[2022] **JMSC Civ 179**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV02298

BETWEEN	**DELROY FOSTER**	**APPLICANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**DEFENDANT**

IN CHAMBERS

Dr Delroy Beckford and Marcia Elliot instructed by Samuel Beckford for the Applicant

Mr Maurice Manning and Tavia Dunn instructed by Nunes, Scholefield DeLeon & Co for the Defendant

Heard: August 25th, 2022 and October 14th, 2022

Application for injunction – serious issue to be tried – adequacy of damages - balance of convenience - adverse possession – what is required to show exclusive undisturbed possession - effect of a possessory title on foreclosure – striking out

HUTCHINSON, J

INTRODUCTION

[1] On the 22nd of July 2022, the Applicant Delroy Foster filed a notice of application for Court Orders. This was supported by affidavits in which he sought the following orders;

a. An interim injunction restraining the Respondents either by themselves, their employees, their servants and or agents, from entering upon, taking possession of, selling or otherwise interfering with the property located at I Logan Avenue, Christiana, P.O., in the parish of Manchester and comprised in the Certificate of Title registered at Volume 1537 Folio 514 of the Register Book of Titles.

b. An interim injunction restraining the Defendant whether by themselves, their employees, their servants and or agents or otherwise howsoever from using or dealing with the property comprised in the Certificate of Title registered at Volume 1537 Folio 514 of the Register Book of Titles in any manner inconsistent with and/or prejudicial to the interest of the claimant until the trial of the matter herein.

c. Such further and other relief as this Honourable Court thinks fit;

d. Costs.

[2] The grounds on which he sought these reliefs were stated as follows:

1. The Applicant resides at premises located at I Logan Avenue, Christiana P.O. in the parish of Manchester and registered in the Register Book of Titles at Volume 1537 Folio 514.

2. The said premises were previously registered in the Register Book of Titles at Volume 1218 Folio 116.

3. On January 31, 2020 the Respondent obtained a foreclosure order for said property under section 1 19 of the Registration of Titles Act.

4. The Applicant has been in open, continuous, and exclusive possession of the said property since 2001.

5. The Applicant has demonstrated multiple acts consistent with exclusive ownership of the said property, including paying property taxes, utility bills, and renovation to the house on said property.

6. The Respondent has indicated its intention to take possession and has taken active steps to take possession of said property.

7. The Claimant gives the usual undertaking to abide by any order as to damages caused by the granting of the injunction.

[3] The application and orders sought are opposed by the Defendants who not only advanced reasons for their objection but also asked the Court to utilise its own inherent powers at Rule 26.3(1) (b) and (c) to have the matter struck out whether as an abuse of process and/or for disclosing no reasonable ground for bringing same.

BACKGROUND

[4] In the course of the matter, affidavits were filed by the Applicant and by Mrs Kathryn Hepburn-Smith on behalf of the Defendant. An additional affidavit was filed by Arlette Gentles in support of the Applicant's position but only gave general information in respect of his presence and actions at the property. As such, the focus of this decision rests on the affidavits from the Applicant and Mrs Hepburn-Smith. These affidavits had a number of documents attached and although some of these documents were contested, the following chronology captures the evidence which was presented before me;

a. Clovis and Gwendolyn Foster were the registered owner of property registered at Volume 1218 Folio 116 of the Register Book of Titles (hereinafter referred to as the property). On the 11th of December 1990 they obtained mortgage no. 648261 to secure the sum of $250,000 with interest and unstamped to cover $175,000. On the 29th of April 1994, mortgage no. 811716 was registered to secure the sum of $460,000 with interest. On the 24th of November 1995, mortgage no. 906472 was registered to secure the sum of $1,645,000 also with interest and on the 16th of October 1996, mortgage no. 950673 was registered to secure the sum of $1,500,000 with interest.

b. The payment on the mortgage loans fell into delinquency and they were among a number of such loans in NCB's portfolio that were transferred to Finsac. A copy of a letter dated 19th of January 1999 from Finsac to Mr Clovis Foster was exhibited in this regard as KH-S1.

c. On or about the 29th of October 2000 Mr Clovis Foster died and through correspondence from her attorneys, which was exhibited as KH-S2, Mrs Foster indicated a proposal to Finsac to service the debt. She requested that the property not be sold to cover the indebtedness. She also advised that her son Delroy Foster, the Applicant herein, was prepared to take up the payment of the re-assessed debt and would travel to Jamaica to oversee the property and enforce the collection of rent for same which could also be used to save the realty. It was also stated that Mrs Foster and Delroy Foster were prepared to be put forward as Joint Administrators in the estate of Mr Clovis Foster.

d. A number of payments were then made to Finsac in respect of the mortgage loan which were exhibited at KH-S3. Four of these were attached to correspondence from Counsel for Mrs Foster and the dates for same were 6th of March 2001, 20th of February 2002 (two cheques) and 16th of August 2002. The Scotia account on which the cheques were drawn bore the names of the Applicant and his mother. It is the Applicant's position that his mother's authorization was not required for these sums to be withdrawn and the withdrawals were done without her knowledge.

e. In 2001 or 2002, the Applicant's mother relocated to Canada where she subsequently purchased property along with her daughter and a certificate of title was exhibited as DF1 which states the date of the transfer of land as the 3rd of September 2002. This was relied on by the Claimant as further evidence of his mother's 'abandonment' of the relevant property.

f. In 2002, the debt was assigned by FINSAC to the now Defendant, Jamaica Redevelopment Foundation Inc (JRFI). On the 28th of June 2002, the Defendant's loan servicer sent correspondence to the Applicant in which a loan re-payment proposal which had been made by him to them was rejected. On the 21st of August 2003, a letter was sent by the loan servicer to Mrs Foster and the Applicant advising of their indebtedness. This letter was exhibited as KH-S4. A meeting was subsequently held with the Applicant and the Defendant's representative during which the Applicant expressed an intention to assume responsibility for the debt. This was confirmed in writing on the 23rd of September 2003 and exhibited as KH-S5. The Applicant in his account acknowledged that he agreed to take up payment of the debt as he had been doing so since his mother migrated to Canada.

g. On the 15th of November 2003, an 'Agreement to Restructure Existing Debt' was executed by Mrs Foster in the presence of Ms. Naudia Sinclair, in-house Counsel for the JRFI. The document also bears the signature of Mr Foster with the words 'executor of the estate of Clovis Foster' appearing beside it. This document provides for the conditional compromise of the debt upon strict compliance with its terms.

h. The body of the document makes reference to the 'Borrower' and 'Guarantor' and their respective obligations. The Schedule names the borrowers as Clovis Foster (dec'd) and Gwendolyn Foster while the Guarantor is named as Gwendolyn Foster. There is nothing in the document which provides that Mr Delroy Foster had assumed the responsibilities of Clovis Foster and become a 'Borrower'. It was accepted by Mr Foster that he signed this agreement but he asserted that this was done purely in his role as Executor and to prevent the loss of the premises which had become his dwelling house. He maintained throughout his affidavits that he made extensive improvements to the property including construction. He also

stated that he used the rent collected from tenants as income and for improvement to the property.

i. On the 3rd of October 2005, the Defendant wrote to Mrs Foster and the Applicant providing an update as to the indebtedness on the account. This letter was exhibited as KH-S7. There were a number of payments made on the account between April and June 2006 from an account bearing the name Jamerica Contractors Inc. It was accepted by Mrs Hepburn-Smith that other payments were made on the account until 2008 when it fell into arrears.

j. On the 30th of June 2008, correspondence was sent from the Defendant to the Applicant advising of the status of the account. A payment was subsequently made on the 11th of May 2011 from the BNS account. A statutory notice of default was then issued to Mrs Foster and the Defendant began making arrangements for the sale of the property to secure the debt. Prior to the auction, the Defendant was sent a letter in respect of same by Mrs Foster's attorneys. It was dated the 1st of June 2011 and has been exhibited as KH-S9. On the 7th of June 2011 an application for an exparte injunction which had been filed by Counsel on Mrs Foster's behalf was granted. That matter had a number of dates, the last of which was the 12th of October 2012, the formal order for which was exhibited as KH-S10. It is not in dispute that the injunction expired in November 2012.

k. The Defendant also placed into evidence two documents, one of which was a Formal Order in respect of the injunction granted in June 2011. The other is an email exchange between Counsel for the respective parties which named the individuals who had been in attendance for the hearing. These were exhibited as KH-S18 and KH-S19. It was noted that one such person was the Applicant and this has not been challenged.

l. On November 14, 2012, a public auction was held but there were no successful bids. On June 30, 2015 Gwendolyn Foster died and a copy of her death certificate was exhibited as DF2 in the Applicant's affidavit of August 22nd, 2022. On November 2, 2017, the Defendant was sent correspondence by Marva Hanson Burnett, 'Attorney-at-Law' for the Applicant in which she sought to ascertain the liabilities of the estates of Clovis and Gwendolyn Foster. This letter was sent pursuant to a power of attorney (POA) granted to a Mr Brendon Bailey by the Applicant. This POA was exhibited as KH-S13. The Applicant however denies granting a power to Mr Bailey to give any instructions for such a letter to be written.

m. In 2019 a second auction was held but the property was not sold. On January 31st, 2020 a Foreclosure Order was issued by the Registrar of Titles, this was exhibited by the Applicant as DF3. Arrears of property taxes between the period 2011 to 2018 were also paid by the Defendant. In July 6, 2020 a letter was sent to the Defendant from THG, Attorneys-at-Law which authorised them to have discussions with THG in their capacity as the Applicant's Attorneys and to provide them with documentation in relation to the said property. This letter Exhibit KH-S14 bears a caption which contains the words;

> *'Estate of Gwendolyn and Clovis Foster, all that parcel of land part of Straun Castle, Christiana P.O….*

n. The Defendants have asked that this be considered by the Court as an acknowledgment by the Applicant that the property remained that of his late parents and he had not acquired a possessory title.

o. On July 28, 2020 a Certificate of Title registered at Volume 1537 Folio 514 of the Register Book of Titles was issued in the name of the Defendant. A Letter was subsequently dispatched from the Defendant dated August 18th, 2020 to THG and the Estates of Gwendolyn and Clovis Foster advising that the Defendant had foreclosed on the said property.

Issues

[5] 1. Has the Applicant established a proper basis to justify the grant of an injunction, i.e.;

a. Is there evidence of a serious issue to be tried?

b. Would damages be inadequate to compensate him?

c. Does the balance of convenience favour the grant of this injunction?

2. Should the matter be struck out on the basis that the Claimant has no real prospect of success and/or the claim constitutes an abuse of process?

Applicable Law – Injunction

[6] In order to ground the case for an injunction the Claimant must first satisfy the court that there is a cause of action[1]. The claim in this matter is for declarations that the Claimant acquired a possessory title over the subject property by virtue of being in exclusive and continuous possession of same from 2001. He also seeks orders that the Defendant is not entitled to bring an action to recover same from him. The principles which guide the court when considering whether or not to grant injunctive relief have long been settled in the line of authorities which include the ***American Cyanamid v. Ethicon***[2] decision. 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.

[7] Where the court finds that there is in fact a serious issue to be tried, the question of whether damages would be an adequate remedy must then be considered. If damages would be an adequate remedy, the injunction should not be granted. In

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[1] Fourie v. Le Roux [2007] 1 W.L.R. 320
[2] [1956] 3 All ER 970

the event that the answer to this question is in the negative however, the Court must then determine whether the Defendant would be adequately compensated under the Claimant's undertaking as to damages.

[8] Where 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. These principles were approved and applied in ***National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.*** [2009] 1 W.L.R. 1405.

[9] In this matter, the claimant has alleged that he has acquired possessory title against his mother who was the surviving joint tenant in respect of the property. He contends that the title acquired by the Defendants should be set aside and the Defendants barred from recovering possession of the property from him. It is noted, that at this stage of the proceedings where the evidence is incomplete, the court in coming to its decision is concerned with ensuring that a just result is achieved. According to Lord Hoffman in ***National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.*** (supra), 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?

[10] In making an assessment under this head, it is not in dispute that the Court ought not to embark on an exercise which is akin to a trial. Additionally, there is no requirement for a prima facie case to be proved. Lord Diplock in the ***American Cyanamid*** case expressed the relevant 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".*

[11] It is settled law however, that where the Court is able to form a view as to the relevant strength of each party's case, this can act as a useful guide in determining whether an injunction ought to be granted[3].

[12] In my examination of this issue, it is necessary to examine the question of whether the Claimant had managed to 'dispossess' his mother of the relevant property. This analysis would require careful consideration of the law on adverse possession and whether the requirements for same have been satisfied. In extensive submissions, Counsel for the respective parties made reference to a number of authorities on this subject matter as well as the applicable principles for the grant of an injunction. While all have been reviewed, my comments will be restricted to extracts from but a few as the legal principles are largely the same.

[13] It has long been established that the fact that an individual's name appears on a certificate of title as a registered owner of property is not by itself conclusive that such a person cannot be dispossessed by another. This statement of law is seen in Section 68 of the Registration of Titles Act which provides;

> *No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of entry thereof in the Register Book,* ***and shall subject to the subsequent operation of any statute of limitations,*** *be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power. (emphasis added)*

[14] In this situation, although the names which appeared on the original title were Clovis and Gwendolyn Foster, the Claimant asserts that he had acquired possession from 2001 when the surviving joint tenant, 'abandoned' her interest and relocated to Canada. He claims that by virtue of this, his possessory title ought

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[3] ***Series 5 Software v. Clarke*** [1996] 1 All E.R. 853

to be viewed as taking precedent over that of the Defendant which was acquired through his mother on foreclosure. In dissecting this argument, it was determined that sections 3,7 and 30 of the Limitations of Actions Act are relevant to this issue and these provide as follows: –

> *3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make any such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.*
>
> *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 payment 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*

[15] The effect of sections 3 and 30 of the Limitation of Actions Act is to bar a registered owner from making any entry or bringing an action to recover property after twelve (12) years where their right to do so has been extinguished. In analysing these provisions, careful note was also taken of the decision of **Ludbrook v Ludbrook**[4] which examined section 35 of the UK Act[5] the wording of which is similar to section 7 of the Jamaican legislation. In that decision, the English Court of Appeal made it clear that this provision applied not only against the mortgagor and persons claiming under him but also as against a person who has acquired a good title by

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[4] [1901] 2 KB 96
[5] English Real Property Limitation Act 1837

virtue of the Statute of Limitations Act as against the mortgagor and those claiming under him.

[16] In support of his position that a possessory title has been acquired, the Applicant pointed to the period from 2001 to 2022 when the Defendant acquired title by foreclosure as surpassing the twelve-year period required. He asked the Court to note that after his mother 'abandoned' the property in 2001, she acquired a new home in Canada and even re-married, thereby setting down roots there. He asserted that from that year he was left in sole undisturbed possession of the property. He averred that he not only resided there but also undertook significant construction projects which altered the footprint of same. He also collected and used the rent which was being paid by the tenants, who had already been in occupation, for which he gave no accounting to his mother.

[17] He relied on the decision of ***Powell v McFarlene***[6] which was affirmed in ***J.A Pye (Oxford) Ltd etal v Graham etal etal [2002] 3 All ER 865*** in which the principle was outlined that legal possession required (i) a sufficient degree of physical custody and control (factual possession), and (ii) an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess). It was noted in that decision that the necessary intention was one to possess, not to own the property and evince an intention to exclude the paper owner only so far as was reasonably possible.

[18] The Claimant also relied on the decision of ***Recreational Holdings Ltd v Lazarus (2016) UKPC*** in which the Court upheld a decision previously given in ***Chisholm v Hall***[7] that a bona fide purchaser for value could have their title defeated by an individual who had acquired a legal title by adverse possession of property against the vendor. In that case Lord Wilson stated;

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[6] [1979] 38 P & CR 452
[7] [1959] AC 719.

> *34. So the Board rejects each of the company's contentions. It concludes as follows:*
>
> *(a) the Board's Opinion in the Chisholm case was correct;*
>
> *(b)* ***the proviso to section 70 of the Act explicitly subordinates the title of the registered proprietor to such unregistered rights under the Limitation Act as have begun to accrue since the first registration under the Act; and no exception is made, as it is elsewhere in the Act, for the registered proprietor who can claim to have been a bona fide purchaser for value;***
>
> *(c) section 68 of the Act does not (to borrow the word from Mr Knox) trump the proviso to section 70 because, as was held in the Chisholm case, the word "subsequent" in section 68 means "subsequent to the first registration", with the result that section 68 is complementary to the proviso; Page 13*
>
> *(d)* ***notwithstanding the near paramountcy under it of the registered title and the often favoured status under it of the bona fide purchaser for value, the Act does nothing to disturb this obvious conclusion: that, if the vendor's title has been "extinguished" under section 30 of the Limitation Act, there remains no title for the vendor to pass…and none for his purchaser to receive; and***
>
> *(e) the decision of the Court of Appeal, explained in a judgment of Morrison JA to the clarity of which the Board pays respectful tribute, was correct. (emphasis mine)*

[19] Applying the principles extracted from these authorities, it is the Applicant's argument that the Court should find that the very same conclusion ought to be arrived at in the instant case as the title of his mother having been extinguished by adverse possession. There was no title which could be passed to the Defendant.

[20] In their submissions in rebuttal, the Defendants asked the Court to pay careful attention to the dicta of Romer LJ in the **Ludbrook** decision which examined when and where the rights of a mortgagee could be extinguished. Specific mention was made of the following remarks[8];

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[8] Page 100

> *If the mortgage be an existing one and was executed before the commencement of the possession of the person claiming to have acquired a title by such possession under the Statute of Limitations, then the statute 7 Will. 4 and 1 Vict. c. 28, undoubtedly applies in favour of the mortgagee, although the person in possession may have acquired a good title as against the mortgagor and those claiming under the mortgagor*

[21] They also made reference to the Trinidadian decision of ***Taurus Services Limited v Thomas and others***[9] in which the Court considered Section 12 of the Real Property Limitations of Actions Act which is similar to Section 7 of the Jamaican Act. In the Court's discussion on this issue, Mendonca J.A stated as follows;

> *30. …note that section 12 does not cause time to run afresh and confer a new right of entry on the mortgagee where time is already running in favour of a stranger in possession of the mortgaged property at the time the mortgage is created. Where, therefore, at the time of the creation of the mortgage, the mortgagor is not in possession and someone is in adverse possession of the mortgaged property so that time is running against the mortgagor, time will continue to run against the mortgagee as the mortgagor is a person through whom the mortgagee claims and the mortgage does not confer a new right of entry on the mortgagee. This is so notwithstanding section 12. This was held to be so in* ***Thornton v France*** *[1897] 2 QB143. In that case Chitty L.J. in giving the judgment of the court stated (with reference to the English provisions in the same terms as are applicable in this jurisdiction):*
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> *"Further we think that the Act does not confer a new right of entry on the mortgagee where at the time of making the mortgage, a man is in possession holding adversely to the mortgagor, and the statute 3&4 Will. 4 has already begun to run in his favour against the mortgagor."*
>
> *(see also* ***Ludbrook v Ludbrook*** *[1901] 2 K.B. 96).*

[22] Having stated thus, the Court continued;

> *31.* ***The position is different where at the time of the creation of the mortgage there is no one whose possession is adverse to the mortgagor. In those circumstances even though the right to possession might subsequently accrue to the mortgagee, the effect of section 12 is to cause time to run a fresh from the date of each payment of principal or interest and gives to the mortgagee a new***

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[9] Civil Appeal No. S117 of 2013

> ***right of entry or action***. *The position in law is succinctly put in* ***Fisher and Lightwood's Law of Mortgage*** *(4th ed.) (at para. 26.56) as follows:*
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> *"Where, after the creation of the mortgage, a stranger begins adverse possession of the land, so that time is running in his favour as against both mortgagor and mortgagee, payment of interest by the mortgagor keeps alive the right of the mortgagee. However, if at the date of the mortgage time was already running against the mortgagor, payment of interest will not give the mortgagee a new right of entry and so stop time running." (emphasis added)*

[23] The Defendant argued that these principles provide significant support for their contention that the Claimant has not dispossessed his mother and as such would not have acquired a title which could defeat theirs. They insisted that the evidence clearly showed that the Defendant would have been aware of a third party interest from very early in these proceedings as he was named in correspondence sent on behalf of his mother, following the death of his father in 2000. Additionally, he was specifically named as the individual who was prepared to take conduct of payments and do the collection of rent in order to service the debt. They also pointed to his signature on the re-structuring agreement as further knowledge on his part that the loan portfolio had been passed to the Defendant and the terms on which the payment of the debt was now to be structured. The Defendant also placed heavy reliance on the payments made on the loan from an account bearing both names as well as the Court action initiated in 2011 at the instance of the Applicant's mother.

[24] On a careful review of the affidavits, it is evident that the credibility of the Affiants is critical to the resolution of this issue. The nucleus of the Applicant's claim is his assertion that he had acquired and exerted exclusive and undisturbed possession for in excess of twelve years subsequent to his mother's 'abandonment' of the property. Exhibit KH-S3 tells a different story however, as its contents reveal that the Applicant was actually 'put in charge' by his mother who explained that his role was 'to see to the monitoring of the property and collection of rent in order to service the mortgage loan' which was then still with Finsac.

[25] The signature on the re-structuring agreement (Exhibit KH-S6) is also quite revealing. Although the Applicant sought to argue that the agreement ought not to be considered by the Court on the basis that there was no novation and as such he could not be bound by it, I did not find that novation actually arose for consideration. This is seen in the fact that the document made it clear that he was not a borrower or guarantor, but was signing in a limited capacity as executor. In other words, a mere witness to the document for the purpose of his father's estate. The very position which his mother's attorneys had previously alluded to in KH-S3. This agreement named the owners/borrowers as the Applicant's parents and sought to re-structure how the payments would now be made to the Defendants.

[26] The agreement, did not stand alone however as KHS-4 and 5 which were correspondence exchanged between the Defendant, the Applicant and his mother were also examined. The letters revealed that a meeting had been arranged and attended by the Applicant during which he volunteered to take over the servicing of the mortgage debt and this indication was later reduced to writing in September 2003 (KHS-5). The Applicant acknowledged that he signed the agreement and sought to explain that this was done to secure his home. At this stage however, by his own admission he would only have been in possession for a span of about 2 years. Additionally, by being a signatory to an agreement with his mother, he was aware that she was still executing documents, an action which was consistent with her still exercising control over her property. As such, I did not find his explanation to be credible.

[27] I also noted that within the very period in which this was happening, payments were being made on the loan account from an account bearing the Applicant's name as well as that of his mother. While the Applicant has sought to insist that the deductions were made automatically and without his mother's instructions, it was noteworthy that several of these cheques were sent through the mother's attorneys. Additionally, there is no evidence that the Applicant sought to stop these payments. What is obvious instead is that a number of payments were also made

from a US Bank Account which appears to have been associated with him and all these cheques formed a part of the attachments seen at KH-S3.

[28] Exhibits KH-S7, 8 and 9 revealed that there was consistent communication sent between the Defendant, the Applicant and his mother on the subject of the ongoing indebtedness to the Defendant Company. KHS-9, which is dated 2011, is of particular interest as it was a letter from Attorneys acting on behalf of the Applicant's mother in which a concern was raised in response to the Defendant's intention to auction the property. This was swiftly followed by the aforementioned Court action. This entire sequence of events tells a tale of actions by Mrs Gwendolyn Foster which were inconsistent with the abandonment claim of the Applicant. His continued involvement in discussions and even his attendance at the Court hearing would tend to lend credence to the argument that he was in fact her representative/agent and not her 'dispossessor' as he has sought to argue.

[29] The documentation shows that the Court action initiated by Mrs Foster continued up to 2012, with the injunction obtained having expired in November of that year. Additionally, there were payments made up to May 2011 on the loan account. Although Mrs Foster died in 2015, the history of this matter does not show any 12-year period during which the Applicant could have had the opportunity to acquire the interest that he says he did. With the Court action and payments having occurred in the 2011/2012 period, the principle outlined in the ***Ludbrook*** and ***Taurus*** line of cases is clearly relevant and applicable. Accordingly, the Applicant would have to provide evidence to rebut the argument raised by the mortgagee that these actions in any event, would have caused time to stopped running against his mother. As such, the mortgagee who claimed through her would not have been dispossessed.

[30] On a review of the Applicant's affidavits there was no evidence presented to rebut that any of these actions had been taken by or at the instance of his mother. The subsequent communication between the Attorneys who purported to act on the Applicant's behalf and the Defendant did not assist with this issue. As not only did

the caption of the letters continue to make reference to the property as owned by his parents but the contents revealed his continued acknowledgment of the Defendants interest and sought to have discussions in relation to same. It was also noted that neither correspondence sought to raise the point that the Applicant had acquired a possessory title and this assertion appears to have made its first appearance after the Defendants had foreclosed and acquired Title.

[31] In light of the foregoing, I am not persuaded that the Applicant has satisfied the requirement of showing that there is a serious question to be tried and on all the evidence presented there are clear questions as to the strength of his case.

Adequacy of Damages

[32] Having determined that there isn't a serious issue to be tried, I considered it prudent nonetheless to examine the question of whether damages would provide an adequate remedy to the Parties. In *Bean, Injunctions, 10th edition* the learned author outlined the applicable principle as follows;

> *"If, however damages would not adequately compensate the claimant for the temporary damage, and he is in a financial position to give a satisfactory undertaking as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial, an interim injunction may be granted. If the claimant is not in a financial position to honour his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction will usually be refused"*[10]

[33] In this matter while the Applicant has asserted that he will be severely prejudiced if the Defendants are not prevented from seeking orders to recover the property from him as this was his home and source of income. On a review of the documentation provided, it is clear, that the Defendant's clearly have the financial means to provide a solid undertaking as to damages. Additionally, given the

[10] Paragraph 3.19

tenuous nature of the Applicant's assertions, it is clear that any loss, while remote, would be adequately compensated for by the Defendant's undertaking.

[34] On the other hand, the Defendants would have a valid concern. As although they are the registered owners of the disputed property they are currently in a position in which their ability to exercise full and total control over same is adversely affected. This includes their ability to collect rent from the occupants or even to offer the property for sale. This situation is compounded by the fact that they have exercised the option to foreclose thereby extinguishing the other remedies previously open to them.

[35] While the Applicant has presented evidence of holding the equivalent of over $1 million dollars JMD in his bank account in support of his undertaking as to damages, it is clear that this amount would be woefully inadequate to address any loss which may be suffered by the Defendant if this injunction were to be granted and then discharged. As such, it is clear that not only would there likely be damage and loss sustained by the Defendant, but the Claimant's undertaking would be insufficient to honour same.

Balance of convenience

[36] This issue arises for consideration where there is doubt as to the adequacy of damages. Lord Hoffman analysed this point in ***National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.***(supra) where he stated:-

> *"At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.*

> *17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."*

[37] It is clear from the evidence presented and foregoing discussion that far more irredeemable prejudice would be done to the Defendant than the Applicant if the injunction sought were to be granted. As such, the balance of convenience in my view is in favour of the Defendant.

Striking Out

[38] In asking the Court to strike out the claim brought, the Applicant has placed reliance on the powers outlined at Part 26.3(1) of the rules with specific reference to 26.3(1)(c) and (d) which provides;

> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*

[39] It is clear that R 26.3(c) requires that if a cause of action discloses no reasonable grounds for bringing the claim the Court should act to have the matter struck out. This principle was stated in ***Sebol Ltd etal v Ken Tomlinson etal SCCA 115/2007*** by Dukharan Ja at page 13 paragraph 28 as follows:

> *"The focus of the new rules is to deal with the matters expeditiously and to save costs and time, if there are no reasonable grounds for bringing an action, then the Court ought to strike it out."*

[40] This position was also emphasised in the decision of ***S&T Distributors Limited and S&T Limited v CIBC Jamaica Limited and Royal & Sun Alliance SCCA 112/04*** where Harris JA stated;

> *The striking out of a claim is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implications of striking out and balance them carefully against the principles as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases.*

[41] Having stated thus, the Learned Judge continued;

> *In light of the foregoing, it is clear that a claim will only be struck out as disclosing no reasonable cause of action if it is obvious that the claimant has no real prospect of successfully prosecuting the claim. Real prospect of success contemplates the existence of a claim which carries with it realistic prospect of successfully prosecuting the claim as opposed to a prospect*

[42] Finally, this provision was also examined by Batts J in C***ity Properties Limited v New Era Finance Limited 2013 JMSC Civil 23*** where he stated;

> "*On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.*

[43] In my earlier analysis, I found that the Applicant has failed to show that there is a serious issue to be tried. Unfortunately for him, on the question whether his claim has a real/reasonable prospect of success, my finding was also in the negative. This conclusion was based on the dearth of evidence presented to prove that the Applicant had in fact acquired a possessory title. As such, I am satisfied that this is a matter in which the Court ought to exercise its inherent powers to have this claim struck out. Such a decision would not only save judicial time but also be entirely consistent with the overriding obj ectives.

Conclusion

[44] As such, my orders are as follows;

a. The Application for an injunction is refused.

b. The Claimants claim is struck out.

c. Costs are awarded to the Defendant to be taxed if not agreed.