[2024] JMSC Civ 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV03012

BETWEEN SEYMOUR STEWART CLAIMANT

A N D NKOSANA NAIM NKRUMAH DEFENDANT

IN CHAMBERS

Mr. Donald Gittens instructed by Mesdames Robertson & Co for the Claimant

Ms. Teriann Lawson with Mr. Courtney Williams instructed by Juris Partners for the Defendant

HEARD: February 12 and 19, 2024

Injunction – Application for Interlocutory Injunction – Whether there is a Serious Issue to be Tried – Whether or not the Balance of Convenience Rests with the Claimant.

Money Lenders Act – Whether the Act Applies to this Loan – Whether Defendant's Lending is Incidental to his Main Business – Whether Loan Agreement and Security are Enforceable – Whether Court Should Exercise its Discretion Under s. 8(3) of the Act

D. STAPLE J

BACKGROUND

[1] It was June of 2022 and Jamaica was still in the process of coming out of the economic downturn brought upon the world by the calamity known as the COVID-19 Pandemic.

[2] The Claimant in this case, like countless others, says he suffered tremendously economically as a consequence of the pandemic and found himself in financially difficulty.

[3] In his desperation to be rid of some financial difficulties (the nature of which was disputed in the pleadings by the parties, but is not relevant here), he says he borrowed from the Defendant a substantial sum of money – to wit – TWENTY MILLION DOLLARS ($20M). This loan agreement was reduced to writing and was exhibited to the Affidavit of the Defendant sworn on the 19th October 2023 at exhibit NN2. The date on this agreement, which will prove consequential, was the 30th June 2022.

[4] The loan was secured by a mortgage on property owned by the Claimant registered at Volume 1442 Folio 992 of the Register Book of Titles. The mortgage deed was dated the 27th June 2022. It was exhibited to the affidavit of the Claimant sworn on the 25th September 2023 at exhibit SS 2. Whilst the exhibit is labelled "loan agreement" it is clearly the Mortgage Deed. This date of the mortgage will also prove consequential.

[5] This loan of the 30th June 2022 was not the only loan taken from the Defendant by the Claimant. On the 8th August 2022, the Claimant entered into yet another loan agreement with the Defendant for a further sum of FIVE MILLION DOLLARS ($5M). The same property registered at 1442 Folio 992 was stated as the security.

[6] On the said title, the 2 mortgages are noted; Mortgage 2412235 was registered on the 30th June 2022 and Mortgage 2422922 was registered on the 29th August 2022.

[7] An oddity arose in the evidence of date of execution. For by letter dated the 17th June 2022, Mr. Stewart acknowledges, among other things, signing the Mortgage Deed and the Loan Agreement on the 17th June 2022. This letter is exhibit NN1 of the Affidavit of the Defendant sworn as said above. The ultimate result for this particular application will not matter, but it is curious and may be resolved in evidence at the trial.

[8] The Court has not seen the second mortgage deed which secured the second loan of $5M. I therefore cannot say the date on which that deed was executed.

[9] Ultimately, the Claimant made some payments on the first loan, but defaulted. The agreements stipulated that the Claimant was to repay the loans by making 1 lump sum payment for each loan on or before the maturity date of 180 days from the 30th June 2022 (1st agreement) and 24th December 2022 (2nd agreement). It is noted that in the Defence filed by the Defendant at paragraph 7, they said that the $5m loan was settled in full as the Defendant applied one of the payments made by the Claimant to that loan and not to the $20m loan. So as far as the Defendant was concerned, only $8.5m was applied to the $20m loan. There was no Reply to this Defence.

[10] The Claimant having defaulted, the Defendant proceeded to issue the statutory notice of sale to the Claimant pursuant to their mortgage. Having received same, the Claimant acted quickly to attempt to liquidate the debt, but could not so do. By the 22nd September 2023, the Defendant had begun earnest steps to sell the property by auction and the Claimant filed this claim in Court to, among other things, declare the agreement null and void and unenforceable.

[11] He filed the instant application to restrain the sale of the property and an interim injunction was granted. It is now for me to determine whether the said injunction should remain in place pending the outcome of the claim.

ISSUES

[12] The Court received the written submissions from both parties and heard oral arguments. The Court is grateful to counsel for their preparation of their very helpful submissions and wishes to assure them that they were duly considered even if not referred to fully in this judgment.

[13] As this is an application for an interim injunction, the Court had regard to the well-established guidelines from the celebrated cases of ***American Cyanamid Co v***

Ethicon Limited[1] and the judgment of Lord Diplock. This was further affirmed in the local Privy Council decision **of *NCB Limited v Olint Corporation***[2] (hereinafter *Olint*). These considerations are:

(i) Is the Claimant's case frivolous or vexatious? Meaning, is there a serious issue to be tried?
(ii) If the answer to the above is no, then the injunction ought not to be granted. If the answer is yes, then I must next consider whether or not damages would be an adequate remedy.
(iii) If there is no clear answer to the question of whether or not damages would be an adequate remedy to compensate either the Plaintiff or the Defendant, then I will go on to examine the balance of convenience generally;
(iv) If, after considering the balance of convenience generally, the Court is still unable to come to a definitive conclusion, and there are no special factors, it is advisable to have the status quo remain.

[14] In the case of ***Tapper v Watkis-Porter***[3] Phillps JA stated that, "An analysis of the balance of convenience entails an examination of the actual or perceived risk of injustice to each party by the grant or refusal of the injunction"

[15] Earlier in the said judgment at paragraph 36, she adumbrated and distilled the principles on the concept of the balance of convenience from the ***American Cyanamid*** **and the *Olint*** cases. I can do no better than to quote from the eminent jurist:

> *In considering where the balance of convenience lies, the court must have regard to the following:*
>
> > *Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not be granted. However, if damages would be an adequate remedy for the*

[1] [1975] 1 All ER 504
[2] Privy Council Appeal No. 61/2008, April 28, 2009.
[3] [2016] JMCA Civ 11 at para 37

> *respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted.*
>
> *If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party's case.*

[16] At the end of the day though, the Court should try to take the course that will result in the least irremediable prejudice to either party[4].

[17] So for the purposes of this particular application, these are the issues that I have identified as material to resolving whether to continue the injunction:

a) **Is the Money Lenders Act applicable to these loans:**
b) **If it is, was the agreement illegal and void ab initio;**
c) **If no, was the agreement and security unenforceable pursuant to s. 8 of the Act;**
d) **If unenforceable, could the court exercise it's discretion under s. 8(3) of the Act to enforce the agreement?**
e) **Does the balance of convenience lie with the Claimant?**

[18] The items highlighted from a – d above can all be grouped under the heading "whether there is a serious issue to be tried".

[19] The Defendant has also challenged the capacity of the Claimant to meet his undertaking as to damages, but that will be considered later.

Does The Money Lenders Act Apply to These Loans?

[20] The Defendant filed a document on the 8th January 2024 in which he stated that his main business is that of a business operator. Unfortunately for him, I cannot

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[4] Id

take cognisance of that document as it is not a valid affidavit. The full name of the Justice of the Peace is not stated therein. Therefore, none of what was said therein I took into account.

[21] The Defendant, in his written submissions and oral argument from Mr. Williams, sought to advance that the Defendant's main business is that of a real estate investor and so, by virtue of s. 13(1)(h) of the **Money Lenders Act** the loans he gave the Claimant are exempted from the operation of the Act.

[22] Mr. Gittens, on behalf of the Claimant, countered that section 13(1)(h) of the Act, on which Mr. Williams relied, goes further to require that for the exemption to apply, not only must the main business not be money lending, but it requires that the lending of money must be incidental to the main business and there is no evidence of this from the Defendant. Mr. Gittens urged on the Court the authority of ***North American Holdings Co. Ltd v Webber and Evans***[5]. He directed the Court's attention to paragraphs 17 and 18 where the issue of "main business" was discussed.

[23] Having read the section suggested, I find that those paragraphs did not advance a meaning of "main business" to be considered helpful.

[24] I agree with Mr. Gittens. Section 13(1)(h) of the Act provides as follows:

> **This Act shall not apply to:**
>
> **…**
>
> (h) any person whose main business is not the lending of money and who lends money solely incidental to the conduct of such business;

[25] The admissible affidavit evidence from the Defendant filed on the 20th October 2023 gives the Defendant's occupation as a businessman. That is all. There is

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[5] [2013] JMSC Civ 156

no evidence from the Defendant that indicates the nature of his main business and that the lending of money is incidental to the conduct of this main business.

[26] In the circumstances, I cannot say that I am satisfied, for these purposes, that it is likely that he will be found to be exempted from the Act.

[27] Therefore, for these purposes, the Act applies and so we turn now to the substantive loans.

Was the Loan in Breach of s. 9 and therefore Illegal?

[28] At paragraph 7(2) of his written submissions filed on the 20th November 2023, Mr. Gittens argues that the loan charges compound interest and so, among other reasons, the loan is illegal.

[29] Mr. Gittens advanced arguments under s. 3 of the Act, but it is really section 9 which is the relevant section for this argument. I will set it out here:

> *Subject as hereinafter provided, any contract made after the commencement of this Act for the loan of money shall be illegal in so far as it provides directly or indirectly for the payment of compound interest* ***or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract*** *(emphasis mine):*
>
> *Provided that provision may be made by any such contract that if default is made in the payment upon the due date of any sum payable to the lender under the contract, whether in respect of principal or interest, the lender shall be entitled to charge simple interest on that sum from the date of the default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from any default and any interest so charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan:*
>
> *Provided further that any such provision for the payment of simple interest in the circumstances aforesaid shall be in writing and signed personally by the borrower.*

[30] Compound interest is defined very simplistically as interest being charged on both principal and interest previously capitalized.

[31] The agreement dated the 30th June 2022 provides for a monthly interest rate of 8% per month. There is nothing in the agreement that expressly provides for the interest rate to be computed as compound interest. I can find no words that do this expressly or even indirectly (as per the words of the statute).

[32] Nor is this a contract between a bank and a customer where compound interest could be implied into the contract, even if not expressly stated[6].

[33] In the case of ***National Bank of Greece SA v Pinios Shipping Co*** *No. 1 et al*, P., the bank, and G. entered into a tripartite management agreement, under which G. undertook, inter alia, (a) to act as P.'s sole and exclusive agent to manage the activities of a shipping vessel, in G.'s absolute discretion and in accordance with any instructions the bank might issue to G., performing its duties in the best interests of P. and the bank; (b) to keep the vessel insured in U.S. dollars for not less than 130 per cent. of the total balances, including interest, currently due under both mortgages. **The bank proceeded to send P. four quarterly statements, each of which revealed, without objection by P., addition of the previous quarter's interest to capital** (emphasis mine).

[34] Meanwhile a rapid deterioration of the dollar against the yen had led to 130 per cent. of the balances due under the first and second mortgages rising to $9.6m. and $2.3m., respectively, by 1 April 1978, on which date, to the knowledge of the bank (but not of P.) G. renewed the vessel's insurance at only $10m. Nine days later the vessel was lost: the insurance proceeds satisfied the first mortgage but were insufficient to satisfy the second. On 13 November 1978 the bank demanded repayment of the balance then due to it from both P. and the second defendant;

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[6] See the discussion in the House of Lords decision of *National Bank of Greece SA v Pinios Shipping Co No. 1 et al* [1990] 1 AC 637.

writs against each followed, and in due course both actions were consolidated. P. brought a claim in arbitration against G. in respect of G.'s under-insurance of the vessel. The claim succeeded; but G. failed to pay the damages awarded against it.

[35] In the consolidated action, the defendants counterclaimed damages against the bank in respect of its failure to ensure that G. had adequately insured the vessel. The judge held that the counterclaim failed and that the bank was entitled to compound interest on the balance due, after, as well as before, 13 November 1978. On appeal by the defendants, the Court of Appeal allowed the appeal in part, holding that the bank's entitlement to compound interest ceased on 13 November 1978. On appeal by the bank the H.L. held that the bank was entitled to the principal sum due to it with interest thereon as agreed until payment or judgment in the usual way, and that the agreement included the term, **implied by the usage of bankers**, that the bank was entitled to capitalise interest, which in the present case (by concession) was at quarterly rests; and that such entitlement continued until judgment.

[36] Concerning the question of whether or not compound interest was chargeable, Lord Goff affirmed that it was implied in this contract between the bank and its customer that it was so chargeable even beyond the ending of the banker and customer relationship.

[37] In the circumstances of this case, there is no banker/customer relationship between the Claimant and the Defendant. Nor is there any previous course of dealing between them. As stated earlier, the terms of the agreement do not provide for any capitalization of the monthly interest earned being added to the principal and rolled to the next month. Indeed, the express term is that all of the money must be repaid at once as a lump sum at the end of the period.

[38] In my view then, it is not likely that on this evidence compound interest could be found to be charged for the main loan agreement.

[39] The loan agreement further provides at paragraph 9 of the schedule that a late fee is chargeable at 1% interest per day. This 1% is not expressed explicitly as compound interest either. Nor can it be implied for the reasons stated above. But when one examines s. 9 of the Act, either the charging of compound interest **or** (emphasis mine), **increasing the rate of interest charged** for the loan **by reason of a default** in the payment of a sum due under the contract, makes only that portion of the contract illegal.

[40] Authority for this provided from the case of ***Ken Sales & Marketing Ltd v Earl Levy et al***[7]. In that case Jones J held that the provision in a mortgage that expressly charged compound interest did not render the entire contract illegal under s. 9 of the **Money Lenders Act**. It simply made that portion of the contract unenforceable (but not illegal) leaving the remainder of the contract potentially enforceable[8]. The wording in the ***Ken Sales*** case of the offending clause, as found by Jones J, was an increased rate of interest **compounded at monthly rest** (emphasis mine) in the event of default.

[41] Jones J relied on the ratio from the decision of ***Malcolm Muir Ltd v Jamieson***[9] per Lord Jamieson who said as follows, "The question is whether what is legal in the default clause can be severed from what is illegal. Section 7 provides that 'any contract ... by a moneylender shall be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of the sums due under the contract.' It is only in so far as a contract provides for compound or a higher rate of interest on default in payment that it is declared illegal. The section does not say that the contract is illegal if it so provides. We were told there is no authority on the matter, but the wording of the section seems to make it clear that **the**

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[7] (Unreported Claim No. 2004 HCV 01978, Jones J, December 3, 2008.
[8] Id at para 53.
[9] [1947] SC 314

illegality extends only to a provision entitling the moneylender to obtain more interest than he would have received if no default in payment had been made (emphasis mine). I think, therefore, the pursuers are entitled to found on the default clause in so far as it provides for immediate payment of the balance of the principal sum and to jettison, as they have done, the part which illegally provides for interest thereon."

[42] I have no clear evidence that the interest charged is compound interest unlike the ***Ken Sales*** case above as it is not worded as such and there is nothing to imply that the interest is to be compounded in my view. But this is not the end of the consideration.

[43] In this case the rate of interest is increased by at least 1% per day if there is late payment. But is late payment a default? Clause 20.0 lists the Events of Default. Clause 20.1.1 lists as a default event if (among other things),

> **"the Borrower fails to pay any sum payable by the Borrower under this agreement and/or any related documents, when due (emphasis mine), in the currency and manner provided in this agreement."**

[44] Under Clause 6, the repayment terms are described in Item 6 of the Schedule. Item 6 provides that repayment is to be one lump sum payment on or before the maturity date. Item 4 of the Schedule has the maturity date as 180 days of the date of the Agreement.

[45] In my view therefore, the failure to pay the loan in full on or before the maturity date of the loan is likely to be found to be a defaulting event. Therefore, late payment is likely a default event. The late payment attracts an interest rate of 1% per day after the maturity period. This is an increase of 1% per day over the stated interest rate of 8% per month as set out in item 7 of the Schedule.

[46] The proviso to s. 9 does allow for the charging of a late fee where there is default in payment of a sum due under the contract. However, the proviso requires that the rate charged shall not exceed the rate payable in respect of the principal (apart from any default) and it must be expressed as simple interest. In this case, the 1% per day will likely be found to easily outstrip the interest rate on the principal of 48% (over the life of the loan).

[47] Firstly the 1% per day does not state that it is 1% on the outstanding balance. The contract itself, at clause 13.2, does allow for part payments to be made despite what Clause 6 says. In that event, there may be part payments made prior to the due date, but an outstanding balance may be present. The late fee does not contemplate that the interest charged is only on the outstanding balance. So it amounts to 1% on the entire principal borrowed. This amounts to $200,000.00 per day. It is likely that it would be found that this is far in excess of what the daily rate would be for the interest on the loan ($1,600,000.00 per month translates to just over $52,000.00 per day in interest).

[48] It is likely then that it would be found that this has the effect of increasing the interest rate on the loan by reason of the default. As such, the contract is likely to be found in breach of s. 9 and the proviso therein. However, this does not render the entire contract illegal. Only this portion of the contract is rendered illegal. It is capable of being severed from the remainder of the contract (see again the decisions in ***Ken Sales*** **and** ***Malcolm Muir*** **above**). So this argument fails and there is no serious issue to be tried in this respect.

If Not Illegal, is it Unenforceable?

[49] Counsel Mr. Gittens at paragraph 7(3) of his submissions argued that the mortgage and instrument of transfer were unenforceable. He cited no provision or made other argument in relation to this proposition.

[50] Sections 8(1) and (2) are the applicable sections in this regard. I will start with 8(1). It states as follows:

> *8-(1) Subject to subsection (3), no contract for the repayment by a borrower of money lent to him or to an agent on his behalf after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract* ***containing the particulars required by this section*** *be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable* ***if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be****.*

[51] What the highlighted portion indicates, in my view, is that the contract or security is not enforceable if it is proven that the written contract for the loan was not signed by the borrower **before the money was lent or security given.** Put another way, if the security was entered into or money lent **before** the contract was duly signed by the borrower, then the contract and/or security would be unenforceable.

[52] In the case at bar, the security – the 1st Mortgage for the 1st loan – was dated the 27th June 2022. The contract itself was dated the 30th June 2022. So on the face of those documents, the security was signed **before** the loan contract was signed. This would, if found to be so at trial, make the security and contract unenforceable. However, the evidential waters are muddied by correspondence signed by the Claimant dated the 17th June 2022 wherein he indicates that the loan contract **and** the mortgage were both *signed by him* (emphasis mine) on the same date of the letter – the 17th June 2022. This was also set out in his Particulars of Claim. But then he also pleaded at paragraph 5 of his Particulars that he recalls only receiving the executed letter and the Mortgage Deed.

[53] This raises quite serious issues to be tried as to exactly when the events happened. Much will turn on cross-examination of the parties to resolve this issue.

[54] Next we come to section 8(2). It states as follows:

> *The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and* ***the interest charged on the loan expressed in terms of a rate per centum per annum****.*

[55] It is evident that the interest rate charged does not comply with section 8(2) in that the rate of interest expressed in the contract is not expressed as a per annum rate. It is expressed as a monthly rate of 8% per month. This would translate to a per annum rate of 96%. As the contract does not express the rate per annum, it does not comply with section 8(1) insofar as s. 8(1) requires the written contract to contain "the particulars required by this section" one of which is that the rate of interest be expressed as a per annum rate.

[56] Therefore, I find that a strong case with a real prospect of success has been raised that the loan agreement and the mortgage are unenforceable.

If Unenforceable, Can Section 8(3) Come to the Aid of the Defendant?

[57] Even if the contract was found to be unenforceable, section 8(3) does provide for the Court to exercise its discretion to allow for the contract to be enforced **if it considers it equitable** to do so (emphasis mine).

[58] This would be where ss. 2 and 3 of the Act can be prayed in aid by the Claimant. Section 2(1) allows for the Court, in a claim for the recovery of the money loaned by the lender, to essentially reopen the transaction and impose terms that are more reasonable if it is that the Court finds, on evidence, that either:

a) The interest charged on the principal was excessive; or
b) The amounts charged for fees, expenses, penalties etc were excessive; or
c) In any case, the transaction was harsh or unconscionable.

[59] Section 2(2) allows for the borrower to take action and seek the remedies available under s. 2(1) even before the action for recovery of the money under the contract is taken by the lender.

[60] Section 3 of the Act allows for the Court to presume, in circumstances where the evidence shows that the interest charged is in excess of the rate prescribed by the Order of the Minister, that the rate is excessive and the transaction is harsh and unreasonable. In this case, based on the Defence filed and the Affidavits before me, there was no dispute that the interest rate of 48% over the life of the loan was in excess of the rate prescribed.

[61] The application of section 8 was considered in the case of ***Estate of Imorette Palmer (deceased) v Cornerstone Investments and Finance Co. Ltd. (Jamaica)***[10].

[62] In that case among the issues that fell for the Board's consideration was whether the statutory jurisdiction to give relief to the moneylender should be exercised if the security documents were found to be unenforceable. Ultimately the Board concluded that it should not restore the appellants' liability under the guarantee and mortgage.

[63] This final position was taken by the Board (agreeing with the dissenting judgment of Downer JA from the Court of Appeal of Jamaica), that it would have been inequitable to enforce the guarantee as the Appellant and the other guarantors may have had no clue about the obligation to guarantee Mr. Rankine's loan when agreeing to guarantee Mr. Salter's loan and this should have been specifically pointed out to them and there was no evidence that it was[11].

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[10] Privy Council Appeal No. 23/2006, July 16, 2007.
[11] See n 5 at paragraph 41.

[64] In the case at bar, there are serious questions to be tried on the issue of whether to allow for the contract to be enforced on equitable grounds even if it did not comply with sections 8(1) and (2). After all, the contract was negotiated between counsel of years at the bar and a layman. On the other hand, as Mr. Gittens valiantly argued, sometimes counsel can be careless in the handling of their own affairs and it was pleaded in the Particulars of Claim, he was in a desperate situation and the Defendant knew it. This was staunchly resisted in the Defence filed.

[65] Mr. Williams' quick rejoinder was that the Claimant signed and confirmed that he had received independent legal advice before executing the document. In other words, as the Defendant has been at pains to point out in his Defence, the Claimant well knew what he was getting into and expressed no objections to the terms or taking the money; he took the money; used it in whatever manner pleased him and is now seeking to get out of the contract. Incidentally, in the very contract, signed by him the Claimant, warranted that the agreement was, among other things, legal and enforceable.

[66] There is much grist for the mill and so I am prepared to say at this time that there is indeed a serious issue to be tried in this regard.

Would Damages be an Adequate Remedy?

[67] The answer to that question is clearly no. Damages would not be and could not be an adequate remedy for the Claimant. He is trying to restrain the sale of property used to secure a very substantial debt. It is also a potential source of income for the Claimant.

[68] In addition, land is of unique value (generally speaking) and generally, when it comes to land, damages is not an adequate remedy to compensate for its loss.

The Undertaking as to Damages

[69] Mr. Williams, in both written and oral submissions, has argued that the Claimant's undertaking in damages is evidentially worthless and, in the circumstances, the injunction should not be granted even if the Court finds that there is a serious issue to be tried.

[70] I do agree that the Claimant has put himself in a precarious position. I have no idea what the value of the property, the subject of the mortgage, is as no current valuation was put before the Court.

[71] Therefore, I cannot say that the Defendant holds in hand a security that would be able to cover any losses incurred by him as a consequence of the injunction being granted should the Court eventually rule in his favour.

[72] Nor do I have any evidence from the Claimant to satisfy me that he is likely able to meet the undertaking on his own otherwise. The Claimant is an Attorney-at-Law, however, I have from him no statement of his current financial situation to satisfy myself that he has the wherewithal to meet any claim upon him. We are now in February. He ought to have had his financials from his practice filed with the General Legal Council for the year 2023 already. So those should have been readily to hand. Yet they haven't been exhibited.

[73] However, it is now well recognized that there is no inflexible rule that a litigant needs to give either an undertaking or a cross-undertaking in damages to be given an injunction. It is the justice of the case that will determine whether one is necessary[12].

[74] The above principle was applied in the case of ***Sheldon Gordon et al v Arleen McBean et al*** *consolidated with* ***Arleen McBean v Sheldon Gordon et al***[13].

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[12] See the case of *Allen and others v Jambo Holdings Ltd* [1980] 2 All ER 502 at 506 per Lord Denning MR.
[13] [2023] JMCA Civ 44

There, the Court of Appeal upheld the decision of the learned Judge not to require an undertaking as to damages from the Claimants in the circumstances of the case. They relied on the *Allen* decision as well as the case from Australia of ***Caravelle Investments Ltd v Martaban Ltd and King & Co****; The Cape Don*[14] where the Federal Court of Australia also recognized that there was no inflexible rule that an undertaking in damages is required before the granting of an injunction.

[75] In this case, I find that given the relative strength of the Claimant's case against the enforceability of the contract, it would not be fair and just to deny him an injunction to preserve the asset, simply because he cannot afford the undertaking. If the contract and security are upheld at trial, then the asset would still be available to the Defendant. In the interim, the Defendant's mortgages are noted on the title and the Defendant has the title. So there is no danger to the Defendant.

[76] On the other hand, if the Defendant is not restrained and the agreement declared illegal or unenforceable or at least harsh and unconscionable and subject to being changed pursuant to s. 3 of the Money Lenders Act, then the Claimant's losses would likely not be recoverable due to the uniqueness of land.

[77] Therefore, I am not requiring an undertaking as to damages from the Claimant.

The Balance of Convenience.

[78] I am minded to agree with the submissions of Mr. Gittens that the balance of convenience is in the Claimant's favour in this case. I will not repeat myself, but simply refer to my earlier discussions from paragraphs 59-60 above which I believe illustrate why the balance of convenience rests with the Claimant.

[79] I do not find that the Defendant's potential loss is adequately established. For one thing, I have no idea why it was that the Valuator utilized a property in St. Andrew

[14] [1999] FCA 1505.

as his baseline. The loan to the Claimant was $20m with an expected return of $29.6m (inclusive of the interest) if paid on time. I have no evidence of what property or other investment $30m could be used to acquire and what returns there would likely be on such an investment had he been repaid the loan and interest.

[80] I accept that the Defendant himself had to borrow some of the money from a syndicate. But I do not know the terms of that loan and what hardship the Defendant faces as a consequence as that was not put in evidence before me. But there is evidence, which I accept, of the greater hardship the Claimant would face if the injunction is not granted.

CONCLUSION

[81] All told I find that there is a serious issue to be tried between the parties as:

a) I accept that the legislation does apply to the Defendant at this time as there isn't sufficient evidence before me that makes him fall into the exempted class of persons under s. 13(1)(h).

b) I accept that a case with a real prospect of success has been raised that the contract and security are unenforceable pursuant to ss. 8(1) and (2) of the Act insofar as the security was, on its face, entered into before the loan contract was signed and/or the interest rate in the agreement is not expressed as a per annum rate; and

c) I also accept and find that the evidence before me presently shows that the contract is likely to be deemed at least unconscionable and harsh as the interest rate charged goes above the prescribed limit of 25% for the life of the loan.

[82] I find that damages would not be an adequate remedy in this case because of the unique nature of land and damages are not generally an adequate remedy when land is involved.

[83] In the circumstances of this case I accept that the Claimant has not given any adequate and supported undertaking as to damages, but I will not require one of him in the circumstances of this case.

[84] Finally, I am of the view that in all the circumstances, the balance of convenience rests in favour of the Claimant in granting the injunction.

DISPOSITION

1 The Defendant is restrained, whether by himself, his servants and/or agents from exercising his power of sale pursuant to Mortgage No. 2412235 registered on the 30th June 2022 and Mortgage No. 2422922 registered on the 29th August 2022 on the Title Registered at Volume 1442 Folio 992 of the Register Book of Titles or otherwise disposing of or dealing with the said property in any way pending the outcome of this claim.

2 The Court does not require an undertaking as to damages from the Claimant.

3 Costs on this Application to be in the Claim.

4 Claimant's Attorneys-at-Law shall prepare, file and serve this Order on or before the 23rd February 2024 by 4:00 pm.

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D. Staple, J