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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV4293

BETWEEN	LORGAY CONSTRUCTION & EQUIPMENT COMPANY LIMITED	1ST CLAIMANT
AND	LORIN C. GAYLE	2ND CLAIMANT
AND	JAMAICA REDEVELOPMENT FOUNDATION INC.	DEFENDANT

IN CHAMBERS

Crafton Miller and Ms. Celia Barclay instructed by Crafton S. Miller & Co. for the Claimants.

Emile Leiba and Robert Collie instructed by Myers, Fletcher & Gordon for the Defendant.

HEARD: August 28 & September 2, 2009

Application for interim injunction- restraining mortgagee from exercising power of sale- challenge to legality of assignment of mortgage debt- whether agreement vitiated by duress- whether third party rights likely to be affected by exercise of power of sale- factors to be considered- injunction refused.

McDONALD-BISHOP, J

1. This is an application by Lorgay Construction and Equipment Company Limited and Lorin C. Gayle (the claimants) for an interim injunction to restrain Jamaica Redevelopment Foundation Inc. , the defendant, from exercising its power of sale as mortgagee in respect of property situated at Southfield in the parish of Saint Elizabeth

and registered at Volume 1157 Folio 537 of the Register Book of Titles (the mortgaged property).

2. The defendant in the exercise of its power of sale had scheduled an auction for August 20, 2009 which was duly advertised. The claimants, upon becoming aware of the scheduled auction, initiated proceedings by way of Fixed Date Claim Form on August 19, 2009 and by Notice of Application of even date applied for an interim injunction to prevent the sale. An interim injunction was granted by Cole-Smith, J to be in effect from August 19, 2009 until August 28, 2009.

3. It is for further consideration of the Notice of Application that the matter has come before me on an *inter partes* hearing. The question now to be determined is whether an injunction should be imposed to restrain the defendant from exercising its power of sale until trial of the Fixed Date Claim Form. In determining this question, it would prove quite useful to first gain an insight into the circumstances leading up to this application.

THE FACTS

4. The first claimant has its registered offices at Southfield, St. Elizabeth and is said to carry on business of 'equipment and road construction'. The second claimant is its Managing Director and the sole surviving registered proprietor of the mortgaged property. He had held the land as joint tenant with his father Linton Claude Gayle who is now deceased.

5. Between 1993 and 1995, the first claimant obtained certain credit facilities from Workers Savings & Loan Bank in respect of which the second claimant stood as a guarantor. The facilities offered in 1993 consisted of two amortized demand loans and an overdraft facility with interest payable on each. The letter of commitment for these facilities state that the security offered included personal unlimited guarantee of the second claimant and his father which was supported by a legal mortgage over the mortgaged property, among other things.

6. In June, 1995, Workers Savings & Loan Bank increased its credit facilities to the first claimant. Apart from demand loans and overdraft facilities, there was added a newly issued bond. This increased facility was again stated to be secured by, among other things, the unlimited personal guarantee of the second claimant and his father which was supported by a 1st and 2nd legal mortgage on the mortgaged property.

7. The credit facilities were again increased by Workers Savings & Loan Bank in September, 1995. The mortgaged property continued to be used as security for these facilities in support of the unlimited personal guarantee of the second claimant solely. The guarantee of the second claimant was expressed to be supported by the two legal mortgages and a 3rd legal mortgage. The 1st and 2nd legal mortgages were endorsed on the certificate of title for the mortgaged property on October 21, 1994 and May 3, 1995 respectively. The letter of commitment for the last credit reveals that the third mortgage was to have been registered and stamped but the documents were to be held in a

registrable form until the death of the second claimant's father was noted on title. This mortgage was, however, never registered.

8. The second claimant and the company secretary, Mrs. Maureen Gayle, both acting for the first claimant, affixed their signatures to the respective letters of commitment in respect of each facility and expressly declared that the terms of the loan facilities have been fully explained to them and that they clearly understood and accepted the terms and conditions.

9. Following on the financial sector 'melt – down' in the 1990's, the claimants' debt was eventually assigned to the defendant by way of a Deed of Assignment dated January, 2002. By a letter of March 27, 2002, Refin Trust/ FINSAC notified the claimants that the loan portfolio was transferred to the defendant. By this letter, the claimants were advised that the debt was sold to the defendant on February 1, 2002 and that Joslin Jamaica Limited was appointed by the defendant to service the debts and to directly manage the accounts on its behalf.

10. The certificate of title in respect of the mortgaged property shows that on September 26, 2006, there was a registered transfer to the defendant of the two legal mortgages. The consideration was stated to be *"in pursuance of the matter recited in the transfer."* The exact terms of the instrument of transfer, however, is not disclosed. There is no indication in any of the documents exhibited as to what became of the 3rd mortgage.

11. The claimants subsequently defaulted in payment of the loans. Following on several pieces of communication between Joslin Jamaica Limited and the claimants and/ or their duly appointed agents, the claimants entered into an Agreement to Restructure Existing Debt (the restructured debt agreement) with the defendant to be effective as of February 28, 2005. By this agreement, the debt was restructured to USD$ 417,000.00 at 12% interest per annum amortized over 20 years with a five year balloon. The defendant also agreed not to exercise its rights as mortgagee to enforce the security in exchange for the claimants faithfully complying with the terms and conditions of the restructured debt agreement.

12. After entering into the restructured debt agreement, the claimants made several payments through their attorney-at-law at the time, Mr. Jeremy Palmer, albeit irregularly and not in keeping with the terms of the new agreement. The claimants were eventually advised by letter of their failure to pay in accordance with the restructured debt agreement. They promised to pay off the arrears by October, 31, 2006. They were again advised by letter in November, 2007 of their failure to pay as agreed. A formal demand for them to make the restructured debt account current was again made by letter in December, 2007. They were advised then that failure to do so would result in their account reverting to the original debt. A statement of account was then sent to them in relation to the restructured debt account.

13. The defendant was subsequently advised by Mr. Jeremy Palmer that an attempt was being made to obtain financing to satisfy the debt. In January, 2008, a letter was sent

to the defendant by RBTT advising that they were approached by the claimants to provide refinancing to discharge the claimants' indebtedness to the defendant. Nothing further was heard from RBTT or the claimants concerning this proposal to obtain re-financing. Following on all this, the last payment received by the defendant on account was in May, 2008.

14. On April 22, 2009, the defendant issued statutory notices to the claimants to discharge their indebtedness. The defendant claimed that JA$81, 791,281.47 representing the principal sum and interest, was outstanding as at the date of the notice. Despite the demand notices, no payment was made by the claimants and so the defendant moved to exercise its power of sale under the mortgages. To this end, the auction was scheduled to be held but was stopped by the Order of Cole-Smith, J on August 19, 2009. The question now is whether the defendants should be restrained from exercising its power of sale until the determination of this claim.

THE LAW

15. The determination as to whether to grant or not to grant an interim injunction stands to be informed by the well - defined and long established principles authoritatively laid down by Lord Diplock in **American Cyanamid v Ethicon** [1975] 1 All E.R. 504. These principles have consistently been endorsed by the courts within our jurisdiction and as recently as April, 2009, the Privy Council re-affirmed them in **National Commercial Bank Jamaica Ltd v. Olint Corp. Limited,** Privy Council Appeal No. 61 of 2008 delivered April 28, 2009.

16. The tests formulated for the grant of an interim injunction in **American Cyanamid** and re-asserted by the Privy Council in **NCB v. Olint** are distilled and conveniently summarized as follows:

(1) *The court must first consider whether there a serious question to be tried. This means, in effect, that the claim must not be frivolous or vexatious. This is not the same as the requirement to establish a prima facie case. What must be disclosed is that the claimant has a real prospect of succeeding in his claim for a permanent injunction at trial. If there is no serious question to be tried, then the injunction will be refused.*

(2) However, if there is a serious question to be tried, the next question is whether damages would be an adequate compensation to the claimant for his losses pending trial and, if so, is the defendant in a position to pay them. If the answer is 'yes' an injunction should not be granted. For, if damages will be an adequate remedy for the claimant, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction.

(3) If the answer is 'no', that is, damages would not be adequate, then the court must investigate whether if an interim injunction were granted, the claimant is able to give an undertaking to adequately compensate the defendant for any loss if at the eventual trial, the court finds that the claimant was not entitled to the injunction. If the claimant is able to give an undertaking effectively, there is a strong case to grant the injunction because it is unlikely that injustice would be caused by granting it.

(4) If there is doubt as to the adequacy of the respective positions with regard to damages, then the case depends generally on the balance of convenience. The test is whether it would cause greater hardship to grant or refuse the injunction. If this consideration is evenly balanced, then

other factors may be taken into account, for example, the desirability of maintaining the status quo, the relative strength of the parties' cases or even the effect on the general public. (See too: ***Smith v Inner London Education Authority*** *[1978] 1 WLR 1248.*

(5) *At the interlocutory stage, the court must assess whether granting or withholding an injunction is more likely to produce a just result. The basic principle being that the court should take which ever course seems likely to cause the least irremediable prejudice to one party or the other. What is required in each case is to examine what on the particular facts of each 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 it will turn out to have been wrongly granted are low. That is to say, "a high degree of assurance that at the trial it will appear that the injunction was rightly granted." (per Megarry, J in* ***Shepherd Homes Ltd v Sandham*** *[1971] Ch 340, 351).*

17. While the foregoing principles will have to guide my deliberations on the question before me, the decision to grant or not to grant the interim injunction also stands to be influenced by the specific principles governing the restraint of a mortgagee in the exercise of his power of sale. (See: **Paulette Hamilton v. Gregory Hamilton and others** SCCA No. 77/07 delivered July 31, 2008, para.10). The general rule pertaining to the exercise by a mortgagee of the power of sale is well settled to be as follows:

> *"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has commenced a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee swears to be due to him, unless on the terms of the mortgage, the claim is excessive."*

See: **Halsbury's Laws of England**, 3rd edn., vol. 27 at paragraph 301; **Gill v. Newton** [1866] 14 T.L.R. 240; **Inglis v. Commonwealth Trading Bank of Australia** (1972) 126 CLR 161; **SSI (Cayman) Ltd. and others v. International Marbella Club S.A.** SCCA no. 57 of 1986 delivered on February 6, 1987.

18. Since **Marbella**, we have had in our jurisdiction cases that have departed from what has become popularly known as the '*Marbella Principle*' and so injunctions have been granted restraining a mortgagee in the exercise of his power of sale without a condition that the mortgage sum, alleged to be owing, is paid into court. The principle has been declared by our Court of Appeal that a mortgagee may be restrained in the exercise of his power of sale where there are triable issues as to the validity of the document upon which the mortgagee seeks to found his power of sale. See for instance, **Global Trust Ltd and anor v. Jamaica Redevelopment Foundation Inc** S.C.C.A. No. 41/ 2004 delivered July 22, 2007 and **Rupert Brady v. Jamaica Redevelopment Foundation and others** S.C.C.A. no. 29/2007 delivered June 12, 2008.

ANALYSIS AND FINDINGS

19. In seeking this interim injunction, the claimants are contending that the injunction should be granted for several reasons. It has been argued by learned counsel on their behalf that there are serious issues to be tried and that damages would not be an adequate remedy. According to them, the balance of convenience is in favour of the grant of the injunction. The defendant, however, stands in strong opposition to the grant of the injunction with Mr. Leiba submitting on its behalf that when all the tests for the grant of an interim injunction are applied, the circumstances do not justify restraint of the

defendant in the exercise of its power of sale. He further submitted, however, that if the Court should come to the conclusion that the claimants are entitled to an injunction, then the grant of the injunction must be conditional on the claimants paying into court the sum claimed by the defendant to be due.

Is there a serious issue to be tried?

20. The first issue to be examined is whether there are, indeed, serious issues to be tried as the claimants are contending. The evidential bases of the claimants' application are set out in the two affidavits of the second claimant while the bases for the defendant's opposition to the grant of the injunction are detailed in the affidavit of Janet Farrow, Chief Executive Officer of the defendant, filed in response to the second claimant's affidavits.

21. In order to make a determination as to whether there is a serious issue to be tried, I think it absolutely necessary to examine the substance of the claim being pursued against the defendant. It is the pleadings that do indicate the issues to be determined at trial and it is from them, in conjunction with the evidence adduced in support of the application, that one would be able to conclude at this interlocutory stage whether there are serious issues to be tried.

22. The claimants are claiming against the defendant for several remedies summarized as follows:

(1) *An injunction restraining the defendant from selling, leasing, transferring or otherwise dealing with the mortgaged property.*

(2) *A declaration that the debt together with the interest has been repaid in full and so the defendant is not entitled to realize its security.*

(3) *An order for the defendant to produce proof of its assignment of the debt owed by the claimants to the Bank.*

(4) *A declaration that the original debt and/or the restructured debt overlap and consist(s) of excessive and exorbitant interest charges, including compound interest never agreed by the claimants by virtue of which they are unconscionable, unenforceable and irrecoverable.*

(5) *An order that the defendant provide a detailed statement of account for the life of the loan showing for instance, how the principal and interest alleged to be owing was made up; the amount of the principal and interest at the date of assignment of the debt to the defendant; the total amount paid towards principal and interest up to the date of the said assignment; the amount of principal and interest paid during the time the loan was managed by FINSAC and Refin Trust; how much of the debt remained outstanding as at the date the defendant acquired the debt from Refin Trust and the total amount of principal and interest paid to the defendant after it had acquired the loan from Refin Trust.*

Issue # 1: Discharge of the debt

23. As can be seen, the claimants are seeking a declaration that the debt together with interest has been repaid in full and so the defendant is not entitled to realize the security. In examining the evidence presented in support of this aspect of the claim, it is seen that the claimants cannot, in fact, say that they are not in default. From all indications, they are not sure of the extent of their indebtedness. I am led to this conclusion from the

evidence adduced in several paragraphs of the second claimant's affidavit wherein he indicated as follows:

"32. *There was default in the repayment of the debt which had grown increasingly onerous, especially with the GCT being charged in US currency. As a result the defendant issued formal demands dated the 22nd April, 2009 for full payment within 14 days... the said demands were six months premature of the date of expiration of the five year balloon stipulated in the agreement...*

46. N*either the 1st Applicant as primary debtor nor I as the guarantor has had the opportunity to make proper arrangements for the repayment of the said debt because the extent of indebtedness has always been uncertain. It is unknown whether the balance outstanding relates to the original debt or the Restructuring Agreement.*

47. *The Applicants have therefore not been afforded a proper opportunity to make arrangements to repay the debt voluntarily and without the property used as security being mortgaged.*

48. The Applicants have nonetheless made substantial payment towards the debt and do verily believe that the principal sum together with reasonable interest accruing thereon has already been paid so that the Respondent is not entitled to exercise powers of sale to realize its security...

52. I do verily believe that the debt has been repaid in full and if not there should only be a minimum sum outstanding bearing in mind certain payments made."

It is clear from all this that the claimants have provided no concrete evidence or tangible proof that the debt, inclusive of the contractually agreed interest, has been discharged.

24. The defendant, however, has shown undisputed documentary evidence which would lead to a reasonable and inescapable conclusion that the claimants knew that the debt was not discharged. The records show that in December 2007, following default of the claimants, a formal demand was made for the payment of $33,604.38 no later than January 2, 2008. It was pointed out to the claimants then that failure to pay that sum in full would result in reversion of the account to the original debt as provided for in the restructured debt agreement. They were also advised that the matter would be referred to the legal department for collection.

25. Almost two weeks later, on January 14, 2008, the defendant was sent a letter from RBTT advising that the second claimant had approached them for assistance in settling the outstanding debt. The defendant was told by RBTT that the request was being assessed and that the decision would be communicated by January 25, 2008. However, nothing further was heard from RBTT. The fact that the second claimant approached RBTT is a strong indication that he accepted that the debt was not fully discharged up to January, 2008. The undisputed evidence is that the last payment received on account was in May, 2008 which did not discharge the debt. This material bit of evidence has not been rebutted by any cogent evidence to the contrary coming from the claimants.

26. It is also seen in exhibit 'LCG 20' that up to August 11, 2009, Mr. Crafton Miller wrote to the defendant, on behalf of the claimants, stating that he had noted the stated indebtedness of the claimants to the defendant. In that letter learned counsel indicated that the mortgaged property had been subdivided into lots *"which are now being*

marketed with the hope of using the proceeds to redeem any outstanding indebtedness which may be due and payable to you." He then later wrote: *"Will you therefore withdraw the publication of the auction for sale on the 20th August, 2009 and instead let us have a conference with a view to arrive at a settlement figure."* This has shown that up to almost the 'eve' of the scheduled auction and one week before the application for an injunction, there was nothing coming from the claimants to say that they disagreed with the defendant's assertion that they were in default.

27. There is thus no positive denial from the claimants that they are not in default. Therefore, it cannot be an issue of substance and reality that the claimants are not in default as there is no material presented by them to affirmatively say otherwise. It is, therefore, the default by the claimants that would operate to trigger the power of sale under the mortgage documents. As such, there is no evidence put forward which could point to a serious issue to be tried on the ground that the mortgage debt had been fully discharged and that the defendant's power of sale has not validly arisen. At highest, *the* evidence of the claimants tends to point to a dispute as to the quantum of the mortgage debt rather than a challenge to the validity of the mortgage document on which the debt was founded. As such, there is no merit in the claimants' contention that the defendant should be restrained as the debt has been paid in full.

Issue# 2: Legality of the assignment

28. The claimants are also claiming for an order that the defendant proves the assignment of the debt to them. They are contending that although they were notified by letter that their debt had been sold to the defendant, they had no documentary evidence of

the assignment. It was submitted by Mr. Miller that this is a challenge to the legality of the assignment and so raises questions beyond a mere dispute as to quantum. This, he submitted, would justify restraint of the defendant. The claimants have, however, not pleaded anything concerning the validity or otherwise of the assignment of the debt. Indeed, they have presented no evidence to show a basis on which they can mount a challenge to the legality or validity of the assignment. Non-production of the instrument of assignment to them is not a sufficient basis to say it is not legal or valid.

29. Moreover, it is seen from the evidence that the claimants, having been advised that the debt was assigned to the defendant, did not then, or at any subsequent time thereafter, request documentary proof of the assignment. Instead, they continued to deal with the defendant as their mortgagee. In fact, in clause 4 of the recital to the restructured debt agreement, the claimants expressly acknowledged the assignment of the debt to the defendant and declared their acceptance of it. They then proceeded to make payment to the defendant as mortgagee under the new arrangement without any form of protest whatsoever. It is clear that they, by words and conduct, accepted the defendant as the assignee of their debt. It is my view that it is rather frivolous and insincere for the claimants to now raise the fact of non-production of the instrument of assignment as a basis to restrain the defendant from exercising its power of sale.

30. But even more importantly, and what seems to present an insurmountable hurdle to the claimants in seeking to put the defendant to prove its assignment, is that the transfer of the two legal mortgages to the defendant had been duly registered. The

registration of the transfer is notice to the world of the defendant's standing as registered proprietor of the mortgages and, in the absence of fraud, its status as such is unimpeachable. There is certainly no allegation of fraud against the defendant in this case and so it stands as the duly registered proprietor of the mortgage with an indefeasible title to it. Any failure on its part to produce the deed of assignment to the claimants cannot change that position.

31. In **Michael Levy v. Jamaica Redevelopment Foundation and anor** S.C.C.A. no. 26/2008 delivered July 11, 2009, a similar challenge was posed as to the validity of the assignment of a mortgage to the defendants in this case. Morrison, J.A found, as I have done in this case, that the appellant had not put up any material in support of the challenge to the validity of the assignment. The learned Judge of Appeal duly noted:

> *"On the first question, I agree with Mrs. Minott-Phillips that the substantial basis of the appellant's pleaded case against the respondents is his challenge to the validity of the assignment of his debt to the 1st respondent's predecessor in title. Quite apart from his having put up absolutely no material in support of that challenge, it seems to me that the appellant has an even steeper challenge in the fact that the 1st respondent 's mortgage is now registered under the provisions of the Registration of Titles Act. The effect of this, in my view, is that the efficacy of the mortgage therefore, now flows from the fact of registration, and not from any antecedent circumstances relating to the assignment...*
>
> *In the absence of any allegation of fraud in the case against the 1st respondent as mortgagee, therefore, it appears to me that the appellant's proposed challenge to the validity of the assignment of the debt cannot get off the ground and that, on that basis alone, no injunction should be granted."*

32. I will wholeheartedly adopt his dictum of Morrison, J.A. in disposing of this aspect of the claimants' claim for an injunction. It is abundantly clear that the proposed challenge to the validity of the assignment of the debt to the defendant 'cannot get off the ground.' This aspect of the claimants' claim seeking proof of the assignment of the debt, in my view, raises no serious issue to be tried.

Issue #3: Unfair contractual terms

33. A substantial portion of the arguments put forward on behalf of the claimants as raising serious issues to be tried relates to the restructured debt agreement. It is contended by the claimants that the agreement contains unfair terms and conditions in several respects. Within this context, they spoke, *inter alia,* to overlapping of the original debt and the restructured debt which they are contending consist of excessive and exorbitant interest charges, including compound interest that they say were never agreed on by them. They maintained that as a result, the interest charges are unconscionable, unenforceable and irrecoverable.

34. While the claimants are saying that the charges are exorbitant and unconscionable, they have provided no factual or legal basis on which such an allegation is grounded. This omission assumes significance when one takes into account the fact that the defendant is exempted from the provisions of the **Money Lending Act**. Mr. Miller valiantly sought to make out a case on behalf of the claimants in raising the question as to the legality of the defendant's exemption from the **Money Lending Act**. This line of argument cannot not take the claimants anywhere meaningful, however, as

the exemption of the defendant from the **Money Lending Act** does not form part of their statement of case or the evidence they have presented in support of the application. I will take my analysis of such argument no further.

35. Several issues were raised on behalf of the claimants in submissions before me which do not form part of their statement of case and so those are ignored during the course of my analysis for all intents and purposes. In the end, despite counsel for the claimants brilliant effort to convince me, I could see no serious issue to be tried arising from their contention that the terms of the agreements were onerous or otherwise unfair so as to warrant the grant of an injunction against the defendants.

36. But I will go further and say that even if I am wrong in saying that there is no serious issue to be tried in relation to this aspect of the claimants' claim, it does appear to me that any relief to which the claimants would be entitled, if they succeed at trial, would be quantifiable in monetary terms. The claimants then could be adequately compensated in damages if the defendant is not restrained and they were to be successful at trial on this limb. The defendant seems better positioned than the claimants to honour any award of damages. I find, therefore, that there is no basis for the grant of an injunction on this point raised by the claimants with respect to the interest charges and other aspects of the terms and conditions of the loan agreements.

Issue# 4: Duress

37. It is also contended by the claimants that they had entered into the restructured debt agreement under duress as Mr. Don Kennedy, acting on behalf of the defendants, advised them that the property would be sold if they did not enter into this agreement. They argued that for that reason too, the agreement is voidable at their instance and should be set aside.

38. I have examined the circumstances leading up to the signing of the restructured debt agreement. The claimants were clearly in default and this was accepted by them. They obtained the services of an accounting consultant in the person of Mr. McGrath. They also had a legal adviser in the person of Mr. Jeremy Palmer. They, therefore, had the opportunity to make an informed decision as to the options available to them in the face of their default. Even if Mr. Kennedy had said the property would be sold, that was the stark reality that faced them. The fact is that having been given an option to make good their default, the claimants were the ones who voluntarily made the proposal that formed the basis for the new agreement.

39. On top of this, the evidence shows that the restructured debt agreement was signed by the claimants in the presence of Mr. Palmer, their attorney –at-law, who affixed his signature as a witness. It is evident that the parties had access to independent legal advice even at the time of signing this agreement. Indeed, they are not asserting that they did not obtain such advice or that they were prevented by the defendant from obtaining such advice. It was against that background that the terms and conditions of the

restructured debt agreement were duly accepted by them. It is, therefore, difficult for me to conceive how duress could have arisen under such circumstances.

40. Mr. Leiba, in responding to this aspect of the claimants' case, relied on dicta from the Privy Council in **Pao On v. Lau Yiu Long** [1980] A.C. 614 where Lord Scarman, in giving the opinion of the Board, stated at page 635:

> "*Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr, J in* ***Occidental Worldwide Investment Corporation v. Skibs A/S Avanti*** *[1976] 1 Lloyd's Rep. 293, 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as coercion of his will so as to vitiate his consent." ... In determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to be coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are relevant in determining whether he acted voluntarily or not.*"

41. Lord Scarman further opined:

> "*Where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy. It would also create unacceptable anomaly. It is unnecessary because justice requires that men, who have negotiated at arm's length, be held to their bargain unless it can be shown that their consent was vitiated by fraud, mistake or duress. If a promise is induced by coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he choses and acts in time, can avoid the contract. If there is no coercion, there can*

be no reason for avoiding the contract where there is shown to be a real consideration which is otherwise legal."

42. Having considered the case being advanced by the claimants against the background of the law and having perused the indisputable documentary evidence, I do agree with the defendant's contention that there is no serious issue to be tried on this limb of the claimant's claim. Indeed, given that there is no dispute as to facts in relation to the circumstances surrounding the negotiation and signing of the agreement, I make bold to express my provisional view that the claimants have no real prospect of succeeding in establishing a case of duress against the defendants to successfully procure an injunction at trial on this ground.

43. In any event, the fact of the matter is that even if on the claimants' best case, duress were to be made out, the most that would result is that the restructured debt agreement would be set aside. This would then mean that the original debt, which had not been extinguished, would still be there to be discharged. The claimants, in such circumstances, would still be in default and so the defendant's power of sale would have arisen in any event by operation of the terms and conditions of the original debt agreement which is not alleged to have been entered into under duress. The claimants would then be no better off than they would have been under the restructured debt agreement.

44. Even more importantly, the defendant had already reverted to the original debt upon the alleged failure of the claimants to comply with the terms of the restructured debt

agreement. The defendant is, therefore, not seeking to exercise any power of sale pursuant to the restructured debt agreement but rather by virtue of the original mortgage agreement. So any complaints concerning duress in respect of the restructured debt agreement cannot assist the claimants on this application since there is no material challenge to the validity of the original agreement. In the light of this, it is difficult to see how a claim of duress can give rise to a serious issue to be tried sufficient to restrain the defendant from exercising its power of sale.

Issue# 5: Acquiescence

45. It is also contended by the claimants, as a basis for restraining the defendant, that it was understood and agreed by the defendant's agent that the funds to repay the loan would have been sourced from a subdivision development undertaken by the claimants. It is their contention that the defendant was advised that proceeds from sale of the mortgaged property would be used to service the loans. According to them, the defendant was paid by the claimants' attorney- at- law from the proceeds of sale and that the claimants have also started to sell the lots in the subdivision with the knowledge and concurrence of the defendant. They also pointed out that third parties have actually paid deposits and two purchasers have started construction on the property. Mr. Miller submitted that in these circumstances, it remains for the court to determine at trial whether the defendant acquiesced in the sale so as to be estopped from taking any action to prejudice the interest of the purchasers.

46. They are also contending that if the defendant is not restrained and the property is sold by auction, the sale would necessarily prejudice not just innocent third parties who

have acquired an interest in the property but also the rights of the claimants. For, according to them, sale by the defendant would prejudice the claimants as they would face 'law suits' for breach of contract.

47. The defendant, in its response, pointed out that it was an express provision of the instruments of mortgage that the second claimant would not "*seek to sell, lease, let, or part with possession of the mortgaged lands or any part thereof without the express consent* ***in writing*** *of the mortgagee.*" The defendant contended that there is no record of Workers Savings and Loan Bank or FINSAC consenting to the claimants' proposal to subdivide the land. The defendant further maintained that although it was aware of the proposal to subdivide the property, the claimants did not, at any time, advised it that they were offering portions of the property for sale or that they had entered into any sale agreement. They were not shown any sale agreement until August 19, 2009. It was also pointed out that payments were sent to the defendant by the claimants' attorney-at-law and, later through NCB, but that at no time was reference made to the sale of any part of the property or the source of the funds from which payments were being made.

48. The claimants have not materially refuted all this evidence and argument presented by the defendant. This could be because they are not saying that there was express consent from the defendant for them to sell portion of the mortgaged property. They are contending instead that the defendant knew of the proposal to subdivide the land for sale and so by not stopping them, it had acquiesced. This may well be a question of fact to be determined at trial but to the extent that there are documents exhibited detailing

the dealings between the parties, it is indeed open to me, on clear and undisputed evidence, to arrive at a provisional view as to the prospect of success of this argument at trial. I will now examine the available evidence on this issue.

49. The evidence of Ms. Farrow and documented evidence of correspondence between the parties reveal that in or around 2001, the claimants sent a proposa,l for discharge of the debt to Refin Trust./ FINSAC. In that proposal it was indicated that the claimants intended to satisfy the debt from net proceeds of sale of division of 16 lots and that a copy of the subdivision approval would be sent. A preliminary projection was also indicated.

50. The documentary evidence reveals that although the claimants have communicated the proposal for approval, there has been no response to this proposal which would show express consent or point to acquiescence on the part of the defendant. It is seen too that the request for approval took place before the restructured debt agreement was negotiated but nothing was incorporated into that agreement about subdivision and sale of the land been earmarked as the source for the repayment of the outstanding debt. Furthermore, as Mr. Leiba pointed out, when the repayments were being made by the claimants' attorney, no reference whatsoever was made to any sale of the mortgaged property and that proceeds of sale would provide the source of the repayments. This argument of acquiescence being advanced by the claimants does nothing to advance their case for the grant of an injunction.

Issue # 6: Effect on third party rights

51. In relation to the claimants' argument about the likely effect of the exercise of the power of sale on third party rights, I must again say that the claimants are in no better position in establishing that a serious question arises on this limb. Even if one were to find that there are valid third party rights in the property, those rights would have arisen subsequent to the transfer of the mortgages to the defendant which had been duly entered in the Register Book of Titles and endorsed on the certificate of title for the mortgaged property. Furthermore, there is no allegation of fraud which could affect the indefeasibility of the defendant's title as mortgagee. Therefore, the subsequent equitable and unregistered interests of the purchasers are subordinate to the legal rights of the defendant as a registered mortgagee. Indeed, even if the defendant's rights were equitable ones, they would still rank in priority over those of the purchasers as they would have been first in time. On any version of the facts, the defendant would have a right to realize its security notwithstanding the interests of the third parties involved.

52. Having considered the evidence placed before me against the background of the law, I find it difficult to conclude that the exercise of the defendant's power of sale would be prejudicial and adverse to third party rights. This contention on the part of the claimants raises no serious question to be tried. The same thing applies to the second claimant's assertion as to the sentimental and intrinsic value of the property to him as a basis for restraint of the defendant's he power of sale. This too provides no legal basis on which a mortgagee should be prevented from realizing his security once his power of sale has validly arisen.

<u>Issue# 7: The quantum of the debt outstanding</u>

53. The claimants, up until now, have not made any positive assertion as to what sum they owe or believe they owe to the defendant. There is thus no material presented by the claimants to point, at least, to a probability that the defendant has miscalculated the debt. They are only able to say that given payments made to date, the debt should have been discharged inclusive of <u>reasonable</u> interest (my emphasis.). This is not conclusive evidence that the debt with agreed interest is paid off. Given the vagueness and imprecision of the claimants' evidence on the quantum of the debt, I am a bit reluctant to say that there is a serious issue to be tried with respect to quantum. This is so because it is the claimants who are asserting that the debt is discharged and so the onus is on them to prove this assertion in the ordinary course of things. They have not presented any evidence from, say, an accounting consultant to at least raise a real issue with some degree of seriousness that the defendant's claim is erroneous and its power of sale has not arisen.

54. At the risk of being over-generous to the claimants, I would venture to say that despite the claimants' failure to present clear evidence of inaccuracy in computation of the outstanding debt, there may well be an issue to be investigated between the parties with respect to quantum of the debt. I have come to this conclusion because upon my perusal of the figures disclosed on the certificate of title and the letters of commitment, I find it a bit difficult to comprehend how the defendants have arrived at the sum of $17m being demanded as the principal sum outstanding. How much of a serious issue it is might be debatable however.

55. Of course, I must admit that I have my own challenges in understanding and therefore interpreting statistical and accounting data of this nature without specialist assistance. I am therefore not in a position to say, at this interlocutory stage, that there is or there is not a likelihood that the outstanding sum being claimed by the defendant is inaccurate. Since it is not for me to embark in these proceedings on a mini -trial so as to conduct a detailed enquiry into disputed facts relating to quantum, I would view this aspect as an issue worthy of enquiry and so treat it, for the purposes of my analysis as a serious issue to be tried.

Would damages be adequate?

56. But even if it is a serious issue to be tried, that, in and of itself, does not entitle the claimants to an injunction and so the enquiry as to whether to grant an injunction cannot end here. The further considerations within the **American Cyanamid** guidelines is to determine whether damages would be an adequate remedy to the claimants for any loss incurred at them pending trial if it was to be found at trial that an injunction should have been granted and if so, whether the defendant is in a position to pay them.

57. In considering the question as to adequacy of damages, I have noted that the mortgaged property, from the very start, was offered as security in the context of commercial dealings. It was being utilized as part of a money making venture. I find in all the circumstances that the claimants would not in any way be prejudiced by an award of damages if they were to succeed at trial in proving that the sum demanded by the

defendant, as being outstanding, is inaccurate. Given the history of the conduct of the claimants in dealing with the mortgage payments and the financial position they are clearly in at this time *vis-à-vis* the position of the defendant as a mortgagee whose power of sale has, *prima facie,* validly arisen, I am of the view that damages would be an adequate remedy for the claimants if they were to succeed at trial. There is nothing to say that the defendant would not be able to pay such damages if it was to turn out at trial that the injunction should have been granted. On the **American Cyanamid** analysis, I ought to refuse the injunction since damages would be adequate and the defendant would be in a position to pay them.

58. I would nevertheless go on to say that within the special context of this case as it relates to a mortgaged debt, the only issue that seems worthy of any enquiry between the parties is one that, in the end, would translate into a dispute as to the amount of the mortgage debt that is due and payable. It raises no issue as to the validity of the mortgage by virtue of which the defendant is seeking to exercise its power of sale. It is clear on the relevant authorities (some of which have already been cited) that even where the issue as to quantum can be taken as a serious issue to be tried, that is not a proper basis on which to restrain the mortgagee seeking to exercise its power of sale. The claimants would therefore be caught within the drag net of the '*Marbella Principle*' which means the defendant ought not to be restrained unless the claimants pay into court the sum claimed to be owing.

59. The claimants have argued, in a strenuous effort to resist the defendant's demand for discharge of the debt, that the defendant had made demand prematurely being six months premature of the date of the five year balloon stipulated in the agreement. They also contend that they have other property and assets of substantial value that could be realized to liquidate the debt. I will simply say that these arguments have nothing to commend them as putting forward valid reasons for the exercise of the defendant's power of sale to be restrained.

60 I conclude that barring the one issue that relates to the quantum of the mortgage debt that seems to require investigation, there is no serious issue to be tried that has arisen on the claimants' case to warrant injunctive relief. In any event, even if there are, I have found that damages would be an adequate remedy if the claimants were to succeed at trial and that the defendant seems in a position to pay them. Accordingly, I can find no grounds for interfering with the defendant's freedom of action even on condition that the alleged sum is paid into court. I am, therefore, constrained to hold, in all the circumstances, that it is just and convenient that an interim injunction not be granted.

ORDER

61. The claimants' Notice of Application for Court Orders filed on August 19, 2009 for an interim injunction pending the determination of the matter is denied.

62. The interim injunction granted on August 19, 2009 is hereby discharged with costs to the defendant to be agreed or taxed.