[2013] JMCC Comm. 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMERCIAL DIVISION

CLAIM NO. 2012 CD 00134

BETWEEN	MICHELLE SMELLIE	1ST CLAIMANT
AND	IVAN LEWIS	2ND CLAIMANT
AND	ICILDA LEWIS	3RD CLAIMANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	DEFENDANT

Mr. Marc Jones instructed by Henlin, Gibson, Henlin Attorneys-at-law for the Claimants.
Mrs. Alexis Robinson instructed by Myers, Fletcher & Gordon Attorneys-at-law for the Defendant.

IN CHAMBERS

Heard: 7th December, 2012 and 15th January, 2013

INTERLOCUTORY INJUNCTION - MORTGAGE BY WAY OF GUARANTEE AND GUARANTEE - WHETHER SERIOUS ISSUE TO BE TRIED - UNCONSCIONABLE CONDUCT/UNDUE INFLUENCE - BANK'S OBLIGATIONS TO VOLUNTEERS – LEGAL ADVICE CLAUSE-CONDITION FOR GRANT OF INJUNCTION-PAYMENT INTO COURT

MANGATAL, J

[1] By way of Application for Court Orders filed on November 20, 2012, the Claimants seek the following orders, pursuant to Rule 17.1(1)(a) and 17.4 of the Civil Procedure Rules 2002, ("the CPR"):

a. An injunction to restrain the Defendant, whether by itself, its servants, agents or otherwise howsoever from disposing, transferring and dealing with land comprised in Certificate of Title registered at Volume 1007 Folio 42 of the Register Book of Titles known as 1A West Armour Heights, Constant Spring in the Parish of Saint Andrew ("the mortgaged property").

b. Costs in the claim.

[2] In the Claim Form and Particulars of Claim, also filed on November 20, 2012, the Claimants claim:

a. A declaration that the Defendant's exercise of its power of sale under Mortgage No. 1613440 entered on the Certificate of Title for the mortgaged property is unconscionable against the Claimants.

b. A declaration that Mortgage No. 1613440 entered on the Certificate of Title for the mortgaged property is set aside.

c. Delivery up of the said mortgage for cancellation as against the Claimants.

d. Rectification of the Certificate of Title for the mortgaged property by deleting therefrom Mortgage No. 161340.

e. A permanent injunction restraining the Defendant from disposing, transferring and dealing with the mortgaged property.

f. An order setting aside any Agreement for Sale entered into by the Defendant in the exercise of its power of sale under Mortgage 1613440.

g. Costs.

[3] The stated grounds of the application are as follows:

(a) The mortgaged property is subject to Mortgage No. 1613440 in the Defendant's favour in the sum of $15,000,000.00.

(b) The mortgage secures a guarantee given by the Claimants in respect of a debt incurred to the Defendant by a company operated by their husband and son-in-law respectively.

(c) The mortgage is impeachable because the circumstances in which the Defendant procured the Claimants' execution of same render it unconscionable for the Defendant to enforce it, based upon the following circumstances:

(i) The Claimants are volunteers to the mortgage. They did not obtain any financial benefit or other gain for giving the mortgage.

(ii) The Claimants were unaware of relevant information about the financial arrangements between the said company and the Defendant in so far as they did not know the amount of the company's indebtedness for which they guaranteed.

(iii) Furthermore the Claimants did not understand the nature of the Mortgage by way of Guarantee nor the risks and consequences of executing it.

(iv) The Claimants were placed in this disadvantageous position because the Defendant failed to explain the transaction to the Claimants and/or ensure that they had the benefit of independent legal advice.

(v) Instead the Defendant relied on Patrick Smellie, the principal of the debtor company, to procure the Claimants' execution of the Mortgage.

(vi) The Defendant knew or ought to have known that Patrick Smellie is the Claimants' near relation in so far as he is the 1st Claimant's husband

and the son-in-law of the 2nd and 3rd Claimants and that accordingly they were likely to repose trust and confidence in him regarding the transaction.

(vii) In those circumstances the Defendant appreciated or ought to have appreciated the risk that Patrick Smellie would not fully and accurately explain the transaction to the Claimants.

(viii) The Claimants did not really understand the Mortgage by way of Guarantee that they executed in favour of the Defendant and which it now claims the benefit of, to their detriment.

(d) The debtor company has defaulted on the loan from the Defendant.

(e) The Defendant has called in the guarantee against the Claimants and is now exercising its power under the mortgage.

(f) In the circumstances, damages are not an adequate remedy having regard to the fact that the mortgaged property is the Claimants' family home.

[4] The Application is supported by the Affidavit of the 2nd and 3rd Claimants ("Mr. and Mrs. Lewis") and the Affidavit of Patrick Smellie. The Defendant has filed the Affidavit of Janice-Stone Dunkley, a Business Manager at the Defendant's Manor Park Branch in opposition to the application.

The Relevant Legal Principles

[5] The guidelines for the grant of an interim injunction until trial (or interlocutory injunction), are set out in the oft-cited case of **American Cynamid v. Ethicon Ltd.** [1975] 1 All E.R. 504, and more recently in the decision of the Judicial Committee of the Privy Council in **NCB V. Olint** [2009] J.C.P.C. 16. Basically, the following considerations arise:

(a) Is there a serious issue to be tried? If there is a serious question to be tried, and the claim is neither frivolous nor vexatious, the court should then go on to consider the balance of convenience generally.

(b) As part of that consideration, the court will contemplate whether damages are an adequate remedy for the Claimants, and if so, whether the Defendants are in a position to pay those damages.

(c) If on the other hand, damages would not provide an adequate remedy for the Claimants, the court should then consider whether, if the injunction were to be granted, the Defendants would be adequately compensated by the Claimants' cross-undertaking in damages.

(d) If there is doubt as to the adequacy of the respective remedies in damages, then other aspects of the balance of convenience should be considered.

(e) Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are designed to preserve the status quo.

(f) If the extent of the uncompensatable damages does not differ greatly, it may become appropriate to take into account the relative strength of each party's case. However, this should only be done where on the facts upon which there can be no reasonable or credible dispute, the strength of one party's case markedly outweighs that of the other party.

(g) Further, where the case largely involves construction of legal documents or points of law, depending on their degree of difficulty or need for further exploration, the court may take into account the relative strength of the parties' case and their respective prospects of success. This is so even if all the court can form is a provisional view-see **NCB v. Olint**, and the well-known case of **Fellowes v. Fisher** [1975] 2 All E.R. 829. This is of course completely different from a case involving mainly issues of fact, or from deciding difficult points of law, since, as Lord Diplock points out at page 407 G-H of **American Cynamid**, "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult points of law which call for detailed argument and mature considerations".

(h) There may also be other special factors to be taken into account, depending on the particular facts and circumstances of the case.

[6] At the end of the day, in principle, what the court must try to do at this interlocutory stage is to adopt the course which seems likely to cause the least irremediable harm or prejudice, this exercise of necessity having to take place at a time when the court cannot be certain as to the final outcome of the matter.

[7] Mrs. Robinson, who appeared for the Defendant, relied upon the decision in **Garden Cottage Foods Ltd. v. Milk Marketing Board** [1983] 2 All E.R. 770 at 774(j) and submitted that the relevant status quo is the state of affairs existing during the period immediately preceding the issue of the Claim Form. I agree that the relevant status quo in this case is that the property is mortgaged to the Defendant, the loan is in default and the Defendant has commenced its exercise of its power of sale by issuing a statutory notice. Indeed, this Notice was issued from January 2012 and this claim was filed on November 20 2012.

Is there a Serious Issue to be Tried

[8] The evidence of the 2nd and 3rd Claimants ("Mr. and Mrs. Lewis") is that they intended to mortgage their home as collateral for a loan from NCB to Jatlin Construction and Associates Limited ("Jatlin"). The mortgage the Claimants now seek to set aside was collateral for a loan to Jatlin in the principal sum of $15,000,000. Mr. and Mrs. Lewis say that they did not understand that the Mortgage was both a Mortgage and a Guarantee. They thought that they were only giving a mortgage. On these facts, Mrs. Robinson submits, a plea of *non est factum* cannot assist the Claimants in setting aside the mortgage though they allege they did not understand that they were guaranteeing Jatlin's debts. This, Counsel submits, is because there is no fundamental difference between what they did (i.e. guarantee $15,000,000 of Jatlin's principal debt and mortgage their home as collateral for that guarantee) and what they thought they were doing (i.e. mortgaging their home as collateral for a loan to Jatlin). Further, Mrs. Robinson submitted that what the Claimants have not disclosed to this court is that in

addition to signing the Mortgage by way of Guarantee, they in fact signed a Guarantee *simpliciter,* guaranteeing the principal sum of $15,000,000 loaned to Jatlin. In fact, Mrs. Robinson is correct in the sense that Mr. and Mrs. Lewis' Affidavit only exhibited a copy of the Mortgage by Way of Guarantee. It is the Affidavit by Mrs. Stone-Dunkley that exhibits the Guarantee which has been executed by the Claimants and the Claimants mention this Guarantee, which bears the same date as the Mortgage by way of Guarantee, being July 22, 2009, in neither their pleadings nor their evidence.

[9] Mr. Jones, on behalf of the Claimants, said that his clients' case does not rely upon the plea of *non est factum* and also is not framed on the basis of undue influence. He stated that the Claimants' case is based upon the equitable principles of unconscionable conduct as set out in the Australian case of **Garcia v. National Australia Bank Ltd.** [1998] 194 C.L.R. 395.

[10] It is clear from the House of Lords' decision in **Royal Bank of Scotland v. Etridge (No. 2)** [2001] 4 All E.R., 449, cited by both sides, that banks may be put on inquiry in certain cases where the relationship between the surety and the debtor is non-commercial. That decision also makes it clear that in certain circumstances the bank is expected to take reasonable steps to satisfy itself that the practical implications of the proposed transaction have been brought home to the surety. These principles are not limited to spouses; they apply in any situation where the relationship between the parties is such that the party who is a volunteer, meaning that the person obtains no personal benefit from the transaction, is likely to repose trust and confidence in the other person and that other person is in a position to abuse that trust. The nature of the influence one person has over the other provides scope for misuse without any specific overt acts of persuasion.

[11] In **Etridge**, it was held that (Headnote 2(ii)), where a bank has been put on inquiry, it need do no more than take reasonable steps to satisfy itself that the practical implications of the proposed transaction have been brought home to the volunteer, in that case, the wife, in a meaningful way, so that she enters into the transaction with her eyes open so far as its basic elements are concerned. The bank is not required to discharge that obligation by means of a personal meeting with the wife, provided that a

suitable alternative is available. **Ordinarily, it will be reasonable for the bank to rely upon confirmation from a solicitor, acting for the wife, that he has advised her appropriately.** The position will be different if the bank knows that the solicitor has not duly advised the wife or the bank knows facts from which it ought to have realized that she has not received appropriate advice. In such circumstances, the bank proceeds at its own risk. In the ordinary case, however, deficiencies in the advice are a matter between the wife and the solicitor, **and the bank is entitled to proceed in the belief that a solicitor advising the wife has done so properly.** In giving such advice, the solicitor is acting not as the bank's agent but solely for the wife.
(My emphasis)

[12] Mrs. Robinson on behalf of the Defendant has argued that there is nothing on the facts to suggest that this case is out of the ordinary. Accordingly, all NCB has to show in order to defend the Claimants' claim is that it relied upon confirmation from an attorney acting for the Claimants that he advised them appropriately. NCB's proof of that is on the face of the security documents, which have not been challenged in any way by the Claimants in their evidence before this court. Those documents, Mrs. Robinson continues, clearly show that NCB understood that the Claimants received independent legal advice on both the Mortgage by way of Guarantee and the Guarantee itself from their attorney-at-law, Douglas A.B. Thompson. Mr. Thompson certified to NCB that the Claimants appeared to understand the purport of the documents and signed them with their own free will and accord.

[13] Mr. Jones, on the other hand, has argued that, **Etridge** demonstrates that it is not enough for the bank to show that it inserted a legal advice clause in order to show that it has discharged its obligation. The Claimants rely quite heavily upon the Appellate Court's decision in **Garcia**. At paragraph 33, in discussing the circumstances and principles involved where dealings would be considered unconscionable, and where there is an absence of evidence of actual undue influence, the Court stated:

….it depends upon the surety being a volunteer and mistaken about the purport and effect of the transaction, and the creditor being taken to have appreciated that because of the trust and confidence between surety and debtor the surety may well receive from

the debtor no sufficient explanation of the transaction's purport and effect. ***To enforce the transaction against a mistaken volunteer when the creditor, the party that seeks to take the benefit of the transaction, has not itself explained the transaction, and does not know a third party has done so, would be unconscionable.***
(The Claimants' emphasis).

[14] In **Etridge**, in addition to the ratio outlined above at paragraph 11 above, the learned Law Lords also went on to address the issue of what should happen in the future(albeit Lord Hobhouse at paragraph 100 appeared to express the view that aspects of the guidance should not apply only to future transactions). At paragraphs 79 and 80, Lord Nicholls, who gave the main opinion with which the other Law Lords agreed in principle, stated :

79….in future, the bank should communicate directly with the wife, informing her that for its own protection, it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them…..

80.*These steps will be applicable to future transactions. In respect of past transactions, the bank will ordinarily be regarded as having discharged its obligations if a solicitor who was acting for the wife in the transaction gave the wife confirmation to the effect that he had brought home to the wife the risks she was running by standing as surety.*

[15] In my view, if these relatively more demanding steps set out in paragraph 79 of **Etridge** would only be considered applicable to future transactions by banks in England, i.e. transactions occurring after the decision, then plainly, these more stringent pronouncements would hardly likely be applicable to banks here in Jamaica. As far as I am aware, no similar judicial pronouncements along the lines recommended by Lord Nicholls for the future, have been made by our highest courts. I therefore agree with Mrs. Robinson that in this case it would, on the present state of our law, be reasonable

for the Defendant to rely upon confirmation from an Attorney-at-Law acting for the Claimants, that they have been advised appropriately by him. In my judgment, the reference in **Garcia** to the creditor's obligation either to explain the transaction itself, or to satisfy itself that a third party has done so, is fulfilled, just as it was held in **Etridge**, by receiving confirmation by an Attorney-at-Law acting for the volunteer that he has explained the transaction to him/or her.

[16] I agree with Counsel for the Defendant that the Claimants have made bald statements in their affidavit about not having the benefit of independent legal advice. They have made no comment upon the legal Advice Clause prominently place on the Mortgage document they have exhibited to their affidavit. I find this extremely puzzling, especially because this is a most material issue. There is a legal advice clause prominently appearing on the Mortgage by Way of Guarantee, as well as on the Guarantee, signed by Mr. Douglas Thompson, Attorney-at-Law, in respect of each of the Claimants as follows:

Legal Advice Clause

I certify that this document has been explained by me to(respective names of Claimants) *and he/she appears to understand the purport thereof and has signed the same of his/her own free will and accord.*

[17] On the other hand, NCB's evidence is that it is its general policy and practice to insert such clauses on security documents prior to their execution in order to ensure that independent legal advice is obtained. NCB's evidence is corroborated by the document put into evidence by the Claimants, who have made no comment upon the clause, which is signed by an officer of the court.

[18] Further, at sub-paragraph 23(k) of the Particulars of Claim, the Claimants have particularized the following as a breach of duty and/or unconscionable conduct:

23(k) Furthermore, it (the Defendant) *did not have reasonable grounds for believing that they had benefited from such legal advice in so far as it entrusted Patrick Smellie with the execution of the document, which is its standard form mortgage containing the*

standard legal advice clause. In this regard, the Defendant and/or its servants and/or agents are entitled under clause 2(p) of the Mortgage to complete the instrument by filling in any blank spaces left by the Claimants and inserting other information.

[19] What are the Claimants saying here? I do not really know what this allegation means. The Claimants, in addition to saying nothing about the legal advice clauses and Mr. Thompson, Attorney-at-Law, have not presented one iota of evidence in support of this assertion at 23(k). They have given no evidence as to the state of the documents when they signed them, which would be relevant to this allegation. The Court cannot allow itself to be drawn into speculation and can only act on the evidence placed before it.

[20] It is interesting that the Claimants have relied upon the Affidavit of Patrick Smellie sworn to and filed on November 20, 2012 in support of their application since it is Mr. Smellie who the Claimants are saying was the person who breached the trust and confidence which they reposed in him. Although Mr. Jones has stated that his clients' case is not one about undue influence, even if that is so, as Mrs. Robinson submitted, evidence from the alleged abuser of the trust, or at the very least, the person who never explained the purport and effect of the transaction to them, seems unusual and could well be thought of as self-serving. Counsel argued that this could even be thought of as pointing to a conspiracy between Mr. Smellie, his wife, and his in-laws to come up with a scheme that will allow them to avoid the agreed consequences of Jatlin's failure to repay the loan. Whilst I would not think that it goes that far, I certainly think it odd. This is particularly so as one of the main dramatis personae, the 1st Claimant Michelle Smellie, the wife of Mr. Smellie, and who appears, (even if she may have the same proprietary interest in the mortgaged property as Mr. and Mrs. Lewis), to have played a different role from her parents in relation to the transactions, has not sworn any affidavit in this matter. Whilst the Claim Form and Particulars of Claim indicate they were not signed because the 1st Claimant was out of the jurisdiction at the time, I do not consider that is a sufficient explanation of her not swearing an Affidavit, whilst her husband has. At the end of the day, the fact that the Claimants have not sought to give evidence about the legal advice clause and are content to make the bald assertion that they did

not receive independent advice, coupled with this evidence by Mr. Smellie along with the lack of evidence from Mrs. Smellie, leaves me with the unsettling sense that the Court has not been fully apprised of all the material facts. An injunction is an equitable remedy. It is trite that he who seeks equity must do equity and must lay all of the relevant considerations before the court.

[21] In his affidavit, Mr. Smellie sets out how he procured the signatures of the Claimants without disclosing the amount of the indebtedness he was asking them to guarantee or the risks involved. The Defendant submits that his evidence is self-serving and inherently unreliable. It was also pointed out that though Mr. Smellie has sworn that he is the majority shareholder of Jatlin, there is no document at the Companies Office of Jamaica that verifies that allegation. This point was taken in relation to Mr. Smellie's credibility, as opposed to any substantive issue in the case. I agree with the submissions with regard to the self-serving nature of Mr. Smellie's evidence and its negative effect on the plausibility and credibility of the case being advanced by the Claimants.

[22] Counsel for the Claimants sought to make a point about the evidence of Mr. Smellie that the Defendant was allegedly interested in having the mortgaged property as security for the loan to Jatlin, as opposed to some other property. It was argued that this indicates that the Defendant pursued its own commercial interests without taking into account the Claimants' position as volunteers, and reinforces the allegation that the Defendant was guilty of breach of duty and/or unconscionable conduct. I fear that I do not take that view of this point and cannot see it either by itself, or as a component facet, constituting a serious issue to be tried. In any event, the independent legal advice clause would also subsume this issue.

[23] Further, notwithstanding the evidence before the court as to what the Claimants did or didn't know, while this may entitle the Claimants to a claim against the debtor for breaching his duty of disclosure, or against their attorney for his failure to properly advise them, it cannot operate against the bank that did all the law requires it to do.

[24] I agree with the Defendant's submission that based on the material available to the court the Claimants have no real prospect of succeeding against the Defendant on their claim for a permanent injunction at the trial and the setting aside of the mortgage. There is no serious issue to be tried. The Court cannot properly act on anything but the evidence. Even though I can appreciate the skill and ingenuity with which the legal arguments have been advanced on behalf of the Claimants, here there is no proper evidential basis for the claim mounted. I also find it hard not to feel a certain amount of sympathy for the Claimants, especially Mr. and Mrs. Lewis who are both retired people, and who stand to lose their family home. However, that is not a sound basis for granting relief. In my judgment, the Claimants' application for an interim injunction should therefore, for the reasons previously stated, fail without more.

Damages an Adequate Remedy

[25] In the event that I am wrong about there being a lack of serious issues to be tried, or in viewing the Claimants as having no real prospects of succeeding in a claim for a permanent injunction at trial, I have gone on to consider whether the Claimants will be adequately compensated by an award of damages for any loss they would have sustained as a result of the Defendant not being restrained. In my judgment, the Claimants cannot be adequately compensated in damages and I agree with Mr. Jones in that regard. This is particularly so since the claim concerns land, and the mortgaged property is the family home, and has been the family home, particularly for Mr. and Mrs. Lewis, since 1983. Section 106 of the Registration of Titles Act, to which Mrs. Robinson referred as showing that any loss the Claimants will suffer will be financial, is in my view not relevant to the real loss that the Claimants would suffer if indeed they have raised serious issues to be tried. This is because this case would not be concerned with the improper exercise of powers for sale and therefore the fact that section 106 limits the mortgagor's remedy to damages alone does not therefore illuminate the issue. If I am wrong on that, and damages would be an adequate remedy, it is clear that the Defendant would be in a position to satisfy such a claim. If this is so, then an injunction also ought not to be granted on this basis either.

[26] It is clear that damages would on the other hand be an adequate remedy for the Defendant, since the Defendant is really interested in realizing its security and recovering the sums loaned plus interest and costs. However, the Defendant claims that the Defendants are indebted to the Bank for the considerable principal sum of over $51,000,000 accruing interest at rates of interest in excess of 20% per annum (see Notice of Sale dated January 3, 2012, exhibited to the Defendant's Affidavit). The Claimants have only identified 4 vehicles, all over 9 years old, and various furniture and paintings, as assets that are available to satisfy their undertaking. I agree with Counsel for the Defendant that if this injunction is granted and it succeeds at trial in defending this claim, the Defendant's loss will be the principal sum of $51m plus interest at the contracted rates over whatever period elapses between now and the determination of this matter and that there is no evidence that the Claimants will be in a position to pay those damages.

Injunction Only On Terms

[27] The Defendant submitted that if the Court was minded to grant the Claimants' application, any injunction to restrain it from exercising its powers under its mortgage should be conditional on the Claimants paying into Court the amount which the Defendant swears is owing to it. This to my mind falls within the consideration generally of the balance of convenience and because the subject matter relates to mortgages, this consideration falls within the band of other special factors which may exist in a particular case as referred to in **American Cynamid**.

[28] In **SSI (Cayman) Limited v International Marbella Club S.A.** Carey J.A. stated at page 14 that:

> *"There is no question but that the Court has an undoubted power to restrain a Mortgagee from exercising his powers of sale, but if it is so ordered, the term invariably imposed is that the amount claimed must be brought into Court"*

[29] Rowe, P., at page 6-7, agreed stating that:

> *"in the instant case the contract and the security documents were prima facie valid and will continue in that state of validity until a court, if that day ever comes, declare them to be void … If the defendants/appellants wish the remedy of rescission they must restore the status quo, which means, they must pay into court the amount which was lent by the plaintiff and the accrued interest"*

[30] The Court of Appeal in the recent decision **Mosquito Cove Ltd. v. Mutual Security Bank Limited** [2010] J.M.C.A. Civ 32, has confirmed that the principles discussed in **Marabella** are alive and well. In a comprehensive, pellucid judgment, Morrison J.A., who delivered the lead judgment, at paragraphs 55 and 56 confirmed that the general rule is that a mortgagee will only be restrained from exercising its power of sale under a mortgage if the mortgagor pays into court the amount claimed by the mortgagee to be due. Morrison J.A. acknowledged that there are exceptional cases in which payment in by the mortgagee may, in the court's discretion, not be insisted upon as a precondition to the grant of an injunction. At paragraph 53 Morrison J.A. also appears to confirm that there is no factual distinction to be drawn between mortgages and mortgages given in support of guarantees in respect of the nature of these securities. I was not sure whether, by not making mention of the Instrument of Guarantee the Claimants were trying to draw such a distinction.

[31] Mr. Jones sought to argue that the present case is one that should come within the exceptional category, some instances of which were given at paragraph 64 of **Mosquito Cove**. The argument that where the mortgagee has been guilty of unconscionable conduct this constitutes an exception to the general principles adumbrated in **Marabella**, may well live to fight another day. However, because of the view which I have taken as to the lack of serious issues to be tried in this particular case, and the disproportionately strong case that the Defendant has as against the Claimants, I do not think it would be appropriate for me to deal with this issue in this case. Suffice it to say, that if an injunction should be granted in favour of the Claimants, which I have already said it ought not to, then I am of the view that it would have to be on condition that the

Claimants pay into Court the entire amount which the Defendant states is due to it, including principal, interest and costs.

Disposition

[32] For the reasons set out above, the Claimant's application ought to be dismissed. I am of the view that the course which is likely to cause the least irremediable harm or prejudice is to refuse the interlocutory injunction sought. I make the following orders:

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1) The Notice of Application for Court Orders filed on November 20 2012 on behalf of the Claimants is dismissed.

2) Costs are to be the Defendant's costs in the Claim.

3) On oral application of the Claimants, an interim injunction is granted pending the filing of an Appeal, i.e. until the 26th February 2013, upon the Claimants' usual undertaking as to damages.