IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2006HCV01377

BETWEEN	PATVAD HOLDINGS LIMITED	1st CLAIMANT
AND	VIVIAN DALEY	2nd CLAIMANT
AND	PATRICIA DALEY	3RD CLAIMANT
AND	JAMAICAN REDEVELOPMENT FOUNDATION INC.	1ST DEFENDANT
AND	DENNIS JOSLIN JAMAICA INC.	2ND DEFENDANT

IN CHAMBERS

Mr. Peter Simmonds and Mr. Herbert Grant instructed by DunnCox for the Claimants.

Mr. Maurice Manning and Miss Tavia Dunn instructed by Nunes, Scholefield DeLeon & Co. for the Defendants.

HEARD: OCTOBER 2, 2006 & MARCH 9, 2007

McDONALD-BISHOP, J. (Ag)

1. On October 2, 2006, I heard an application by the claimants for an interlocutory injunction to prevent the defendants from exercising a power of sale under a mortgage in respect of premises at 25 Seymour Avenue, Kingston 6 in the parish of St.Andrew. At the end of the hearing, I denied the application and gave an oral synopsis of my reasons for so doing. I promised then that I would reduce my reasons into writing at a later date. I now undertake to fulfill that promise.

2. The first claimant is a limited liability company registered under the laws of Jamaica with registered offices at 25 Seymour Avenue, Kingston 6 in the parish of St. Andrew. It is also the registered proprietor of the said premises. The second and third claimants are husband and wife respectively and the sole directors and shareholders of the first claimant. They also reside at 25 Seymour Avenue which has been their matrimonial home since 1987.

3. In or around August 1995, the second and third claimants secured a loan in the sum of $18.1m plus interest from the Capital Assurance Building Society (CABS) in order to liquidate a debt owed by the first claimant to the former Century National Bank (CNB). This loan from CABS was secured by a mortgage on 25 Seymour Avenue (the mortgaged property) dated April 1, 1996. The CNB loan was thus fully discharged.

4. They then secured an additional loan from CABS in the sum of $7m bringing their total indebtedness to CABS to $25.1m. The $7m was borrowed to discharge a mortgage in favour of Victoria Mutual Building Society (VMBS) and Island Life Merchant Bank (ILMB) that was held over another property, 18 Hopefield Avenue. This property was owned by the second claimant and a third party. It was the plan of the second claimant that 18 Hopefield Avenue was to be developed into town houses for sale and the proceeds used to liquidate the CABS loan of $25.1m. This plan of the claimant was brought to the knowledge of CABS.

5. CABS later got into financial difficulties and its temporary management was assumed by the Ministry of Finance in or around February, 1998. There was then a transfer of CABS' debt portfolio to FINSAC or its subsidiary Refin Trust. Subsequently, by a Deed of Assignment dated January 30, 2002, this debt of $25.1m was assigned to the first defendant. The first defendant, therefore, became the mortgagee in respect of the mortgaged property. The second defendant is 'Loan Servicer' for the first defendant and is sued as its agent.

6. Following on a dispute between the parties and an attempt by the first defendant to exercise its power of sale in or around June 2004, a settlement was arrived at between the parties. This resulted in the signing of an Agreement to Restructure Existing Debt in December 2004 that was agreed to take effect as of October, 2004 (the Agreement). The claimants along with two other related companies signed as borrowers while the second and third claimants along with one of the said companies signed as guarantors of the loan.

7. By virtue of the Agreement, a supplemental mortgage was executed in respect of the said 25 Seymour Avenue to secure the principal sum of US$ 1,100,000.00. This mortgage was duly registered on 9th January 2006. There were thus two mortgages in favour of the first defendant in respect of the mortgaged property: the one registered April 1, 1996 in respect of which it was the assignee and the other, the supplemental mortgage registered January 9, 2006.

8. The claimants defaulted in repaying the loan on the terms and conditions stipulated in the Agreement and so the first defendant proceeded to take steps to exercise its power of sale. Consequently, by Notice of Application dated April 11, 2006, the claimants sought an injunction in the following terms:

> *"An injunction restraining the Defendants and each of them whether by themselves, their respective servants, agents, Directors, Officers or otherwise howsoever for a period of 28 days from the date of the order made herein from selling the First Claimant's property at 25 Seymour Avenue by Public Auction or otherwise and from taking any steps to enforce the said mortgagees numbered 924546 registered on the first day of April, 1996 as well as that mortgage registered on the 9h January, 2006 and numbered 1391672 in respect of the Mortgaged Property."*

9. On April 11, 2006, an exparte interim injunction was granted pending an inter partes hearing. This injunction was subsequently extended by successive judges. On September 14, 2006 a condition was imposed by Rattray, J. that the claimants should pay a sum of U.S. $10,000.00 to the first defendant on or before the 25th September,

2006 by 4:00 p.m. failing which the application for interim injunction was to stand dismissed. The matter was then adjourned for October 2, 2006. The condition imposed by Rattray, J. was fulfilled by the claimants and so the matter came before me for hearing as to whether the injunction should be granted pending trial of the claim.

10. The claimants' case rests solely on the affidavits of the second claimant filed on April 11, 2006 and June 13, 2006 in support of the application and in response to the affidavit of Ms. Janet Farrow, Chief Executive Officer of the first defendant's Jamaican operations, dated June 2, 2006. Mr. Simmonds contended, on behalf of the claimants, that based on the remedies being sought as set out in their amended claim form dated July 10, 2006, an interim injunction is necessary to restrain the first defendant from exercising its power of sale.

11. In relying on the principles formulated by Lord Diplock in **American Cyanamid v Ethicon** [1975] 1 All E.R. 504 (**American Cyanamid**), he argued that the injunction ought to be granted because there are serious questions of law to be tried and that damages would not be an adequate remedy. He stated that on the balance of convenience, an injunction should be granted. According to him, the first defendant is a foreign company that would in no way be displaced or prejudiced if an injunction were to be put in place until trial. He argued that if the first defendant were to sell the property now, there is no guarantee that it would be around at time of trial to compensate the claimants, if the claimants were to be successful.

12. The application was strongly opposed by the defendants who, through their counsel, Mr. Manning, maintained that the circumstances do not fall within the realm for the grant of an injunction pending the determination of the matter. They relied on the affidavit of Ms. Janet Farrow dated June 2,2006 and on documents exhibited to the affidavits of the second claimant as showing the factual basis upon which the application ought to be denied. Mr. Manning argued that the claimants

have not deponed to any facts that would support an application for an interlocutory injunction within the principles of **American Cyanamid**.

13. The general principles governing the grant of an interim injunction are, by now, well established following on the authoritative pronouncements of Lord Diplock in **American Cyanamid**. I consider it quite useful to illuminate the main planks of Lord Diplock's guidelines, which are set out seriatim.

(i) The claimant need not establish a prima facie case but merely that there is a serious question to be tried on the merits. All that needs to be shown is that the claim is not frivolous or vexatious. Unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the claimant has any real prospect of succeeding in his claim for a permanent injunction at trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief.

(ii) As to that [the balance of convenience], the governing principle is that the court should first consider whether if the claimant were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. If damages would be an adequate remedy and the defendant would be in a financial position to pay them, then no interlocutory injunction should normally be granted, however strong the claimant's claim appeared to be at this stage.

(iii) If, on the other hand, damages would not be an adequate remedy for the claimant in the event of him succeeding at trial, the court should then consider whether, if the injunction were granted, the defendant would be adequately compensated under the claimant's undertakings as to damages. If damages recoverable under the undertaking would be

an adequate remedy, and the claimant would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.

(iv) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party that the question of balance of convenience arises. According to Lord Diplock *"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."*

(v) Where other factors are evenly balanced, it would be prudent to take such measures as are calculated to preserve the status quo.

(vi) A significant factor in assessing where the balance of convenience lies is the extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at trial. If the extent of the uncompensatable disadvantage to each party would not differ greatly, then in tipping the balance, it would be proper to take into account the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. However, this should only be done when it is apparent on the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the relative strength of either party's case.

(vii) In addition to the factors that have been noted [in assessing the balance of convenience] there may be other special factors to be taken into consideration in the particular circumstances of individual cases.

14. It must be noted that in speaking of the **American Cyanamid** principles, the learned authors of **Blackstone's Civil Practice 2004** at paragraph 37.19 pointed out that *"the court must also be careful to apply the overriding objective and to grant an injunction only if it is just and convenient."* According to them, *"the underlying purpose of the guidelines is to enable the court to make an order that will do justice between the parties, which ever way the decision goes at trial, while interfering with the parties freedom of action to the minimum extent necessary (see Polaroid Corporation v Eastman Kodak Co **[1977] RPC** 379 per Buckley LJ at p .395.)"* I accept this as a sound and useful principle.

15. The same authors have noted and with which I agree that although the **American Cyanamid** principles provide great authority on the question of the grant of interim injunctions, they are not to be treated as if they are statutory provisions: **Blackstone's** (supra). I agree that given the nature of an injunction as an equitable remedy, there must be some degree of flexibility as the special circumstances of individual cases may warrant from time to time. The circumstances of the particular type of case must be considered in order for one to arrive at the most just and convenient decision in all the circumstances. It is, therefore, my view that in considering whether or not to grant an injunction, every effort should be made to eschew inflexibility, which could lead to injustice. Regard must be had to the particular circumstances of each case and the overriding objective to do justice between the parties.

16. This brings me to assert at this point that before me is a case that concerns the legal rights of a mortgagee seeking to exercise its power of sale. This issue touches on an area of the law that has its own clearly defined principles. Special rules have evolved governing this question of restraining a mortgagee's power of sale. It means then that those special rules must also be taken into account in determining whether interlocutory relief should be granted to the mortgagor in the given set of circumstances. The question must, therefore, not only be considered by reference to the **American Cyanamid** guidelines but also with reference to the special principles

applicable to restraining a mortgagee from exercising his power of sale. It is for that reason that I first sought to examine the established legal principles concerning a mortgagee in the exercise of his power of sale.

17. It is from the mortgage instrument that the mortgagee derives his rights, duties and obligations and so it is to this instrument that one must first look to ascertain the rights of the defendants over the mortgaged property in question. In this case, the mortgage instrument has expressly conferred the power of sale on the first defendant as mortgagee. This power has also been preserved by the restructured debt agreement. The power is specified to be exercisable in the event of certain specified defaults on the part of the claimants. There is no dispute that such defaults that are specified as effective to trigger the power of sale have occurred. It is, therefore, beyond question that the first defendant has a right to exercise its power of sale in respect of the mortgaged property by virtue of the mortgage instrument and the general law.

18. The rights and duties of a mortgagee in the exercise of his power of sale were, conveniently for me, examined by Wolfe, J. (as he then was) in **Dreckett v Rapid Vulcanizing Ltd**. (1983) 20 J.L.R. 61. There [at page 65], he quoted the highly persuasive dictum of Kekewich, J. in **Colson v Williams** L.J.1889, vol. 58, 539 at page 540 by which I am also guided:

> *"Where a mortgagee under ordinary circumstances thinks it necessary-and, as long as he is not prohibited by the terms of his contract, he is the sole judge of what is necessary-to realise his security, he can do so without hesitation. If there is a notice to be given he must give it; if some conditions are to be observed they must be observed; but as regards the time when he shall realise his security he is the sole arbiter and no one can interfere with him. He may even do it from bad motive...The court has nothing to do with the motives of a mortgagee. If he, from whatever motive, deems it right to realise his security, although he may be guilty of spite, although he may even look forward with complaisance or satisfaction to the ruin of his debtor, still, if he chooses to exercise his power, he can do so; but whether he acts from good or bad motive, whether he acts*

merely as a man of business deserving to realise his security, or whether he acts from some other or any of the reasons which may influence the human mind, he is equally bound to remember that there is an equity of redemption behind him, and that being so, he cannot do that which would otherwise be possible, and in many circumstances easy. A mortgagee to whom is owed a sum of money on security of land cannot offer the land to a purchaser merely for that which could cover his principal, interests and costs independently of the value of the property. If there is a margin which can be reasonably obtained he must remember that there is the mortgagor or possibly a second mortgage claiming through him or possibly other persons having charges who are entitled to be considered. But so long as he exercises the power fairly in that view, so long as he does that which he fairly can do to realise a fair price, he is, in my judgment entirely free."

19. The general rule pertaining to the exercise by a mortgagee of the power of sale is expressed in the following terms in **Halsbury's Laws of England**, 3rd edn., vol. 27 at paragraph 301.

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has commenced a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee swears to be due to him, unless on the terms of the mortgage, the claim is excessive."

20. In **Inglis v Commonwealth Trading Bank of Australia** (1972) 126 CLR 161 Walsh, J., in determining whether a mortgagee should be restrained from exercising its power of sale, stated at page 164:

"A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this be not in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into court."

He continued at pages 164- 165:

> *"In my opinion, the authorities which I have been able to examine establish that for the purposes of the application the general rule to which I have referred, nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due... The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claim for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed."*

21. This principle has since then been endorsed and applied within this jurisdiction and so provides a useful guide in my deliberations. Our Court of Appeal in **SSI (Cayman) Ltd. and others v International Marbella Club S.A.** SCCA no. 57 of 1986 delivered on February 6, 1987 adopted the reasoning of Walsh, J. and reaffirmed the principle laid down by the authorities that a mortgage debt can only be extinguished by actual payment. Carey J.A. in speaking of this rule cited, at page 14 of the judgment, the dictum of Cotton, L.J. in **McLeod v Jones** [1884] 24 Ch. D 289, where he stated at page 299:

> *"Now under ordinary circumstances the Court never interferes unless there is something very strong; it does not interfere on any suggested case without requiring the Plaintiff applying to pay into Court not what the Judge of the Court on hearing the evidence is satisfied will probably be the amount due, but what the mortgagee, the accounts not having yet been taken swears is due to him on his security. And that this is perfectly right, because we ought not to prevent mortgagees from exercising the powers given to them by their security without seeing that they are perfectly safe."*

Carey, J.A. then declared at page 15 of the judgment:

> *"The rule is therefore well settled and indeed, despite Mr. George's valid efforts, nothing has been said, which in any way permits a Court of Equity to order restraint*

without providing an equivalent safeguard, which is, the payment into Court of the amount due or claimed in dispute."

22. It becomes quite evident, on the authorities, that the exercise of a mortgagee's power of sale is a serious matter, which must not be lightly interfered with. This is a case in which there is no dispute that the mortgage debt remains outstanding- be it on the original debt or the restructured debt. The full debt has not been paid into court and there is no indication that this is intended or contemplated. With the mortgage debt not having yet been extinguished by payment, should the claimants succeed in restraining the defendants from exercising its power of sale in these circumstances? I will now consider this question against the background of the foregoing principles relevant to the nature and exercise of a mortgagee's power of sale and also within the framework provided by the **American Cyanamid** guidelines.

23. Mr. Simmonds contended that there are serious questions to be tried that warrant the grant of the interim injunction. He submitted that the injunction is justifiable for the following reasons:

(i) The claimants were not aware of the rate of interest being applied to the mortgage nor the justification for applying those rates despite repeated requests by them of the defendants' predecessors to furnish such information.

(ii) The first defendant has refused all attempts made by the claimants to ascertain the exact amount of the debt under the Restructuring Agreement and to liquidate the said debt.

(iii) The first defendant had registered the supplemental mortgage on January 9, 2006 and issued a registered notice on the said date pursuant to the exercise of its power of sale and demanding the payment of JA$172,821,122.38 and US$9,120.90

(iv) The claimants, despite previous requests, were never presented with an account of their indebtedness and they were completely unaware as to

how the sums stated to be owing in the registered notice were calculated.

(v) The first defendant continues to refuse all attempts by the claimants to liquidate the debt and their matrimonial home on the mortgaged premises was advertised for sale by public auction on April 5, 2006.

24. Against this background, he contended that there are serious questions to be tried that warrant the grant of the interim injunction. He distilled five broad issues that he submitted as constituting serious questions to be tried. He identified as the first question to be tried, the issue as to whether clause 13 of the Agreement is a provision for a penalty and is therefore unenforceable and/or void. He submitted that the Notice of Default dated January 9, 2006, demanding settlement of a liability calculated on the basis of the original debt at the interest rate specified, is unlawful, void and ineffective to trigger the power of sale under the Registration of Titles Act. In support of this point, he prayed in aid the cases of **Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited** [1915] A.C. 79; **Workers Trust & Merchant Bank Ltd. v Dojap Investments Ltd.** [1993] A.C. 573 and **Ford Motor Co. v Armstrong** 31 the Times L.R. 267. He submitted that all these cases deal with the question as to whether a stipulated sum is a penalty or liquidated damages and that when they are applied to clause 13, they undoubtedly raise a serious question to be tried.

25. On this point, Mr. Manning responded that clause 13 makes provision as to what will occur in case of default and is not a penalty clause. He maintained that the Agreement uses language that clearly spells out the obligations of each of the parties. He pointed out that in the Agreement, the claimants, as borrowers and guarantors, all acknowledged the original debt due to the first defendant and as such, they cannot now argue that they are unaware of the amount of the debt. According to him, the Agreement was a conditional compromise of the original debt; there is, therefore, no question that the original debt is due. He continued by saying that far from it being a sum held *"in terrorem"*, the first defendant had agreed to forbear collection on the

original debt, acknowledged by the claimants as being due, in consideration for the claimants' keeping their end of the bargain to make timely payments towards a lesser sum. Mr. Manning directed my attention not only to the terms of the Agreement but also to the Relationship 'Roll up Sheet', signed by the first and second claimants which sets out their indebtedness, in terms of both principal and interest, as at October, 2004.

26. I must begin by saying that in considering whether there are serious questions to be tried, I do so mindful of the admonition of Lord Diplock when he stated in **American Cyanamid** at page 509:

> *"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."*

27. This is a case, however, in which I have before me written documents evidencing the dealings among the parties. An examination of the seriousness of the question raised in relation to clause 13 can only be ascertained by an examination of the Agreement of which it is a part. For as Lord Dunedin said in **Dunlop Pneumatic Tyre** (supra) at page 87*: "the question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of the breach..."*

28. Indeed, in determining whether there is a serious issue to be tried in the context of restraining a mortgagee's power of sale, I would have to, of necessity, examine the merits of the claimants' contention by reference to the undisputed mortgage instrument and other relevant documents before me. This is particularly imperative in the context of this case where the mortgagee's right to realize his security, once it has lawfully arisen, must not be lightly interfered with. There must be shown on the affidavit evidence before me a serious question to be investigated, that is, one of substance and reality.

29. It is seen that clause 13 is part of the uncontested Agreement exhibited to the second claimant's affidavit. Even without 'detailed argument' and 'mature considerations', it is evident that the terms of this Agreement are clear and unambiguous. The recital expressly indicates that at the time of entering into the Agreement, the claimants acknowledged and accepted being previously indebted to the first defendant's predecessors in the sum of J$167,242,191.00 and US $9,121.00. They then acknowledged their indebtedness to the first defendant in the said sum and expressly accepted the said sum to be accurate. The 'roll up sheet' setting out the original debt was duly signed by the second and third claimants endorsing their acceptance of it.

30. The Agreement also shows that the claimants acknowledged that the original debt was due and payable and was enforceable by the first defendant and that the first defendant has the immediate right to exercise all of its rights under the security. It also shows an agreement between the parties that the first defendant would not enforce the existing debt and would extend time within which it should be paid provided certain conditions as set out in the Agreement were fulfilled. It is clearly seen that the parties have agreed to conditionally compromise the original debt in the amount of US$1, 1,000,000.00 provided there was strict compliance by the claimants with all the terms of the Agreement. This stood undisputed on the evidence before me.

31. It is also a term of the Agreement that the existing security (25 Seymour Ave) shall remain in force to secure the original and the restructured debt in accordance with the terms of the Agreement and that the first defendant was *"expressly retaining its rights, titles, interests, liens, remedies or powers to the fullest extent."* It further provided that, *"neither this Agreement nor any provisions of the credit and security documentation may be waived, modified or amended except by an instrument in writing signed by the parties hereto."* The Agreement has clearly disclosed that the original debt was never

intended or agreed by the parties to be extinguished at the time the Agreement was executed.

32. The undisputed evidence is that the claimants have failed to liquidate either the original debt or the restructured debt. The fact of the claimants' default is thus uncontested. It is the amount payable that is disputed by them. It is accepted, as an established principle of law that a mortgagee's power of sale cannot be restrained merely because there is a dispute as to how much is owed.

33. In **Bunbury Foods Pty. Ltd. v National Bank of Australasia Ltd** (1984) 153 CLR 491, the High Court of Australia had this to say at page 504:

> *"It is of some materiality to note that it is not essential to the validity of a notice calling up a debt that it correctly states the amount of the debt. Even a notice given to the mortgagor by the mortgagee, as a condition precedent of a power of sale is not rendered invalid because it demands payment of more than is due...*
> *The interest of the parties will be more adequately protected by the principle that the debtor must be allowed a reasonable opportunity to comply with the demand before the creditor can enforce or realize the security than by the adoption of the suggested proposition that the notice of demand must specify the amount of the debt."*

34. The claimants have made no complaint about insufficient notice. The demand notice has specified the amount that the first defendant is claiming as due and payable. The fact that the claimants are now saying that they are not aware as to how the figure is arrived does not afford a proper basis, as a matter of law, upon which the first defendant's power of sale may be restrained. In fact, **Inglis** (supra) and **Marbella** (supra) both demonstrate the principle that even where the mortgagor alleges, for instance, conspiracy, fraud or misrepresentation on the part of the mortgagee, that is not sufficient, without more, for the mortgagee's power of sale to be restrained.

35. It is evident that the first defendant agreed to accept a lesser sum for a greater sum on certain specified conditions. The lesser sum not having been paid and the condition for its acceptance as discharge of the greater sum not having been fulfilled, the greater sum cannot be held to have been satisfied. This is trite law. When we go back to the rule in **Pinnel's case,** we are reminded that *"payment of a lesser sum on the day in satisfaction of a greater sum cannot be satisfaction of the whole."* In this case, there has not even been 'payment of the lesser sum on the day' or any at all. It means then that the whole remains unsatisfied. So, even on 'first principles', it becomes obvious that the original debt is subsisting and is, therefore, still enforceable. Clause 13 makes provision for what should happen in the event of default in payment of the lesser sum. In my view, the question as to whether the clause provides for a penalty or liquidated damages is not of such substance and reality that would afford a proper basis upon which the defendants should be restrained.

36. Within this context, I have also considered the provision within clause 13 as to the applicable interest rate. It is worthy to note, that the first defendant is exempt from the provisions of the Moneylending Act and so the issue raised as to the demand for payment of the original debt with the interest specified cannot be resolved by reference to the provisions of that statute. In any event, I have seen that the Agreement has its own 'in-built mechanism' to deal with the question of the interest payable on the debt. The document stipulates that the applicable interest rate in the event of default is "subject to the **Maximum Interest Rate** defined below". This then follows:

> *"The" **Maximum Interest Rate" shall mean that no provision of this agreement or any other Security shall require the payment or the collection of interest in excess of the maximum permitted by the applicable law. If any excess of interest in such respect is hereby provided for, or shall be adjudicated to be so provided, in any Security or otherwise in connection with this Original Debt or the Restructured debt, the provisions of this Section shall govern and prevail and neither Borrower or sureties, guarantors, successors ,or assigns of Borrowers shall be obligated to pay the excess amount of such interest or any other excess sum paid for the use, forbearance or detention of sums***

loaned pursuant to the Security. In the event JRF ever receives, collects, or applies as interest any such sum, such amount which would be in excess of the maximum amount permitted by applicable law shall be applied as a payment and reduction of the principal of the indebtedness evidenced by the Security; and, if the principal of the Security has been paid in full, any remaining excess shall forthwith be paid to the Borrower." (Emphasis supplied)

The said clause then goes on to stipulate what the parties should do in determining whether or not the interest specified to be paid exceeds the Maximum Interest Rate.

37. When the provisions are examined, it is clear that the parties had in their contemplation the possibility of the specified interest rate exceeding that authorized by law. It is thereby made subject to the maximum interest rate permitted by law. The contract also reveals that if the specified interest rate should be found to be excessive, be it by adjudication or otherwise, the excess will be applied to the benefit of the claimants either by being applied to the principal sum, if that sum is still outstanding, or be paid to the claimants directly, if the principal is paid off. The contract, itself, provides for compensation to the claimants for any excess there might be in the interest rate specified. It follows then that any damage to be caused to the claimants in relation to exorbitant interest is compensatable and reparable in monetary terms.

38. After a review of the available evidence and after due consideration of the authorities cited on behalf of the parties, I conclude that the first issue identified by the claimants is not of such seriousness and weight as to justify the restraint of the defendants in the exercise of the first defendant's power of sale. It does not provide one of the proper bases upon which the defendant, as a mortgagee, ought to be restrained in the exercise of its power of sale.

39. The claimants also presented the following additional questions as constituting serious questions to be tried:

(i) Whether the defendants unreasonably withheld from the claimants permission for them to sell a lot of the mortgaged property without proper justification and also failed to produce the duplicate certificate of title for the mortgaged property in breach of covenants 2 (h) and 2 (i) of the supplemental mortgage numbered 1391672 registered on January 9, 2006.

(ii) Whether the defendants have acted in a manner so as to prevent and frustrate the claimants' ability to fulfill their payment obligations under the mortgages and should be estopped from claiming default on the part of the claimants.

(iii) Whether the claimants are entitled to damages for detinue and conversion with respect to the said duplicate certificate of title for premises located at 18 Hopefield Avenue.

(iv) Whether the claimants are entitled to damages for loss of profits in respect of the failure on the part of the defendant's to facilitate the contemplated development of the mortgaged property.

40. In seeking to convince me that these are serious questions to be investigated on the merits, Mr. Simmonds argued that the first defendant unreasonably withheld permission for sale of a part of the mortgaged property because the sale would not have prejudiced its interest in any way and would not affect the value of the mortgaged property. He maintained that the first defendant was unreasonable because it knew that the claimants needed to develop the property to liquidate their indebtedness.

41. In response, Mr. Manning directed my attention to certain documents and pieces of correspondence exhibited to the second claimant's affidavit evidencing the dealings among the parties in relation to this question. The first defendant admitted that it was made aware of the claimants' intention to pursue a development and of their plans to apply the proceeds towards liquidating the debt. This was, however, never incorporated in any way in the Agreement or the mortgage instrument. There

is, therefore, nothing in writing pointing to an agreement or, what could be seen as, an enforceable contract between the parties that part of the mortgaged property would be developed and sold to pay the existing mortgage and that permission to do so would not be withheld unreasonably.

42. In any event, the undisputed evidence also revealed that no definitive decision was taken by the defendants in relation to the permission for the sale of a portion of the mortgaged property. The second claimant, upon seeking permission to sell, was advised by the first defendant's Asset Manager, Mr. Raymond McBride, in a letter dated September 27, 2005, that:

> *"As we have discussed on several occasions, I am not in a position to submit any request as you are proposing in your letter as long as your account is in a delinquent status.*
>
> *If your account is brought current by September 30, 2005, I will prepare a case for submission to JRF per your proposal. The amount of the arrears on your account is US$21,157.68.*
>
> *I will be awaiting a response and payment of your arrears in order to process your proposal."*

There is no evidence from the claimants that their request for permission was submitted to the company for approval. The letter from Mr. McBride itself unequivocally stated that the claimants' proposal would not have been processed and submitted by him to JRF (meaning the first defendant) until they have sorted out their delinquency. The delinquency evidently continued and nothing further was done in respect of obtaining permission to sell a part of the mortgaged property.

43. Clearly, from the uncontested evidence before me and on the claimants' own case, there is nothing showing a withholding of permission by the first defendant or, at minimum, any awareness on the part of the first defendant, as distinct from its Asset Manager, that permission was being sought by the claimants. The Asset Manager had indicated that he would *"prepare a case for submission"* to the first

defendant *"as per the proposal"* if the account was brought current by a specified date. This condition was not satisfied by the claimants, as they have remained delinquent up to the hearing of this application. There is thus no evidence that the claimants' request for permission and their proposal was submitted to the first defendant for there to have been, in fact, a withholding of permission. In all the circumstances, the claimants have failed to establish, on the evidence, a serious question to be investigated on this issue -one of such gravity- as to warrant the restraint of the first defendant in the exercise of its power of sale.

44. The claimants also argued that the first defendant, without legal entitlement, held onto the duplicate certificate of title for 18 Hopefield Avenue. According to them, the defendant had withheld the title in breach of the Agreement. They maintained that their inability to secure the title for these premises compromised their ability to secure financing for the proposed development to meet their obligations under the mortgages. The first defendant should, therefore, not be allowed to exercise its power of sale under a mortgage agreement which it was itself in breach of upholding and should be estopped from claiming a default on the part of the claimants which it was itself instrumental in causing. It is also on this premise that their claim for detinue and conversion and loss of profit stands.

45. In relation to this issue, my attention was again drawn to the Agreement and to correspondence between the second defendants' attorney-at-law and the claimants' attorneys-at-law. In this regard, Item 8 (d) of the Schedule to the Agreement provides:

> *"Upon receipt of US$100,000.00 outlined at (a) above and upon JRF and all the parties hereto executing this Agreement JRF shall, release the title relating to premises known as 18 Hopefield Avenue, Kingston 6 in the parish of St. Andrew being registered at Volume 1092 Folio 362 to the party or parties specified in writing by Mr. Darien Green & Mr. Vivian Daley."*

It is seen from the claimants' exhibits that the sum agreed in the above clause was received by the first defendant on December 9, 2004. However, it was agreed that all the parties would also have to execute the Agreement before the title would be released. On December 9, 2004, when the money was received by the first defendant, the Agreement was not yet executed by all parties. The claimants had signed on December 9, 2004 but the first defendant did not sign until December 15, 2004.

46. It was upon the execution of the Agreement by the first defendant on the 15th December, 2004 that the certificate of title in question was sent to the claimants' attorneys- at-law under cover of a letter of even date from the second defendant's attorney-at-law. A copy of this letter was stamped by the claimants' attorneys-at-law showing that it was received by them on December 16, 2004- one day after all the parties had executed the Agreement. The title was thus released onto the claimants within a day of the execution of the Agreement.

47. In the letter accompanying the duplicate certificate of title in question that was received by the claimants' attorney-at-law, it was also stated:

> *"Attached please see copy letter sent to VMBS requesting a renewed Discharge of Mortgage in respect of Mortgage No. 776843. Please make contact with them to forward same to you. We are in contact with FINSAC Limited to execute a new Discharge of Mortgage in respect of Mortgage No. 850083. We will forward same to you as soon as possible."*

It is obvious that the discharge of the mortgages was to be dealt with by third parties- VMBS and FINSAC. The claimants contended that the defendants failed to deliver the discharge until February, 2005- two months after the title was released. One of the terms of the Agreement accepted by the claimants, as evidenced by their signatures, is that the first defendant would "release" the title to them. There is no agreement that the title should be released along with the discharge upon payment of the money and the execution of the Agreement. In the absence of such evidence, I failed to find a serious question to be tried on this issue as to warrant the restraint of

the first defendant in its capacity as a mortgagee whose power of sale has properly arisen.

48. Lord Diplock pointed out in **American Cyanamid** at page 509:

> *"In those cases where the legal rights of the parties depend on 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 purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by technical rule forbidding its exercise if on that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50% or less, but permitting its exercise if the court evaluated his chances at more than 50 percent."*

Lord Diplock's point is well taken as still being an applicable and useful one. However, this is a case in which there is substantial uncontested material before me in the form of documentary evidence contained in the second claimant's affidavit. Given the nature and contents of these documents, there would hardly be any need, if at all, for oral cross-examination because they contain unchallenged evidence of the parties' relationship, dealings and discourse on the critical aspects of the case. In fact, it seems that there is hardly any material evidence left to be adduced. So, this is not a case in which the material evidence is incomplete and untested by cross-examination so as to render it unsafe for one to form a view as to the prospect of success of the claimant securing a permanent injunction at the trial on the basis of the issues raised. I have been provided with substantial "hard" evidence at this stage that has assisted me in determining the seriousness of all the questions raised by the claimants. In all the circumstances, I have not managed to discern a question of such seriousness to be investigated so as to warrant a restraint of the defendants in the exercise of the power of sale conferred by the mortgage instrument.

49. It is the principle that where there is no serious question to be tried, then the injunction ought to be refused and the matter should end there. The corresponding principle is that where there is a serious question to be tried, the court should then consider whether the applicant will be adequately compensated by an award in damages or whether the defendant could be adequately compensated under the claimants' undertaking as to damages. Although I have not found a serious question to be tried, I have, nevertheless, considered the contrary position given the nature of the issues before me and the fact that the mortgagee could still be restrained upon terms imposed to safeguard its interest. Having done so, I have found in evaluating the questions posed that the losses alleged by the claimants to have flowed from the alleged breaches of the defendants are pecuniary in nature. In fact, for the most part, the claimants are alleging breach of contract, which is ordinarily remedied by an award of damages.

50. Mr. Simmonds, however, maintained that damages would not be an adequate remedy if the injunction is not granted and the claim was to be decided in the claimants' favour at trial as the claimants and their family would be displaced from the property which has been their matrimonial home since 1987. This property, according to him is unique, and no amount of damages would allow them to purchase a property with the same characteristics elsewhere. He argued that if the claimants are displaced, an entire family would be left homeless and they would have to wait until trial to have any hope of obtaining money in compensation, if they are successful.

51. The property is owned by the first claimant- a company. The fact that it is used as a matrimonial home by the second and third claimants did not prevent them from using it as security for the loans in question. They ought to have had it within their contemplation, at the time they contracted the loans, that the property could be taken away from them in the event of default. I have given this submission all the seriousness I could muster and in the end, I have dismissed it as a consideration to say that damages would not be an adequate remedy.

52. I have formed the view that the damages alleged by the claimant are not uncompensatable or irreparable. The alleged losses would be ascertainable and calculable for an assessment of damages to be made. I conclude, therefore, that even if there were serious questions to be tried and the claimants were to succeed at trial, damages would be an adequate remedy and there is no material evidence before me to satisfy me that the defendants would not be in a financial position to satisfy such damages.

53. Having found that there is no serious questions to be tried and that damages, in any event, would be an adequate remedy, there would be no need for me to decide where the balance of convenience lies in keeping within the principles of **American Cyanamid.** I have noted, however, that it is Lord Diplock's view that in considering whether to grant relief, the relative strength of the parties' cases must not be considered except as a matter of last resort when all else is equal. I venture to say however, that there are some cases, like the instant case, where in considering the available affidavit evidence and documents exhibited in order to ascertain whether there is a serious question to be tried, the strength of each party's case is automatically and inevitably exposed. The question therefore arises: should the judge, at this stage, ignore the merits of the parties' cases in considering whether interlocutory relief should be granted? I find it difficult to think so. The overriding objective demands that the court must do justice between the parties. I am moved to opine that 'any clear view' the judge may reach about the relative strength of the parties' cases, without having had to conduct a mini-trial, ought to be a relevant factor to be taken into account where the special circumstances of a case so warrant.

54. This view seems to find support in the judgment of Laddie, J. in **Series 5 Software Ltd. v Clarke** [1996] 1 All E.R. 853- in which, after one of the most comprehensive analyses of the principles governing the grant of interim injunctions, he convincingly stated that one of the major factors that should be borne in mind in deciding whether to grant interlocutory relief is any clear view the court may reach as to the relative strength of the parties' cases. According to him, however, this view

should only be reached where it is apparent from the affidavit evidence and any exhibited contemporary document that one party's case is much stronger than the other's. At page 864, he stated:

> *"If it is apparent from the material that one party's case is much stronger than the other's then that is a matter the court should not ignore. To suggest otherwise would be to exclude from consideration an important factor and such exclusion would fly in the face of the flexibility advocated earlier in* ***American Cyanamid.***"

55. I have also found favour with the views of Sir John Pennycuick expressed in **Fellowes and Another v Fisher** [1975] 2 All ER 829 at pages 843-844 where, after a careful review of the **American Cyanamid** principles, he stated:

> *"I think it must be the duty of this court to follow the actual decision of the House of Lords in the American Cyanamid case...But the principles laid down by Lord Diplock do seem to me to present certain difficulties.*
>
> *By far the most serious difficulty, to my mind, lies in the requirement that the prospect of success in the action have apparently to be disregarded except as a last resort when the balance of convenience is otherwise even. In many classes of cases, in particular those depending in whole or in great part on the construction of a written instrument, the prospect of success is a matter within the competence of the judge who hears the interlocutory application and represents a factor which can hardly be disregarded in determining whether or not it is just to give interlocutory relief...I venture to think that the House of Lords may not have had this class of case in mind in the patent action before them."* (Emphasis mine)

56. It is my view that the relative strength of the parties' cases, as it has emerged without the court having had to conduct detailed examination into disputed facts, is a relevant factor that can hardly be ignored in the circumstances of this case. The strength of each party's case rests substantially, if not wholly, on undisputed documentary evidence. At this interlocutory stage, the uncontested documentary evidence speaks for itself. In fact, there is hardly any material aspect of the evidence that stands incomplete and untested so as to warrant serious investigation as in the

cases that might have been contemplated by the House of Lords in **American Cyanamid**. Given the nature and high probative value of the documentary evidence in this case, I would borrow the words of Sir John Pennycuick (supra) and say that *"the prospect of success is a matter within my competence and represents a factor that can hardly be disregarded in determining whether or not it is just to grant interlocutory relief."*

57. It should be noted that my endorsement of the view expressed by Sir John Pennycuick is by no means novel. In **Karlene Henry and Another v Navieney Burns-Gayle and Another** 2005HCV1971, delivered September 15, 2006 (Unreported), Mangatal, J. concluded, after a thorough examination of the relevant principles as stated in **American Cyanamid** and **Fellowes v Fisher,** among others, that in determining whether or not interlocutory relief should be granted, it was within her competence to form a provisional view as to the outcome of the case based on the nature of the evidence before her.

58. Indeed, I believe that each case must be decided on fairness, justice and common sense in relation to the whole of the issues of fact and law which are relevant in the particular case: **Hubbard v Vosper** [1972] 2 Q.B. 84 at 98, per Megaw, LJ. This case involves the exercise of a mortgagee's power of sale that warrants its own special considerations. Both the mortgagor and the mortgagee have their respective interests in the mortgaged property to be protected. This cannot be taken lightly. While there should be no clogging of the mortgagor's equity of redemption on the one hand, it is equally important, on the other hand, that a mortgagee's security in the mortgaged property is protected even in cases where there are allegations of fraud and misrepresentation against him.

59. So, in considering whether injunctive relief should be granted in the special circumstances of this case, I am not able to disregard the relative strength of the parties' cases and relegate it to the status of being a matter of last resort. I would, therefore, part company with this aspect of Lord Diplock's guidelines in treating with the merits of each party's case because the special circumstances of this case so

demand. The special circumstances do dictate the relevant factors to be taken into account. I do not think justice can be done in a case of this nature without, in the end, paying some regard-even to a limited extent- to the merits of each party's case as disclosed on the available uncontested evidence.

60. In my view, once the mortgagee's power of sale has lawfully arisen, it should only be restrained upon serious and compelling grounds. The claimants have been in default for some time and this has not been remedied despite repeated requests from the first defendant to do so. They have neither exhibited the willingness nor the capability to pay the sum claimed by the first defendant into court or at all. Falling short of actual payment of the mortgage debt, something strong is required for me to interfere to deprive the first defendant of its security. Upon a thorough assessment of this case, within the context of the relevant legal principles as I have applied them, I am not satisfied that these are circumstances that warrant a restraint of the first defendant's power of sale even on terms.

61. I have ventured a bit outside of the strict application of the **American Cyanamid** guidelines and have paid some regard to the merits of each party's case even though there was no need for me to examine wherein the balance of convenience lies. I have done so in the special circumstances of this case in an effort to ensure the most just and convenient result in keeping with the overriding objective to do justice between the parties. In the end, the claimants have not managed to persuade me, within the application of the **American Cyanamid** guidelines and/or otherwise, that they deserve the exercise of my discretion in their favour in granting interlocutory relief within the terms sought in their Notice of Application for Court Orders.

62. Accordingly, the application for interim injunction is refused with costs to the defendants to be agreed or taxed.