[2018] JMCC COMM 36

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISON

CLAIM NO. 2018 CD00531

BETWEEN	**FOREIGN OPTIONS LTD**	**CLAIMANT**
AND	**JENNIFER MESSADO**	**1ST DEFENDANT**
AND	**RELIANCE GROUP OF COMPANIES LIMITED**	**2ND DEFENDANT**
AND	**GORDON TEWANI**	**3RD DEFENDANT**

IN CHAMBERS

Mr. Ransford Braham QC, Ms Pamela Whittingham and Ms Jody-Ann Gaff, instructed by Vaccianna & Whittingham, Attorneys-at-Law for the Claimant

Ms Samoya Young and Ms Chantelle Young, instructed by Clough, Long, & Co. Attorneys-at-Law for the 1st Defendant

Mr Patrick Foster QC and Mr Francois McKnight, instructed by Nunes Scholefield & Deleon Attorneys-at-Law for the 2nd and 3rd Defendants

Heard: 24th, 29th, 31st October and 12th November 2018

Injunction - Principles to be applied - Applicant registered legal owner – Party against whom injunction is sought is a mortgagee – Payment into court by mortgagor under 'Marabella principle' - Exceptions to applicability of the principle

LAING, K

The Application

[1] The Claimant by Notice of Application filed on 18 September 2018 seeks the following orders:

> 1. *An interim injunction restraining the 2nd Defendant, Reliance Group of Companies Ltd, its servants and/or agents from selling transferring or otherwise disposing of the mortgages registered on the Certificate and Duplicate Certificate of Title registered at Volume 1481 Folio 496.*
>
> 2. *An interim order compelling the 2nd Defendant to hand over the Duplicate Certificate of Title to the Registrar of the Supreme Court or an Independent Third party as determined by this Honourable Court to prevent its use in any way or form that would be detrimental to any judgment or Order made in the Claim.*
>
> 3. *An interim Order compelling the 2nd Defendant to hand over the Duplicate Certificate of Title to the Registrar of the Supreme Court or an Independent Third party as determined by this Honourable Court to prevent its use in any way or form that would be detrimental to any judgment or Order made in the Claim.*
>
> 4. *In the alternative, an order restraining the Registrar of Titles from registering any transaction in relation to and/or against the land registered at Volume 1481 Folio 496 unless order to do so by this Court.*
>
> 5. *The orders sought above shall remain in effect until determination of this trial or until such further order of this Honourable Court.*
>
> 6. *Costs to be costs in the claim.*

The Background

[2] The Claimant is a company registered in Jamaica under the Companies Act. The Claim Form and the Notice of Application (which application is being considered herein), recites its address as 27 Tobago Avenue, Kingston 10 in the parish of Saint Andrew, Jamaica.

[3] The Claimant was the registered owner of lands in Negril, Westmoreland, formerly registered at Volume 963 Folio 620 and now registered at Volume 1481 Folio 496 of the Register Book of Titles ("the Land").

[4] The 1st Defendant Mrs Jennifer Messado ("Mrs Messado"), at the material time was an Attorney-at-Law and partner in the firm of Jennifer Messado & Co with offices at 10 Holborn Road, Kingston 10. Mrs Messado was also a director of the Claimant together with Mr. Peter Thomas ("Mr Thomas"). Mr George Antonio Salmon who was also a director at one stage, was deceased at the material time and he was survived by his wife Mrs Joan Salmon ("Mrs Salmon").

[5] The 2nd Defendant, Reliance Group of Companies Ltd ("Reliance") is a company incorporated under the laws of the Cayman Islands and having its registered office at Caledonia House, Georgetown, Grand Cayman, Cayman Islands.

[6] The 3rd Defendant, Mr Gordon Tewani ("Mr Tewani") is a businessman and is described as being "the principal" of Reliance.

[7] In or about September 2013, Mrs Messado, purporting to act for/and or on behalf of the Claimant, approached Tewani Limited for a loan in the sum of US$360,000.00 ("the Loan") purportedly for "...*infrastructure works as contemplated by the approval from National Investment Bank of Jamaica (NIBJ)*" in connection with the Land. The Land was offered as security for the proposed Loan. The proposal was formalised in a letter dated 16 September 2013 signed by Mrs Messado, on the letterhead of the law firm Jennifer Messado & Co.

[8] Mr Donovan Jackson ("Mr Jackson"), an Attorney-at-Law and a Partner of the firm of Nunes, Scholefield, Deleon & Co, wrote a letter dated 26th September 2013, addressed to Jennifer Messado & Co, for the attention of Mrs Messado. He indicated therein that he had been instructed by Tewani Limited and Mr Gordon Tewani to whom she had communicated by letter dated 16th November 2013, to indicate Mr Tewani's willingness to make the Loan in the sum of US$360,000.00 to Foreign Options Limited in order to facilitate the infrastucture works as

contemplated by the approval from the NIBJ. It was also indicated that Mr Tewani had advised that the loan would be made through Reliance as this would be most expedient. The Letter proceeded to set out the terms of the Loan and the security required which was First legal mortgage in the amount of US$360,000.00 over the Land, the personal guarantee of Mr Thomas (director) and the personal guarantee of Mrs Messado (director).

[9] By letter to Mr Jackson dated 2nd October 2013, Mrs Messado enclosed the duplicate Certificate of Title for the Land, in order to facilitate the preparation of the loan documentation and indicated that "*we have asked Mr Gordon Tewani to release Mr Peter Thomas as guarantor*".

[10] Mr Jackson acknowledged receipt of the duplicate Certificate of Title by letter dated 4th October 2013 addressed to Mrs Messado, in which he enclosed a number of draft documents and requested a copy of a Companies Office Certificate of Good Standing for the Claimant as well as a copy of its Articles and Memorandum of Association.

[11] There was a further exchange of correspondence and on 15th October 2013 an instrument of Mortgage was executed (the "First Mortgage"), purportedly under the common seal of the Claimant with Mrs Messado signing firstly as Director and secondly as Director/Secretary pursuant to a power of attorney dated 6th November 2012 and numbered 1791857 granted by Mrs Salmon ("the POA"). A guarantee of Mrs Salmon was also produced having been so offered by Mrs Messado.

[12] A resolution bearing the seal of the Claimant which was also purportedly passed on 15th October 2013, was produced by Mrs Messado.

[13] The sum of US$360,000.00 being the proceeds of the Loan were paid to Jennifer Messado & Co, the receipt of which Mrs Messado acknowledged by her letter to Mr Jackson dated 4th November 2013.

[14] By letter to Mrs Messado dated 13th May 2014, Mr Jackson confirmed that his client, (presumably Mr Tewani) had advised that based on discussions with her he had acceded to a request to make a further loan in the sum of US$150,000 ("the Second Loan") on similar terms as the Loan, on the security of a second mortgage over the Land ("the Second Mortgage"). The Loan and the Second Loan are referred to herein as the Loans".

[15] The Second Mortgage was executed on the 14th day of May 2018 by Mrs Messado in her capacity as director of the Claimant and by Mrs Messado signing as Director/Secretary under the POA.

The Law

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

a. Is there a serious issue to be tried?

b. Would damages be an adequate remedy?

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

These factors will be developed and explored in turn in the body of this judgment.

A. Is there a serious issue to be tried?

The Claimant's submissions

[17] The Claimant asserts that the Defendants acted fraudulently. It also claims Mr Tewani and/or Reliance are liable for the torts of dishonest assistance and knowing receipt of trust property.

[18] The Claimant acknowledged that under the Registration of Titles Act ("RTA"), a person who has his interest in land registered on the title obtains an indefeasibe title, which can only be defeated in cases of fraud. Section 70 of the RTA provides as follows:

> *"**70.** Notwithstanding the existence in any other person of any estate or interest, whether derived 'by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to my qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that my by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:*
>
> *Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument."*

[19] Mr Braham Q.C. submitted that "*fraud*" under the RTA is actual fraud. Dishonesty and constructive or equitable fraud will not suffice. However, Counsel submitted that if a party abstained from making enquires for fear of learning the truth, fraud may properly be ascribed to him. In support of this positon Counsel relied on the Privy Council case of **Assets Company Ltd v Mere Roihi & Others** [1908] AC 210 and in particular page 210 of the Judgment where Lord Lindley delivering the Judgment of the Court stated as follows:

> *"Passing now to the question of fraud, their Lordship are unable to agree with the Court of Appeal. Sects 46, 119, 129 and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, ss. 55, 56, 189 and 190) appear to their Lordships to shew that by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents, Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquires for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."*

[20] Mr Braham submitted that on the evidence, Reliance is guilty of fraud. He argued that Mrs. Messado dishonestly executed the mortgages pursuant to the POA that provided her with no authority to sign the mortgages and is guilty of fraud.

[21] He referred to Article 121 of the Claimant's Articles of Association which requires that every instrument to which the Claimant Company's seal is affixed be signed by a second director. Article 119 of said articles prohibits the same person who holds the position of director and secretary to execute an instrument where the instrument is to be executed by a director and secretary.

[22] In relation to the First Mortgage, dated 15th October 2013, Mrs. Messado first signed in her capacity as a director. She also signed a second time "*per Joan Salmon under Power of Attorney No. 1791857 dated 6th day of November 2012*." In relation to the Second Mortgage, Mrs Messado similarly signed twice purportedly under the POA.

[23] Mr Braham submitted that in executing the mortgages as she did, Mrs Messado was representing that she was authorized to sign the mortgages a second time pursuant to the POA and that this representation was false and dishonest.

[24] Counsel submitted that this representation was false because paragraphs 1-6 of the POA expressly limits Mrs Messado's authority as follows:

> *"1. To act on my behalf in regards to all aspects of development known as Negril Vista, Negril, Westmoreland registered at Volume 963 Folio 620 of the registered Book of Titles (hereinafter referred to as "the development").*
>
> *2. To act on my behalf in any dealings with the aforementioned development and all the relevant applications for the local authorities, the Parish Council, the National Environmental Planning Agency for the furtherance of the development and the establishment of the development.*
>
> *3. To carry into effect and perform all agreements entered into by me with any other person or persons for the furtherance of the development.*
>
> *4. For the purposes aforesaid or any of them to sign my name and execute on my behalf all contracts, transfers and deeds whatsoever.*
>
> *5. To concur in doing any of the acts and things therein before mentioned in conjunction with any other person or persons interested in the development.*
>
> *6. Generally, to act in relation to the development and affairs and to this deed as fully and effectually in all respects as I could do in particular matters under the Registration of Titles Act."*

[25] Counsel pointed out that the POA authorizes Mrs Messado as follows:

> *-"To act on Mrs. Salmon' behalf in regards to all aspects of the development known as Negril Vista, … registered at Volume 963 Folio 620 (hereinafter referred to as "the development"). The land registered at Volume 963 Folio 620 is now registered at Volume 1481 Folio 496 and the land the subject of this claim."*

Counsel submitted that since Mrs Salmon was only a shareholder in the Claimant and not the owner of the Land, the authority could not have extended to the acts performed by Mrs Messado. He argued that to the extent that Mrs Messsado effectively represented that she was entitled to sign the mortgages by virtue of

the POA, such representation was patently false and furthermore, the falsity was discoverable from a mere reading of the POA and the title. Counsel further submitted that Mrs. Messado's fraud was "*brought home*" to Reliance and/or its agent Mr Jackson.

[26] Mr Braham submitted that Reliance cannot credibly deny actual knowledge of Mrs. Messado's fraud because it acted through its Attorneys-at-Law, Nunes Scholefield DeLeon & Co. Its partner, Mr Jackson, reviewed the Power of Attorney and made the following endorsement on a copy thereof:

> *"I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE POWER OF ATTORNEY #1791857 REGISTERED AT THE ISLAND RECORD OFFICE ON THE 7th DAY OF NOVEMBER 2012".*

[27] Mr Braham also relied on a number of matters which he submitted provide further support for the contention that Reliance and Mr Tewani were in fact aware and had actual knowledge of Mrs Messado's fraud. These matters were concisely stated in his written submissions and I reproduce them hereunder:

> *"(a) The Articles of Association of the Applicant are public documents and by virtue of this Reliance is deemed to have knowledge of its contents particularly the requirement for the Applicant to execute the documents.*
>
> *(b) However, Reliance's Attorneys-at-Law in its letter of the 4th October 2013 to Jennifer Messado & Co requested a copy of the Articles, thus demonstrating an understanding of the importance of these documents*
>
> *(c) Reliance knew that the Applicant had two directors, Mrs. Messado and Mr. Peter Thomas*
>
> *(d) Reliance's Attorneys-at-Law by letter dated 26th September 2013 requested the personal guarantee of Mr. Peter Thomas as a condition for making the loan*
>
> *(e) Mrs. Messado in her letter of the 2nd October 2013 requested that Mr. Thomas be released as a guarantor*
>
> *(f) This request was acceded to by Reliance and Mr. Tewani. This is shown in Nunes Scholefield DeLeon & Co's letter of the 4th October 2013 where it is stated:*

> *"Our client has advised that based on discussion with you he has acceded to a request to increase the loan amount of US$390,000.00 (an increase of US$30,000.00) and to accept your personal guarantee as a director and not require a guarantee from Mr. Peter Thomas"*
>
> *(g) The Personal guarantee of Joan Salmon was substituted*
>
> *(h) Reliance purports to rely on a resolution purportedly passed at a meeting of the Applicant on the 5th October 2013*
>
> *(i) The Applicant denies that its Board met on the 15th October 2013 and denies passing the resolution. Interestingly this purported resolution at paragraphs 2 and 4 requires two directors or a director and the secretary to execute the mortgage. This was not done. Instead Mrs. Messado signed the mortgage twice*
>
> *(j) Although the directors are alleged to have met on the 15th October 2013 and the mortgage executed on the 15th October 2013, Mr. Peter Thomas did not execute the mortgage. Mrs. Messado instead did so twice. If there was a meeting on the 15th October 2013 as alleged and the resolution passed as alleged Mr. Thomas could well have executed the mortgages. We submit that Mr. Thomas was not a party to the decision to borrow from Reliance and the creation of the Power of Attorney was an attempt to conceal the existence of the mortgage from Mr. Thomas*
>
> *(k) Mr. Donovan Jackson of Nunes Scholefield DeLeon & Co. was the Attorney who acted for Reliance and Mr. Tewani during the purported loan transaction and was in correspondence with Mrs. Messado and/or her firm."*

[28] It was Mr Braham's primary submission that there is a serious question to be tried as to whether Reliance is guilty of actual fraud. However, he submitted in the alternative, that if the Court finds that Reliance did not have actual knowledge of fraud, the Court should find that there is a serious question to be tried as to whether Reliance is guilty of fraud based on the aforementioned principle of willful blindness as considered by the Privy Council in the **Assets** case.

[29] Mr Braham also submitted that there is a serious issue to be tried in respect of the claims of dishonest assistance and knowing receipt. I have deliberately not considered whether this is so, because I find that such a determination is unnecessary having regard to the Court's findings on the issue of whether there is a serious issue to be tried in relation to fraud as well as having regard to the

limited ambit within which the Court is permitted to interfere with the mortgages endorsed on a registered title.

[30] Mr Braham's written submissions also spoke to the possible effect of section 22A of the Bank of Jamaica Act but this point was essentially abandoned by him and in any event was shown by Mr Foster Q.C. not have any weight.

Submissions on behalf of the 2nd and 3rd Defendants on the issue of whether there is a serious issue to be tried.

[31] Mr Foster suggested that one issue which arises for the Court's determination is whether Mrs Messado, as the director of the Claimant, had actual or apparent authority to enter into the negotiations on the Company's behalf and to have finalised the mortgage which was endorsed on the title for the Land, in order to secure the said Loans.

[32] Counsel accepted as settled law that the authority of an agent may be actual (express or implied) or apparent. Implied actual authority refers to the authority of an agent to do whatever is necessary for or ordinarily incidental to the effective execution of his express authority in the usual way. Apparent authority arises where, because of the relationship and dealings between the principal and the agent, the law regards the authority as having been given to the agent by the principal (see **Bowstead and Reynolds on Agency** 17th Ed (at paragraph 3-024).

[33] In support of his argument Counsel relied on the case of **Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal), Ltd and Another** [1964] 1 All ER 630 where at page 645 H Diplock, LJ stated that:

> *"…The commonest form of representation by a principal creating an "apparent" authority of an agent is by conduct, viz., by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons*

> *dealing with such agent that he has authority to enter contracts on behalf of the corporation into contacts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do normally enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business."*

[34] Mr Foster, admirably, in his usual candid style, conceded that there was insufficient evidence to support a finding that Mrs Messado had actual authority to have acted in the way she did. However, Counsel argued that she did have apparent authority. Counsel also asked that the Court views the events from the perspective of Mr Jackson and the facts that were evident to him. Counsel pointed to the fact that Mrs Messado held the duplicate Certificate of title for the Land and submitted that this amounted to a representation from the Claimant that she had authority to enter into the loan agreements. Furthermore, he pointed to the fact that she held the Claimant's company seal and that the Claimant's registered address is the same as that of Jennifer Messado & Co. It is not quite clear to me from the evidence that the registered address of the Claimant is in fact the same as that of Jennifer Messado & Co., Nevertheless, this does not affect the force of Counsel's point, because the address of Jennifer Messado & Co is identified as the address of the Claimant in the schedule of both mortgages.

[35] Mr Foster also relied on the correspondence from NIBJ in respect of the approval for financing of the Land development as well as the correspondence from the Westmoreland Parish Council relating to the subdivision approval in respect of the Land, as elements pointing to Mrs Messado having had ostensible authority to enter the transactions on behalf of the Claimant . Counsel pointed out that as it relates to the substitution of Mrs Salmon as guarantor, this was an element of the transaction that was initiated wholly by Mrs Messado, as is evidenced by the fact that Mr Jackson's letter dated 4th October 2013 merely confirmed the release of Mr Thomas as requested by Mrs Messado, but did not require a replacement guarantee.

[36] Mr Foster argued that viewed against the backdrop of this factual matrix, it would not have been unreasonable for Reliance to reasonably regard Mrs Messado as having authority to act on behalf of the Claimant.

[37] Mr Foster also submitted that an issue to be determined was whether any serious question is raised in relation to fraud that would justify the defeat of the indefeasible title of the mortgagee by virtue of section 70 of the RTA.

[38] Learned Queen's Counsel also relied on **Assets** and the extract at page 210 of the Judgment which has been previously quoted. He agreed with Mr Braham on the applicability of the test as laid down in **Assets** and at paragraph 35 of his written submissions he represents the position as follows:

> *"35. This means that in relation to the issue of fraud, actual knowledge is necessary. The simple presence of suspicious activities does not by itself translate to fraud and FOL [Foreign Options Ltd] is required to go further to prove that Reliance "**abstained from making inquiries for fear of learning the truth**". This in our view, has not been done based on the affidavit evidence in both Thomas affidavits. It is therefore submitted that there is no fraud or collusion on the part of Reliance and /or Mr. Tewani of the interest (i.e. the mortgagee) and none that could be 'brought home' to defeat the indefeasible title."*

[39] Paragraph 36 of Counsel's written submissions succinctly expresses his submission on this point and I reproduce it hereunder:

> *"36. Carelessness in examining a document less than thorough and without complete due diligence, or the failure of a party to make inquiries (even if they were reasonable), will not make a registered proprietor guilty f fraud. The Jackson Affidavit indicates that at all material times, Reliance was under the belief that it was in dealings with an authorised agent of FOL"*

Analysis in relation to the serious issue to be tried condition

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

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."*

[41] The factors to which Mr Foster pointed as providing a reasonable basis for Reliance to have reasonably concluded that Mrs Messado had apparent authority to conduct the transaction and sign the mortgage documents, cannot be viewed in isolation. If it is accepted that these factors were present, it can be argued that, by themselves, they may be sufficient to lead to a reasonable conclusion that Mrs Messado had apparent authority. However, that cannot be the end of the matter. Those factors simply cannot be considered in isolation. All the facts that were evident at the relevant time have to be considered, and will have to be weighed by the trial judge in reaching his conclusion as to the effect of the facts on which Mr Foster relied. This is because in my view, ostensible authority cannot trump the provisions of the Claimant's Articles of Association, or the law governing the scope of a Power of Attorney, especially where the donor of the Power of Authority does not have the authority to delegate the powers that she has purported to delegate.

[42] The crux of Mr Braham's submission is that all the "red flags" which would have led any reasonable person to conclude that Mrs Messado was not authorised to sign the mortgages were ignored. In my view the key issue to be resolved is whether the "red flags" which Mr Braham identified were ignored because Reliance and its agent Mr Jackson "*abstained from making inquiries for fear of learning the truth*" or whether it was merely - "*carelessness in examining a document [or documents] less than thorough and without complete due diligence, or a failure of a party to make inquiries (even if they were reasonable)*".This is an issue which can only properly be explored within the context of a trial after discovery, cross examination and the various other tools available to each party in its quest to prove its case.

[43] Having performed my assessment with the aforementioned guidance of Lord Diplock in mind, I have concluded that for the reasons submitted by Mr Braham there is a serious issue to be tried as to whether Reliance and its agent Mr Jackson abstained from making inquiries for fear of learning the truth and is therefore guilty of fraud, based on the principle of willful blindness as expressed in the **Assets** case, a principle which was accepted by both Counsel.

B. Would damages be an adequate remedy?

The approach to be taken by the Court

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

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

Are damages adequate where the injunction is sought to restrain the disposal of real property?

[46] In support of his submission that damages would not be an adequate remedy for Reliance, Mr Braham relied on the case of **Tewani Ltd v Kes Development Co. Ltd & ARC Systems Ltd.** (unreported) Supreme Court, Jamaica, Claim No.

2008 HCV 02729, judgement delivered on 9 July 2008, and the statement of Brooks J (as he then was) as follows:

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

[47] Mr Foster, in turn relied on the case of **Lookahead Investors Limited v Mid Island Feeds (2008) Limited and Others** [2012] JMCA App 11 in which 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."*

[48] At first blush, it would appear that the Land in this case is indeed unique. It is located in Negril, which has its unique character created in part by the somewhat unusual way in which tourism developed. More importantly, Negril is an area of the island in which land is at a premium, largely as a result of the laws, (of which this Court takes judicial notice) that limit the construction of buildings above a certain height. Naturally, these restrictions on building vertically fuel the demand for greater land space and in turn, positively influence. It is noted that the valuation report produced by the Claimant shows that the Land has a prime location in the centre of the town.

[49] Interestingly, Mr Thomas in his second affidavit stated that the intention of the board of directors of the Claimant was always to sell the Land "*as is*" and that

"*the Land is still empty waiting to be sold as initially intended by the Applicant despite Mrs Messado's lies about development".*

[50] On the back of these assertions by Mr Thomas, Mr Foster has submitted that the Land is a mere asset of the Claimant, which the Claimant intends to sell. As a consequence, it has no unique characteristics and is simply an asset which the Claimant intends to dispose of. For this reason, damages would provide adequate compensation to the Claimant if it succeeds at trial after Reliance, not having been restrained, has disposed of the Land.

[51] Mr Braham argued that notwithstanding the assertion by Mr Thomas as to the intention of the Claimant to sell the Land, the Claimant ought not to be forced to dispose of it before the Claimant decides to do so. Mr Braham submitted that the effect of the Court ruling that damages are an adequate remedy, would be to deprive the Claimant of the ability to continue hold the Land, as it has been doing for a number of years. It would lose the right to sell when it decides the time is right having regard to market conditions and other factors, in order to maximise the investment.

[52] I do not agree with Mr Braham that the fact that the Claimant has expressed an intention to dispose of the Land ought not to lead to a finding that damages are an adequate remedy. The Court appreciates that it may be difficult to assess the quantum of such losses, but that is an exercise that can be accomplished by the Claimant producing expert evidence as to the likely projected increase in the price of the Land having regard to historical data.

[53] I have accepted Mr Foster's submission on this issue and for these reasons, it is this Court's conclusion that because of the commercial nature of the Land and the fact that the Claimant has expressed an intention to sell it "**as is**", damages would provide an adequate remedy for the Claimant, if Reliance is able to pay it.

The Court having found damages to be an adequate remedy for the Claimant, is Reliance able to pay?

[54] Mr Braham submitted that there is a notable absence of any cogent evidence to support Reliance's assertion that it will be able to satisfy a monetary judgment against them if one is awarded as a result of the Claimant prevailing in the Claim. I accept these submissions and find that there is insufficient evidence of Reliance's ability to pay. I have not placed any weight on the fact that Reliance is incorporated in the Cayman Islands. I have reached this conclusion purely on the dearth of supportive evidence as to its ability to pay. In my view, it would be impermissible to assume that because Reliance entered into the transactions which the Claimant seeks to impugn and paid over funds or loaned other sums which may be the subject of other Court proceedings, it must necessarily be in a financial position to pay the damages which may be assessed.

If the defendant were to succeed at trial would the loss he suffered as a result of having been restrained by the injunction be adequately compensated by the Claimants undertaking as to damages?

[55] The Claimant has offered an undertaking as to damages and asserts that its assets exceeds the purported loan amount. It has also produced a valuation of the Land which expresses an opinion of the Market value as being US$1,800,000-US$1,900,000. This adequately satisfies me that the Claimant is financially able to satisfy its undertaking.

C. The Balance of convenience

[56] Lord Diplock said in **American Cyanamid** at page 510 letter G:

> *"…If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage..."*

Where there is doubt as to the adequacy of damages as a remedy available for either party the question of the balance of convenience arises. For the reasons given earlier in this judgment, the Court finds that damages would not be an adequate remedy if the Claimant succeeds at the trial, given the absence of

sufficient evidence of Reliance's ability to pay and it is therefore necessary for me to go on to consider whether the balance of convenience favours the granting of an injunction.

[57] In ***National Commercial Bank v Olint Corp. Limited*** [2009] UKPC 16, the Privy Council reaffirmed the **American Cyanamid** principles and offered further useful guidance on the approach to interlocutory injunctions. At paragraphs 16,17 and 18 of the Judgment delivered by Lord Hoffman it is stated as follows:

> *"16. ...It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."*
>
> *"17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:*
>
> > *"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."*
>
> *18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the*

> *defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."*

[58] In the instant case, the Court finds that the least irremediable harm will be caused to either party by the granting of the injunction and ensuring that the Land is not disposed of until the substantive issues in the claim are resolved. If the injunction is not granted there is the risk that the Claimant's Land will be disposed of. On the other hand, (and this is a factor on which the Court places much weight), there is no evidence before the Court as to the need for any particular urgency in the sale or disposal of the Land, which would be defeated by the grant of the injunction. If the Claimant is found to be liable for the Loans then the Claimant will have the opportunity to pay off the outstanding balance and Reliance will be adequately compensated. Having regard to these conclusions, for the reasons I have already expressed as to the suitability of fraud and the issues being ventilated at trial, I do not find it necessary, or indeed advisable, for me to attempt to consider the relative strength of the parties' cases in my assessment.

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

[59] Counsel on both sides are agreed that the general rule is that the Court ought not to interfere with the Mortgagee's right to exercise his power of sale except where the sums claimed to be due are paid into Court. In this jurisdiction, this is commonly referred to as the Marbella Principle, the name being derived from the case of **SSI (Cayman) Limited et al v International Marabella Club SA** (unreported), Court of Appeal Jamaica, [Supreme Court] Civil Appeal No. 57/1986 Judgment delivered 6 February 1987.

[60] Downer JA said in **Marbella** at page 24 of that judgment:

> *"The important aspect of the law is that where there is an allegation of fraud equity tends to qualify the right of the Mortgagee to enforce his remedy of sale but the terms and conditions which are impressed is that the mortgagor pays the amount claimed or such other amount as the court considers just into court"*

Unsurprisingly, there have been exceptional cases in which payment into Court by the Mortgagor has not been insisted on as precondition to the grant of the injunction. **Alexander House Limited v Reliance Group of Companies Limited** [2018] JMCA Civ 18 appears to be the most recent case in which the Court of Appeal has considered this issue. At Paragraph 40 of the judgment McDonald-Bishop JA, summarised the categories of those exceptional cases as follows:

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

[61] Mr Braham has submitted that in the instant case, questions have arisen as to the validity of the mortgage document and this brings the case squarely within exception (iii) as identified by McDonald Bishop JA in **Alexander House**. Mr Braham also submitted that where a company's seal is supplied in a manner

contrary to the Articles the relevant document to which it is affixed is a forgery, particularly where the application of the seal is not accompanied by the required signatures. He relied on the case of **Ruben v Great Fingal Consolidated** [1906] 1 AC 439 to support this proposition. In that case Lord Davey at page 445 point stated as follows:

> *'The seal on the certificate was, indeed a genuine impression of the Company's seal, but it was place there without any authority, and (as concisely stated by Lord Lindley in his work on Companies, 6th ed. p.246) "A document of that kind, if there is any intent to defraud is a forged instrument".'*

[62] Mr Foster submitted that insofar as McDonald-Bishop JA in **Alexander House** was summarising the pronouncements of Morrison JA in **Mosquito Cove v Mutual Security Bank and Others; Grange Hill Farms Ltd and Another v Mutual Security Bank Ltd and others** [2010] JMCA Civ 32 ("Mosquito Cove"), the summary is inaccurate as it relates to (iii) where questions arise as to the validity of the mortgage document. Counsel submitted that this exception ought properly to be attributed to Cooke JA. Furthermore, Counsel suggested that the opinion expressed by Cooke JA in this regard, was obiter. This Court is bound by the decision of the Court of Appeal in **Alexander House** and these submissions would be more appropriate before that Court. However, in any event, as will be demonstrated below there is ample evidence that (iii) has been accepted in this jurisdiction.

[63] In the case of **Brady (Rupert) v Jamaica Redevelopment Foundation and others** (unreported), Court of Appeal, Jamaica, [Supreme Court] Civil Appeal No. 29/2007, Judgement delivered on 12 June 2008 ("Brady"), the Claimant Rupert Brady, by fixed date claim form, sought the Court's determination as to whether a mortgage of property in respect of which he was a joint owner, was enforceable against him in circumstances where he was asserting that he never signed the mortgage document and that his purported signature was a forgery. He asserted that evidence of the forgery of his signature was supported by the fact that at the time he is purported to have signed the mortgage documents in Jamaica, he was

not within the jurisdiction. His position, was that based on these assertions, he was under no obligation to repay any of the loan sum which his brother Harold Brady, the ancillary Defendant, who was then a prominent Attorney-at-law, had borrowed.

[64] The learned Judge at first instance considered the fact that the proceeds of the challenged mortgage was used to liquidate two earlier mortgages on the property which was jointly owned by the Claimant Rupert Brady and his brother Harold Brady. The learned Judge concluded that:

> *"..Mr Harold Brady did not apply the loan to benefit himself solely. In the circumstances Dr. Brady would have derived a benefit, albeit ignorantly. Having so benefitted equitable principles of fairness would dictate that the sum by which he benefited be repaid even though he alleges he was an ignorant beneficiary to the whole transaction."*

[65] The learned judge was of the view that in the circumstances where the allegation was that the guarantor's signature had been forged, it would be unjust to allow the property to be sold and granted the injunction but ordered that the claimant pay into Court the sum of $14,225,046.35 as a condition of the granting of the injunction.

[66] In the Court of Appeal judgment in **Brady,** Panton P, expressed the following view at page 5:

> *"Mr Piper for the first respondent has contended that **Flowers Foliage & Plants (supra)** was a departure from the principle state in **SSI (Cayman) et al v International Marabella Club S.A.**, and referred to **Flowers Foliage and Plants** (supra). I do not agree. The fact of the matter is that the nature of the issues to be determined in the instant case is such that were the Court to permit a sale to take place before the determination of these issues, there would be the risk of a serious injustice being done to the appellant. In the circumstances, it would be unjust to demand that he deposit such a huge sum of money in order to protect his rights. The appropriate course at this time is for the matter in the Supreme Court to be tried as early as possible."*

[67] Cooke JA in the same judgment stated at page 11 that:

> *"…The correct distinction is between cases where the issue is in respect of the amount of money owed under a valid mortgage and cases where the validity of the mortgage is challenged (see **Global Trust Limited & Others v Jamaica Re-development Foundation Inc. et al** SCCA No. 41/2004 delivered on 27th July 2007). In the instant case the appellant is challenging the validity of the mortgage document as it pertains to him"*

Cooke JA disagreed with the learned Supreme Court Judge's assessment of the facts and her Ladyship's basis for ordering the payment in. Cooke JA commented at page 12 as follows:

> *"9. ...The Court's attention should be directed to the application of the correct judicial principles within the totality of the circumstances before it. A telling circumstance was the assertion by the appellant that he was a complete stranger to the execution of the mortgage document. This circumstance the learned judge indicated demanded a flexible approach by the Court. However, she abandoned her postulated course and decided to apply "the general rule". She did not say why the principles enunciated in **Foliage**, (supra) – **when the challenge is to the validity of the mortgage - should be completely ignored.** (emphasis supplied)."*

[68] In **Mosquito Cove**, while analysing the current position in relation to the **Marabella** principle and what he described as some "exceptional cases", Morrison JA at paragraph [62] of the Judgment stated as follows:

> *"[62] In **Rupert Brady v JDRF and others**, to which I have already made a passing reference (at para. [54] above), this court itself engrafted another exception upon the **Marabella** principle. This was a case in which the mortgagor's position was that he had not signed the relevant mortgage documents, that he had not given authority to anyone to pledge his property as security and that the alleged mortgage was therefore null and void."*

[69] As Morrison JA further stated in **Mosquito Cove** at paragraph [64];

> *"[64] While other or further exceptions to the rule are no doubt to be found in the books and will also emerge in the future, it seems to me that the kinds of in stances discussed in the foregoing paragraphs suggest that the court will only sanction departures from the general rule in highly exceptional cases, based on very special facts, such as the existence of a fiduciary relationship between mortgagor and mortgagee or perhaps in cases of forgery. I naturally intend these as examples only, which are by no means exhaustive."*

[70] Having regard to the foregoing, it is therefore this Court's opinion that the challenge to the mortgage exception to the **Marabella** principle, is clearly one which has been recognised in this jurisdiction, whether birthed in **Brady** or subsequently. Of course, it is not in every case that an issue is raised as to the legality or validity of a mortgage that the **Marabella** principle will not be applied. The cases appear to be consistent in their acceptance that there must be exceptional circumstances. An example of the carefully nuanced approach of the Court influenced by the particular circumstances of a case can be seen in the first in instance judgment of my learned brother Batts J in **Alexander House** where on those particular facts involving the issue of an alleged illegality having tainted the loan, he found it appropriate to follow **Mosquito Cove** rather than **Brady** and ordered a payment in.

Is this an exceptional case?

[71] Mr Braham submitted that there are a number of similarities between the instant case and that of **Brady**. Firstly, the Claimant is asserting that the mortgage documents were not signed with its authorisation and secondly that it did not receive the benefit of the proceeds of the Loans. Mr Foster's elegantly expressed view was that:

> *"..the strength of the challenge to the validity of mortgage may be of a sufficient nature that the matter is considered exceptional and based on those special facts a court could make a ruling that the **Marabella** principle does not apply but it would be unreasonable and inconsistent with the law for the Court to find that where the validity of the Mortgage is questioned, that [without more] opens the door for the **Marabella** principle to be ignored."*

Mr Foster then sought to distinguish **Brady,** on the basis that in **Brady,** the issue of agency did not arise as it has the instant case, and the Court should not ignore the representations faced by Reliance, which when viewed through the eyes of Reliance and its agent, could reasonably have been considered to have been valid representations of the Claimant.

[72] I find that there are sufficient similarities between the instant case and that of **Brady**. It is my view that the interposition of the agency issue is not a factor which is sufficient to distinguish the instant case from that of Brady to the point that a similar result should not obtain. The agency issue is merely another issue with which the Court will have to grapple at trial. I again confirm that I am cognisant of the guidance given to the Courts in **American Cyanamid** and subsequent cases, that at this stage of the proceedings the court is not concerned with making any final determination of facts. It is therefore not necessary for me to make a final determination as it relates to the evidence before me.

[73] However, in determining whether this is an exceptional case at this stage, invariably the Court must undertake a preliminary assessment of the challenge to the validity of the Mortgage, in order to avoid the risk of a litigant, with the hope of avoiding **Marabella**, simply raising such a challenge, without any reasonable supporting assertions of the facts which it intends to advance as a part of its case. In my preliminary assessment of the strength of the Claimant's challenge to the validity of the Mortgage for the limited purpose as expressed herein, I have considered the letter dated 13th October 2015 to Mr Thomas, signed by Mrs Messado, (which purports to be written on behalf of Jennifer Messado & Co), in which she acknowledged that the Loans were taken out without his knowledge and authority.

[74] It is therefore my finding that on the strength of the evidence before the Court, there is sufficiently credible evidence which supports the challenge to the validity of the mortgage which is being advanced by the Claimant, and which places the instant case squarely within the categories of cases which can be described as exceptional. This case has sufficient similarities to the case of **Brady** and I have reached a similar conclusion to that reached by Panton P in that case. I adopt his conclusion and in applying it to this case find that:

> *"…the nature of the issues to be determined in the instant case is such that were the Court to permit a sale to take place before the determination of these issues, there would be the risk of a serious injustice being done to the appellant…"*

[75] I also similarly find that in the circumstances, it would be unjust to demand that the Claimant deposits the amount of the outstanding balance of the Loans which is a huge sum of money, in order to protect its rights. I also have not been convinced as to any good reason why I ought to exercise my discretion in favour of ordering the payment into Court of any lesser sum and I will not make any order to that effect.

[76] I think it is also necessary to note that the Claim is filed in the Commercial Division of the Supreme Court where the availability of trial dates is measured in months rather than years. As a consequence, it is unlikely that there will be any prejudice occasioned to Reliance as a result of the Court departing from the **Marabella** principle in this case. Having regard also to the Claimant's undertaking as to damages and the value of the Land, I am of the view that Reliance will be sufficiently protected in the event that its defence prevails at the trial.

[77] The Claimant has also asked that the Certificate of Title be deposited with the Registrar of the Supreme Court as an added level of protection. However, I am not of the view that this is necessary. Given the scope of the injunction, I do not expect the Defendants to be so unwise as to wantonly disregard the Court's order.

Disposition

[78] For the reasons expressed herein the Court makes the following orders on the Claimant giving the usual undertaking as to damages:

1. The Court hereby grants an interim injunction restraining the 2nd Defendant, Reliance Group of Companies Ltd, its servants and/or agents from selling, transferring or otherwise disposing of the land and/or the mortgages registered on the

Certificate and Duplicate Certificate of Title registered at Volume 1481 Folio 496.

2. Costs of the application are awarded to the Claimant against the Defendants.