[2021] JMCC Comm 05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00423

BETWEEN	**RHESHAN CAPITAL MANAGEMENT LIMITED**	**CLAIMANT/APPLICANT**
AND	**FIRST GLOBAL BANK LIMITED**	**DEFENDANT/RESPONDENT**

IN CHAMBERS

Mr. Christopher Dunkley and Mrs. Kayola Muirhead instructed by Phillipson Partners for the Claimant/Applicant

Mrs. Sandra Minott-Phillips QC and Mr. Litrow Hickson instructed by Myers, Fletcher and Gordon for the Defendant/Respondent

Heard: January 4 and 28 2021

Civil practice and procedure - Interlocutory injunction - Application to restrain the mortgagee from exercising power of sale under mortgage - Whether mortgagee acted in bad faith - Whether damages is an adequate remedy - Whether the applicant is entitled to Injunctions in circumstances of this case.

PALMER HAMILTON, J

BACKGROUND

[1] This is an Application for an injunction pending the trial of the Claim brought by the Applicant against the Respondent for inter alia, damages for breach of contract and damages for breach of duties in relation to the Respondent's exercise of its power of sale. This Claim is stridently opposed by the Respondent.

[2] The Applicant is a company duly incorporated under the laws of Jamaica carrying on the business of real estate development. The Respondent is a company duly incorporated under the laws of Jamaica carrying on the business of commercial banking.

[3] The Applicant obtained several mortgages from the Respondent to fund the construction of its housing developments. On the Respondent's case the Applicant's cumulative principal debt to the Respondent was the sum of Five Hundred and Five Million Three Hundred and Ninety Thousand Six Hundred and Fifty-Five Dollars ($505,390,655.00) with interest. The agreed date for repayment was the 31st day of March 2016. Evidently, the Applicant defaulted in its payments on the terms and conditions of the loan and upon this default in the repayment of the loans, the Respondent decided to exercise its power of sale.

[4] The Applicant does not deny that it was in default of its obligations under the mortgage instrument nor does it contend that the Respondent's power of sale did not arise at the time it sought to exercise it. The gravamen of the Applicant's contention is that the Respondent exercised its contractual rights of the power of sale in complete bad faith.

[5] The Applicant predicates this averment on the fact that it attempted to reduce its indebtedness to the Respondent by continuing its marketing of the remaining units for sale. This aggressive marketing was fruitful in that it resulted in the preparation of three (3) agreements for sale for units 16, 17 and 22, the combined total of these sales being One Hundred Million Dollars ($100,000,000.00). It is the Applicant's averment that despite being notified of these sales, the Respondent withheld its permission from the Applicant to complete the sales therefore no proceeds of sale would be forthcoming and this stifled its ability to reduce its debt.

[6] The Applicant claimed that Respondent subsequently proceeded to exercise its power of sale over the said units at an undervalue that resulted not only in damage

to its commercial reputation, but the loan facility with the Respondent continues to accrue interest daily to the Applicant's detriment.

[7] This impelled the Applicant to file the substantive Claim. Against this background, the Applicant filed an application for an interim injunction seeking inter alia, an order to restrain the Respondent from disposing, transferring or otherwise dealing with the unit number 17. The Respondent vigorously asserted that the Claim is not maintainable primarily because the extent of the contractual relationship between the parties is defined in written contracts only and the Applicant admits being in breach of its obligations to the Respondent.

[8] The Defence also itemizes other reasons why the Claim is not maintainable, including the reasons that the statements of case are an abuse of the process of the Court and it discloses no reasonable grounds for bringing the Claim. On the 7th day of December 2020, the notice of application came on for hearing *ex parte* before me and after hearing the Applicant's attorney-at-law, I granted an interim injunction and made certain other orders relating to the Respondent's disclosure of certain documents pending the hearing of the *inter partes* application for interlocutory injunction. I will just say, in passing, that a tribunal considers and make decisions in a matter based on the material information put before it at the material time.

[9] This judgment is in respect of the *inter partes* hearing of the application for injunction against the Respondent, which came on for hearing and was concluded on the 4th day of January 2021. The evidence in support of the application is contained in three (3) Affidavits of Troy Brennan and the evidence in response to the application is contained in the Affidavit of Aleca Green-Miller.

[10] Both parties through their Attorneys-at-Law, have provided written submissions, which were bolstered by extensive oral submissions. Both parties were also given the opportunity to make submissions in reply to the authorities cited by each. I

wish to state at this juncture that I have given them careful and due consideration, but

for the sake of brevity, I do not propose to recite them in detail in this judgment but only to the extent that influenced my decision.

SUBMISSIONS OF THE APPLICANT

[11] Learned Counsel for the Applicant Mr. Christopher Dunkley submitted that in considering whether to grant an interim or interlocutory injunction, the Courts have been consistently guided by the principles laid down in the **American Cyanamid v Ethicon** [1975] 1 All ER 504. Mr. Dunkley indicated that the three (3) main principles from that case are: -

1. Is there a serious issue to be tried?
2. Would damages be an adequate remedy?
3. Does the balance of inconvenience lie in favour of granting or refusing the injunction?

[12] In submitting on section 106 of the Registration of Titles Act (hereinafter referred to as "the RTA") and the issue of the mortgagor's equitable right to redeem, Mr. Dunkley submitted that where an exception applies, a mortgagor is at liberty to ask for injunctive reliefs on the basis that section 106 is not applicable, in which case the transaction is liable to be set aside in any event.

[13] Learned Counsel averred that the case of **Aspinal Wayne Nunes v Jamaica Redevelopment Foundation Inc** [2019] JMCA Civ. 20 determined that in cases concerning whether the mortgagee can be restrained from exercising powers of sale, section 106 of the RTA is not relevant to consider whether damages are an adequate remedy under **American Cyanamid v Ethicon** (supra) principles. It was also submitted that the limitation of damages under section 106 of the RTA is a statutory imposition relating to certain circumstances where a mortgagee has already dealt with the property and could be considered an imposition based on

public policy rather than any substantive consideration of what constitutes "adequate" compensation.

[14] Paragraph 70 of **Aspinal Wayne Nunes v Jamaica Redevelopment Foundation Inc** (supra) was quoted and Learned Counsel stated that this judgment concluded that section 106 was not a deeming provision, meaning, it did not necessarily follow that in every case, damages would be an adequate remedy, or an injunction should automatically be granted. In certain instances, a Court will readily find that damages are not an appropriate remedy, given the nature of the breach and the rights that are being interfered with.

[15] Mr. Dunkley stated that the right to redeem is a fundamental right under a mortgage. The right is also partly founded in equity, and a court of equity would be loath to sanction poor conduct by and signal to mortgagees, that they are free to behave in bad faith or oppressively in relation to a mortgagor by deriving the latter of his to property once he can pay compensation.

[16] Mr. Dunkley propounded that in certain instances, a mortgagee may seek to exercise its powers of sale in bad faith and in a manner which is oppressive to the mortgagor which would warrant the intervention of the Court at the enforcement stage. Learned Counsel submitted that the "bad faith" conduct which warrants the exception to section 106 of the RTA would rest somewhere above mere impropriety, negligence or carelessness and below actual fraud. It is conduct amounting to a misuse of the contractual power granted to it in an oppressive manner or in a manner that is calculated to "cheat" the mortgagor out of his equity of redemption which is a fundamental legal right grounded in the contract with the mortgagor.

[17] Learned Counsel proffered that the case of **Waring (Lord) v London and Manchester Assurance Company Limited and others** [1935] Ch. 310 acknowledges the equitable jurisdiction to set aside a contract for sale with a third party due to the lack of bona fides on the part of the mortgagee. Mr. Dunkley also

indicated that the jurisdiction to set aside for bad faith was also implicitly recognized by **Forbes and Forbes v Miller's Liquor Store (Dist) Limited** [2016] JMCA Civ. 1 where the mortgagee's powers of sale came under scrutiny. Paragraph 52 was quoted and Learned Counsel stated that implicit in the reasoning of the trial judge is that bad faith in the process of the sale would have been a basis for the said transaction to be set aside, thereby preserving the mortgagors' equity of redemption, irrespective of whether the third party purchaser was aware of it.

[18] The Australian case of **Forsyth and another v Blundell and others** (1973) 129 CLR 477 was cited by Learned Counsel and he indicated that the court upheld the granting of the injunction on the ground that the mortgagee acted with calculated indifference to the interests of the mortgagor when exercising its powers of sale. Mr. Dunkley also cited the case of **Hearn et al v Republic Bank Limited et al** H.C.A. No.3738 of 1990 and stated that the court upheld the grant of an interim injunction on the ground that the certain conduct constituted dealing in bad faith by the mortgagee, giving rise to a strong possibility that the said contract may be set aside in a trial of this matter.

[19] Mr. Dunkley submitted that section 106 of the RTA ought not apply in cases of wilful conduct, effectively cheating the mortgagor out of his equity of redemption as this would amount to bad faith dealing.

[20] Learned Counsel indicated that given the proprietary rights that are involved in this case, the Court is urged to find that the balance of convenience should lie in favour of a grant of an injunction, as to do otherwise could lead to a permanent deprivation of the Applicant's right to redeem which would be practically destroyed. On the other hand, there is no inconvenience or injustice to be suffered by the Respondent whose interest only lies in money.

[21] Mr. Dunkley ended his submissions by indicating that the Applicant ought to have the benefit of injunctive relief on the following basis: -

> *"i) FGB's refusal to accept or recognize sales which could have paid up the Claimant's loan to the Bank, but instead left Rheshan Capital in a position where interest continued to accrue on the loan and could only be of the utmost bad faith amounting to a fetter on its equitable right of redemption.*
>
> *ii) FGB's refusal to accept the Claimant's Agreement for Sale for the subject Unit 17, The Riviera, for a sale price of the Three Hundred Thousand United States Dollars (USD$300,000.00).*
>
> *iii) Purporting to exercise its power of sale to enter into an Agreement for Sale with a third party, for Unit 17, despite being made aware of the Claimant's agreement for sale at a sale price of Three Hundred Thousand United States Dollars (USD$3,000,000.00), and refusing to disclose the sale price of this 'second in time' agreement, very likely being sold for less than the sale price of the Claimant's earlier in time sale.*
>
> *iv) The subject property is already in the possession of the Claimant's Purchaser or its tenants, licensees, invitees or nominees, who have done substantial works on the property and currently resided in the subject property with their family.*
>
> *v) The Claimant's indebtedness to the Defendant is nearly, if not already, discharged, but the Defendant has failed to accept its Attorney's earlier conditional tender of Twenty Million Dollars, and more recently, its November 26, 2020 tender of Thirty-Five Million Dollars, it currently holds negotiated, whilst its loan facility continues to accrue interest daily to its detriment.*
>
> *vi) Unless the Defendant is restrained, the Defendant's later sale of Unit 17, for a lesser price will require more funds from the Claimant to clear its loan facility with the Defendant."*

[22] Other cases mentioned by Learned Counsel are **Sandgate Corporation Pty Ltd and Anor v Ionnou Nominees Pty Ltd and Ors** [2000] WASC 91, **Lloyd Sheckleford v Mount Atlas Estate Ltd** (unreported) Supreme Court, Jamaica, Civil Appeal No. 148/2000, judgment delivered on the 20th day of December 2001, **Devon Morris, Cherrida McBean Morris & Morlyn Mangaroo-McBean v JN Bank Ltd, Total Credit Services and Heather Wright** [2019] JMCC COMM. 25 and **Bruce James v Jamaica Money Market Merchant Bank Limited** [2020] JMSC COMM 34.

SUBMISSIONS OF THE RESPONDENT

[23] Learned Queen's Counsel Mrs. Sandra Minott-Phillips indicated that on an *ex parte* application *uberrima fides* is required and it is therefore incumbent upon an applicant to make full and frank disclosure of all material facts. Mrs. Minott-Phillips

QC cited the case of **Jamculture Ltd v Black River Upper Morass Limited et al** 26 JLR 244 and indicated that the court upheld the dissolution of an *ex parte* injunction because the applicant failed to make reference in his supporting affidavit

to material facts. The failure constituted a material non-disclosure of fact which could have had an effect on the judge who granted the injunction. Learned Queen's Counsel further indicated that the court considered the applicant's failure to do so to be a deliberate attempt to manipulate the court, a consequence of which was the applicant's disentitlement to equitable relief.

[24] It was submitted that the principles in **Jamculture Ltd v Black River Upper Morass Limited et al** (supra) should apply in the instant case as there is no indication in the documents put forward by the Applicant of it having disclosed to the Court all the material facts relevant for the court's consideration of its interim injunction application. Mrs. Minott-Phillips, QC stated that the Applicant did not produce for the Court's consideration (i) a copy of the parties' written agreement to lend set out in their commitment letters, (ii) a copy of the certificate of title to the property (iii) a copy of the mortgage instruments it executed in favour of the Respondent. These documents according to the averment of Learned Queen's Counsel contains the parties' contractual arrangement and might reasonably have been regarded by the Court of weight.

[25] It was proffered that an injunction is an equitable remedy that can be accessed only if none of the bars to equitable relief applies. Even if the Applicant had not by its inequitable conduct disqualified itself from receiving equitable relief, the ordinary principles applicable to the grant or refusal of an interlocutory injunction restraining a registered mortgagee from exercising its power of sale ought to result in the dismissal of its application to restrain the bank from exercising its power of sale over Units 17 and 29 of the property pending trial.

[26] Learned Queen's Counsel submitted that there are no serious issues to be tried. In the absence of a serious triable issue warranting it, there is no basis in law for granting the interlocutory injunction being sought be the Applicant.

[27] It was further submitted that the extent of the legal relationship between the parties is governed entirely by the written commitments to lend and the mortgage instruments the Applicant signed in favour of the Respondent in respect of the property. The Applicant has no underlying claim for a permanent injunction restraining the bank from exercising its power of sale on account of its debt having been paid off or for any other reason. Aside from seeking an accounting for the proceeds of sales conducted by the Respondent, which it already provided, the sole relief the Applicant seeks against the Respondent is pecuniary for damages, costs and interest.

[28] Mrs. Minott-Phillips averred that the contracts between the parties indicate that the Applicant has agreed that the Respondent is entitled to apply to the Applicant's loan account the costs and fees incidental to the securitization of the mortgage facility or its realization. For this reason, the Applicant's contention that the Respondent is applying costs and fees to its loan account cannot amount to a triable issue because, simply put, it has agreed that it should be so.

[29] Learned Queen's Counsel contended that there is nothing improper about the Respondent exercising its rights under its security consequent on the debtor's default and the fees the Respondent is incurring in enforcing its security being applied to the loan account as those are expressed terms of the parties' agreement.

[30] It was submitted that the Applicant's allegations that the Respondent has fettered its equity of redemption and is selling units at an undervalue are also unmaintainable as the Applicant has no right to redeem any of its security until it has repaid its debt. There is nothing remarkable or unusual about a forced sale being conducted on an "as is where is" basis. It is in fact, the typical basis for such

sales. Also, Mrs. Minott-Phillips QC maintains that the selling of the units “as is” does not mean they are being sold by the Respondent at an undervalue.

[31] It was further submitted that as the Respondent entered into a prior agreement for sale in relation to Unit 17, the Applicant’s equity of redemption in relation to that unit was extinguished as at the date of the signing of that agreement. The equity

of redemption can only be restored following the lawful cancellation of an existing agreement for sale, as ultimately happened in relation to Unit 17.

[32] Mrs. Minott-Phillips also stated that as a matter of law, an agreement for sale entered into by a mortgagee/bank pursuant to its power of sale under the mortgage overreaches any agreement for sale entered into by the mortgagor/debtor subsequent to the date of registration of the mortgagee’s interest on the certificate of title. Section 105 of the RTA was cited in support of this submission.

[33] Learned Queen’s Counsel submitted that in breach of the contractual obligation found under Clause 2.16 of the mortgage instrument, the Applicant entered into an agreement for sale for unit 17 on the 1st day of July 2020 not only without first having obtained the Respondent’s prior consent to do so, but in spite of the Respondent expressly forbidding it in its letter dated the 3rd day of January 2019 to the Applicant’s agent. The case of **Midway Wood Products Pty Ltd v Permanent Custodians Pty and Prempower (Investments) Pty Ltd** [1991] Vic SC 509 was cited in support of this submission. In this case, the court found that there was no real issue to be tried as the mortgagee had not consented to the sale, whether expressly or impliedly. Mrs. Minott-Phillips QC also indicated that the Respondent in the instant case only had sight of the purported agreement for sale when it was served with the Applicant’s Particulars of Claim.

[34] Mrs. Minott-Phillips contended that in relation to units 17 and 29 and following the Respondent’s cancellation of the sale of unit 17, the Respondent tried to

accommodate the Applicant's requests for it to retain its cheque in the amount of Thirty-Five Million Dollars ($35,000,000.00) in exchange for a partial discharge of its mortgage over that unit and sending the duplicate certificate of title for that unit and sending the duplicate certificate of title for that unit to the Applicant, only to have the Applicant do a *volte face* on its former entreaty and put forward an entirely different proposal.

[35] Also, the Respondent had no option but to cancel an agreement for sale that it tried to accommodate in relation to unit 29 on the Applicant's behalf since the Applicant refused to sign the instrument of transfer and resell the property in keeping with its statutory right to do so under section 106 of the RTA. Learned Queen's Counsel submitted that there is evidence before the Court that every breach of the parties' agreement is a breach committed by the Applicant.

[36] It was maintained that this is a case in which the Court ought to find that damages would be an adequate remedy for the Applicant if the Respondent is not restrained from exercising its power of sale in relation to units 17 and 29. After all, damages is the only remedy for the purported unauthorised sale of the property by the mortgagee sought by the Applicant in its Particulars of Claim.

[37] Learned Queen's Counsel submitted that the Torrens systems of land holding in Jamaica affords registered mortgagees the power to sell the security to recover the unpaid debt in the event of a default in payment and cited the case of **National Commercial Bank v Olint Corporation Limited** [2009] UKPC 16 in support of this position. It was further submitted that these "special rules" result in the courts unconditionally restraining a registered mortgagee's exercise of its power of sale only *"…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"*. Mrs. Minott-Phillips QC stated that no such very special fact exists in the instant case as would render it an exceptional case. in the case at Bar, the mortgagor admits borrowing the money, that it has defaulted

on its debt and that the mortgagee's resort to exercising its power to sell its security is understandable.

[38] Mrs. Minott-Phillips QC concluded her submissions by indicating that there is no legal basis to grant an interlocutory injunction restraining the Respondent from exercising its power of sale however, if the Court is minded to do so, it can only be imposed on the condition that the Applicant pays into Court the amount claimed by the Applicant to be due, that is, Sixty-Five Million Three Hundred and Forty-Two

Six Hundred and Six Dollars and Twenty-One Cents ($65,342,606.21). The case of **Aspinal Wayne Nunes v Jamaican Redevelopment Foundation Inc** (supra) was cited in support of this condition.

ISSUES

[39] The primary issue to be determined by the Court is whether is Applicant is entitled to the injunctive relief claimed.

LAW AND ANALYSIS

[40] The Court's power to grant an injunction is not only found in its equitable jurisdiction, but it is entrenched in section 49(h) of the **Judicature (Supreme Court) Act** which provides: -

> *"A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court,* ***in all cases in which it appears to the Court to be just or convenient that such order should be made****; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just..." [my emphasis]*

[41] It is established that the principles governing the grant of an injunction are to be found in the seminal case of **American Cyanamid v Ethicon** (supra). Lord Diplock declared that an Applicant seeking an interlocutory injunction must satisfy the following conditions: -

i. There are serious issues to be tried; ii.

Damages are not an adequate remedy;

iii. The balance of convenience generally lies in favour of granting the injunction.

[42] These principles are embedded in our jurisdiction and have been endorsed in pivotal cases such as **National Commercial Bank v Olint Corporation Limited** (supra). Lord Hoffmann, who delivered the judgment of the Board, said at paragraph 16: -

> *"…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 I injunction is more likely to produce a just result…"*

[43] I am guided by these steadfast principles and note that the first point for my contemplation is to determine whether there is a serious question to be tried in relation to the substantive claim.

Is there is a serious issue to be tried?

[44] Lord Diplock in **American Cyanamid v Ethicon** (supra) stated that before granting an injunction the Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious issue to be tried. He further stated at page 323: -

> *"It is not 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...* ***So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought****." [my emphasis]*

[45] I also note the dictum of Laddie, J. in the case of **Series 5 Software v. Clarke**

[1996] 1 All E.R. 853: -

> *"(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b)……….and (d) any clear view the court may reach as to the relative strength of the parties" cases."*

[46] The Applicant is essentially seeking to restrain the Respondent's power of sale on the ground that it exercised its power in bad faith and in a manner which is oppressive to the mortgagor. In forming a view as to the strength of each party's case herein, I carefully examined the authorities, submissions and the evidence placed before the Court. I considered the facts complained of to aid my assessment as to whether such conduct, if proved at the trial, can constitute bad faith.

[47] Ordinarily, conduct amounting to bad faith are mainly matters of fact which should properly be resolved in the forum of a trial with cross examination and after discovery. I garner this principle from paragraph 20 of the case **of Devon Morris v Cherrida Morris and Morlyn Mangaroo-McBean et al** [2019] JMCC Comm 20. However, on the facts before me, I have made a preliminary assessment that the conduct of the Respondent taken together, did not constitute bad faith.

[48] I found the authority of **Downsview Nominees Ltd v First City Corporation** [1993] AC 295 instructive. At page 312 Lord Templeman stated: -

> *"Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage.* ***From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower****. These principles and rules apply also to a receiver and manager appointed by the mortgagee." [my emphasis]*

[49] His lordship went further at page 315: -

> *"If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor.* Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. [1971] Ch. 949 *is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition.*

[50] In assessing the indicators of the alleged bad faith proposed by the Applicant, in particular, that it refused to recognize or accept sales which could assist the Applicant in paying off the debt, the authorities made it clear that the Respondent is not liable to the Applicant to do so even though the terms might be regarded as disadvantageous to the Applicant. The interests of the Respondent come before the interests of the Applicant. The mortgagee is under no duty to consider any interests other than its own when deciding whether or not to exercise its rights which it has. There was nothing put before the Court by the Applicant to show that there was any improper motive on the part of the Respondent in refusing to accept these sales which the Applicant entered into against the expressed prohibition of the Respondent after it lawfully exercised its power of sale.

[51] Also, the Applicant failed to produce any cogent evidence to indicate that Unit 17 is being sold at an undervalue. What is placed before the Court is a mere assumption that the unit is *"very likely being sold for less than the sale price"*. The Court will not interfere with the exercise of the mortgagee's power of sale at the instance of empty assertions. Furthermore, the mere fact that a higher sale price may have been achievable will not necessarily mean that a mortgagee is in breach of its duty. I also considered the proposals made by the Applicant which it alleged were refused by the Respondent. These proposals fell way below the amount due and would not, in any event, satisfy or extinguish the mortgage debt. In the light of this, the Respondent would not be under any duty to accept these proposals as they would in no way realize its security for the repayment under the mortgage instrument.

[52] The Applicant has consistently maintained that it had a valid equity of redemption.

Brooks JA (as he then was) in **Forbes and Forbes v Miller's Liquor Store (Dist) Limited** (supra) highlighted the meaning of equity of redemption at paragraphs 35 and 36: -

> *"The term "equity of redemption" is a term belonging to what Australian lawyers term "the old system", as distinct from the Torrens system of registration of titles to land. The old system included the relevant statute law, the common law and the relevant principles of equity as they affected interests in land.* ***Under the common law, a mortgagee became the owner of the property. Equity, however, allowed the mortgagor, upon repayment of all monies due under the mortgage, to redeem the property and regain ownership of it. The mortgagor was therefore said to have, an "equity of redemption". Where the mortgagee sold the property, however, the mortgagor's equity of redemption was extinguished.***
>
> *Under the Torrens system of registration, the mortgagor remained the legal owner of the property. The term "equity of redemption", therefore, has a different implication under the Torrens system. It speaks to the mortgagor's right to have the encumbrance to his title, created by the mortgage, removed. Some principles of the old system do, however, apply conveyancing practice under the Torrens system. An informative discourse on the differences between these systems of law with respect to mortgages, is set out in* ***King Investment Solutions v Hussain [2005] NSWSC 1076 (27 October 2005)*** *at paragraphs 45-82. The ROTA is modelled on the Torrens system of registration of titles to land." [my emphasis]*

[53] The authorities show that the right to redemption arises upon the mortgagor repaying all the monies due under the mortgage. In my view, the evidentiary material before the Court reveals that the Applicant's equitable redemption was already extinguished at the moment that the Respondent decided its power of sale under the terms of the mortgage instrument.

[54] Page 310 of **Fisher and Lightwood's, Law of Mortgage** read as follows: -

> *"The mortgagee will not be restrained from exercising his power of sale because the mortgagor has commenced a redemption action or because he objects to the arrangement for sale or because the amount due is in dispute. But he will be restrained, if before there is a contract for sale or the mortgaged property the mortgagor pays into court, the amount claimed to be due, that is the amount the mortgagee swears to be due to him for principal, interest and costs.*

[55] It is my view that there was no conduct on the part of the Respondent which would amount to bad conduct or *mala fides* and as such, support any equitable relief due to the Applicant on that ground.

[56] I found guidance in the dictum of Beach J of **Latrobe Capital Mortgage Corporation Limited and Anor v Mt Eliza Mews Pty Ltd and Anor** [2001] VSC 464 stated: -

> *"It has long been established that as a general rule, an injunction will not be granted restraining a mortgage from exercising powers conferred by a mortgage and in particular a power of sale, unless the amount the amount of the mortgage debt, if that is not in dispute is paid unless, if the amount is disputed, the amount claimed by the mortgagee is paid into court; and that rule will not be departed from, merely because the mortgagor claims to be entitled to set off an amount of damages claimed against the mortgagee…"*

[57] In my judgment, there is no serious issue to be tried. The documents before me contain unchallenged evidence of the parties' relationship and dealings and I have been provided with substantial evidence to support my position that the Applicant will not likely succeed on a balance of probabilities in its Claim. I cannot discern

any seriousness to be investigated at trial so as to warrant the restraint of the Respondent's power of sale.

Would damages be an adequate remedy?

[58] It is trite law that if it is found that there is no serious question to be tried, then the application fails in limine. However, if I am wrong on this and there is in fact a serious issue to be tried, the Applicant needs to further satisfy the Court that damages would not be an adequate remedy and if damages would be an adequate remedy, then the injunction ought not to be granted.

[59] Lord Diplock at pages 510 and 511 of **American Cyanamid v Ethicon** (supra) stated: -

> *"As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the 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 as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. 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. If, on the other hand, damages would not*

> *provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason for this ground to refuse an interlocutory injunction.*
>
> *It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. 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."*

[60] In the case at Bar, the Applicant in its substantive Claim is claiming damages for breach of contract and for breach of duties, and, if it is that the Respondents would be found liable on this, damages would be the appropriate remedy to compensate the Applicant for any suffered.

[61] I am of the view that the provisions of Section 106 of the RTA apply herein, and by virtue of this, I find that damages would be the only remedy available to the Applicant for any wrongful exercise attributed to the Respondent. Also, the Applicant had, in its substantive Claim, quantified its harm in monetary terms and the court in the case of **Aodhcon LLP v Bridgeco Ltd** [2014] EWHC 535 (Ch) concluded that the irreparable harm required to established entitlement to an injunction is harm that cannot be quantified in monetary terms. In giving due consideration to the circumstances of this case it is my view that the withholding of the injunction will not result in "irremediable prejudice" to the Applicant.

Where does the balance of convenience lie?

[62] Having found that there are no serious questions to be tried and that damages in any event would be an adequate remedy, in keeping with **American Cyanamid v Ethicon** (supra) there would be no need to consider where the balance of convenience lies. I however considered the prejudice that may be accorded to the Applicant if the injunction is not granted and I found that such prejudice may be

compensated by an award of damages. The Respondent's power of sale should be restrained upon serious and compelling grounds and in the absence of such, the balance of convenience lies heavily in favour of refusing the injunction.

Is this a matter suitable for Summary Judgment?

[63] Learned Queen's Counsel Mrs. Minott-Phillips urged the Court in her submissions to consider whether the Claim of the Applicant is unmaintainable and as such, warrants the action of striking out the Applicant's statements of case. The Defence of the Respondent also underscores this, and it contained the statement of belief that there was no real prospect of the Applicant succeeding on the Claim. I indicated at the conclusion of the submissions that I would be considering and making a determination as to the merits of the case.

[64] As a rule, in the discretionary exercise of his or her case management powers a judge, on his or her own motion, may give summary judgment on the whole claim

or on an issue of fact or law in the claim (see paragraph 34 of **Ocean Chimo Ltd Claimant v Royal Bank (Jamaica) Ltd (RBC) and others** [Consolidated claims] [2015] JMCC Comm. 22). Rule 15 of the Civil Procedure Rules (hereinafter referred to as "the CPR") permits the court to do so. In the instant case, having already determined that there was no serious question to be tried I am mindful of rule 15.2 (a) of the CPR.

[65] Rule 15.2(a) of the CPR provides: -

> *"The court may give summary judgment on the claims or on a particular issue if it considers that –*
>
> *a. the claimant has no real prospect of succeeding on the claim or the issue; or..."*

[66] Having formed the view that there are no triable issues, in my judgment this is a matter suitable for the granting of summary judgment. In **DYC Fishing Limited v. The Owners of MV Devin and MV Brice** (unreported) Supreme Court, Jamaica,

Claim No. 2010 A 00002, judgment delivered on the 8th day of October 2010 the Honourable Mr. Justice Patrick Brooks (as he then was) at page 19 stated: -

> *"It is often said that the court is not entitled to embark on a mini – trial when assessing the prospects of success of a party's case. If the case is based on a point of law which is obviously bound to fail, or after relatively short argument proved to be so, then summary judgment may be granted. If, however, there are arguable points of law or issues as to fact which, depending on the resolution, would affect the outcome, then summary judgment ought not to be granted...".*

[67] Bearing this guidance in mind, I am heedful that a mini trial ought not to be conducted however, in order to determine the prospects of success of the Claim, I am permitted to form a provisional view of the Claim and decide its likely outcome.

[68] Having considered the evidence presented in this proceedings, I find that the Applicant has failed to show that on the available material before the Court and without any prospect of further evidence emerging in discovery or on cross examination that the Claim is not fanciful and is one that has a real prospect of succeeding. In my view it is clear that the pleaded Claim and the evidence in support of it did not make out a case against the Respondent with respect to breach of its duty to act in good faith in the exercise of its power of sale.

[69] I am guided by Potter, L.J. in **ED & F Man Liquid Products Limited v. Patel & another** [2003] CP Rep 51 where he stated at paragraph 10: -

> *"…In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save cost and delay of trying an issue the outcome of which is inevitable…"*

[70] I am of the view that this is a case in which a trial would amount to *"no more than a serious waste of time and expense for the parties"* (see paragraph 31 of **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12) and as a result of this and in an effort to further the overriding objective, I am of the view that summary judgment is appropriate in the circumstances.

ORDERS AND DISPOSITION

1. The Notice of Application for Court Orders dated the 1st day of December 2020 and filed the 2nd day of December 2020 is hereby refused. Interim injunction granted on the 7th day of December 2020 is discharged.

2. Notice of Application for Court Orders dated the 22nd day of December 2020 and filed the 23rd day of December 2020 is refused.

3. Summary judgment is entered against the Claimant.

4. Costs to the Respondent to be taxed if not agreed.

5. Leave to appeal is granted.

6. Respondent's/Defendant's Attorneys-at-Law to prepare, file and serve Orders made herein.