



[2012] JMSC Civil 58

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

**CIVIL DIVISION**

**CLAIM NO. 2012HCV01807**

**BETWEEN                      DONNA PASLEY    CLAIMANT**

**AND                              JAMAICA REDEVELOPMENT                      FIRST DEFENDANT**

**FOUNDATION, INC.**

**AND                              REGISTRAR OF TITLES    SECOND DEFENDANT**

Miss Tameka Jordan and Miss Jade Hollis instructed by Tameka Jordan for the claimant

Mrs. Sandra Minott-Phillips and Miss Alexis Robinson instructed by Myers, Fletcher & Gordon for the first defendant

**Heard: April 18, May 1 and 17, 2012**

**APPLICATION FOR INJUNCTION – RIGHTS OF A SPOUSE UNDER SECTION 6 (2) OF THE PROPERTY (RIGHTS OF SPOUSES) ACT – EXERCISE OF MORTGAGEE’S POWER OF SALE – LIMITATION OF ACTIONS ACT**

**SIMMONS, J.**

[1] This matter arises out of a claim in which the following orders are being sought:-

- i. A declaration that pursuant to section 6(2) of the Property Rights of Spouses Act the claimant is entitled to one half of the family home located at Hart Hill, Windsor Castle, Portland registered at Volume 1125 Folio 337 of the Register Book of Titles;
- ii. A declaration that mortgages numbered 1708943, 1723580 and 1723581 endorsed on the Certificate of Title for property located at

- Hart Hill, Windsor Castle, Portland registered at Volume 1125 Folio 337 of the Register Book of Titles are invalid/void/unenforceable;
- iii. An order that mortgages numbered 1708943, 1723580 and 1723581 endorsed on the Certificate of Title for property located at Hart Hill, Windsor Castle, Portland registered at Volume 1125 Folio 337 of the Register Book of Titles be discharged or removed by the 1<sup>st</sup> Defendant/2<sup>nd</sup> Defendant from the said Certificate of Title;
  - iv. A declaration that the 1<sup>st</sup> Defendant is entitled to sell only the deceased Dudley Pasley's remaining half interest;
  - v. An order that the 2<sup>nd</sup> Defendant herein register the Claimant's interest aforementioned on the Certificate of Title registered at Volume 1125 Folio 337 of the Register Book of Titles.

[2] On the 4<sup>th</sup> April 2012 the claimant obtained the following orders on an ex parte Notice of application:-

- i. An injunction restraining the 2<sup>nd</sup> Defendant whether by herself or by her servants or agents or otherwise howsoever from registering the transfer of the property comprised in the Certificate of Title registered at Volume 1125 Folio 337 of the Register Book of Titles by the 1<sup>st</sup> defendant and or its agents and or servant to any third party or at all until the 18<sup>th</sup> April 2012.
- ii. An injunction restraining the 1<sup>st</sup> Defendant whether by herself or by her servants or agents or otherwise howsoever from using or dealing with the property comprised in the Certificate of Title registered at Volume 1125 Folio 337 of the Register Book of Titles in any manner inconsistent with and/or prejudicial to the interest of the claimant until 18<sup>th</sup> April 2012.

[3] In this matter there is very little if any, dispute as to the facts. It concerns property comprised in the Certificate of Title registered at Volume 1125 Folio 337 of the Register Book of Titles (the property) which is in the name of Dudley Altimon Pasley, the claimant's deceased husband. The property was acquired on the 10<sup>th</sup> February

1983 and was owned by the deceased and his first wife Ambrozine Pasley as joint tenants. She died on the 27<sup>th</sup> August 1992 and her death was noted on the 9<sup>th</sup> November 2001. The deceased married the claimant on the 22<sup>nd</sup> September 1996. He died on the 18<sup>th</sup> June 2001. The mortgage under which the first defendant now seeks to exercise a power of sale was executed on the 25<sup>th</sup> April 1995. However it was not registered until the 13<sup>th</sup> June 2011. On the 30<sup>th</sup> June 2011 the claimant lodged a caveat to protect her interest in the property.

### **Claimant's Submissions**

[4] Miss Jordan has submitted that there are a number of serious legal issues that need to be resolved in this matter. She has listed them as follows:

- (a) Does the claimant have an equitable or legal interest in the family home?
- (b) Does the first defendant have a legal or equitable mortgage or both? Assuming that the claimant has an interest in the family home, is the registration of the mortgages in 2011 by the first defendant an empty formality?
- (c) If the registration of the mortgages by the first defendant is not an empty formality; nevertheless can they defeat the claimant's interest in the family home?
- (d) Should the court of equity exercise its discretion in the first defendant's favour?
- (e) Can the first defendant exercise its power of sale in light of the inordinate delay in doing so and the limitation periods prescribed?
- (f) Was the second defendant negligent in allowing the first defendant to register these mortgages without notifying the Claimant?

[5] With respect to the claimant's interest in the family home counsel relied on section 6 (2) of the Act which states:-

*“Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home”.*

It was submitted that as of June 2001 when the claimant’s husband died, she obtained either a legal or equitable interest in the property.

[6] With respect to the first defendant’s mortgage counsel submitted that up to the 10<sup>th</sup> June 2011 it was only in possession of an equitable mortgage. Upon registration, pursuant to section 105 of the **Registration of Titles Act** it became a legal mortgage. It was argued that if the claimant had a legal interest in the property as of June 2001 this would defeat the first defendant’s equitable interest. It was also submitted that equitable interests rank in priority of time only if the rival interests are equal. Miss Jordan argued that the interest of the claimant would override that of the first defendant.

[7] Counsel referred to the fact that there had been a considerable delay on the part of the first defendant in registering the mortgage and as such the doctrine of laches would be applicable.

[8] Miss Jordan also sought to rely on sections 7 and 30 of the **Limitation of Actions Act**. It was argued that the first defendant is statute barred from foreclosing on the property or exercising any right under the mortgage. This submission was based on the fact that the mortgage was executed in 1995 and no evidence had been presented to the Court which shows that any payments were made by the mortgagor towards the settlement of the debt. They state:

*“7. It shall and may be lawful for any person entitled to or claiming under any mortgage of land to make an entry, or bring an action or suit to recover such land, at any time within twelve years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twelve years may have elapsed since the time at which the right to make such entry or bring such action or suit shall have first accrued.*

30. *At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.”*

[9] Reference was also made to the case of ***Franz Fletcher and David and Petagaye Morgan v. Jamaica Redevelopment Foundation*** Supreme Court Civil Appeal No 134/2010. In that matter, there was an application for a stay of the execution of an order refusing an application for an interlocutory injunction to restrain the mortgagee from selling a property to anyone other than the Morgans. The applicant Franz Fletcher, who was the executor of the mortgagor’s estate, also sought the release of the certificate of title in order to register the Morgan’s interest.

[10] The background to the matter is that the mortgages were executed in support of a guarantee to Century National Bank Limited and also as security for a debt to Century National Building Society. They were later transferred to the respondent. The payments fell into arrears and the applicant entered into an agreement for sale with the Morgans who lodged a caveat to protect their interest in the property. They also sought a declaration that the mortgages were invalid and/or void and/or unenforceable against them. No evidence had been presented to the court pertaining to the last date when any payments were made and as such the date of the mortgage was used as the reference point from which the time for its enforcement was to be computed. The applicant relied on sections 7 and 30 of the ***Limitation of Actions Act*** in support of the assertion that the matter was statute barred as it was more than twelve (12) years since the payment of any monies due under the mortgage. It was argued that in those circumstances the obligation under the mortgage had been discharged. At first instance it was held that by virtue of the date of the instrument of guarantee the mortgage was not statute barred.

[11] In the Court of Appeal, Phillips, J.A. said:

*“The question must arise whether the guarantee subsists if the sums are no longer recoverable under the mortgage, the right to do so having been*

*extinguished. Is the debt extinguished? What is the true impact of that on the guarantees, if the cause of action arises separately, and in any event would that only affect an action against the guarantor for the recovery of the sums due, or can it affect the exercise of the powers of sale of the mortgagee and finally do the provisions of the statute affect that exercise? It does appear that there are serious issues to be tried”.*

[12] With respect to the claim against the second defendant, counsel relied on the provisions of sections 139 and 142 of the **Registration of Titles Act** which deal with the lodging of caveats and the duties of the Registrar of Titles once a caveat has been lodged. Section 142 states:

*“So long as any caveat shall remain in force prohibiting any registration or dealing with the estate or interest in respect to which such caveat may be lodged, the Registrar shall not enter in the Register Book any change in the proprietorship or any transfer or other instrument presented for registration subsequent to the date on which such caveat was lodged purporting to transfer or otherwise deal with or affect the estate or interest in respect of which such caveat may be lodged, unless such transfer or other instrument or dealing be expressly exempted from the operation of the caveat or unless the caveator shall consent thereto in writing.”*

Reference was also made to the case of **Barclays Bank v. Taylor** [1973] 1 All E.R. 752 in which Russell, LJ stated that *“the caution lodged on behalf of the Taylors had no effect whatever by itself on priorities: it simply conferred on the Taylors the right to be given notice of any dealing proposed to be registered so that they might have the opportunity of contending that it would be a dealing which would infringe their rights and to which the applicants for the registration were not as against them entitled”*. It was submitted that the Registrar of Titles had a duty to notify the claimant of the registration of the mortgage.

[13] Miss Jordan submitted that damages would not be an adequate remedy by virtue of the fact that if the premises are sold by the first defendant the claimant would have lost her home.

## First Defendant's Submissions

[14] Mrs. Minott-Phillips submitted that there is no serious issue to be tried. She argued that the first declaration being sought can only be obtained if all persons entitled to a benefit in the deceased's estate are made parties to the action. She also submitted that section 6 (2) of the Act is subject to the provisions of section 7 which sets out the circumstances in which a court may exercise its discretion to vary the equal share rule in section 6.

[15] With respect to the second declaration, counsel pointed out that there is only one mortgage registered on the title. It was submitted that there are no grounds on which such an order could be made as there is no allegation that the mortgagee did not sign the Instrument of Mortgage.

[16] Counsel indicated that the mortgage was registered prior to the lodging of claimant's caveat and that the claimant has no legal interest in the land until she is registered as an owner. It was submitted that at the present time she has an equitable interest. The first defendant it was said is asserting a legal right as of the date of registration of the mortgage and enjoys priority over the claimant's equitable interest. She stated that the only exception is where fraud is proved and there is no claim in this matter that there has been any fraud on the part of the first defendant.

[17] Counsel also made submissions regarding the claim for the mortgage to be discharged or removed from the Certificate of Title. Reference was made to section 71 of the **Registration of Titles Act** which absolves any party dealing with the registered proprietor of land from any responsibility to enquire as to the existence of any unregistered interest, except in the case of fraud. The section states:

*"Except in the case of fraud, no person contracting with or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered lease or mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any*

*trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”*

[18] With respect to the claim for a declaration that the first defendant's power of sale only relates to one half of the property, counsel referred to section 18 of the Act which states as follows:-

*“18. (1) Subject to the provisions of sections 21 and 22, the rights conferred on any spouse by an order made under this Act shall be subject to the rights of any person entitled to the benefit of any mortgage, security, charge or encumbrance affecting any property in respect of which the order is made if such mortgage, security, charge or encumbrance was registered before the order was made or if the rights of that person arose under an instrument executed before the date of the making of the order.”*

In light of the above provision, it was submitted that even if the claimant is entitled to a one half share of the property it would be one half of the mortgaged property.

[19] Where the claim against the second defendant is concerned, it was submitted that there has been no breach of section 142 of the **Registration of Titles Act** as the mortgage was registered before the caveat was lodged.

[20] Counsel also dealt with the issue of laches and submitted that this was a bar to equitable relief and as such did not apply to the respondent who was seeking to enforce a legal right. Reference was made to the case of **Barclays Bank v. Administrator General and Hamilton** (1973) 20 W.I.R. 344 in which Fox, J.A. examined section 71 of the **Registration of Titles Act**. His lordship was of the view that the section was only applicable to *“...registered interest; a registered fee simple, a registered lease, a registered mortgage or a registered charge, and was not intended to apply to an unregistered interest created for the first time”*. That case according to Hercules, J.A. was concerned with two competing equitable interests. Counsel also sought to distinguish the case of **Barclays Bank v. Taylor** on the basis that it is based on the English system and not the Torrens system which is applicable in Jamaica.



[21] Mrs. Minott-Phillips stated that the equitable interest of the claimant would be postponed to legal rights of the first defendant. She referred to the case of **Wedderburn v. Capital Assurance Building Society Limited**, Supreme Court Civil Appeal no. 77/98, in which appellant who was not registered on the Certificate of Title appealed against an order refusing an injunction and striking out the action. Langrin, J.A. (Ag.) as he then was stated that issue was if “...*the intended mortgagee upon receiving an application fails to investigate whether the spouse of the intended mortgagor has an interest in the matrimonial property or fails to obtain the consent of the spouse to the pledging of the intended security (the matrimonial home) is the said mortgage voidable and is the Court entitled to declare the said mortgage void?*” His Lordship went on to state that the matter was essentially one that was concerned with the validity of the mortgage which was obtained in circumstances where the mortgagee knew or ought to have known of an unregistered interest in the property. It was held that the mortgagee’s interest in the subject property was free from any claim that the wife may have as her interest was not registered on the Certificate of Title. The court also pointed out that its ruling did not preclude the plaintiff from pursuing her claim to establish her interest in the property.

[22] Counsel also referred to the case of **SSI Cayman Ltd. & others v. International Marbella Club S.A.** Supreme Court Civil Appeal No. 57/86 as authority for the proposition that where a court is minded to grant an injunction against a mortgagee in the exercise of its power of sale it is a usual condition that the sums outstanding to be paid into court. Further, Counsel referred to **Green v. Jamaica Redevelopment Foundation Inc.** Supreme Court Civil Appeal No. 124/2009 in which it was stated that an injunction may be granted without an order for payment into court where fraud is raised.

[23] Mrs. Minott- Phillips stated that the **Limitation of Actions Act** relates to court actions and has no applicability to the exercise of a mortgagee’s power of sale. She also submitted that where reliance is being placed on that statute it must be pleaded. In addition, it was argued that the Act is a shield and not a sword.

[24] Miss Jordan in response submitted that section 6 (2) of the Act is not subject to the provisions of section 7. This provision she said, created a legal interest unlike that which obtained in **Wedderburn v. Capital Assurance Building Society Limited**. With respect to the applicability of the **Limitation of Actions Act** she argued that based on the judgment of the Court of Appeal in the **Fletcher** case, the statute can be used to defeat a claim.

[25] It was also submitted that **SSI Cayman Ltd. & others v. International Marbella Club S.A.** is not applicable in this case where the mortgage itself is being challenged and there is a claim for an interest in the property. She also stated that the court in **Green v. Jamaica Redevelopment Foundation Inc.** had expressed the view that the court should only exercise its discretion to require a payment into court in compelling cases.

[26] Miss Jordan has also urged the court to find that if the first defendant has a legal interest it is postponed by the equitable interest of the claimant by reason of gross negligence. In this regard she referred to **Fisher and Lightwood's, Law of Mortgage, 11<sup>th</sup> ed. page 700** and submitted that the first defendant's failure to register its mortgage in a timely manner amounted to gross negligence.

## **The Law**

[27] In order to ground a claim for an injunction the claimant must satisfy the court that there is a cause of action - **Fourie v. Le Roux** [2007] 1 W.L.R. 320. The substantive claims in this matter are for a declaration under section 6 (2) of the **Property (Rights of Spouses) Act** (the Act) and that the mortgage endorsed on the title is void, invalid or unenforceable. This latter claim is in effect a challenge to the first defendant's exercise of its power of sale. With respect to the second defendant, the claim alleges that there has been a breach of section 142 of the **Registration of Titles Act**.

[28] The principles which guide the court when considering whether or not to grant injunctive relief are to be found in the case of **American Cyanamid v. Ethicon** [1975] 1 All ER 504. In that case, Lord Diplock stated that before granting an injunction the Court

must be satisfied that the claim is not frivolous or vexatious and that there is a serious issue to be tried. Secondly, if there is a serious issue to be tried, the Court has to consider whether damages would be an adequate remedy. Thirdly, if damages would not be an adequate remedy, whether the defendant would be adequately compensated under the claimant's undertaking as to damages. In the event that there is doubt as to the adequacy of damages and whether the claimant's undertaking would provide enough protection for the defendant the court must then decide where the balance of convenience lies.

[29] It must however be borne in mind that the claimant is seeking to restrain the first defendant from exercising its power of sale. In ***Patvad Holdings Limited and others v. Jamaica Redevelopment Foundation Inc. and another*** Claim No. 2006HCV01377, McDonald-Bishop, J. (Ag.) as she then was, stated that this *“area of the law...has its own clearly defined principles. Special rules have evolved governing this question of restraining a mortgagee's power of sale...those special rules must also be taken into account in determining whether interlocutory relief should be granted to the mortgagor in a given set of circumstances”*. This approach is consistent with the authorities in this area which have consistently demonstrated that the courts will not lightly interfere with the exercise of a mortgagee's power of sale.

[30] In fact even where the amount owed by the mortgagor is in dispute the court will not as a general rule, restrain the mortgagee from exercising this power: ***Gill v. Newton*** (1866) 14 WR 490. An exception to this is where the amount said to be due is either paid to the mortgagee or into court before the conclusion of any contract for sale. In ***Inglis v. Commonwealth Trading Bank of Australia*** (1972) 126 C.L.R. 161, Walsh, J. stated:

*“A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this be not in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into Court.”*

[31] This approach is based on the principle that the power of sale is given to the mortgagee for his own benefit in order for him to realize the debt. In the *Inglis* case, Walsh, J. was of the view that *“the benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised a claim for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed.”* The mortgagor’s interest is protected by virtue of the fact that although the mortgagee is not a trustee of the power of sale he is a trustee of its proceeds. In addition, at this stage of the proceedings where the evidence is incomplete, the court is concerned with trying to ensure that a just result is achieved. According to Lord Hoffman in *National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.* [2009] 1 W.L.R. 1405, the purpose of an injunction is *“to improve the chances of the court being able to do justice after a determination of the merits at trial”* and the court is required to *“...assess whether the granting or withholding an injunction is more likely to produce a just result”*.

#### **Is there a serious issue to be tried?**

[32] It is accepted that a court in making an assessment under this head is not to embark on a trial. In fact the claimant need not show that she has a prima facie case. Lord Diplock in the *American Cyanamid* case expressed that rule in the following terms:-

*“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial”.*

[33] However, in the case of *Series 5 Software v. Clarke* [1996] 1 All E.R. 853 it was held that where a judge is able to form a clear view as to the relative strengths of the parties’ cases that view is relevant to the issue of whether or not the injunction should be granted. Laddie, J. stated:-

*“(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b).....and (d) any clear view the court may reach as to the relative strength of the parties” cases.”*

Lord Hoffmann in ***National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.*** [2009] 1 W.L.R. 1405 also expressed the view that the court’s opinion as to the strength of each party’s case is relevant to the determination of this issue.

[34] The issues which arise in this case are:

- i. whether mortgage numbered 1708943 endorsed on the Certificate of Title for property located at Hart Hill, Windsor Castle, Portland registered at Volume 1125 Folio 337 of the Register Book of Titles is unenforceable; and
- ii. whether the interest of the first defendant is subject to that of the claimant.

[35] The claimant essentially, seeks to challenge the validity of the mortgage and by extension, the exercise of the first defendant’s power of sale on two grounds. Firstly, that by virtue of section 30 of the ***Limitation of Actions Act*** the rights of the mortgagee have been extinguished and consequently, the enforcement of the charge more than twelve years after its execution is statute barred and therefore invalid. Secondly, that any power of sale is subject to the claimant’s one half interest in the family home.

[36] The registration of first defendant’s mortgage under ***Registration of Titles Act*** confers on that defendant a legal interest in the property. This principle was confirmed by the Court of Appeal in ***Green v. Jamaica Redevelopment Foundation Inc.*** Section 71 of the above Act protects the first defendant whose interest is stated to be

indefeasible unless it has been obtained by fraud. There has been no allegation of fraud in this case.

[37] The claimant asserts that she has an interest in the property by virtue of section 6(2) of the Act. For clarity I have quoted the entire section. Section 6 states:-

*“(1) Subject to subsection 2 of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home-*

*(a) On the grant of a decree of dissolution of marriage or the termination of cohabitation...*

*(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home”.*

Section 7 gives the court the discretion to vary the rule in section 6(1) provided that certain criteria are met. I agree with counsel for the claimant that section 7 does not apply to section 6 (2) under which the claimant seeks to establish her interest.

[38] The issue arises as to whether the claimant has an equitable interest or legal interest in the property. In **Wedderburn** the court clearly stated that until a declaration is made the interest of the party who is not a registered proprietor is equitable. Counsel for the claimant has sought to distinguish the **Wedderburn** case on the basis that it was brought under the **Married Women’s Property Act** which contains no provision that is similar to section 6(2). This difference in my view, does not affect the broad principle that in order for a person to acquire a legal interest there must be some declaration on which registration may be effected. The Act simply stipulates the share to which the surviving spouse is entitled. The nature and extent of her interest is yet to be determined.

[39] It is important to note that the deceased was the sole proprietor of the property and there is no evidence before the court as to whether he made a will or died intestate. In this regard I accept the submissions of counsel for the first defendant that an order

declaring the claimant's interest cannot be made unless the other beneficiaries or the executor or administrator of Mr. Pasley's estate are made parties to the action.

[40] It must also be considered whether the first defendant's legal interest is postponed by the claimant's equitable interest by reason of gross negligence. Miss Jordan has urged the court to find that the delay on the part of the first defendant in its registering the mortgage amounts to gross negligence. The section of ***Fisher and Lightwood's, Law of Mortgage*** to which counsel referred, contains an extensive discussion on what may amount to gross negligence on the part of a mortgagee. In essence it seems to be conduct in regard to the deeds which allows a subsequent right to be created. In this case, the right of the claimant was created by a statute and not by any negligence on the part of the first defendant. That same statute expressly recognizes and protects the rights of a mortgagee (section 18).

[41] Section 18 also would be relevant to the order sought at paragraph 4 of the Amended Fixed Date Claim Form. The provision states that the rights conferred on a spouse are subject to those of a mortgagee. The claimant would without more, only be entitled to a one half share of the mortgaged property.

[42] The issue of whether the defendant's right to exercise of the power of sale has been extinguished is an important one. This was recognized by Phillips, J.A. in the ***Fletcher*** case where the executor of the mortgagor's estate and the mortgagee were parties. The claimant is challenging the very existence of the first defendant's power of sale in the particular circumstances of this case. I do not agree with counsel for the defendant that the provisions of the ***Limitation of Actions Act*** can only be utilized in the defence of an action. In ***Wills v. Wills***, Privy Council Appeal No. 50 of 2002, its provisions were invoked in aid of a claimant. I am satisfied that this is a serious issue to be tried which ought to be determined at the trial.

### **Adequacy of Damages**

[43] Having determined that there is a serious issue to be tried, I must now turn to the question of whether damages would provide an adequate remedy to the parties.

[44] In assessing whether or not an award of damages would be adequate it must be considered whether the granting or withholding of the injunction is likely to cause “irremediable prejudice”. There is no magic formula which will assist a court in its assessment under this head. Lord Diplock in **American Cyanamid** expressed the following views:

*“It would be unwise to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them”.*

In the **Olint** case Lord Hoffman stated that:

*“Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out too have been wrongly granted or withheld, that is to say, the court’s opinion of the relative strength of the parties’ cases”.*

It is clear from the above, that a court is required to consider the probable consequences of the granting or withholding of the injunctive relief based on the facts of each case. In *Spry*, **The Principles of Equitable Remedies**, 6<sup>th</sup> edition pages 464- 465 it was stated:-

*“The degree of probability of success of the plaintiff that must be established hence depends on ‘a number of factors, including the nature of the right asserted by the plaintiff and its threatened infringement and the opportunities available to secure and present in the early stages of a suit evidence of such right and infringement’ and on ‘the practical consequences likely to flow from the order he seeks’ or from the refusal of that order. Accordingly, for example, if there is substantial risk that the enjoyment of property of the applicant will be seriously diminished or that he will be otherwise seriously inconvenienced, it is generally sufficient that he should show a case that requires at least serious consideration,*



*subject to special questions of hardship to the defendant...Often it is found that risks of substantial prejudice to the plaintiff are so great that, provided it appears that there is a substantial question to be determined at the final hearing, the balance of justice favours the grant of interlocutory relief. So it has been said, 'It is certain that the court will in many cases interfere and preserve property in status quo during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights'.*

[45] In this matter the claimant at best as a matter of law, is entitled to a one- half interest in the property. The main issue in this case is whether the first defendant's right to exercise its power of sale has been extinguished by virtue of ***The Limitation of Actions Act*** and its resolution may lead to one of two conclusions. Namely, that the claimant is entitled to a one-half interest in the property as a whole or that she is entitled to a one-half interest in the mortgaged property. This in my opinion appears to give her a monetary interest in the property. This is an important consideration as it is often said that damages are not an adequate remedy in matters involving land which has been described as being of a peculiar nature. I have noted that the claimant resides at this property and will be inconvenienced if it is sold. However, at this time there is no evidence that given her presumed one-half interest, she would be entitled to remain in occupation.

[46] In these circumstances, it is my view that the withholding of the injunction will not result in *"irremediable prejudice"* the claimant as an award of damages would enable her to realize her interest and provide an adequate remedy.

[47] As stated previously the restraint of a mortgagee's power of sale is usually subject to the payment into court by the applicant of the sums due. In this case no evidence has been provided that the claimant is in a position to make such a payment.

[48] The application for the injunction is therefore refused. Costs are awarded to the first defendant against the claimant to be taxed if not agreed.