[2022] JMCC COMM 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00044

BETWEEN	**MB DEVELOPMENT & INVESTMENTS LIMITED**	**CLAIMANT**
AND	**A&A LIME HALL DEVELOPMENT COMPANY LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Keith Bishop and Ms. Roxanne Bailey instructed by Bishop & Partners for the Claimant/Applicant

Mr. Nigel Jones instructed by Nigel Jones & Company for the Defendant/Respondent

Mr. Alexander Williams instructed by Alexander Williams & Company for the Interested Party, Ophite Limited

Dates Heard: June 28 & 29, October 14 & 21, 2022

Civil Practice & Procedure – Application for Prohibitive Injunction – Notice of the application to be given to the Respondent – Factors to be considered when granting an injunction – Whether there is a serious issue to be tried – Whether damages is an adequate remedy – Balance of convenience

PALMER HAMILTON, J.

BACKGROUND

[1] The Claimant (hereinafter referred to as 'MB Development'), by way of a Claim Form and Particulars of Claim filed on February 9, 2022 is seeking several declarations from this Honourable Court. This matter involves the determination as

to the ownership of property located at 28 Cherry Gardens in the parish of Saint Andrew (hereinafter referred to as 'the Property'). The Orders sought by way of the Claim Form as follows:

> a. *A declaration that the Claimant is the beneficial owner of **ALL THAT** parcel of land part of Cherry Gardens now called Cherry Hill in the parish of SAINT ANDREW being the lot numbered 28 on the plan of party o Cherry Gardens now called Sherry Hill aforesaid deposited in the Office of Titles on the 22nd day of March 1995 of the said shape and dimensions and butting as appears by the said plan and being all the lands registered at Volume 1284 Folio 162 of the Register Book of Titles ("the said Property").*
>
> b. *A declaration that the Defendant holds the said property on trust for the Claimant.*
>
> c. *An order that the Defendant shall execute a transfer in favour of the Claimant in respect of the said property within seven (7) days of the date of the order.*
>
> d. *Further and/or alternatively, an order for specific performance of Agreement for Sale dated the 12th October 2021, for the Defendant to execute transfer and deliver to the Claimant, the Duplicate Certificate of Title for the said property.*
>
> e. *An order that the Registrar of the Supreme Court is empowered to sign any transfer or other documents to give effect to the transfer of the said interest in the property in the event that the Defendant shall fail, refuse and/or neglect to execute the transfer.*
>
> f. *Damages for unjust enrichment.*
>
> g. *Interest on damages*
>
> h. *Liberty to apply.*
>
> i. *Costs and Attorneys' Costs.*
>
> j. *Such further and/or other relief as this Honourable Court deems just.*

[2] It is not in dispute that the parties entered into an Agreement for Sale dated the 12th day of October, 2021 (hereinafter referred to as 'the first Agreement for Sale') for the sale of the Property from A&A Lime Hall Development Company Limited (hereinafter referred to as 'A&A Lime Hall) to MB Development. The crux of the substantive claim surrounds the true construction of special condition numbered 3

in the first Agreement of Sale between the parties. MB Development is alleging that the A&A Lime Hall breached the said Agreement for Sale when they unlawfully cancelled the sale. A&A Lime Hall denies the allegations set out against them and maintained in their Defence that the first Agreement for Sale was lawfully cancelled and there is no agreement subsisting between the parties.

[3] Special condition number 3 in the first Agreement for Sale states that, *"It is understood and agreed that if the Transfer Tax and Stamp Duty are assessed by the Stamp Commissioner on a value in excess of the purchase price herein, the Vendor shall be entitled to treat this Agreement as rescinded and to serve the Purchasers with a Notice of Rescission within 14 days of the said assessment in which event this Agreement shall automatically be rescinded, SAVE THAT, the Purchaser may within fourteen (14) days of the said assessment, pay to the Vendor'* (sic)*, any additional increase in assessment."*

[4] On or about the December 10, 2021, the Attorney-at-Law on behalf of MB Development was informed by the Attorney-at-Law on behalf of A&A Lime Hall that the Tax Administration Jamaica (hereinafter referred to as TAJ) had assessed the transfer tax at a value that is in excess of the agreed purchase price between the parties. Notice of the higher assessment was sent to MB Development on December 10, 2021. MB Development is alleging that by virtue of special condition number 3 they sent to A&A Lime Hall a Manager's Cheque representing the excess transfer tax as assessed by TAJ on the same day they were notified of the assessment. However, A&A Lime Hall makes no admission in this regard. Their defence is that, on the same day, that is December 10, 2021, they instructed their Attorney-at-Law to cancel the first Agreement for Sale pursuant to special condition number 3 and to renegotiate for a higher purchase price and they did not give any instructions or authorization to accept any payment in respect of the increased assessment by TAJ. A&A Lime Hall averred that they instructed their Attorney-at-Law to issue a Notice of Rescission pursuant to the said special condition number 3 and to return the purported payment of the excess transfer tax.

[5] MB Development is also alleging that having received a Statement of Account to Purchaser from A&A Lime Hall, it raises concern regarding monies that ought to have been returned and further evidences a breach of contract. However, A&A Lime Hall in their Defence averred that the said Statement of Account has since been corrected and sent to MB Development.

[6] Essentially MB Development is claiming that A&A Lime Hall holds the Property on trust for them and as a corollary they are the beneficial owner of the Property under the first Agreement for Sale. While A&A Lime Hall maintains that MB Development has no legal or equitable interest in the said Property as the first Agreement for Sale was lawfully rescinded and is null and void and as such is no longer binding on the parties.

[7] A&A Lime Hall has since entered into another Agreement for Sale (hereinafter referred to as 'the second Agreement for Sale) to sell the Property to a third party, Ophite Limited. This Agreement for Sale is dated the 15th day of January, 2022. Mr. Alexander Williams, a representative for Ophite Limited, was present at the hearing of the Application.

THE APPLICATION

[8] The Claim Form and Particulars of Claim was also accompanied by a Urgent Without Notice of Application for Court Orders seeking the following Orders:

> *a. The time for filing and serving this Notice of Application for Court Orders is abridged.*
>
> *b. Upon the Applicant giving the usual undertaking in damages, an injunction restraining the Defendant, A&A Lime Hall Development Company Limited and/or its nominee/s, its agent/s and/or servant/s from selling, transferring, mortgaging or otherwise disposing of or otherwise dealing in any matter whatsoever in respect of ALL THAT parcel of land part of CHERRY GARDENS now called CHERRY HILL in the parish of Saint Andrew being the lot numbered 28 on the plan of part of Cherry Gardens now called Cherry Hill aforesaid deposited in the Office of Titles on the 22nd day of March 1995 of the said shape and dimensions and butting as appears by the said plan and being all the lands registered at Volume 1284 Folio 162 of*

the Register Book of Titles ("the said property"), until the trial hereof or for such period as ordered by this Honourable Court.

c. *Costs to the Applicant to be taxed, if not sooner agreed.*

d. *Such further and/or other relief as this Honourable Court deems just.*

e. *The Applicant's attorneys-at-law to prepare, file and serve the orders herein.*

[9] The grounds of the Application were as follows:

(1) In relation to Order 1:

a. *The Applicant will be unable to give the Defendant the requisite notice, as stipulated under the Civil Procedure Rules, while at the same time, the Applicant has urgent need for the orders sought herein.*

(2) In relation to Orders 2 and 3:

a. *The Applicant is asserting that, the Claimant is the sole beneficial owner of the said property, and as a corollary the Defendant holds the Property on trust for the Claimant;*

b. *There are serious issues to be tried as the Claimant has filed its claim herein alleging that:*

i. *The Defendant has breached the agreement for sole, to the detriment of the Applicant;*

ii. *The Applicant has spent substantial sums in preparation of developing the said Property;*

iii. *If the injunction is not granted to prohibit the Defendant, its servants, agents and/or nominees from dealing with the said Property before the substantial claim is disposed of, or an interest therein created that could render nugatory any judgment that could potentially be awarded in my favour; and*

iv. *If the Court finds that the Defendant is entitled to rescind the agreement for sale of the said Property, the effect of this order would merely be a delay in its ability to deal with same and any losses suffered by it could be adequately compensated by damages.*

c. That given the issues arising herein, damages would not be an adequate remedy, if the Applicant were to succeed at trial; and

d. The balance of convenience favours the grant of the injunction in terms requested; and

(3) The granting of the orders herein will further the overriding objective.

SUBMISSIONS ON BEHALF OF THE APPLICANT

[10] Counsel on behalf of MB Development, Ms. Bailey, outlined the principles set out in **American Cyanamid Company v Ethicon Limited** [1975] AC 396 and refined by the Privy Council in **National Commercial Bank Jamaica Limited v Olint Corporation Limited** [2009] UKPC 16. Learned Counsel summarized the factors to be considered as follows:

(a) Whether there is a serious issue to be tried. If this is answered in the affirmative, then the Court is to consider whether the balance of convenience lies in favour of granting or refusing the injunction.

(b) Whether damages would be an adequate remedy. This question includes whether damages would suffice as an adequate remedy. That is, where there is a serious issue to be tried. The next step would be a consideration as to whether the applicant would be adequately compensated by damages at the trial for any loss that would have been suffered if the defendant continues to do what was sought to be stopped or changed. If damages are found to be an adequate remedy and the defendant is able to pay, then no injunction will be granted. If damages would not suffice, then the court must consider whether the defendant would get adequate compensation based on an undertaking as to damages from the applicant for any loss sustained by being so affected from the time of the injunction up to the time of trial.

(c) The balance of convenience. If there is doubt as to whether damages are adequate for either side, then the general question about the balance of convenience arises. On the other hand, if there are other factors that place the issues at an even balance then it is wise to maintain the status quo.

[11] Ms. Bailey submitted that there are 2 serious issues to be tried, that is:

(a) Whether or not the Claimant has obtained a beneficial interest in the property, and as a collar, the Defendant holds the property on trust for the Claimant; and

(b) Whether in the circumstances, the Court should make an order for specific performance of the Agreement for Sale between the parties.

[12] Counsel in dealing with the first issue submitted that there is evidence before the Court that MB Development performed all its actions in accordance with the first Agreement for Sale, that is the paying of the deposit of the purchase price, the issuing of the Letter of Undertaking, providing the Manager's Cheque for the excess transfer tax and even authorizing the Vendor to pay the outstanding property taxes from the deposit paid. She further submitted that MB Development having performed all these actions is now the beneficial owner of the property and is entitled to specific performance of the said contract. The point was also made that a beneficial interest for MB Development was created upon the parties singing the said Agreement for Sale as there was clear intention on the part of A&A Lime Hall to sell the Property to them. Ms. Bailey asked the Court to find that even though the transfer was not complete it ought not to defeat the clear intention of A&A Lime Hall. Counsel relied on the case of **Earline Lawrence v Dean Edwards** [2017] JMSC Civ 121 for this point, specifically paragraphs 44-45, which state that:

> *"[44] The Authors, Charles Harpum, Martin Dixon et al in Meggary and Wade, The Law of Real Property, 8 th Edition, highlighted that if the purchaser is potentially entitled to the equitable remedy of specific performance he obtains an immediate equitable interest in the property contracted to be sold. He is, or soon will be, in a position to call for it specifically. As equity "looks upon things agreed to be done as actually performed", the purchaser becomes the owner in the eyes of equity from the date of the contract (See; Lysaght v Edwards (1876) 2 Ch D 499 at 506 - 510). It is therefore irrelevant that the date for completion (when the purchaser may pay the price and take possession of the land) has not arrived.*
>
> *[45] The purchaser does not of course become the legal owner of the land until it is conveyed to him or he is registered as proprietor of it. The purchaser becomes owner in equity through the operation of the doctrine of conversion (See; Lysaght v Edwards (1876) 2 Ch D 499 at 506).*

[13] Counsel Ms. Bailey contended that should the injunction not be granted MB Development could run the real risk of losing its interest in the property to a bona fide purchaser for value without notice as the said property would be disposed of,

or interest created that could render nugatory any judgment that could potentially be awarded in her client's favour.

[14] In dealing with the second consideration, she submitted that damages are not an adequate remedy where the Claimant is claiming a beneficial interest in the subject property for which it is being asserted that the legal interest ought to be transferred to them. Counsel further submitted that damages would be an adequate compensation for the Defendant as the effect of the injunction being improperly granted would only delay its ability to recover money on a sale of the property, which in this case is quantifiable. In any event, there is sufficient evidence to prove MB Development's undertaking to pay damages if the Court makes an award in favour of A&A Lime Hall.

[15] Counsel Ms. Bailey further contended that if the Court is not minded to find that damages would be an adequate remedy, the balance of convenience ought to lie in favour of the granting of the injunction. She relied on the cases of **American Cyanamid** and **NCB v Olint**. She further submitted that MB Development would suffer irremediable prejudice if A&A Lime Hall whether by itself, its servants, agents, nominees or otherwise are allowed to dispose of or interfere with the property. On the other hand, A&A Lime Hall would suffer no prejudice as all that would be suffered is the mere inconvenience of being kept out of money from the sale of the property.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[16] Counsel Mr. Jones identified the following issues to be determined in deciding whether or not to grant the injunction:

> *(a) Whether having regard to the existence of the 2nd Agreement/Transaction, the Defendant can, at this point, be restrained from transferring its property to a third party, even if it was liable for any breach under the 1st Agreement;*
>
> *(b) Whether the Defendant lawfully cancelled the 1st Agreement; and*

(c) Whether the balance lies in favour of granting the injunction having regard to:

i. damages being an adequate remedy;

ii. the strength and value of any undertaking given;

iii. etc…

[17] Mr. Jones relied on the principles as summarized on pages 165 to 168 in the text Commonwealth Caribbean Civil Procedure and in the case of **TPL Limited v Thermo-Plastics (Jamaica) Limited** [2014] JMCA Civ 50.

[18] Learned Counsel, Mr. Jones submitted that it is trite law that the Court will not ultimately grant specific performance if the effect of that will be causing the Respondent to interfere/terminate/cancel/breach a contract with a third party. Counsel contended that what is a bona fide purchaser for value is one for the Court's determination at trial and it is unchallenged as there is no contrary assertion made by MB Development. MB Development is therefore not entitled to the relief sought as to grant them such a relief would mean that A&A Lime Hall would be breaching the first Agreement for Sale with Ophite Limited. He relied on the case of **Warmington and another v Miller** 1973 QB 877 which stated that:

> *"I turn to consider the alternative submission advanced on behalf of the landlord that the judge ought not to have ordered specific performance requiring the landlord to do what which he cannot do under the terms of the lease under which he holds the premises and which, if he did, would expose him to proceedings for forfeiture. In my judgment, that submission is well founded. I can see nothing in this case to take it outside the practice of the court, in determining whether to exercise its discretionary power to grant the equitable remedy of specific performance, not to do so where the result would necessitate a breach by the defendant of a contract with a third party or would compel the defendant to do that which he is not lawfully competent to do…. Here the landlord is under an unqualified covenant in his lease not to underlet or part with possession of part only of the premises demised to him. To order him to specifically perform the contract by granting an underlease and so allowing the tenants to retain possession would be to order him to do something he cannot do or, if he did it, would expose him to a forfeiture."*

[19] Counsel contended that MB Development will have to convince this Court that it should not give effect to a clause which provides for an unlawful payment. He relied

on section 3(1) of the Transfer Tax which imposes an obligation on the vendor to pay the transfer tax. To continue with the first Agreement for Sale would therefore involve the breach of the laws of the land. Mr. Jones submitted that there is no ambiguity in special condition numbered 3 as the saving provision of the said condition is not enforceable and what is left allows his client to rescind and that is what was done by his client. Having regard to that, there is no serious issue to be tried and based on the injunction principles that ought to be the end of the matter.

[20] In the event that they are incorrect and the Court is of the view that there is a serious issue to be tried, submissions were made on the balance of convenience. In dealing with this aspect, Counsel Mr. Jones submitted that damages are an adequate remedy. He discerns from the name of the Applicant that the intention is for the company to generate profit or some other form of pecuniary gain from the Property. No evidence has been led to suggest otherwise and certainly damages can be assessed. Counsel also challenged the strength of and value of the undertaking given as it is not the historical position of the Claimant, it is the position of the Claimant at the time the application was made. MB Development has not provided any evidence from which this Court could make the assessment and determine that it could pay damages.

[21] Counsel contended that the balance of convenience weighs in favour of his client. MB Development has not shown that this piece of land is of intangible value and which has such intrinsic value to them.

ISSUES

[22] The main issue for my determination is whether the Application for interim injunction should be granted. There are several sub-issues which arise and which will help to determine whether the interim injunction ought to be granted. They are:

(a) Whether there is a serious issue to be tried;

(b) Whether damages would be an adequate remedy for the Applicant. If damages are not an adequate remedy for the Applicant, is the Applicant's undertaking in damages adequate for the Respondents?; and

(c) Whether the balance of convenience lies in favour of the granting of the Application.

LAW AND ANALYSIS

[23] The Court is empowered under Rule 17.1 of the Civil Procedure Rules 2020, as amended (hereinafter referred to as 'the CPR') to grant an interim injunction. Under Rule 17.4 of the CPR the Court may grant an interim order for a period of not more than twenty-eight (28) days on an application made without notice if it is satisfied that no notice is possible in the case of urgency or that to give notice would defeat the purpose of the application. The Application before me was made without notice to the Respondent. However, based on the ruling in **National Commercial Bank Jamaica Limited v Olint Corporation Limited** [2009] UKPC 16, I was and still am of the view that some notice ought to have been given to the Respondent. When the Application first came before me the interim injunction was granted for twenty-eight (28) days and it was set for another date to facilitate some form of notice being given to the Respondent, which was complied with.

[24] Lord Hoffman in **NCB v Olint** stated that:

> *"Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."*

[25] In determining whether or not to grant an interim injunction, the Courts are guided by the dicta of Lord Diplock in the locus classicus case of **American Cyanamid Co. v Ethicon Ltd. [1975] 1 All ER 504,** where he identified the list of principles as guidance for factors to be considered in doing so. The principles have been adopted in our jurisdiction. Mangatal J in the case **Michelle Smellie & Ors. v National Commercial Bank Jamaica Limited** [2013] JMCC Comm. 1 at paragraph 5 outlined the following considerations which arose in the cases of **American Cyanamid** and **NCB v Olint**:

> *(a) Is there a serious issue to be tried? If there is a serious question to be tried, and the claim is neither frivolous nor vexatious, the court should then go on to consider the balance of convenience generally.*
>
> *(b) As part of that consideration, the court will contemplate whether damages are an adequate remedy for the Claimants, and if so, whether the Defendants are in a position to pay those damages.*
>
> *(c) If on the other hand, damages would not provide an adequate remedy for the Claimants, the court should then consider whether, if the injunction were to be granted, the Defendants would be adequately compensated by the Claimants' cross-undertaking in damages.*
>
> *(d) If there is doubt as to the adequacy of the respective remedies in damages, then other aspects of the balance of convenience should be considered.*
>
> *(e) Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are designed to preserve the status quo.*
>
> *(f) If the extent of the uncompensatable damages does not differ greatly, it may become appropriate to take into account the relative strength of each party's case. However, this should only be done where on the facts upon which there can be no reasonable or credible dispute, the strength of one party's case markedly outweighs that of the other party.*
>
> *(g) Further, where the case largely involves construction of legal documents or points of law, depending on their degree of difficulty or need for further exploration, the court may take into account the relative strength of the parties' case and their respective prospects of success. This is so even if all the court can form is a provisional view-see **NCB v. Olint**, and the well-known case of **Fellowes v.***

> ***Fisher*** *[1975] 2 All E.R. 829. This is of course completely different from a case involving mainly issues of fact, or from deciding difficult points of law, since, as Lord Diplock points out at page 407 G-H of* ***American Cynamid****, "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult points of law which call for detailed argument and mature considerations".*
>
> *(h) There may also be other special factors to be taken into account, depending on the particular facts and circumstances of the case.*

[26] The purpose of granting the injunction was laid down in the decision of the Privy Council in the **NCB v Olint**. Lord Hoffman in reiterating the principles in **American Cyanamid** stated that:

> *"It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result."*

[27] In the case of **Cavne & Another vs Global Natural Resources** (1984) 1 AER 225 it was held that where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the Court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice and to balance the risk of doing an injustice to either party.

A. *Is there a serious issue to be tried?*

[28] In the case of **American Cyanamid** Lord Diplock in addressing the Court's consideration of whether there is a triable issue in the matter stated that:

> *"…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 on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law*

> *which call for detailed argument and mature considerations. These are matters to be dealt with at the trial… So* ***unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought****. [emphasis added]"*

[29] George J in addressing this consideration stated at paragraphs 14 and 15 in the case of **Pamela Reidy v Joni Young-Torres (Administrator Estate Karl Young)** [2017] JMSC Civ. 189 stated that:

> *[14] Lord Diplock in the Privy Council decision of* ***ENG Mee YONG and Others v Letuchasan****, 1979 UKPC 13 (4th April 1979), made it clear that:*
>
> > *"The guiding principle in granting an interlocutory injunction is the balance of convenience. There is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a 'probability,' a 'prima facie case' or 'a strong prima facie case' that if the action goes to trial, he will succeed; but before any question of a balance of convenience can arise, the party seeking the injunction must satisfy the court that his claim is neither frivolous or vexatious; in other words that the evidence before the court discloses there is a serious question to be tried, American Cyanamid v Ethicon Ltd. (1975) AC396."*
>
> *[15] This principle has been somewhat refined or qualified by later cases such as Olint, where the Court uses expressions such as the Claimant 'must show a prospect of success' and in some cases, a real prospect of success. (See: paragraph 23 of Olint). This of course should not be strange concepts, as in considering a serious issue to be tried, this must necessarily involve an assessment of any prospect of success."*

[30] Likewise, the test for 'serious question' was characterized in the case of **Australian Broadcasting Corporation v O'Neill** [2006] HCA 46; 229 ALR 457 as:

> *"whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief".*

[31] The authors in the text Commonwealth Caribbean Civil Procedure listed the guidelines upon which the Court should exercise its discretion to grant or refuse an interlocutory injunction as established in **American Cyanamid**. In dealing with this issue of whether there is a serious question to be tried they stated at pages 165-166 that:

> *"The court should not 'at this stage try to resolve conflicts of evidence on affidavits as to the 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. These are matters to be dealt with at trial."*

[32] In keeping with the principles as laid out in the case law the Court must consider whether the Applicant's case is one that is not frivolous. In doing this, the Court has to examine the merits of the case and make an assessment as to any prospect of success the Applicant has. Therefore, I must consider the evidence before me and make a determination as to whether MB Development has a real prospect of success.

[33] However, at this juncture, my role is not to resolve the issues and the opposing views raised by the parties. My role is to determine that the issues raised by the Applicant has *"sufficiently plausible grounds for granting the final relief,"* as was so ably described by Gleeson CJ in **Australian Broadcasting Corporation v Lenah Game Meats Pty Limited** [2001] HCA 63; 185 ALR 1.

[34] As already indicated the crux of the matter surrounds the interpretation of special condition number 3 in the first Agreement for Sale. That special condition gives the vendor, A&A Lime Hall, the option to rescind the contract where TAJ has assessed the transfer tax and stamp duty at a higher rate than what was agreed between the parties save that the purchaser, MB Development, may pay that increase as assessed.

[35] MB Development is claiming that they have a beneficial interest in the Property. I found the cases of **Earline Lawrence v Dean Edwards** and **Lysaght v Edwards**, which Counsel Ms. Bailey relied on to be useful. The principle arising from those

cases is that a purchaser obtains an immediate equitable interest in the Property contracted to be sold but of course, does not become the legal owner of the land until it is conveyed to him. This can be seen in the case before me. MB Development is claiming that they have an equitable interest in the Property by virtue of the first Agreement for Sale. This is not an issue for me to make a determination now but it does assist in showing that MB Development has a real prospect of success at the trial on the substantive claim.

[36] A&A Lime Hall's position is that they did in fact rescind the agreement once they knew that the transfer tax was assessed at a higher rate than was agreed and in any event aspects of that special condition are unenforceable. Essentially their argument is that, MB Development's claim has no standing as the part of the special condition that they are relying on is not to be enforced. In my view that is a question of law for a tribunal to determine. The Court will have to make a determination as to the meaning that ought to be given to the "save that" provision in special condition numbered 3. If the Court is to rule in favour of MB Development, then the first Agreement for Sale would still be valid and they would be entitled to specific performance.

[37] There are other issues that arise, such as whether Ophite Limited is in fact a bona fide purchase for value without notice. If the answer to that question is in the affirmative, then it may defeat the first Agreement for Sale. This particular issue is dealt with in more detail in determining where the balance of convenience lies.

[38] In my judgment, these are issues that require a fuller investigation into the facts and a thorough examination of all the circumstances and the material negotiations to determine what the parties intended and what meaning ought to be given to special condition number 3. It cannot be said that MB Development's claim is either frivolous or vexatious and it cannot be described as one which fails to disclose any real prospect of success. In my view, there is much that is in dispute that needs to be resolved by a tribunal of law and fact. There is a serious question to be tried and I therefore find accordingly.

B. *Whether damages would be an adequate remedy for the Applicant. If damages are not an adequate remedy for the Applicant, is the Applicant's undertaking in damages adequate for the Respondents?*

[39] Having determined that there is a serious issue to be tried, I must now determine whether damages would be an adequate remedy to compensate the Applicant for any harm suffered in the event that he is successful at trial but the injunction was not granted.

[40] Clarke J. in the case of **Sheridan v The Louis Fitzgerald Group Ltd.** [2006] IEHC stated: -

> *"It is well established that in order to obtain interim or interlocutory relief a plaintiff must satisfy the court that damages would not be adequate to compensate the plaintiff in the event that he should establish his case at trial but not have obtained an interlocutory injunction....In Smith Cline Beacham [sic] PLC v. Genthon BV (unreported, High Court, 28th February, 2003, Kelly J.) this court noted that the onus was on the plaintiff, as a matter of probability, to demonstrate the risk that damages would prove to be an inadequate remedy."*

[41] In the Privy Council decision of **NCB v Olint**, Lord Hoffman at paragraph 16 of his judgement stated:

> *"At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction."*

[42] Lord Hoffman also stated at paragraph 16 that:

> *"…if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."*

[43] In the case of **Tewani Ltd. v KES Development Co. Ltd. and ARC Systems Ltd. Claim No. 2008 HCV02729, unreported, delivered July 9, 2008** Brooks J stated that:

> *"The second question to be analysed is whether damages would provide an adequate remedy for a claimant who succeeds at trial but was denied an interim injunction. Where damages will provide an adequate remedy then the injunction should not be granted. (Per Lord Diplock in American Cyanamid (cited above) at page 510g)"*

[44] His Lordship went further to consider this principle in relation to the subject matter of real property. He stated that:

> *"The significance of the subject matter being real property, raises a presumption that damages are not an adequate remedy, and no enquiry is ever made in that regard. The reason behind that principle is that each parcel of land is said to be "unique" and to have "a peculiar and special value"".*

[45] I am also guided by the case of **Arleen McBean v Sheldon Gordon, Patrae Rowe and The Police Federation** [2019] JMSC Civ. 38 where Bertram Linton J stated:

> *"On the authority of Brerton J in **Goyal v Chandra** 68 NSWLR 313, an application for an interlocutory injunction should not be granted where there is an adequate remedy in damages. However, if damages are available as a remedy but are inadequate, the onus is on court to use its discretion while considering among other things "the extent to which any damage to the plaintiffs can be cured by payment of damages rather than by the granting of an injunction". The germane question should be "is it just, in all the circumstance, that a plaintiff should be confined to his remedy in damages?"*

[46] I also found the case of **Lookahead Investors Limited v Mid Island Feeds (2008) and Others** [2012] JMCA App 11 to be useful in regards to the inadequacy of damages in a matter concerning land. Brooks JA stated that:

> *"[38] …I am inclined toward the school of thought that contends that, where land is concerned, it is presumed that damages are not an adequate remedy, and no enquiry should ever be made in that regard. The reason behind that thinking is that each parcel of land is said to be "unique" and to have "a peculiar and special value" (see page 32 of Specific Performance 2nd Ed. by Gareth Jones and William Goodhart). That reasoning may be found in the judgement*

> *of Hardwicke LC in **Buxton v Lister & Cooper** (1746) 3 Atkyns Reports 383, when he said at page 384:*
>
> > *"As to the cases of contracts for purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them**, it is on a particular liking to the land, and it is quite a different thing from matters in the way of trade**." (Emphasis supplied)*
>
> *[39] The principle seems to apply even if the transaction in respect of the land is part of a commercial venture. In **Verrall v Great Yarmouth Borough Council** [1981] 1 QB 202 at page 220 B-C Roskill LJ said, in the context of an application for specific performance of a commercial contract to lease a hall:*
>
> > *"It seems to me that, since the fusion of law and equity, it is the duty of the court to protect, where it is appropriate to do so, any interest, whether it be an estate in land or a licence, by injunction or specific performance as the case may be."*

[47] In the light of the abovementioned principles and case law, if the Court is of the view that MB Development would be adequately compensated by an award of damages, in the event that they are successful at trial, then an injunction ought not to be granted. However, if the Court finds that damages would not be adequate then the Court must go on to consider whether A&A Lime Hall would be adequately compensated based on the undertaking given by MB Development for any loss suffered as a result of the injunction being granted.

[48] I find merit in Counsel Mr. Jones' submission that damages are an adequate remedy as MB Development has identified no unique features or purpose in relation to the Property. It is accepted that the presumption in law is that each parcel of land is unique and has a peculiar and special value. I note here however that there have been cases where the Court has departed from this presumption. One such case being **Global Trust Ltd and another v Jamaica Redevelopment Foundation Inc. and another** SCCA No 41/2004 (delivered 27 July 2007), where Court of Appeal held that damages would be an adequate remedy as the property had no intrinsic value which would defy ready monetary conversion.

[49] Even though the cases all say that land in and of itself is of a unique nature, no evidence has been put forward by MB Development to show that the land possesses any special or particular feature that defies ready monetary conversion.

[50] On the one hand, it is unlikely that damages would suffice as MB Development will be unable to get back what they lost if the injunction is not granted, as their substantive claim is for specific performance in relation to the Property. If the injunction is not granted, then A&A Lime Hall has the opportunity to dispose of the Property rendering their claim nugatory. On the other hand, damages might cure any harm suffered by MB Development if the injunction is not granted as there is no evidence to show that losses are not quantifiable. On the contrary, damages would be adequate for A&A Lime Hall if the injunction is granted and at the trial of the substantive claim it is found that it ought not to have been granted.

[51] I am guided by the case of Mangatal JA in the case of **TPL Limited v Thermo-Plastics (Jamaica) Limited [2014] JMSC Civ 50** paragraph 67 and relied upon by Counsel Mr. Jones. Paragraph 67 states that:

> *"Counsel for the respondent is correct that there is no rule "writ in stone" that the court must require evidence as to a party's ability to give a cross-undertaking as to damages before an interlocutory injunction will be granted. However, that is as far as it goes. It is completely fallacious to suggest that rule 17.4(2) of the CPR, which deals with procedure, governs or has changed the substantive law in relation to interlocutory injunctions. The proper usual practice and law is, and has been, to require evidence both of a willingness and an ability to provide a proper undertaking as to damages. It would be quite impossible to carry out the balancing exercise required by the court as referred to in American Cyanamid and more recently in NCB v Olint and to arrive at a proper assessment of which course is likely to cause the least irremediable prejudice without requiring some substantiation of an applicant's posture and capacity to pay damages in the event that they are required to do so. Indeed, the practice has been particularly so in relation to companies, and commercial matters. Some authorities even go so far as to suggest that where a company is concerned, financial statements, records or accounts should be placed before the court in order that the court can properly assess the adequacy of the remedy of damages to the defendant and the claimant's financial ability to pay them. It is trite law that courts act on evidence and not bar assertions. Of course, in this case, the respondent did not even express a willingness to give an undertaking as to damages, much less assert or elucidate upon its financial ability to fulfil such a commitment."*

[52] Ms. Bailey submitted what she considers to be evidence of her client's ability to give an undertaking as to damages which she is saying is adequate compensation for A&A Lime Hall. However, Mr. Jones contended that there is nothing to suggest that MB Development can satisfy the undertaking as to damages.

[53] I find merit in Counsel Mr. Jones' arguments that it is not about the historical position of the claimant; it is the position of the claimant at the time the application is being made. However, the Court can exercise its discretion while considering the extent to which damages can cure the harm suffered by the person seeking the injunction.

[54] In light of the considerations outlined by Mangatal J in the case of **Michelle Smellie** and what Bertram Linton J noted in the **Arleen McBean** case if there is doubt as to the adequacy of the respective remedies in damages, then other aspects of the balance of convenience should be considered. Therefore, I will consider whether the balance of convenience lies before making a determination as to whether or not damages are adequate.

C. *Whether the balance of convenience lies in favour of the granting of the Application.*

[55] I now turn my focus in determining whether the balance of convenience lies in favour of granting or refusing the application. I will take into account the relative strength of each party's case. However, in the words of Mangatal J in **Michelle Smellie**, this should only be done where on the facts upon which there can be no reasonable or credible dispute, the strength of one party's case markedly outweighs that of the other party.

[56] Brerton J in **Goyal v Chandra** guided the courts in assessing this factor by giving the key consideration of whether or not irreparable injury will occur if an injunction is not granted. The onus is therefore on the applicant to show as a precondition that there is a threat of irreparable injury, which if not prevented by injunction cannot be afterwards compensated for by damages.

[57] Bertram Linton J in the case of **Arleen McBean** referred to the text Injunctions and Specific Performance which defined what is meant by irreparable harm. Robert Sharpe, the author, on page 2 states that irreparable harm *"has not been given a definition of universal application: its meaning takes shape in the context of each particular case."* The author went on to identify irreparable harm as a consideration made on a case by case basis. He theorizes that the courts have held that irreparable harm includes loss of goodwill or irrevocable damage to reputation, loss of market share (though not necessarily irreparable if the loss is recoverable) and permanent loss of natural resources.

[58] To quote the words of Lord Diplock in **American Cyanamid.**:

> *"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****. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake;* ***whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial****.[emphasis added]"*

[59] It is already my judgment that there are serious issues to be tried in this case. I must now determine where and with whom the balance of convenience lies. Counsel Ms. Bailey submitted that her clients would suffer irremediable prejudice if A&A Lime Hall, its servants and/or agents and/or nominees or otherwise are allowed to dispose of or interfere with the Property. She further submitted that there would be no prejudice suffered by A&A Lime Hall as all that would be suffered is the mere inconvenience of it being kept out of money from the sale of the Property.

[60] On the other hand, Mr. Jones' position is that the balance of convenience lies with his client, as to give effect that special condition would cause his clients to breach the second Agreement for Sale. I will now consider whether Ophite Limited is in fact a bona fide purchaser for value which would have great and grave impact on the first Agreement for Sale.

[61] Jackson-Haisley in the case **Glenton Mcfarlane v Hopeton Ferguson** [2017] JMSC Civ 21. Jackson-Haisley J described the concept of a bona fide purchaser for value without notice as follows:

> *"In order to qualify as a bona fide purchaser for value without notice, the Defendant must have given valuable consideration and must have acted in good faith. He must also have acquired some legal estate in land and he must have had no notice of the Claimant's interest whether actual, constructive or imputed. These requirements are set out by James. LJ in Pilcher v Rawlins L.R. Ch. App. 259. The defence of bona fide purchaser for value without notice is said to be an absolute, unqualified and unanswerable defence, and an unanswerable plea to the jurisdiction of the court."*

[62] There is no evidence before me from Ophite Limited or from A&A Lime Hall that they in fact qualify as a bona fide purchaser for value without notice. In fact, a representative from Ophite Limited was present at the hearing of the application but no submissions led on their behalf. No submissions were put forward as to whether Ophite Limited does in fact qualify as a bona fide purchaser for value without notice. The only thing put forward was that A&A Lime Hall has now sold the Property and the second Agreement for Sale was exhibited.

[63] There not being any evidence before me, I am unable to make a finding that Ophite Limited is a bona fide purchaser for value without notice. However, if the substantive claim is ruled in favour of MB Development, the second Agreement for Sale would not be valid. Ophite Limited would have to bring their own claim against A&A Lime Hall for any damages suffered as a result of A&A Lime Hall wrongfully cancelling the first Agreement for Sale and subsequently entering into the second Agreement for Sale. Therefore, in my view, the fact that A&A Lime Hall entered into a second Agreement for Sale does not diminish the fact that the first Agreement for Sale might be found to still be valid at the trial of the substantive claim.

[64] Counsel Mr. Jones relied on the case of **Warmington v Miller** to support his point regarding the unenforceability of the first Agreement for Sale. However, that case is distinguishable from the present case before me. In **Warmington** there was a

clear covenant prohibiting the defendant from assigning, underletting or parting with possession part only of the demised premises. The plaintiff entered into an agreement with the defendant to grant the plaintiff tenancy of part of the demised premises. The plaintiff sued the defendant for specific performance. The Court held that they would not order the defendant to do that which he cannot do under the terms of the lease. The court continued that a party must show, that in seeking specific performance, he does not call upon the other party to do an act which he is not lawfully competent to do. In the instant case, the special condition was not clear and it is, as I mentioned earlier, the crux of the substantive claim. The outcome of this matter turns on the interpretation that the Court will give to the said special condition.

[65] I am of the view that there is a high possibility that MB Development might suffer irreparable harm if the injunction is not granted as their substantive claim will be rendered nugatory if the Property is disposed of before the trial. MB Development stands to suffer greater prejudice if the injunction is not granted. They have filed a claim seeking specific performance for a contract that they are saying is not cancelled. If A&A Lime Hall is given the opportunity to dispose of the Property then essentially, MB Development will be confined to a remedy in damages and that, in my view is not adequate. I believe that this case is one instance in which injunctive relief is necessary to restore the status quo prior to the hearing of the substantive claim and to prevent any further disturbance of the status quo until the matter is determined.

[66] It is my judgment that the balance of convenience weighs in favour of the granting of the application.

CONCLUSION

[67] While the Court uses the principles laid out in American Cyanamid as a guide in determining whether to grant an interim injunction, they are not to be seen as a checklist rule. This was stated by Anderson J in **Agatha Pettigrew v Colleen**

Theresa Danvers Channer [2010] JMSC Civil 16. It is while considering the balance of convenience that the Court will determine where the greater risk of injustice will lie. It is incumbent on me to ensure that whatever order I make, will result in the least risk of injustice.

[68] In light of the reasons abovementioned, I therefore conclude that the injunction requested ought to be granted until trial, when the dispute between the parties on the substantive claim is determined or until further orders of the Court.

ORDERS & DISPOSITION

[69] Having regard to the forgoing these are my Orders:

(1) Paragraph 2 of the Claimant's/Applicant's Urgent Without Notice Application for Court Order dated February 4, 2022 and filed February 9, 2022 is granted:

> "The Defendant/Respondent, A&A Lime Hall Development Company Limited and/or its nominee/s, agent/s and/or its servant/s are restrained from selling, transferring or mortgaging or otherwise disposing of or dealing in any matter whatsoever in respect of **ALL THAT** parcel of land part of Cherry Gardens now called Cherry Hill in the parish of Saint Andrew being the lot numbered 28 on the plan of part of Cherry Gardens now called Cherry Hill aforesaid deposited in the Office of Titles on the 22nd day of March 1995 of the said shape and dimensions and butting as appears by the said plan and being all the lands registered at Volume 1284 Folio 162 of the Register Book of Titles ("the said Property") until the claim is determined or further orders of the Court."

(2) The Claimant/Applicant, through their Counsel, is to give the usual undertaking as to damages.

(3) Costs of this Application awarded to the Claimant/Applicant to be taxed if not agreed.

(4) The Claimant's/Applicant's Attorneys-at-Law to prepare, file and serve Orders made herein.