[2021] JMCC COMM. 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2020CD00187

BETWEEN	**LORENZ REDLEFSEN**	**CLAIMANT**
AND	**SILVER SANDS ESTATES LIMITED**	**1st DEFENDANT**
AND	**DEVELOPMENT BANK OF JAMAICA**	**2nd DEFENDANT**
AND	**SAGICOR PROPERTY SERVICES LIMITED**	**3rd DEFENDANT**

IN CHAMBERS

Mr Marc I Williams and Mr Duncan L Roye instructed by Williams, McKoy and Palmer, Attorneys-at-law for the Claimant

Mrs Tana'ania Small-Davis and Mrs Kerri-Ann Allen-Morgan instructed by Livingston, Alexander & Levy, Attorneys-at-law for the 1st and 2nd Defendants

Mr Andre Moulton instructed by Patterson Mair Hamilton, Attorneys-at-Law for the 3rd Defendant

Heard: 15th 16th and 26th March 2021.

Auction - No reserve- Whether contract formed on bid being submitted- Whether bid satisfied conditions of invitation

Registered Land – Caveat- principles to be applied on application to remove caveat - Extent of the asserted interest in land that is sufficient - Whether damages can be an appropriate remedy in a claim for land

LAING, J

Background

[1] The Claimant resides in the United States of America. The 1st Defendant is a limited liability company duly registered and incorporated under the laws of Jamaica and was at all material times the registered owner of 16 lots of land in the parish of Trelawny (hereinafter referred to collectively as the Properties). The 2nd Defendant is a limited liability company duly registered and incorporated under the laws of Jamaica and at all material times operated as a financial institution wholly owned by the Government of Jamaica.

[2] In July 2019, the 1st and 2nd Defendants commenced the process of selling the Properties, fifteen of which were undeveloped with one developed lot having a three-bedroom, three-bathroom villa erected thereon (the Villa). The sale process was by way of sealed bids and was and managed by the 3rd Defendant which was retained to provide real estate brokerage services.

[3] The 3rd Defendant acted as agent of the 2nd Defendant and published advertisements inviting bids/offers to purchase the Properties (the "Invitation"), the first being on or about the 28th April 2019. The Invitation contained the following terms:

> *Offers **must** include the following documents:*
>
> - *Duly completed (MLS) Offer To Purchase Form with your best offer.*
> - *Duly completed Customer Information Form (Individual/Corporate).*
> - *Valid copy of picture ID (DL/PP/Jamaican Voter's ID) signed by a JP or notary public.*
> - *Pre-qualification letter for mortgage, if applicable, not older than three (3) months at time of submission.*
> - *Proof of funds for cash purchase (a bank statement or letter verified by the bank).*

[4] In what appears at first blush to be a commercially bizarre approach in the context of the Jamaican real estate market and in particular, having regard to the high

market value of the Properties, the invitation to bid contained no reserve price for any of the lots, nor did it reserve the right not to accept the highest bid. Instead, it contained what is on its face an unequivocal statement that the highest valid bid would be the winning bid in these terms:

> *The winning bid will be based on the highest valid offer. In the even that two (2) or more bidders' offers are the same, the bidders will be notified within two (2) days of the opening and will be invited to submit their best and final offer within five (5) working days. The highest valid offer that meets the requirements, will be the winning bid.*

The reason or reasons for the Defendants having adopted this approach is of no relevance to this judgment.

[5] The opportunity provided by this "one in a million golden ticket" appears not to have been readily apparent to most Jamaicans or indeed the world. However, the seemingly endless possibilities were not lost on the Claimant, who, no doubt recognizing the significance of the absence of any reserve price, shrewdly submitted 16 offers to purchase the Properties. The package available to bidders contained the market value of each lot and Claimant submitted bids on the fifteen undeveloped lots in amounts ranging from $1,600,500.00 to $1,612,600. The Claimant also bid $1,612,600.00 on Volume 1078 Folio 980, the lot which had the Villa thereon. The market value on one estimated by the 1st Defendant is $70,000,000.00 (and it was subsequently advertised by the 3rd Defendant in the Daily Gleaner of 18 April 2019 at a price of $80,000,000.00). The evidence on behalf of the 1st Defendant does not confirm which of the sixteen lots has the lowest market value, but it is disclosed that Volume 1416 folio 874 has a market value of $11,600,000.

[6] On or about the 8th of August 2019 by a letter delivered via e-mail, the Claimant was advised that none of his bids were accepted. The Claimant's bids were rejected on the basis that the documentation he submitted was incomplete and non-compliant with the requirements as stipulated in the Invitation.

[7] The 1st and 2nd Defendants sold six of the sixteen lots to persons other than the Claimant and nine of the lots were again offered for sale during the period of September to October 2020. The evidence before the Court is that in December 2020 and January 2021 the 1st Defendant entered into sale agreements in respect of two of the lots offered in the second round of sale, in particular the lots registered at Volume 1078 Folio 950 and at Volume 1078 Folio 968 of the Register Book of Titles. It was mentioned during the proceedings that there are agreements for sale in respect of five of the lots, but this is not asserted in the evidence.

[8] Following discussions between the parties, which unfortunately did not bear any fruit, on 7th of May 2020 the Claimant filed the claim herein ("the Claim"), in which he averred that his bids were the highest for all sixteen lots and claiming, *inter alia*, "*Damages for breach of contract in lieu of specific performance or in addition to specific performance*". The Defendants have filed defences. The essence of the defence of the 1st and 2nd Defendants is that the Claimant's bids were invalid. The 1st and 2nd Defendants averred that the Claimant's bids were not the highest for all 16 lots. It was however conceded before the Court that in respect of some lots, the Claimant's bid was the only bid.

The Application

[9] By Notice of Application filed on 19th February 2021 the 1st Defendant sought the following primary relief:

> 1. *An Order directing the Registrar of Titles of (sic) remove the Caveats lodged against the Certificates of Title registered at Volume 1416 Folio 873, Volume 1416 Folio 874, Volume 1078 Folio 950, Volume 1078 Folio 968 and Volume 1078 Folio 980 of the Register Book of Titles.*

These lots will be referred to herein collectively as ("the Five Lots").

[10] The supporting evidence of Ms Sheron Henry contained in her affidavit filed 19th February 2021 is that on 8th February 2021 the 1st Defendant received three Notices of Caveats against dealings from the Registrar of Titles in relation to three

of the Five Lots. Consequent upon the receipt of these notices, the 1st Defendant caused a search to be made of the Titles Office in respect of all the parcels of land which it owns. This search revealed that the Claimant had also caused caveats to be lodged in respect of the two other lots, which in addition to the lots in respect of which notices words received, comprise the Five Lots.

[11] It is to be noted that whereas the Application is in respect of the Five Lots, the Claimant's Counsel disclosed to the Court that in fact a total of ten caveats have now been lodged against various lots.

What is a caveat?

[12] A Caveat is a notice to the Registrar which, subject to specified conditions and exceptions, has the effect of prohibiting the registration of certain instruments or documents while it remains in effect. In the Privy Council case **Rose Hall Ltd v Elizabeth Lovejoy Reeves** (1975) 25 WIR 348, a case arising from Jamaica, Lord Wilberforce delivering the judgment of the Court confirmed that a caveat is a fact which may be justified in law or not. Accordingly, even if the caveator has no interest to protect, that does not *ipso facto* make the caveat void. The determination of whether the caveat is justified in law or not must be decided through the procedure laid down in the Registration of Titles Law. That is the enquiry which is being embarked upon by the Court on this application.

[13] **Section 139 of the Registration of Titles Act** ("the RTA") provides for a person having the appropriate interest to register a caveat as follows:

> *139. Any beneficiary or other person claiming any estate or interest in land under the operation of this Act, or in any lease, mortgage or charge, under any unregistered instruments, or by devolution in law or otherwise, may lodge a caveat with the Registrar in the Form in the Thirteenth Schedule, or as near thereto as circumstances will permit, forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest, either absolutely or until after notice of the intended registration or dealing be given to the intended caveator, or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat.*

[14] **Section 140** of the RTA addresses the manner in which the life of the Caveat may end and is in the following terms:

> ***140.*** *Upon the receipt of any caveat under this Act, the Registrar shall notify the same to the person against whose application to be registered as proprietor, or as the case may be, to the proprietor against whose title to deal with the estate or interest such caveat has been lodged, and such applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he thinks fit, summon the caveator to attend before the Supreme Court, or a Judge in Chambers, to show cause why such caveat should not be removed, and such Court or Judge may, upon proof that such caveator has been summoned, make such order in the premises, either ex parte or otherwise, and as to costs as to such Court or Judge may seem fit.*
>
> *Except in the case of a caveat lodged by or on behalf of a beneficiary under disability claiming under any will or settlement, or by the Registrar, every caveat lodged against a proprietor shall be deemed to have lapsed as to the land affected by the transfer or other dealing, upon the expiration of fourteen days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing, unless in the meantime such application has been withdrawn.*
>
> *A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest, but if before the expiration of the said period of fourteen days or such further period as is specified in any order made under this section the caveator or his agent appears before a Judge, and gives such undertaking or security, or lodges such sum in court, as such Judge may consider sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, then and in such case such Judge may direct the Registrar to delay registering any dealing with the land, lease, mortgage or charge, for a further period to be specified in such order, or may make such other order as may be just, and such order as to costs as may be just.*

[15] In the Court of Appeal case of **Venus Investment Ltd v Wayne Ann Holdings Ltd** [2015] JMCA App 24 Morrison JA at paragraph 19 explained the effect of section 140 as follows:

> *[19] Section 140 does three things. First, as Mr Chen submitted, it provides a mechanism by which the registered proprietor or persons claiming under him may summon the caveator to show cause why the caveat should not be removed. The court may, upon proof that the caveator has been summoned, make such order as it thinks fit, whether ex parte or otherwise. Second, it provides that the caveat will lapse 14 days after notice to the caveator that the registered proprietor has applied for the transfer or other dealing with the land. It is a notice to the applicant, as caveator, under this*

> *part of the section which triggered these proceedings in the first place. Third, once such notice has been served, the caveat will not be renewed, unless within the same 14 day period the caveator or his agent appears before the court and gives an undertaking or security sufficient to indemnify every person against any damage that may be suffered by reason of the delay in the registration of any disposition of the property.*

[16] Morrison JA noted at paragraph 20 of the judgment that the first part of section 140 which allows the registered proprietor to summon the caveator to show cause, etc., did not apply to that case because the caveator had brought a claim against the registered proprietor to restrain it from transferring or dealing with the property. In the case before me, the first part of that section is the applicable portion because whereas the Claimant has initiated the claim herein, he has not adopted the usual course, as adopted in **Venus Investments** (supra), of applying for an injunction to restrain the registered proprietor from transferring or dealing with the Five Lots. I will address this issue of the Claimant's failure to do so later in this judgment.

What is the correct procedure to be applied on the Application?

[17] The 1st Defendant has utilized the provision of **Section 140** of the RTA to summon the caveator/Claimant to attend before the Supreme Court or a Judge in Chambers, to show cause why such caveat should not be removed. The burden is therefore on the caveator to show that the caveat should remain in place.

[18] Mrs. Small-Davis has commended the case of **Eng Mee Yong and Others v Letchumanan S/O Velayutham** [1980] A. C. 331 to the Court. That is a decision of the Privy Council arising from Malaysia, a jurisdiction which also utilizes the Torrens system of land registration and conveyancing. It is important to acknowledge that the Legislation in Malaysia, although it allows for an application to remove the caveat, it is not identical to the provisions of the RTA. The Court made the following observations at 337 which nevertheless provides very helpful guidance:

> *Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining*

> *the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the court to be just and convenient to do so. Similarly in section 327 it is provided that "the court … may make such an order on the application as it may think just." The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a "probability," a "prima facie case" or a "strong prima facie case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried: American Cyanamid Co. V Ethicon Ltd. [1975] A.C. 396.*
>
> *This is the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.*

[19] On applications for interlocutory injunctions 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 on the claim?

b. Would damages be an adequate remedy?

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

[20] The similarity between applications for interlocutory judgments and an application for the removal of a caveat is further highlighted by the Privy Council in **Eng Mee Yong** (supra) at pages 337-338:

> *In the case of a refusal by the vendor to complete a contract for the sale of land the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special*

> *circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial.*
>
> *So too in an application by a caveatee 327 for removal of a caveat, once the caveator has met the first requirement of satisfying the court* ***that the claim on which his caveat is based*** *does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried. (emphasis supplied)*

[21] Following this approach, in this application for a discharge of a caveat, the first issue to be determined is whether the Caveator's claim to an interest in the property raises a serious issue to be tried on the claim.

The factual dispute

[22] The Claimant is asserting that he was the highest bidder and was therefore the successful bidder in respect of the five Lots which are the subject of this Application. In order for the Court to determine whether there is a serious issue to be tried in respect of the interest which the Claimant is asserting that he has, the Court is therefore required to determine whether there is a serious issue to be tried as to:

(a) whether the Claimant was indeed the successful bidder in respect of the Five Lots; and

(b) if the Claimant was the successful bidder, whether he obtained an interest in the Five Lots prior to the execution of an agreement for sale.

[23] The position advanced by the 1st Defendant is that none of the Claimant's bids were successful, and they were all invalid because they were incomplete for two primary reasons. Firstly, it was argued that the Claimant only partially completed the Customer Information Form which was required as part of the vendors' due diligence, especially having regard to the fact that the 2nd Defendant is a financial

institution which is subject to the Proceeds of Crime Act. Secondly, the Claimant did not satisfy the bidding instructions which required the following:

> *Proof of funds for cash purchase (a bank statement or letter verified by the bank).*

It was submitted that the Claimants proof of funds was deficient in that his bank statement submitted in the various bids was not verified by the bank.

[24] As it relates to the assertion that the customer information form was incomplete, the Claimant averred that he indicated on the form that he was retired. He posited that as a result of this express declaration, one could not reasonably expect answers to the sections of the form which speak to "place of business" and other questions related to his employment. It was submitted to the Court on behalf of the Claimant that the only fields in the form which were not completed were those which were rendered inapplicable because of the Claimant's disclosed status of being retired. The 1st Defendant challenged this assertion that those were the only incomplete fields and it was argued that it was not open to the Claimant to decide which portions of the form should not be completed.

[25] Unfortunately, the Customer Information Forms were not exhibited in evidence before the Court. The Court is therefore unable to make an assessment as to which party's position is correct.

[26] As it relates to the assertion that the bidding instructions required a bank statement verified by the bank, this is a matter of construction. It was submitted by Mrs. Small-Davis that when the bidding instructions are looked at as a whole, it is clear that the vendor required assurance that the bidder was able to complete the purchase in the event that his bid constituted the highest valid offer. It was further submitted that it is customary, especially where a document is not delivered directly by the bank, to require it to be certified by the bank. No evidence was presented of such a custom being in existence which would be applicable in this case.

[27] The evidence of the Claimant was that his bids included a bank statement from Bank of America as required. Furthermore, following inquiries made by him in advance of submitting the bids he was assured by an agent of the 2nd Defendant that the bank statement would satisfy the requirement. The Claimant did not disclose the name of this agent and the explanation given by Mr. Williams was that the identity of that agent was being withheld for the protection of that agent. Having regard to such nondisclosure the issue of whether an assurance as alleged was in fact given was not explored.

[28] Mr. Williams argued that the natural and ordinary meaning of the bidding instructions is that the bank statement does not need to be verified. He submitted that the words "*verified by the bank*" apply exclusively to the word "letter" which immediately precedes those qualifying words. The words "*a bank statement*" identifies a wholly independent method of satisfying the requirement for proof of funds and because they appear before the word "*or*", they are not similarly qualified words "*verified by the bank*".

[29] Lord Diplock stated in **American Cyanamid** at page 510 C that, "*the court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.*" However, at page 510 D he made the significant observation that:

> *"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."*

Having regard to the similarities between the requirements imposed on a caveator on an application to discharge a caveat and the requirements imposed on an applicant for an injunction, I accept that these words of caution of Lord Diplock apply equally on this Application.

[30] Mrs. Small-Davis submitted that the issue of the proper construction to be placed on the requirement in the bidding instructions for "*Proof of funds for cash purchase*

(a bank statement or letter verified by the bank)" is one which could be resolved by the Court without evidence. There is considerable merit in that submission. In the case of **Barbara Wakefield and Winston Wakefield v Olive Dotsey** Suit Mo E510 of 2000 Supreme Court Jamaica unreported delivered April 9, 2002, Anderson J accepted the position reflected in a passage from **Re Moosecana Subdivision and G.T.P. Volume 7 D.L.R.** 674 at page 677 as follows:

> *"A caveat based upon a prima facie valid document will not be vacated on a summary application to a judge in chamber where the facts are involved and each party has denied by affidavit the principal allegations made on affidavit by the other party. The application might be entertained if the facts are undisputed and the issue rested upon the interpretation or validity of the written document on which the caveat is founded:* ***McGreevy v Murray 1 D.L.R. 285***

[31] However, in this case a finding by the Court as to the proper construction to be placed on the words "*(a bank statement or letter verified by the bank)*" to resolve the disputed position of the parties would, in any event, be purely academic. This is so given that the disputed issue of fact as to whether an agent of the 2nd Defendant had confirmed the validity of the questioned bank statement before its submission would remain unresolved, and so too would the issue of the legal effect of such confirmation if the Court finds that it did occur.

[32] In these circumstances, even if the Court were to resolve the dispute as to whether the unverified bank statement satisfied the requirement of the bidding instructions, there still would remain unresolved the issue of whether the Customer Information Form was incomplete and therefore invalid. Having not seen the relevant forms, and in the context of a factual dispute as to the precise portions thereof which were not completed, the Court at this stage is not in a position to determine whether the omissions breached the requirement of the bidding instructions. Accordingly, the Court is not in a position to make a finding as to whether the form being incomplete provided a proper basis in law for the 1st Defendant to have rejected the Claimant's bids as being invalid.

[33] Having considered the evidence before the Court, I find that there is a serious issue to be tried as to whether the Claimant's bids were valid. The 1st Defendant's position was that the Claimant's bids were invalid. However, no evidence was presented to the Court as to whether they would have been the highest bids in respect of the Five Lots if they were in fact valid as the Claimant asserts.

[34] In his affidavit filed 10 March 2021 the Claimant at paragraph 3 indicated as follows:

> *….In fact, I discovered that I was the only bidder on a number of the said lots and was reliably informed that I was the highest bidder on all them (sic)with the exception of six (6) (i.e. lots 34,35,36,37,70 and 74).*

Lots 34, 35, 36, 37, 70 and 74 are not part of the Five Lots. Mrs Small-Davis complains that the Claimant's statement is a statement of information and belief which although permitted in interlocutory proceedings pursuant to CPR rule 30.3 is subject to the requirement under CPR 30.3 (2)(b)(ii) that the affidavit indicates the source for all matters of information and belief and this was not complied with in this case. Counsel is quite correct in this regard. However, it is clear from the pleadings and from the exchange of correspondence between the parties that the 1st and 2nd Defendants understand the Claimant to be asserting that he was the highest bidder in respect of the Five Lots (and others). In spite of this, the 1st Defendant has not by evidence on this application, positively asserted that he was not the highest bidder as far as the Five Lots were concerned. What it asserts is that his bids were not the highest valid bids. In regard to my previous finding that there is a serious question to be tried as to whether the Claimant's bids were valid, I also find that there is a serious question to be tried as to whether the Claimant's bids were the highest valid bids. I make this finding notwithstanding the Claimant's failure to disclose the source of the information that he was the highest bidder. I have not placed much weight on this omission since the 1st and 2nd Defendants are uniquely placed in a position to determine whether his assertion of having made the highest bids in respect of the Five Lots is correct (acknowledging of

course that the 1st Defendant contests the Claimant's assertion that he was the highest valid bidder.

The sale process and the breach of contract issue

[35] The relevant law on this area can be found in Chitty on Contracts 13th edition volume 1 chapter 2 paragraph 22 in the following terms:

> *2-022* ***Tenders****. At common law, a statement that goods are to be sold by tender is not normally an offer to sell to the person making the highest tender; it merely indicates a readiness to receive offers. Similarly, an invitation for tenders for the supply of goods or for the execution of works is, generally, not an offer, even though the preparation of the tender may involve very considerable expense. The offer comes from the person who submits the tender and there is no contract until the person asking for the tenders accepts one of them. These rules may, however, be excluded by evidence of contrary intention: e.g. where the person who invites the tenders states in the invitation that he binds himself to accept the highest offer to buy (or, as the case may be, the lowest offer to sell or to provide the specified services). In such cases, the invitation for tenders may be regarded either as itself an offer or as an invitation to submit offers coupled with an undertaking to accept the highest (or, as the case may be, the lowest) offer; and the contract is concluded as soon as the highest offer to buy (or lowest offer to sell, etc.) is communicated.*

[36] Counsel were both agreed that the principles reflected in the paragraph quoted above accurately reflects the law and that in this case, a contract is brought into existence upon the submission of the highest bid. It is not disputed that there was no reserve price and there were express terms of the invitation that "*the winning bid will be based on the highest valid offer*" and that "*the highest valid offer that meets the requirements, will be the winning bid*". The position of the 1st Defendant, expressed stridently, is that the Claimant's bids did not meet the expressly stated requirements and as a consequence, were invalid.

Conclusion on the merits of the claim

[37] Having found that there is a serious issue to be tried as to whether the Claimant's bids were the highest valid bids in respect of the Five Lots, on the balance of the evidence before the Court, I find that the claim on which the Claimant's caveats

are based raises a serious issue to be tried. The necessity for this conclusion is based on the approach suggested in **Eng Mee Yong** (supra) that the appropriate enquiry is into the claim on which the caveats are based and to which I have earlier made reference.

[38] Notwithstanding the approach suggested in **Eng Mee Yong** arising from the similarity between injunctions and caveats, I am of the view that the appropriate test at the first stage is not simply whether the Claimant's claim establishes a serious issue to be tried in respect of the claim on which the caveat is based. My reason for this conclusion is based on the following analysis. Section 139 of the RTA offers the discretion to a person claiming "*any estate or interest in land*" to apply to have a caveat registered. It is generally accepted that under the Torrens system of land registration the Registrar does not conduct a formal inquiry to determine whether the applicant does in fact have any "estate or interest in land" and acts in an administrative capacity in this regard. The words "estate or interest in land" would therefore be otiose unless there is a subsequent point at which they become relevant, and in my opinion they become relevant on an application by the registered proprietor of land pursuant to section 140 of the RTA.

Does the Claimant have a caveatable interest?

[39] In determining this issue there are two alternative views as to what the Caveator responding to an application to set aside the caveat must establish. The first school posits the view that a caveator must establish that there is a serious issue to be tried that he has one of the permissible estates or interest in land. This conclusion flows naturally from the wording of section 139 which speaks to "estate or interest in land". Mrs. Small-Davis in her submissions referred to the Tasmanian case of **Woodberry v Gilbert** (1970) 3 Tas. L.R. 7 in which the court acknowledged that the interest claimed ought to be one that confers a legal or equitable interest in the land itself. The Court also listed seven categories of estates or interests which could support a caveat. These included "*a right to the present or future position of the land ….as an owner of the fee simple*" which Mrs. Small-Davis submitted was

the only interest which the claimant could possibly be claiming to have acquired. I have not reproduced the other categories since in my opinion they are not exhaustive and there are other instances of estates or interests in land which were not identified among the seven categories but which have been held to be sufficient to support a caveat.

[40] The position of the second school supports an expansion of the qualifying "interest" needed and assert that a contractual right only may be sufficient. This approach is evident in the case of **Barbara Wakefield and Winston Wakefield v Olive Dotsey** Suit No E510 of 2000 Supreme Court Jamaica unreported delivered April 9, 2002. In that case Anderson J accepted as a correct statement of the law, the following passage from the text entitled "Registration of Title throughout the Empire" at page 186:

> *"Having regard to the intimate connection between caveats and litigation, it is submitted that any claim which would entitle the claimant to initiate litigation in respect of land, should entitle him to enter a caveat, whether the claim be based on an equitable interest, or only on a contract to a right"*

[41] Anderson J, found additional support in the Western Australian case of **Jandric v Jandric & Anor**, [1000] WASC 22 (18 May 1999) a decision of Commissioner Bus, Q.C. in which he made the following statement:

> *"Plainly, a person who claims a legal estate or interest in land will be entitled to lodge a caveat against the land. But where a person does not have a legal estate or interest, he will be entitled to lodge a caveat only if he has an interest in respect of which equity will give specific relief against the land itself. This relief may be by way of an order that the interest claimed be satisfied out of the land itself; for example, by an order for the sale of the land and the payment out of the proceeds of an amount in respect of which the caveator has a charge. If the person has an interest in respect of which Equity will give specific relief against the land itself, then the interest is caveatable, and it is appropriate to describe it as an equitable proprietary interest in land."*

What is the interest or right acquired by the Claimant if he submitted the highest valid bid?

[42] The authorities establish that the legal estate in land does not pass until the execution of a conveyance or transfer however, a purchaser of land obtains an equitable interest as soon as there is a valid contract for sale and before payment of the purchase price. Sir George Jessel MR, in **Lysaght v Edwards** (1876) 2 Ch D 499, 506 referred to what had been settled doctrine since the time of Lord Hardwicke:

> *"It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession".*

At page 510 he went on the state as follows:

> *"It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into."*

[43] The nature of that equitable interest and its incidents has proved to be controversial. In the case of **Scott v Southern Pacific Mortgages Ltd** [2014] UKSC 52 the United Kingdom Supreme Court considered the nature of the purchaser's interest before completion and examined a number of the authorities on the point. In this Application before me however, I am not concerned with the precise nature of that equitable interest. I am solely concerned with whether such an equitable interest may exist.

[44] Mrs Small-Davis submissions in writing at paragraph 30 on this point are as follows:

> *…. We accept that as a matter of legal principle, ordinarily, in a contract for sale the vendor becomes a trustee for the purchaser, with the purchaser gaining a beneficial interest in the property subject to his completion of the contract by the payment of the purchase price. There is however no documentary evidence of a contract between the Claimant and the Applicant....*

In this application there has not been an executed agreement for sale. No doubt the Claimant would argue that his has not been due to any fault of his own. In these circumstances whether one accepts the expanded test with which my brother Anderson J found favour in **Wakefield v Dotsey** (supra) may prove to be determinative. In conducting my analysis, I am guided by the observations of Parnel J in **Barclays Bank DCO v Administrator General and Hamilton** (1970) 15 WIR 461 that the Registration of Titles Law, Cap 340 (the pre-cursor to the RTA), is by no means uniform in all its terms, purpose, and sociology with its Australian counterpart. Accordingly, the learned judge opined that "*an Australian decision on any given provision which is said to be similar to the Jamaican statute cannot bodily be accepted here as an authority without careful examination*."

[45] Parnel J cited with approval the observations of Lord Jenkins in **Chisholm v Hall** 7 JLR 164 where in delivering the judgment of the Privy Council at page 169 said:

> *'The plaintiff's contention on this part of the case demands reference at some length to the provisions of the Registration of Titles Law. This Law is one of many enactments for the registration of titles in force in this country and in various parts of the Commonwealth and Empire. But these enactments are by no means uniform in their terms, and it was agreed in the course of the argument that no useful purpose would be served by comparing other enactments with the Jamaican law, or citing cases decided on other enactments as aids to the construction of the Jamaican law.'*

These observations apply equally to the judgments from the other jurisdictions to which reference has been made. Nevertheless, I am of the view that these cases can be of assistance especially where the prime issue is not the precise construction to be applied to the RTA and provided that one appreciates the differences in the various legislation. Cognisant of the need for this caution, I have considered the cases to which I have referred and I am attracted to the test in

Wakefield and Dotsey. Accordingly, I share the conclusions of Anderson J as to its applicability.

Conclusion on whether the Claimant has a caveatable interest

[46] Having previously found that there is a serious issue to be tried as to whether the Claimant was the highest valid bidder I find that there is a serious issue to be tried as to whether the Claimant has a right to specific performance. It follows almoat naturally that this leads to a finding on a balance of probabilities that the Claimant has shown that there is a serious issue to be tried as to whether he has a sufficient interest in the Five Lots which would entitle him to have the caveats remain in place. However, I am not of the view that the matter ends here and that this *per se* means that the caveats should remain in place. Both Counsel were agreed that a further enquiry is necessary, similar to that undertaken on an application for an injunction.

The balance of convenience

[47] In the case of **Tapper (David Orlando) v Watkiss-Porter (Heneka)** [2016] JMCA Civ 11 the Honourable Ms. Justice Hillary Phillips JA, at paragraph 36 of the Judgment distilled these principles applicable to injunction applications and stated that once the Court has been satisfied that there is a serious issue to be tried, in considering the balance of convenience the court must have regard to whether damages would be an adequate remedy for either party. The learned judge stated that:

> *(i) If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party's case.*
>
> *(ii) In deciding whether to withhold or grant the injunction the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.*

(iii) If the balance of convenience is even then the court should preserve the status quo.

[48] When considering the adequacy of the remedy of damages available for either party on an application for an injunction, the Court usually adopts the following approach distilled from **American Cyanamid** (supra) and approved locally in **National Commercial Bank Ltd v Olint Corp Ltd**. [2009] UKPC 16. As a first step the Court considers whether, if the Claimant were to succeed at trial in establishing his claim, 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.

[49] The second step becomes necessary only 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.

[50] I have formed the view that the second step would not be appropriate because this is where one of the differences between an injunction and a caveat becomes apparent, and that is, the caveator is not usually required to give an undertaking as to damages. I appreciate that the Court at this stage can impose conditions which will serve a similar purpose, but these are conditions which only ought to be applied (if found to be appropriate) after the Court has decided whether the caveat should remain in place. These conditions should not factor into the determination at this stage of the issue of whether damages are an adequate remedy.

The Claimant's submissions

[51] The Claimant submits that damages is not a sufficient remedy. Reliance is placed on the dictum in the case of **Neville Peralto and Another v COK Sodality Co-**

Operative Credit Union Ltd. [2017] JMSC Civ 210 and in particular paragraph 15 in which Fraser J (as he then was) stated the following:

> *[15] As recognized in **American Cyanamid** most if not all cases are really about money (in differing ways and with varying levels of adequacy of compensation). There are additionally sometimes other considerations, especially where there are elements of intangible value such as sentimental attachment which homeowners may have to their family home, which a court may be asked to weigh in the balance when considering whether or not damages may be an adequate remedy.*

[52] Mr. Williams relied on the Claimant's evidence as to his emotional attachment to Properties which is best expressed in his own words as stated in paragraphs 12 to 15 of his affidavit and which I reproduce hereunder:

> *12. That might interest in the lots is not at all motivated or based on monetary value. I have a very strong emotional and sentimental attachment to Silver Sands, hence my interest in purchasing the lots in the first instance.*
>
> *13. In speaking to my emotional and sentimental attachment to Silver Sands, I have spent every single Christmas holiday in Silver Sands since the day I was born, bar two Christmases in 1979 and 2020 (due to instability in the country in 1979 and the Covid-19 pandemic in 2020).*
>
> *14. My intention for the lots is to preserve as much of the character of Silver Sands and keep them as green space. I have no interest in monetary gain from Silver Sands Estate or the monetary value of the lots. In fact, through my attorneys I had proposed to the Defendants as a settlement option that the lots be transferred into a trust or some other entity that would be bound to preserve them as green space in perpetuity.*
>
> *15. As such, there is no amount of money that could suffice in the event that I am successful in this Claim before the Supreme Court but (sic) the defendants were allowed to sell the properties.*

[53] Mr. Williams submitted that the Court should make an order to maintain the status quo until the matter is heard and should consider the fact that the 1st Defendant has been the registered proprietor of most of the relevant lots since 1971 almost 50 years. Counsel indicated that they were registered on a few of the lots in 2008 but in general these properties have been sitting idle for decades. It was submitted that in the circumstances this is not an urgent matter that should deprive the

Claimant of his rights under the RTA to be warned if and when the 1st Defendant decides to sell the lots.

[54] It was also submitted on behalf of the Claimant, that it was the legislators' intention for the RTA to allow a bona fide purchaser the opportunity to be alerted when there is a contentious matter involving property. This is an additional reason why the Court should allow the caveat to stand to allow the Claimant to take whatever steps are necessary to protect his interest at the appropriate time. Therefore, he argued, if the caveat is removed the *bona fide* purchaser would be robbed of his opportunity to make an informed decision before entering into an agreement to purchase one of the Five Lots.

The 1st Defendant's submissions

[55] Mrs. Small-Davis has drawn the Court's attention to the map of Silver Sands which shows that the developers have included green space within the estate. Counsel further submitted that in assessing the Claimant's evidence of the sentimental value he attaches to Silver Sands and whether damages will be an adequate remedy the court should consider the following facts:

> *(a) six of the lots in which the Claimant has expressed an interest are located outside of the Silver Sands Estates gated community;*
>
> *(b) one lot is already developed and has a 3 bedroom villa and swimming pool;*
>
> *(c) the Claimant is not resident in Jamaica and visits annually for Christmas; and*
>
> *(d) the Claimant has bid on all 16 lots which suggests that he does not have any particular attachment to any lot or location within the Estate.*

[56] Mrs. Small-Davis also submitted that in assessing the balance of convenience the court should consider the desire of the 1st Defendant to dispose of the properties including the Five Lots. Ms Small-Davis further submitted that the proper course was for the Claimant to apply for an injunction to prevent the dissipation of the Properties which were the subject of the Claim. Furthermore, Counsel argued that

by delaying his application for the Caveats he has adversely affected the marketing efforts of the 1st and 2nd Defendants.

The Court's analysis of whether damages are an adequate remedy

[57] In **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, Brooks J (as he then was) expressed the general principle 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 to have 'a peculiar and special value'."*

However, in **Lookahead Investors Limited v Mid Island Feeds (2008) Limited and Others** [2012] JMCA App 11 Brooks JA on an application in chambers 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."*

[58] Each case must therefore be taken on its own facts because the presumption that damages are not an adequate remedy is rebuttable. It is being advanced on behalf of the Claimant that he has no commercial interest in the Five Lots and that his interest is derived purely from his emotional attachment to the Silver Sands Estates. In response to the assertion that he has also bid on six of the lots which are outside the Silver Sands Estates gated community, Mr. Williams submitted that by virtue of their close proximity to the gated community, they have an impact on the nature and character of the community which is the feature that the Claimant

is desirous of protecting. A suitable explanation has not been advanced to refute the submission of Mrs. Small-Davis that bidding on the developed lot on which the Villa with swimming pool is located raises a question as to what characteristics of the area the Claimant is interested in protecting.

[59] The Claimant has asserted that evidence of his genuine wish to preserve the nature and character of the area can be seen in his offer of settlement to have the Properties held by an appropriate trust unchanged for perpetuity. However, I am unable to place much weight on this fact owing to the general nature of that offer and having regard to the numerous details which would have to be agreed in order to make that a realistic possibility.

> *The Claimant is not ordinarily resident in Jamaica and only visits at Christmas. He has not expressed an intention to live here. Mrs Small-Davis has submitted that the Claimant is being less than frank with the Court because it appears that he may have an interest as beneficial owner in a company which shares his disclosed residential address and which is the legal owner of two lots in Silver Sands. I will not draw any inferences based on that assertion for purposes of this application. Admittedly, as submitted by Mrs Small-Davis the Claimant has taken a widespread, scattershot, approach to his acquisition of all sixteen lots including bidding on the developed lot which has the Villa and that this arguably suggests that his interest is not non-commercial as he claims. It is also correct that the developers of the project have built into it adequate green spaces for the benefit of all the owners.*
>
> *Nevertheless, it would be inappropriate for this Court, based on the conflicting evidence before it, to make a finding as to whether the Claimant's interest in the Five Lots genuinely stems from the emotional attachment which he describes or whether his interest is commercial in nature but masquerading as a romantic attachment to the way things are and a desire to have the status quo remain. In the absence of evidence which clearly refutes the Claimants assertion the Court is required to accept his evidence as true on a balance of probabilities for purposes of this Application.*

[60] I wholly accept the observations of the learned Judge in **Tewani Ltd** (supra) that the Court should weigh in the balance intangible values such as sentimental attachment which homeowners may have to their family home, when considering whether or not damages may be an adequate remedy. This situation presented to the Court is far removed from a homeowner wishing to preserve his childhood

home or a person who wishes to acquire a particular lot of land to build his home. However, the starting point remains the general legal principle that each parcel of land is said to be “unique” and a has “‘a peculiar and special value”. The emotional attachment which the Claimant asserts is not to a particular lot or to the Five Lots but to the entire Silver Sands area. The fact that the Five lots are separate and/or separated does not affect the principle that each lot of land is unique. The fact of the Claimant’s interest in multiple lots as opposed to a single lot (the latter being the usual situation presented to the Courts) is in my opinion, not a distinguishing feature which creates an exception to the principle that the land and its location are unique.

Conclusion on the issue of the adequacy of damages

[61] In the absence of any evidence which can support a finding that the general principle that damages will not provide an adequate remedy to a person such as the Claimant who desires to acquire land in a particular area, I find that damages would not provide an adequate remedy for the Claimant in this case.

Conclusion on the issue of the balance of convenience

[62] The approach suggested in **Eng Mee Young** (supra) suggests that once the caveator establishes that there is a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until the Claim is concluded. This position is supported by Donald Kerr in The Principles of Australian Land Titles (Torrens) System commended to the Court by Mrs Small-Davis. In that text at page 490 he suggested that having reviewed the relevant case law, one of the principles on which the Court will act is that “*If the caveator has a prima facie case, the fullest opportunity of litigating any matter that may be in dispute will be given to the caveator, however the court will not decide the matter on the summons, but order the caveator to bring an action within a stated time*”.

[63] The 1st Defendant has entered into sale agreements in respect the lots registered at Volume 1078 Folio 950 and at Volume 1078 Folio 968 of the Register Book of Titles which are 2 of the lots which comprise the Five Lots. However, in addition to finding that the Claimant has established a prima facie case, additionally, I have found that damages would not be an adequate remedy for him if his claim succeeds. I am therefore of the view that the balance of convenience lies in favour of having the Caveats remain in place.

Additional considerations

[64] On this Application, the caveator is required to show cause why such caveats should not be removed and I have concluded that the Claimant has succeeded in doing so.

[65] In **Abigail v Lapin** [1934] All ER Rep 720, the Privy Council considered The Real Property Act, 1900, of New South Wales, and certain elements of the Torrens system registration of title to land. The Court observed at page 725 that a caveat served to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed.

[66] It is noteworthy that in this case the Claimant filed the caveats in respect of the Five Lots only after he had initiated this claim. Mr Williams argued that the real purpose of lodging the caveats was so that the Claimant could be notified in the event that there was going to be a sale of any particular lot. At that stage, the Claimant would decide what steps to take and whether for example he would apply for an injunction prohibiting the disposal of that lot or lots.

[67] However, when pressed as to whether an injunction would not have provided adequate and overarching protection Mr Williams explained that the use of caveats in this manner was a calculated strategy because the Claimant recognized that he would not be in a position to give an appropriate undertaking in damages for an injunction in respect of the Claim covering all the Properties. Therefore, by this

method he could delay the application for an injunction until it is absolutely necessary to protect a specific lot or lots and then only at that point provide an undertaking for the injunction in respect of that lot or lots on an *ad hoc* basis. If a particular lot was not in any immediate danger of sale, then he would not have to make an application for an injunction in respect of that lot and would not need to unnecessarily provide an undertaking in respect of that lot.

[68] Mr Williams submitted that this was a perfectly permissible use of Caveats and furthermore the public has an interest in knowing that there was a dispute between the parties and this would guide their conduct and decision making.

[69] Whereas I agree with Mr Williams that the procedure adopted by the Claimant is not expressly prohibited, it is open to the Court to weigh the reasons for the Claimant lodging the caveat, in the balance, when considering whether it should attach any conditions to the order that the caveat should not be removed. The Claimant is well aware that the 1st and 2nd Defendants are making attempts to dispose of the Five Lots and can make his plans on the assumption that agreements for sale if not already entered into may be entered into at any time. He has the benefit of this claim which he has already filed.

[70] I experience some unease with the Claimant's admitted strategic objective of using the caveat as a tool to obtain protection akin to an injunction while avoiding the provision of an undertaking as to damages for the protection of the 1st and 2nd Defendants. Mrs Small Davis suggested that the court has the power pursuant to section 140 of the RTA to order that the Claimant give an undertaking as to damages and that such undertaking be fortified by the provision of good and sufficient. In support of her submissions counsel referred to the cases of **Locke v Bellingdon Ltd** (2002) 61 WIR 68 and **Sinclair Investment Holdings SA v Carlton Ellington Cushnie** [2004] EWHC 218. Both cases concerned an injunction and the issue of the fortification of an undertaking as to damages. It is trite law that the Court can in appropriate circumstances order that the undertaking as to damages be fortified. What is unclear, in my opinion is whether the court can

order an undertaking as to damages as a condition to a caveat remaining in place as in the case of an injunction.

[71] I have not been presented with any case law authority to support the position advanced by Mrs Small-Davis position nor have I been able by my own research to identify any. I therefore have reservations as to whether the Court does have the power under section 140 of the RTA, any other provision, or its inherent jurisdiction, to require an undertaking as to damages in these circumstances. In any event the Court has already made an order that the Claimant provides security for costs in an amount the court considers just. I am of the view that having regard to the close connection between the Claim and the caveats, it would be inappropriate to impose an additional security obligation on the Claimant in respect of the caveats against the Five Lots.

[72] For the reasons expressed herein the Court makes the following orders:

1. The 1st Defendant's Notice of Application filed on 19th February 2021 seeking an order that the Registrar of Titles be ordered to remove the Caveats in respect of the properties registered at volume 1416 Folio 873, Volume 1416 Folio 874, Volume 1078 Folio 950, Volume 1078 Folio 968 and Volume 1078 Folio 980 of the Register Book of Titles, is refused.

2. Leave to appeal is granted to the Applicant

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

3. The Attorneys-at-law for the 1st Defendants are to prepare file and serve a copy of this order.