

Construction and Investments Limited and otherwise from November 1999 to November 2013;

- ii. That the defendant in his personal and/or representative capacity give an account of all funds collected and used by him in respect of 121A Barbican Road, Kingston 8 in the parish of Saint Andrew from November 1999 to the date of any order made by the court;
- iii. That the defendant ceases to collect rental in respect of 121A Barbican Road, Kingston 8 in the parish of Saint Andrew until the transfer of the life interest to Thelma Jacas by the claimant ;
- iv. The defendant surrenders Duplicate Certificates of Title Volume 1042 Folio 437 and volume 119 folio 9 of the Register Book of Titles to the claimant within seven 970 days of the order of the court;
- v. The defendant immediately ceases all acts of intermeddling in the estate of Sylbert Juan Jacas, deceased.

[2] The claimant is one of the executors of the estate of Sylbert Juan Jacas who died on the 13th June 1999. He is survived by his widow and thirteen children. Probate was granted to the claimant and Dwight Jacas, sons of the testator, on the 8th June 2001. By way of a document dated the 18th October 2013, Dwight Jacas is purported to have authorized the claimant to act on his behalf in relation to the estate. The effect of that document which does not appear to have been registered in Jamaica is not an issue which falls for my determination. Mrs. Thelma Jacas, the

testator's widow, was given a life interest in premises at 121A Barbican Road, Kingston 8 in the parish of Saint Andrew (the property). That property is rented and it is common ground that those sums were always paid to her. The situation has not changed.

[3] On the 19th June 2014 the claimant filed a Notice of Application in which he sought an order that the defendants cease collecting rental in respect of 121A Barbican Road, Kingston 8 in the parish of Saint Andrew, being all that parcel of land registered at Volume 1042 Folio 437 of the Register Book of Titles.

[4] On the 23rd July 2014 Thompson-James J, refused the claimant's application for an interim injunction and the matter was set for an inter partes hearing. The court is now being asked to determine whether an interlocutory injunction ought to be granted.

[5] The claimant in his affidavit stated that it was customary for his brother Gordon to collect the rent for the property. Those sums would then be handed over to Mrs. Thelma Jacas, their mother. He subsequently instructed Gordon to pay those sums into an account to which he had access. This was done in December 2013.

[6] It is not disputed that the tenants were told that only Mrs. Jacas and the first defendant who is also a son of the testator had the authority to collect the rent. The claimant asserts that as a result of their actions he is not in a position to account for those funds. He has also stated that the estate has not yet been settled and he will require funds to do so.

[7] The issue of legal fees associated with the administration of the estate was also raised. Mr. Stephen Johnson, Attorney-at-Law who was

present at the request of the first defendant indicated *viva voce* that all outstanding fees had been settled by Mrs. Jacas. I am mindful of the fact that Mr. Johnson's did not file an affidavit and his statements in relation to this matter must be reduced into writing if either party intends to rely on them.

[8] The claimant also alleged that the first defendant transferred three of the properties to the beneficiaries without his knowledge. Mr. Johnson indicated that the transfer tax in respect of all of the properties has been paid and only the registration fees would be outstanding. It was also confirmed that only two of the properties remain to be transferred, one being the subject of this application. These are Green Castle in the parish of Saint Mary and the property. Where the property is concerned the first defendant said that the only act required of the claimant is for him to sign the documents necessary to register Mrs. Jacas' life interest.

[9] The claimant did however depone that legal fees are owed to Mesdames Taylor, Deacon and James and Mr. Winston Taylor. This was not challenged.

[10] He stated that he is able to give an undertaking as to damages as he is one of thirteen beneficiaries entitled to an interest in the Green Castle property which is comprised of five acres and of "significant" value.

[11] The first defendant has denied intermeddling and has stated that it was the claimant who gave the Certificates of Title and the documents necessary to effect the transfers to Mrs. Jacas. He also stated that there has been undue delay on the part of the claimant in his administration of

the estate. He has also indicated that he will pay the fees necessary to effect the transfer of the property.

Claimant's Submissions

[12] Mrs. Taylor began her submissions by referring to the well-known authority of ***American Cyanamid v. Ethicon*** [1975] 1 All ER 504. She argued that an injunction should be granted in this case as there are serious issues to be tried and an award of damages would not be an adequate remedy. She stated that the actions of the defendants have prevented the claimant from executing his duties in accordance with his oath and has exposed him to legal action. Counsel also stated that the balance of convenience was in the claimant's favour as he was being placed in a position where he could not comply with the law.

[13] Reference was made to the case of ***Commissioner of Stamp Duties v. Livingston*** [1965] A.C. 694 in support of her submission that the life interest bequeathed to Mrs. Jacas did not vest until it was registered. She stated that at this time the claimant is the only person who has the legal right to deal with the property. It was also submitted that based on the said case, the claimant would be personally liable for any breach of his duties as an executor. Specific reference was made to the following passage:

"...whatever property came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and

these duties would be enforced on him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate. Certainly, therefore, he was in a fiduciary position with regard to the assets that came to him in the right of his office, and for certain purposes and in some aspects he was treated by the court as a trustee. Kay J in Re Marsden, Bowden v Layland, Gibbs v Layland, said ([1881–85] All ER Rep 993 at p 996; (1884), 26 ChD 783 at p 789):

“An executor is personally liable in equity for all breaches of the ordinary trusts which, in courts of equity, are considered to arise from his office.”

He is a trustee “in this sense”. It may not be possible to state exhaustively what those trusts are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed “duties in respect of the assets” as trusts. What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration.

[14] Mrs. Taylor also argued that the actions of the first defendant and Mrs. Jacas have deprived the estate of a portion of its income for which the claimant is liable to account. She stated that the court in deciding whether or not to grant injunctive relief ought to be concerned with whether it would be more just to grant the injunction than to award damages. Reference was made to Spry, **The Principles of Equitable Remedies**, 6th edition page 383, where the learned author stated in reference to perpetual injunctions:-

“Recently however, the courts have tended to depart from this traditional jurisdictional analysis; and especially because equity and the common law are now administered in the same courts a general test has been put forward instead, whereby it is simply asked as the ultimate question whether it would be more just to grant an injunction than to award damages.”

[15] Counsel also sought to rely on the case of **Allwood v. Administrator General of Jamaica and another** [2014] JMSC Civ. 29 in which it was stated that damages would not be an adequate remedy where the wrong is irreparable such as when someone is dismissed from a professional post. She argued that the claimant had been suspended from carrying out his duties as executor by the actions of the defendants. It was also submitted that the defendants’ instructions to the tenants not to pay rent to the claimant has exposed him to irreparable harm.

[16] With respect to the case of **Montaque (Executrix of the estate of Seaton Montaque) v. G.M and Associates Limited and another** [2013]

JMCA App 7, which was referred to by Mr. Mayne, counsel submitted that it was irrelevant as the court found that there was no serious issue to be tried.

Defendants' submissions

[17] Mr. Mayne referred to paragraph 9 of the affidavit of Howard Jacas and stated that there has been no intermeddling in the estate by the defendants. That paragraph states that the property at 121A Barbican Road is yet to be transferred to Mrs. Jacas and funds collected from the rental of the property are needed to complete that process. The funds are also required to cover outstanding travelling and legal expenses.

[18] Reference was also made to paragraph 13 of the same affidavit where it is stated that the company Jacas Construction and Investment Limited was created to manage the property situated 5 Balmoral Avenue, which houses a business complex consisting of 13 shops. The company is said to have managed eleven of the thirteen shops and the rent which was collected paid into an account to which Lorenzo Jacas, the defendant, and Mrs. Jacas had access. These funds were said to be used to maintain the Balmoral Avenue property as well as pay the outgoings of the property at 16 ½ Wickham Avenue. It was also alleged that the first defendant has not given an account of how the funds were used despite numerous requests.

[19] The court's attention was also directed to a letter dated December 11, 2002 which is alleged to have been written by the claimant to Mr. Stephen Johnson instructing him to release the titles of several properties to Mrs. Jacas along with the original grant of Probate for the estate. Mr. Mayne stated that the claimant had cooperated with Mrs. Jacas and the

transfers could not have been effected if the claimant had not signed the relevant documents. He also submitted that what the defendants have done is in accordance with the terms of the will.

[20] In the circumstances he submitted that the claimant has not suffered any prejudice as a result of the actions of Bryan Jacas in either his personal or representative capacity.

[21] He stated that the issues that the claimant has raised are pecuniary in nature and an award of damages would be an adequate remedy. Reference was made to the case of ***Montaque (Executrix of the estate of Seaton Montaque) v. G.M and Associates Limited and another*** (supra) in support of that submission. He also pointed out that Mrs. Jacas had been collecting the rent for the property prior to the testator's death.

[22] Counsel also stated that the claimant has not been suspended from his post and as such the case of ***Allwood v. Administrator General of Jamaica and another*** (supra) is irrelevant in relation to that point.

Discussion

[23] The duty of an executor is to administer the testator's property and to carry into effect the terms of the will. In ***Re Stewart; Smith and another v Price and others*** 5 ITELR 622 at 630, Laursen J in his examination of the role of an executor stated:-

“An executor is the person appointed by a testator or testatrix to administer his or her property and carry out the provisions of the will. To this end the executor has certain specific statutory and common law duties and powers, namely to:

- *Bury the deceased;*
- *Make an inventory of assets;*
- *Pay all duties, testamentary expenses and debts;*
- *Pay legacies;*
- *Distribute the residue to the persons entitled; and*
- *Keep accounts.*

The learned author, G Nevill, in Maxton (ed) Nevill's Law of Trusts, Wills and Administration in New Zealand (8th edn, 1985) notes at ch 20, p 407:

'But before proceeding to discuss the technicalities of the duties it seems opportune to mention that in the case where a will has been left, many of the duties here set out are really facets of the one primary duty of an executor, to propound and maintain the will by which he has been appointed. Let others attack that document if they wish. It is not for him to aid and abet them in their design of rewriting the testator's directions a little nearer to their heart's desire. It is not for him unwarrantedly to thwart them.'

The obligation to perform these duties arises within the special fiduciary relationship which exists between a trustee as a fiduciary to whom property is entrusted, and the beneficiaries entitled to that property. The most obvious element of that relationship is the requirement imposed in equity that the trustee will deal with those assets with the utmost probity which, in turn, requires that the trustee will not on any account allow

him or her to have or acquire any personal interest in those assets without the express and informed consent of the beneficiary. There is, in addition, a further aspect to an executor's fiduciary responsibilities, namely a duty to act even-handedly between the beneficiaries. It is within this area of responsibility that the obligation not to unwarrantedly thwart claims arises”.

[24] An executor’s title is derived from the will and he may pay or release debts as well as get in and receive the testator’s estate even before probate is granted. He holds the assets of the estate for the sole purpose of carrying out his duties and functions and is therefore in a fiduciary position in relation to those assets and may be held liable if he is negligent or reckless in his management of the estate. It is for this reason that he is bound by his oath to *“faithfully collect, get in and administer according to law all the real and personal estate of the deceased”* and to *“render a just and true account of”* his *“executorship whenever required by law so to do”*.¹

[25] In this matter it has been alleged that the defendants are intermeddling in the estate and have placed the claimant in a position where he will be in breach of the law. The specific act with which the court is concerned in this application is the collection of the rent from the tenants at the property.

[26] Where a person intermeddles in an estate in such a way as to denote the assumption of authority or an intention to exercise the functions

¹ Civil Procedure Rules 2002, Form P.1

of an executor he may be treated as an *executor de son tort*. Such a person is liable to be sued by the rightful representative, beneficiaries and even creditors. It should also be noted that the slightest acts of interference are sufficient to attract that designation. A definition of this term was given in ***Peters v. Leeder*** (1878) 47 L.J.Q.B. 573 where Lush J said:

“An executor de son tort is ‘one who takes upon himself the office by intrusion, not being so constituted by the deceased, nor for want of such constitution substituted by the Court to administer’ (See Williams on Executors, cap 5.)

The definition implies a wrongful intermeddling with the assets, a dealing with them in such a way as denotes an usurpation of the functions of an executor, an assumption of authority which none but an executor or administrator can lawfully exercise.”

[27] The issue of whether the defendants have intermeddled in the estate is not one which needs to be resolved at this stage. The claimant is at this juncture seeking to prevent the Bryan Jacas from collecting any more rent from the tenants at the property.

[28] In order to ground a claim for an injunction the claimant must first satisfy the court that there is a cause of action - ***Fourie v. Le Roux*** [2007] 1 W.L.R. 320. The substantive claim in this matter is for an account.

[29] 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 (supra). 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.

[30] Where the court finds that there is in fact a serious issue to be tried, it must then be determined whether damages would be an adequate remedy. In the event that damages would not be an adequate remedy, it must be determined whether the defendant would be adequately compensated under the claimant's undertaking as to damages.

[31] 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.

[32] In this matter, the claimant has alleged that the defendants are intermeddling in the estate and is seeking to restrain the defendants from collecting the rent from the tenants at the property. It should however be noted, 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.** (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*".

[33] His Lordship referred to the ***American Cyanamid*** case and stated that where damages would provide an adequate remedy, the injunction ought not to be granted.

Is there a serious issue to be tried?

[34] It is accepted that where a court is making an assessment under this head, it should not to embark on an exercise which is akin to a trial. In fact, the claimant is not required to demonstrate that he has a prima facie case. Lord Diplock in the ***American Cyanamid*** case expressed the 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”.

[35] 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.*** (supra) 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.

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

- i. whether the defendants have intermeddled in the estate; and if so
- ii. whether the claimant is entitled to an account in relation to their activities.

[37] It is clear from the affidavits which have been filed in this matter that the assessment of the credibility of the parties is critical to its resolution. The claimant has asserted that the defendants have transferred certain properties, taken possession of Certificates of Title and wrongfully collected rent in respect of the property. The first defendant has stated that where the first two acts are concerned, this was done with the claimant’s approval and acquiescence. Where the collection of the rent is concerned, he has said that Mrs. Jacas has a life interest in the property and the proceeds of the rent have always been paid to her.

[38] Mrs. Jacas’ interest in the property is not yet registered and as such has not been realized. In law, the only person authorized to collect monies

owed to the estate would be the executors. It has been alleged that Bryan Jacas has intermeddled in the estate. There have however been allegations that various agreements were made in respect of the management of the estate. The claimant has raised certain issues which amount to an allegation of fraud. These are matters for the determination of a trial court which will have the opportunity to hear the evidence and assess the credibility of the witnesses.

[39] I am therefore satisfied that there is a serious issue to be tried.

Adequacy of Damages

[40] 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.

[41] 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 irreparable harm. There are however, no set guidelines as to what factors are to be taken into account to assist the court in making its assessment under this head. This was stated by Lord Diplock in ***American Cyanamid*** :

“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 the factors which a court is required to consider are the probable consequences of the granting or withholding of the injunctive relief are not fixed. Each case is to be assessed on its own facts. In *Spry*, **The Principles of Equitable Remedies**, 6th 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'.

[42] In Bean, ***Injunctions***, 10th edition the learned author in his articulation of the principle to be applied said:-

"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".²

² Paragraph 3.19

[43] In this matter the claimant has asserted that he will be severely prejudiced if the defendants are not prevented from collecting the rent from the tenants at the subject property. Counsel for the defendants has argued that it is simply a matter of dollars and cents and that damages would in those circumstances, be an adequate remedy. Evidence was also presented that the transfer tax for all of the properties had already been paid by the defendants. Mrs. Taylor on the other hand made the point that the actions of the defendants have interfered with the claimant's ability to carry out his functions in accordance with the law. This she said would have would have a negative impact on his administration of the estate.

[44] Where the defendants are concerned, their answer to the allegations that they are intermeddling is that the claimant is taking an inordinately long time to complete his administration of the estate. There are legal remedies which are open to them if that is the case. The defendants cannot rely on self-help and subsequently seek mount that as a defence.

[45] The responsibilities of an executor, according to case of **Re Stewart; Smith and another v Price and others** (supra), are fiduciary in nature. Consequently, where he fails to carry out those functions or is negligent in their execution he may be held to be personally liable. (see **Commissioner of Stamp Duties v. Livingston**, supra). The principle that an executor's duties are fiduciary in nature was also accepted in the case of **Iva Freeman v. Ina Freeman and another** BVI HCV 2004/0151 (delivered on the 19th December 2006).

[46] Mr. Mayne has urged the court to accept his submission that any loss which may be suffered by the claimant is pecuniary in nature and

ought to be dealt with in a similar manner as the application in the case of ***Montaque (Executrix of the estate of Seaton Montaque) v. G.M and Associates Limited and another*** (supra). I am unable to agree with Counsel on that point. That case was concerned with the bequest of the proceeds of the sale of the testator's one half share in the respondent company. The parties disagreed as to which of the company's Articles was the appropriate one to effect their disposal. In those circumstances the Court of Appeal upheld the learned trial Judge's finding that there was no serious issue to be tried and that an award of damages would be an adequate remedy.

[47] In present case, there are thirteen beneficiaries who have an interest in the properties which remain to be transferred. Unless Mr. Bryan Jacas is saying that the claimant ought to fund any future expenses out of his own pocket their continued action of collecting the rental income is likely to result in his inability to wind up the estate. His actions will almost certainly guarantee that he will be unable to account to the beneficiaries for those sums. This would be a clear breach of his fiduciary duty for which he would be personally liable. I agree with counsel for the claimant that damages would not be an adequate remedy in circumstances where the claimant is unable to fulfil his fiduciary duties.

[48] If the present situation is allowed to continue the claimant would be rendered defenceless against any action that any one or all of the thirteen beneficiaries could take against him. When one considers that the beneficiaries could, for instance, seek to force him to complete his administration their action could result in irreparable harm. In such a case damages in my view, would not provide an adequate remedy

Balance of convenience

[49] This issue falls to be considered where there is doubt as to the adequacy of damages. In **National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.**(supra) Lord Hoffman in addressing this point said:-

“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.”

[50] In considering where the balance of convenience lies. In ***American Cyanamid*** Lord Diplock stated:-

“Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies..”

[51] The balance of convenience in my view is in favour of the claimant who is and will continue to suffer irreparable harm if the actions of the Mr. Bryan Jacas are allowed to continue. Therefore the application for an interlocutory injunction is granted. Costs are awarded to the claimant to be taxed if not agreed.