IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO: E 478 OF 2001

BETWEEN	**WILFRED EMANUEL FORBES**	**1ST PLAINTIFF**
AND	**COWELL ANTHONY FORBES**	**2ND PLAINTIFF**
AND	**MILLER'S LIQUOR STORE (DIST) LTD.**	**DEFENDANT**

Heard on December 3 & 7, 2001 and October 18, 2002

Mr. W. Charles (Mr. C. Forbes in person) for the Plaintiffs.

Mrs. M. Taylor-Wright and Ms. Y. Stone instructed by Taylor Wright & Co. for Defendant.

ANDERSON: J

This is an application by way of summons for an interlocutory injunction to be granted in favour of the plaintiffs herein, against the defendant company.

The action had been begun by way of Originating Summons, and had been filed in the Supreme Court, on the 20th September 2001. The Originating Summons claimed a declaration as follows:

> That the Plaintiffs are entitled to redeem the said mortgage(d) property upon payment by the plaintiffs jointly and/or severally to the defendant of any sum found to be due on the taking of an account
>
> That in taking the said account, the defendant/mortgagee should not be allowed to claim interest after the 31st August then due under the said mortgage.
>
> That the plaintiffs are entitled to an injunction restraining the defendant and/or his (sic) servants or agents from taking any further steps to complete the purported contract of sale between the Defendant and Duncarl Limited, such purported contract dated the 30th August 2001 and from executing or seeking to have registered any Instrument of Transfer in respect of property situated at 17 Ward Avenue Mandeville in the Parish of Manchester and registered in the Register Book of Titles at Volume

1053 Folio 757 and Volume 1035 Folio 462 until the trial of this action or until further order.

That the purported contract for sale of the mortgage(d) property was a gross undervalue and the plaintiffs are entitled to damages for negligence and misrepresentation.

Damages with interest, for breach of contract and wrongful exercise of the power of sale thereof.

When the matter initially came on for hearing on December 3, 2001, Mrs. Taylor-Wright, for the defendant, indicated that she wished to raise some preliminary objections. She submitted firstly, that the court had no jurisdiction to hear the plaintiffs' case in the manner in which it was being brought. The incorrect procedure had been used to get this matter to court. Proceeding by way of the Originating Summons by which the action had been commenced, was inappropriate and the procedure had to be used in accordance with the provisions of the Judicature Civil Procedure Code Law, sections 532 to 545. In this regard, she submitted that section 535 which permits a mortgagor or mortgagee to take out an originating summons in pursuance of certain rights, and which is set out below, contains no provisions which allow an originating summons to be used in an action for the taking of accounts or for the award of damages also remedies claimed by the plaintiff.

535: Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable, as may by the summons be specified, and as the circumstances of the case may require, that is to say, -

Payment of money secured by the mortgage or charge;

Sale;

Foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge, by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;

Redemption;

Reconveyance;

Delivery of possession by the mortgagee.

By way of support she referred also to the case of ***Eldemire v Eldemire, Vol. 38, West Indies Report 1990 p. 234.*** In that case,

> H claimed that by virtue of the wills of the parents of A and himself and an agreement between the two of them certain lands were held by A and himself upon trust for A absolutely and that he was entitled to have the lands vested in him. He issued an originating summons to enforce his claim. The trial judge made an order in H's favour but the Court of Appeal allowed A's appeal against the order on the ground that an originating summons was not an appropriate form of proceeding for the relief claimed; the court regarded the action essentially as being a claim for specific performance of the agreement between A and H and thus not falling within the provisions of section 532(a) of the Judicature (Civil Procedure Code) Law (originating summons to determine questions affecting rights or interests of persons claiming as creditors, devisees, legatees, next of kin, heirs at law or *cestui que trust*. On the question whether H's claim fell within section 532 (a); **Held,** that H's claim concerned a trust estate which he claimed was held on his behalf absolutely and the facts not being in dispute, his claim was in the nature of a claim by a *cestui que trust* and had properly been brought by originating summons in accordance with section 532(a).

Secondly, she submitted that when there are contentious or disputed facts the action should be commenced by a writ and not by Originating Summons. She claimed that this submission was supported by the case of ***Gowe v Lurch 1987 Vol. 24 Jamaica Law Report p. 508.*** The 3rd holding in the head note in that case provides as follows:

> "that in contentious matters in which oral evidence is likely to be necessary, it is appropriate to commence the action by writ and not by originating summons".

In the case of ***Eldemire v Eldemire (supra)*** Lord Templeton in delivering the advice of the Board at page 238 said:-

> "As a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts. The modern practice varies; sometimes when disputed facts appear in an originating summons proceedings, the court will direct the deponents who have given conflicting evidence by affidavit, to be examined and cross examined

> orally and will then decide the disputed facts. Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim."

Further support for her submission is found by Mrs. Taylor-Wright, in particular, in the judgment of Carberry J.A. in the Gowe v Lurch case (supra) at page 512. In relation to that case he said:

> "It was not appropriate to use an Originating Summons as a means of bringing this contentious dispute...before the court."

By way of making a further preliminary point, Mrs. Taylor-Wright urged the court to find that the plaintiffs had no *locus standi* to have brought the action. She cited the case, ***Thorne v British Broadcasting Corporation (1967)*** **WLR** ***1104 at p. 1109.*** The proposition which she seeks to elicit from this case is taken from the following words in the judgment of Lord Denning M.R.:

> "It is a fundamental rule that the court will only grant an injunction at the suit of a private individual to support a legal right"

It is, I would urge with respect, a misconceived submission which does not assist this court. One of the issues which will be determined in the substantive action between the plaintiffs and the defendant is, what right, if any, the plaintiffs may have. This summons is an application for an interlocutory injunction. It seems a finding that the plaintiffs have no legal right, as in the ***Thorne case,*** is a substantive finding which will be made later and not at this interlocutory stage. I need hardly add that a submission that the plaintiffs have no locus standi, is not necessarily the same as one saying that the plaintiffs have no legal right which he may seek to protect.

In further support of her submission that the plaintiff had no *locus standi*, Mrs. Taylor-Wright for the defendant submitted that under section 103 of the Registration of Titles Act, it is "the proprietor of any land under the operation of this Act" who may mortgage the same by signing the mortgage thereof in a form in the Eighth Schedule, and may charge the same with the payment of an annuity by signing a charge thereof in the form

of the Ninth Schedule. She submits that pursuant to this section only a "proprietor" may validly grant a mortgage. Proprietor is defined by section 3 of the Act as being:-

> "the owner solely, jointly or in common with any other person, in possession, remainder, reversion, expectancy or in tail, or otherwise, of land, or a lease, mortgage or charge; and any such word shall include the donee of a power, or other person empowered or authorized to appoint or dispose".

She points out that the plaintiffs' names had never been entered in the Register Book of Titles with respect to the property, the subject of the agreement for sale between the parties. She submitted that while under section 3 they may, as mortgagors, qualify to be proprietors, the fact is that they were not in law "proprietors". This was because, since as noted above, the plaintiffs had not been registered as proprietors in the Register Book of Tiles, they must needs qualify as "proprietors" as "mortgagors". However, the mortgage under which the plaintiffs purport to be proprietors is not a legal mortgage. If I understand the point counsel was seeking to make, it was that, not only was the mortgage not registered, it could not have been registered, as the mortgagors were not registered proprietors as required by section 103 of the Registration of Titles Act. Indeed, in an affidavit sworn on the defendant's behalf by its managing director, it is stated that it gave instructions to its attorneys to effect the said registration, but does not know why this was not done.

She submitted that the plaintiff can only have a "legal" right to an injunction as sought in these proceedings if they could show that they had a legal right to mortgage the land, unless the plaintiffs are able to show by some other means that they were proprietors. In the present circumstances, the plaintiffs were not competent to mortgage the registered property in question.

Mrs. Taylor-Wright finally submitted that in relation to the mortgage deed, the plaintiff could not rely on it, as it was not in conformity with section 36 of the Stamp Duty Act. Section 36 of the Stamp Duty Act provides as follows:

> "No instrument, not duly stamped according to law, shall be admitted in

> evidence as valid or effectual in any court or proceeding for the enforcement thereof."

The mortgage deed in the instant proceeding has not been stamped and accordingly was inadmissible as evidence in this proceeding.

This last point of the defendant's attorney's preliminary submission may be easily disposed of peremptorily. In the first place, the defendant itself is purporting to resist this action on the basis that it exercised validly, a power of sale under the mortgage. It is, in my view, entirely inconsistent to assert that there is no valid mortgage. Such a conclusion could be quite damaging to the defendant's own case. I shall make a further comment on this proposition later.

Further, it is common ground that the plaintiffs paid their half costs of the stamping and registration of both the documents. The plaintiffs had done all that had been required of them and they are, surely, entitled to rely upon that maximum of Equity "*Omnia praesumuntur rite et solemniter esse acta*". Equity regards as done that which ought properly to have been done.

In any event, an appropriate undertaking to stamp the offending unstamped documents, is usually enough to cure this defect.

Mr. Charles for the plaintiffs in response to the preliminary submissions, conceded that under the provisions of the Judicature Civil Procedure Code Law, in an action such as that which the plaintiffs are seeking to maintain here, proceeding by way of Writ of Summons may be more appropriate. He also submitted however, that with respect to the claim by the plaintiffs, it was a claim to exercise an equity of redemption, that such a claim was not, of its nature, contentious and could therefore be brought by way of Originating summons. (Note my reference below, in this regard, to the Australian case from the State of Victoria, Latrobe Capital Mtge. Corp).

In any event, as stated in Eldemire v Eldemire, it is open to the court to grant leave to treat the matter as if begun by Writ of Summons, and to treat the affidavits as if they were pleadings.

Further in relation to the submission that the plaintiffs had no *locus standi*, since they were not "Proprietors" within the meaning of section 103, it was submitted that the plaintiffs' application is for an interlocutory injunction and, indeed, their claim for relief at all, is based upon the agreement for sale signed between the parties and pursuant to which they could urge that they had at least an equitable interest in the property, the subject matter of the litigation. He submitted that the defendant's preliminary objections should be over-ruled and the application for the interlocutory injunction, proceeded with.

At the end of the submissions on the preliminary objections raised by counsel for the defendant, I ruled that none of the points would prevent me from hearing the summons then before me. At the time I did not elaborate on my reasons for so doing. I shall discuss these briefly here.

Sections 532 – 545 to which reference was made constitute "Title 43" which is captioned "Proceedings in Chambers by way of Originating Summons". The cases adverted to by learned counsel, viz, Gowe and Eldermire are cases which had been brought and tried pursuant to section 532.

In the instant case, the matter is an interlocutory application by way of summons. This procedure is entirely appropriate. This objection might properly have been made before the trial court if the matter had been there but is out of place here.

I have already indicated that the preliminary submission that the plaintiffs had no "legal right" for which injunctive relief would be available, was misconceived. These plaintiffs clearly have standing to seek an injunction based upon the pleadings. This is in essence a suit claiming specific performance of the agreement for sale.

I also ruled that the matter should be treated as having been begun by writ and the respective affidavits of the plaintiffs and the defendant's managing director, were to be

treated as the Statement of Claim and defence respectively, with liberty to apply to amend as deemed necessary.

Authority for this ruling is found in the judgment of Lord Templeton in the Privy Council in *Eldemire v Eldemire.* I need hardly state that I reject the third (3rd) submission that, in any event, the mortgagors could not proceed as the mortgage upon which they purport to rely was not in proper form, not having been duly stamped in accordance with the provisions of section 36 of the Stamp Duty Act. A litigant cannot be heard to say:-

> "I know that I had a duty to stamp and register the instrument of mortgage. However, I did not carry out my contractual obligation, and so you cannot rely on the unstamped document in an action on that document."

It would appear that this would be an invitation to commit fraud. The ruling of the court was therefore that it would proceed to hear the substantive summons for interlocutory injunction.

Mr. Charles opened by reviewing the evidence which had been presented in the affidavits before the court and it is useful to review that evidence. What emerges, as will become apparent, is some level of agreement on the factual substratum of the claim, but important factual and legal differences in the position of the parties.

According to the main affidavit of the second plaintiff, sworn to on the 6th day of October 2001, the plaintiffs, as purchasers, and the defendant, as vendor, entered into an agreement for sale of certain premises at 17 Ward Avenue, Mandeville in the Parish of Manchester. The agreement was dated 13th August 1993. The address of the property in question was 17 Ward Avenue and was comprised of the land in the titles registered in the Register Book of Titles at Volume 1053 Folio 757, and Volume 1035 Folio 462. Under the terms of the agreement for sale, carriage of sale was to be by the defendant's then Attorneys-at-Law, Robertson, Smith, Ledgister. As revealed in the affidavit by the Plaintiff, Cowell Forbes, the agreement provided for the registration of a mortgage in

favour of the defendant. Neither the transfer nor the mortgage was ever registered, contrary to the terms of the agreement for sale.

On the 15th September 1993, the plaintiffs signed the mortgage deed which had been contemplated in the agreement for sale. This deed provided that a mortgage was being granted by the vendor over a 10 year period with a principal sum of Four Million Dollars ($4,000,000.00) and a rate of interest of 15% per annum. A copy of the relevant agreement for sale and mortgage, are attached to the affidavit of the second plaintiff. The deed provided that the mortgagors were to be registered as "proprietors of an estate in fee simple, subject to the encumbrances, if any, endorsed on the title". The plaintiffs allege that they paid their appropriate half-costs of the transfer and the mortgage to the defendant's attorney-at-law. In the month of October 1993, the plaintiffs began paying installment under the mortgage. Subsequently, payments were made by giving to the defendant, twelve (12) post-dated cheques, for a period of one year, commencing on the 15th November and ending in October of 1994. There was also a provision in the agreement for sale that the defendant would grant vacant possession "on completion". According to the agreement for sale, completion was to be effected "on or before the 31st day August 1994".

Despite the execution of the relevant transfer and mortgage deed and the commencement of payment to the defendant, the defendant did not vacate the premises for approximately ten (10) months after the signing of the mortgage. There is evidence, according to the second plaintiff, of communication between attorneys for the plaintiffs and the defendant, protesting the continued occupation of the premises. One of the letters from the plaintiffs' attorneys, appended to the second plaintiff's affidavit, purported to claim a sum (stated to be "damages") but presumably really for "use and occupation" on the basis of 10% of the value of the premises per annum, to be calculated from "the date of completion". It is common ground that there was a meeting between the attorneys for the plaintiffs and the defendant somewhere on or around April 21, 1994. According to the second plaintiff, at that meeting the defendant promised that he would pay to the plaintiffs as *mesne profits*, a monthly sum of Forty Five Thousand Eight Hundred and Thirty Three Dollars and Thirty Three Cents, ($45,833,33) as from the 1st October 1993 to the 30th September 1994,

because the defendant company had continued in occupation during that period. The defendant finally vacated the premises in 1994.
Notwithstanding the continued occupation, the mortgage payments continued to be made by the first and second plaintiffs. The plaintiffs alleged that it was their expectation and understanding that their mortgage indebtedness would be credited by the defendant with the monies which had been agreed for use and occupation by the defendant.

The second plaintiff's affidavit then jumps to April 2001. The reason for this appears to be that up to that month, the mortgage was paid up. At this later date, says the affiant, the plaintiffs experienced a "temporary financial difficulty and went to the defendant and advised him" of this difficulty. I take it that, since the defendant is actually a limited liability company, the "him" referred to here, is its managing director, Mr. Sydney Miller, who himself swore affidavits on behalf of the defendant company.

In June 2001, the defendant through its then Attorneys-at-Law, Robertson, Smith, Ledgister, wrote to the plaintiff, enclosing a notice to the plaintiffs, that there had been a default in the payment of the mortgage and that "such default has continued for a period in excess of sixty (60) days and despite numerous attempts from the mortgagees, you have not brought your payments up to date."

AND TAKE FURTHER NOTICE that unless you settle your account in full within thirty (30) days of the date hereof, your property registered at Volume 1035 Folio 462 and Volume 1053 Folio 757 of the Register Book of Titles will be sold by public auction or by private treaty in accordance with the Powers of Sale contained in the mortgage dated the 15th day of September, 1993" (my emphasis)

The "Notice to Mortgagor" was dated the 22nd June 2001.
According to the second plaintiff's affidavit, during August 2001, the affiant spoke to the representative of the defendant and advised him that the mortgage debt would be liquidated by the 31st August 2001, and "he appeared to be satisfied". He further depones that on August 31, 2001, the plaintiffs delivered a cheque for Two Million, Four Hundred and Sixteen Thousand, Six Hundred and sixty-Six Dollars and Eighty-six Cents

($2,416,666.86) representing the outstanding principal and interest on the mortgage, to the defendant through its managing director, Sydney Miller along with a letter. According to the affiant, Mr. Miller "accepted the envelope, opened same and looked at the Manager's Cheque, read the letter, smiled and then drove off."

On the following day, September 1, 2001, the defendant's managing director called the second plaintiff to advise that he was returning the cheque as the property, the subject of the mortgage had been sold by private treaty on August 30, 2001. It emerged from the contents of the affidavit of Cowell Forbes that the Agreement for Sale was with a company, Duncarl Limited, at a price of Six Million Dollars ($6,000,000.00).

The affidavit makes four additional points in support of the application for the relief sought:

1) The plaintiff's had made improvements to the property in the sum of Two Hundred and Fifty Thousand Dollars. (It should be noted here that nothing in law or equity turns on this allegation)
2) The property had recently been valued at Twelve Million Dollars ($12,000,000.00)
3) The defendant did not advertise the mortgaged property or place a reserve price on its sale.
4) The mortgage deed had not been registered.

In regards to (4), it only needs to be recognized at this time, that this does not prevent the mortgage from being an equitable mortgage.

The affidavit goes on to make the point that the investigations by the plaintiffs revealed that an agreement for sale had been entered into by the defendant and a company, Duncarl Limited for the purchase of the subject property. He further avers that the mortgaged property had recently been valued at Twelve Million Dollars ($12,000,000.00) whereas the sale price to Duncarl was a mere Six Million Dollars ($6,000,000.00). By this he hoped to indicate that the defendant had failed to advertise the property, had sold it at private treaty without the benefit of any advertising and had sold it at an undervalue.

The inference was that the purported agreement for sale was fraudulent, or in breach of duty owed by mortgagee to mortgagor.

In response to the 2nd plaintiff's affidavit, Mr. Sydney Miller, the managing director of the defendant filed an affidavit on behalf of the defendant company. The affidavit evidences a fairly high degree of agreement with the facts alleged by the plaintiff but takes issue with certain averments in the second plaintiff's affidavit.

The affidavit sworn by Mr. Sydney Miller, for the defendant, indicates as indicated above, a considerable measure of agreement to the facts averred in the affidavit of the second plaintiff. However, he does disagree in certain material particulars. He denies that there was at any time any agreement by anyone on behalf of the defendant, that the plaintiffs could credit their mortgage account with the last year's interest as the second plaintiff had alleged. Nor does he agree that at the meeting referred to by the plaintiff at which the respective attorneys were present, was there any agreement to pay the sum of Forty Five Thousand Eight Hundred and Thirty Three Dollars and Thirty Three Cents, ($45,833,33) or indeed any sum at all. In fact, he said, there was a verbal agreement that the defendant would remain in the occupation of the premises until another business location had been identified. Mr. Miller on behalf of the defendant also denies that he had any discussion with either of the plaintiffs concerning the settlement of the mortgage debt on August 31, 2001. He states, "I had already sold the property in August 30, 2001". I believe that there is some slight misunderstanding here as to what the second plaintiff had said was done "in August". According to the second plaintiff's affidavit, there were discussions in which a promise was made to liquidate the obligation by the 31st August. The import of that statement is not that the conversations took place on the 31st as seems to be suggested by the affidavit of Mr. Miller, but before that date with the promise of settlement by that date. The following also comes from Mr. Miller:-

1. He states that the instrument of mortgage which had been signed by the parties had indicated that the mortgagors, that is the plaintiffs, were in fact already registered as the proprietors of the fee simple interest in the property. This was not so. In fact, up until the time of the action, the plaintiffs had still not been

registered on the title as proprietors, although the defendant alleges that instructions had been issued to its attorneys to effect the registration.

2. He states that there was an agreement between the plaintiffs and the defendant for the defendant to remain in occupation of the premises which had been sold until the defendant found alternative accommodations.
3. He denies that there had been any arrangement to pay the plaintiffs any money as mesne profits or indeed any sum at all. In particular he denied that there was any agreement for the payment of Forty Five Thousand, Eight Hundred and Thirty Three Dollars and Thirty-Three Cents ($45,833.33) per month to the plaintiffs.
4. Mr. Miler denied that he, as agent for the defendant, had any conversation with the plaintiffs concerning settlement of the mortgage debt on August 31, 2001.

It is not immediately clear whether he was denying that he had any conversation as the plaintiff alleged in his paragraph 22 sometime in August in which a promise was purportedly made for the settlement of the outstanding mortgage by the 31st August, or whether he was saying that he had no discussion with the plaintiff on the 31st August.

5. He says that on 31st August, he received an envelop from a gentleman whom he did not know containing a cheque in the sum of Two Million four Hundred and Sixteen Thousand Six Hundred and Sixty Six Dollars and Eighty Six Cents ($2,416,666.86). He denies, however, that the cheque was accepted by him as the property had already been sold on August 30, 2001.
6. In any event he says that the amount submitted as full payment was incorrect as the mortgage had been outstanding for five months, from April, by the time of the payment and the amount which would have been due on the 30th of August, 2001 would be Two Million Four Hundred and Ninety Nine Thousand Nine Hundred and Forty One Dollars and Thirty Two Cents, ($2,499,941.32).

Mr. Miller repeats his assertion that as of the 30th August 2001, the mortgagee had validly exercised powers of sale under the terms of the mortgage which had been executed on the 15th September, 1993.

By way of additional information, the managing director of the defendant also alleged that the plaintiffs had indicated to him that between 1999 and 2001 they had been making consistent efforts to sell without success. In fact, according to this affidavit, the plaintiffs were alleged to have told Mr. Miller that the best offer they had received was one for Eight Million Dollars ($8,000,000.00) from a Miguel Smith, a resident of Mandeville, and that this offer still stood at the date when the mortgagee purported to effect its sale. The plaintiffs do not respond to this allegation. Note, however, that insofar as there are conflicts in the evidence or even allegations which have not been specifically denied, affidavits are not the same as pleadings in which there is a need to respond to each specific allegation. In an interlocutory matter being heard on affidavits, one is not obliged to join issue on every allegation. Secondly, and in any event, "It is no part of the courts function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations". (Per Lord Diplock at p. 510 of the American Cyanamid case).

In a supplemental affidavit sworn and filed on the 28th November 2001, Mr. Miller, again on behalf of the defendant, denied that the defendant had not advertised the property, as had been alleged by the plaintiff. He states that at the time of the purported sale to Duncarl Limited, a valuation had been obtained from September Homes Limited and the valuation which is dated the 17th September 2001, had been paid for by the principal of the purchaser Duncarl Limited, Mr. Carlton Dunkley. He also indicated that the best information that they had received from September Homes Limited who had always inspected and valued this and other property owned by the defendant was that in 1996 there was a valuation of the property for Eight Million Dollars ($8,000,000.00). He also stated that the principal of September Homes Limited a Mr. Fairbourne Maxwell had indicated that property values had held firm between 1996 and 2001 and a fair selling price would be between Eight to Twelve Million Dollars ($8 – 12,000,000.00), having regard to the lack of buoyancy in the market. Finally he alleged that when the defendant decided to sell, the only offer that it received was that of Duncarl Limited, the purchaser under the terms of the agreement for sale. It should be noted that the valuation from September Homes Limited which is appended as an exhibit to Mr. Miller's affidavit, does

indicate that the market value of the property in question would be around Twelve Million Dollars ($12,000,000.00). This is the figure which is submitted by the plaintiff as being a more realistic selling price.

In pursuing the application for an interlocutory injunction, Mr. Charles for the plaintiff started out by indicating that he was relying upon the principles enunciated in the *locus classicus*, ***American Cyanamid Company v Ethicon Limited (1975) A.C. 396.*** In particular, he adopted the following passage which was taken from the judgment of Wolfe CJ in the case ***Ciboney Group Limited and anor. v Neuson Limited and anor. Suit C.L.C073 of 1998***. In that case at page 4 of the judgment, the learned Chief Justice had the following to say:

> "In Fellowes and Sons v. Fisher [1976] 1 QB 122 at p. 137, Browne LJ set out Lord Diplock's guidelines in American Cynamid (supra) in an enumerated series which judges throughout the ages have found helpful in dealing with applications of this kind. I set out below the guidelines –
>
> 1. The governing principle is that the court should first consider whether, if the plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction.
> If damages would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however, strong the plaintiff's claim appeared to be at that stage.
>
> 2. If on the other hand, damages would not be an adequate remedy, the Court should then consider whether, if the injunction were granted, the defendant would be adequately compensated under the plaintiff's undertaking as to damages. <u>If damages in the measure recoverable under such an undertaking would be adequate remedy and the plaintiff would be in a financial position to them, there would be no reason upon this ground to refuse an injunction.</u> (emphasis mine)

3. It is where there is doubt as to the adequacy of the respective remedies in damages that the question of the balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

4. Where other factors appear to be evenly balanced it is a Counsel of prudence to take such measures as are calculated to preserve the status quo.

5. The extent to which the disadvantages to each party would be incapable off being compensated in damages in the event of his succeeding a t the trial is always a significant factor in assessing where the balance of conveniences lies.

6. If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionable to that of the other party.

7. In addition to the factors already mentioned there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

Mr. Charles, in analyzing the case which his client seeks to put forward, states that there is no question that there are a serious issues to be tried. The main issue is whether his clients have a valid equity of redemption in the property the subject matter of the agreement for sale. Mr. Charles then proceeds to make a further submission that in the event of the injunction being denied and the plaintiffs succeeding, damages would not be

an adequate remedy. It is not immediately clear from the affidavit evidence whether or not damages would be an adequate remedy. It is trite law that where there is an action for specific performance involving an agreement for the sale of land, that damages is not generally regarded as an adequate remedy. Hence the court in its equitable jurisdiction is allowed to grant specific performance. On the other hand in the instant case, there are some allegations from the defendant that the plaintiff had been seeking to sell the property. In my respectful view, this is the kind of allegation which must be subjected to cross-examination at the trial.

Mr. Charles submitted that in so far as the defendant was concerned, there is no doubt that damages would be an adequate remedy for the defendant should it prevail in the long run while the injunction remains in place to the end of the trial. Mr. Charles said that he was relying upon the Ciboney case for it's full substance and effect.

By way of further support for the submission that there was, here, a meaningful issue to be tried, Mr. Charles also cited the case of ***Joan Adams v Workers' Bank (1992) 29 JLR 447***. In that case it was held, per W. James (Ag) (as he then was) that "a mortgagee was under a duty to act to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it. Factors which are taken into consideration to determine whether the mortgagee has failed in his duty are omission to ensure a fair price, failure to get a proper valuation and failure to advertise. The defendant did not advertise the property before it chose to sell by private treaty. Such failure meant that it had failed in its duty to the plaintiff".

It will be recalled, Mr. Charles noted, that among the averments in the second plaintiff's affidavit was that there had been a failure of the defendant to advertise the property generally for sale and that the sale by private treaty was at a gross undervalue.

Mr. Charles also cited the case of ***Cuckmere Block Company Limited and Another vs. Mutual Finance Limited (1971) 2 A.E.R. 633***. In that case the English Court of Appeal held that:

> "A mortgagee was not a trustee of the power of sale for the mortgagor and, where there was a conflict of interests, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale; however, the mortgagor was not merely under a duty to sell in good faith, that is, honestly and without reckless disregard for the mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it".

Mr. Charles, in stressing the affidavit evidence given by the plaintiff to the effect that there was (a) no advertising and (b) sale at an undervalue, urged the court to accept his reasoning as to the effect of Adams, NCB v Whitelocke, and Cuckmere.

These cases, it was submitted, (and based upon the available evidence so far produced in the affidavits, and which evidence was not yet subjected to cross examination), suggested that in this action, there were serious issues to be tried, a proposition which satisfies at least one of the critical criteria for an interlocutory injunction as laid down by Lord Diplock in American Cyanamid and adopted repeatedly in cases thereafter.

In summary, Mr. Charles submitted that his plaintiff had established that:-

(1) There were serious issues to be tried.

(2) In light of the fact that the plaintiffs' claim was, in essence, one for specific performance of the Agreement for Sale, damages would not normally be an adequate remedy for the plaintiffs.

(3) The balance of convenience lay in granting the applicants' prayer for the interlocutory injunction, in that the damage to the plaintiff should he succeed in the action after the refusal of the interlocutory injunction, would likely out-weigh any potential injury which the defendant may suffer from the granting of the injunction.

Mrs. Taylor Wright in response to submissions from counsel for the plaintiff, concurred with those submissions as they related to the criteria necessary to obtain the interlocutory injunction. In particular, she stated that the plaintiff must satisfy the court that there are serious issues to be tried. She submitted that here the only issue was whether the plaintiffs had a valid equity of redemption. In this regard she submitted that there was no serious issue to be tried as the equity of redemption had already been extinguished by the valid exercise of the mortgagee's power of sale under the terms of the mortgage.

I pause here to hark back to the submission on the preliminary objections made by Mrs. Taylor-Wright. It will be recalled that she had submitted that the mortgage was not a proper one as it had not been stamped, and the mortgagors were in any event not "proprietors" as the transfer had never been registered. It seems to me to be quite disingenuous on the part of the defendant to argue, that a plaintiff who had done everything required by him under the terms of the agreement for sale, should now be resisted in his application for an injunction by a defendant who acknowledges that his attorneys had failed to register the transfer or stamp the mortgage, on the basis that the mortgage is not valid by virtue of the non-performance of the defendant's own obligations. What is even more incredible, is that at the same time, the defendant purports to defend the subsequent sale of the premises to Duncarl on the basis that this sale was a proper exercise of the mortgagee's power of sale, under the same mortgage, the exercise of which power has extinguished the equity of redemption.

When counsel sought to make that submission as a preliminary objection to this matter continuing, I ruled against the submission. In essence, the submission is again being made, this time to support the proposition that there is no issue to be tried. In further support of this proposition, she cites Halsbury's Laws of England, 4th Edition, Volume 32 page 190. There, in reference to the equity of redemption it is stated:

> "The right continues unless and until, by judgment or foreclosure or, in the case of a mortgage of land where the mortgagee is in possession, by the running of time, the mortgagor's title is extinguished or his interest is destroyed by sale either under the

> process of the court or of a power in the mortgage incident to the security".

It is easy to agree with this statement of the law as it affects the equity of redemption, at any rate under a mortgage, properly registered pursuant to the terms of the Registration of Titles Act. With respect to the specific claim for an injunction restraining the defendant from concluding the sale to Duncarl Limited, Mrs. Taylor-Wright submitted that in the absence of "*mala fides*", an injunction would not be granted to the mortgagor claiming a right to rely upon an equity of redemption where the mortgagee had purported to sell the property under powers of sale contained in a mortgage. She cited the case of ***Waring (Lord) v London And Manchester Assurance Company, Limited, [1935] 1 Ch., 310***. The head note states:

> "The court will not grant an injunction to a mortgagor tendering the monies due under the mortgage an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of his power of sale unless it is proved that the mortgagee entered into the contract in bad faith".

On page 317 of the report, Crossman J. in the course of his judgment stated.

> The contract is an absolute contract, not conditional in any way and the sale is expressed to be made by the company as mortgagee. If before the date of the contract, the plaintiff had tendered the principal with interest and costs, or had paid it into court in proceedings, then, if the company had continued to take steps to enter into a contract or sale, or had purported to do so, the plaintiff would, in my opinion, have been entitled to an injunction restraining it from so doing. After a contract has been entered into, however, it is, in my judgment, perfectly clear, (subject to what has been said to me today) that the mortgagee (in the present case, the company) can be restrained from completing only on the ground that he has not acted in good faith, and that the sale is therefore liable to be set aside".

Mrs. Taylor-Wright says that there is no allegation of bad faith or fraud in relation to the purported sale to Duncarl. Further, she says, the amount tendered by the plaintiffs was not the correct amount due, but was the amount due in June of 2001, and not August 2001. She cites ***Duke v Robson, (1973) W.L.R. 267***. In that case, the plaintiffs had purported to purchase freehold property from mortgagors of the property. However, the mortgagee had entered into a contract for the sale of the said property under powers of sale in the mortgage. It was held, per Russell L.J., following ***Waring (Lord) v London And Manchester Assurance Company, Limited,*** (supra), that " a tender of payment of

what was due under the incumbrance.... would be necessary if someone was to say on that ground that the mortgagee no longer had their power to sell available to them. ***Crossman J. in Lord Waring v London & Manchester Assurance Co. Ltd.***, indicated that that was what was required if an injunction was to be obtained against a mortgagee purporting to exercise his power to sell by proposing to enter into a contract for sale thereunder". She concludes from these submissions that the plaintiffs must fail in their bid for the injunction on the basis that the equity of redemption had been extinguished.

She also refers to the case of ***Cuckmere*** (supra) cited by Mr. Charles, in relation to his submission that the mortgagee owed the mortgagor a duty of care in ensuring that market price was received for the mortgaged premises. She says that that case is to be seen in the context of a breach of the duty as a trustee, to secure the best price, but does not affect a case where the issue is the availability of the equity of redemption.

Finally Mrs. Taylor-Wright, in further support of her submission on the right of the mortgagee to sell mortgaged property under the powers of sale contained in the mortgage, referred to the case of ***SSI (Cayman limited), Dr. Steve Laufer, SSI Financial Services U.S Inc., Defendants/Appellants v International Marbella Club S.A. Plaintiff/Respondent (cross-appellant) SCCA No. 57 of 1986***. In particular she refers to the judgment of Rowe P. and cited the section of the judgment at page 7 thereof:

> "What are the special and peculiar rights which a mortgagee may exercise over the secured property? For this one must look at the mortgage instrument and in the instant case the power of sale is conferred upon the mortgagee in the event of certain defaults, all of which have occurred. It was submitted on behalf of the plaintiff/cross-appellant, that the only basis upon which a mortgage may be restrained from exercising his power of sale is upon payment of the sum claimed by the mortgagee into court. For this proposition Mr. Muirhead relied on extracts from Halsbury's Law of England, 4th Edition, Vol. 7, at paragraph 877 and Vol. 32 at paragraph 724 and 725, as also on a passage from Fisher and Lightwood on Mortgages, 3rd Edition at page 310. A typical statement of the law is taken from Fisher and Lightwood:
>
> > 'The mortgagee will not be restrained from exercising his powers of sale because the mortgagor has commenced a redemption action (f), or because he objects to the arrangements for sale (g), or because the

> amount due is in dispute (h). But he will be restrained if, before there is a contract for the sale of the mortgaged property (i), the mortgagor pays into court the amount claimed to be due (k); that is, the amount which the mortgagee swears to be due to him for principal, interest and costs (l), unless on the face of the mortgage, the claim is excessive (m), or where notice is required, if due notice has not been given (n), unless, as is the case under statutory power (o), the mortgage provides that the only remedy in case of irregularity shall be damages (p)."

By way of interest only, in light of Mrs. Taylor-Wright's trenchant submissions, I would like to advert to an Australian case from the State of Victoria which I have found on the Internet. This is the case of ***Latrobe Capital Mortgage Corporation Ltd., and Anor v Mt. Eliza Mews Pty. Ltd., and Anor, Case No: 7940 of 2000. [2001] VSC 464*** This was also a case involving an attempt by a plaintiff mortgagor to secure an interlocutory injunction against a defendant who was seeking to enforce his rights under powers of sale in a mortgage. There are two (2) aspects of the case which are relevant here. In that case, the action was commenced by Originating Motion. The defendant objected to the plaintiff having started by Originating Motion and claimed that the action should have been started by Writ. Beach J., stated:

> "It is commonplace for resolution of disputes between mortgagor and mortgagee to be initiated by filing of an originating motion. There is nothing in the present case to take it out of that category".

Secondly, (and this supports Mrs. Taylor-Wright's basic contention and submission, if it needed more support), he said, at page 4 of the judgment:

> "It has long been established that as a general rule, an injunction will not be granted restraining a mortgagee from exercising powers conferred by a mortgage, and in particular a power of sale, unless the amount of the mortgage debt, if that is not in dispute, is paid or unless, if the amount is disputed, the amount claimed by the mortgagee is paid into court; and that rule will not be departed from merely because the mortgagor claims to be entitled to set off an amount of damages claimed against the mortgagee. See *Inglis & Another v Commonwealth Trading Bank of Australia*, and *Cunningham and Others v National Australia Bank Limited*".

He continues:

> "Indeed in the present case clause 73 of the Memorandum of Common Provisions to the first mortgage provides that the mortgagor must pay all monies it owes to the mortgagee in full and that the mortgagor must not deduct from any payment, any amount it claims the mortgagee owes to the mortgagor. Of course it may well be different if it could be demonstrated that (the defendant) Mount Eliza Mews' default had been caused by the action of the plaintiffs. But as I have already stated, in my opinion the evidence before the Court does not establish that is the situation".

But not only does counsel for the defendant say that the equity of redemption has been extinguished, she goes further. She notes in so far as the question of notice is concerned, notice was not required under the terms of the mortgage granted by the defendant but it had, notwithstanding this lack of obligation, given notice in any event. Thus the plaintiffs were put into a better position than they would be if the provisions of the mortgage deed alone had been relied upon.

In closing her submissions, Mrs. Taylor-Wright advanced a series of propositions which I shall set out below:

(1) The plaintiffs are seeking an injunction to restrain the defendant from taking any further steps to complete its purported agreement for sale to Duncarl Ltd. dated August 30, 2001.

(2) The plaintiffs have not joined issue on the question of whether the contract for sale to Duncarl was made before the tendering of any monies to the defendant.

(3) The equity of redemption was therefore extinguished on August 30, 2001 when the defendant agreed to sell the property.

(4) Where the mortgagee has already exercised its powers of sale the court would not grant an interlocutory injunction to prevent completion unless fraud has been alleged and proven.

(5) There has been no allegation of bad faith in the exercise of the power of sale.

(6) The question as to whether there is a serious issue to be tried is to be determined by reference to whether the plaintiff has any real chance of succeeding at the trial.

(7) Since the plaintiffs no longer enjoyed the equity of redemption, they can have no legal rights to protect by way of injunction and the highest that they can go in this claim, is that the plaintiffs could get damages for breach of a duty to take reasonable care in securing appropriate market value.

(8) The allegation of a sale at an undervalue is not evidence per se of fraud.

(9) The court must be mindful of the rights of third parties, particularly where the third party is not a party to the suit. This protection has been recognized both at Common Law and under the Registration of Titles Act. (She cited Geon ***Contractors and Associates Limited v National Commercial Bank Jamaica Limited & Gillian Holdings Limited (unreported) Suit No: E 294 of 1980***. However, as this case involved a mortgage which had been registered under the Registration of Titles Act, I do not find it helpful). Hence, she submitted, damages would be an adequate remedy for the plaintiff but would not be an adequate remedy for the defendant. In this regard she also submitted that the apparent financial difficulties that the plaintiffs have experienced would cast doubts upon their ability to satisfy any damages awarded by the court at the trial, whereas the defendant faces the risk of legal action by the purchaser Duncarl Limited on the agreement for sale of the 30th August 2001.

(10) Damages would be an adequate remedy for the plaintiffs whose primary interest is that a fair price be obtained for the mortgaged property and that if not, the plaintiffs would be compensated for any loss that they might have suffer.

(11) The plaintiffs' action, as it has been brought, can only sound in damages as, even if they are successful at the trial, since there was

> no equity of redemption there would be nothing to redeem and the only remedy for the plaintiff would be damages.

Mr. Charles in a brief response made the following submissions. He suggested that the case of ***Waring v. London and Manchester Assurance Company*** referred to above by Mrs. Taylor-Wright was authority for the proposition that where a mortgagee purported to exercise powers of sale under a mortgage, the agreement for sale into which he entered, ought to indicate that he was selling "as mortgagee". As Authority for this proposition he referred to page 313 of the Waring decision where the mortgagee in that case had indicated in the contract that it was "selling as mortgagee". He also suggested that the statement of principle in Waring was stated too widely and that it was qualified, in his submission, by the later case of ***Duke vs. Robson at page 274*** of the report referred to above. Indeed, Mr. Charles submits that the principle in Waring was extended by the later Cuckmere decision in that the mortgagee *not only* had a duty to act *bona fide*, but also to take reasonable care to obtain the true market value. He raised the question therefore, as to what is the effect of the agreement for sale failing to indicate that the purported vendors were acting as mortgages under a power of sale in the mortgage.

He dismissed the reference to ***Maythorn vs. Palmer, The Law Times Vol XI, New Series, November 12, 1888***, a case referred to by Mrs. Taylor-Wright as not being helpful in determining the issue in this interlocutory matter. In that case the question was whether the court should consider the rights of third parties who were not before the court. But in this case even before deciding whether that third party can be properly considered, the issue of whether he is a bona fide purchaser for value would have to be determined. This is but one of the issues to be tried. He also pointed out that the amount claimed by the notice from the defendant differs from the amount that was subsequently being claimed. Further he asked, how is the court to treat the issue of sums which may be due for use and occupations during the period of almost one year after completion when the vendor had remained in possession of the premises. He further submits that the originating summons which had been taken out and which forms the basis of this interlocutory application was seeking to impeach the validity of the purported contract with Duncarl. That, he submitted, would be a matter which would have to be determined

at the trial. It was not a matter which could be determined on the basis of affidavit evidence at an interlocutory hearing.

Finally he submitted that the plaintiff had made out a case that there was a serious issue to be tried and that damages would not be an adequate remedy. He further submitted that the plaintiffs satisfied another criteria of the American Cyanamid case in that the balance of convenience rested with the granting of the interlocutory injunction, as it was advisable to hold the status quo, and in looking at the respective potential consequences to both parties, the court should exercise its discretion and grant the injunction. He therefore asked that the court grant the interlocutory injunction together with costs of the application and indicated that the plaintiffs gave the usual undertaking in relation to damages.

In these circumstances I had taken some time to review my decision. I apologize that it has taken this long, but am pleased now to deliver my ruling. What is the court to make of all of the foregoing?

Let me first state that I have taken the trouble to review the several authorities cited by both counsel, but more particularly by the counsel for the defendant, out of deference to the obvious industry which it signifies. However, I have to remind counsel that these are interlocutory proceedings. This is an application for an ***interlocutory injunction*** and it is the consideration of the principles which inform the court's ability to grant such injunctions that must be examined here. In that regard, one can do no better than start with the locus classicus, ***American Cyanamid***, which despite the numerous attempts at refinement, continues to be the guiding light by which courts faced with these applications must be informed. It is instructive to recall the words of Lord Diplock at page 508 of the American Cyanamid decision in the House of Lords: "The grant of an interlocutory injunction is a remedy that is both temporary and discretionary". As a point of departure, I would refer to the recent (as yet unreported) judgment of Rattray J. in ***Jamaica Lottery Company Limited v Supreme Ventures Limited, Paul Hoo, Ian Levy and Peter Stewart; Suit No C.L. 2001/J-001***, one of the first matters heard in the Commercial Division of this court. He states at page 13 of his judgment:

'The governing principles relative to the grant or refusal of an Interlocutory Injunction are set out in the well known case of ***American Cyanamid Co. vs Ethicon Ltd. (1975) 1 All E.R. 504***. The often-cited words of Lord Diplock in that case remind this court that:

> "In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination".

The learned law lord went on at page 510 to state:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried".

And further on the same page

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought".

I adopt Rattray J's reasoning for the purposes of this judgment.

During the course of his judgment in American Cyanamid, and before he had delivered himself as above, Lord Diplock had also indicated that although that was a case involving trade marks and patents, the issue was the principles affecting the right to an interlocutory injunction. As those principles on which such injunctions are granted remain the same whatever the area in which sought, he would turn "to consider the principles" applicable to the grant. He stated:

> "My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when, *ex hypothesi*, the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to

> mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of this interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; (emphasis mine)

The extensive submissions of counsel for the defendant and the citing of several authorities with respect to the equity of redemption, I understand to be directed at establishing that the plaintiff has failed to meet the threshold criterion of not being "frivolous or vexation, involving a serious issue to be tried". If indeed it is shown that there is no legal or equitable basis upon which the plaintiff could show that the defendant had exercised its power of sale invalidly, then there would, perhaps, be no serious issue to be tried; and that would be the end of the matter.

> It is trite however, that at this interlocutory stage of proceedings, the court only has before it, the affidavit evidence of the parties. This has not been tested in cross examination, nor is it clear that other relevant and material, but contrasting, evidence may not be forthcoming.

Note that at paragraphs (b) to (d) on page 510 of the judgment of Lord Diplock in Cyanamid he specifically rejects the supposed rule that consideration of the balance of convenience was postponed pending the satisfaction of the court that if the trial court was later to be seized of only the evidence available at the hearing of the application, it would find for the plaintiff.

> "Nevertheless this authority was treated by Graham J and the Court of Appeal in the instant appeal as leaving intact the supposed rule that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went

> trial on no other evidence than is before the court at the hearing of the application, the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought.
>
> Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence of affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration.

Do the allegations which have been made in the affidavits satisfy the court that there are serious issues to be tried, involving both law and fact?

The affidavit evidence of the defendant in this matter, and it is a main plank of the submissions of defendant's counsel, is that neither the transfer nor the deed of mortgage to the plaintiffs was ever registered. Nevertheless, defendant's attorney submitted that there had been a proper exercise of the power of sale under the unregistered mortgage. In response, the plaintiffs deny that there has been such a proper exercise; allege that there had been a tender of the outstanding mortgage amount due and an acceptance of that tender, and also allege breach of the mortgagee's duty to take care to obtain market value for mortgaged premises sold.

Plaintiffs' counsel specifically calls in aid section 105 of the Registration of Titles Act with respect to be issue of the exercise of the alleged power of sale.

> 105. A mortgage and charge under this Act shall, **when registered** (*my emphasis*) as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged or charged; and in case default be made in payment of the principal sum, interest or annuity secured, or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage charge, or hereby declared to be implied in any mortgage, and such default be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee or grantee or his transferees, may give to the mortgagor or grantor or his transferees notice in writing to pay the money owing on such mortgage or charge, or to perform and observe the aforesaid covenants (as the case may be) by giving such notice to him or them, or by leaving the same on some conspicuous place on the mortgaged or charged land, or by sending the same through the post office by a registered letter directed to the then proprietor of the land at his address appearing in the Register Book.

If section 105 of the Registration of Titles Act is to be taken to mean that registration of the mortgage is required to give effect to the mortgage as a security enforceable under the provisions of the Act, then the question arises as to what is the effect of non-registration. I would suggest, without purporting to decide, that the answer may be found in section 63 of the Registration of Titles Act. That section provides as follows:

> When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title. (Emphasis mine)

Does this section mean that neither the transfer nor the mortgage has effect at law, though perhaps in Equity? And is this court to decide at this point the meaning of this section, or does this merely raise another serious issue to be canvassed before the court at time of trial? The question takes on an added piquancy when one considers the terms of section 5

of the Conveyancing Act, which imposes an obligation for the registration of documents on the attorneys with carriage of sale, unless the agreement for sale states otherwise. Section 5 provides:

> "Nothing in this Act contained shall be taken to alter the practice heretofore existing in this Island in conveyancing, by which where there is no agreement to the contrary the following conditions always attached-
>
> (a) The solicitor of the vendor, lessor and mortgagee has the right to prepare and complete the conveyance, lease or mortgage.
>
> (b) The purchaser or lessee pays to the vendor or lessor one-half of the vendor's or lessor's costs so incurred, including stamping the conveyance or lease and, in the case of a lease, of recording it also.
>
> (c) The purchaser records his conveyance at his expense.
>
> (d) The vendor perfects his title on the record at his own expense.
>
> (e) The mortgagor pays all the costs of the mortgage, including all the mortgagee's costs for investigating the title and stamping and recording the mortgage.
>
> (f) The purchaser on a sale examines into the vendor's title and approves of the conveyance at his sole cost.
>
> No vendor is required to give to a purchaser any abstract of title, but in submitting the draft conveyance he furnishes the purchaser's solicitor with any information he may have of the title.

There is clear evidence from the defendant that the attorneys with carriage of sale for the defendant, failed to effect the completion of the conveyance. There are, it seems to me, a number of questions which would need answers and which cannot be answered at this time by this court on the available evidence. Among those issues which must be resolved are:

> "Does an equitable mortgage give rise to the rights to which a legal mortgagee is entitled under the Registration of Titles Act?
>
> What is the effect of the failure of the vendor to register the transfer which had been duly executed by all parties pursuant to and consistent with the agreement for sale?
>
> What is the effect (at law or equity) of the vendor remaining in possession after the date set for completion and at which time the purchaser was entitled to vacant possession?
>
> Do the plaintiffs/purchasers become entitled to mesne profits by virtue of the defendant's continued occupation of the premises as aforesaid, and if so, what effect does this have on the amount owing under the terms of the equitable

mortgage, if any? What rights, if any, may the subsequent purchaser Duncarl enjoy under the terms of the agreement for sale dated August 30, 2001?

One area where there is a direct conflict in the evidence on the affidavits is in relation to the question of the purported delivery to, and acceptance by, the managing director of the defendant company, of the cheque in settlement of the outstanding debt. The second plaintiff says that the cheque was delivered, that Mr. Miller opened the envelope, read it and smiled. The defendant says he got an envelope from someone he did not know, and never really "accepted" it. If the evidence is as stated by the plaintiff, might it have any effect in law or in Equity, on any powers of sale that the defendant may have as mortgagee? Does a waiver or an estoppel arise? These are serious issues of fact and law. All these make it abundantly clear, in my view that, based upon what is derived from the affidavits, there are serious issues to be tried; and accordingly, the first criterion for the grant of the injunction has been satisfied. As was stated by Lord Diplock:

> "The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case."

The second criterion which needs to be fulfilled is that, should the applicant for an interlocutory injunction be successful at the trial of the substantive action, damages would not be an adequate remedy.

Again per Lord Diplock:

> "As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however, strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in

> establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.

Note that Lord Diplock also indicated that the court must also be satisfied that the plaintiff is able to pay any damages to which the defendant may be entitled. (See my comments below on the question of the plaintiff's undertaking.)

I have already indicated that, in my view this is, in essence, a claim by the plaintiff for enforcement of his agreement for sale. It is trite law that in contracts for the sale of real property the court will grant the equitable remedy of specific performance because there is a presumption that damages will not constitute an adequate remedy.

I have accordingly, come to the view that damages would not be an adequate remedy for the plaintiff should he succeed at the trial, if the defendant were not restrained from proceeding to complete the purported sale to Duncarl. I hold that the second limb of American Cyanamid has also been made out.

Despite being satisfied on the questions of serious issues to be tried and the inadequacy of damages to compensate the successful plaintiff, the court must also be satisfied that on a balance of convenience, it is appropriate to grant the injunction. Thus, the learned author of **Spry** on ***"Equitable Remedies, Fourth Edition"***, page 462, cites Turner L.J. in ***Munroe v Wivenhoe and Brightlingsea, 46 English Reports, 1100 at page 1104.***

> "This court when called upon to grant an interlocutory injunction will act according to the justice of the case as ascertained upon the evidence before it and according to the comparative injury which may arise from granting or withholding the injunction"

Similarly, in ***Beese v Woodhouse [1970] 1 W.L.R. 586*** at page 591, it was stated that the court must decide:

> "what, on the balance of convenience, is the right order, and where lies the major risk of damage, and in particular, of any irreparable damage"

Thus, the mere fact the defendant himself, or indeed third parties, may also suffer hardship, while a material consideration in the exercise of the court's discretion, is not in and of itself enough to prevent the plaintiff succeeding. As is noted in ***Spry***, (supra) at page 462: "Hardship is no more than a discretionary consideration, which has more or less weight in the light of other circumstances such as the degree of probability that the threatened acts in question will, if they take place, be wrongful". The weight to be given to the defendant's prospective hardship will be diminished to the extent that the hardship or inconvenience to the plaintiff is determined to be substantial. As Spry notes: "So the plaintiff may be able to establish, for example, ... that his enjoyment of his property may be seriously diminished or interfered with". (See ***Newson v Ponder [1884] Ch. D. 43***)

Indeed, as Lord Diplock himself put it in American Cyanamid:

> "...The plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies". (emphasis mine)

Nor do I believe that any rights which the putative purchaser may have under the August 30, 2001, contract are of such urgency as to outweigh the considerations of the plaintiffs' need for the injunction. It follows that I believe that on a balance of convenience in this case, the injunction ought properly to be granted.

I wish to make only one further observation on the issue of the undertaking which needs to be given by the plaintiffs. It has long been established that in acceding to a plaintiff's request for an interlocutory injunction, the court will normally require the plaintiff to give an undertaking in damages in the event that the trial court finds in favour of the defendant. The reasoning behind the undertaking is succinctly put by Spry at page 473 of his book:

> "The purpose of requiring an undertaking is simply to enable the court, should it think that the justice of the case requires it, to recompense a person who has been temporarily enjoined, and, as it subsequently proves, enjoined contrary to his rights as finally ascertained, for the damage he has meanwhile suffered; and in the end, the view has prevailed that every plaintiff who is granted an interlocutory injunction ought, in the absence of the most exceptional circumstances, to be required to give an appropriate undertaking, especially since by so doing he does not assume a definite liability or obligation but merely facilitates the task of the court, at the final hearing, of making the order that is most just in all the circumstances".

In addition, while I am not called upon to decide any issues which ought properly to be left to the trial court, and it was said clearly in the Cyanamid case that the judge in the interlocutory proceedings should do nothing which may embarrass the trial court in the final hearing, I believe that it would not be improper, in the exercise of the discretion which this court undoubtedly has, to add a condition of the deposit by the plaintiffs of the outstanding mortgage sum in an interest bearing account, and I have made that a part of my Order.

Having found that the criteria for the grant of the interlocutory injunction are present, I now Order that:-

1. An interlocutory injunction is hereby granted restraining the defendant and/or its (sic) servants or agents from taking any further steps to complete the purported contract of sale between the Defendant and Duncarl Limited, such purported contract dated the 30th August 2001 and from executing or seeking to have registered any Instrument of Transfer in respect of property situated at 17 Ward Avenue Mandeville in the Parish of Manchester and registered in the Register Book of Titles at Volume 1053 Folio 757 and Volume 1035 Folio462.

2. The plaintiffs give an undertaking to abide by any order which this court may make as to damages, in case this court shall be of the

opinion that the defendant shall have sustained any, by reason of this order, which the plaintiff ought to pay.

The Plaintiffs, as a condition of this order, shall pay into an interest bearing account at a commercial bank in Kingston, in the joint names of the attorneys at law on the record, the sum allegedly due to the defendant as set out in the defendant's managing director's affidavit, to abide the outcome of the trial, to be done within ten (10) days;

A speedy trial is ordered;

A copy of this order is to be served on the Registrar of Titles;

Costs of this summons, to the plaintiffs', to be agreed or taxed;

Liberty to apply.

Leave to appeal granted, if necessary.