[2023] JMCC COMM. 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISON

CLAIM NO. SU2023CD00060

BETWEEN	**CORAL COVE MANAGEMENT LIMITED**	**CLAIMANT**
AND	**HUGH MAYBURY CROSKERY**	**1ST DEFENDANT**
AND	**MARK HUGH ARSCOTT CROSKERY**	**2ND DEFENDANT**
AND	**SARAH ELEANOR MEANY (nee CROSKERY)**	**3RD DEFENDANT**
AND	**GEORGE CHAI**	**4TH DEFENDANT**
AND	**MARK CHIN**	**5TH DEFENDANT**
AND	**CHRISTINA CHIN**	**6TH DEFENDANT**

Ms. Stephanie Ewbank, Mr. Matthew Royal and Mr. Jacob Phillips, instructed by Mr. Bruce Levy of Levy/Cheeks, Attorneys-at-law for the Claimant

Mr. Courtney Williams, instructed by Ms. Judith Cooper Batchelor of Chambers, Bunny & Steer, Attorney-at-law for the 1st Defendant

Ms. Keisha Spence, instructed by Henlin Gibson Henlin Attorneys-at-law for the 2nd Defendant

Dr. Mario Anderson instructed by Barbican Law Clinic, Attorneys-at-law for the 3rd Defendant

Mr. Ransford Braham K.C., Mr. David Wong-Ken and Ms. Anna Gracie, Attorneys-at-law instructed by Wong-Ken & Co for the 4th to 6th Defendants.

IN CHAMBERS VIA VIDEO CONFERENCE

Heard: 22nd May and 7th July, 2023

APPLICATION FOR INTERIM INJUNCTION PURSUANT TO SECTION 49(h) JUDICATURE (SUPREME COURT) ACT – RULE 17.1(a), 17.1(4) and 17.2 OF THE CIVIL PROCEDURE RULES, 2002 – WHETHER RIGHT OF FIRST REFUSAL GIVES THE APPLICANT AN EQUITABLE INTEREST IN PROPERTY - WHETHER THERE IS A SERIOUS ISSUE TO BE TRIED- WHETHER DAMAGES AN ADEQUATE REMEDY – BALANCE OF CONVENIENCE - WHETHER INJUNCTION IS MANADTORY OR PROHIBITORY- LIKELY PREJUDICE - PRESERVATION OF STATUS QUO

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] This matter concerns a portion of land located at Discovery Bay in the parish of Saint Ann, registered at Volume 1327 Folio 839 (the subject property). It initially formed part of a larger portion of land owned by Coral Cove Management Limited ("CCML") and registered at Volume 1327 Folio 327 ("CCML").

[2] The larger portion of land was subdivided and sold to the 1st Defendant Hugh Maybury Croskery (Hugh Croskery) and his late wife, Eleanor Margaret Croskery pursuant to Agreement for Sale dated March 17, 1998 (the 1998 agreement). The 2nd Defendant, Mark Hugh Arscott Croskery (Mark Croskery) and the 3rd Defendant Sarah Eleanor Meany (nee Croskery) (Sarah Meany) are children of Hugh Croskery and were nominated as transferees for the subject property. Having found himself in financial difficulties and being unable to repay his debts, Hugh Croskery used the subject property along with his home in Norbrook as security to obtain a loan for the sum of United States One Million Dollars (US$1,000,000.00) from the 4th Defendant George Chai in 2014. At the time this debt became due Mr. Hugh Croskery was unable to repay it, therefore George Chai sought to make good of the security, the subject property. An Instrument of Transfer was lodged on November 11, 2022 for the purpose of transferring said property from the 2nd and

3rd Defendants, who are named on the Certificate of Title, to the 4th to 6th Defendants George Lloyd Chai, Mark Andrew Chin and Christian Angela Chin.

[3] CCML alleges that the 1998 Agreement conferred on it the right of first refusal (ROFR) and so prevents the owners from disposing, transferring or assigning the subject property to the 4th to 6th Defendants without first giving to CCML the right of first refusal.

[4] The Fixed Date Claim Form filed February 14, 2023 originally included only the 1st to 3rd Defendants however, on May 9, 2023 when the parties appeared before me, the now 4th to 6th Defendants, having filed a Notice of Application to Intervene on March 20, 2023 were allowed to intervene in the proceedings. Subsequently an Amended Fixed Date Claim Form and an Amended Notice of Application for Court Order were filed naming them as the 4th to 6th Defendants.

[5] The Amended Notice of Application sought injunctive relief against all the Defendants contending that Hugh Croskery has sought to transfer the subject property to the 4th to 6th Defendants without first offering it to CCML for repurchase. Further, the 4th to 6th Defendants have entered upon the subject property and commenced alterations.

[6] The following orders are being sought:

a. The Respondents, jointly and severally, are restrained, until the determination of this action or further order of this Court, whether acting by themselves, their heirs, successors in title, servants, agents or otherwise howsoever from disposing of, transferring, or otherwise dealing with all of the land comprised in the Certificate of Title registered at Volume 1327 Folio 893 of the Register Book of Titles ("the property").

b. The Registrar of Titles and her servants and/or agents are restrained until the determination of this action from registered any dealings whatsoever in relation to the property.

c. The Fourth, Fifth and Sixth Respondents, jointly and severally, are restrained until the determination of this action or further order of this Court, whether acting by themselves, their heirs, successors in title, servants, agents or otherwise howsoever from entering, possessing or otherwise interfering with the property.

[7] It is important to note that though the 2nd and 3rd Defendants were represented at the hearing, they have indicated they have no interest in the claim and are aware of the right of first refusal.

THE CLAIMANT'S CASE

[8] The Claimant's case is supported by two affidavits from Heidi Theresa Clarke, a Director of CCML filed February 14, 2023 and May 5, 2023 as well as an affidavit from Bruce Fabian Lopez, another Director of CCML filed May 5, 2023.

[9] Ms. Clarke in her Affidavit filed February 14, 2023, asserted that Clause 9 of the 1998 agreement grants CCML the ROFR and the right of pre-emption concerning any proposed transfer. This prohibits any transfer of the property except where CCML has been given the opportunity to re-purchase the subject property. She further asserted that in or around late October 2022, there were rumours that George Chai was seizing ownership of the subject property and that there was some transaction in progress for the change of ownership. CCML's attorneys-at-law were instructed to lodge a Caveat on November 18, 2022 prohibiting registration of any change in the proprietorship or of any dealing in respect of the property.

[10] Ms. Clarke stated that a meeting was held on December 15, 2022 between Mr. Bruce Lopez, the attorneys-at-law for CCML and the attorneys-at-law for Mr. George Chai where the existence of a Settlement Agreement and a stamped Instrument of Transfer were disclosed. The Instrument of Transfer listed George Chai, Mark Chin and Christina Chin as transferees and an intention to proceed to lodge the Transfer was expressed. Despite being informed of the ROFR, the 4th to

6th Defendants attended upon the property and informed the staff that they are the new owners of the property.

[11] She further stated that by letter dated January 4, 2023, CCML's attorney-at-law wrote to Mr. George Chai's attorneys-at-law putting them on notice of the intention to commence proceedings to enforce the ROFR and CCML's readiness to purchase the property at the assessed value of Two Hundred and Twenty-Five Million Jamaican Dollars ($225,000,000.00) however there were no responses.

[12] In her May 5, 2023 affidavit, Ms. Clarke stated that despite the injunction being granted by the Court on March 21, 2023, the 4th to 6th Defendants have continued to have possession of the property and their agents attended upon the subject property and have commenced work to remove the kitchen cupboards.

[13] In the sole affidavit of Mr. Bruce Lopez filed on May 5, 2023, he stated that prior to the December 15, 2022 meeting, he contacted Mr. Hugh Croskery regarding rumours he heard that Stocks and Securities Limited was in financial trouble and that the subject property may be at risk of sale. Mr. Hugh Croskery explained to him how he ended up in the dire financial predicament and how he provided the subject property and his Norbrook home as security to cover his indebtedness to a creditor and outlined steps that were taken to enforce the security. Mr. Hugh Croskery also stated that the sum of Five Million United States Dollars (US$5,000,000.00) was needed to retain the subject property. Mr. Lopez also said that no reference was made of the ROFR neither was there any mention or suggestion of any timeline or deadline and it did not appear that there was a genuine offer of sale. He further stated that the subject property is not valued anywhere close to Five Million United States Dollars ($5,000,000.00).

[14] Mr. Lopez stated that the subject property and the CCML property are not separated by boundaries and cannot be separated as they share a small cove. Both properties share the land and amenities which allow for better enjoyment of both properties. It is for this reason that both properties are rented together. He stated further that he and his siblings inherited the property from their late parents,

whose ashes are sprinkled in the Cove adjacent to the properties, and his family and the Croskery family are blood relatives. He asserted that the existing layout of the two properties happened only because of the family connection and is an important part of the family history. He stated that the intimate nature of the two properties and the important family history underpin the reason why the ROFR is important to CCML.

THE DEFENDANTS' CASE

[15] There are two affidavits by Hugh Croskery filed March 20, 2023 and May 8, 2023 and one affidavit from Sarah Meany filed May 4, 2023. There are two other affidavits, one from Mark Andrew Chin filed March 20, 2023 and another from Christina Chin filed May 16, 2023 on behalf of the 4th to 6th Defendants.

[16] In his March 20, 2023 affidavit, Mr. Hugh Croskery stated that in or around October 2022, he had a frank and confidential meeting with Bruce Lopez in his capacity as a Director of CCML regarding his finances and certain financial obligations owed to George Chai. He stated that the obligations were escalating and he had to get them urgently addressed. To that end, he made a verbal offer to sell the subject property to CCML for Three Million United States Dollars ($3,000,000.00) which remained opened for 10-12 days. Mr. Lopez was unable to find a purchaser who was willing to pay that sum for the subject property and with whom they would be comfortable as a neighbour. Mr. Croskery further asserted that a valuation conducted in December 2013 revealed at that time, that the subject property was valued at Two Million Five Hundred Thousand United States Dollars (US$2,500,000.00) and he has signed an Instrument of Transfer presented by Mr. George Chai who has taken possession of the subject property.

[17] The May 8, 2023 affidavit simply exhibits a more recent Valuation report prepared by Langford Brown dated March 2023. The valuation puts the current value of the subject property at Three Million Two Hundred Thousand United States Dollars (US$3,200,000.00).

[18] In her affidavit filed May 4, 2023, Sarah Meany stated that she is Hugh Croskery's daughter and Mark Croskery is her brother. She agreed that CCML is entitled to the ROFR. She also stated that neither she nor her brother is entitled to a beneficial interest in the subject property and reiterated that the subject property is being held on trust for her father.

[19] Mrs. Meany stated that in early July 2022, she attended a meeting at the offices of SSL where George Chai, Mark Chin and David Wong-Ken were present to discuss the monies owed to Mr. George Chai by SSL and Hugh Croskery personally. Mrs. Meany also asserted that there was a demand for Hugh Croskery to relinquish his property and his home in settlement of his indebtedness, however, she pointed out the existence and terms of the ROFR which was met with disregard and rejection. She also confirmed that the ROFR was not merely the subject of a fleeting discussion but was the subject of several subsequent discussions. Mrs. Meany also stated that she offered to settle the personal debt owed by Hugh Croskery, however Mr. Chai and his attorneys-at-law rejected her proposal and insisted that the transfer of the property was the only way to settle the debt.

[20] Mrs. Meany stated that after the Court handed down the Judgment which confirmed that Hugh Croskery was the beneficial owner of the subject property on July 29, 2022, there was an aggressive push to enter into an agreement for the transfer of the subject property to Mr. Chai in settlement of the indebtedness. She indicated that she is extremely embarrassed by the situation that the Lopez family, who are relatives and dear family friend, have found themselves in by trying to enforce the ROFR. She asserted that the Lopez Family decided to splinter their Title and create two villas sharing the same amenities because of the close family relationship. She asserted that Mr. Chai knew of the value and importance of the ROFR to CCML when he pursued the settlement and was determined to circumvent the contractual obligations under the ROFR.

[21] In the affidavit of Mark Chin filed March 20, 2023 he stated that he has worked with his uncle George for more than twenty (20) years. He further states that in or

around 2009 his uncle George retired and turned his bakery over to him and since then he has been running the business with his uncle as a consultant. He is involved in his uncle's estate planning and was aware of secured and unsecured loans made to Hugh Croskery from approximately 2014 to 2021. He further stated that a dispute arose between Hugh Croskery and his uncle and they agreed to resolve the issue by entering into a settlement agreement which included transferring the subject property in partial settlement of the debt. It was also agreed that his uncle George would pay the Transfer Tax and Stamp Duty on the various transactions. Mr. Chin stated that by inadvertence the Instrument of Transfer stated the consideration as One Hundred Jamaican Dollars ($100.00).

[22] Mr. Chin averred that his uncle entered upon the subject property to take control and advise the staff that he was the new owner. His uncle George also handed out business cards following his visit after which he was contacted by Mr. Bruce Lopez and Mr. Bruce Levy. He further averred that after contact was made, a Caveat was lodged after the Instrument of Transfer was sent for assessment and thereafter the Claimant's attorneys made an offer to purchase the land which was refused. Efforts were made to effect the registration of the Instrument of Transfer which was affected by the 2nd Defendant's refusal to sign and by the Caveat which was lodged and the tenancy which was not stated. Mr. Chin averred that the errors in the Instrument of Transfer are now corrected, and they are ready to effect the registration to his uncle George, Christina Chin and himself.

[23] In her affidavit filed May 16, 2023, Ms. Christina Chin asserted that she is the niece of George Chai and the brother of Mark Chin, altogether, they are the Chai team. She stated that sometime in 2014, Hugh Croskery requested a loan of One Million United States Dollars (US$1,000,000.00) from her uncle using the subject property as security for the loan. She indicated that Hugh Croskery took her uncle to view the subject property and a mortgage instrument was executed in favour of her uncle, George Chai and his wife Angela. The mortgage and the Title for the subject property were handed to her uncle in exchange for the loan. As a result of Hugh Croskery's failure to service the loan, the Chai team considered proceeding under

the Powers of Sale contained in the mortgage. She stated further that in pursuing the Powers of Sale, the Mortgage Instrument was submitted for assessment of stamp duty and penalties paid in or around June, 2022, however, the Powers of Sale was forestalled and subsequently abandoned by the execution of the Settlement Deed in or around August 2022.

[24] Ms. Chin asserted that up to the time of the signing of the Instrument of Transfer on or around November 3, 2022, the ROFR was not disclosed and no Caveat was lodged against the Title for the subject property. She also stated that the Chai team knew that the monetary value in aggregate of the subject property and the Norbrook property fell short of the amount of the debts in the Settlement Agreement, however, the team concluded that the subject property has good income earning potential and over time, her uncle would be able to recover as much of the outstanding amount so that it could support his autistic son.

[25] Ms. Chin confirmed that the Chai team took possession of the subject property and commenced replacing the cabinetry for the kitchen and bathrooms on March 21, 2023 because they were infested with termites and roaches. Ms. Chin asserted that the ROFR was never discussed and its value and importance was not known since it was not lodged on the Title.

DISCUSSION

[26] The question as to whether or not the injunction should be granted will turn on certain factors. The principles, enunciated in the decision of **American Cyanamid Co. v Ethicon Limited** [1975] AC 396 and followed in **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16, are well known and require no repetition at this point. In the written submissions advanced on behalf of the Applicant it was forcefully argued that the claim presents serious issues for trial. Counsel Ms. Stephanie Ewbank highlighted four main issues as arising.

[27] Firstly, whether the 1st Defendant has breached the 1998 Agreement by agreeing to transfer the subject property to the 4th, 5th and 6th Defendants without permitting the Claimant's exercise of its ROFR. On this point she relied on the authority of **Dennis Woodbine v John Ebanks SCCA** No. 147 2007 delivered on December 20, 2004 for the definition to be accorded to the "right of first refusal". Harrison JA defined it as follows:

> *"A right or pre-emption or of first refusal over land is a contractual offer from the owner of the land that in the event that he decides to sell the land he will first offer it to the contracting party in preference to any third party-buyer. No binding obligation arises on the part of the owner to sell if he does not wish to sell, nor is the other party bound to accept when the offer is made …"*

[28] Counsel further stated that the Court of Appeal observed that in construing the terms of an agreement to determine the existence of a right of first refusal, its terms *"should be given their ordinary meaning unless the term of the contract are in a particular context, or the subject matter compels another meaning to be adopted."*

[29] Counsel also relied on **Smith v Morgan** [1971] All ER 1500 where the Court declared that a valid option is created by the clause and pronounced further on its effect as follows:

> *"… the obligation on the vendor should she wish to sell is an obligation to make an offer to the purchaser at the price and at no more than that price at which she is, as a matter of fact, willing to sell"*

[30] Ms. Ewbank submitted that the authorities show that the 1st Defendant was bound to make an offer to the Claimant at the price at which he is, in fact, prepared to sell and is prohibited from disposing of the property, except where he first offers it to the Claimant. She further submitted that it is beyond peradventure that section 9(a) of the Agreement creates a right of first refusal and that the presumption of the existence of the right arises from the clear language of the section, including the use of the word "first" and is confirmed by the reference to a future offer to sell which is triggered by the owner's intention to transfer the property to another. Counsel submitted that the presumption is not displaced.

[31] She contended further that the 1st Defendant admitted the breach of the 1998 Agreement when he mentioned a conversation between himself and Mr. Bruce Lopez where a verbal offer to sell the property was made which remained open for a period to 10-12 days. She submitted that even if the putative offer was made, it did not comply with the terms of the 1998 Agreement which stipulated that a written offer should be made which should remain open for a period of 30 days. Counsel also contended that the suggested sale price of Five Million United States Dollars (US$5,000,000.00) far exceeds the market value of the subject property which as at March, 2023 stands at Three Million Two Hundred Thousand United States Dollars (US$3,200,000.00).

[32] The second issue identified as arising is whether the Claimant is entitled to specific performance of the 1998 Agreement since the 1st Defendant has, by his taking steps to transfer the property to others, actuated the condition precedent for the exercise of the ROFR. The third issue was whether it is just and convenient to restrain the transfer of the subject property to the 4th, 5th and 6th Defendants or any other third party to forestall the breach of the ROFR. The fourth issue identified was whether the transaction between the 1st Defendant, on the one hand, and the 4th, 5th and 6th Defendants on the other hand, bars the award of the equitable relief sought on the claim.

[33] In respect of these issues, Counsel argued that it would be appropriate for the Court to grant an order for specific performance to compel the 1st, 2nd and 3rd Defendants to honour the Claimant's ROFR. She relied on the Canadian case of **City of Halifax v Vaughn Construction Limited** [1961] SCR 715 which confirmed that a "…..right of pre-emption will be specifically enforced and its violation restrained by injunction". Counsel submitted that the Canadian Court recognized the creation of an equitable interest in property, arising as a consequence of the agreement granting a right of first refusal. It was also submitted that the **City of Halifax** decision was cited in **Pritchard v Briggs** [1980] 1 All ER 294 where the English Court of Appeal confirmed that pre-emptive rights created an interest in property once the triggering event has occurred. Reliance was also placed on

Manchester Ship Canal Company v Manchester Racecourse Company Limited and Trafford Place Park Estate Limited [1901] 2 Ch 37 to buttress the points made.

[34] Counsel argued that the ROFR became an equitable interest when the 1st Defendant, in breach of the 1998 Agreement, entered into an agreement for the transfer of the subject property to the 4th to 6th Defendants. She further argued that the equity ranks in priority to the Settlement Agreement entered between the 1st Defendant and the 4th, 5th and 6th Defendants, therefore, the Claimant is entitled to an injunction to restrain the breach of the 1998 Agreement and specific performance of the ROFR.

[35] The 4th to 6th Defendants' response in their written submissions was that there are no serious issues to be tried and that the Claimant is not entitled to the injunction. It was highlighted that the parties are ad idem that there is a 1998 Agreement and that Clause 9 of the Agreement conferred on the Claimant the ROFR. In the written submissions, a number of issues were identified as being in dispute to include the issue as to whether the right of first refusal created an estate in land. A number of authorities were relied on including **Pritchard v Biggs** where it was emphasized that the right is merely contractual and no equitable interest in the land is created by the agreement. Other authorities cited were **Lookahead Investors Limited v Mid Island Feeds (2008) Limited, Jamaica Livestock Association Ltd, Newport-Fersan (Jamaica) Ltd., Registrar of Titles and Royal Bank of Canada (Intervener)** 2012 JMCC Comm 8 where Sinclair-Haynes J. (as she then was) considered the granting of injunctive relief in circumstances of where the right of pre-emption arose. At paragraph 44 the learned Judge stated:

> *"A pre-emption right does not provide JLA, the holder, with an equitable interest. It is a contractual obligation to offer the property to JLA for sale. This right is personal to JLA."*

[36] It was also argued that the 4th to 6th Defendants were placed into possession once the Settlement Agreement was signed and the Title to the subject property along with the undated Transfer were handed over to them which demonstrated that an

equitable mortgage had been created and the 4th to 6th Defendants have all authority to carry through with the transfer.

[37] Kings Counsel Mr. Ransford Braham who submitted on behalf of the 4th to 6th Defendants at the hearing did not forcefully submit that there were no serious issues to be tried and no doubt with good reason as based on all the issues raised, it would have been the inevitable conclusion that there are serious issues to be tried.

[38] There are certain matters not in dispute such as the fact that the Claimant and the 1st Defendant entered into an Agreement in 1998 and that Clause 9 of the Agreement conferred the ROFR. The main questions seem to surround whether the Claimant was offered this right and in what form. The 1st Defendant contends that in a meeting he offered the Claimant the ROFR however Clause 9 of the Agreement clearly stipulates that this ought to be in writing. The main issue therefore would be the effect of the failure to offer this ROFR in writing on the subsequent actions of 1st Defendant in seeking to transfer the property in the names of the 4th to 6th Defendants. It is also not in dispute that the 4th Defendant is owed money by the 1st Defendant, neither is the Claimant disputing that the 4th to 6th Defendants are the subject of an Instrument of Transfer meant to transfer the subject property to them which has not yet been registered. The dispute surrounds whether the ROFR creates an equitable interest in land or simply a contractual right and whether any equitable mortgage granted by the 1st Defendant to the 4th to 6th Defendants trumps the Claimant's ROFR.

[39] Based on the well-established principles surrounding the grant of an injunction on the issue of whether there is a serious issue to be tried, as set out in the **American Cyanamid** case which emphasizes that in order to succeed in an application such as this, the applicant must first establish that there is a serious issue to be tried. This simply means that the claim is not frivolous or vexatious and that the applicant has some prospect of succeeding. These principles were followed in the **Olint** case and more recently applied by President Brooks in **Brian Morgan [Executor of the**

Estate of Rose I Barrett) v Kirk Holgate [2022] JMCA Civ 5. It is clear to me that this case raises serious issues to be tried.

[40] Some of the issues that the court would have to address have been distilled are as follows:

a. Whether the triggering of the ROFR in the 1998 Agreement created an equitable interest in land?

b. Whether the ROFR merely confers a contractual right?

c. Whether the equitable mortgage ranks in priority to the ROFR?

d. Whether the equitable interest in land has already passed to the 4th to 6th Defendants?

e. Whether the 1st Defendant's verbal offer of sale to the Claimant satisfied Clause 9 of the 1998 Agreement?

Whether damages is an adequate remedy?

[41] Counsel for the Claimant has submitted that in principle, damages are not an adequate remedy for a breach of contract which requires conveyance of the legal estate in property. Counsel relied on **Sudbrook Trading Estate Ltd v Eggleton** [1983] 1 A.C. 444 which concerned a claim for specific performance of an option held and exercised by a lessee for the purchase of a certain property where the court considered that:

> *"… the damages for loss of such a bargain would be negligible and, as in most cases of breach of contract for the sale of land at a market price by refusal to convey it, would constitute a wholly inadequate and unjust remedy for the breach."*

[42] It was also submitted that this approach was approved by the Court of Appeal in **Lookahead Investors** where Brooks JA (as he then was) noted that:

> *"… where land is concerned it is presumed that damages are not an adequate remedy, and no enquiry should ever be made in that regard. The reason behind that thinking is that each parcel of land is said to be "unique" and to have" a peculiar and special value …"*

[43] Counsel advanced that the evidence to this case affirms the presumption that damages is an inadequate remedy for the Claimant as the evidence reflects the peculiar features of the subject property, the long history of family ownership and the familial relationship between the Claimant's principals and the 1st to 3rd Defendants which formed the bedrock of the 1998 Agreement. It is submitted that it is through this close relationship that the Clamant made sure to reserve for itself a ROFR.

[44] On the other hand, it is submitted that damages are an adequate remedy for the 1st to 3rd Defendants, as the 1st Defendant's undisputed evidence is that he wishes to sell the property so that he can settle the debt obligation owed to the 4th Defendant and others. Counsel further submitted that their interest is entirely pecuniary and no injury will come to them if the interim injunction is granted. Similarly, the 4th to 6th Defendants' interest is of a pecuniary nature so damages would be an adequate remedy for all the Defendants.

[45] Neither Kings Counsel on behalf of the 4th to 6th Defendants nor Counsel on behalf of the 1st to 3rd Defendants sought to argue that damages would be adequate to the Claimant. The facts surrounding the history of the property were not disputed, in fact the 2nd Defendant Mrs. Meany spoke affirmatively to the long outstanding family relationship which led to the ROFR.

[46] It is evident that the subject property is of great value and importance to the Claimant's principals. It is important to them not only because of the cove and amenities that connect the properties but because it could also be considered as a family heirloom. In my research on the adequacy of damages, I located the Court

of Appeal case of **Mavis Rodney v Jane Rodney-Seale and Leleith Rodney-Roberts** (1994) 31 JLR 674 (CA) where the Court confirmed the view that interests in land are rights which persons are entitled to protect by way of injunctions and caveats. Forte JA stated the following at page 684 of the judgment:

> *"In this regard, a passage cited by Mr. Miller for the respondents, from the text ""Registration of Title to Land throughout the Empire" by James Edward Hogg, M.A., Oxon dealing with the Torrens system throughout the Commonwealth including Jamaica is of significant relevance. It reads: 'The necessity for protecting unregistered interests by means of injunctions, and the close resemblance that the caveat bears to an injunction, justify the general principle of giving an extended meaning to the 'interest' which will support a caveat. It must of course be borne in mind that (as already pointed out ante, P. 173) 'interest' includes a claim to an interest; the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests, and of interests that have not yet become actual interests in the land."*

[47] In the Court of Appeal case of **Pride of Derby and Derbyshire Angling - Association Ltd v British Celanese Ltd** [I953] Ch. 149, the Lords found that a person who establishes that his proprietary rights are being wrongly interfered with, is prima facie entitled to an injunction. Lord Evershed MR stated at page 181 as follows:

> *"It is, I think, well settled that if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an adequate remedy for the wrong that he has suffered."*

[48] The Claimant is seeking to ensure that the subject property remain in the family, and it is prepared to repurchase the property from the 1st Defendant to effect that. The 4th to 6th Defendants have admitted that the main purpose for proceeding with the transfer of the property is so that they can recover as much of the outstanding debt owed to the 4th Defendant. It is clear to me that the 4th to 6th Defendant's interest in acquiring the property is of a pecuniary nature and they have not sought to suggest otherwise. I therefore find merit in the arguments advanced on behalf of the Claimant that the 4th to 6th Defendants' interest is purely pecuniary and can

be satisfied with damages. The 1st Defendant's beneficial interest in the property is also of a pecuniary nature as he has sought to divest himself of the property for the sole purpose of satisfying his indebtedness. The 2nd and 3rd Defendants interest would flow from that of the 1st Defendant. For these reasons I find that damages would not be an adequate remedy for the Claimant.

[49] The Claimant has given an undertaking in damages and has stated it is ready, willing and able to purchase the subject property for Two Hundred and Twenty-Five Million Jamaican Dollars (J$225,000,000.00). The Claimant has also stated it has the means and ability to satisfy any orders made pursuant to its undertaking as to damages and is willing to furnish its books and details of its assets should that be required.

[50] The decision in the **Olint** case following up on the **American Cyanamid** decision has reiterated the principles for the grant of an interim injunction at paragraph 16 of the judgment as follows:

> *"As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that mean that if damages will be an adequate remedy for the plaintiff, there are no grounds for the interference with the defendant's freedom of action for 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."*

[51] In the **American Cyanamid** case, it is succinctly stated page 323 that:

> *"If on the other hand damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a*

financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises."

[52] From these well-established principles, it would appear that there is no need to move on to consider the balance of convenience and other factors because I am satisfied that there is a serious issue to be tried and that damages would not be an adequate remedy for the Claimant. The Claimant having established the existence of a serious issue to be tried and the fact that damages would not be an adequate remedy would be entitled to an interim injunction against all the Defendants.

[53] Despite my views here, and in deference to the very forceful submissions of Kings Counsel Mr Braham I will move on to consider the balance of convenience.

Whether the balance of convenience lies in favour of granting or refusing the injunction being sought

[54] On behalf of the Claimant, it was submitted that the balance of convenience favours granting the injunction. Further, that if the injunction is refused, the Claimant is likely to suffer irremediable prejudice in that if the Claimant is unable to secure its exercise of the ROFR, the Defendants will be permitted to deal with the subject property as they see fit and Claimant may never be able to realise the value of its ROFR and could potentially lose forever the opportunity to reclaim the subject property. On the other hand, there would be no prejudice to the 1st Defendant as his interest is simply pecuniary as he has asserted he does not wish to preserve the subject property for himself. The 2nd and 3rd Defendants have no interest of their own in the property. The 4th to 6th Defendants interest is also of a pecuniary nature.

[55] It was on this point of the balance of convenience that Kings Counsel on behalf of the 4th to 6th Defendants focused his submissions. He forcefully submitted that the

4th to 6th Defendants have acquired the right to possession by signing the Settlement Agreement and therefore an equitable interest in the property as they have already taken up possession of the property and have even exercised rights of ownership and that any interim injunction granted would affect their ability to exercise their right to possession. Prior to the grant of the interim injunction on March 21, 2023 their equitable interest was already created despite the fact that they had not then been included as a party to these proceedings.

[56] He argued that although the caveat was lodged before possession, this does not affect the right to possession so the caveat would be of no relevance. He contended that their position is strengthened by the **American Cyanamid** principles dealing with preservation of the status quo in that where all factors are evenly balanced the Court should take measures to maintain the status quo. To interrupt the 4th to 6th Defendants in their possession of the property would cause great inconvenience and disrupt the status quo.

[57] He contended that to order them to leave the property would be a mandatory injunction as opposed to a prohibitory one and that the Claimant has not established the basis for the Court to grant a mandatory injunction. To leave the property without anyone in possession would be to the detriment of the maintenance of the property. They should not be turned out of the property in favour of another party who has not yet established their right to possession. The Claimant has not paid any consideration with respect to the property whereas the 4th to 6th Defendants have already provided compensation and acquired an equitable interest.

[58] The Claimant's response to these submissions was that the Settlement Agreement did not confer on them early possession as the transfer was not registered and there is no evidence of their right to early possession and so the 4th to 6th Defendants' possession is wrong as they were aware of the caveat and to allow them to remain would be to allow them to benefit from their wrong doing.

Furthermore, notwithstanding the injunction granted by the Court, they made changes to the property.

[59] Counsel contended that the appropriate injunction is prohibitory as the use of the property is continuous. However, even if the court takes the view that it is a mandatory injunction, they have met the threshold for the grant of a mandatory injunction. Reliance was placed on the case **Infochannel Ltd v Cable and Wireless Jamaica Ltd** Unreported Suit No. C/L 1038/2000 delivered on 17 August 2000 for the distinction to be drawn between both types of injunctions.

[60] Mr Courtney Williams on behalf of the 1st Defendant agreed with the submissions advanced that the injunction being sought is prohibitory and not mandatory.

[61] Counsel for the 2nd Defendant pointed out that based on the Order of my sister Reid J the sole beneficial owner of the property is the 1st Defendant and therefore the 2nd Defendant has no interest in the property and so was never in the position to transfer or deal with it. Therefore, to make an order against the 2nd Defendant would be to make an order against an arbitrary person and so there is no basis on which to restrain him by the grant of an interim injunction. The Claimant's response to that is the 2nd Defendant is one of the registered owners on Title.

[62] The issue of whether what is being requested is mandatory or prohibitory and the effect on the grant of an injunction has been raised and so require some thought. The Court in the **Infochannel** case placed a greater burden on an applicant seeking a mandatory injunction vis a vis one seeking a prohibitory one and placed an emphasis on the requirement to prove special circumstances. The Court relied on the decision of **Localbail International Finance Ltd v Agro-export and Others** (1986) 1 All ER 900, where at page 901 the Court arrived at the view that "before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction". However, that view seems to have been diluted by the decision of the Privy Council in the **Olint** case where Lord Hoffman reflected on

the nature of prohibitory and mandatory injunctions commencing at paragraph 19 of the judgment and in reference to the **American Cyanamid** case said the following:

> *"There is however no reason to suppose that in stating these principles Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in **R v Secretary of State for Transport, ex parte Factortame Ltd** (No 2) [1991] 1 AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see **Films Rover International Ltd v Cannon Film Sales Ltd** [1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in **Shepherd Homes Ltd v Sandham** [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."*
>
> *For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see the Films Rover case, ibid. What matters is what the practical consequences of the actual injunction are likely to be.*

[63] From the **Olint** decision, it would appear that whether or not the injunction is of a prohibitory nature or mandatory nature, the underlying principle remains that the Court must take the course which seems likely to cause the least irremediable harm. What the Court must pay attention to is the fact that if it is in fact a mandatory injunction that is being sought, it may be more likely to cause irremediable harm than where it is a prohibitory injunction that is being sought. Therefore, the question as to whether the injunction being sought is mandatory or prohibitory is not critical to the determination as those arguments are described as being barren but what appears critical is the question of irremediable harm which brings into play the issue of prejudice.

[64] In considering where the balance of convenience lies, the Court should have regard to the factors outlined in **Olint** which include any prejudice that the parties are likely to face by the grant or refusal of the injunction and the relative strength of the parties' case. Where the factors are evenly balanced then the issue of the preservation of the status quo should be given consideration.

Prejudice

[65] From my review of the evidence, it is only the Claimant who has asserted that it has a specific interest in the subject property separate and apart from a pecuniary interest. All the other parties' interest lies principally in the financial value that the property holds. The 1st Defendant's aim is to transfer it so he can satisfy his indebtedness. The 2nd and 3rd Defendants have not stated that they have any interest in the property. The 4th and 6th Defendants wish to acquire it in lieu of the debt owed to the 4th Defendants. If the property were to be transferred to the 4th and 6th Defendants, any opportunity the Claimant would have to exercise its rights under the ROFR would be thwarted. The 4th and 5th Defendant have already demonstrated that they intend to make some changes to the property. To allow them to remain in possession would afford them the opportunity to make additional changes which may also inure to the prejudice of the Claimant if the Claimant were to succeed at trial.

[66] In considering whether any prejudice would be occasioned to the 4th to 6th Defendants, I bear in mind that if the injunction were granted this would restrict the 4th to 6th Defendants from continuing with the transfer of the subject property during the life of the injunction and the delay could mean that the debt will continue to escalate and that the 1st Defendant may have a greater debt to settle. Additionally, considering the indication by Ms. Chin that they took up possession of the property in December 2022 they would now be required to give up possession. I do note however, that there is no indication from any of the Defendants that there is any intention to use the property for residential purposes. From all indications, the property was being used as a villa housing guests, which is indicative of a

commercial venture which strengthens the Claimant's position that the 4th to 6th Defendants' interest is primarily financial. In all these circumstances, any prejudice occasioned to them could therefore be remedied by an award of damages.

[67] However, were the inunction not granted, the Claimant would lose forever a valued family heirloom which could not be remedied by an award of damages. This outweighs any prejudice the Defendants may suffer in having to await the determination of the matter to recover any financial loss. It is therefore my opinion that the Claimant is the only party who will face irremediable prejudice if the injunction were not granted.

Relative Strength of the Parties' Case

[68] Based on the available evidence, the 1st Defendant did not abide by the terms of the ROFR and so it appears uncontroversial that the ROFR has been breached by the 1st Defendant. Such a right operates firstly as a contractual right and although it is no more than a pre-emptive right, it imposes an obligation on the owner if he chooses to sell or first offer it to the other party and it prohibits him from disposing of the property without taking this first step. The decision of the **City of Halifax**, although not binding, provides guidance. It enunciates the principle that "a right of pre-emption will be specifically enforced, and its violation restrained by injunction". The Canadian Court accorded recognition to the creation of an equitable interest in the property arising as a consequence of the agreement granting the right of first refusal. Not only would the Claimant have a contractual right which they are entitled to seek to enforce, but they could also have acquired an equitable interest by virtue of the right of ROFR. This case lends credence to the Claimant's view that they may be entitled to Specific Performance of the contract if successful.

[69] On the other hand, the 4th to 6th Defendants may also have firstly the right to an equitable mortgage and consequently and by virtue of their alleged assumption of possession of the property an equitable right to possession. In my research on the point, I located the authority of **Karin Murray v Brilliant Investments Limited and Ors** [2022] JMSC Civ 67, Nembhard J at paragraph 20 opined that:

> *"One method by which an equitable mortgage may be created is by the delivery to the lender of the title deeds relating to the borrower's land, accompanied by a demonstrably clear intention to treat the land as security for the monies advanced. It is not necessary that any general words of charge be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property referred to in the document should constitute a security."*

[70] From the authority cited above it would be that the 4th to 6th Defendant could have obtained an equitable mortgage and in the normal scheme of things would have all right to proceed with the transfer of the subject property from the 1st Defendant to the 4th to 6th Defendants. In addition to that, by virtue of the Settlement Agreement and their taking up possession of the property and assertion of the rights of ownership, they may have secured for themselves and equitable interest in the property.

[71] So therefore, both parties would have a claim in equity. In considering the strength of the parties' case, the question as to the competing equities would arise. On behalf of the 4th to 6th Defendants the authority of **Lookahead Investors Limited** was relied on. Sinclair-Haynes J as she then was faced with the issue of determining whether a pre-emption agreement is invalid and or illegal and therefore void and unenforceable. The judgment is instructive. She reviewed the often cited maxim that where there is a competition between two equities the first in time prevails, but not without highlighting the criticism of the rule as seen in **George Rice and Lydia Rive v William Nail et al** 61 ER. 646 (1853) 2 Dewry 73 at paragraph 26 of the judgment. She highlighted that preference was given to the rule that "As between persons having only equitable interests, if their equities are in all respects equal, priority of time gives the better equity; or, qui prior est tempore potior est jure". Sinclair-Haynes did find that the pre-emption right did not provide the holder with an equitable interest but rather it is a contractual obligation to offer the property. I find this case to be distinguishable on the facts because of the allegations regarding fraud and illegality but the principles remain useful. However, the case of **Pritchard v Briggs** suggests that while the right of pre-emption did not initially confer an interest in land, it was converted to an equitable interest as soon

as the owner decided to dispose of the property. While the view is not unassailable, it puts the Claimant in a strong position to argue that his interest should be given priority over that of the interests of the 4th to 6th Defendants.

Preservation of Status Quo

[72] Although it is impossible to stop the world pending trial, the preservation of status quo is important. The current state is that the transfer has not been perfected and so the 1st Defendant is still the beneficial owner and the individual with the legal right to possession. Incidental to possession would be the right to preserve and maintain the property or to direct others to do so. Incidental to this right he could chose to put anyone he desires in possession. However, it is his position that consequent upon the position in which he found himself he signed an Instrument of Transfer for the property and Mr Chai has taken up possession, but the property is yet to be transferred. He has in no way stated that he has given any permission for early possession or how it is that Mr Chai came to take up possession.

[73] The injunction being sought against the 1st to 3rd Defendants would operate to prevent them from exercising their usual rights to possession. The 5th and 6th Defendants have deponed to the fact that the agents of the 4th Defendant have entered the property to take control of it, but this alone may not be sufficient to establish any right to possession and to displace the possession of the 1st Defendant who remains the beneficial owner until the transfer takes effect. It is only upon registration of the transfer, that the estate and interest of the registered owners would pass to the transferees. In light of the Order of the Court making the 1st Defendant the beneficial owner he has the legal right to possession. I am of the view that the current status quo should remain until after the determination of the matter.

[74] Taking into account, all the factors discussed, I have formed the view that the balance of convenience weighs in favour of the Claimant. The registered owners as reflected on the Certificate of Title remain the 2nd and 3rd Defendants and so

even though they are owners on Title only they cannot seek to distance themselves from issues regarding the grant of the injunction.

[75] The Claimant has satisfied the test for the grant of an interim injunction against all the Defendants therefore my orders are as follows:

a. The Defendants, jointly and severally, are restrained, until the determination of this action or further order of this Court, whether acting by themselves, their heirs, successors in title, servants, agents or otherwise howsoever from disposing of, transferring, or otherwise dealing with all of the land comprised in the Certificate of Title registered at Volume 1327 Folio 893 of the Register Book of Titles.

b. The Registrar of Titles and servants and/or agents are restrained until the determination of this action from registering any dealings whatsoever in relation to the property.

c. The Fourth, Fifth and Sixth Respondents, jointly and severally, are restrained until the determination of this action or further order of this Court, whether acting by themselves, their heirs, successors in title, servants, agents or otherwise howsoever from entering, possessing or otherwise interfering with the property.

d. Costs of the application to the claimant to be taxed if not agreed save that the costs in relation to the 2nd and 3rd Defendants be costs in the claim.

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Stephane Jackson Haisley
Puisne Judge