[2022] JMCC Comm 38

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE INSOLVENCY DIVISION

CLAIM NO. SU2022IS00009

IN THE MATTER OF MYSTIC MOUNTAIN LIMITED (In Receivership)

AND

IN THE MATTER of section 79 of the INSOLVENCY ACT, 2014

AND

IN THE MATTER of section 46(2) of the SECURITY INTEREST IN PERSONAL PROPERTY ACT, 2013

BETWEEN	**KARIBUKAI LIMITED**	**APPLICANT**
AND	**SKY-HIGH HOLDINGS LIMITED (as purported Bondholder and as purported agent of the Bondholder's Trustee the JCSD Trustee Services Limited)**	**1ST RESPONDENT**
	MYSTIC MOUNTAIN LIMITED (IN RECEIVERSHIP AND BANKRUPTCY)	**2ND RESPONDENT**

WILFRED BAGHALOO **3RD RESPONDENT**

(Receiver Manager [and former Bankruptcy Trustee] of Mystic Mountain Limited, in Receivership and Bankruptcy)

Insolvency- Receivership – Receiver appointed under Debenture- Application for injunction to prevent Receiver exercising power of sale- Whether serious issue to be tried- Adequacy of damages- Balance of convenience – Section 79 Insolvency Act and section 46(2) Security Interest in Personal Property Act- Whether Receiver acted in good faith- Whether best price reasonably obtainable-Whether court has jurisdiction to make supervisory order in relation to the power of sale.

Caroline Hay KC, Sheldon Robinson, Y.M. Fitz-Henley, and Zurie Johnson for the Applicant instructed by Ramsay & Partners, attorneys-at-Law

Carlene Larmond KC, Dane Patterson, and Giselle Campbell for the 1st Respondent instructed by Patterson, Mair, Hamilton, attorneys-at-Law

Dr Christopher Malcolm, Ivally McDonald, De-Anna Toussaint for the 2nd Respondent instructed by Debbie-Ann Gordon and Associates, attorneys-at-Law.

John Vassell KC, and Julianne Mais Cox for the 3rd Respondent instructed by DunnCox, attorneys-at-Law.

Fayola Evans-Roberts for the Supervisor of Insolvency

HEARD: 28th October, 1st November, 2nd November, 4th November and, 11th November 2022.

In Open Court

COR: BATTS J

INTRODUCTION

[1] On the 4th and 11th days of November, 2022 I, announced my decision and, made the orders stated at paragraph 46 of this judgment. I promised then to put my reasons in writing at a later date. This judgment is the fulfilment of that promise. It has been produced in this timely manner due, in no small measure, to the assistance rendered by my judicial clerk Mrs Yanique Brown.

[2] It is first necessary to identify each party and explain their relation to the insolvent company. The Applicant is the sole shareholder in Mystic Mountain Ltd the insolvent company. The 1st Respondent is an agent of the debenture holder, JCSD Trustee Services Limited, which is a secured creditor of Mystic Mountain Ltd. The 2nd Respondent is the insolvent company Mystic Mountain Ltd which is in receivership and bankruptcy. The trustee of the 2nd Respondent is Ms Debbie Ann Gordon, an attorney at law. The 3rd Respondent Mr. Wilfred Baghaloo is the Receiver, appointed under power contained in a debenture and, the former trustee of the 2nd Respondent. The Supervisor of Insolvency appeared by counsel but took no active part in these proceedings save to make submissions on points of law at my invitation.

[3] A chronology of relevant events was helpfully provided by counsel for the 3rd Respondent. It went unchallenged. I can therefore, with reference also to the affidavits filed, concisely state the material facts.

a. On the 26th day of January 2022 there was a demand for accelerated payment on default issued by JCSD Trustee Services Limited (JCSD) to Mystic Mountain Ltd;
b. On the 3rd February 2022 Mystic Mountain Limited filed a Notice of Intention to Make a Proposal, dated the 28th January 2021. It named Mr. Caydion Campbell as proposed Trustee.
c. Also on the 3rd February 2021 JCSD filed a Notice of Intention to Enforce Security under section 72(1) of the Insolvency Act;
d. By a Deed of Appointment dated the 23rd day of September 2021 Sky-High Holdings Ltd was made the agent for JCSD;

e. On the 8th day of February 2022 the secured and unsecured creditors of Mystic Mountain Limited rejected the proposal. The Trustee reported to the Supervisor of Insolvency on the failure of the proposal. Mr. Wilfred Baghaloo was appointed Receiver, over all of Mystic Mountain Limited's assets, by the secured creditors.
f. On the 9th day of February 2022 Mystic Mountain Ltd was by law deemed bankrupt and a Certificate of Assignment issued by the Supervisor of Insolvency. Mr Caydion Campbell was named in the certificate as Trustee in Bankruptcy of Mystic Mountain Limited.
g. Mr Wilfred Baghaloo gave Notice of his appointment as Bankruptcy Trustee on the 25th March 2022. He was however appointed same on the 17th March 2022 at a meeting of creditors;
h. A Claim was filed by the Supervisor of Insolvency, being Claim No. SU2022IS00006 and, in which judgment was delivered by me on the 22nd April 2022. I there declared that a Receiver, appointed by a secured creditor, can be appointed Bankruptcy Trustee by the unsecured creditors;
i. In or about April 2022 the assets of Mystic Mountain Ltd were advertised by the Receiver;
j. On or about the 25th April 2022 the Supervisor of Insolvency issued a Certificate of Appointment of Wilfred Baghaloo as Trustee in Bankruptcy;
k. On the 15th day of June 2022 Mr Wilfred Baghaloo resigned as Bankruptcy Trustee which resignation, at the request of the Supervisor of Insolvency, did not take effect until a suitable replacement was found;
l. The 20th day of June 2022 was the original deadline, for submission of bids for purchase of the insolvent company's assets, but that was extended to the 15th day of July 2022.
m. A preferred bidder was selected;
n. On the 8th day of August 2022, at a meeting of creditors, Ms Debbie Ann Gordon was appointed Trustee in Bankruptcy. A Certificate of Appointment of Debbie-Ann Gordon as Trustee in Bankruptcy was issued by the Supervisor of Insolvency on the 10th day of August 2022;

o. The Applicant bid unsuccessfully for the assets placed on the market.

[4] It is in the above stated factual context that, on the 14th day of September 2022, an Urgent Notice of Application for Court Orders was filed, see page 189 of bundle #1(Judge's Bundle of Documents filed on the 6th day of October 2022). The orders applied for were as follows:

1. *"The 1st Respondent and the Receiver-Manager for the 2nd Respondent are restrained until further Order of this Honourable Court or determination of this claim, whether by its directors, agents, servants, officers, employees, affiliates and any other associated party from making or entering any agreement for any legal or equitable transfer by way of sale, gift, exchange, grant, assignment, surrender, release or other disposal of any of the assets of the 2nd Respondent without prior permission of this Honourable Court.*
2. *Costs.*
3. *Liberty to apply".*

[5] The Urgent Notice of Application was heard on the 14th day of September 2022 and an injunctive order made by the Honourable Mrs. Justice C. Brown Beckford, see bundle #1 page 606. On the 29th day of September 2022 the 3rd Respondent filed a Notice of Application for Court Orders, see bundle # 1 page 1. The 1st Respondent on the 4th day of October 2022 also filed a Notice of Application for Court orders. That application was amended on the 12th day of October 2022, see bundle # 2 pages 1 and 7. The Respondents by these applications sought to have the order of the 14th day of September 2022 set aside or discharged and any further application for an injunction refused. The 1st and 3rd Respondents also seek to have the Applicant provide security for costs of these proceedings in the sum of US$25,000 and US$60,000 respectively. The parties ultimately came to an agreement on the matter of security for costs.

[6] The applications for my determination therefore are: (i) the inter partes hearing of the application for continuation of an injunction restraining the 1st and 3rd Respondents from exercising the power of sale and, (ii) the 1st and 3rd

Respondents' applications to discharge the original injunctive order, refuse a further order and, strike out certain portions of the affidavit evidence.

[7] All Counsel relied on written submissions and were permitted to speak to them. I have considered carefully the evidence as well as the written and oral submissions. Reference to same will be made only to the extent necessary to explain my decision.

APPLICANT'S CASE

[8] The grounds on which the Applicant seeks injunctive orders, as stated in its Notice of Application, are as follows:

1. *"The Applicant has a good arguable case in that there are questions regarding whether the Receiver has discharged and/or is discharging his duty to act in good faith and his duties to the Company in which the Applicant is an interested party/person, and that directions are required from the Court in order to determine the methods to be used by the Receiver.*
2. *By virtue of common law and section 30 of the Debenture which the 1st Respondent seeks to enforce, the Applicant will have no recourse once any legal or equitable transfer by way of sale, gift, exchange, grant, assignment, surrender, release or other disposal of any of the assets of the 2nd Respondent is made.*
3. *The Receiver-Manager of the 2nd Respondent has indicated that a sale of the Company's assets is imminent.*
4. *The balance of convenience favours the granting of the injunction to maintain the status quo pending determination of this matter in light of the above and that the Company is now performing in a manner that can facilitate suitable payments towards the debt owed to the 1st Respondent.*
5. *Damages would not be an adequate remedy to the Applicants in the circumstances, since the Applicant is at risk of losing its entire interest in the Company including its ability to realize its vision for*

the Company, and will have no recourse against a bona fide purchaser.

6. *Damages wold be an adequate remedy for any loss sustained by the secured creditor and/or Company by virtue of an injunction.*
7. …..". [see page 190 bundle # 1]

[9] Mrs Hay KC, for the Applicant, indicated that the application is presented pursuant to section 49(h) of the ***Judicature (Supreme Court) Act*** and Part 17 of the ***Supreme Court Civil Procedure Rules 2002(CPR).*** Part 17 is made applicable to proceedings in the Insolvency Division by way of ***CPR Rule 77.28(1)***. The Applicant contends that the first hearing of the application for the interim injunction was not ex parte but was short served. Short service occurred because the hearing was set for 3:00pm on the 14th day of September 2022 only hours after the claim was filed. This is the reason notice was sent by email prior to the hearing. In support of its position on short service of notice counsel for the Applicant relied on ***National Commercial Bank of Jamaica Limited v Olint Corpn. Ltd (Privy Council Appeal No.61 of 2008)*** reported at ***[2009] 1 WLR 1405.*** Counsel submitted that it is trite law that any notice is better than no notice. These assertions are the Applicant's response to the Respondents' assertion that the Applicant had a duty of full disclosure because the application was made ex parte. The Applicant also denied making any material non disclosures.

[10] King's Counsel also relied on ***Williams et al v The Commissioner of Lands & Anor [2012] JMSC Civ. 118*** at paragraph 34, and submitted that Her Ladyship Mangatal J adopted the guiding principles of the locus classicus ***American Cyanamid Co. v Ethicon Ltd. [1975] A.C.396*** when granting an application for interim injunction. It was asserted that the test for injunctive relief was in two stages. These were, she submitted, whether there was a serious issue to be tried that is whether the material before the Court raised issues that required further examination at a trial and, whether the overall justice of the case supported the grant of an injunction.

[11] It was also submitted that insolvency law and practice are highly technical. Its objective is to create an environment for the rehabilitation of debtors and the preservation of viable companies. Section 70 of the ***Insolvency Act*** empowers any interested party to seek the Court's intervention and directions relating to the duties of the 3rd Respondent. King's Counsel submitted that the 3rd Respondent failed to present an account of his receivership and to disclose critical information such as:

a. *"satisfying the Court that he has acted in capacity as Receiver-Manager and as Trustee during the time he held both positions in conformity with the statutory duty to act in a commercially reasonable manner and in good faith in his dealing with all bidders for the property and/or assets of the 2nd Respondent, subjecting them all to the same requirements;*
b. *satisfying the Court that the debenture and Trust Deed pursuant to which he has been appointed entitle him to dispose of the assets of the Company which he intends to transfer;*
c. *demonstrating to the Court that he has satisfied himself that the assets of the Company are not being sold to a party connected to the 1st Respondent; and*
d. *demonstrating to the Court that he has not exercised his powers in a manner that in all likelihood will substantially increase the burden to the Company beyond what would otherwise be the case." [see paragraph 28 of Applicant's submissions (bundle 5 tab A)].*

All these matters, it was submitted, raised triable issues.

[12] The Applicant submitted that the existence of a serious triable issue was connected also to the insolvency of the 2nd Respondent and whether the steps taken by the 3rd Respondent, to resolve the insolvency, were commercially reasonable and conducted in good faith. This submission counsel for the Applicant argued should be considered in light of the fact that the purchaser in the sale could be connected to the 1st Respondent. The triable issue is whether or not the 3rd Respondent has discharged his common-law and statutory duties

to act in good faith and in a commercially reasonable manner. It was asserted that, by virtue of section 36(4) of the ***Security Interest in Personal Property Act,*** the secured creditor has a duty to act in good faith to obtain the best price at the time of disposal of the secured property that is reasonably obtainable. A duty that is deemed discharged when the property is disposed of in a commercially reasonable manner, see the decision of ***Lashmont Financial Services Limited & Anor v Morgan's Harbour Limited (in receivership) [2019] JMCA Civ 47*** at 92, which counsel submits has accepted the duties at common law enunciated by the Judicial Committee of the Privy Council in ***Downsview Nominees Ltd and Anor v First City Corporation Ltd and Anor [1993] AC 295*** at page 317:

> *"A mortgagee owes a general duty to subsequent encumbrancers and to the mortgagor to use his powers for the sole purpose of securing repayments of the moneys owing under his mortgage and a duty to act in good faith."*

[13] Evidence of bad faith supporting a triable issue, according to the Applicant's counsel, is that the 1st Respondent which is the secured creditor:

a. offered to purchase the Applicant's interest in Mystic Mountain Limited
b. indicated an interest in acquiring it;
c. has a director from a "Rescue Group" that wrote expressing an interest; and reached an agreement with bondholders concerning preservation of the lease which did not concern repayment of the debt;
d. resisted proposal attempts for full repayment of the debt; and
e. appointed a Receiver, the 3rd Respondent, who stated that he did not know if the proposed purchaser was connected to the 1st Respondent.

[14] The Applicant's counsel also submitted that the loss of assets through the sale by the Receiver-Manager would leave Mystic Mountain Ltd and its shareholders with a shell of a company, unable to realize its unique purpose. Counsel cited Brooks J in ***Ocean Chimo Limited v RBTT Bank Jamaica Limited Claim No. 2010 HCV 02413*** at paragraph 45:

"it is said that because real property has its own unique characteristics, damages is not usually an adequate remedy for a party faced with losing that property."

This, it is submitted, is also why damages are not an adequate remedy and why the balance of convenience favours the grant of the injunction. The balance of justice, it was submitted, strongly favours the preservation of the status quo with an order that the Respondents be compensated in damages in the event that the injunction is later determined to have been wrongly granted.

1ST RESPONDENT'S CASE

[15] Miss Larmond K.C., for the 1st Respondent, submitted that the application does not comply with the relevant provisions, of **Part 17 of the Civil Procedure Rules 2002,** in the following respects:

"a) Rule 17.2(3)- absence of an undertaking to serve the claim by a certain date;

b) Rule 17.4(2)- absence of an undertaking as to damages and of any order dispensing with the requirement for such an undertaking;

c) Rule 17.4(3)- failure to give the requisite notice, or to obtain an order abridging time for serving the application;

d) Rule 17.4(4)- the order exceeds the 28-day period prescribed by this rule." [see bundle # 7 (1st Respondent's Outline Arguments filed 13th October 2022)].

It was also contended by the 1st Respondent that rules 11.16 (1), (2) and (3) of the ***CPR 2002*** are relevant because the application was made without notice and heard in its absence. The purported service by email was not proper and the provisions of rule 17.4(4) were not adhered to. In this case 'notice' was sent by email one hour and fifteen minutes before the hearing of the application. The 'notice' was wholly insufficient because, on the evidence, the Applicant knew since the 8th day of August 2022 of the circumstances giving rise to the application for the injunction. Notice, as required by Rule 17.4(3), could

therefore have been given. King's Counsel, also argued that several paragraphs in the affidavit of Rafael Preschel, filed on the 19th September 2022 on which the Applicant relies, contravene the rule against hearsay evidence and should be struck out as being scandalous, irrelevant or otherwise oppressive.

[16] On the substantive grounds, for setting aside the interim injunction and refusal to grant further injunctive relief, King's Counsel argued that there are no serious questions to be tried and that the 1st Respondent is not a proper party to the claim, see section 79 of the ***Insolvency Act*** and section 46(2) of the ***Security Interest in Personal Property Act***. Also that there is absolutely no relief being sought against the 1st Respondent. The Notice of Application does not direct the 1st Respondent to do, or abstain from doing, any act. Neither do the declarations sought concern the 1st Respondent. This court ought therefore to treat this application as an abuse of process directed at a wholly impermissible fishing exercise. The affidavits contain speculative assertions and display only efforts made to elicit information from the 3rd Respondent. When section 79 of the ***Insolvency Act*** and section 46 of the ***Security Interest in Personal Property Act*** (hereinafter referred to as SIPPA), are examined the 1st Respondent could not be subject to any of the orders listed. As such there is no question to be tried in respect of the 1st Respondent.

[17] It was submitted also that there was no undertaking as to damages. Reliance was placed on ***TPL Limited v Thermo Plastics (Jamaica) Limited [2014] JMCA Civ 50,*** and specifically paragraphs 67 to 69 of that judgment***.*** That court made it clear that a party must give evidence of a willingness and ability to provide an undertaking as to damages, and an ability to pay them. Mr Preschel's affidavit it is said is devoid of any such evidence.

2ND RESPONDENT'S CASE

[18] Counsel for the 2nd Respondent made oral submissions which highlighted that his client, having been substituted for the 3rd Respondent as Trustee, requested records and information from the 3rd Respondent as to several matters including the preferred bid price. The records and information requested have not been provided and are required because the Trustee has an obligation to protect the

estate and the interest of all creditors. As to the substantive issue before the court counsel relied on section 88 of the ***Insolvency Act*** and submitted that triable issues related to whether restraining the sale was for the benefit of all creditors, and the need to ventilate the question of whether the 3rd Respondent had the authority to sell the assets.

3RD RESPONDENT'S CASE

[19] Mr. Vassell KC, for the 3rd Respondent, relied on ***American Cyanamid v Ethicon Limited [1975] 1 AC 396*** for the legal principles applicable. Counsel submitted that the starting point is to see whether or not the Amended Fixed Date Claim raised a serious issue to be tried, if it does, then the other two elements of the three pronged test come into play. The voluminous paper notwithstanding, the claim is devoid of any merit and fails to establish a serious issue to be tried. The Applicant's complaint that there is a conflict of interest between the role of Trustee and Receiver is without merit, as this issue was already decided by this court in a previous suit, see Claim Number SU2022IS00006, bundle # 1 page 87 to 88. It was submitted that, the 3rd Respondent having assessed that the preferred bidder had made the best offer, the court should not delay the sale process.

[20] King's Counsel also urged that a Receiver's duty was explored in the case of ***Morgan's Harbour Limited (In Receivership) v Lashmont Financial Services Limited & Anor [2018] JMCC Comm 9***. It was there decided that the duty is to exercise his powers in good faith and for the purpose of repayment of the debt owed. It was held that a Receiver cannot be in breach of his duty of good faith in the absence of dishonesty, improper motives or bad faith. Additionally, that a Receiver's duty to act in a commercially reasonable manner included the duty to attempt to obtain the best price obtainable for the assets in the circumstances. This does not mean the highest price but that he must take care to obtain a proper price.

[21] In response to the complaint that the preferred bidder is somehow "*connected"* to the 1st Respondent counsel stated that even if this is so it is permitted by

section 40 of ***SIPPA*** which provides that a secured creditor may purchase the secured property if the purchase is a public sale for a price that is reasonable in relation to the market value. It is submitted that the Applicant's case has no real prospect of success and that there is no triable issue between the parties. Further to this counsel submitted that the Applicant failed to disclose to the court that it was one of the competing bidders in the sale process but was ultimately unsuccessful.

[22] King's Counsel submitted further that if damages are an adequate remedy the injunction ought not to be granted. In this regard it was argued that any loss suffered in the sale process, due to the actions of the 3rd Respondent, would be to the 2nd Respondent and the other creditors. The Applicant it is submitted does not stand to lose its interest in the company since the sale is of the assets and not the shares. Damages are calculable and therefore constitute an adequate remedy for the company and its creditors.

THE RELEVANT STATUTORY PROVISIONS

[23] It is convenient at this juncture to state the statutory provisions relevant to, the duty of a Receiver exercising a power of sale and, the court's supervisory jurisdiction.

a) ***The Insolvency Act, 2014:***

Section 79:

(1) "A receiver or other interested party, may apply to the Court for directions in relation to any provision of this Part.

(2) The Court shall in relation to an application for directions under subsection (1) give such directions, it considers proper in the circumstances including an order-

(a) appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;

(b) determining the notice to be given to any person, or dispensing with notice to any person;

(c) declaring the rights of persons before the Court or otherwise; or directing any person to do, or abstain from doing, anything in relation to the receivership;

(d) fixing the remuneration of the receiver or receiver-manager;

(e) requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed

(i) to make good any default in connection with the receiver's or receiver- manager's custody or management of the property and business of the company;

(ii) to relieve any such person from any default on such terms as the court thinks fit; and

(iii) to confirm any act of the receiver or receiver-manager; and

(f) giving directions on any matter relating to the duties of the receiver or receiver- manager."

Section 277 states:

"Subject to this Act, the Court shall have full power to decide all questions of priorities in accordance with applicable law and all other questions whatsoever, whether of law or fact, that may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide in furtherance of the objects of this Act."

b) ***The Security Interests in Personal Property Act, 2013 (SIPPA)****:*

Section 46:

(1) "A security contract may provide for the appointment of a receiver and, except as provided in this Act or any other law, for the rights and duties of a receiver.

(2) On application by an interested person, the Court may –

(a) appoint a receiver, notwithstanding the absence in the security contract of any provision for the appointment of a receiver;

(b) remove, replace or discharge a receiver, whether appointed by a court or under a security contract;

(c) give directions on any matter relating to the duties of a receiver;

(d) notwithstanding anything contained in a security contract, approve the accounts and fix the remuneration of a receiver;

(e) notwithstanding anything contained in a security contract, make an order requiring a receiver, or a person by or on behalf of whom the receiver is appointed, to make good any default arising in connection with the receiver's custody, management or disposition of the secured property or any other property of the debtor or to relieve the person from any default or failure to comply with this Part;

(f) exercise with respect to receivers appointed under a security contract the jurisdiction that it has over receivers appointed by the Court."

Section 36 (4), (5) and (6) provide:

"(4) A secured creditor has a duty to act in good faith to obtain the best price reasonably obtainable when disposing of secured property pursuant to this Part, and that duty shall be deemed to have been discharged where the disposition of secured property is made in a commercially reasonable manner as provided in subsection (5).

(5) A disposition of secured property is made in a commercially reasonable manner if the disposition is made -

(a) in the usual manner in any recognized market;

(b) at the price current in any recognized market at the time of the disposition; or

(c) otherwise in conformity with reasonable commercial practices among dealers in the type of property that is the subject of the disposition.

(6) For the purposes of subsection (5), the fact that a greater amount could have been obtained by a disposition at a different time or by a different method from that selected by the secured creditor is not of itself sufficient to preclude the secured creditor from establishing that the disposition was made in a commercially reasonable manner."

ANALYSIS

[24] I will first consider the procedural issues. The complaint of short notice is not fatal to the grant of interim injunctive relief. The jurisdiction to grant ex parte orders is too well established to be seriously challenged however, where this is done, the applicant has a duty to disclose all material facts and law to the court, see ***North American Holdings Co. Ltd v Androcles Ltd [2015] JMSC Civ 151 (unreported judgment of Sykes J, 22nd July 2015)*** and ***Port Kaiser Oil Terminal SA v Rusal Alpart Jamaica (A Partnership) [2016] JMCC Comm 10 (unreported judgment of Batts J, 7th April 2016).*** Ex parte applications for injunctive relief are reserved for occasions where either, it is impractical to serve the Respondent or, where to do so will be prejudicial to the application, see paragraph 13 of Lord Hoffman's judgment in ***National Commercial Bank v Olint Corptn. Ltd (cited at paragraph 9 above).*** This is why, for example, applications for freezing orders are ex parte and without notice. The duty of full disclosure applies to ex parte applications generally and is not limited to applications for an injunction, see ***Masri v Consolidated Contractors International Company SAL [2011] EWHC 1780 (Comm) July 13 , 2011 (unreported) per Burton J at para 58*** and, ***page 730 "Civil Procedure 2016" (The White Book) Volume 1 at paragraph 25.3.5.***

[25] In this case the return date on the application is the same date on which it was filed. This suggests that the Registrar was satisfied as to the urgency of the application. It also means that the hearing was intended to be ex parte. This

must be so because the rules require a minimum period of notice, usually seven days, for service of applications. Where service is effected, but less than the required minimum notice is given, the court may still proceed to hear the application for injunctive relief. If the respondent to the application is absent the hearing is ex parte. If the respondent is present but has either, not filed affidavits in answer or, filed affidavits and complains about the short notice and/or an inadequate time to properly reply, the hearing is treated as "*an opposed ex parte"* application, see ***page 355 "*A Practical Approach to Civil Procedure" by Stuart Sime 5th edition**. In both cases, ex parte and opposed ex parte, the duty of full disclosure applies. Authority for this basic rule of practice, if needed, is to be found in ***CEF Holdings Ltd v Mundey [2012] EWHC 1524 QB June1, 2012 (unreported judgment, per Silber J at paragraph 183*** and ***"Civil Procedure 2016" Volume 1 (The White Book) at 25.3.5.1 (page 731).***

[26] In the case at bar notice of the application was sent by email to the 1st and 3rd Respondents on the same day of the hearing. Neither Respondent attended or was represented. It was in fact and law an ex parte hearing. There was a duty of full disclosure. It is manifest that the Applicant failed to disclose the fact that it was an unsuccessful bidder for the property the sale of which is being impugned. Whilst complaining that the 1st Respondent bid more than once the Applicant also failed to disclose that it also bid more than once, see exhibit JMC 1 to the 3rd affidavit of Julianne Mais Cox filed on the 31st October 2022. Such material non-disclosure suffices to justify a setting aside of the ex parte order. The setting aside of the ex parte order, however, does not necessarily mean that an injunction until trial will not be granted after the inter partes hearing, see ***The White Book 2016 (cited at paragraph 25 above) at 25.3.6 and 25.3.8 (pages 732 and 733***.

[27] The Respondents as we have seen complain about procedural irregularities. I do not find that cumulatively or individually they are fatal to the application. Rule 26(9) of the ***Civil Procedure Rules 2002*** gives the court power either, on application or its own motion, to give directions or make orders to cure such matters. In matters of urgency, and applications for injunctive relief often fall into that category, a court of justice must extend leniency. Counsel and his client

often have a short time to put together evidence and documentation. So clerical errors, and procedural omissions, are to be expected at times, see ***Brink's MAT Ltd v Elcombe [1988] 1 WLR 1350 at 1359 per Slade J*** and ***"The White Book 2016" (cited at paragraph 25 above) paragraph 25.3.6 (page 732).*** The matters complained of, see paragraph 15 above, have caused no prejudice to the Respondents. I would not on those grounds decline to hear the application. Had it become necessary I would have made such orders as were necessary to put things right. However, given the decision at which I have arrived, I do not think this is necessary.

[28] As regards the allegations of inadmissible, scandalous, irrelevant and/or hearsay evidence I will say that, at this interlocutory stage, the court is concerned with whether the evidence on the face of it demonstrates a serious question to be tried. I am not required to make any factual findings and will not do so in the course of this judgment. Hearsay evidence is permissible provided the source is attributed, see ***Rule 30.3(2)***. Irrelevant and/or scandalous evidence of no probative value is not permitted. I therefore briefly state my conclusion, on each paragraph objected to in the Perschell affidavit filed on the 29th September 2022 (page 192 bundle 1), as follows:

> Paragraph 14*: "Although an agreement was reached in principle between the bondholders and MML the bondholders had not signed the Agreements up to August 2020 given that such documentation had not been completed by MML's then Attorneys."*

This is a statement of fact, of which the affiant may have personal knowledge, given his position in a company which is the majority shareholder of the Applicant which in turn is sole shareholder of the 2nd Respondent (MML).

> Paragraph 15: *"I made repeated enquiries to Janet Morrison, an Attorney-at-Law of Hart Muirhead Fatta, to ascertain the reason for the delay in execution of the supplemental bond documents by the bondholders but I did not receive a clear explanation. RFA then requested a meeting of the MML board to discuss the issue, but this meeting did not occur as the then Chairman of the Board Mr.*

Michael Drakulich was reluctant to convene the meeting. RFA then discovered that the correct board member composition of MML (6-5 in favour of RFA) which ought to have been in place pursuant to a resolution passed in a previous board meeting was apparently not correctly applied and finalized."

This also contains factual averments which for similar reasons on the face of it the witness may have had first hand knowledge.

Paragraph 16: *"Despite these delays, I received a copy of a letter dated October 12, 2020 from Hart Muirhead Fatta to Myers, Fletcher & Gordon who represented the bondholders, in which it was confirmed that "the holders of the majority of the bonds made it clear that it had already agreed the terms coming out of the meeting on July 24, 2020 and were merely awaiting the ballots in order to vote and to execute the Supplemental Trust Deed and Amended DSRA Exhibited hereto and marked as RP4 for identification is a copy of the said letter dated October 12, 2020."*

This paragraph is unobjectionable

Paragraph 17: *"In or around December of 2020, after the Annual General Meeting of MML was held, and Hart Muirhead Fatta was replaced by Myers, Fletcher & Gordon as attorneys for MML, I was able to communicate with one of the original bondholders, who mentioned that "a certain turn of events" had occurred and the bond restructure documents were not yet signed to their knowledge."*

This paragraph contains hearsay evidence. The person from whom the information is obtained has not been specifically identified. The allegation is that "*bond restructure documents were not yet signed"* and is intended to support an assertion that the 1st Respondent has no standing. The paragraph is therefore struck out.

Paragraph 18: *“In or around the same time after enquiry by MML's attorney, I received a notice from JCSD Trustee Services Limited and discovered that an entity known as the "Mystic Mountain Rescue Group" which later incorporated the 1st Respondent and were taking steps to acquire the existing bond.”*

Paragraph 19: *“In or about December of 2020, JCSD Trustee Services Limited confirmed to the Applicant that the restructured bond agreements were not executed but instead some of the bondholders entered into Bond Purchase Agreements with the 1st Respondent (then called Mystic Mountain Rescue Group). It became clear to the Applicant that the 1st Respondent's objective was for the original bondholders to sell the bond to them, and their intention was to try to acquire MML's assets amount below fair market value and utilize the company's debt as a means of negotiation in exchange for equity or acquisition of its assets.”*

Paragraph 20: *“The 1st Respondent then entered into a bond purchase agreement with the original bondholders that would transfer the proxy votes of the Bond to the 1st Respondent and on or about January 26, 2021, MML was served with a Notice of Events of Default and other accompanying notices dated January 26, 2021”.*

Paragraph 22: *“I state unequivocally that at no time before sending the notice of default and acceleration of the loan did Sky-High afford MML or the Applicant the opportunity to discuss the renegotiation/restructuring of the terms of the Bond despite several attempts by RFA and the Applicant to open meaningful channels of communication. Exhibited marked RP7 is one such email dated January 5, 2021 from Josef Preschel to Mayberry Investments, Sky-High's agent.”*

These paragraphs (18 to 22) speak to matters which may be in the witness's personal knowledge and contain inferences he is entitled to express. He describes persons acting in their perceived financial interest. The paragraphs are unobjectionable.

> Paragraph 23: *"Further, and in the interim, RFA had successfully courted local investors in a bid to secure funding to refinance the debt to the original bondholders since the RFA anticipated an attempt by the 1st Respondent to take over MML by acquiring its debt. I wish to also state that it is within my personal knowledge that at least three potential Jamaican investors indicated that they received calls from someone who was part of the aforementioned "Mystic Mountain Rescue Group" which incorporated Sky-High, who told them not to get involved by supporting the refinancing of MML's debt. I verily believe this to have been an attempt by the 1st Respondent to frustrate the efforts of RFA to secure funding to save MML from insolvency. I was forced to come to this conclusion particularly after a conversation in March 26th 2021 when a Director of Sky-High indicated an interest in purchasing either all of MML's equity or RFA's interest in the Applicant in order to obtain control of MML as it would be a good addition to their portfolio of tourism products"*

This is hearsay evidence as he is reporting what unidentified persons told him someone had said to them. The purpose of the evidence is to support an allegation that the 1st Respondent actively discouraged persons who might have rescued the 2nd Respondent thereby inducing insolvency. The assertion is scandalous with little probative value. I will therefore strike the paragraph.

> Paragraph 25: "I *was instructed by my financial advisors and do verily believe that had the Mystic Mountain Rescue Group not interfered in the restructuring efforts with the original bondholders and the Bond been restructured on the terms agreed in principle by the original bondholders on July 24, 2020, MML would not have*

been in default with its senior creditors. In fact, MML has been operating on a positive EBITDA basis since December of 2020, even with the restrictions and reduced visitation associated with the COVID-19 pandemic, and had started to make interest payments to JCSD Trustee Services Limited in accordance with what would have been the restructured terms agreed in principle in July of 2020. I exhibit hereto marked RP8 for identification proof of interest payments made in June 2021, one quarter before the required interest payment of Sept 2021 as per the July restructure agreement."

The witness has attributed this bit of hearsay evidence albeit he has not identified the financial adviser by name. The relevance of what the debtor may have done in circumstances where insolvency has in fact occurred escapes me. However as it forms part of a general narrative I will not strike out the paragraph.

Paragraph 26: *"To the best of my knowledge, information and belief EBITDA is a measure to determine profitability of a company and its ability to service its debt obligations. EBITDA stands for earnings before interest, tax, debt and amortization. RFA uses it as it is in our opinion a better way to determine operating profitability than looking at net income. I believe that the Receiver-Manager, Mr Baghaloo, has paid insufficient attention to MML's ability to be rehabilitated by servicing its debts, by disregarding its EBITDA and focusing on net income. His rush to sell the assets of MML has therefore unnecessarily and substantially increased the burden to MML"*

In this paragraph the witness, no doubt from his vantage point as an officer in the company, expressed an opinion. Even assuming he has expertise it is clearly one tainted by bias. More importantly however it is quite irrelevant given that the evidence is that the secured creditors rejected the proposal put forward. The paragraph will however be allowed to stand.

> Paragraph 27: *“That in or around February of 2021, MML appointed Caydion Campbell (licensed Trustee) as Trustee for the purposes of assisting with filing the proposal referenced above. The deadline for the proposal to be filed was March 5, 2021. On February 22, 2021, Mr. Campbell submitted a preliminary proposal to the JCSD Trustee Services Limited. In that letter, Campbell immediately indicated that "the possibility exists that we will not finalize the formal Proposal by 5 March 2021, in keeping with the requirement of Section 14(6) of the Act, MML intends to apply to the Supervisor for an Extension of Time to File the Proposal." MML, with support from Campbell as the Trustee, then requested an extension of time from the Supervisor of Insolvency which was ultimately granted. A copy of that letter is exhibited hereto and marked as exhibit RP9 for identification”*

This paragraph states factual matters as part of the narrative. It is unobjectionable.

> Paragraph 28: “*By way of letter dated March 5, 2021, the 1st Respondent wrote to Caydion Campbell indicating that by virtue of its bond purchase, they were now appointed the authorized representative for the bondholders and rejected the preliminary proposal which was sent to the JCSD Trustee Services. A copy of that letter is exhibited hereto and marked as exhibit RP10 for identification”*

This also is a factual assertion forming part of a general narrative.

> Paragraph 30: *“That the 1st Respondent through their Attorneys-at-law, Patterson Mair Hamilton, continued writing to the Supervisor of Insolvency and by letter dated May 7, 2021 opposing time being given to MML for it to submit a proposal for the repayment of the entire Bond as the creditors would have "no option but to accept full repayment'. I verily believe that this evidences that receiving*

repayment of the bond was not the 1st Respondents objective, as it is more interested in the assets of MML. Exhibited hereto and marked RP12 is a copy of Patterson Mair Hamilton's letter dated May 7, 2021."

This paragraph mixes a fact with the affiant's inference from that fact. The witness is entitled to commend the thought to the court. The paragraph will stand.

Paragraph 34: "I *do verily believe that MML had complied with all conditions for the financing to have been disbursed. Although the Term Sheet was not binding, we were told by MML's attorneys-at-law and verily believe that that is normal lending practice for final approval to be given once the conditions are met. Given the indications from previous potential investors of the 1st Respondent's interference during MML's fund-sourcing efforts, I found the decision to withdraw by NCB Capital Markets highly suspicious."*

This paragraph again mixes facts and conjecture. However it is not so scandalous as to move me to strike it out.

Paragraph 35: *"A meeting was convened on August 9, 2021 at which point, MML made an amended proposal to use the US$3M available from RFA to put the bond current per its original terms and prepay it through December 2021. Furthermore, it would establish an escrow that would guarantee the servicing of the bond through June 2022 and requested until such time to refinance the reminder(sic) of the bond debt, while the bondholders would maintain their security on the assets. MML's positive growth of cash-flow and the steady recovery of the tourism industry from the impact of the pandemic would have allowed for the full servicing and refinancing of the bond. It is my belief that any bondholder whose objective is a financial return would have accepted such proposal,*

however the 1st Respondent's objective being strategic, and to acquire the assets of MML at below fair market value expressed their desire to reject such proposal. I exhibit hereto the Trustee's Report of the said meeting marked as exhibit RP15 for identification."

The affiant is here stating as a fact the motives of the 1st Respondent which he has inferred from certain conduct. I therefore strike out the words *"objective being strategic, and to acquire the assets of MML at below fair market value".*

Paragraph 38: *"During the said meeting, several unsecured creditors voted to appoint Mr Baghaloo as Trustee in Bankruptcy and reject the proposal that would rehabilitate the company. I do verily believe that at least one unsecured creditor was influenced to reject the proposal at the persuasion or insistence of Mr. Michael Drakulich (MML's former CEO) and the 1st Respondent. Exhibited marked RP17 is an email dated February 9, 2022 from the Chief Financial Officer of one of MML's largest unsecured creditors in which he clearly indicates his decision was made on the basis of deference to Michael Drakulich. It seems in that email that the unsecured creditor viewed a vote to accept the proposal to fully repay the bond as against the interests of both Mr Drakulich and Sky-High".*

I see nothing objectionable in this paragraph

Paragraph 39: *"In the meeting of creditors held on March 17, 2022 RFA expressed concerns that unsecured creditors voted to appoint Mr. Baghaloo as bankruptcy trustee in place of Mr. Campbell, in particular as he was already the Receiver-Manager of what has been a contentious insolvency engagement. I noted that even though Mr. Baghaloo accepted and occupied both roles, he was clearly primarily interested only performing the duties of the Receiver-Manager and, never tried to do a proper evaluation of the*

potential for MML's rehabilitation to a profitable entity. Mr Baghaloo rather seemed more keen to invite bids for the acquisition of its property, plant, equipment, shares and assets. Several concerted attempts were made to have Mr Baghaloo disclose what efforts would be made to ensure that in the case of a sale the best market value would be realized. However, these efforts were fruitless."

I see nothing objectionable in this paragraph.

Paragraph 40: *"By March 2022, the Applicant had serious concerns about Mr. Baghaloo acting in his capacity as a receiver-manager"*

Save to observe that a company's concern can only be that of its directors the paragraph is unobjectionable.

Paragraph 41: *"With respect to the bidding process, the Applicant became aware of the number of bidders that were involved, following a conversation with the receivership team. It came to the attention of the Applicant that bidders had to deposit $1000.00 USD in MMLs account to participate in the bid and/or to have access to the information memorandum and other confidential information required to place a bid, however the number of bidders mentioned by the receivership team was inconsistent with the number of wire transfers into MML's account. There was one less wire transfer. At the time, the Applicant assumed that one of the bidders simply did not pursue the next step in the process. It later learned that there was one bidder that actually did not pay US$IOOO.OO for the bidding process via wire transfer into MML's account. I do verily believe that the payment of the $1000.00 was either not submitted or submitted in a different manner to conceal the identity of the bidder. I believe the withholding of the identity of the preferred bidder, particularly in light of the concerns regarding Sky-High's interest in acquiring the assets of MML raises several concerns about the commercial reasonableness and good faith in relation to*

the bidding process and the treatment of all bidders in the same way".

The witness spoke to a fact and the concerns that fact evoked. The paragraph is unobjectionable.

> Paragraph 42: *"The fact that the now preferred bidder didn't even submit the US$I,000.00 payment to acquire the information memorandum to place the bid, raises several concerns including the following questions:*
>
> *a. Did the preferred bidder submit the bid on time as per the timeline setup in the information memorandum provided to other bidders.*
>
> *b. If not, was the preferred bidder treated preferentially, including being provided access to privileged information that other bidders didn't.*
>
> *c. If no preferential treatment was given, how was the preferred bidder (if not connected to the secured creditor or to another party that has access to privileged information) able to place a bid if it did not have access to the information in the data-room and/or the information memorandum."*

This paragraph raised questions pertaining to the bidding process. There is nothing objectionable save to say they may not be directly relevant to what is the ultimate issue, that is, whether the price obtained is the best reasonably obtainable in the circumstances.

> Paragraph 44: *"Compounding our concern was the fact that the vigorous pursuit of the receivership process was at the expense of Mr. Baghaloo responsibilities as Trustee in Bankruptcy, a post he ultimately relinquished without explanation in or about June of 2022. However, no attempt was made to ensure that another trustee be appointed. RFA consequently wrote to the OSI requesting that the receivership process be halted until a new bankruptcy trustee was*

appointed who would have sufficient time to review all aspects of the receivership process before the assets would be disposed of. This would better ensure that the process would be performed in a manner in which the value of the estate was maximized".

There is no basis to strike out this paragraph.

Paragraph 45: *"During a meeting of creditors on or about the 8th of August 2022, Mr. Baghaloo further confirmed that despite the notice of the OSI he had continued the receivership process, and expected to sign the agreement with the preferred bidder from the invitation on, Sky-High, by or about the 15th of August 2022. RFA again raised the crucial need to appoint a new Trustee and give him/her the time to review all matters of the estate and the receivership process before the sale of the assets could be completed (a consideration with which the proposed new trustee expressed agreement). However, it is also worth noting that it does not appear that the new Trustee has received satisfactory interim reports from Mr. Baghaloo as I am informed by my Attorneys-at-law on record and do verily believe is required of receivers by section 73(2)(c) of the Insolvency Act".*

I see no basis to strike out this paragraph.

Paragraph 47: "*The value of MML and its potential far exceeds the value of the bond which the Receiver has opted to render by transfer of shares. That in light of the foregoing I do not believe that the Receiver has discharged and/or is discharging his duty to act in good faith or in a commercially reasonable manner in his duties to MML in which the Applicant is an interested party/person, and that directions are required from the Court in order to determine the methods to be used by the Receiver."*

This paragraph is also unobjectionable

> Paragraph 48: *"I do not believe that all bidders in the receivership process were considered on the same footing and subjected to the same requirements, and I humbly ask this Court to compel the Receiver to show that this was done".*

The witness has expressed his personal concern. This is unobjectionable. The probative value of that belief is a matter for the court to assess given the evidence, or lack thereof, to ground that belief.

> Paragraph 51: "I *do verily believe that there exists a serious issue to be tried by this Honourable Court as a result of the serious concerns regarding whether the receivership has been conducted in good faith and with commercial reasonableness"*

Again the witness is expressing his belief and concern. It is unobjectionable.

> Paragraph 52: "I *do verily believe that the balance of convenience favours the granting of the injunction to maintain the status quo pending the determination of this matter in light of the above and that MML is now and has been performing in a manner that can facilitate suitable payments towards the debt owed to the 1st Respondent, Sky-High."*

This paragraph is unobjectionable.

[29] On the question of the appropriate approach, when considering interlocutory relief, I prefer the position of the 3rd Respondent's counsel. It is a three stage test although one not to be mechanically applied, see ***National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd. (cited at paragraph 9 above)*** as per Lord Hoffman at paragraphs 16 and 17:

> *"16. It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The Court may order a defendant to do something or not to do something else, but such restrictions on*

the defendant's freedom of action will have consequences, for him and for others, which a Court has to take into account. The purpose of such an injunction is to improve the chances of the Court being able to do justice after a determination of the merits at the trial. 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 accordingly 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 irreversible 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 whatever course seems likely to cause the least irreversible prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396,408:

> *"It would be unwise to attempt even 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."*

His Lordship, and I say so respectfully, has in that passage rather unhelpfully rolled all three elements of the analysis into one.

[30] The three stage approach, to determine whether or not an interlocutory injunction is to be granted, was clearly articulated by Lord Diplock in **American Cyanamid** which Lord Hoffman cited with approval. The approach has, on many previous occasions, been endorsed by our courts, see for example: ***Carib Ocho Rios Apartment v Proprietors Strata Plan No 73 & Anor [2013] JMCA Civ 33*** at paragraph 17***; Algix Jamaica Ltd v J. Wray and Nephew Ltd [2016]JMCC Com 2 (upheld on appeal on 8th April 2016); Tara Estates Limited v Milton Arthurs [2019] JMCA Civ 10 (unreported judgment delivered on the 12th April 2019)*** which applied Algix***; Andrew Buddan et al v Bethel Chapel Apostolic Foundation Limited [2022] JMSC Civ 195 (unreported judgment of Thompson James J delivered on the 11th November 2022);*** and, ***Vinayaka Management Limited v Genesis Distribution Network Limited et al [2022]JMCA App 32 (unreported judgment delivered 14th October 2022)*** at paragraph 56***.*** The three stages are:

a) First, make a determination whether there is a serious issue to be tried, that is, whether the applicant has demonstrated a real prospect of succeeding on the claim to an injunction at trial. If there is no serious issue to be tried the injunction is refused. If there is the court will then go to the second stage.

b) The second stage relates to the adequacy of damages as a remedy. This involves a consideration of whether if the injunction is refused, but ultimately the applicant succeeds at trial, he will be adequately compensated by an award of damages. If so an interim injunction will normally be refused. On the converse side the court will ask whether if the injunction is granted, but the respondent succeeds at trial, he will be adequately protected by the applicant's undertaking as to damages. If the relative adequacy of damages is evenly balanced, or if damages are an inadequate remedy, the court will have regard to the overall balance of convenience.

c) The consideration of the "*balance of convenience*" is the third stage of the test for interlocutory relief. It involves a consideration of which course of action will, in all the circumstances, cause the least irreversible loss.

> There is no limit, at this stage, to the factors to which a court may have regard. It may, for example, involve consideration of the relative strength of each party's case or the peculiar circumstances of each party. Bearing in mind always that the court should make no finding on factual issues in dispute at this interlocutory stage.

It is important to bear in mind that the court is not to adopt a ritualistic or, as Lord Hoffman put it, a "*box ticking*" approach to the application of the three stage test. It is not a statutory mandate and the injunction, being an equitable remedy, is flexible and designed to meet the overall justice of the particular case. This is the ratio decidendi, as I understand it, of Lord Hoffman's judgment in the **Olint case**. Note also that this analysis varies slightly where the grant or refusal of interim relief will effectually bring the claim to an end. The court then pays greater attention to, each party's likelihood of success at trial and, to maintaining the status quo, see ***W.D. Miller et al v O'Neil Cruikshank (1986) 23 JLR 154/(1986)44WIR 319*** and, ***NWL Ltd v Woods [1979] 3 Aller 614.***

[31] In determining whether there is a serious question to be tried Lord Diplock in ***American Cyanamid Co. v Ethicon Ltd. [1975] A.C.396*** at page 404 referenced, but departed from, Lord Justice Russel's statement in the court of appeal ([1974] FSR 312 at 333) that:

> *"…if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants' proposed activities, that is the end of the claim to interlocutory relief."*
>
> Lord Diplock instead stated (at page 407):
>
> *"Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability", "a prima facie case", or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be*

satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious issue to be tried."

*A*nd, (at page 408)*:*

"….So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

[32] It is now settled law that the duty when exercising a power of sale, whether as trustee, mortgagee or debenture holder, is to act in good faith and, take reasonable care to obtain the best price reasonably obtainable in the market at the time of sale. This common law standard is now codified, see section 36 (4) of the **Security Interests in Personal Property Act 2013 (SIPPA)**. The affidavit of Mr. Preschel filed on the 21st September 2022, bundle #1 page 192, does not assert that the assets are being sold at a gross undervalue or that the efforts made to advertise are not in keeping with the appropriate standard. Although fears and beliefs, mostly related to improper motives of the 1st and 3rd Respondents, are expressed there is no evidence that the consequence of the or any alleged improper motive has adversely affected the price reasonably obtainable in the market.

[33] Mr Perschel asserts that the preferred bidder was allowed to put in three bids, unlike the other bidders. When asked counsel for the Applicant acknowledged that her client had put in two bids. She contends that the second bid was only made after the realization that the preferred bidder had made multiple bids. It emerged that bidders were permitted to bid and to submit revised bids, see letter dated 30th August 2022, exhibit JMC1 to the affidavit of Julianne Mais Cox filed 31st October 2022. However, whether the auctioneer considered a single bid or more than one bid per bidder is irrelevant to the ultimate question, which at the trial of this matter will be, whether reasonable steps were taken to obtain the best price reasonably obtainable in the market at that time. I find no merit in

this point. The Applicant's evidence does not support any issue relevant to the question whether the Receiver should be restrained from exercising the power of sale contained in the debenture. As regards the alleged connection between the preferred bidder and the debtor company no authority has been cited which precludes a debtor or a creditor purchasing the debtor's assets, see section 40 of the ***SIPPA*** . The affidavits in support of this application for injunctive relief, even were I to consider the parts struck out, raise mainly speculative matters not probative of any fact which is capable of impugning the or any intended sale.

[34] On the question of alleged bad faith by the Receiver there is, similarly, no evidence to support that. The failure as alleged, of the Receiver to answer questions related to the identity of the intended purchaser, does not without more prove bad faith. Similarly the rejection of a proposal to settle and an expression of an interest to acquire the debtor's assets do not without more mean that a creditor should be precluded from realising its security. It must be remembered that the borrower always is able to exercise the equity of redemption if able to do so. Short of that occurring the court will not prevent a secured creditor realising its security.

[35] The Applicant's counsel relied on a case out of New Zealand, ***Vivian Judith Fatupaito v Keith Vincent Harris et al [2018] NZCA 497(unreported judgment delivered 14th November 2018).*** That decision underscores the right of secured creditors to exercise the power of sale. Setting aside the appointment of a receiver due to bad faith may only occur if the purpose of doing so was unrelated to obtaining repayment. In that case the unrelated purpose was to gain an advantage in an acrimonious matrimonial property dispute. The words of Justice Winkeman, who delivered the judgment of the court, are instructive:

> "*41. The issues in Downsview* [Downsview Nominees Ltd v First City Corp.Ltd [1993] 1 NZLR 513 PC] *arose out of the appointment of a receiver under a debenture. The hearing before the Privy Council proceeded on factual findings made by the first instance Judge that in appointing a receiver, the first ranking debenture holder had not acted*

for the proper purpose of realising its security, but for the improper purpose of allowing the mortgagor to continue in trade. It achieved this by the receiver obstructing the efforts of a subsequent mortgagee to enforce its own security. There was no plan to sell the property"

and further,

"63. We therefore conclude that the evidence establishes that Mr Oliver/Bankhouse appointed receivers for the principal purpose, perhaps even the sole purpose, of obtaining control of the properties as a means of acquiring the debts due by Ms Sparks and Waimarie Trust. Bankhouse's purpose in this regard was to enable Mr Oliver to better pursue his personal dispute with his former wife. Acquiring those assets was not for the purpose of securing repayment of the secured debt. The sale of the properties would repay Bankhouse fully."

[36] It must therefore be an odd case indeed in which an effort to sell secured property by a creditor is restrained on the basis that the creditor has no real intention to recover debt. It is instructive that in both authorities referenced in paragraph 35 above no sale occurred. This suffices to result in my dismissing the application for an interlocutory injunction as the Applicant has no real prospect of success in the claim. However, in the event another court takes a different view, I will consider the question of whether damages provide an adequate remedy.

[37] In ***American Cyanamid (cited at paragraph 31 above)*** Lord Diplock stated, (at page 408):

"*As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to*

pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's case appeared to be at that stage. If on the other hand damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction"

[38] In other words if damages are an adequate remedy the injunction should not normally be granted. If they are not, the court must then determine whether the Respondents will be adequately compensated by the Applicant's undertaking as to damages. An interim injunction should not normally be granted if damages, recoverable at common law, are adequate and the Defendant can afford to pay them.

[39] I do not agree with counsel for the Applicant that any loss suffered or likely to be suffered is immeasurable. I find that the or any alleged loss is quantifiable as it is a matter of computing the difference between the price reasonably obtainable in the market and the price actually obtained for the assets sold. In this regard the primary asset consists of leases of land upon which the 2nd Respondent's attraction is operated. The Applicant is a shareholder in the insolvent company, that is, in the 2nd Respondent. It is the company and its creditors generally who stand to lose if the assets are sold at a gross undervalue. A sale of assets by the 3rd Respondent to recover its debt has no direct prejudicial consequence for the Applicant whose shareholding remains intact. It is clear to me that any loss, in consequence of the injunction being refused, can be adequately compensated in damages. On the other hand if the

injunction is granted but the Applicant is ultimately unsuccessful at trial valid concerns are, whether the Respondents would have lost a sale and, whether by the time of trial any willing purchaser at the price now obtainable will still be available. The concern is greater because the Applicant is also a bidder whose bid did not exceed the bid of the selected intended purchaser. It is safe to presume that neither the Applicant nor the 2rd Respondent is able to meet the obligation to the secured and unsecured creditors (by clearing the debt owed). In these circumstances there must be a legitimate concern about the Applicant's ability to compensate the 1st Respondent for loss incurred in the event the injunction is granted. This is because the injunction may frustrate the present preferred buyer and result in a missed opportunity to realize the best price reasonably obtainable in the circumstances. The evidence, of the Applicant's ability to support financially its undertaking as to damages, is inadequate, see paragraph 55 of the affidavit of Rainford Perschell dated 13th September 2022(bundle 1 page 203).

[40] I therefore hold, on the one hand, that damages are an adequate remedy in the event the injunction is refused and the Applicant is ultimately successful at trial. I hold also that if the injunction is granted there is insufficient evidence to satisfy me that the Respondents will be adequately protected by the Applicant's undertaking as to damages.

[41] Lord Diplock at page 408 of his judgment in **American Cyanamid** (cited at paragraph 31 above) stated:

> "*It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even 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. These will vary from case to case.*
>
> *Where other factors are evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo".*

[42] Therefore the third limb, of the approach to considering injunctive relief, only arises if contrary to my holding damages are not an adequate remedy. I nevertheless go on to consider the balance of convenience in the event another court takes a contrary view of the adequacy of damages. The question at this stage is whether it is just or convenient to grant the injunction or, as put by the Judicial Committee of the Privy Council, whether in all the circumstances the justice of the case warrants injunctive relief, see ***National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd. (supra paragraph 9)***. At this stage the court considers all the circumstances of the case including the extent of the disadvantage that may result to each party in the event of, the grant on one hand or, the refusal on the other of injunctive relief.

[43] I find that the course, that seems likely to cause the least irremediable prejudice to either party, is to refuse to grant the injunction sought. The risk of frustrating the sale process, and the unpredictability of whether in the future a willing buyer for the assets at this price will be found, are to my mind dispositive of the overall justice of the matter. What an injunction could do at this stage is in effect deter the preferred bidder. It is not insignificant that the major asset being sold is a lease or leases of land, see bundle # 1 pages 145 and 152. Any delay means that the period of the lease will be further reduced. It is therefore probable that the value of that asset will be in consequence also reduced. When considering the overall justice of the case the relative strengths of each party's case is relevant. In this regard, on the evidence available at this stage, it appears the 3rd Respondent went into the market advertised assets and engaged a competitive bidding process. The case of bad faith and/or of failure to take reasonable care is not supported by the evidence presented whether ruled admissible or not. The Respondents are taking steps to realise the security in order to recover their debt. The justice of the case favours refusal of injunctive relief.

[44] It is clear from all I have said that injunctive relief is refused. However, this is a bankrupt's estate over which the court has a supervisory jurisdiction. In ***Makeda Jahnesta Marley and others v Mutual Security Merchant Bank and Trust Company Ltd [1991] 3 AllER 198*** the court was asked, by the Trustee, to

approve a sale that had already been negotiated. The sale agreement had a clause which made the approval of the court a condition precedent to completion. The Judicial Committee outlined the nature of the evidence required in such a matter. The sequel to that saga is found in the, culturally very significant but largely unheralded, judgment of Walker J in ***Mutual Security Merchant Bank and Trust Company Limited v Rita Marley et al Suit P-850 of 1991 (unreported judgment delivered on the 20th day of December 1991).*** I, however, digress**.** The point is that I am moved by the arguments of counsel for the 2nd Respondent. He asked this court to assist the Trustee in the effective execution of her duties and, in particular, to obtain information she deemed necessary to protect the interest of the estate and of the creditors generally. In the context, of the exercise of a power of sale by secured creditors, the primary concern should be to ensure that reasonable steps have been taken to obtain the best price reasonably obtainable in the market at the time of sale. This is best demonstrated by the 3rd Respondent. I therefore urged counsel to make submissions on the jurisdiction of the court to make the following supervisory order:

Proposed supervisory order:

> *"The Court directs the 3rd Respondent to insert in any contract for sale entered into a 'subject to' clause making completion of the sale conditional on the Receiver obtaining prior permission of this Court, the said permission to be obtained within a time mutually agreed by the parties, not being less than three months, failing which the purchaser may indicate if he/she elects to be released from all obligations."*

[45] On the 4th day of November 2022 therefore, having indicated that the injunctive order would be refused, I adjourned to the 11th November 2022 to hear further submissions on the proposed supervisory order. At the resumed hearing all counsel accepted that the court did have jurisdiction and referenced sections 73.1 (a), 79 & 277 of the ***Insolvency Act*** and section 46 of the ***Security Interest in Personal Property Act***. The 1st and 3rd Respondents however thought it was unnecessary to make the order. Having considered the further

submissions, I decided that the court, in insolvency proceedings, acts in a supervisory capacity, see section 277 of the ***Insolvency Act.*** The 2nd Respondent's concerns have caused me to conclude that it is prudent to make the order proposed. Such an order will add certainty and transparency to the sale and will benefit all parties involved. It is however incumbent on the court, once the application for approval is filed, to deal with the matter with dispatch.

CONCLUSION

[46] It is for the reasons articulated above that I made the following orders, first on 4th November 2022:

(1) The Ex Parte Order made on the 14th September 2022 is set aside

(2) The Application for Court Orders filed on the 14th September, 2022, for an Order restraining the 1st and 3rd Respondents, is dismissed and the application refused.

(3) Matter stood over, for Counsel to make submissions on the court's proposed "supervisory" order, to 11th November 2022 at 2pm for 2 hours.

(4) By consent Claimant shall pending determination of these proceedings pay into a joint interest bearing account at a reputable financial institution in the names of the respective attorneys at law for the relevant parties the following sums representing security for the cost of the proceedings:

(i) USD22,500 in respect of the 1st Respondent cost within 60 days of the date of this Order provided that the said sum is paid by the Claimant to its attorneys at law within 30 days of date of this order, where notice of such payment is to be given to the 1st respondent attorney at law and held by the Claimants attorney at law pending payment into the said interest bearing account.

(ii) USD60,0000 in respect of the 1st Respondent cost within 60 days of the date of this Order provided that the said sum is paid by the Claimant to its attorneys at law within 30 days of date of this order, where notice of such payment is to be given to the 1st respondent attorney at law and held by the Claimants attorney at law pending payment into the said interest bearing account.

(5) Failing compliance with Order number 4 the Claimants claim shall stand struck out as against the party entitled to security for costs.

(6) Date for Case Management Conference and submissions on costs also adjourned to the 11th November, 2022.

(7) 3rd Respondent's attorneys- at- law to prepare, file and serve this formal Order.

On the 11th November 2022 the following further orders were made:

(1) The Order made on November 4, 2022 in relation to a case management conference is vacated.

(2) The Court directs the 3rd Respondent, pursuant to powers contained in section 73.1 (a), 79 & 277 of the Insolvency Act, to insert in any contract of sale entered into a "subject to" clause making completion of the sale conditional on the Receiver obtaining prior permission of this Court. The said permission is to be obtained within a period mutually agreed between the Receiver and the purchaser, not being more than three (3) months, failing which the purchaser may elect to be released from all obligations.

(3) The Order at paragraph 2 above is made with reference to concerns raised by the Trustee in Bankruptcy but is subject always to the discretion of the Court hearing the application for

approval to consider any other relevant issues.

(4) The first hearing of the Fixed Date Claim Form is fixed for 23rd February 2023 at 11:00 am for one (1) hour.

(5) Certificate for two (2) counsel is granted.

(6) Costs to the 1st 2nd and 3rd Respondents against the Claimant, such costs to be immediately taxed if not agreed.

(7) Claimant's counsel is to prepare, file and serve this Order.

David Batts
Puisne Judge.