[2019] JMCC COMM. 25

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISON

CLAIM NO. SU 2019CD00033

BETWEEN	**DEVON MORRIS**	**CLAIMANT**
AND	**CHERRIDA MCBEAN MORRIS**	**2ND CLAIMANT**
AND	**MORLYN MANGAROO-MCBEAN**	**3RD CLAIMANT**
AND	**JN BANK LIMITED**	**1STDEFENDANT**
AND	**TOTAL CREDIT SERVICES LIMITED**	**2ND DEFENDANT**
AND	**HEATHER WRIGHT**	**3RD DEFENDANT**

IN CHAMBERS

Mr Patrick Foster QC and Mr Mark-Paul Cowan, instructed by Nunes Scholefield, DeLeon & Co., Attorneys-at-Law for the Claimants

Mr Christopher Dunkley and Ms Carissa Bryan instructed by Phillipson Partners Attorneys-at-Law for the Defendants

Heard: 19th July and 26th July 2019

Injunction - Principles to be applied - Applicant not registered legal owner but executed an agreement for sale with a third party– Whether there should be payment into court by mortgagor under 'Marbella principle' - Exceptions to applicability of the principle – whether sending of cheque to Mortgagee amounts to an appropriate payment or other security

LAING, J

The Application

[1] The Claimant by Ex Parte Application for Injunction filed on 5th February 2019 seeks the following orders:

> 1. *An Interim injunction retraining the 1st Defendant, whether personally, their servants and/or agents or otherwise howsoever from disposing, transferring or otherwise dealing with the property situate at 12B Ocean Towers, 8 Ocean Boulevard in the parish of Kingston registered at Volume 1128 Folio 795 of the Register of Book of Titles for a period of twenty eight (28) days or until further orders of the Court.*
>
> 2. *An interim injunction restraining the 1st, 2nd and 3rd Defendants, their agents and/or servants from interfering with the 1st and 2nd Claimants' enjoyment of the property situate at 12B Ocean Towers, 8 Ocean Boulevard in the parish of Kingston registered at Volume 1128 Folio 795 of the Register Book of Titles for a period of twenty eight (28) days or until further orders of the Court.*
>
> 3. *An Order that the said Caveat No. 2159816 remains in effect until this Honourable Court shall make an order for its removal.*
>
> 4. *Costs to be costs in the claim.*
>
> 5. *Such further and other as this Honourable Court shall deem fit.*

The Background

[2] The 1st and 2nd Claimants Devon Morris and Cherrida McBean Morris purchased an apartment at 12B Ocean Towers, 8 Ocean Boulevard in the parish of Kingston registered at Volume 1128 Folio 795 of the Register Book of Titles ("the Property"). The Property was secured by a registered mortgage in favour of the 1st Defendant JN Bank Limited and the National Housing Trust on a joint financing basis ("the Mortgage").

[3] The 1st and 2nd Claimants failed to make the payments that were contractually due and the mortgage fell into arrears. The 2nd Defendant, which is a wholly owned subsidiary of the 1st Defendant which provides debt recovery services became

involved. For purposes of this decision, unless the context suggests otherwise, I will refer to the 1st and 2nd Defendants together as "JN".

[4] In August 2018, the 1st and 2nd Claimants were advised that JN was attempting to exercise its powers of sale contained in the Mortgage and the 1st and 2nd Claimants on or about the 21st August 2018 purported to execute a transfer of the Property to the 3rd Claimant who is the mother of the 2nd Claimant. On the same day, the 1st and 2nd Claimants through their Attorney-at-law made a request for a statement of account from the 1st and/or 2nd Defendant.

[5] The 1st Defendant purported to exercise its powers of sale contained in the Mortgage by a sale by private treaty to the 3rd Defendant after there were no successful bids at auction.

[6] The 1st and 2nd Claimants by their Amended Claim Form and Particulars of Claim filed 13th Feb 2019 pray for the following orders and declarations:

a. *An order that 1st and 2nd Claimants are entitled to the exercise their right of redemption in respect of mortgage number 1736535 registered against property registered at Volume 1128 Folio 795 of the Register Book of Titles.*

b. *A declaration that the 3rd Claimant is entitled to the legal and beneficial interests in the said registered at Volume 1128 Folio 795 of the Register Book of Titles.*

c. *An order that 1st and/or 2nd Defendants produce and deliver up to the Claimants the Original Duplicate Certificate of Title registered at Volume 1128 Folio 795 of the Register Book of Titles together with a stamped registerable discharge of mortgage of mortgage numbered 1736535.*

d. *In the alternative, and order that the 1st, 2nd and 3rd Claimants are entitled to damages for breach of contract, breach of statutory, equitable and fiduciary duties, and negligence against* ***JN BANK LIMITED*** *and* ***TOTAL CREDIT SERVICES LIMITED****, the 1st and 2nd Defendants, arising out of their conspiracy to unjustly enrich themselves at the expense of the 1st and 2nd Claimants all consequent on the actions of the 1st, 2nd and 3rd Defendants in purporting to exercise Power of Sale under mortgage registered 1736535 as endorsed and entered on the Duplicate Certificate of*

Title registered at Volume 1128 Folio 795 of the Register Book of Titles.

e. *A declaration that the Agreement for Sale between the 1st Defendant, **JN BANK LTD** and 3rd Defendant **HEATHER WRIGHT**, is void for the 1st and/or 2nd Defendants' several breaches of common law and statutory duties.*

f. *In the alternative, an order that the 1st, 2nd and 3rd Claimants are entitled to damages as against the 3rd Defendant **HEATHER WRIGHT** for conspiracy to effect unjust enrichment.*

The Law

[7] In determining the circumstances in which an interlocutory or interim injunction ought to be granted, our Courts have consistently been guided by the principles laid down in **American Cyanamid v Ethicon** [1975] 1 All ER 504 which can conveniently be reduced to three main considerations, which in summary are:

a. Is there a serious issue to be tried?

b. Would damages be an adequate remedy?

c. Does the balance of convenience favour the granting of an injunction?

A. Is there a serious issue to be tried?

The Claimant's submissions

[8] Mr Foster QC at the outset of his submissions indicated that he wished to depart somewhat from the course that was being pursued by Counsel who had previously represented the Claimant. He indicated that whereas it was pleaded that there was collusion between JN and the 3rd Defendant because there was insufficient evidence of that "*at this time*", or of any knowledge on the part of the 3rd Defendant of any improprieties.

[9] Learned Queen's Counsel indicted the thrust of his submissions would be that there was evidence of bad faith on the part of JN which if found at the trial of the

Claim would ground the granting of the reliefs sought and accordingly, at this stage the Court should grant the injunction in order to permit the Claimants to be able to obtain the Property as opposed to being confined to damages only if they are successful.

[10] Counsel submitted that **Waring (Lord) v London Manchester Assurance Company Limited and Others** [1935] Ch 310 is an English Chancery case which acknowledges the equitable jurisdiction of the Court to set aside a contract for sale with a third party due to lack of *bona fides*. Counsel conceded that there is a need for caution having regard to the different regime for registration in Jamaica. He submitted that, despite the differences, the jurisdiction to set aside a sale for bad faith was implicitly recognized by the Jamaican Court of Appeal in **Cowell Anthony Forbes and Another v Miller's Liquor Store (Dist) Limited** 2016 JMCA Civ 1. These submissions were grounded on the fact that the Court at paragraph 51 of its judgment reviewed and approved the finding of the Judge at first instance that there was no bad faith involved in the sale and therefore the equity of redemption was extinguished. Furthermore, Mr Foster submitted that the Court of Appeal approved the position of **Waring** (supra) where at paragraph 45 Brooks JA made the following observation:

> *"[45] In respect of the third issue, a critical principle that is applicable is that once a mortgagee enters into an agreement to sell the mortgaged property, the mortgagor's equity of redemption is extinguished, unless the mortgagee has acted in bad faith. Once extinguished, the equity of redemption cannot be revived. Those principles have been extracted from the decision in* ***Waring London and Manchester Assurance Company Limited and Others*** *[1935] 1 Ch 310. They apply under the old system a well as under the Torrens system. That case has been accepted in this jurisdiction as accurately setting out the relevant law."*

[11] Counsel also relied on a number of other cases such as the Australian case of **Forsyth v Blundell** (1973) HCA 20 and the Trinidadian case of **Hearn et al v Republic Bank Limited et al** (HCA No 3788 of 1990) in support of the proposition that bad faith is a basis for setting aside a sale by a mortgagee in the exercise of its powers contained in a mortgage.

[12] Mr. Foster relied on the case of **John Kennedy v Mary Annette de Trafford** [1895-9] AII ER. Rep 408 where the Lord Chancellor said as:

> *"… if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Lindley LJ in the Court below, says that 'it is not right or proper or legal for him either fraudulently or willfully or recklessly to sacrifice the property of the mortgagor.' Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words 'good faith', but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he willfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith".*

[13] Council also relied on Supreme Court of Canada decision in **Enterprises Sibeca Inc. v. of Frelighsburg (Municipality)**, 2004 SCC 61, [2004] 3 S.C.R. 304, where the concept of bad faith was summarized as follows at para. 26:

> *"[…] the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it."*

[14] The 1st and 2nd Claimants have made a number of allegations which they say amount to bad faith on the part of JN. They allege, for example, that after their account fell into arrears they were advised in 2017 by Ms Mullings an employee of JN to focus on servicing the NHT portion of the mortgage and that she also said that she would protect them from JN. They aver that Ms Mullings also advised them that despite the notice that the 1st Defendant was prepared to exercise its power of sale the Property was not in danger of being sold as long as they continued to service the loan in its original terms. The Claimants alleged that after this assurance by Mrs Mullings they were of the view that their property was not in

any jeopardy of being sold and they would have received a fresh notice or communication if the status quo changed. However, they aver that they did not receive any additional notices in 2018 and the next communication was by their Attorney-at-Law Ms Debbie- Ann Gordon who initiated a telephone discussion on 21st August 2018.

[15] Mr Foster also relied on a series of events which he submitted shows "*a desperate attempt by the 1st and 2nd Claimants to redeem their property and a callous and bad faith response by the Bank to that attempt*". These events as summarised by Counsel are reproduced below:

> *i. Upon an examination of the Agreement for Sale with the 3rd Defendant, it appears that JN Bank signed same on **August 18, 2018.** The 3rd Defendant had not signed at this point a fact which is supported by, inter alia, the Agreement date of **August 31, 2018**.*
>
> *ii. Ms. Mullings was contacted by a senior attorney-at-law, Ms. Debbie-Ann Gordon on **August 21, 2018** who made a clear representation that the mortgagors wanted to redeem the property in addition to requesting a statement of account to close. A letter of authority was also transmitted on the same day in order to confirm representation.*
>
> *iii. At exhibit **DAG 7**, Ms. Mullings indicates that on **August 24, 2018**, a further teleconference occurred with Ms. Gordon and Mr. Mullings indicated that she was awaiting the "file" to process the request for the Statement to Close and to verify the signature on the authorization letter.*
>
> *iv. It must be noted here that at no time was it mentioned in the telephone discussions that there was an executed contract with the 3rd Defendant. The obvious inference is that the 3rd Defendant had not yet signed a contract and there was not executed agreement thereto.*
>
> *v. Ms. Mullings did not action the request that was made on August 21, 2018 and Ms. Debbie-Ann Gordon, out of concern, sent letters on **August 27, 2018** and **August 31, 2018** requesting the Statement to Close.*
>
> *vi. The Agreement for sale was executed on or about the **31st day of August** and sent to Stamp Office on the **3rd of September 2018.***
>
> *vii. It was only on **September 5, 2019** that Ms. Gordon received correspondence dated August 29, 2019 informing of the execution of the Agreement for Sale with the 3rd Defendant and attaching the Statement to Close which was requested from August 21, 2018.*

> *viii. It is submitted that in the ordinary course of things, a letter transmitted on Wednesday August 29, 2018 by the 2nd Defendant should have reached the offices of Ms. Gordon the following day or on Friday the latest. The inescapable inference here is that the Letter and Statement to close was dispatched the following week after the Agreement for Sale was fully executed and ready for stamping on August 31, 2018.*

Submissions on behalf of the Defendants on the issue of whether there is a serious issue to be tried.

[16] Mr Dunkley agreed that bad faith was a basis on which a sale by a mortgagee to a third party could be set aside. However, he submitted that the bar as it relates to what will constitute bad faith in such cases is very high. Mr Dunkley was involved in the case of **Forbes and Forbes** (supra) and with the insight gained from that involvement, he spent a considerable amount of time in an attempt to convince the Court that the allegation of the Claimants in this case even if proved, would not pass that hurdle. He reminded the Court that the allegation of the 1st and 2nd Claimants was challenged by the affidavit evidence of Ms Mullings in support of JN. He submitted that the conduct of the Defendants in **Forbes and Forbes** was egregious but even in that case such conduct failed to meet the requisite standard. Counsel urged the Court to find that if the conduct in **Forbes and Forbes** was not sufficient to amount to bad faith then the Court should find that in this case JN's conduct of which the 1st and 2nd Defendants complain could not amount to bad faith and as a consequence the Court should find that there is no arguable case.

[17] As it relates to the 3rd Defendant, Mr Dunkley submitted that as a matter of law she was a stranger to the Mortgage and therefore by extension she has no interest in this Claim in her own right. He also submitted that at the highest, the 3rd Claimant could only be considered a contracting party with the 1st and 2nd Defendants who would be liable to her for their failure to complete.

Analysis in relation to the serious issue to be tried

[18] As Lord Diplock stated in **American Cyanamid** at page 510 C, "*the court must no doubt be satisfied that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried.*" At page 510 D he stated as follows;

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit 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 the trial."*

[19] Mr Dunkley submitted that as far as is possible this Court should be mindful of other decisions such as **Forbes and Forbes** and attempt a comparative analysis in assessing the conduct complained of in each case. I agree that this should be the approach of the Court in appropriate cases. However, whereas other cases can sometimes provide useful guidance, they do not where the facts are materially different. In the present case, the conduct is different from those in **Forbes and Forbes** and in my opinion an attempt at a comparative analysis ought not to be the main focus of the Court. The Court should look at the facts complained of and seek to make an assessment as to whether such conduct if proved at the trial can constitute bad faith.

[20] It is clear that the allegations by the 1st and 2nd Defendant as to the conduct JN which can amount to bad faith is being contested. These are mainly matters of fact which should properly be resolved in the forum of a trial with cross examination and after discovery.

[21] I have analysed the conduct of JN which the 1st and 2nd Claimants have complained of and to which I have referred above. I have not made any findings as to the allegations about JN's conduct since that is not my task at this stage, but I have made a preliminary assessment that such conduct taken together, especially the allegation that JN did not provide the Statement to Close indicating the payoff balance in a timely manner to the 1st and 2nd Defendants or their Counsel can constitute bad faith.

[22] By letter dated 27th August 2018 from Ms Debbie-Ann Gordon, Attorney-at-law for the 1st and 2nd Defendants, received by JN on 29th August 2018, a formal request was made for a Statement to Close. Ms Gordon also stated in that letter as follows:

> *" In our initial teleconference on 21 August 2018, the undersigned advised that the Borrowers wish to redeem the Mortgage and pay out the balance owed in full. You indicated that the mortgage property was under contract and that in order to address any queries regarding that contract, a letter of authority was necessary".*

[23] It therefore appears that the 21st of August 2018 when the 2nd Defendant was advised by Ms Gordon that her clients wished to redeem the Mortgage and pay out the balance, that was at a critical juncture. I have previously quoted Mr Foster's submission that:

> *"iv. It must be noted here that at no time was it mentioned in the telephone discussions that there was an executed contract with the 3rd Defendant. The obvious inference is that the 3rd Defendant had not yet signed a contract and there was no executed agreement thereto".*

However, I am not sure that this statement is entirely accurate having regard to the contents of Ms Gordon's letter which I have reproduced above. Notably, JN's Defence at paragraph 31 avers that by letter dated 1st May 2018 the 2nd Defendant informed the Claimants of its receipt of an offer of $13.5 million dollars which was accepted for the Property. What is clear, is that the chronology of events around this period is in dispute and may have a bearing on a Court's finding on the issue of bad faith. If the agreement for sale was not signed between JN and the 3rd Defendant until 31st August 2018 as the Claimants asserted, then there is a serious issue to be tried as to whether JN acted in bad faith in disposing the Property to the 3rd Defendant having regard to the overtures that were being made by Ms Gordon on behalf of her clients. In the premises, I am satisfied on a balance of probabilities that there is a serious issue to be tried as to whether the conduct of JN amounts to bad faith. These are issues best suited for resolution at a trial.

B. Would damages be an adequate remedy?

The approach to be taken by the Court

[24] When considering the adequacy of the remedy of damages available for either party the Court adopts the following approach. Firstly, the Court considers whether, if the Claimant were to succeed at 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 by the refusal to grant the injunction. If damages would be an adequate remedy and the Defendant is in a financial position to pay them, then the injunction should be refused, regardless of how strong the Claimant's claim may appear to be at that stage.

[25] Secondly, if damages would not provide an adequate remedy for the Claimant in the event of him succeeding at the trial, then the Court should consider whether, if the defendant were to succeed at trial the loss he suffered as a result of having been restrained by the injunction would be adequately compensated by the Claimant's undertaking as to damages.

Are damages an adequate remedy where the injunction is sought to restrain a mortgagee exercising its power of sale?

[26] In support of his submissions that damages would not be an adequate remedy for the 1st and 2nd Claimants, Mr Foster sought to place heavy reliance on the freshly minted Court of Appeal case of **Aspinal Wayne Nunes v Jamaica Redevelopment Foundation Inc.** [2019] JMCA Civ 20 which was handed down on 21st June 2019. In this case, Morrison P gave very helpful guidance on the effect of section 106 of the Registration of Titles Act ("RTA"). This section provides as follows:

> *"106. If such default in payment, or in performance or observance of Covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether, or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such*

> *acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."*

[27] Critical guidance is given by the learned President of the Court of Appeal at paragraph 70 of the judgment where he stated as follows:

> *"[70] Accordingly, section 106 will not necessarily foreclose the grant of an interim injunction in every case in which there is a dispute between mortgagor and mortgagee. To the contrary, as the language of the section itself in both* ***Sheckleford*** *[Lloyd Sheckleford v Mount Atlas Estate Ltd unreported, Court of Appeal, Jamaica, Supreme Court Civil Appeal No 148/2000, judgment delivered 20 December 2001] and* ***Global trust*** *[Global Trust Limited and Donald Glanville v Jamaica Redevelopment Foundatin Inc and Dennis Joslin Jamaica Inc [(Unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 41/2004, judgment delivered 27 June 2007] make clear, the limitation in section 106 only applies to cases in which the Mortgagee has in fact exercised the power of sale by entering into an agreement for sale of the mortgaged property."*

In **Aspinal Wayne Nunes** the Court found that although the JRF had advertised the property more than once there was no evidence that the JRF had exercised the power of sale by entering into an agreement for sale and therefore section 106 was inapplicable. In the case before this Court it is common ground that JN has purported to exercise its power of sale by entering into an agreement with the 3rd Defendant for the sale of the Property.

[28] At paragraph 72 the learned President observed as follows:

> *"[72] In his application for an interim injunction, Mr Nunes sought an order preventing what he alleged to be an unauthorised or improper or irregular exercise of the power of sale. In these circumstances, the power not yet having been exercised, there was in my view therefore nothing in the language of section 106 to prevent the court (subject always to the "serious issue to be tried" threshold) from considering the application as a matter of discretion on the basis that, if JRF's exercise of the power of sale was not restrained, damages would have been an adequate remedy.* ***Indeed, it***

> ***seems to me that, in an appropriate case, the grant of an interim injunction to preserve the status quo pending trial may well be indicated precisely because, once the power of sale is exercised, section 106 will exclude the mortgagor from any other remedy other than damages."*** *(emphasis supplied)*

[29] Since section 106 is not an absolute bar to the grant of an interim injunction, accepting the guidance of Morrison P, what I am required to do is to give unfettered consideration to the question of whether damages would be an adequate remedy for the 1st and 2nd Defendants "*bearing in mind the common law presumption that damages are not usually regarded as an adequate remedy in cases involving land*."

[30] This time honoured attitude of the Court to land is reflected in the case of **Tewani Ltd v Kes Development Co. Ltd & ARC Systems Ltd.** (unreported) Supreme Court, Jamaica, Claim No. 2008 HCV 02729, judgment delivered on 9 July 2008, and the statement of Brooks J (as he then was) at page 3 as follows:

> *"The significance of the subject matter being real property, raises a presumption that damages are not an adequate remedy, and no enquiry is ever made in that regard. The reason behind that principle is that each parcel of land is said to be "unique" and a have 'a peculiar and special value'."*

[31] In **Lookahead Investors Limited v Mid Island Feeds (2008) Limited and Others** [2012] JMCA App 11 Brooks JA on an application in chambers nuanced the position as earlier expressed by him and made the following acknowledgment at paragraph 40 of the judgment:

> *"There are two fairly recent cases in which this court has found that, in the context of commercial entities, damages would have been an adequate remedy. They are* ***Shades Ltd v Jamaica Redevelopment Foundation Inc****. SCCA No 55/2005 (delivered 20 December 2006) and* ***Global Trust Ltd and another v Jamaica Redevelopment Foundation Inc. and another*** *SCCA No 41/2004 (delivered 27 July 2007). In* ***Shades****, this court was of the view that such land, was "a mere asset of the company" despite the fact that it comprised a residence of one of the principals. In* ***Global Trust****, the property was an incomplete hotel and not a going concern. Both those cases, in my view, have different considerations which make them exceptions to the principle that the land and its location are unique. I do not consider the land in the instant case to be an exception to that principle."*

[32] Mr Foster submitted that the Court should not consider the fact that the 1st and 2nd Defendants purported to sell the Property to the 3rd Defendant as supporting a conclusion that damages would be an adequate remedy for them. He submitted that the transaction was a bailout from the 3rd Defendant, who is the mother of the 2nd Defendant and who wished for the Property to remain in the family given the cultural and sentimental value attached to it as dowry. Accordingly, the sale should not be viewed as a commercial transaction in the normal sense.

[33] Mr Dunkley argued that the bailout could have been done without structuring it as a sale and that is correct. He submitted that the 3rd Claimant has been added as a party in her own right as purchaser of the Property and that that serves to diminish her position as a rescuer. However, I am not of the view that structuring it as a sale lessens the likelihood that it was a bailout and that the 1st and 2nd Claimant have an emotional and cultural attachment to the Property. In these circumstances, I do not find that the willingness to sell the Property to the 3rd Defendant is a factor which should causes me to depart from the general principle that land and its location are unique. Furthermore having regard to the evidence of the special significance of the Property to the 1st and 2nd Defendants I am of the opinion that damages would be an adequate remedy for the 1st and 2nd Claimant in this case.

If the Defendants or any of them were to succeed at trial would the loss they suffered as a result of having been restrained by the injunction be adequately compensated by the Claimants undertaking as to damages?

[34] Mr Foster has argued that the 1st Defendant has been paid the arears of the Mortgage and this would provide adequate protection for JN. I expressed to Counsel my concern as to the circumstances of the tendering of the cheque which he has characterised as payment of arrears, since there is no clear evidence that the cheque has been accepted as a payment of the arrears as he asserted. Furthermore, the fact of the non-return of the cheque which was asserted by Counsel, in my view, would not be sufficient evidence of acceptance in the circumstances. Counsel indicated that the Claimants would be willing to provide

evidence of their ability to satisfy their undertaking and payment in if so required. By affidavit filed on 24th July 2019 the 3rd Claimant has provided what I consider to be ample evidence of her ability to satisfy an undertaking as to damages.

[35] As it relates to the 3rd Defendant Mr Foster submitted that if the injunction is granted and she succeeds at trial damages would be an adequate remedy for her because the Property would still be available to her and any additional expense she would have incurred such as rental, which she would have had to pay while being kept out of the Property, could be compensated by a money sum. I agree with those submissions but I also am cognisant of the need for her to be protected by a suitable undertaking as well.

C. The Balance of convenience

[36] Where there is doubt as to the adequacy of damages as a remedy available for either party the question of the balance of convenience arises. For the reasons given earlier in this judgment, the Court finds that damages would not be an adequate remedy if the 1st and 2nd Claimants succeed at the trial, given the special character of the Property and it is therefore necessary for me to go on to consider whether the balance of convenience favours the granting of an injunction.

[37] In ***National Commercial Bank v Olint Corpn. Limited*** [2009] UKPC 16, the Privy Council reaffirmed the **American Cyanamid** principles and offered further useful guidance on the approach to interlocutory injunctions. At paragraphs 16- 8 of the Judgment delivered by Lord Hoffman it is stated as follows:

> *"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 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. 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."*

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant 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 to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

[38] In the instant case, the Court finds that the least irremediable harm will be caused to the 1st and 2nd Claimants on the one hand, and JN and or the 3rd Defendant on the other hand by the granting of the injunction and ensuring that the Property is not disposed of until the substantive issues in the claim are resolved.

[39] If the injunction is not granted the Property will not be available to the 1st and 2nd Defendants if they succeed and they would be confined to a remedy in damages. As it relates to JN, I do not find that whether the injunction is granted or not makes a serious difference to it either way since it has no connection with the Property other than a commercial interest in its disposal and the satisfaction of its loan. It is protected on two fronts by the possibility of payment from the Claimants (the 3rd

Claimant in particular) on the one hand, and by the 3rd Defendant on the other hand so the financial risk to it is almost completely eliminated.

[40] As it relates to the 3rd Defendant I agree with Mr Foster's submission that if successful she will be able to acquire other property. I do accept Mr Dunkley's submission that she has a special attraction to that location but her desire to reside there would not weigh as heavily in the scales as the Claimant's connection to the Property. Mr Dunkley argued that the 3rd Defendant The 3rd Defendant in her affidavit has indicated that arising from the Claimants application for an injunction, and the Court's temporary granting pending its ruling, she is now obliged to meet the higher costs of interim financing while the matter is being resolved. The Court appreciates that the injunction will have some adverse effects on the 3rd Defendant and if she succeeds at trial these effects may include a reduction in the period that she will have to repay her mortgage having regard to her age and the statutory retirement age.

[41] When the Court weighs the balance of convenience, and contrasts the likely impact on the 1st and 2nd Claimants of the loss of the opportunity to keep the Property if the injunction is not granted, against any potential detriment that may be suffered by the Defendants, I am of the considered opinion that the scales tip appreciably in favor of the granting of the injunction as the result which will cause the lease irremediable prejudice. I do not consider this case to be one in which it was necessary for me to consider "*the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases*" in arriving at my conclusion having regard to the nature of the Property and the Claimant's connection thereto.

The application of general equitable principles

[42] Mr Dunkley submitted that there are other reasons why the Court should not exercise its discretion in favour of granting the injunction. He referred to the fact that the Mortgage had been in arrears on a number of different occasions. He also

identified the pleadings related to collusion and the allegations of misconduct on the part of the 3rd Defendant.

[43] The admission by Mr Foster that the Claimants are unable at this stage to support the allegations of collusion was made in the highest tradition of the bar, however the Court cannot ignore those portions of the Claimant's pleadings notwithstanding the fact that they were done by the Attorneys-at-law who previously represented the Claimant. I agree with Mr Dunkley that the allegations as they relate to the 3rd Defendant are potentially injurious to her reputation and ought not to have been made without solid evidence.

[44] Nevertheless, I am not of the view that these are issues which are so grave that they should bar the Claimants from the equitable remedy which they seek.

Conclusion as to whether the injunction should be granted

[45] For the reasons stated herein I am of the view that the injunction sought by the Claimants should be granted.

Should the Claimant be required to make a payment into Court as a condition for the grant of the interim injunction

[46] In **Aspinal Wayne Nunes** (supra) Morrison P reiterated "*the Court's general reluctance to deprive a mortgagee of the benefit of his security without providing him with an appropriate safeguard, save in exceptional circumstances*". The general rule is that the Court ought not to interfere with the Mortgagee's right to exercise his power of sale except where the sums claimed to be due are paid into Court. In this jurisdiction, this is commonly referred to as the Marbella Principle, the name being derived from the case of **SSI (Cayman) Limited et al v International Marbella Club SA** (supra).

[47] There have been exceptional cases in which payment into court by the mortgagor has not been insisted on as precondition to the grant of the injunction. **Alexander House Limited v Reliance Group of Companies Limited** [2018] JMCA Civ 18 is

a relatively recent case in which the Court of Appeal has considered this issue. At Paragraph 40 of the judgment McDonald-Bishop JA, summarised the categories of those exceptional cases as follows:

> *"[40] There are therefore special rules that have evolved to protect the mortgagee from a recalcitrant mortgagor and so, the **Marbella** principle, as Morrison JA said in **Mosquito Cove**, is "alive and well", albeit that that there may be a departure from it, if justice demands it in special circumstances. Morrison JA, himself, pointed to some of those exceptional circumstances in which the **Marbella** principle may be departed from as follows (paragraphs [57]-[63]):*
>
> *i. where the terms of the mortgage deed are peculiar or unusual (see **Gill v Newton** (1866) 14 WR 490);*
>
> *ii. where the issue of fiduciary relationship between the mortgagor and the mortgagee arises; or in the case of forgery (see **MacLeod v Jones**);*
>
> *iii. where questions arise as to the validity of the mortgage document. For example, where a person asserts that they did not sign or give authority for the mortgage document to be signed (see **Rupert Brady v JRF**); and*
>
> *iv. where on the face of the mortgage, the mortgagee's claim is excessive (see **Fisher & Lightwood's, Law of Mortgage**)."*

[48] It is clear that this is not an exceptional case and therefore the ordinary rule should be applied. Mr Foster submitted that because the Claimants have sent a cheque in satisfaction of the Mortgage the 1st and 2nd Claimants should not be required to make any further payment since that payment would provide an adequate safeguard. As a result of the uncertainty surrounding the circumstances under which the cheque was sent to JN, (a matter to which I previously referred herein) I am of the view that the usual order should be made.

Disposition

[49] For the reasons expressed herein, and on the Claimants undertaking as to damages and the 3rd Claimants undertaking which is deemed to also be on behalf of the 1st and 2nd Claimants, the Court makes the following orders:

1. The Court hereby grants an interim injunction restraining the 1st Defendant, whether personally or by its servants and/or agents

from disposing, transferring or otherwise dealing with the property situate at 12B Ocean Towers, 8 Ocean Boulevard in the parish of Kingston registered at Volume 1128 Folio 795 of the Register Book of Titles until the trial of the Claim herein or further order.

2. The injunction herein is on the condition that the Claimants collectively or either of them, pay into court within 60 days of the date hereof the sum of $6,517,714.89.

3. Costs of the application are to be costs in the Claim.