breach of its various agreements with the Defendants and thus could not hold them liable for same based on the Indemnification clause set out at Clause 3 of the Letter of Intent

**[43]** Dr. Anderson submitted that the Letter of Intent makes it clear that the property belonging to the 1<sup>st</sup> Defendant was to be used as an interim security only, and the sums paid on her behalf was a deposit for the purchase of the Defendants' shares. He further submitted that pursuant to Clause 13 of the Agreement, the condition precedent to the said Agreement coming into force is that the Directors of both the Claimant and Symbiote shall cause (1) the Share Transfer Certificates to be signed, (2) the Letter of Intent to be signed and (3) to sign any supplementary documentation that will give effect to the performance by any party of any action as contemplated by the Letter of Intent and the said Agreement. He stated that these documents were signed and forwarded to the Claimant however he accepted

that there is no evidence that the Claimant signed the document, thus it would appear that the Agreement did not come into force.

**[44]** As it relates to the equitable mortgage, Counsel submitted that the Letter of Intent makes it clear that the property belonging to the 1<sup>st</sup> Defendant was to be used as an interim security only, and the sums paid on her behalf was a deposit for the purchase of the Defendants' shares. Counsel submitted that there is no basis in law or otherwise for the Claimant to retain the 1<sup>st</sup> Defendant's Title as it has no equitable mortgage on the subject property.

**[45]** It is further submitted that although Symbiote has had its many challenges, the company still has valuable assets, and its shares thus have significant value. The Defendants have made it clear that they are still in a position to complete the transaction and the Claimants have also indicated that they are still interested in investing in a telecommunications business.

**[46]** Having considered, the Claim, the evidence by both sides and the submissions advanced, the issues requiring resolution can be simplified as follows:

1. What is the nature of the agreement between the parties?
2. Is the Promissory Note valid and enforceable?
3. Was there a breach who is in breach?
4. Was an equitable mortgage created in favour of the Claimant?

#### **WHAT IS THE NATURE OF THE AGREEMENT BETWEEN THE PARTIES?**

**[47]** The resolution of this issue will turn on the interpretation to be accorded to the various documents passed between the parties as well as my assessment of the credibility and competency of the witnesses to speak on the details of the transaction. I will start with the credibility and competency of the witnesses. Counsel on behalf of the Defendants has argued that the sole witness being relied

on by the Claimant is not competent to speak to several of the matters in contention and that she is merely a witness of convenience who only came to the fore because of the absence of the director Mr. Winston Finzi who is the one with direct knowledge and involvement in the transaction.

**[48]** Mr. Finzi was the main man behind the transactions with the Defendants and it was he who led the discussions with the Defendants and was present in all the discussions. It is true that Ms. James was absent from some of the discussions and appeared in some instances to rely on the information given to her from Mr. Finzi. During her evidence, she did make certain concessions in respect of her inability to speak to certain events that transpired pertaining to the transaction. However, she was able to speak to certain essential facts pertaining to the transaction.

**[49]** She gave evidence which I accept that she was a director of Skyrock since its inception and subsequently became company secretary. With respect to this transaction, she was a signatory to the Non-Disclosure Agreement signed on July 3, 2017 which was the first document signed in respect of the transaction which put in train the formal negotiations of the deal. I am of the view that this demonstrates that she was integrally involved from this early stage and that as director and company secretary she can speak to certain essential aspects of the transaction. I reject the Defendants' contention that she is not competent to give evidence on behalf of the Claimant. In view of Mr Finzi's absence, there are certain lapses in the evidence but I did not find that detrimental to the Claimant's case because much of what is being relied on can be extracted from the documentary evidence. The Defendants themselves have agreed that the written agreement reflected the agreements arrived at.

**[50]** With respect to my assessment of Ms. James as a witness, I did find her in most respects to be a credible witness and when her evidence is compared with that of the Defendants, it accorded more with the documentary evidence. The Defendants



on the other hand did not come across as entirely frank and so where there are points of divergence, I found her more credible than the Defendants.

**[51]** This brings me now the nature of the agreement as can be discerned from the documentary evidence. On behalf of the Claimant, it was argued that the Court is restricted by the 'parol evidence rule', from considering extrinsic evidence including all prior discussions, arrangements and negotiations. Although there is some merit in this submission, this however does not take away from the ability of the Court to consider the evidence led referable to the actions of the parties along with the written documentation. The following documents were agreed by the parties and are relevant to the issues raised:

- The Non-Disclosure Agreement dated July 3, 2017
- The Agreement dated August 30, 2017
- The Promissory Note dated August 30, 2017
- The Letter of Intent dated August 30, 2017 (the side letter)

**[52]** The Non-Disclosure Agreement set the stage for the parties to enter into formal discussions. It was signed by both Mr Finzi and Ms. James in their capacities as directors of Skyrock. The confidant and the directors of the entities Symbiote Investment Limited, GN Holding Limited and Caricel were also signatories. None of the Defendants was party to this Agreement. This Agreement referred to the parties' intention to engage in discussions regarding potential future business relationships. One of the purposes was for the parties to agree to the obligation of confidentiality. This was deemed necessary because of the significant commercial value of their potential investment. They also agreed to the obligation of non-competition and non-circumvention.

**[53]** One of the other main clauses of this Agreement was the Due Diligence clause which provided that 'the Due Diligence requirements which will be supplied after

the signing of this agreement, is not conclusive and the process is continuous over the life of this agreement’.

- [54]** It is agreed and established by all parties that the Agreement dated August 30, 2017 never came into effect. It was clearly expressed in that Agreement that a condition precedent to this Agreement coming into force was that the parties would execute ‘The Share Transfer Certificate’ to be signed, The Letter of Intent to be signed and any supplementary documentation. The condition precedent to the Agreement was never fulfilled. This Agreement also referred to the Non-Disclosure Agreement which was to remain in full force until the completion of Due Diligence by Skyrock. A further description of Due Diligence was provided in this Agreement wherein it was expressed that the investment is entirely conditional on the company successfully passing the Due Diligence exercise.
- [55]** In order for the Agreement to take effect the Director of the Companies would have had to execute at the very least the Share Transfer Certificates and the Letter of Intent. The Letter of Intent was executed on August 30, 2017, the same day as the Agreement and provided that the Claimant was prepared to begin Due Diligence in relation to the proposed acquisition of the shares in Symbiote. It was contingent upon, *inter alia*, successful completion of legal, financial, commercial and technical Due Diligence.
- [56]** Clause 2 of the Letter of Intent provided for the payment terms and Clause 3 of the Letter of Intent contains an Indemnification Clause that “you hereby agree to wholly indemnify Skyrock should they decide, after conducting the due diligence exercise to withdraw from this agreement, whereupon any and all monies paid shall become a debenture on the Company and you will also be liable jointly and severally to Skyrock for the repayment of any and all sums you have received.
- [57]** The Promissory Note referred expressly to the sum of Thirty-Eight Million, Five Hundred Thousand Jamaican Dollars (JM\$38,500,00.00) received by the

Defendants and their promise to pay the sum on demand. Of importance was the last clause that stipulated that 'This Promissory Note shall be deemed satisfied in full and of no further legal effect on the date of the execution of the Share Purchase Agreement.

- [58]** The parties are agreed that the Share Purchase Agreement was never executed. The Claimant's contention is that it was the Defendants who caused the failure of Due Diligence and that despite requests for performance by the Defendants, they failed to properly execute and deliver the Share Transfer Certificates and that is why the execution of a Share Purchase Agreement never took place.
- [59]** They further averred that the Defendants having failed Due Diligence, they are also in breach of the Non-Disclosure Agreement and that they thereafter proceeded to terminate the Agreement by the Notice they gave to them.
- [60]** The Claimant's contention is that the Promissory Note remains valid. The Defendant has accepted having received the sum of Thirty-Eight Million, Five Hundred Thousand Jamaican Dollars,(J\$38,500,000.00), Thirty Six Million (\$36,000,000) of which was paid to the National Commercial Bank and the balance to them however, they have argued that these sums were paid on account of the sale of shares in Symbiote to the Claimant and that the sum represents a partial settlement of the sums due under the Agreement for the sale of the shares and was never intended as a loan unless the Defendants failed to execute the Agreement. They say that Mr. Finzi was provided with full information on the company's performance and its financial and regulatory affairs and with that knowledge he agreed to purchase all of Mrs. Lawrence's shares and that of others to obtain a majority shareholding in the company. They assert that Mr. Finzi on behalf of the Claimant received valuable equipment which is more than the value of any sums paid by the Claimant.

- [61]** The Defendants are however not saying that the Agreement was ever executed so how then can they argue that the money paid represented a partial settlement of the sums due as a deposit on the Agreement. The fact of the Claimant entering into an agreement providing for Due Diligence before any execution contradicts the Defendants' suggestion of Mr Finzi blindly entering into the transaction for the purchase of shares. Mrs Lawrence in her evidence has also asserted that they did not borrow any money from Mr. Finzi or Ms. James however this is not consistent with how the documentary evidence is to be construed in light of the failure of Agreement.
- [62]** The Letter of Intent contradicts the Defendants' assertions. The essence of the Letter of Intent was that Skyrock would begin Due Diligence with respect to the proposed acquisition of shares in Symbiote. The Letter of Intent repeated the terms of the Agreement as well as the terms and conditions of the proposed acquisition and also set out how the money paid to the National Commercial Bank on account of the Defendants should be treated.
- [63]** Based on the Letter of Intent and the subsequent actions of the parties, I would be prepared to find that there was a valid agreement between the Claimant and the Defendants, the nature of which, expressed simply, was that the parties intended to enter into an agreement whereby the Claimant would purchase the Defendants' shares in the company. However, the Defendants found themselves in a position where they needed to pay a certain sum to the National Commercial Bank to settle their obligations with the bank. What is of note is that the sums advanced were very close to the sum required to settle this obligation, which in my view lends credence to the Claimant's contention that when the money was advanced the contemplation was that this would firstly be a loan to them. Ms James has insisted in her evidence that the funds were entirely a loan as they would not be interested in shares as there were no shares then for them to receive then. I am not convinced of this. I accept however, based on the documents presented that although the sum was advanced primarily for the purpose of being a loan there was a

contemplation that it could be converted to a deposit towards the acquisition of shares in the company upon certain conditions being satisfied.

**[64]** This agreement is supported by the contents of the Promissory Note. The Defendants have also asserted that the Promissory Note is not admissible in evidence and is neither valid nor enforceable as it failed to comply with section 35 of the Stamp Duty Act. Further, that section 35 provides that the Promissory Note should be signed within seven (7) days of execution and this was not done. The question therefore arises as to whether the Promissory Note is valid and enforceable.

#### **IS THE PROMISSORY NOTE VALID AND ENFORCEABLE?**

**[65]** A Promissory Note is defined under section 83 of the Bills of Exchange Act to be “an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer”.

**[66]** It is the Defendants’ contention that the Promissory Note having been executed on August 30, 2017, it should have been stamped within seven (7) days of its execution. It has not been disputed by the Claimant that the Promissory Note was not stamped within seven (7) days of its execution, however the Claimant has contended that it was in fact stamped at a later date and that it is valid and carried evidentiary weight.

**[67]** Sections 35 and 36 of the Stamp Duty Act provide as follows:

35. *The Commissioner shall not stamp any inland or foreign bill of exchange, or promissory note, or foreign bill of lading, after the lapse of seven days from the execution thereof, or any coast-wise receipt, or inland bill of lading after the execution thereof.*

36. *No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof.*

Section 36 must be read in conjunction with Section 50 which provides that:

- “50. *Every person who issues, endorses, transfers, negotiates, presents for payment, or pays any bill of exchange, or promissory note liable to duty, and not being duly stamped, shall incur a fine or penalty not exceeding one hundred dollars and the person who takes or receives from any other person such bill or note, either in payment, or as security, or by purchase, or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever, except that the same may be used for the purposes of evidence on payment of the stamp duty payable thereon, together with a penalty equal to the stamp duty payable thereon, which penalty shall be in lieu of the penalty imposed by section 32:...*”.

**[68]** Both parties placed reliance on the authority of **Garth Dyche v Juliet Richards and Michael Banbury** where Phillips JA in reference to section 50 of the Stamp Duty Act made the following observations:

[53] *Section 50 of the Stamp Duty Act, however, appears to contemplate that even where a promissory note is not duly stamped within the time set out by section 35, the necessary duties and fines can be paid thereon at which time the document becomes valid and available as evidence....*

[54] The wording of section 50 indicates that it does not amplify nor repeal section 36. It therefore still remains that a document thus described in that section could not be admitted in evidence in order to recover on or enforce it. What, in my opinion, section 50 does, however, allow, is that on payment of the required stamp duty and a fine and/or penalty, the document may be used for the purposes of evidence. By virtue of this section, a person in the appellant’s position is able to say, “This document is corroborative of an agreement I had with the deceased. I now seek to tender it.” It is my view that in so far as the learned judge failed to appreciate this, *he fell into error.*

[69] Based on the guidance to be gleaned from the authority referred to above, I have formed the view that even if the document was not stamped within the time provided for stamping, it could still be used for the purpose of its evidentiary value. The decision of my brother Batts J in the case of **National Commercial Bank Jamaica Limited v Humphrey Lee Mcpherson** [2016] JMCC COMM 3 substantiates the position that an allegation that a promissory note was not signed is not a Defence to a claim for repayment of sums borrowed. It having been admitted into evidence, the Court can consider its contents and attach the evidentiary weight that is appropriate. Further, the averments raised on behalf of the Defendants do not provide them with an adequate defence. The only defence to a Promissory Note is that it was obtained by fraud or illegality. See **Wayne Chen v Tiksi International Management Inc.** [2015] JMCA 14. The Defendants have not made any allegation of fraud in relation to the procurement of the Promissory Note.

[70] The essence of the Claim is really that there is money due under the agreement which is supported by the Promissory Note. I am therefore of the view that the Promissory Note is corroborative of the parties' agreement. I therefore accept that the effect of this was that the Share Purchase Agreement never came into effect. Therefore, the agreement to purchase shares was no longer in effect. It would therefore mean that the terms of the Promissory Note should be given effect. The Defendants promised to pay the Claimant the sum of Thirty-Eight Million, Five Hundred Thousand Jamaican Dollars (J\$38,500,000.00) upon demand plus interest on all sums remaining unpaid at the date of demand at a rate of 19 percent per annum as well as any specified charges.

#### **WAS THERE A BREACH OF CONTRACT?**

[71] The main contention by the Claimant is that the Defendants have failed to properly execute and deliver the Sale Purchase Agreement as they failed to sign the Share Transfer Certificates. Further that, they failed to carry out Due Diligence as

required. The essential terms of the contract can be discerned from the documentary evidence. I accept that an important term of the contract was that the Defendants would comply with Due Diligence requirement. I accept the evidence of the Claimant that a Due Diligence request was reduced in writing by way of letter dated January 9, 2018 and sent to the 1<sup>st</sup> Defendant. This was in addition to several other requests for this to be done. I accept that the Claimant itself had no way of completing Due Diligence and the onus of doing so rested on the Defendants and that they failed to discharge this onus. In fact, they provided no evidence of any acts on their part that would amount to providing Due Diligence. I accept that the Defendants did not comply with this and so they were in breach of the terms of the contract.

[72] In addition, the fact that the Defendants proceeded to dispose of their shares in Symbiote without any prior notice to the Claimant is indicative of their intention not to abide by the terms of the agreement. Although the transfer in and of itself does not mean there must have been a breach, the actions by the Defendant operated to breach the contract. This is further supported by the context in which this was happening, exacerbated by the decision of the Court of Appeal in **Symbiote Investments Limited v Minister of Science and Technology** [2019] 1JMCA which resulted in the cancellation of the licence to operate case.

[73] The evidence also substantiates the fact that the Claimant served on the Defendants a “Notice of Material Breach of Agreement and Notice of Failure of Due Diligence by Symbiote Investments Limited” dated August 28, 2018. Among the terms of this Notice was that “you have failed to fully execute the said Agreement and have committed material breaches of the said Agreement...’. It also included a term that they have failed due diligence and that this agreement is being terminated at the remit of Skyrock in accordance with Paragraph (8) followed by a term regarding the mortgage which was set out as:

*“TAKE FURTHER NOTICE that Skyrock now require you to sign a Mortgage Agreement in accordance with paragraph (15) of the*



*Agreement and paragraph 2 of Schedule 1 within SEVENTY TWO HOURS HEREOF and TAKE FURTHER NOTICE that you are liable for damages resulting from your actions and that you MINETT LAWRENCE AND LOWELL LWRENCE are jointly and severally liable in accordance with the terms of the said Agreement.”*

- [74] There was no response to this Notice and the Claimant followed with another Notice dated October 24, 2018 now giving Notice of intention to file civil court proceedings and make final notice of demand. The Defendants also did not respond to this Notice.
- [75] What is clear to me based on the evidence led which I accept on a balance of probabilities is that the Defendants had found themselves in a position where they needed money urgently and so the directors of the Claimant agreed to advance the sum as a loan with the alternate position that if the Agreement came into effect the sum would operate as a deposit towards the shares. I also accept the viva voce evidence of Ms James that in terms of how this would work practically, it was their understanding that the loan would be repaid when they were purchasing the shares and they would deduct it from the sum. If, however, the share purchase was executed that would satisfy the Promissory Note.
- [76] That Agreement did not come into effect and so what remains is a loan of the sum to the Defendants. I also accept that the Promissory Note was an interim security for the Share Purchase Agreement which the parties would execute once Due Diligence was completed. The sum was never converted to a deposit as the purchase of the shares did not proceed as planned. The share purchase agreement not having been executed, the Promissory Note was not satisfied in full and remains in effect, it rendered the sums as a loan to the Defendants which was to be paid upon demand.
- [77] The Defendants having breached the contract they would then be required to pay back the loan made by the Claimant to them. They have failed to do this. There is no proof that any equipment given to Mr Finzi would satisfy this debt and so they

remain indebted to the Claimant for the full amount plus interest and other fees claimed. The Claimant has succeeded in proving that the sum owed by the Defendants amounted to Jamaican Fifty-Five Million and One Thousand, Four Hundred and Eighteen Dollars and Forty-Eight Cents (J\$55,001,418.48) with interest accruing at Jamaican Twenty-Eight Thousand, Six Hundred and Thirty Dollars and Eighty-Eight Cents (\$28,630.88) per diem amounting to a total figure of Sixty Million Eight Hundred and Thirty Two Thousand, Three Hundred and Seventy Six Dollars and Fifty Three Cents (\$60,832,376.53).

### **WAS AN EQUITABLE MORTGAGE CREATED IN FAVOUR OF THE CLAIMANT?**

**[78]** The issue regarding whether or not an equitable mortgage was created raises question of law and fact. I will deal firstly with the legal issue and examine the basis on which an equitable mortgage can be created. It was submitted on behalf of the Claimant that there is sound basis on which the Court can find that an equitable mortgage exists and that it is clear that the Defendants intended to treat the property as security for the sum of money owed to the Claimant. Further that this is made apparent by the delivery of the Duplicate Certificate of Title to the Claimant's Attorney-at-law and the signing of the Agreement which provided that Skyrock will hold the title pending repayment by Minett Lawrence from the proceeds of sale herein as well as the instructions which provided that "Ballantyne Beswick & Company shall retain said security and discharge on such terms as contemplated by our Agreement. By virtue of the wording of the Agreement she contended that the intention was for the title to be used as security and for the Claimant to have the powers of a mortgagor and sale of the property.

**[79]** Counsel for the Defendants argued that the Letter of Intent makes it clear that the property was to be used as an interim security only and that the sums paid were a deposit for the purchase of the Defendants' shares. Further, that Clause 15 of the Agreement provided that if due diligence failed then the moneys invested should be converted to a mortgage and will be a debenture chargeable against the companies and there was no mention there of a mortgage on the property.

**[80]** The case of **Karin Murray v Brilliant Investments Limited and Others** relied on by the Claimant provides very useful guidance on the creation of an equitable mortgage. My sister Nembhard J prefaced her discussions on the law with the definition to be accorded to a mortgage followed by the burden and standard of proof in relation to its creation which she expressed rests on party who is claiming its existence. She continued by discussing the creation of a legal mortgage followed by the creation of an equitable mortgage which is of particular interest. At paragraphs 18 to 22 of the judgment my sister set out the following:

### ***The creation of an equitable mortgage***

[18] *Where the mortgagor executes a document purporting to charge his interest in land, which document does not satisfy the requirements of the ROTA, the question to be determined is, what is the effect that that document has, if any at all.*

[19] *There can be no doubt that the owner of an interest in land may create an equitable mortgage.*

[20] *One method by which an equitable mortgage may be created is by the delivery to the lender of the title deeds relating to the borrower's land, accompanied by a 7 [1947] 2 All ER 372 at pages 373-374 8 demonstrably clear intention to treat the land as security for the monies advanced. It is not necessary that any general words of charge be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property referred to in the document should constitute a security.*

[21] *The law clearly establishes that an equitable mortgage may be created by: - (a) an agreement to create a legal mortgage; (b) a mortgage of an equitable interest; (c) a mortgage that fails to comply with the formalities of creating a legal mortgage; 10 or (d) a deposit of the title deeds or duplicate certificate of title to the lender. 11 The effect of an equitable mortgage*

[22] *An equitable mortgage creates a charge on the property but does not convey a legal estate or interest to the mortgagee. It only transfers an equitable estate or interest in the property. The legal interest in the property*

*remains with the mortgagor. 12 The operation of an equitable mortgage is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.*

[81] She continued thereafter to discuss the enforcement of the mortgage at paragraphs 23 to 25:

### **Enforcement of an equitable mortgage**

[23] *Under the equitable jurisdiction of the court, an equitable mortgagee may be entitled to a variety of equitable remedies. Halsbury's Laws of England Volume 77(2021))/3, at paragraph 248 provides a detailed summary of the remedies available to an equitable mortgagee. It reads as follows: -*

*“An equitable mortgagee is entitled to possession if there is a special agreement or the court so orders. He may appoint a receiver if empowered to do so expressly or by statute; otherwise an application to the court is necessary. If an express or statutory power exists, he may sell the property and may have express powers enabling him to convey the legal estate. He may obtain an order for sale, specific performance, or foreclosure; and he may, instead of proceeding against the security, bring a claim on the personal covenant.”*

[24] *Additionally, an equitable mortgagee by deposit is entitled to call for a legal mortgage, even in the absence of an express agreement, unless the right is excluded by an agreement.*

[25] *In **Jamaican Redevelopment Foundation Inc v Anthony Everald Ferguson**, Brooks J (as he then was) in speaking of the enforcement of an equitable mortgage stated as follows: -*

*“For the equitable mortgagee to have the right to call for a legal mortgage to be executed, requires an intention on the part of the mortgagor to create a mortgage. There, however, need be no specific words to that effect. So long as the right has not been excluded, the mortgagee, who has had a title deposited with him as security, may call for a legal mortgage.”*

[82] There is firm foundation for my sister's finding. Support is found in the cases of **Fitzritson v Administrator General** (1969) 11 JLR 288 and **Swiss Bank**

**Corporation v Lloyds Bank Ltd** [1982] A.C. 584. At page 594 of the **Swiss Bank** case the court examined the creation of an equitable mortgage as follows:

*“An equitable charge may, it is said, take the form either of an equitable mortgage or of an equitable charge not by way of mortgage. An equitable mortgage is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless demonstrates a binding intention to create a security in favour of the mortgagee, or in other words evidences a contract to do so:*

[83] In determining whether or not an equitable mortgage is created, the intention of the parties is crucial and must therefore be scrutinized. It is clear that based on the wording of the agreement it did not satisfy the requirements under the Registration of Titles Act for the creation of a legal mortgage. The terms of the agreement included that *“Skyrock will hold the title pending repayment by Minett Lawrence from the proceeds of sale herein”* and also the instructions to the attorneys-at-law that *“Ballantyne, Beswick and Company shall retain said security and discharge on such terms as contemplated by our Agreement.”*

[84] The Payment Clause under the Letter of Intent stipulated as follows:

*Payment. It is understood that the National Commercial Bank (Jamaica) Limited has an outstanding mortgage on the private residence of Minett and Lowell Lawrence. Upon signing this agreement, there shall be an immediate payment of JM\$38,500,000.00 from Skyrock to Minett Lawrence from which NCB's mortgage will be settled in exchange for the release of the title to Skyrock; and Skyrock will hold the title pending repayment by Minett Lawrence from the proceeds of sale herein. Skyrock shall be at liberty to (1) register a caveat on the property for its equitable interest; (2) register a mortgage on the said title for the JM\$38,500,000 at an interest rate of 19% per annum, and/or (3) prepare an Agreement for Sale which you irrevocable agree to execute for the benefit of Skyrock and/or their nominee. Concomitantly with this agreement, you will execute Promissory Note for the amount of JM\$38,500,00.00.*

**[85]** The Defendants have insisted that there was no urgency on their part to have the mortgage with the National Commercial Bank settled, however, this contradicts their correspondence with the Claimant's Attorneys-at-law wherein on August 31, 2017 a day after the signing of the Agreement and the Promissory Note, Mrs Lawrence wrote indicating that 'I appreciate the effort made by your Client to accommodate the urgency on my side; however that payment does not satisfy the deposit requirement under the Side Letter. This is consistent with the evidence of Ms James that they acted based on the situation in which the Lawrences had found themselves. Although Mrs. Lawrence sought to explain that the urgency was not with the bank but with herself, I was not convinced of this.

**[86]** I accept that the understanding was that the property was to be used as an interim security for the loan if the share purchase agreement was not completed. I accept that there was a meeting at the offices of Ballantyne, Beswick and Company which Mr. Finzi, Mrs Lawrence and Mr Lawrence attended and that Ms. James, although not in the meeting was in the vicinity. There was an argument between Mr. Finzi and Mr Lawrence because Mr Lawrence at first refused to sign the Promissory Note and Transfer of Mortgage. I accept the evidence of Mrs Lawrence that it was she who proposed that the Promissory Note be amended so that it would be rendered unenforceable once the sale of shares agreement was executed. Even on the evidence of Mrs Lawrence, it was her understanding that the Promissory Note would be rendered unenforceable once the shares agreement was executed, then the converse must be true that if the share agreement is not executed that the Promissory Note would be enforceable.

**[87]** She also pointed out that they were adamant that the Title to their home would not be encumbered in any way as security for the immediate disbursement and that she and Mr Lawrence were completely willing and able to deliver the share desired by the Claimant. It is clear to me from the very words of Mrs Lawrence that they appreciated that there was a risk involved in agreeing that their Title was to be deposited with the Attorneys-at-law however based on their belief that they would

be able to deliver the shares they took this risk. I accept that Mr. Finzi made it patently clear to the Defendants that the only way to secure the money was to hold on to the Title for their home. The parties fully well appreciated that this meant that holding the Title as security would come to an end once the Share Purchase Agreement was executed. It is agreed between everyone that this Agreement was never executed.

**[88]** I am in agreement with Counsel for the Claimant that the wording of the Agreement evinced a clear intention for the property to be treated as security for the sums advanced. This is supported by the oral discussions that the parties had. In support of that intention was the delivery of the Certificate of Title to the Claimant's Attorneys-at-law.

**[89]** I therefore find as a fact that the parties intended to treat the property as security for the sum of money paid by the Claimant on behalf of the Defendants. I therefore find that an equitable mortgage was created over the Defendants' property.

**[90]** There is an application for an Order for Sale of the property. The Claimant having made a demand for the payment of the sums owing, would be entitled to sell the property to recover the debt. This is a remedy available upon the establishment of an equitable mortgage. The entitlement to obtain an order for sale of the property is supported by the decision of Brooks J (as he then was) in the decision of **Jamaican Redevelopment Foundation Inc v Anthony Everald Ferguson** (supra) where having found that an equitable mortgage had been created, he proceeded to grant an order for sale of the subject property. At paragraph 17 of the judgment he said the following:

*"What therefore are the remedies available to JRF? Based on the principles cited above, it may obtain an order for sale or an order to have a mortgage registered against Mr Ferguson's title. Those remedies are also authorised by statute. Firstly, section 48 of the Judicature (Supreme Court) Act authorises this court to grant any equitable remedy which could have been granted by the Court of Chancery before the passing of the Act. Secondly, section 28 (2) of the Conveyancing Act specifically*

*authorises a sale of the mortgaged property in order to recover the monies owing on the debt.”*

**[91]** I am prepared to make a finding similar to that of Brooks J (as he then was) that an appropriate order to be made is an order for sale of the said property.

**[92]** My Orders are as follows:

1. Judgment is for the Claimant against the Defendants.
2. The Claimant is entitled to payment of the sum of Sixty Million, Eight Hundred and Thirty-Two Thousand, Three Hundred and Seventy-Six Dollars and Fifty-Two Cents (\$60,832,376.52) inclusive of interest at a rate of 19% per annum or Thirty-One Thousand, Six Hundred and Sixty-Six Dollars and Seventeen Cents (\$31,666.17) per diem from July 17, 2019 to the date of payment.
3. The Claimant holds an equitable mortgage over all that parcel of land part of Constant Spring situated in the parish of Saint Andrew being the land comprised in Certificate of Title, Volume 1355 Folio 834 registered to Minett Palmer in the amount of Thirty-Eight Million, Five Hundred Thousand Jamaican Dollars (J\$38,500,000.00) with interest at 19% per annum as of August 30, 2017.
4. The Claimant is entitled to an Order for sale of all that parcel of land part of Constant Spring situated in the parish of Saint Andrew, being land comprised in Certificate of Title, Volume 1355 Folio 834 registered to Minett Palmer as Mortgagee to recover their mortgage proceeds with interest and expenses.
5. That the Registrar of the Supreme Court is empowered to sign any document with respect to the sale of the said property.



6. That Attorneys-at-law Guyah Tolan and Associates shall have Carriage of Sale of the property herein and shall supply such accounting to the Defendants herein as Mortgagors.
  
7. Costs to the Claimant to be taxed if not agreed.

.....  
**S. Jackson-Haisley**  
**Puisne Judge**