THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2017/0379

BETWEEN:

1. BARDEN HOLDINGS INC
2. ST. **MICHAEL'S** HOSPITALITY CORPORATION LIMITED

Claimants

and

1. BESSAGE LIMITED
2. ST KITTS-NEVIS-ANGUILLA NATIONAL BANK LIMITED

Defendants

Appearances:

Ms. Lenora Walwyn with Ms. Rochelle Duncan for the Claimants
Ms. Dia Forrester for the First Defendant
Mr. Damian Kelsick holding papers for Mrs. Ermelin Sebastian for the Second Defendant

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2018: November 22
2019: January 15

JUDGMENT

[1] VENTOSE, J.: The First Defendant filed on 6 February 2018 an application with sworn affidavit to strike out the Claimants' Fixed Date Claim pursuant to CPR 26.3(1)(c) for being an abuse of the process of the court.

The First **Defendant's** Application

[2] This application has its genesis in a previous application made by the First Defendant in another matter, namely, Claim No. NEVHCV2016/0129 where the First Defendant filed an application on 3 November 2016 against the Second Claimant and the Second Defendant seeking the following orders: (1) for the sale of a parcel of land forming part of the Salt Pont Estate (the "Land"); (2) that the Second Defendant discloses the amount due and owing to it under its Indenture of Mortgage dated 27 July 2001 between the Second Defendant and the Second Claimant (the "First Mortgage"); and (3) the manner in which the proceeds of sale are to be applied pursuant to the order for sale.

[3] The First Defendant and the Second Claimant entered into an Indenture of Mortgage dated 17 January 2008 (the "Second Mortgage"). The First Defendant does not, and could not, dispute that its mortgage is second in time to the First Mortgage. The First Defendant on 18 March 2016 entered into an agreement with a third party for the sale of the Land. The Second Defendant in its affidavit filed in response to the application for sale indicated that it was in the process of exercising its power of sale pursuant to the First Mortgage by reviewing bids and that it intended to complete the sale before October 2016.

[4] Both parties filed submissions in relation to that application. The First Defendant, after reviewing section 39 of the Conveyancing and Law of Property Act CAP 10.04 of the Laws of Saint Christopher and Nevis (the "Property Act") and Clause 6 of the Second Mortgage, stated:

> Those provisions make it clear that there is no need for the [First Defendant] to apply to the Court for an Order for sale of the [Land] and there continues to be no obligation on [the First Defendant] to seek an Order of the Court, which is why [the First Defendant] in this application seeks merely the Court's approval of its pending sale.

[5] After quoting section 40 of the Property Act, the First Defendant submitted that:

> It is apparent based on [the First Defendant's] mortgage and Section 40 of the [Property Act], [the First Defendant] is not seeking the Court's permission for it to be granted a "power of sale", for [the First Defendant] as a mortgagee has a power of sale based on the [Clauses in the Second Mortgage] and the provisions of the [Property Act]. However, despite [the First Defendant's] ability to exercise its Power of Sale without application

> to the Court and [the First Defendant] currently exercising its power of sale, this application became necessary firstly, as [the Second Defendant] has not disclosed that information on the basis that it has a duty of confidentiality to [the Second Claimant]. Secondly, the pending sale of the [Land] is below the valuation obtained by [the First Defendant] but higher than that obtained by [the Second Defendant], and out of an abundance of caution, the Court's approval of the sale is being sought.

[6] The Second Claimant submitted that:

> … The Indenture of Mortgage is really in effect a loan dressed up in (sic) a mortgage. It was agreed to be a "loan" according to the true intention of the parties.
>
> … a legal mortgage has generally taken the form of a conveyance with a proviso for reconveyance on the payment of money by a specified date. But a conveyance in this form is by no means necessarily a mortgage. … Only if according to the real intentions of the parties the property was to be held as a pledge or security for the payment of money, and as such to be restored to the mortgagor when the money was paid, is the conveyance to be considered a mortgage.

[7] The Master gave her decision on 9 August 2017 where she refused the order for sale and ordered the Second Defendant to provide the information as sought by the First Defendant (the "**Master's** Decision"). I will examine in detail the Master's Decision later at the appropriate section in this judgment.

The Application to Strike Out

[8] As mentioned above, the First Defendant applied on 6 February 2018 to strike out the Claimants' Fixed Date Claim filed on 16 January 2018. In that Fixed Date Claim the Claimants seek various orders in summary as follows: (1) a declaration that the Second Mortgage is irregular null and void; (2) a declaration that the Second Mortgage is irregular null and void and should be cancelled; (3) a declaration that the Second Claimant's equity of redemption in favour of the Second Defendant cannot be fettered by the First Defendant purporting to sell the Land and the Second Defendant purporting to participate in any sale by the First Defendant either directly or indirectly, including acceptance of any moneys to pay off the First Mortgage. The Claimants sought orders in similar terms to the three declarations sought. One of the bases for seeking these declarations and orders is that no provision exists in the Property Act for a second mortgage and that any

"encumbrance on a Deed once a mortgage is noted by way of Further Charge". The essence of the Claimants' claim is that there is no power to have a second mortgage in accordance with the laws of Saint Christopher and Nevis and that a second mortgagee cannot exercise any power of sale under the Property Act. The court on 21 December 2017 granted an interim injunction prohibiting the First Defendant from selling the Land.

[9] In the application to strike out, the First Defendant states that validity of its Second Mortgage is *res judicata* and is therefore not open to further argument in light of the Master's Decision. The First Defendant submits that: (1) there has already been a judicial determination by a competent court as to the validity of the Second Mortgage; (2) the Master's Decision on the validity of the Second Mortgage is of a final character and the issue was determined on its merits; (3) the issue before the court on the Claimants' claim is the same question as sought to be put in issue by the pleas in respect of which estoppel is claimed; (4) the issue is between the same parties, or their privies, as the parties whom the question is sought to be put in issue; and (5) there is an express judicial determination on the issue of the validity of the Second Mortgage as it was necessary and fundamental to the overall Master's Decision.

[10] The First Defendant further submits that: (1) the Master's Decision gives rise to an estoppel on the point of the validity of the Second Mortgage such that the Claimants are precluded from making or raising any claim on that issue or reopening that issue in the case at bar; (2) the question of the validity of the Second Mortgage was a necessary ingredient for determination in the Master's Decision; (3) it would be an abuse of the court's process to allow the Claimants to proceed with their Fixed Date Claim and that there should be finality in litigation, and a party should not be twice vexed with the same matter; and (4) the Claimants' pleadings contain no new statements which could not with reasonable diligence, and should not in all the circumstances, have been brought in for determination in the previous litigation.

Res Judicata

[11] The applicable principles of *res judicata* were recently restated by the Supreme Court of the United Kingdom in Virgin Atlantic Airways Ltd v Zodiac Seats UK Limited [2013] UKSC 46 where Lord Sumption considered the leading decisions in this area, namely, the decision of: Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, the Privy Council in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581, and the House of Lords in Arnold v National Westminster Bank plc [1991] 2 AC 93. Lord Sumption accepted the following (at p. 104-105) definitions from the decision in Arnold:

> Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened.
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> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue. (Emphasis added)

[12] Lord Sumption also made reference to another principle first articulated in Anderson and clarified in Arnold. In Anderson, Wigram V-C stated (at p. 115):

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time... Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit

> in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule. (Emphasis added)

[13] In Arnold, Lord Keith of Kinkel, after referring to that highlighted portion of the passage from Henderson, stated (at p. 105) that:

> It will be seen that this passage appears to have opened the door towards the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action.

[14] He continued (at pp. 108-109) that:

> But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success. In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result … (Emphasis added)

[15] Lord Sumption in Virgin Atlantic Airways stated (at [22]) that Arnold is the authority for the following propositions:

> (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.

> (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.
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> (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised [the Henderson principle].

[16] The appellants in Virgin Atlantic Airways argued that recent case-law had re-categorized the Henderson principle so as to treat it as being concerned with abuse of process and to take it out of the domain of *res judicata* altogether. Lord Sumption concluded as follows:

> 24. I do not accept this. The [Henderson] principle … has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in Yat Tung.
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> 25. … Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in Arnold v National Westminster Bank at p 110G, "estoppel per rem judicatam, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process."
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> 26.It may be said that if this is the principle it should apply equally to the one area hitherto regarded as absolute, namely cases of cause of action estoppel where it is sought to reargue a point which was raised and rejected on the earlier occasion. But this point was addressed in Arnold, and to my mind the distinction made by Lord Keith remains a compelling one. Where the existence or nonexistence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims.

[17] The essential question for determination is whether the Claimants' Fixed Date Claim filed on 16 January 2018 is estopped because the issue of whether the

Second Mortgage was legal and valid has been litigated and decided upon in the Master's Decision and this issue forms a necessary part of the Fixed Date Claim that the Claimants now wish to reopen. The first part requires an examination of the Master's Decision and it is to this I now turn.

The **Master's** Decision

[18] As stated earlier, the master refused to order the sale of the Land but ordered the Second Defendant to file and serve an affidavit indicating the amount due and owing to the Second Defendant by the Second Claimant on the First Mortgage. In the preamble to the order, the master stated as follows:

> AND the court considering the submissions filed by the [Second Claimant] do not set out any objection to the application by the [First Defendant] for an order that the [Second Defendant] to disclose the extent of its interest in the [Land] but rather objects to the application for an order for sale for various reasons which include that the [Second Mortgage] between the [First Defendant] and the [Second Claimant] is not a true mortgage.
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> ...
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> AND the court not being persuaded that granting the order directing the [Second Defendant] to disclose the extent of its interest could amount to the court giving the [First Defendant] the power of sale since by clause 6(vi)(b) of the [Second Mortgage] entered into with the [Second Claimant] the [First Defendant] has the power to sell the property separate and apart from the power of sale conferred by Section 39 of the [Property Act] which said section states that it is "*subject to the terms of the mortgage deed and to the provisions herein contained*." AND the court considering that the [Second Mortgage] remains valid and enforceable and there is no evidence that the [Second Claimant] has taken any steps to challenge the validity of the [Second Mortgage]; AND in the circumstance the court being of the view that the [First Defendant] has established a basis for seeking the order to enable it to discharge its obligation under Section 43 of the [Property Act].

[19] It seems to me that the master accepted as correct that the First Defendant had two legitimate bases to seek the order for disclosure: namely, first, pursuant to section 39 of the Property Act and, second, under clause 6(vi)(b) of the Second Mortgage. To exercise any rights under both of these, there must exist a presumptively valid mortgage, which was recognized by the master when she stated that the Second Mortgage "remains valid *and* enforceable" (emphasis

added). The right of disclosure was in furtherance of the exercise by the First Defendant of its statutory rights under section 39 of the Property Act and its contractual right under clause 6(vi)(b) of the Second Mortgage. The master then premised her decision to grant the order for disclosure on the ground that the "[First Defendant] has established a basis for seeking the order to enable it to discharge its obligation under Section 43 of the [Property Act]" (emphasis added).

[20] A reading of the Master's Decision and its preambles leads me to the conclusion that the master *did not decide* the issue of whether the Second Mortgage was legal and valid. She assumed this was the case observing that "there [was] no evidence that the [Second Claimant] ha[d] taken any steps to challenge the validity of the [Second Mortgage]". In other words, the master was emphasizing that the application before her was not whether the Second Mortgage was legal and valid but rather whether she should grant the order for disclosure to enable the First Defendant to enforce its contractual and statutory rights pursuant to a presumably "valid and enforceable" Second Mortgage. The master was seemingly suggesting that until the Second Claimant challenges the validity of the Second Mortgage the Second Claimant must be taken to accept its validity and that such a challenge could not be made on the application for disclosure before the court. That too would explain the master's decision not to grant a specific order for sale of the Land, as it was not necessary since the legal basis rested on clauses in the Second Mortgage and provisions of the Property Act.

[21] The master proceeding on the basis that the Second Mortgage was presumptively valid and legally enforceable is not the same thing as *a determination* by the master that the Second Mortgage was a valid and legally enforceable one. Why then would the master observe that the Second Claimant had taken no steps to challenge the validity of the Second Mortgage if she intended to make a determination on its validity? There seems to me to be no other way of reading the preambles to the Master's Decision otherwise than as suggesting to the Second Claimant that until a determination is made on the validity of the Second Mortgage on a challenge properly brought by the Second Claimant, the Second Mortgage is

presumed to be valid and enforceable. Read this way, the order for disclosure itself is not based on a determination that the Second Mortgage was valid and enforceable. Rather, it is based on the presumption that the Second Mortgage is valid and enforceable until a court of competent jurisdiction properly moved determines otherwise.

[22] In the decisions cited by the First Defendant, the court makes it clear that "[i]t is well settled that a party is not permitted to re-litigate an issue or matter simply because he wishes to present a different argument" (Chief Justice Dame Janice Pereira in King v Attorney General of Antigua and Barbuda (ANUHCVAP2017/0011 dated 18 September 2018 at [48]). The important point to note is that the words used by the Chief Justice are "re-litigate an issue or matter". Has the issue of the validity and enforceability of the Second Mortgage been *litigated*? Based on the evidence before this court, it does not seem as if it was. That having been said, the issue relating to the appeal of the order by the Second Claimant or the First Claimant does not assist in disposing of this issue.

[23] The First Defendant cites in support the decision of the Privy Council in Hoysted v Commissioner of Taxation [1926] A.C. 155. In proceedings relating to the rights of children of one of seven beneficiaries under a will, the appeal concerned the assessment to tax of the appellant beneficiaries by the respondent for the years 1920 and 1921, which the Privy Council noted was dependent on what was decided by the parties in relation to the years 1918 and 1919. In respect of those earlier years, the appellant had appealed to the Full Court of the High Court of Australia the decision of the respondent not to allow certain deductions on the basis that they were entitled to those deductions as trustees for taxable persons as joint owners and holders of original shares within the meaning of that term in the Land Tax Assessment Act 1910-16.

[24] The Privy Council observed that the objection expressly related to six of the seven beneficiaries of the will, but not the grandchildren (the children of one of the beneficiaries (the seventh) who died). The respondent, the Commissioner of Taxation, disallowed the objection and a case was then stated for the High Court

of Australia's determination as follows: (1) whether the shares of the joint owners or of any and which of them in the land were original shares within section 38; and (2) How many deductions of £5,000.00 the respondent should make. The Full Court of the High Court heard the appeal and answered as follows: (1) The shares of the six children surviving at the date of the assessment; and (2) Six. The respondent accepted as correct the decision of the Full Court of the High Court and made the payments accordingly. In a subsequent year, in respect of the same parties and the same estate, the respondent decided to allow a deduction for one beneficiary only. The appellants argued that the respondent was estopped by the judgment already pronounced and the Full Court in a second decision disagreed that the respondent was estopped, with one dissent that accepted that the respondent was estopped by the previous judgment.

[25] The Privy Council observed that in respect of the amount of deduction to be made under the Act, the former litigation settled six sums of £5,000.00 whereas the latter settled one. The Board stated as follows:

> There is accordingly between the same parties in regard to the same property a definite prescription of deduction from assessable values. The Board is of the opinion that prescription was as conclusively settled in the former litigation as language could settle it, it having been "How many deductions of £5,000 the respondent should make?" and the judicial answer being "six". Apart from the other arguments and the authorities to be presently alluded to, the case appears thus to be concluded in favour of the appellants.

[26] It must be noted that the parties were identical, namely, the trustees and the Commissioner for Taxation and the issue in both cases considered by the Full Court was identical, namely, the number of deductions of £5,000.00 the respondent should make. The Board explained the applicable principle as follows

> Various numerous authorities were referred to. In the opinion of their Lordships it is settled that, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new

> versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle, namely that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.

[27] Some observations are necessary properly to understand what exactly the Privy Council in Hoysted meant by the words used above. First, the Privy Council states "that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact". A material aspect here is that there must be an admission of a fact fundamental to the decision arrived at. In Hoysted, the respondent was taken to have admitted that the beneficiaries were joint owners since the legislation only allowed the deduction in respect of joint owners. The respondents moreover did not protest the first decision of the Full Court of the High Court and allowed the deductions pursuant to that judgment. In the case at bar, the Second Claimant: (1) did not admit any fact fundamental to the Master's Decision; and (2) consistently maintained that the Second Mortgage was not valid.

[28] Second, the Privy Council stated "the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact". In the instant case, the Second Claimant did not make any erroneous assumption as to the legal quality of any fact in issue. Therefore, the Privy Council's view that "[p]arties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances" does not apply here.

[29] Third, the Privy Council stated "the same principle, namely that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed". This merely states that where a point fundamental to a decision is taken or assumed by the claimant which point could be objected to by the defendant and the defendant does not object, then the defendant is taken to have assumed the point as well and could not bring fresh litigation to argue the point which previously the defendant *could have* argued. This third statement by the Privy Council is a restatement of the Henderson principle mentioned earlier. In the case at bar far from sleeping on its rights in relation to any point fundamental to the decision taken or assumed by the master, the Second Claimant consistently maintained that the Second Mortgage was not valid.

[30] The Privy Council stated further that:

> It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision.

[31] The Privy Council then cited from Henderson above at [11], concluding that "[t]his authority has been frequently referred to and followed, and it settled law".

[32] In the premises, the First Defendant has not shown that the master decided the legal validity and enforceability of the Second Mortgage to engage the principle of *res judicata* to prevent the Claimants from filing the Fixed Date Claim.

No Reasonable Ground for Bringing the Claim

[33] At the hearing of the application by the First Defendant for an order that the Claimants' statement of case be struck off for being an abuse of the process of the court, the court on its own motion invited the parties to file and serve submissions and authorities on whether the Claimants' statement of case should be struck out for not disclosing any reasonable ground for bringing the claim. The Claimants' Fixed Date Claim essentially challenges the validity of the Second Mortgage on two main grounds. First, the execution of the Second Mortgage was in breach of a

loan agreement and commitments made by the Second Claimant to Geostar Inc; and, secondly, that no provision exists in the Property Act for a second mortgage. Both of these questions are legal questions, which do not require evidence for them to be determined.

[34] The courts have repeatedly stated that the power to strike out is a draconian measure, which should be reserved for exceptional cases. For reasons that will be explored later, it will become evident why this case is such an exceptional case. In Citco Global Custody NV v Y2K Finance Inc (HCVAP 2008/022 dated 19 October 2009), Edwards JA opined that:

> [13] On hearing an application made pursuant to CPR 26.3(1)(b) the trial judge should assume that the facts alleged in the statement of case are true. "Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny."
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> [14] Among the governing principles stated in Blackstone's Civil Practice 2009 the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross–examination of witnesses often change the complexion of a case. Also, before using CPR 26.3(1) to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in every application must be exercised in accordance with the overriding objective of dealing with cases justly.

[35] Chief Justice Dame Janice Pereira summarized the applicable principles relating to striking out applications in Cedar Valley Springs Homeowners Association Incorporated v Pestaina (ANUHCVAP 2016/0009 dated 18 January 2017) as follows:

> [6] A useful starting point is the consideration of the appellant's complaint to the effect that the master misapplied the relevant legal principles in relation to a strike out application. Counsel for the appellant, Mr. Martin, relies on the three authorities of this court, namely: [Spencer v Attorney General of Antigua and Barbuda [ANUHCVAP 1997/0020A dated 8 April 1998], [Tawney Assets Limited v East Pine Management Limited [BVIHCVAP 2012/0007 dated 17 September 2012] and [Citco Global Custody NV v Y2K Finance Inc. BVIHCVAP2008/0022 dated 19 October 2009]. From these authorities the following principles may be distilled:
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> (a) This summary procedure which calls for the exercise of a discretionary power, should only be used in clear and obvious cases as it is a drastic step. The result of such a measure is that it deprives a party of his right to a trial and his ability to strengthen his case through the process of disclosure and other procedures such as requests for information.
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> (b) This procedure should only be used where it can be seen on the face of the claim that it is obviously unsustainable, cannot proceed or in some other way is an abuse of process of the court. This has been expressed in terms that the claim should not be struck out if there is a 'scintilla' of a cause of action.
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> (c) In treating with an application to strike out made pursuant to CPR 26.3(1)(b), the trier of the application should proceed on the assumption that the facts alleged in the statement of case are true.
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> (d) The employment of this procedure is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about, or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant.
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> (e) Conversely, this procedure would be inappropriate where the argument involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or where the strength of the case may not be clear because it has to be fully investigated

[36] The two bases on which the Claimants seeks relief in the Fixed Date Claim does not involve a substantial point of law and does admits of a plain and obvious answer and it can be seen on the face of the Fixed Date Claim that they are obviously unsustainable.

[37] The Claimants argue that the Second Mortgage is void because Geostar Inc (Geostar) and the Second Claimant had an agreement, which the Second Claimant breached by entering into the Second Mortgage. The agreement was the

loan to the Second Claimant by Geostar of the sum of US$3,000,000.00. Geostar advanced additional loans to the Second Claimant, which were secured by: (1) a pledge of the outstanding shares of the Second Claimant; (2) a mortgage of the equity of redemption of the Second Claimant; and (3) covenants by the Second Claimant not to issue further shares or borrow additional monies without the express consent of Geostar.

[38] The Second Claimant defaulted on the loans granted to it by Geostar. Geostar sold its 1,000 shares in the Second Claimant to the First Claimant for US$4,095,563.00. Geostar could sue the Second Claimant for breach of contract but that cause of action does not affect or depend on the legal validity of the Second Mortgage. Moreover, as the First Defendant points out, Geostar did not register any charge in respect of its loans to the Second Claimant. Section 4 of the Registration and Records Act CAP 23.25 of the Laws of Saint Christopher and Nevis (the "Registration Act") states in effect that an unregistered deed is void as against subsequent purchaser. The existence or otherwise of any agreement between the Second Claimant and Geostar cannot prevent the creation *in law* of a subsequent mortgage. The claim that Geostar might have for breach of contract against the Second Claimant does not in law affect subsequent the acquisition of property rights by third parties.

[39] The Claimants' primary argument is that the Property Act does not provide for the creation of a second legal mortgage. This is a pure question of law that can be answered without the need for requests for information, examination or cross-examination at trial. What exactly is a mortgage? According to Halsbury Laws of England 4th Edition, a mortgage is defined (at para. 301) as follows:

> A mortgage is a disposition of property as security for a debt. It may be effected by a demise or sub-demise of land, by a transfer of a chattel, by an assignment of a chose in action, by a charge on any interest in real or personal property or by an agreement to create a charge, for securing money or money's worth, the security being redeemable on repayment or discharge of the debt or other obligation. Generally, whenever a disposition of an estate or interest is originally intended as a security for money, whether this intention appears from the deed itself or from any

> other instrument or from oral evidence, it is considered as a mortgage and redeemable.

[40] As Kodilinye put its "A mortgage is, essentially, a real security for the repayment of money lent" (Commonwealth Caribbean Property Law 3rd ed, by Gilbert Kodilinye, 168). A mortgage can be: (1) a "legal mortgage" that is created by a conveyance of the mortgagor's fee simple estate to the mortgagee subject to a proviso that, upon redemption (that is, repayment of the debt), the property should be reconveyed to the mortgagor; or (2) an "equitable mortgage" that can be created, inter alia, where the mortgagor has only an equitable interest in property, by assignment of the interest to the mortgagee (Ibid). A mortgage is simply the transfer of a legal or equitable interest in property to the mortgagee with the provision that the mortgagee's interest will end on repayment by the mortgagor of the loan, interest and costs.

[41] In A Manual of The Law of Real Property (Megary London 1962) it is stated (at p. 493) that:

> The essential nature of a mortgage is that it is the conveyance of a legal or equitable interest in property, with a provision for redemption, i.e., that upon repayment of a loan or the performance of some other obligation the conveyance shall become void and the interest shall be reconveyed.

[42] Similarly, a mortgage of an equitable interest is described (at p. 502) as follows:

> Such mortgages are still made by a conveyance of the equitable interest with a proviso for reconveyance. The actual form of words is immaterial provided their meaning is plain. No need for the mortgage to be made by deed, as is essential for a legal mortgage; but it must either be in writing signed by the mortgagor or his agent authorized in writing, or else made by will.

[43] The Claimants do not dispute the manner of creation of a legal mortgage, but state that no provision exists in the Property Act for the creation of a second legal mortgage. However, it is possible to create a further mortgage notwithstanding the existence of a prior a legal mortgage. Martin Dixon in his book Modern Land Law (at p. 407) states that:

> The equity of redemption represents the sum total of the mortgagor's rights in the land that is subject to the mortgage. In essence, it comprises

> the residual rights of ownership that the mortgagor has, both in virtue of their paramount legal estate in the land, and the protection that equity affords them. Indeed, the equity of redemption is itself valuable, and is a proprietary right, which may be sold or transferred in the normal way. It represents the mortgagor's right to the property (or its monetary equivalent) when the mortgage is discharged (redeemed) or the property sold, and its existence is the reason why second and third lenders are willing to grant further loans. (Emphasis added)

[44] It is possible to have a second mortgage over a property although there can only be one *legal* mortgage on that property. However, this matters little since registration is key. Non-registration of any mortgage (legal or equitable) will make it void against a subsequent purchaser. I agree with the First Defendant that in the Second Mortgage, the Second Claimant mortgaged its equity of redemption, which is an interest in land that can be mortgaged subject to a prior encumbrance with provision for the equitable right to redeem, as a second mortgage of land is in principle a mortgage of the equity of redemption of the first mortgage. The Second Mortgage is therefore a registered equitable mortgage.

[45] In Downsview Nominees Ltd v First City Corp Ltd [1993] AC 295, the Privy Council stated (at p. 311) that:

> A mortgage, whether legal or equitable, is security for repayment of a debt. The security may be constituted by a conveyance, assignment or demise or by a charge on any interest in real or personal property. An equitable mortgage is a contract which creates a charge on property but does not pass a legal estate to the creditor. Its operation 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. All this is well settled law and is to be found in more detail in the textbooks on the subject and also in Halsbury's Laws of England …
>
> …
>
> … The owner of property entering into a mortgage does not by entering into that mortgage cease to be the owner of that property any further than is necessary to give effect to the security he has created. The mortgagor can mortgage the property again and again. A second or subsequent mortgage is a complete security on the mortgagor's interests subject only to the rights of prior encumbrancers. If a first mortgagee commits a breach of his duties to the mortgagor, the damage inflicted by that breach of duty will be suffered by the second mortgagee, subsequent encumbrancers

and the mortgagor, depending on the extent of the damage and the amount of each security. (Emphasis added)

[46] Second mortgages are permitted in law. However, if an authority is needed, the decision of Lord Templeman speaking for the Privy Council in Downsview makes clear that a property can be mortgaged many times subject only to the equity of redemption, which is the difference between the open market value of the property and the total debt currently secured by the property. However, this is not the Claimants' specific argument. The Claimants submit that the Property Act only recognizes one legal mortgage, and this must be correct since two legal mortgages cannot coexist on the same property. Any other mortgage would have to be equitable in nature. Since the Second Mortgage is an equitable mortgage that was created by deed, that objection fails.

[47] Section 2 of the Registration Act defines a deed as including "every document in writing affecting or relating to Land, tenements, or hereditaments in the State". Registration of the Second Mortgage grants the First Defendant the following privileges under the Registration Act:

> 4. Unregistered deeds void as against subsequent purchasers.
>
> Every deed shall be absolutely void as against any subsequent purchaser for valuable consideration, or mortgagee, unless such deed shall have been duly registered before the registration of the deed under which subsequent purchaser, or mortgagee, shall claim, and within the time limited for the registration of deeds after their execution.
>
> 5. Unregistered deeds not to be received in evidence.
>
> No deed shall be received in evidence in any proceeding, whether at law or equity, in the State, unless such deed shall have been duly registered.

[48] The Property Act makes reference to mortgages in section 32, which provides as follows:

> 32. Mortgages may be made by way of sale, demise or assignment as in England.
>
> Subject to the provisions in any statutory enactments for the time being in force in the State, all mortgages of any land or chattels, debts, or other

property in the State may be made by way of sale, or demise, or assignment, according to the nature of the property mortgaged, subject to a proviso or condition for making void the same or for the re-conveyance or reassignment of the property thereby sold, demised, or assigned according to the forms used in the like cases in England as on the 11th of December, 1845, and every mortgage so made shall vest in the mortgagee the same legal estate and interest in the property comprised in such mortgage as the mortgagee would take in the like case according to the law of England at that date, subject nevertheless to the same equity of redemption as the mortgagor or those claiming through him or her would be entitled to in the like case according to the course and practice of the courts of equity in England at that date. (Emphasis added)

[49] Section 10(1) of the Property Act provides that all conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed. A legal mortgage of land to be valid must be made by deed. An equitable mortgage does not have to be made by deed. If it is made by deed, which is permissible, it can be registered pursuant to the Registration Act and benefit from the applicable provisions of the Property Act.

[50] The next issue that arises is whether the rights granted to a mortgagee under the Property Act are conferred only on a mortgagee of a legal mortgage. Section 39(1) of the Property Act provides that:

> 39. Powers incident to estate or interest of mortgagee.
>
> (1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further, namely,
>
> (a) a power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots by public auction or by private contract, subject to such conditions respecting title, or evidence of title or other matter as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby;
>
> (b) a power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire

any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the property which or an estate or interest wherein is mortgaged, and the premiums paid for any such insurance shall be a charge on the mortgaged property or estate or interest, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money;

(c) a power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property or any part thereof; and

(d) a power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract. (Emphasis added).

[51] The only condition that section 39 imposes is that the mortgage must be made by deed and once this is done, the mortgagee shall have all the powers outlined in that section. Therefore any mortgagee of a mortgage made by deed can exercise the powers granted under section 39 of the Property Act. The Claimants are therefore not correct in stating that the Property Act allows only one mortgage on a property held by deed. The correct position is that only a legal mortgage can exist at any point in time on a property but other mortgages of an equitable nature may exist and they may or may not be made by deed. If they are made by deed, the mortgagees are entitled to exercise the powers granted to mortgagees under section 39 of the Property Act.

[52] The First Defendant is correct in stating that: first, no greater power is given to any one mortgagee over the other despite the ranking in time of a mortgagee when exercising a mortgagee's power of sale; and second, the mortgagee first in time has the legal right for its encumbrance to be satisfied before any other, regardless of the party who has conduct of the sale. It is clear that section 39 of the Property Act gives no priority to a legal mortgage and any mortgagee of a mortgage made by deed (whether legal or equitable) can exercise the powers granted under section 39. I have no doubt therefore that the First Defendant as mortgagee of the

Second Mortgage that was created by deed can exercise the powers under section 39 of the Property Act.

[53] If an authority is needed, Swift 1st Ltd v Colin at al [2011] EWHC 2410 (Ch) (27 July 2011) provides it. In Swift, there was a dispute between the parties concerning the effects of charges over a property. A particular charge had not been registered, but merely noted on the register. The defendants purchased the property from another chargee acting under a power of sale. The defendants then applied to the Land Registry to register the land but the Land Registry refused registration. Purle Q.C. J stated as follows:

> 13. Accordingly, it seems to me that the claimant had full power of sale over the freehold, notwithstanding that its charge was not substantively registered and that it did not become the registered proprietor of any charge. The power of sale derives not from the niceties of the Land Registration legislation, but from the Law of Property Act 1925, and all that is required is a mortgage by deed. For section 88 to be engaged, all that is required, so far as relevant to the present case, is a charge by way of legal mortgage. The fact that this charge by way of legal mortgage was in the event unregistered, is, in my judgment, neither here nor there. It is still such a charge within the meaning of the Law of Property Act 1925, and section 88 in particular. In those circumstances it seems to me that the claimant is entitled to succeed on that ground alone.
>
> 14. The Land Registry have taken the point in correspondence that, as the charge was unregistered, it took effect in equity only and that, as an equitable mortgage, albeit made by deed, the power of sale did not arise. This, it seems to me, is erroneous. The power of sale, as I have said, arises under section 101 of the 1925 Act, and that merely requires that a mortgage be made by deed, which this one was.
>
> 15. My attention was drawn to the decision of, firstly, Wilberforce J and then of the Court of Appeal in Re White Rose Cottage [1964] Ch 483. Wilberforce J held - in the case of a mortgage by deposit under seal, a true equitable mortgage - that the expression "the mortgaged property" in section 101 meant the property over which the mortgage deed purported to extend and was not limited to an equitable interest in that property. That seems to me to be correct. As counsel pointed out in the course of argument, a power, including the power of sale, is by its nature an authority to exercise rights over property in which the donee of the power does not necessarily have any proprietary interest, and which therefore enables the donee of the power to dispose of property which that donee does not own. Given that that is so, there is no good reason why the extent of the power of sale should be limited by reference to the

limited extent of the interest to which it may be annexed, such as, on this analysis, an equitable mortgage.

[54] This decision supports the view that an equitable mortgage once made by deed can exercise all of the powers granted to a mortgagee under section 101 of the United Kingdom Law of Property Act 1925, which is in *pari materia* to section 39 of the Property Act. Any second or subsequent mortgagees can exercise the powers granted to mortgagees under section 39, although by virtue of the rules of priority a second mortgagee will only be able to sell the property subject to the rights of the first mortgagee. Principle or authority does not support the Claimants' view that there can only be one mortgage made by deed. Consequently, I therefore hold that the Claimants' Fixed Date Claim does not disclose any reasonable ground for bringing the claim, as it is obviously unsustainable.

Disposition

[55] For the reasons explained above, I make the following orders:

(1) The First Defendant's application to strike out the Fixed Date Claim is refused.
(2) The Fixed Date Claim is struck out for not disclosing any reasonable ground for bringing the claim.
(3) The interim injunction granted by the court on 21 December 2017 is hereby discharged.
(4) Costs to the First Defendant to be assessed if not agreed within 21 days.

Eddy D. Ventose
High Court Judge

By the Court

Registrar