[2022] JMSC Civ. 48

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021 CV 04104

BETWEEN	**MAXINE SINCLAIR**	**CLAIMANT**
AND	**JAMAICA POLICE CO-OPERATIVE CREDIT UNION**	**FIRST DEFENDANT**
AND	**GILENE SMITH**	**SECOND DEFENDANT**

IN CHAMBERS VIA ZOOM

Miss Rechella McNeil instructed by McNeil and McFarlane for the claimant/applicant.

Ms Lavern Glave instructed by Scott Bhoorasingh and Bonnick for the first defendant.

Mr Philmore Scott and Mrs Camille Scott instructed by Philmore H. Scott and Associates for the second defendant.

January 20, 2022, March 25, 2022, and April 26, 2022.

Application for interim injunction–exercise of the mortgagee's power of sale - Whether fraud and/or collusion on the part of mortgagee and purchaser - Sections 70, 71, 161, 105 to 108 of the Registration of Titles Act.

PETTIGREW-COLLINS J

THE APPLICATION

[1] The present application was filed on September 29, 2021 and is one for an interim injunction in the following terms:

(i) The Claimant shall remain in possession of the property situated at 30 Davidson Avenue, Kingston 20 in the parish of St. Andrew,

registered at Volume 1123 Folio 546 of the Register Book of Titles until the determination of the claim or such time as this Honourable Court deems fit; or

(ii) The defendants be restrained by themselves, their respective agents and/or servants or otherwise, from instituting recovery of possession proceedings against the claimant until the determination of the claim or such time as this Honourable Court deems fit;

(iii) The 2nd defendant be restrained by herself, her agents and/or servants and/or otherwise from doing any and all acts, whether disposing, selling, mortgaging or transferring, in relation to the property registered at Volume 1123 Folio 546 of the Register Book of Titles.

THE CLAIM

[2] The claimant filed a Claim Form and Particulars of Claim on September 29, 2021. On November 10, 2021, she filed an Amended Particulars of Claim. In her claim, she is seeking orders for the sale and conveyance of property previously owned by her which she still occupies, to be voided on the basis of collusion between the first and second defendants and/or fraud on their part. She is also seeking an order for the Registrar of Titles to be directed to cancel the transfer to the second defendant. She claims that the first and second defendants colluded in selling and purchasing her property at a gross undervalue. Further, that the first defendant was in breach of its duty in equity to the claimant for failing to obtain a proper valuation and failing to advertise or to advertise the property adequately.

[3] In her Amended Particulars of Claim, she sets out the background to the claim. The first defendant is a registered financial institution and holds a mortgage in respect of property registered in the name of the claimant as well as her daughter

Marie Hines who is now deceased. The mortgage was taken on October 9, 2012 in the sum of $5,525,000.00 in order to carry out repairs to the property. She said that in order to obtain the mortgage, a valuation was carried out and the value assigned to the disputed property in June 2012 was $6,000,000.00. She said she fell into arrears with the mortgage payments as at 2014 but that payments were nevertheless made subsequently.

[4] She stated that Marie Hines died in August of 2020 and proof of death was provided to the first defendant. On the August 17, 2020, she received a letter from the first defendant advising her that the property had been sold and that she was required to vacate. A title search revealed that the property was sold to the second defendant who according to the claimant was at all material times an employee of C.D. Alexander Company Realty. A valuation of the property was carried out by C.D. Alexander Property Realty and the value then assigned to the property was $6,800,000.00.

[5] It is contended that the second defendant became acquainted with the claimant and her family in or around 2014/2015 and became aware of the claimant's financial problems. It is alleged that the second defendant used the intimate knowledge of the claimant's financial circumstances in order to acquire the property at a price far below its market value. It is further alleged that the market value stated in the valuation report purportedly prepared by C.D. Alexander Company Realty is not the true or fair market value of the property but is as a result of the collusion and/or fraud on the part of the defendants.

[6] The basis for saying that the valuation is fraudulent is that the claimant obtained a valuation report from Oliver's Property Services dated July 27, 2021 in the sum of $13,000,000.00.

[7] The assertions above are taken from the Amended Particulars of Claim but are also reproduced in the claimant's affidavit in support of the interim injunction. In her affidavit, the claimant also deponed that she was advised that the loan was insured up to a minimum of $3,000,000.00. She said her daughter fell ill in late

2018 or early 2019 and she was unable to continue paying the mortgage. She said that when her daughter died in August 2020, she took proof of her daughter's death to the Credit Union (first defendant), as she was of the view that the entire loan was insured, based on the fact that she and her daughter were joint tenants and so the full arrears would have been paid up.

[8] She also deponed that after she fell into arrears, she attended at the Credit Union and met with various persons and she was advised that she should continue paying the mortgage. She claimed that as at the time of her daughter's death, she continued to have discussions with the Credit Union personnel and she sought to no avail, to get an updated Statement of Account.

[9] Regarding the second defendant, the claimant said that after she ran into difficulties, the defendant started showing interest in the property. She said that upon learning of the sale of the property, she challenged the sale price. She said she is now aware that the second defendant is seeking to sell the property for the sum of $13,000,000.00. She said despite her best efforts through her Attorneys-at-Law, she is still unable to get a statement of account from the Credit Union. She said that she had not received any notice from the Credit Union that the property had been sold and she never saw any advertisement in respect of the property.

THE CLAIMANT'S SUBMISSIONS

[10] The claimant accepts that the mortgage payments were in arrears for a period in excess of a month but denies that she was served with the statutory notice as required by Section 106 of the Registration of Titles Act (RTA). She contends that although a mortgagee does not owe a fiduciary duty to the mortgagor in the exercise of the power of sale, that position does not negate the mortgagee's duty to act in good faith. She commends to the court the case of **Bruce James v Jamaica Money Market Brokers Merchant Bank Limited** [2020] JMSC Comm

34 (para. 45). She submitted that the actions of the first defendant amounts to bad faith and posited that on this basis, the court has the power to set aside a contract for sale with a third party due to lack of bona fides. Counsel cited the cases of **Waring (Lord) v London Manchester Assurance Company Limited and Others** [1935] Ch 310 and **Cowell Anthony Forbes and Another v Miller's Liquor Store (Dist.) Limited** [2016] JMCA Civ. 1. She also referenced **Devon Morris and Others v JN Bank Limited and Others** [2019] JMCC Comm 25 as a matter involving a finding of bad faith where the court granted an interim injunction upon determining that there are serious issues to be tried.

[11] The claimant also relies on an excerpt from the case of **Rudolph Daley v RBTT Bank (Jamaica) Limited** unreported SC Claim No. 1995 D/162, to the effect that proof of an attempt to obtain the best possible price would include advertising the property and seeing to it that the property was properly described in the advertisement and that a critical measure of good exercise of the power of sale is whether a current valuation was obtained and that a failure to obtain same is evidence that there was a failure to take reasonable precaution to obtain the true market value of the property.

[12] It is the claimant's further contention that the first defendant cannot escape liability by relying on the purported valuation figures in the 2018 valuation report in circumstances where more likely than not, the sale to the second defendant was by private treaty. The claimant acknowledged that the first defendant's power of sale did in fact arise but takes issue with the manner in which the power of sale was exercised; the main contention being that the property was sold at a gross undervalue. The further contention is that there are serious issues to be tried in relation to the allegation that the first defendant's conduct constitutes bad faith in the exercise of its power of sale.

[13] On the question of whether damages are an adequate remedy, the submission is that it would not be for the claimant, given that the property in question is her family home which was gifted to her by her late father and which had been in the

family for some fifty years. Further, it is where she resides and she would suffer grave hardship and homelessness if the second defendant is not restrained from evicting her. In the converse, she says that the second defendant does not reside at the premises and is in fact seeking to sell the property for the sum of $13,000,000, which is evidence that to the defendant, the property is merely an asset. She says therefore that damages would be an adequate remedy for both defendants.

[14] The claimant urged the court to accept the observation in the case of **Devon Morris** as well as **Tewani Ltd. V Kes Development Co. Ltd. V ARC Systems** SC Claim No. 2008 HCV 02729, unreported judgment delivered July 9, 2008 that the common law presumption is that damages is not regarded as an adequate remedy in a case involving land.

[15] As regards the balance of convenience, the claimant asked the court to find that there is no doubt as to the adequacy of damages for the defendants. She said further that if the court were to decline to grant the injunction and the claimant were to succeed in establishing her claim, by then she would have lost the property and would be confined to damages as her only remedy. She contends that the second defendant can be compensated for any mortgage payment that she would have made as a result of the delay in the sale of the property, also that the property is likely to appreciate in value and so the second defendant would earn more on the sale of the property. On those bases, the claimant contends that the scale tips appreciably in her favour.

[16] Her final salvo is that Laing J. in the **Devon Morris** case at paragraph 44, expressed the view that the issues in relation to the fact that the claimant's mortgage had been in arrears on a number of occasions and that the pleading related to collusion and allegations of misconduct on the part of the purchaser and the third defendant were unsupported at the stage of the application for interim injunction were not so grave that they should bar the claimants from the equitable remedy they sought.

THE LAW

[17] The cases of **American Cyanamid V Ethicon** [1975] 1 All ER 504 and **National Commercial Bank V Olint** [2009] UKPC 16 provide guidance. The court must first decide whether there is a serious issue to be tried. In coming to that determination, the court is not at that stage concerned with resolving conflicts in the evidence as to the facts on which each party relies. Neither is the court concerned with resolving questions of law which may require detailed arguments and "mature considerations".

[18] If it is determined that there is a serious issue to be tried, the court must next consider whether if the claimant were to succeed at the trial in establishing her right to a permanent injunction, he would be adequately compensated by an award of damages for the loss she would have sustained as a result of the defendant being able to continue the conduct sought to be enjoined between the hearing of the application and the time of the trial. If the court determines that damages will be an adequate remedy and that the defendant will be in a financial position to pay them, then the interlocutory injunction should not be granted. If the court takes the view that damages will not be an adequate remedy for the claimant in the event she succeeds at trial, the court must then go on to consider if the defendant were to succeed at the trial in establishing the right to do what the claimant sought to prevent her from doing, she would be adequately compensated by the claimant's cross-undertaking in damages for the loss she would have sustained by being prevented from carrying on her conduct between the time of the application and the time of the trial. If damages would be an adequate remedy for the defendant and the plaintiff would be in a financial position to pay the damages, there would be no reason on that basis to refuse the interlocutory injunction. It is in circumstances where there is doubt as to the adequacy of the respective remedies in damages that the question of the balance of convenience arises. At this stage there are various matters to consider. Where the factors appear to be evenly balanced, it makes good sense to take such measures that will preserve the status quo.

[19] As was held in **National Commercial Bank v Olint** [2009] J.C.P.C. 16. the purpose of an interlocutory injunction:

> ***"is to improve the chances of the court to do justice after the determination of the merits at the trial. At the interlocutory stag, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd*** *[1975] 1 ALL ER 504,* ***pointed out that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.***
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> ***In practice, however, it is often hard to tell whether either damages or cross undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the cause may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other"***

[20] The court also considered that the following matters:

> ***"prejudice the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction may turn out to have been wrongly granted or withheld, that is to say the court's opinion of the relative strength of the parties' cases."***

[21] The issues to be decided are:

(1) whether there is a serious issue to be tried. That discussion really answers the question whether the claimant has a viable cause of action against the defendants or either of them;

(2) Whether if the claimant should ultimately succeed at trial, damages would be an adequate remedy;

(3) Whether the claimant will be able to satisfy the undertaking as to damages and whether the defendant would be adequately compensated by the undertaking as to damages;

(4) If there is doubt as to the adequacy of damages for the respective parties, does the balance of convenience favour the grant of an injunction;

WHETHER THERE IS A SERIOUS ISSUE TO BE TRIED.

[22] The claimant/applicant contends that there is a serious issue to be tried whereas the defendants say that that is not the case. In order to determine that question, it is necessary to examine the relevant law surrounding the rights of the mortgagee and the position of a purchaser in respect of mortgaged property when the mortgagor has defaulted on the mortgage payments.

[23] It is worth commencing an examination of the law by having regard to the provisions of the relevant sections of the Registration of Titles Act. Without setting out the section in its entirety, section 70 provides that the "proprietor of land or of any estate or interest in land under the operation of this act shall, except in the case of fraud, hold the same as the same may be described or identified in the certificate of title…" This certificate of title is held absolutely free from all encumbrances unless there is in existence a prior registered title in respect of the same land or where there may be a portion of land included in that certificate of title by misdescription. Other exceptions are enumerated in section 161 of the Act.

[24] Section 71 of the act is of particular relevance to this application. The section states:

> ***"Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud".***

[25] Section 105 provides that a mortgage and charge under the act when registered, operates as a security but not a transfer of the land so mortgaged. Further, that where there is a default in the payment of the principal or interest, or in performance or observance of any covenant and the default continues for one month or other period expressly fixed, the mortgagee may give the mortgagor notice in writing to pay the money owed or to perform and observe the covenant. The notice may be given through registered post to the proprietor or by leaving it at some conspicuous place on the mortgaged land.

[26] Section 106 of the act gives a mortgagee a power of sale in respect of the mortgaged property in the event the mortgagor fails to comply with a notice of default. The notice of default is served pursuant to section 105 of the act. Based on section 106, a purchaser of the property from the mortgagee has no obligations to inquire whether in fact any default occurred or continued, or whether the required notice was served on the mortgagor, or otherwise into the propriety or regularity of the sale. Further, the Registrar, upon production of a transfer made in the professed exercise of the power of sale, pursuant to the Act, or the mortgage is not concerned or required to make any inquiries. Where an improper or unauthorized or irregular exercise of the power occurs, the mortgagee's remedy lies in damages only, against the person exercising the power.

[27] A notable feature of the provision of this section is that the purchaser is not required to make inquiries into whether the power of sale properly arose and or was properly exercised.

[28] Based on the provision of section 108 of the Act, where land is transferred by a mortgagee pursuant to his power of sale, the interest of the mortgagor vests in the purchaser free from all liability in respect of the mortgage.

[29] The second defendant's attorney at law very helpfully summarized some relevant principles which I will state as succinctly as I can.

[30] It was established in **Cowell Anthony Forbes (Representative of the Estate of Wilfred Emmanuel Forbes V Miller's Liquor Store (Dist) Limited** [2016] JMCA Civ.1 that once a mortgagee enters into an agreement to sell the mortgaged property, the mortgagor's equity of redemption is extinguished, unless the mortgagee acted in bad faith. Once extinguished, the equity of redemption cannot be revived. Based on section 106, the protection to the purchaser arises as soon as the mortgagee enters into the agreement to sell. See **Lloyd Sheckleford v Mount Atlas Estate Limited** SCCA No 148/2000(Delivered December 20, 2001). In that case, the question arose as to whether an interim injunction should be granted to restrain the completion of a sale by a mortgagee who was acting under a power of sale in circumstances where the mortgagor's remedy (if he was entitled to any), was against the mortgagee for damages. The court took the view that the injunction should not be granted.

[63] The mortgagor is required to show actual fraud in order to impeach the title of the purchaser. As to the nature of the fraud required, it was made clear in the case of ***Assets Company v Mere Roihi and Others*** 1905 UK PC 11, that fraud:

> ***"meant actual fraud i.e., dishonesty of some sort; not what is called constructive or equitable fraud…The fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts must be brought home to the person whose registered title is impeached or***

to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for a fear of learning the truth, the case is very different and fraud may properly be ascribed to him…."

[31] In paragraphs 79 and 80 of her judgment in **Linel Bent (Administrator of the estate of Ellen Bent deceased and Linel Bent Administrator of the estate of Elga Isaacs v Elenor Evans** C.L. 1993/B 115 McDonald Bishop as she was then, gave clarification as to what amounts to fraud. She expressed the following:

> ***78. "Again, in Sawmilling Company Limited v. Waoine Timber Company Limited [1976] A.C. 101, the Board made the point:***
>
> > ***"If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent and so also fraud may be established by a deliberate and dishonest risk causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend on its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.***
>
> ***79. These principles have been adopted and affirmed by our Court of Appeal in several cases see for instance: Enid Timoll Uylett v George Timoll*** *(1980) 17 JLR 257****; Franklyn Grier v Tavares Bancroft SCCA*** *no.16 of 1997* ***delivered April 6, 2001.***

[32] The case of **Cowell Anthony Forbes and Another v Miller's Liquor Store (Dist.) Limited (supra)** makes it clear that the sale of the mortgaged property at an undervalue is not by itself evidence of bad faith. The following was said at paragraph 49 of the judgment:

> ***The fact that a mortgagee sells the mortgaged premises at an undervalue is not, by itself, evidence of bad faith. Crossman J so held in Waring. The principle has not been criticised. At page 319, he quoted, with approval, dictum from Warner v Jacob*** *20 Ch D 220, at page 224:*

> ***"...a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."***
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> ***In Waring, the property was sold by the mortgagee for £186,000 although it had been previously put up for auction with a reserve price of £220,000. The attempt at auction was unsuccessful. Crossman J rejected the contention that it had been sold at a gross undervalue.***

[33] The decision of the Court of Appeal in **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley and others and RBTT Bank Jamaica Limited et al** [2010] JMCA Civ 46 is instructive. RBTT Bank exercised its power of sale in respect of mortgaged property. The proprietor Mr Daley had without the consent of the bank (which was required) executed an agreement for sale in favour of one Mr Walters who at some point went into occupation of the premises. The bank advertised the property for sale by auction. The property was not sold. The bank subsequently sold the property at a gross undervalue by private treaty to Harley Corporation. Apparently, the property was improperly described in the advertisement. Mr Walters was served notice to quit but failed to vacate the property. A number of claims were brought: by Harley Corporation against Mr Walters to vacate, by Mr Daley against RBTT, by Mr Walters against Mr Daley, RBTT and Harley Corporation and a second claim by Mr Walters against Mr Daley and RBTT.

[34] Sykes J heard the consolidated claims and made several orders including that the sale to Harley Corporation be set aside, that the property be transferred to Mr Walters upon him paying certain sums to complete his obligations, that the purchase price paid by Harley Corporation be refunded to RBTT and a number of orders for the payment of sums of money and cost orders. The Court of Appeal distilled from the many grounds of appeal three main issues which were (1), whether there was a valid and enforceable agreement between the bank and

Harley Corporation; whether estoppel arose and whether fraud on the part of Harley Corporation was properly before the learned judge.

[35] The Court of Appeal found that the bank had legally transferred the property to Harley in the exercise of its power of sale which had arisen. Further, that Harley Corporation having been registered as the proprietor, was afforded the protection of sections 70 and 71 of the RTA in the absence of fraud. In response to Mr Daley's assertion that the statutory notice had been served at an incorrect address and that he did not receive it, the court found that the fact that he was not in receipt of the statutory notice would not bar the mortgagee from exercising its power of sale because in that particular instance, a clause in the mortgage contract authorized the bank to invoke its power of sale without issuing the statutory notice. It was said to be permissible for the presence of such a clause in the mortgage contract. (See **Jobson v Capital and Credit Merchant Bank and Others**).

[36] The Court found that the bank's written consent which was required was not secured prior to Mr Daley entering into a contract of sale with Mr Walters and that there was no evidence of acquiescence on the part of the bank. It was argued that Harley Corporation's failure to make an enquiry into the sale price was not sufficient to defeat its interest and that wilful blindness on its part as found by Sykes J was insufficient to establish fraud. The court opined that fraud had not been pleaded in Daley's case and more importantly, his case did not disclose any allegations of fraud. The court readily accepted that even where fraud was not expressly pleaded, it may be inferred from the acts or conduct of a defendant but none could be inferred in the circumstances of the case. The court decided that even if Harley Corporation had in fact known the proper value of the land and did not disclose same to the bank, it was not an imputation of fraud, as a purchaser is under no obligation to disclose to a vendor, the true value of the land.

ANALYSIS

[37] I will firstly consider the case against the second defendant. In the amended particulars of claim, the particulars of collusion and/or fraud on the part of the second defendant are as follows:

a) Colluding and/or committing acts of fraud with the first defendant in respect of the valuation report purportedly prepared by her employers.

b) Failing to act in a bona fide manner in respect to the purchase of the property.

[38] The claimant's evidence is that after her financial difficulties began, the second defendant started showing interest in the property and the second defendant had discussions with her and her son concerning the loan. She said that she was not of the view that the defendant wanted to purchase the premises but rather that she was trying to assist her.

[39] At paragraph 30 of her affidavit, she said *"That due to my suspicion about the bona fides of the sale and the* ***possible*** *collusion between Gilene Smith and Jamaica Police Cooperative Credit Union I carried out an enquiry and discovered that the said Messrs C. D. Alexander with whom Ms Gilene Smith worked had purportedly carried out a valuation in 2018 stating the value of the premises to be $6,800,000.00."* Further at paragraph 36, the claimant expressed that she did not believe that the second defendant was a bona fide purchaser.

[40] The second defendant does not deny that she is an employee of CD Alexander Realty. She said that she started working with the company in August of 2016 as a Marketing assistant in the sales department. She stated that she has never been a part of the Valuation department. The claimant does not allege that she was. She further stated that she had no input in the valuation process, that she had no control, approval or signing off rights in relation to valuations and was not involved in doing the valuation. The claimant makes no assertion in any of those regards against the second defendant. What is apparent from the claimant's

evidence, is that she is suspicious that the claimant had some input in the value assigned to the property. She spoke of possible collusion. The fact of the second defendant being employed to the company which was engaged by the first defendant to carry out the valuation is clearly not evidence from which fraudulent acts can be inferred. The case against the second defendant has not risen beyond the mere speculation or the possibility of fraud.

[41] The second defendant also gave evidence of matters which are supported by documentary evidence detailing communication between the claimant's attorneys at law and the second defendant's attorney. In an email dated October 28, 2020, an attorney at law Ms Janene Laing wrote to Ms Karina Marsh the second defendant's attorney explaining the claimant's plight. In that email, it was explained that the attorney had been approached by the claimant regarding the notification of sale under the power of sale by the first defendant, that the property was held jointly with the claimant's daughter who had recently died from cancer, that she was aware that the documents are with the National Housing Trust for the endorsement of the defendant's interest, that the property had been in the claimant's family for 50 years and was requesting that the second defendant allow the claimant to buy back the property. It was stated that the request was being made on humanitarian grounds and not a legal request.

[42] There was a further email in which the claimant's request to purchase the property back from the second defendant was made on behalf of the claimant. It was also stated that the property was in a state of disrepair, that the roof was leaking like a sieve, that the back of the premise is flooded when it rains because of the condition of the roof, that the property sits on a termite mound which has caused significant damage to the property. It was also said that photographs were attached evidencing the state of the property. Copies of those photographs were exhibited. That email is dated October 20, 2021. The matters explained in the emails as to the state of the property readily gives rise to doubts that the property was recently renovated. I however make no findings in that regard.

[43] Having examined the evidence of the claimant and considering the indisputable evidence of the communication from the claimant's attorney, the evidence of fraud and or collusion between the defendants is non- existent. I make this finding without having regard to the evidence of the second defendant except to the extent that she admits that she was employed to CD Alexander Realty at a time when the valuation was done. Given the state of the law, in the absence of any evidence whatsoever of fraud and or collusion on the part of the second defendant, she takes the property free of all liability relating to the mortgage. By the time the claimant's attorney contacted the second defendant's attorney, the claimant's right of redemption had expired.

[44] The second defendant was not concerned with enquiring into questions of whether the power of sale properly arose or questions of whether the claimant was served with notice or any matter affecting the propriety of the exercise of the power of sale. The second defendant had no obligation to the claimant with regard to the price of the property even if in fact she purchased it at an undervalue. Even if I assume that the claimant is speaking the truth that she had conversations with the second defendant regarding her financial plight, the claimant has not explained how if at all the defendant could have utilized that information in order to secure the purchase of the property from a financial institution. The registered title to the property has been transferred to the second defendant who now holds an indefeasible title to the property and she enjoys the full protection of the provisions of sections 70, 71 and 108 of the RTA.

[45] In **Harley Corporation**, although the Court of Appeal accepted that the property had been sold at a gross undervalue, the sale was not set aside. In the instant case, there would be no basis to set aside the sale on any such ground. Further, even if the first defendant did in fact sell the property at an undervalue, that in itself is not evidence of bad faith.

[46] In light of the foregoing I take the view that there is no serious issue to be tried between the claimant and the second defendant. Therefore, the question of the adequacy of damages does not arise for consideration.

THE FIRST DEFENDANT

[47] The particulars of collusion and/or fraud and breach of duty in equity on the part of the first defendant were stated as follows:

(a) Failing to take all reasonable steps to get the best price reasonably obtainable in exercising its Power of Sale of the property.

(b) Failing to serve the Claimant with Notice(s) of its intention to exercise its Power of Sale in respect of the property.

(c) Failing to provide the Claimant with a Statement of Account in respect to her loan account and the proceeds of sale.

(d) Failing to advertise or adequately advertise the property.

(e) Failing to obtain a proper and/or independent valuation of the property so as to ascertain its true market value.

(f) Selling the property grossly undervalued to the 2nd defendant

(g) Failing to act in a bona fide manner in the sale of the property to the 2nd defendant.

[48] The first observation to be made is that on the face of it, the particulars do not disclose any conduct that could conceivably be regarded as an act of collusion between the defendants. The particulars regarding the first defendant if borne out by satisfactory evidence, could conceivably amount to bad faith.

[49] The second observation is that the first defendant has completely divested itself of any interest in the property and that it is the second defendant who now wholly owns it. This case is therefore not one in which the claimant is asking the court to

restrain a mortgagee from exercising its power of sale. The first defendant has no authority to permit the claimant to remain in possession, or to institute recovery of possession proceedings against the claimant, or to dispose of, sell, mortgage or transfer the disputed property. Therefore, it would be nonsensical for this court to grant an injunction against the first defendant to restrain it from doing any act in respect of a property over which it has absolutely no authority.

[50] In any event, without attempting to resolve disputed facts, the conduct of the claimant makes it evident that she is not being forthright about the course of events leading up to the sale of the property. From her attorney's correspondence with the second defendant's attorney at law, it may be garnered that the claimant was well aware that the property was being sold to the second defendant. She took no steps to restrain the defendants or any of them at a point in time when based on email communication from her attorney at law, she was aware that the certificate of title was with the National Housing trust for the purposes of endorsing the second defendant's interest. Instead, she sought to appeal to the second defendant on humanitarian grounds not to continue with the purchase and thereafter, sought to repurchase the property from her.

[51] The claimant has also not provided one iota of evidence of fraud on the part of either defendant or any evidence of collusion between them. Her main contention is that the power of sale was not properly exercised because of lack of notice to her and that the property was sold at a gross undervalue. It may be observed that the first defendant exhibited copies of tear sheets from the daily gleaner as proof that the property was advertised for sale by auction on three separate occasions as far back as June of 2016, contrary to the claimant's assertion that there was a failure to advertise or to adequately advertise the property for sale.

[52] I need not make any determination as to whether the first defendant has any liability towards the claimant in relation to the exercise of the power of sale. However, the most that could conceivably be said in this instance is that the power of sale was irregularly exercised.

[53] This court recognizes that based on the principles enunciated in **American Cyanamid** and **Olint**, it is not required that I review in any detailed manner the factual allegations, especially those that are in dispute and that it is not in a position to attempt to resolve any such dispute. Even if it could be said that there is a serious issue to be tried as against the first defendant, regarding the exercise of the power of sale allegedly without the giving of notice and with regard to sale of the property allegedly at an undervalue, it is a case where the claimant's remedy against the first defendant would necessarily sound in damages based on the provisions of section 106 of the RTA.

[54] Section 106 in my understanding operates as a bar to the grant of an interim injunction in circumstances where there is no evidence of fraud. In any event, the purpose of the injunction would have been to restrain the mortgagee's exercise of the power of sale. In this instance, the power of sale has already been exercised. It is worth emphasizing that the claimant is not challenging that based on the fact that her mortgage payments were in arrears, the first defendant's power of sale arose.

[55] As the attorney at law for the first defendant pointed out, this case is clearly distinguishable from the case of **Aspinal Wayne Nunes v Jamaica Redevelopment Foundation Inc**. [2019] JMCA Civ 20 where an injunction was granted because the power of sale had not yet been exercised by the mortgagee.

[56] Although not of much relevance to the outcome of this application, it is worth noting that the claimant seems to have been operating under the mistaken notion that upon her daughter's death and of proof of same being provided to the first defendant, the insurance policy would become activated and the benefits of the policy would be applied to the loan. The first defendant exhibited a document to its defence which indicates that the claimant's now deceased daughter was a guarantor to the loan and not a co applicant and therefore there would be no benefit arising from the death of the guarantor. It is to be noted that a guarantor's responsibility is not the same as the principal but a guarantor is only secondarily

liable on a loan when the principal defaults, therefore it is not at all difficult to see why there would be no assurance arising from the death of a guarantor.

[57] I now briefly examine the following authorities relied upon by the claimant**. Bruce James v Jamaica Money Market Brokers Merchant Bank Limited** [2020] JMSC Comm 34 (para 45), **Cowell Anthony Forbes and Another v Miller's Liquor Store (Dist.) Limited** [2016] JMCA Civ 1. In which Waring (Lord) v London Manchester Assurance Company Limited and Others [1935] Ch 310 was references and **Devon Morris and Others v JN Bank Limited and Others** [2019] JMCC Comm 25.

[58] In **Bruce James**, the claimant and his mother Edna James (deceased) were the registered proprietors of the disputed property. Both had acted as guarantors for loans from Capital and Credit Merchant Bank, the defendant's predecessor in title. In or around 2011, the borrower defaulted on the loans which had been consolidated to form one debt. In 2015, the defendant exercised the power of sale. The claimant filed a claim alleging that the defendant had breached its duty to act in good faith in exercising the power of sale. The basis of this complaint was that the property had been sold at a gross undervalue without the defendant obtaining a current valuation. The claimant also alleged that he was not served a statutory notice as required by section of the RTA. With regard to the value of the property, the claimant obtained a valuation for $US 3.3m. The property was sold for $US 760,000.

[59] At paragraph 45 of the judgment, Palmer Hamilton J observed that:

> ***"Though it may be that a mortgagee's conduct when exercising its power of sale is not subject to any duty of care in tort to the mortgagor, this does not negate the mortgagee's duty to act in good faith. It is also reiterated throughout the plethora of authorities on this issue, that the duty owed by a mortgagee to a mortgagor would be restricted to a duty to act prudently and to do all that it reasonably can, in the circumstances, to obtain the best price available at the time of the exercise of the power of sale."***

[60] The learned judge relied heavily on the decision of Sykes J as he was then, in the case of **Rudolph Daley v RBTT Bank (Jamaica) Limited** unreported claim no. 1995/D 162. It is noted that this decision was ultimately overturned on appeal in the case which became **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley and others and RBTT Bank Jamaica Limited et al** [2010] JMCA Civ 46.

[61] The court ultimately found that the defendant not having obtained a current valuation report, in keeping with its duty to ensure that the best possible price could be obtained for the property at the time of the sale, did not act reasonably in exercising its power of sale. It is apposite to note that the learned judge did not set aside the sale, but instead awarded damages to the claimant. The second defendant has argued that the decision is questionable.

[62] I need not seek to delve deeply into that assertion for the simple reason that nothing turns on it in the circumstances of this case. Whether or not the judge was correct in finding that the sale was to be impugned, the fact is that she did not in the circumstances see it open to her to order that the sale be set aside. I have not lost sight of the fact that the concern in this case is the appropriateness of the grant of an interim injunction.

[63] **Cowell Anthony Forbes** involved the sale of premises by Miller Liquor Store Dist. Limited to Messrs Cowell and Wilford Forbes. Messrs Forbes paid a deposit and were required to pay the balance in instalments. Miller took a vendor's Mortgage from Messrs Forbes as a security for the debt.

[64] Messrs Forbes fell into arrears and Miller's demanded payment. The payment was not made. Miller entered into an agreement for sale with another and soon after, Messrs Forbes tendered a cheque in the sum stated in Miller's demand notice. The cheque was refused. Messrs Forbes filed a claim against Miller. Judgment was granted to Miller.

[65] Messrs Forbes contended that Miller's failure to register the mortgage should prevent it from exercising the power of sale. The Court of Appeal agreed with the trial judge's finding that Miller was an equitable mortgagee and was entitled to exercise the power of sale. This decision was also made on the basis that the agreement for sale had been signed before the cheque was tendered and that there was no bad faith involved in the exercise of the power of sale. The court of appeal confirmed the principle that once a mortgagee enters into an agreement to sell the mortgaged property, the mortgagor's equity of redemption is extinguished and cannot be revived unless the mortgagee has acted in bad faith. The court made the observation that those principles have been extracted from **Waring v London Manchester Assurance Company Limited and others.**

[66] It was the submission of counsel for Messrs Forbes that the property was sold at a gross under value and was presumptively done in bad faith and so the sale should be set aside. The Court of Appeal determined that a sale of premises in those circumstances at an undervalue is not by itself evidence of bad faith. (see paragraph 49 of the judgment). The sale price in the agreement with the other party was $8 million. Messrs Forbes had purchased the premises for $5 million. Less than a month after entering into the agreement, the premises was valued at $12 million. There was evidence that Messrs Forbes had said that they were trying to sell but could not secure an offer of more than 8 m.

[67] The Court of Appeal determined that it was not unreasonable for the trial judge to have found that there was no bad faith. The trial judge also found that Miller's breached its duty of care to have secured the best possible price for the property but that since Messrs Forbes had secured an injunction which was still in force, they were not entitled to any damages. The Court of Appeal took the view that the trial judge was wrong in saying that Messrs Forbes were not entitled to damages and determined that she should have ordered an accounting. The position that they were not entitled to an injunction was not criticized. The implication from the judgment which was that the sale by Millers would not be set aside was upheld by the court.

[68] **Devon Morris** involved an application for an injunction. The first and second claimants purchased property which was secured by a registered mortgage in favour of the first defendant. The first and second claimants failed to make payments as they were due and fell into arrears. They were advised that the mortgagee was attempting to exercise its power of sale and the first and second claimants purported to execute a transfer of the property to the third claimant. JN purported to exercise its power of sale by private treaty. The claimants filed a claim seeking orders that they were entitled to exercise their right of redemption. They sought damages in the alternative. The claimants alleged bad faith on the part of JN and submitted that bad faith was a basis on which the sale by a mortgagee should be set aside. The learned judge found that certain conduct on the part of JN to include a failure to provide a statement to close was capable of amounting to bad faith.

[69] At paragraphs 29, 30, 31, 32 and 33 the learned judge made the following observations:

> ***[29] Since section 106 is not an absolute bar to the grant of an interim injunction, accepting the guidance of Morrison P, what I am required to do is to give unfettered consideration to the question of whether damages would be an adequate remedy for the 1st and 2nd Defendants "bearing in mind the common law presumption that damages are not usually regarded as an adequate remedy in cases involving land."***
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> ***[30] This time honoured attitude of the Court to land is reflected in the case of Tewani Ltd v Kes Development Co. Ltd & ARC Systems Ltd. (unreported) Supreme Court, Jamaica, Claim*** *No. 2008 HCV 02729****, judgment delivered on 9 July 2008, and the statement of Brooks J (as he then was) at page 3 as follows:***
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> > ***"The significance of the subject matter being real property, raises a presumption that damages are not an adequate remedy, and no enquiry is ever made in that regard. The reason behind that principle is that each parcel of land is said to be "unique" and a have 'a peculiar and special value'."***
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> ***[31] In Lookahead Investors Limited v Mid Island Feeds (2008) Limited and Others*** *[2012] JMCA App 11* ***Brooks JA on an***

application in chambers nuanced the position as earlier expressed by him and made the following acknowledgment at paragraph 40 of the judgment: "There are two fairly recent cases in which this court has found that, in the context of commercial entities, damages would have been an adequate remedy. They are Shades Ltd v Jamaica Redevelopment Foundation Inc. *SCCA No 55/2005* ***(delivered 20 December 2006) and Global Trust Ltd and another v Jamaica Redevelopment Foundation Inc. and another*** *SCCA No 41/2004* ***(delivered 27 July 2007). In Shades, this court was of the view that such land, was "a mere asset of the company" despite the fact that it comprised a residence of one of the principals. In Global Trust, the property was an incomplete hotel and not a going concern. Both those cases, in my view, have different considerations which make them exceptions to the principle that the land and its location are unique. I do not consider the land in the instant case to be an exception to that principle." -***

[32] Mr Foster submitted that the Court should not consider the fact that the 1st and 2nd Defendants purported to sell the Property to the 3rd Defendant as supporting a conclusion that damages would be an adequate remedy for them. He submitted that the transaction was a bailout from the 3rd Defendant, who is the mother of the 2nd Defendant and who wished for the Property to remain in the family given the cultural and sentimental value attached to it as dowry. Accordingly, the sale should not be viewed as a commercial transaction in the normal sense.

[33] Mr Dunkley argued that the bailout could have been done without structuring it as a sale and that is correct. He submitted that the 3rd Claimant has been added as a party in her own right as purchaser of the Property and that that serves to diminish her position as a rescuer. However, I am not of the view that structuring it as a sale lessens the likelihood that it was a bailout and that the 1st and 2nd Claimant have an emotional and cultural attachment to the Property. In these circumstances, I do not find that the willingness to sell the Property to the 3rd Defendant is a factor which should causes me to depart from the general principle that land and its location are unique. Furthermore, having regard to the evidence of the special significance of the Property to the 1st and 2nd Defendants I am of the opinion that damages would be an adequate remedy for the 1st and 2nd Claimant in this case. If the Defendants or any of them were to succeed at trial would the loss they suffered as a result of having been restrained by the injunction be adequately compensated by the Claimants undertaking as to damages?

[70] The court concluded that damages would not be an adequate remedy for the first and second claimants if they were successful at trial and granted the interim injunction. Ultimately the injunction was granted on the basis that the least irremediable harm would be caused to the 1st and 2nd Claimants on the one hand, and JN and or the 3rd Defendant on the other hand by the granting of the injunction in order to ensure that the property was not disposed of until the substantive issues in the claim were resolved.

[71] This decision turned on its own facts. It is also distinguishable from the instant case in that for one, they had sought to take steps promptly to redeem the property and the application for the injunction seemed to have been made before the transfer to the third defendant had been completed, albeit, after the agreement for sale had been signed.

Whether damages an adequate remedy - the claimant's ability to satisfy the undertaking as to damages

[72] I do not consider it necessary to discuss in any detail the question of the adequacy of damages or the balance of convenience since I am strident in my view that the claimant would not in these circumstances be entitled to an injunction particularly against the first defendant who now has no legal or beneficial interest in the property. Further, based on the provisions of section 106 of the RTA to the effect that any person aggrieved or wronged by an unauthorized or improper or irregular exercise of the power has his remedy only in damages against the person exercising the power, it must be taken that damages are an adequate remedy for the claimant in the unlikely event she should succeed against the first defendant, despite the common law position as reflected in case law that land is unique and may have sentimental value and so presumptively damages are not an adequate remedy.

[73] It may also be observed that apart from stating in her application that she gives the usual undertaking as to damages, the claimant has not in any wise whatsoever attempted to demonstrate that she is capable of satisfying a cross

undertaking as to damages. To the contrary, in her submissions, Miss Mc Neil on her behalf stated that the claimant could only undertake to pay rent to the second defendant. That position in my view would in the circumstances be somewhat of a hindrance to the grant of an interim injunction even if the court otherwise thought she might have been entitled to one.

The balance of convenience

[74] Ultimately in the absence of any evidence whatsoever of collusion and/or fraud on the part of the defendants, the claimant has no hope of being successful in a claim against the second defendant. Even if the claimant has a serious issue to be tried involving the first defendant, it is highly unlikely that her ultimate remedy would be anything other than damages. In those circumstances, the balance of convenience does not favour a grant of an interim injunction which would only affect the second defendant.

[75] Other factors influencing the balance of convenience include the relative strength of each party's case and the question of whether the status quo should be maintained. As between the claimant and the first defendant, the two live issues seem to be whether the property was sold at an under value and whether notice of the sale was given. If the answer to either or both questions is in the affirmative, the court must consider whether that or those factors constitute bad faith. It is sufficient to say for these purposes that on the face of it, the first defendant employed the services of a reputable company to carry out the valuation exercise and the company produced its report. When compared with certain details in the valuation report commissioned by the claimant, it becomes evident that the first defendant's report lacks certain details that could readily be observed to form the basis of the discrepancy in the value assigned to the property. As to whether the statutory notice was formally served or not, the first denied this assertion of non - service. There is nevertheless, evidence from which it could be inferred that the claimant was well aware of the likelihood of the first defendant taking steps adverse to her interest in the property, since as

admitted, she had been in arrears with the mortgage payments for an extended period.

Maintaining the status quo

[76] It is the law that where other factors are evenly balanced, the status quo should be preserved. The status quo has been defined as "generally being the state of affairs existing during the period immediately preceding the issue of the claim seeking a permanent injunction - Garden Cottage Foods Limited v. Milk Marketing Board [1984] 1 A.C. 130" See paragraph 45 of **Ralph Williams V Commissioner of Lands).**

[77] In this case, the claimant is in occupation, while the second defendant who holds the legal title continues to make mortgage payments in respect of the property. That was the state of affairs just prior to the filing of this claim and remains the state of affairs today. It cannot be said in this instance that the other factors are evenly balanced and so on that basis there is no need to preserve the status quo.

CONCLUSION

[78] There is no serious issue to be tried as between the claimant and the second defendant. There are questions of fact to be resolved as between the claimant and the first defendant. The claimant's case does not seem to stand on very firm grounds even if some of those facts are resolved in her favour. In the unlikely event she should succeed at trial, it is my firm view that her remedy lies in damages and on that basis, the application for an interim injunction should be refused. In the result, the application for the interim injunction is refused with costs to the defendants to be taxed if not sooner agreed.

A. Pettigrew-Collins
Puisne Judge