

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2013

CLAIM NO. SKBHCV 2013/0213

BETWEEN:

[1] LEMON GROVE COMPANY
1ST CLAIMANT

[2] ADAM BILZERIAN
2ND CLAIMANT

And

[1] FIRST CARIBBEAN INTERNATIONAL
BANK

[2] BELMONT RESORTS LIMITED

[3] THE REGISTRAR OF THE HIGH COURT

[4] ATTORNEY GENERAL OF THE
FEDERATION OF
ST. CHRISTOPHER AND NEVIS

[5] KATE WALWYN

Appearances:

Mr. John Tyme for the Claimants

Mr. Roger Forde Q.C. with Ms. Kalisia Isaacs and Charmaine Millington for the
First Defendant

Ms. Camilla Cato for the Second and Fifth Defendants

Ms. Simone Bullen-Thompson for the Third and Fourth Defendants

2014: January 24

2015: February 3

The first defendant, the First Caribbean International Bank, the mortgagee of certain property in St. John's, St. Kitts, owned by the first claimant, Lemon Grove Company, sought and obtained an order of judicial sale of the same property which order was entered on the 18th October 2012. It was ordered that the sale be advertised in two weekly newspapers on the island and was to be done by judicial auction. The auction was conducted on the 23rd May 2013, when the property was sold to the second defendant, Belmont Estates Limited. It is that sale which led to the substantive claim being filed by the two claimants against all the defendants seeking declarations that (a) the sale was done contrary to law in that the Order of the Master required that the Registrar conduct the sale and in fact it was the Chief Clerk who carried out this role instead, and (b) that the sale was tainted by fraud as there was only one true bidder at the auction, and that the fifth named defendant, Kate Walwyn, who had earlier claimed to be an observer at the sale, was seen to be in discussions with the representatives of Belmont Estate Limited and then presented herself as a bidder to satisfy the requirement that there be numerous bidders at an auction. She made a token bid and then the second and successful bid was made by Belmont Estates Limited. The claimants also sought an order that notice should be given to the second claimant of the new auction sale. The claimants then filed this application to restrain the transfer of the legal title of the property until the claim is determined. The defendants have all resisted any injunctive relief being granted. Quite apart from the responses to the issues raised by the claimants, arguments were made by the first defendant that the second claimant was merely someone who had a money judgment against the first defendant and that neither the application nor the claim did not reveal any cause of action against any of the defendants and so that no consideration could be given to the grant of any relief to the second claimant.

Held: Granting injunctive relief in favour of the first claimant application and refusing any relief to the second claimant:

1. The Order of the Master made on the 31st July 2012 and entered on the 18th October 2012, approving the Article of Sale which in turn directed that that 'the Registrar of the Supreme Court shall sell' the property must be read together with section 70 Eastern Caribbean Supreme Court (St Christopher and Nevis) Act Cap 3.11. Neither the Master's Order nor the approved Articles Sale can operate to limit the operation of express legislative provision that confers powers on the Chief Clerk to have conduct of judicial auctions, in the event that the Registrar was absent from office. The power given to the Chief Clerk is one given by the operation of law that is triggered by the Registrar's absence from office. This allegation made by the claimants in the circumstances of this case, having regard to the express words contained in the approved Articles of Sale, therefore does not disclose any serious issue to be tried.
2. An allegation that an auction sale was tainted by fraud in the sense that the only true bidder at the auction sale colluded with a mere spectator to present herself as a bidder to satisfy the statutory requirement that there should be numerous bidders at every auction presented a serious issue to be tried as proof of such fraud may have the result that the sale would be set aside.

Applied: **American Cynamid v Ethicon** [1975] AC 396

3. In the usual case, injunctive relief would not be granted where it is appropriate to confine the applicant to his remedy in damages. Whether or not damages would be an adequate remedy is not to be determined on the basis of what outcome one party would desire, but on established principles of law. Where damages are shown to be adequate that would normally be sufficient to defeat an application for an interim injunction. In some cases where the assessment of damages would be an extremely complex and unsatisfactory exercise, damages may not be an adequate remedy. So too, in some cases if assessment involve a speculative ascertainment of the value of a loss of a chance, then that may not be sufficient to prevent an interim injunction as damages may not be regarded as adequate. If this auction sale was tainted with fraud, then in the normal case, the damages that the claimant would have suffered would have to be assessed with reference to the best value or the market value which an auction sale property conducted would have realized at the time of the improper and unlawful disposal. In this case, however, the allegation is that the fraud meant that there was only one bidder at the auction. This is significant at this stage when the court is being asked to grant an interim injunction, in a claim to set aside the actual sale of the property. In these circumstances, quite apart from the market value of the property, the claimants would have also lost that chance to secure an even greater sale price; that is what requires this 'speculative ascertainment' of the value of that chance. It would therefore be a difficult exercise to assess the damages the claimant would have suffered. This is therefore not a case in which the first claimant should be confined to his remedy in damages. The orders being sought would not be refused on this basis.

Considered: **Evans Marshall v Bertola** [1973] 1 WLR 349 **Cuckmere Brick Co. Ltd. v Mutual Finance Ltd.** [1971] 1 Ch 949, 966-969 and **Aodhcon LLP v Bridgeco Ltd** [2014] EWHC 535 (Ch) **NATS (Services) Ltd v Gatwick Airport Ltd** 2014 WL 4636860 Queen's Bench Division (Technology & Construction Court); **Letting International Ltd v Newham LBC** [2007] EWCA Civ 1522; **Araci v Fallon** [2011] EWCA Civ 668; **NATS (Services) Ltd v Gatwick Airport Ltd** 2014 WL 4636860 Queen's Bench Division (Technology & Construction Court)

4. There are several factors in this case that are relevant in considering where the balance of justice lies in this case. These include the fact that upset price on the sale of the property, which has been fixed by the court falls well short of the total indebtedness of the first claimant. In the event there was in fact no bona fide sale, it also includes the possibility that an auction sale conducted with numerous bidders might realize a greater sum that might serve to the benefit even to the first defendant as there would be a smaller sum to be recovered from the first claimant. It also includes the consideration that in the event a fraud is shown to have been perpetuated on the conduct of the auction sale, the integrity of judicial sales might be called into question. It is also relevant to this balancing exercise that commercial banks should be concerned that when they seek to exercise their rights of sale under the mortgage instrument, that such sales are conducted in a

bona fide manner. The damage suffered by the first defendant by the grant of an injunction will be more readily ascertainable and would not be irremediable. The balance of convenience in this case therefore militates in favour of the grant of the injunctive orders being sought.

Applied: **American Cynamid v Ethicon** [1975] AC 396; **National Commercial Bank Jamaica Ltd v Olint Corpn Ltd** [2009] UKPC 16

5. On an application for an injunction, the court is required, whether on the point being taken by the respondent or on its own motion, to consider whether the applicant has any valid legal right of claim capable of supporting his application. Where upon such an examination it is clear from the application and the substantive statement of case, that the applicant has no valid and subsisting cause of action against any of the named respondents, the court is entitled to not only refuse the injunctions sought but may go on to consider whether the instant case is an appropriate one in which to exercise its case management powers and its powers under CPR 15.2 to strike out the underlying substantive claim. In taking such a step the court is acting in accordance with the overriding objective and its duty to effectively manage cases. Such powers, however, must only be exercised in the clear and obvious case, where the court considers that the claimant has no real as opposed to a fanciful prospect of succeeding on the claim or issue. Further, in the absence of an application for summary judgment, the court's powers under CPR 15.2 should only be exercised where the applicant has had an opportunity to be heard on the issue, as was the case on this application for an injunction. In this case, the first defendant's argument that the second claimant had no cause of action to ground neither the application nor the claim was an argument of merit.

Applied: Rule 15.2 of the Civil Procedure Rules 2000; **Swain v Hillman** [2001] 1 All E.R. 91; **Baldwin Spencer v The Attorney General** of Antigua Civil Appeal No. 20 of 1997 considered.

6. The registration system established by the Title by Registration Act, Cap. 10.19 is intended to protect property rights, bring certainty and clarity to land ownership, and to facilitate smooth land transactions by requiring public declaration, by way of registration, of all rights, interests and encumbrances in and over land. This system is designed to ensure that a Certificate of Title guarantees and protects ownership over all such registered land by its indefeasible nature, and to this end it is supported by a statutory scheme which provides that all dealings with such land that are not registered in accordance with Cap 10.19, do not confer any legal rights over the lands itself.
7. A money judgment held by any person in St. Kitts and Nevis does not affect the lands of the judgment debtor held by a Certificate of Title under the Title by Registration Act, Cap. 10.19, unless and until the person entitled to the benefit of such judgment shall have filed an application to the Court for an order for the sale of such lands towards satisfaction thereof, and the Registrar of Titles notes such

application upon any relevant certificate of title in his or her custody. In this case, the second named claimant has not pleaded nor has he presented any evidence that he has made any application for the sale of the property the subject matter of the claim. This court has judicially noted that there is no notation made on the relevant Certificate of Title held by the Registrar of Titles that the second claimant has filed an application for the sale of the property. In these circumstances, there is no legal charge over the property in favour of the second claimant that could give him a legal right to affect a judicial sale of the property. The second claimant's claim therefore is groundless; there is no cause of action revealed.

Applied: Section 106 and Section 109 of the Title by Registration Act, Cap 10.19; Section 3 and Section 5 of The Judgments Act, Cap 3.14 considered.

DECISION

- [1] **RAMDHANI J.: (Ag.)** This is an application filed by the claimants seeking injunctive relief against the Registrar of the High Court and other defendants to prevent the transfer of certain property that was sold at an auction sale until the hearing of a claim to nullify the sale on the basis that the auction was conducted in breach of an Order of the Master and that the sale was affected by the fraudulent conduct of the successful bidder.
- [2] For the reasons set out in this decision, I agree this is an appropriate case for the grant of injunctive relief. I am of the view however, that having regards to the fact that the second claimant has shown no legal right or interest which would give him a right to intervene in the sale of the property, I will grant him no relief and further I will strike out the claim brought on his behalf. My reasons for so doing are also set out below.

Background to the Application

- [3] The application before the court stems from a sale by auction which was carried out by a Mr. Lloyd, a Chief Clerk of the Supreme Court, of property known as:

“All that lot piece or parcel of land situate at Caines Estate Yard in the parish of St. John Capisterre in the Island of Saint Christopher described in Register Book 1, Folio 113, and Register Book N2 Folio 173 of the Register of Titles of the island of Saint Christopher save and except the privately owned properties namely Units No. A2, No. A1 and No. B4 of the Lemon Grove Condominium Development.”

- [4] This sale was being done at the behest of First Caribbean International Bank, the first defendant in this matter, which bank was seeking to exercise its rights under a mortgage, having foreclosed on the same property earlier. At the auction sale, the property was sold to Belmont Estates, the second defendant.

[5] It is this sale by auction that has triggered this claim filed by the two claimants. The first claimant is a local company that owns and had mortgaged the same property to the bank. The second claimant has a judgment against the second claimant in an unrelated matter, and by virtue of this claim filed, is contending together with the first named claimant, that the sale by auction was done contrary to law and fraudulently. Both claimants seek a number of relief including a declaration that the sale by auction was improper on the basis that the first, second and fifth defendants colluded to defraud Lemon Grove. The claimants also sought by way of the present application, an order preventing the Registrar from transferring the property until a new auction was held and that further that the second claimant should be given adequate notice of the new auction.

The Application by the Claimants for Interim Relief

[6] The application before the court is jointly filed by the two claimants and is headed up 'Second Notice of Application for Interim Relief'. The relief being sought on this application is *"[A]n order temporarily restraining the Registrar, whether by herself or by her servants or agents, from transferring, selling or disposing of the [subject] property until the Applicant's claim to have the auction of May 23, 2013 set aside is determined."* Cost is also sought on the application.

[7] In supporting this application, the claimants have relied on the following grounds, namely:

1. On May 23, 2-13, the Property was placed on auction without notice to Mr. Bilzerian. FCIB was well aware and was on direct notice that Mr. Bilzerian was an interested Bidder for the Property.
2. [The First Defendant] breached its fiduciary duty to make reasonable efforts to sell the property at the highest price.

3. [The First Defendant] and [the Fifth Defendant] colluded to defraud Lemon Grove out the benefit of a fair and proper auction and to circumvent the order of the Learned Master.
4. The auction was not conducted by the Registrar, as is required by law, but instead by a Mr. Jose Lloyd, an employee at the Registry.

[8] The claimants have relied on an affidavit sworn to by one Yolanda Vanterpool, who is an Office Administrator attached to International Investment and Consulting Limited of Frigate Bay, St. Kitts and who has deposed that she is authorized to swear the affidavit on behalf of the claimants.

[9] All of the defendants have resisted the orders sought by the claimants, and so the issues which had been raised for this court's consideration was whether injunctive relief in terms sought, is appropriate in the circumstances of this case, having regard to the principles relevant to the grant of interim injunctions?

[10] As I noted in the **Port Zante's** case 'the approach which the Court should take and the tests which are to be applied have been laid down by Lord Diplock in the landmark case of ***American Cyanamid Co v Ethicon Limited*** when he stated:

"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."

[11] 'These principles indicate that when an application is made for an interlocutory injunction, in the exercise of the court's discretion, the first question for the court to consider is whether there is a serious issue to be tried. If the answer to that question is yes, then a further question arises: would damages be an adequate remedy for the party injured by the Court's grant of, or its refusal to grant, an injunction? If there is doubt as to whether damages would not be adequate, or whether the applicant should be confined to his remedy in damages, the Court will seek to discover where lies the balance of convenience or as recent cases have framed it "the balance of justice"?' I now turn to consider these principles in context of this case.

Serious Issues to be Tried

[12] The claimants have grounded this application on two main planks. First, they contend that the Master by an order dated the 31st July 2013 has expressly stated that the sale by auction is to be conducted by the Registrar, but that it was instead conducted by one Mr. Jose Lloyd, an employee of the court. The evidence grounding this claim comes from paragraph 8 of the affidavit of Ms. Vanterpool which states:

"I have seen the Order of the Learned Master Perletta Laans dated July 31, 2012, for the sale of the Property and it specifically states that the Registrar should be the person to have conduct of the sale of the Property. Nowhere in this Order does it state that the Registrar can delegate this duty. A copy of the Order is attached hereto and marked 'YV1'".

[13] That the claimants have relied on this to partly ground this application is a source of concern to this court. First, there is really no dispute that Mr. Lloyd has conducted the sale. What the claimants have failed to mention is that Mr. Lloyd is the Chief Clerk of the court. Further, any cursory examination of the laws of St. Kitts and Nevis reveals that section 70 of the **Eastern Caribbean Supreme Court (St Christopher and Nevis) Act Cap 3.11** states that when the Registrar of the

high Court is absent from office for any reason, her duties may be performed by the Chief Clerk. Mr. Lloyd is the Chief Clerk. A half hearted attempt by anyone would have revealed that Mr. Lloyd is the Chief Clerk and so was authorized to perform the duties of the Registrar in the event of her absence from office. I note in this regard that the defence filed on behalf of the Registrar and the Attorney General, the third and fourth defendants respectively state that the Registrar 'was engaged in other duties and was indisposed to conduct the auction on the 23rd May 2013, and therefore requested the Chief Clerk, Mr. Jose Lloyd to conduct the auction in her absence'.¹ Mr. Lloyd swore to an affidavit in response to the application in which he provided the evidential support for this contention. These contentions were not rebutted by the claimants. Section 70 of the **Eastern Caribbean Supreme Court (St Christopher and Nevis) Act Cap 3.11** must be construed purposefully. This is an empowering provision intended to facilitate the conduct of business at the high court registry. As I interpret it, the duties of an auctioneer devolve on the Chief Clerk whenever the Registrar is absent from her office for whatever reason. So even if she is on active duty somewhere else in the building, if she is absent from her 'office', her 'office' being that place where she is expected to be, to perform duties as an auctioneer, then the Chief Clerk may perform those duties in her absence.

- [14] Second, and the point being made by the claimants, I can hardly see how the actual wording of the Articles of Sale assist the claimants in any event. In the normal circumstances, an order which merely states that '**the Registrar shall sell** the property', is not the same thing as an order which states that '**only the Registrar** shall sell the property'. Section 70 of Cap. 3.11, is an express legislative provision conferring powers on the Chief Clerk in the event of the absence of the Registrar from office. I can hardly see how the court could in any event make any order directing that '**only the Registrar**' shall have the power to sell in the face of section 70 of Cap. 3.11, except perhaps in cases where the Chief Clerk is personally conflicted in the sale. Apart from such rare cases, in my view, even if

¹ Paragraph 10 of the Defence of the Third and Fourth Named Defendants.

the learned Master has stipulated that the sale by auction should have only been conducted by the Registrar, that would not have by itself precluded the operation of section 70 to give authority to the Chief Clerk in the event that the Registrar was absent from office. The power given to the Chief Clerk is one given by the operation of law that is triggered by the Registrar's absence from office. Such absence from office could be for any reason, and it is quite possible that the Chief Clerk may be called to fill the breach in sudden and unforeseen situations, there may well be situations where the Registrar's absence at a future time is known and the Chief Clerk is aware in advance that he would have to step in and perform those duties which thereby devolves on him.

[15] Having regard to my analysis on this point, I can hardly see how this is any serious issue to be tried.

[16] That takes me to the claimants' second plank in arguing that there is a serious issue to be tried. Here the claimants contend that the auction itself was tainted as the second and fifth defendants acted fraudulently in presenting the fifth defendant as a second bidder to ensure that the auction could proceed. The claimants have contended as a factual matter that when the auction sale commenced on the 23 May 2013, there was at first, several persons present including the fifth defendant, who at first stated that she was only there as an observer. Two other person present represented themselves as bidders but it was soon ascertained that they were both there as representatives of the second defendant. Upon this being clarified, the auctioneer, Mr. Lloyd realized that there was only one bidder present in one representative of the second defendant, and he adjourned the auction. During this adjournment, the fifth defendant was seen to be in discussions with the representatives of the second defendant, and after the auction recommenced, the fifth defendant presented herself as a bidder. It would seem that an objection was taken on behalf of the claimants. The evidence on this comes from Ms. Vanterpool who states in her affidavit:

“14. I have been further told by counsel for the claimants and verily believe that Mr. Lloyd was informed of the meeting between Mr. Henry and Ms. Walwyn during the adjournment and also that Ms. Walwyn’s change of position was not genuine but instead an attempt to artificially increase the number of bidders from one to two in order for the auction to proceed and circumvent the order of sale.”

[17] The second and the fifth defendants have denied that they have acted in collusion and committed any fraud. In an affidavit dated the 17th January 2014, Mr. John Geier, the General Manager of the second defendant has actually prayed that the said paragraph be struck out from the pleading as being ‘scandalous in that it represents the opinion of Ms. Vanterpool or Mr. Tyme.

[18] There is no doubt in my mind that a person present as an observer at an auction is entitled to change his her status and then participate as a bidder. Nothing in law prevents that. Counsel for the claimants has however, asked me to look at the contention that when the auction resumed and the fifth defendant took part she only did so to make one bid and that was to put in a bid which was the upset price, namely US\$2,439,488.00 and then the second defendant made a bid of US\$2,440,000.00. This was a bid that was compliant with the approved Articles of Sale that required that each bid be at least \$500.00 more than the previous bid; this one was \$512.00 more than the previous bid. There were no other bids. The fifth defendant took no further part in the auction. This, counsel for the claimants has urged, shows the fraud and that the fifth defendant was simply there as a ‘shill’.

[19] The Articles of Sale requires that the ‘attendance of bidders shall be numerous’.² If the claimants are right, the fifth defendant was merely a pawn of the only real bidder at the auction sale; she would not have really been a bidder at all. Now this may have the consequences of voiding the sale, since the successful bidder, the second defendant, would have colluded to circumvent the Articles of Sale to obtain the property for itself. I do not have to determine this factual matter at all. This is

² Article 3 of the Articles of Sale.

for the trial. It is serious issue. I note that the claimant had not pleaded properly any particulars of fraud, and if it is minded to proceed with this claim, I would suggest that an amendment is in order.

[20] Before I now turn to consider whether damages are an adequate remedy it is appropriate that I give consideration to a preliminary argument taken by Mr. Roger Forde Q.C. for the first defendant to the effect that even if the court were to find that there is a serious issue to be tried with regards the first claimant, there could be no such finding with regards the second claimant, as he has no valid cause of action against any of the named defendants in this claim. Learned Queen's Counsel has asked this court to consider that all the second claimant is relying on, to ground his claim and his application for an injunction, is the fact that he has obtained a money judgment against the first claimant. Learned Queen's Counsel argues that this really gives the second claimant no right in intervene in the judicial sale of the property which is being exercised by the mortgagee under a mortgage.

[21] In oral arguments, the first defendant, through Mr. Forde Q.C has asked this court to consider the claimants' amended statement of claim. This alleges that the property which is the subject matter of the dispute was owned by the first named claimant and on the 31st July 2012, the learned Master approved draft articles of sale which authorized the auction of the property. The amended statement of claim also alleges that the second claimant had obtained a judgment against the first claimant and that the first defendant breached his fiduciary duty to make a reasonable effort to sell the property at the highest price and notify him of the sale. The first defendant, contends that the second claimant is not the owner of the property and as such there is no duty owed to him in respect of the sale of the property, and further, that the Order of the Learned Master did not place 'a duty on the first defendant in favour of the second claimant to receive notice of the auction sale or to obtain the highest bid.'³

³ The First defendant's defence filed on the 20th January 2014.

- [22] The first defendant argues the second claimant can in no circumstances be entitled to the court's consideration for the grant of any injunctive relief, and further that the issues between it and the second claimant can be disposed of without a full investigation at trial, and that further the second claimant has no real prospect of succeeding on the issues.
- [23] I have no doubt that I am entitled on an application for an injunction to consider whether the applicant has any cause of action against the defendant/respondent. It would be startling, if the pleadings and the application fail to show that the applicant has a valid right with regards to which he seeks protection but the court nonetheless grants an injunction.
- [24] On this application, the second claimant has grounded his entitlement to bring this action in the contention that he has secured a judgment against the first claimant. Mr. Tyme responding to these arguments argues that the second claimant holds a money judgment against the first claimant. He must be saying effectively that this gives him a right or interest in the property, the subject matter of the claim. Does it?
- [25] This claim relates to land that is held by a Certificate of Title under the **Title by Registration Act, Cap 10.19**. The registration system is intended to protect property rights, bring certainty and clarity to land ownership, and to facilitate smooth land transactions by requiring public declaration, by way of registration, of all rights, interests and encumbrances in and over land. It is a system designed to ensure that a Certificate of Title guarantees and protects ownership over all such registered land by its indefeasible nature,⁴ and to this end it is supported by a statutory scheme which provides that all dealings with such land that are not registered in accordance with Cap 10.19, do not confer any rights over the land itself, as in addition to giving publicity, registration gives effects to real rights and establishes the order of priority. Where such dealings are in the nature of

⁴ Section 6 of the Title by Registration Act, Cap. 10.19

agreements, they will simply operate as ordinary contracts between the parties incapable, in the absence of registration, from affecting the land of one or the other.⁵ Even persons who has made a claim for a money debt against the owner of land held by Certificate of Title, and which claim has evolved into a judgment of the court, must still comply with section 109 of the Act before such judgment affects the title held.

[26] Section 109 of the **Title of Registration Act, Cap. 10.19** states that a money judgment (including a judgment for costs) shall become a charge on land as soon as:

(a) the person entitled to the benefit of such judgment has filed an application to the Court under the Judgments Act, Cap. 3.14 for an order for the levying of such money or costs or part thereof by sale of such estate right or otherwise, and all further proceedings in connection with such judgment shall be governed by the provisions of that Act; and

(b) The Registrar of Titles shall have noted such application upon any relevant certificate in his or her custody.”

[27] I have noted section 3 of the **Judgments Act, Cap 3.14** of the Revised Laws of St. Kitts and Nevis which states:

“A judgment already entered up or hereafter to be entered up against any person in the High Court shall operate as a charge upon all lands of such person within the State to the extent of his or her beneficial interest therein:

Provided that no such judgment shall affect any such lands as to purchasers, mortgagees, or creditors, unless and until the person entitled to the benefit of such judgment shall have filed an application to the Court for an order for the sale of such lands towards satisfaction thereof.”

[28] In my view, section 109 of Cap 10.19 is the applicable provision in this case as it treats with land held by Certificate of Title. Section 3 of the **Judgments Act, Cap**

⁵ Section 5, Cap. 10.19

3.14 is a general provision relating to all other land not held under the **Title by Registration Act, Cap. 10.19**.

[29] The second claimant therefore, can only be entitled to seek any order on this application if, either on this application or in the underlying claim, he can show that he has a right or interest in the land in question.

[30] An examination of the application or statement of case of the claimants do not show that that there has been any application made by the second claimant for an order of sale of the property in question under section 109 of the **Title by Registration Act, Cap, 10.19** or for that matter under section 3 of the **Judgments Act, Cap 3.14**. Had this been simply a question of failure to properly plead this case, which, with some degree of straining, could be gleaned from the existing pleadings, I might have been inclined to disregard these arguments of the first defendant, and leave the matter there or at best, give indications that suitable amendments be made. Such an approach would have promoted the overriding objective, in particular, save expenses of the second claimant being required to re-file a claim, and more so to use the resources of the court in an affective manner. The case brought by the second claimant, however, suffers from a greater defect. This is seen from a perusal of the Register held by the Registrar of Titles.

[31] I am of the view that since the Register of Title is a public register, I am entitled to take judicial notice of the contents of that register. Upon examination, that register does not show that the Certificate of Title with respect to the property registered at Folio 23 N173 has any notation that the second claimant has filed any application for an order of sale. This being the case, there is no charge on the land in accordance with section 109 of Cap 10.19, in favour of the second claimant. The second claimant therefore has no enforceable or valid claim to any interest in the land that is the subject matter of the claim.

[32] I have held that section 3 of Cap. 3.14 does not apply to land held under the **Registration by Title Act**, but even if I am wrong about its application in this case, and that it should be read to mean that from the moment there is a money judgment, a charge is imposed on land held by Certificate of Title under Cap 10.19, by virtue of the provision to section 3, such a charge is a limited one in the sense that a money judgment has no such effect on such lands with regards to the rights of purchasers, mortgagors or creditors.

[33] In these circumstances, the second claimant has no valid legal interest or claim upon which he can ground his application for an injunction. I will therefore give no further consideration as to whether he should be granted any order on this application.

[34] In fact this court has a duty to promote the overriding objective and in this regard I note CPR 15.2 which provides as follows:

“The court may give summary judgment on the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue.”⁶

[35] In my view CPR 15.2 promotes the overriding objective in a proper case to save time and expenses and avoids the waste of the court’s resources by the early determination as to whether a claim would be bound to fail. To my mind even though I am not considering an application for summary judgment at this stage, having regard to the arguments raised and my examination of the application and the pleadings on the substantive claim, I am of the view that this court on its own motion, has a power in clear and obvious cases to strike out a claim which on its face is obviously unsustainable. When there is no application for summary judgment, but a court is considering whether to strike out a claim for failing to disclose a viable cause of action, an opportunity should be given to the claimant to

⁶ Lord Woolf MR in *Swain v Hillman* [2001] 1 All E.R. 91 when in commenting on the equivalent English rule stated: “The words ‘no real prospect of succeeding’ do not any amplification, as they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success or..”

be heard on this issue. The second claimant was allowed to address the court on this issue. Nothing he has said persuades me that this power should not be exercised in this case. I will therefore exercise this jurisdiction in this case, and not only will I deny the second claimant any relief on his application, but I will also strike out the claim filed on his behalf.

[36] I now turn to consider whether damages would be an adequate remedy with regards the application, which I now regard as the application only of the first claimant.

Whether Damages are an Adequate Remedy

[37] The first claimant, through counsel, argues that damages would not be an adequate remedy. What counsel actually says is that 'damages would be speculative and cannot be proved'. Counsel for the first claimant develops this point by arguing that damages would not a sufficient remedy 'because the only way the claimants could prove damages [from the unlawful sale] would be to provide a self serving affidavit from Mr. Bilzerian that he would have bid a certain amount above the winning bid. For example, if Mr. Bilzerian claimed he would have bid \$20 million more than the winning, would this Court accept that as the measure of damages? If so the claimants will agree that it can prove damages. Otherwise, there is no other way for the claimants to establish damages that are not self serving or speculative.'

[38] *In the usual case, in considering whether to grant injunctive relief, the court should ask whether the applicant should be confined to his remedy in damages. As Sachs LJ said in **Evans Marshall v Bertola [1973] 1 WLR 349** at 380 C to D:*

"The courts have repeatedly recognised that there can be claims under contracts in which, as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary

account in a common law action for breach of contract: loss of goodwill and trade reputation are examples...”

[39] Adequacy is not determined on the basis of what outcome one party would desire, but on established principles of law. *Where damages are shown to be adequate that would normally be sufficient to defeat an application for an interim injunction.* In some cases where the assessment of damages would be an extremely complex and unsatisfactory exercise, damages may not be an adequate remedy.⁷ So too, in some cases if assessment involve a speculative ascertainment of the value of a loss of a chance, then that may not be sufficient to prevent an interim injunction as damages may not be regarded as adequate.⁸ That the loss of a chance and the value to be attributed to such a chance as a matter affecting the determination of the adequacy of damages is seen vividly in a number of English procurement cases **NATS (Services) Ltd v Gatwick Airport Ltd** 2014 WL 4636860 Queen's Bench Division (Technology & Construction Court).⁹

[40] One of these cases is **Letting International Ltd v Newham LBC** [2007] EWCA Civ 1522 in which the English Court of Appeal considered that the difficulty in assessing the value of a lost chance was a factor which led to the grant of the interim injunction. Moore-Bick LJ said:

“33. I turn first, then, to consider the adequacy of a remedy in damages. Mr Giffin's principal submission was that if the contractor is confined to a remedy in damages, as it will be if the present order is discharged, the quantification of its loss would prove very problematical. That is because it will have to take account not only that the claim will for the loss of a chance of being successful in a fairly operated tender process (which will have to take account of how other bidders would have acted under those circumstances), but also the consequential loss of the chance of being

⁷ NATS (Services) Ltd v Gatwick Airport Ltd 2014 WL 4636860 Queen's Bench Division (Technology & Construction Court)

⁸ Araci v Fallon [2011] EWCA Civ 668; NATS (Services) Ltd v Gatwick Airport Ltd 2014 WL 4636860 Queen's Bench Division (Technology & Construction Court)

⁹ The cases examined by Mr. Justice Ramsey included *Morrisons Facilities Services Ltd v Norwich City Council* [2010] EWHC 487 (Ch); *Alstom Transport v Eurostar International Ltd* [2010] EWHC 2747; *Indigo Services (UK) Ltd v The Colchester Institute Corporation* [2010] EWHC 3237 (QB); *Metropolitan Resources Northwest Ltd v Home Secretary* [2011] EWHC 1186 (Ch)

called on by the council to provide services pursuant to the framework contract...

35. To some extent I have already dealt with Miss Holmes' [counsel for the authority] points, which in my view tend, if anything, to reinforce the contractor's argument that, since loss is likely to be so difficult to assess, damages are not an adequate remedy as far as it is concerned. However, they also overlook the fact that the tender procedure is not yet complete and no contract has yet been awarded...

36. A loss of an opportunity to take part in a fair tendering process on equal terms with other bidders may be difficult to evaluate in monetary terms but cannot be said to be of no commercial value at all."

[41] If this auction sale was tainted with fraud, then in the normal case, at the end of a trial, damages that the first claimant would have suffered would have to be assessed with reference to the best value or the market value which an auction sale property conducted would have realized at the time of the improper and unlawful disposal. See the case of **Cuckmere Brick Co. Ltd. v Mutual Finance Ltd.** [1971] 1 Ch 949, 966-969; **Aodhcon LLP v Bridgeco Ltd** [2014] EWHC 535 (Ch). In this case, however, we are not at the end of a trial, and as I interpret the arguments of counsel, the first claimant is contending that it has lost the chance of securing more than the market value of the property. The allegation is that the fraud meant that there was only one bidder at the auction. This is significant at this stage when the court is being asked to grant an interim injunction, in a claim to set aside the actual sale of the property. Here the court is urged really that quite apart from the market value of the property, the first claimant would have lost that chance to secure an even greater sale price; that is what requires this 'speculative ascertainment' of the value of that chance. This to my mind brings that problematical exercise to assess the damages the first claimant would have suffered. I am unable to therefore find that damages would be an adequate remedy. The injunction sought therefore should not be refused on this basis. I now turn to consider the balance of convenience.

The Balance of Convenience

[42] The Privy Council recently made the point **National Commercial Bank Jamaica Ltd v Olint Corpn Ltd** [2009] UKPC 16 that the purpose of an interim injunction was really to 'improve the chances of the court being able to do justice after a determination of the merits at the trial'. At paragraph 16 and 17 of the Board's opinion, Lord Hoffman discussing the principles grounding the grant of an interim injunction made the point that:

"16. ... 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. Likewise, 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.

17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396 , 408: "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."

[43] What then is the balance of justice in this case? The first claimant is indebted to the first defendant bank in the sum of EC\$10,535,742.58 with regards to which the first defendant has exercised its powers of sale in relation to a number of properties of the first claimant. The upset price which has been set with regards all the properties amount to a total of EC\$7,901,124.50, which is less than the total

indebtedness in the amount of EC\$2,634,618.08. When this property would have been sold, there would still be outstanding a significant sum owing to the first defendant.

[44] The first defendant would be put out of its monies until these issues are determined. That is of course not good for commerce and the business of the first defendant. The balance to this, however, is the fact the first defendant actually has a chance of deriving a benefit out of an order being made at this stage as if a greater sum is obtained on a sale there would be less to recover from the first claimant. I would also think that commercial banks should be concerned that when they seek to exercise their rights of sale under the mortgage instrument, that such sales are conducted in a bona fide manner. Furthermore, the first defendant would be entitled to that interest which continues to run on the original debt owed. In my view, the damage caused to the first defendant would (a) not be as great as the damage caused to the first claimant, (b) be more easily ascertainable, and (c) in any event would not be irremediable. With regards the Registrar of the High Court and the Attorney General, it is in their interest that auction sales carried out by the court maintain their integrity. These are serious allegations being made regarding the possible manipulation of a judicial sale by one of the bidders at the sale. If this is proven to be true, the main question that would arise would be whether the title of the property should pass to the buyer of the property of the auction.

[45] From the perspective of the first claimant, there is a chance that if numerous bidders (in the event it is proved that there was only one real bidder at the auction) attend the auction, that a much greater price may be secured thereby reducing or perhaps even extinguishing the debt of the first claimant. It would mean that the first claimant would have lost a real chance to secure a greater sum for the property. The balance of justice in this case therefore lies in the grant of the orders sought on the application.

[46] The first claimant has not given any undertaking as to damages. This court is entitled to require¹⁰ that it gives such an undertaking in writing to be filed in court, to pay such damages to each and every defendant each one would have suffered if it were to be found that that this order was wrongfully granted.

[47] Injunctive relief will therefore be granted to the first claimant. For the reasons that are set out above, no relief is given to the second claimant. The first claimant will also be entitled to its costs in the sum of \$1500.00. This will be borne by all the defendants equally.

Orders

[48] On this application brought by the claimants, there shall be no relief granted to the second claimant. He is removed entirely from these proceedings. Upon an undertaking as to damages given in writing and filed in court by the first claimant, the following is granted, namely: An Order restraining the Registrar, whether by herself or by her agents and her servants from transferring, selling or disposing of the following property until the claim by the first claimant to have the auction of the 23rd May, 2013 set aside, is determined, namely

“All that lot piece or parcel of land situate at Caines Estate Yard in the parish of St. John Capisterre in the Island of Saint Christopher described in Register Book 1, Folio 113, and Register Book N2 Folio 173 of the Register of Titles of the island of Saint Christopher save and except the privately owned properties namely Units No. A2, No. A1 and No. B4 of the Lemon Grove Condominium Development.”

¹⁰ For an instructive discussion on the court's power to exact an undertaking as to damages from a claimant for an injunction, see the case *Caribbean General Insurances Co. Ltd v The St Lucia Coconut Growers Association Limited* Civil Appeal No. 4 of 2008, St. Lucia citing with approval *Cheltenham & Gloucester Building Society (Formerly Portsmouth Building Society) v Ricketts and others* [1993] 1 W.L.R. 1545 (C.A.). Note also *F. Hoffman-La Roche & Co. A.G. v Secretary of State for Trade and Industry* [1975] A.C. 295, when Lord Diplock explained at page 361: “The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is given to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit.”

- [49] The first claimant is entitled to its costs on the sum of \$1500.00 on this application. Such costs are to be borne equally by all the defendants.
- [50] On the dismissal of the claim brought by the second claimant, he shall pay costs to each of the defendants in the sum of \$1000.00.
- [51] The court would like to express its gratitude to the parties for written submissions in this matter, and for their patience.

Darshan Ramdhani
Resident Judge (Ag.)