

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

COMMON LAW AND EQUITY DIVISION

2021/CLE/gen/No.00863

BETWEEN

TYSON STRACHAN

Claimant

AND

ANTHONY SIMON

First Defendant

AND

YORKSHIRE HOLDINGS LTD.

Second Defendant

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Third Defendant

AND

**MCKAY CULMER & ASSOCIATES
(A firm)**

Fourth Defendant

**Before: Her Ladyship The Honourable Madam Senior Justice
Deborah Fraser**

**Appearances: Ms. Gabrielle Rahming and Ms. Yvette Rahming for the
Claimant**

**Mr. Sidney Cambridge Jr. for the First and Second
Defendants**

**Mr. Ferron J.M. Bethell K.C. and Ms. Camille A. Cleare
for the Third Defendant**

Mr. Norwood Rolle for the Fourth Defendant

Judgment Date: 11 October 2023

Parts 17.1, and 17.2 of the Supreme Court Civil Procedure Rules, 2022 – Orders for Interim Remedies – Interim Declaration – Interim Injunction

RULING

1. This is an urgent application brought on behalf of the Claimant, Mr. Tyson Strachan (“**Mr. Strachan**”), requesting the Court to make several interim orders against the named Defendants.

Background

2. Mr. Strachan is the owner of ALL THAT piece parcel or lot of land being Lot Number 12 comprising Six thousand Seven hundred Fifty-two (6,752) square feet situate in the Western District of the Island of New Providence and being a portion of a larger parcel of land known as Crown Allotment Number Thirty-seven (37) and located approximately 547 feet South of Fire Trail Road and bounded Northeastwardly by Lot Number Seventeen (17) and running thereon Fifty (50.00) feet bounded Southwardly by land now or formerly the property of Janice Wallace and running thereon One hundred and Thirty-five and Sixteen hundredths (135.16) feet bounded Westwardly by a Thirty (30) foot wide road reservation and running thereon Fifty (50) feet and bounded Northwestwardly by land now or formerly the property of the Second Defendant, Yorkshire Holdings Ltd. (“**YHL**”) and running thereon One hundred and Thirty-five and Sixteen hundredths (135.16) feet which said piece parcel or lot of land has such position boundaries, shape, marks and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated 07 September 2006 and made between YHL of the one part and Melinda T. Lockhart of the other part and is recorded in the Registry of Records situate in Nassau on the Island of New Providence one of the Islands of the Commonwealth of The Bahamas in Volume 10748 at pages 315 to 319 and is thereon coloured PINK (“**Property**”). His ownership of the Property is evidenced by an Indenture of Conveyance dated 18 September 2012 between Commonwealth Bank Limited and Tyson L. Strachan and recorded in the Registry of Records in the City of Nassau in Volume 11849 at pages 482 to 491 (“**Strachan Conveyance**”).
3. The First Defendant, Mr. Anthony Simon (“**Mr. Simon**”) has a conveyance of the Property dated 16 March 2020 between YHL and Mr. Simon and recorded in the Registry of Records in the City of Nassau in Volume 13428 at pages 415 to 427 (“**Simon Conveyance**”). It is acknowledged by all Parties that this conveyance was recorded after the Strachan Conveyance.

4. YHL is and was, at all material times, a company incorporated under the laws of the said Commonwealth with its registered office located at Ryan & Co. Nassau, The Bahamas. YHL purportedly conveyed the Property to Mr. Simon.
5. The Third Defendant, First Caribbean International Bank (Bahamas) Limited ("**FCIB**") is and was at all material times, a company incorporated under the laws of the said Commonwealth with its registered office at Shirley Street, New Providence, The Bahamas carrying on the business of banking and money lending services. FCIB entered into a mortgage with Mr. Simon over the Property by way of a Mortgage dated the 16 March 2020 from Mr. Simon to FCIB and recorded in the Registry of Records in the City of Nassau in Volume 13428 at pages 428 to 440 ("**Simon Mortgage**").
6. The Fourth Defendant, McKay Culmer & Associates ("**MCA**") is and was at all material times a firm of attorneys and counsel at law at Duffus House Annex, 36B Sears Road, Nassau, New Providence, The Bahamas.
7. In or about February 2021, Mr. Strachan noticed individuals on the Property, without his consent.
8. Mr. Strachan was informed by one of the individuals on the Property (who is said to be a contractor) that it was owned by an individual who engaged the contractor's services. Based on this information, Mr. Strachan believed that Lot Number 10 (a lot which was adjacent to the Property) belonged to him.
9. Mr. Strachan then engaged a surveyor to survey the land Mr. Strachan believed to be his. It was discovered by the surveyor, based on his review of the plan attached to the Strachan Conveyance, that the land was not Mr. Strachan's.
10. After retaining attorneys, Mr. Strachan discovered that the Property was purportedly conveyed to Mr. Simon and that Mr. Simon had tenants on the Property, whom he was collecting rent from. Mr. Strachan brought the error to the attention of Ms. Rachel Culmer ("**Ms. Culmer**"), an attorney from MCA who acted for Mr. Simon and FCIB in the transfer of the Property by way of the Simon Conveyance. Ms. Culmer also prepared the Simon Mortgage.
11. On 17 June 2023, by a Re-Amended Writ of Summons, Mr. Strachan brought an action against all of the Defendants alleging negligence in the unlawful/wrongful transfer of the Property as well as nuisance.
12. In essence, Mr. Strachan claims the following reliefs:
 - A) Special Damages in the amount of \$5,572.00;
 - B) An injunction against the Defendants and their agents preventing them from entering or otherwise dealing with the Property;
 - C) Vacant Possession of the Property; and

D) A Declaration that Mr. Strachan is the owner in fee simple of the Property.

Alternatively an order that:

E) The Property be appraised by a reputable registered Real Estate Appraiser to be appointed by Mr. Strachan;

F) Mr. Strachan is entitled to an equitable lien over the premises to secure the appraised market value of the Property together with interest pursuant to the Civil Procedure (Award of Interest) Act 1992;

G) The Defendants pay to Mr. Strachan the sum equivalent to that quoted as the market value of the Property in the appraisal to be prepared by the appointed Real Estate Appraiser, such sum to be paid within a period of no more than six (6) months after the date on which a copy of the appraisal is delivered to the Defendants;

H) Mr. Strachan upon receipt of the requisite funds from the Defendants, transfer title to the Property to Mr. Simon and/or FCIB by way of conveyance;

I) The Defendants bear all costs associated with the appraisal and the transfer of the Property;

J) In the event that the Defendants fail or refuse to compensate Mr. Strachan as provided above, Mr. Simon is ordered to vacate the Property upon receipt of reasonable notice from Mr. Strachan.

K) Mesne Profits;

L) Damages;

M) Interest pursuant to the Civil Procedure (Award of Interest) Act 1992;

N) Such further or other relief as the Court deems fit; and

O) Costs.

13. Mr. Simon nor YHL filed a Defence against the claim. FCIB and MCA, however, filed their Defences on 18 July 2023 and 31 July 2023 respectively. Both FCIB and MCA appear to admit that the Property belongs to Mr. Strachan but deny the allegations of negligence and nuisance.

14. On 26 July 2023 Mr. Strachan filed an Urgent Notice of Application and Certificate of Urgency requesting the Court to grant several interim reliefs, which, interestingly, mirror the substantive reliefs sought in the Re-Amended Writ of Summons ("**Interim Reliefs**").

ISSUE

15. The issue that I must decide is whether I should grant the Interim Reliefs sought by Mr. Strachan?

EVIDENCE

Mr. Strachan's Evidence

16. In the Urgent Notice of Application, Mr. Strachan expressly states that he wishes to rely on the evidence contained in the following documents:

- (i) The Affidavit of Tyson Strachan filed on 09 August 2021 ("**Strachan Affidavit**");
- (ii) The Affidavit of Rachel Culmer filed on 29 October 2021 ("**Culmer Affidavit**");
- (iii) The Affidavit of Christopher Rahming (an Affidavit Mr. Strachan's counsel says is incorrectly referred to as an Affidavit of Service) filed on 14 September 2022 ("**Rahming Affidavit**"); and
- (iv) The Certificate of Urgency filed on 26 July 2023.

17. Accordingly, the Court will review each in turn.

The Strachan Affidavit

18. The Strachan Affidavit states that: (i) Mr. Strachan is the owner of the Property (the Strachan Conveyance is exhibited to the Strachan Affidavit); (ii) Mr. Strachan initially planned to build a triplex on the Property; (iii) in or around February 2021, Mr. Strachan noticed an unknown individual on the Property without Mr. Strachan's consent; (iv) the individual on the Property was a contractor who stated that he was hired by an individual (who was not identified in the Strachan Affidavit) who claimed to be the owner of the Property; (v) Mr. Strachan was under the mistaken belief that Lot Number 10 was his property and paid Mr. Arthur Stewart to clear it down in order for Mr. Strachan to commence construction of the intended triplex; (vi) Mr. Strachan had his property surveyed by Mr. Donald Thompson who revealed in a survey report dated 29 April 2021 that the Property was, in fact, Mr. Strachan's property (the surveyor's report is exhibited to the Strachan Affidavit); and (vii) On 01 May 2021, Mr. Strachan approached Capital Law Associates for legal support regarding Mr. Anthony Simon's occupation of the Property without Mr. Strachan's permission.

19. The Strachan Affidavit further provides that: (i) In July 2021, Mr. Strachan's cousin, Ms. Natasha Nouguez, contacted him and asked if he was willing to sell the Property. He stated he was not prepared to sell it; (ii) he was also told by Ms. Natasha Nouguez to (and did) contact Ms. Rachel Culmer regarding the Property who confirmed that she made a mistake regarding the purported transfer of the

Property; (iii) a search at the Registrar General's Department's Deeds and Documents website revealed the existence of the Simon Conveyance and the Simon Mortgage (the Simon Conveyance and Simon Mortgage are exhibited to the Strachan Affidavit); (iv) Ms. Melinda T. Lockhart ("**Ms. Lockhart**") purchased the Property from YHL as evidenced in an Indenture of Conveyance between Ms. Lockhart and YHL dated 07 September 2006 and recorded in the Registry of Records in the City of Nassau in Volume 11510 at pages 39 to 44 (it is exhibited to the Strachan Affidavit along with the re-recorded conveyance from YHL to Ms. Lockhart); (v) Ms. Lockhart subsequently obtained a mortgage over the Property by way of a Mortgage between herself and Commonwealth Bank Ltd. dated 11 September 2006 and recorded in the said Registry in Volume 10748 at pages 320 to 333 (which is exhibited to the Strachan Affidavit); and (vi) Ms. Lockhart defaulted on the mortgage and, pursuant to its terms, Commonwealth Bank Ltd. took possession of the Property and sold it to Mr. Strachan in 2012 as evidenced by the Strachan Conveyance.

The Culmer Affidavit

20. The Culmer Affidavit provides that: (i) Ms. Rachel Culmer, counsel and attorney at law, was instructed by Mr. Simon and FCIB to prepare a conveyance and mortgage for a lot of land situate off Fire Trail Road in the Western District of New Providence; (ii) the initial documents were prepared by Ms. Culmer for Lot Number 12 and a correction was made for Lot Number 14 to be the subject property; (iii) the change was made but inadvertently, the documents were printed for Lot 12 (i.e. the Property); (iv) the documents were stamped and recorded and the buyer/mortgagor went on to develop the Property; (v) Mr. Simon built a triplex residential dwelling on the Property, which was funded by FCIB by way of a First Demand Legal Mortgage; (vi) it was subsequently discovered that the Property was in fact purchased by Mr. Strachan with the assistance of a Finance Corporation of The Bahamas Limited (FinCo) mortgage; (vii) Mr. Strachan commenced an action for, *inter alia*, a declaration that he is the owner of Lot 12 and all the improvements thereon; and (viii) he prayed for vacant possession displacing Mr. Simon's tenants.
21. The Culmer Affidavit further states that: (i) in September 2021, an order was granted for eviction of the tenants (though there is no confirmation of which order is being referred to, nor is any eviction order exhibited); along with and preventing Mr. Simon from entering the Property with costs to be paid by Mr. Simon to Mr. Strachan; (ii) then Counsel for Mr. Simon and YHL, Mr. Damien Gomez Q.C., gave undertakings and consented to the terms of the order; and (iii) Mr. Simon and YHL changed attorneys and were advised that Mr. Strachan's case is not legally sound.
22. The Culmer Affidavit goes on to make, what appears to be legal submissions. As that is not evidence, I will not address it here.

The Rahming Affidavit

23. The Rahming Affidavit states that: (i) Mr. Christopher Rahming is the Office Manager of Capital Law Associates; (ii) Mr. Strachan commenced an action by Writ of Summons filed herein on 22 September 2021; (iii) FCIB filed a Defence on 13 October 2021; (iv) Mr. Strachan filed an Ex-parte Summons on 06 August 2021 (which was held *inter partes*) before Madame Justice Indra Charles on 18 August 2021 during which an undertaking was made by counsel for Mr. Simon and YHL that Mr. Simon, YHL nor their agents and/or assigns would (a) enter upon; (b) continue building upon; (c) clear or allow to be cleared; (d) sell; or (e) enter into any agreement to dispose of or lease or otherwise deal with the Property; and (iv) contrary to the undertaking, the tenants remained living in the units on the Property and presumably, made rent payments to Mr. Simon.
24. The Rahming Affidavit further states that: (i) Mr. Strachan sought an application to add McKay Culmer & Associates to the action due to certain admissions made by Ms. Culmer in the Culmer Affidavit; and (ii) in order to properly determine the real questions in controversy, the Writ was amended to add MCA as a party to the proceedings.

The Certificate of Urgency

25. The Certificate of Urgency provides a synopsis of the purpose of this application before me. It states that Mr. Simon and YHL's then attorney made an undertaking on 18 August 2021 that any and all work on the Property by Mr. Simon, YHL and/or their employees, servants, etc. would cease. However, despite the undertaking, the work persisted. It further states that Mr. Simon and YHL have (purportedly) continuously caused delay in these proceedings (though it is not explained what action/inaction by Mr. Simon and/or YHL has caused the alleged delay).
26. Furthermore, the Certificate of Urgency states that the Simon Conveyance and Simon Mortgage have created an encumbrance on title on the Property which has caused Mr. Strachan to suffer loss and damages and he is being restricted from the use and enjoyment of his property. This, according to the Certificate of Urgency, is the reason why this application is one of great urgency.
27. It also outlines the Interim Reliefs sought, as mentioned earlier in this ruling.

Evidence of the Defendants

28. None of the Defendants furnished any affidavit evidence in relation to this application.

SUBMISSIONS

Mr. Strachan's Submissions

29. Mr. Strachan's counsel submits that, based on the foregoing, the Court ought to grant interim orders to reduce the losses which he has suffered thus far. Counsel draws the Court's attention to **Part 17.1 (a),(b),(c),(g),(h)(iv),(j),(i), and (m) of the Supreme Court Civil Procedure Rules, 2022 ("CPR")**. Those excerpts read as follows:

“(1) The Court may grant interim remedies including —

(a) an interim declaration;

(b) an interim injunction;

(c) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under subparagraph (h);

(g) an order for interim costs;

(h) an order for the —

(iv) payment of income from relevant property until a claim is decided;

(j) a “freezing order”, restraining a party from —

(i) dealing with any asset whether located within the jurisdiction or not;

(m) an “order for interim payment” under rules 17.14 and 17.15 for payment by a defendant on account of any damages, debt or other sum which the Court may find the defendant liable to pay.”

30. Counsel cites **Part 17.1(4) of the CPR**, which provides:

“The Court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind.”

31. **Part 17.15(1), (a), (d), and (e)(i)(ii) of the CPR** state:

“(1) The Court may make an order for an interim payment only if —

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;

(d) except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs; or

(e) the following conditions are satisfied —

(i) the claimant is seeking an order for possession of land, whether or not any other order is also being sought; and

(ii) the Court is satisfied that, if the case went to trial, the defendant would be held liable, even if the claim for possession fails, to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession was pending.””

32. Mr. Strachan’s counsel asserts that, even though the Interim Reliefs sought will in effect grant substantially all the relief claimed in the Re-Amended Writ of Summons, the case of **Woodford v Smith [1970] 1 W.L.R. 806** established that in a proper case, an interlocutory injunction may be granted even though it gives the plaintiff the whole of the relief for which he would ask at trial.

33. She contends that the affidavit evidence as well as the Defences filed confirm that Mr. Strachan is the true owner of the Property. This, counsel submits, is not an issue in dispute.

34. Counsel also cited **Arawak Homes Ltd v Bastian et al CLE/gen 783 of 2006** for the following proposition from Justice Albury:

“..a review of the defendants’ intended defence shows that, contrary to the defendant’s assertion, it does not indicate a high probability of success. That intended defence is obviously without merit and not sustainable, in light of the decisions of courts of concurrent jurisdiction, in Supreme Court Actions #CL 27/1991 and #2004/CLE/gen/155, which have displaced any claim of title to the subject land by the defendants’ purported predecessor in title. The defendants accordingly cannot establish any better claim of title to the subject lots. Moreover, the intended defence admits, at paragraphs 7 and 8 thereof, that the plaintiff has documentary title to the subject lots and had been declared the owner of that land in Supreme Court Action # 2004/CLE/gen/155. Based on those admissions, and pursuant to RSC Order 27 rule 3, the plaintiff is entitled to have judgment against the defendants.”

35. Counsel further asserts that, as Mr. Simon has no legitimate ownership over the Property and no right and/or defence in relation to his entry on the Property, the Court has no choice but to find that Mr. Simon is a trespasser. To buttress this assertion, counsel relies on the Court of Appeal decision of **Fairness Limited v Steven Bain et al SCCivAppNo. 30 of 2015**.

36. Counsel concludes by requesting the Court to grant the Interim Reliefs as well as costs.

Mr. Simon's and YHL's Submissions

37. Mr. Simon's and YHL's counsel submits that Mr. Strachan's application and the entire case, is misconceived. He asserts the following:
- (i) Mr. Strachan is not the holder of legal title to the Property and can have no locus standi to bring this action. He ought to be a co-plaintiff with FinCo who holds the legal title to the Property.
 - (ii) Mr. Strachan has no cause of actions as against FCIB as there is no nexus in law – there is no privity of contract nor any duty of care owed to him in tort. **Moxey v Lopez CLE/gen/871 of 2008.**
 - (iii) Mr. Strachan's Re-Amended Writ of Summons does not plead trespass and therefore the remedy for trespass being sought cannot be allowed (per Justice Charles [as she then was] in **Montague Investments Ltd v Westminster College – 2015/CLE/gen/00845**).
38. Counsel also asserts that the matter should be resolved by a mutually agreed committee of senior conveyancing attorneys to assist in advising Mr. Strachan's attorneys as to the expectations and courtesies of the Bar regarding the promotion and encouragement of amicable settlement in line with customs and practices of the Bar (i.e. counsel proposes a Deed of Exchange).
39. Counsel further asserts that there was no discussion in Mr. Strachan's submissions relating to the criteria for the granting of interim/injunctive relief. He asserts that there is case law that provides guidance and outlines the criteria when requesting an interim injunction – namely, **Babanaft International Company S.A. v Bassatne [1988] EWCA Civ** for Mareva injunctions and **Anton Piller KG v Manufacturing Processes Limited [1976] Ch. 55 (C.A.)** for an Anton Piller Order.
40. Further, Counsel submits that there is no risk of escaping any adverse judgment or matter dissipating as the subject matter of this case involved commercial real estate. Counsel also asserts that Mr. Strachan did not make any undertaking to cover any damages that may ensue from the injunction if the Court was minded to grant it.
41. Counsel also asserts that, no declaration would be required in this matter as Mr. Strachan's ownership of the Property is of public record and, as his title deeds were recorded first in time, they take priority to all others. He further asserts that Mr. Strachan is held to strict proof in relation to the allegation that he has suffered loss and that Mr. Strachan merely has an equitable interest in the property. Thus, Mr. Strachan's Equity of Redemption is likely minimal in that (based on the Strachan Affidavit), he purchased the Property in 2012 with 5%

down payment. Mr. Strachan's mortgage payment with interest at 8% was about \$380.00 per month, meaning that his interest was estimated at less than \$25,000.00.

42. In addition, counsel for the First and Second Defendant contends that Mr. Strachan did nothing while the triplex on the Property was being constructed. Counsel submits that Mr. Strachan never once approached Mr. Simon until after the triplex on the Property was complete. This, counsel submits, is a classic case of Unjust Enrichment.

43. In relation to Mr. Strachan's request for an interim order under 17.15 of the CPR, counsel asserts that the court may only make an order for an interim payment where a defendant against whom an order is sought has admitted liability to pay damages. Counsel submits that this is not the case and that Mr. Strachan is put to strict proof as to liability and quantum for any purported losses.

44. Counsel is requesting the Court to dismiss this application with costs to the Defendants.

FCIB's Submissions

45. FCIB's counsel asserts that Mr. Strachan's application is misconceived. Counsel submits that the uncontroverted evidence presently before the Court is that the Property was mortgaged by Mr. Strachan to FinCo. Thus, Mr. Strachan merely has an Equity of Redemption and no legal title to the Property.

46. Counsel further submits that there is no evidence that Mr. Strachan was ever in possession of the Property. Counsel also contends that Mr. Strachan seeks an injunction where an undertaking to refrain from doing what is requested in the Notice of Application has already been given by Mr. Simon and YHL.

47. Counsel also submits that Mr. Strachan's counsel asserted that the Defendants committed acts of trespass, however, this was not pleaded by Mr. Strachan in his Re-Amended Writ of Summons. Counsel highlights the case of **Montague Investments Ltd v Westminster College 2015/CLE/gen/00845** ("**Montague**") where Justice Charles (as she then was) opined on the significance and purpose of pleadings and refused to entertain arguments of adverse possession advanced in affidavit evidence and submissions which were not pleaded.

48. Counsel concedes that there is mention of trespass at paragraph 29 of the Re-Amended Writ of Summons in the context of the particulars of a claim for negligence asserted against YHL, but it is not substantiated or particularized.

49. Counsel further submits, similar to Counsel for Mr. Simon's and YHL, that the FinCo Mortgage was recorded some eight years prior to the Simon Mortgage. Thus, any claim that there is a lien or encumbrance on the Property is misconceived.

50. Lastly, counsel submits that there is no privity of contract as between FCIB and Mr. Strachan, hence the claim against FCIB is misconceived and unsupported by evidence.
51. Counsel is also requesting the Court to dismiss the application and to award the Defendants costs.

Discussion and Analysis

52. I highlight that the submissions of Mr. Strachan were indeed received very late – quite literally on the day of the hearing. As a result, I permitted the Defendants to address the Court in relation to the late submissions orally and allowed them to reduce their submissions into writing for the Court’s consideration. The scope of their submissions was confined to what was presented orally before me on the day of the hearing.
53. I also wish to note that MCA’s counsel indorsed the submissions of the other Defendants and thus, did not prepare any written submissions for my consideration.
54. Mr. Strachan’s position is that the Interim Reliefs are warranted and ought to be granted. The Defendants however contend that the application, and the entire claim, are misconceived and ought to be dismissed.
55. The Court’s powers to grant interim orders are outlined under **Part 17 of the CPR** (as mentioned earlier in this ruling). I agree with counsel for Mr. Simon, YHL and FCIB that Mr. Strachan’s counsel did not highlight any authorities or principles which the Court should address its mind to when considering whether or not it ought to grant any interim orders as outlined under the CPR.
56. In any event, I will outline the relevant law here and now.

Interim Injunction

57. According to the Urgent Notice of Application, Mr. Strachan is seeking an injunction to restrain Mr. Simon and YHL whether by themselves or by their employees, servants or agents or otherwise howsoever from entering or crossing or otherwise dealing with the Property.
58. The Court is empowered to grant an interim injunction by virtue of **Part 17.1(1)(b) of the CPR** which provides:
- “(1) The Court may grant interim remedies including —**
(b) an interim injunction;”
59. According to The Commonwealth of **The Bahamas’ Supreme Court Civil Procedure Rules, 2022 Practice Guide (March 2023)** (“Practice Guide”), at **page 111** at the explanatory notes:

“The purpose of an interim injunction is to improve the chances of the Court being able to do justice after a determination of the merits at the trial. National Commercial Bank Jamaica Limited v Olint Corporation Limited (Practice Note) [2009] UKPC 16 <http://www.bailii.org/uk/cases/UKPC/2009/16.html> The approach to be adopted by the court in hearing applications for interim injunctions and the principles to be applied are derived from American Cyanamid Co v Ethicon Ltd [1975] A.C. 396 (H.L.); Tara Estates Ltd v Arthurs (Milton).pdf (courtofappeal.gov.jm) [2019] JMCA Civ 10; JIPFA Investments Ltd v The Ministry of Physical Planning et al - Eastern Caribbean Supreme Court (eccourts.org):”

60. The principles emanating from **American Cyanamid Co v Ethicon Ltd [1975] UKHL 1 (“American Cyanamid”)** remain the benchmark in determining whether or not an interim injunction ought to be granted.
61. The well-known factors to be considered from **American Cyanamid** are as follows:
- (a) Whether there is a real issue to be tried?
 - (b) Whether damages would be an adequate remedy?
 - (c) Whether the Claimant is willing to provide an undertaking in damages if it is determined that the injunction ought not to have been granted?
 - (d) Whether the balance of convenience lays in favor of the applicant?
 - (e) Whether there are any special factors to consider?
62. Based on the pleadings before me, it is difficult to see any real triable issue as against all of the named Defendants. The Defendants all appear to concede that Mr. Strachan owns the property. Furthermore, in relation to the allegations of negligence and nuisance, I am unable to make the connection of such claims as against the named Defendants – perhaps, save and except as against Mr. Simon. Without saying more, I believe these will be immense hurdles Mr. Strachan will have to traverse at trial. In the premises, I am not satisfied that there is a real issue to be tried as against all of the named Defendants.
63. In relation to the adequacy of damages, from my understanding of the evidence, it appears that damages would be a viable remedy, but Mr. Strachan wishes to cease any further purported loss emanating from the Defendants’ wrongful use of the Property. According to the Rahming Affidavit and Mr. Strachan’s counsel’s submissions, rent is presently being collected by Mr. Simon from tenants presently on the Property. Counsel asserts that this is wrongful and the ongoing collection of the rent ought to stop. The Court bears such evidence in mind (particularly as such evidence was uncontroverted by any of the Defendants) and is of the view that damages may not be an appropriate remedy at this time.

64. With respect to Mr. Strachan making an undertaking, I do not recall seeing anywhere in Mr. Strachan's submission or affidavit evidence any undertaking being made in relation to the granting of the injunction nor was such an undertaking made by his counsel during the hearing of this application.
65. With respect to the balance of convenience, it appears to lay in favor of Mr. Strachan. At present, it appears that Mr. Simon is gaining benefit from the use of the Property, which does not belong to him. I am aware that undertakings were made by Mr. Simon's and YHL's former counsel. According to affidavit evidence, however, the undertaking has not been adhered to and there appears to be continued dealings with the Property by Mr. Simon and YHL. None of this evidence has been opposed or objected to by Mr. Simon or YHL. Granting an injunction will cease any further dealing with the Property by Mr. Simon.
66. Lastly, I do not find any special factors which the Court need consider.
67. In the circumstances, I am prepared to grant an interim injunction to maintain the status quo, only if Mr. Strachan is prepared to make an undertaking as to damages.

Interim Declaration

68. The Claimant did not provide legal submissions on this, nor has any of the Defendants. It is acknowledged that this is a new creature, however, parties should seek to guide the Court on relevant principles to consider. Notwithstanding, the Court will address the matter.
69. Mr. Strachan seeks the following declarations:

“(1) A Declaration that the Claimant is the owner in fee simple of ALL THAT piece parcel or lot of land being Lot Number Twelve (12) comprising Six thousand Seven hundred Fifty-two (6,752) square feet situate in the Western District of the said Island of New Providence and being a portion of a larger parcel of land known as Crown Allotment Number Thirty-seven (37) and located approximately 547 feet South of Fire Trail Road and bounded Northeastwardly by Lot Number Seventeen (17) and running thereon Fifty (50.00) feet bounded Southwardly by land now or formerly the property of Janice Wallace and running thereon One Hundred and Thirty-five and Sixteen hundredths (135.16) feet bounded Westwardly by a Thirty (30) foot wide road reservation and running thereon Fifty (50) feet and bounded Northwestwardly by land now or formerly the property of Yorkshire Holdings Ltd. and running thereon One Hundred and Thirty-five and Sixteen hundredths (135.16) feet which said piece parcel or lot of land has such position boundaries shape marks and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated the 7th September, 2006 and made between Yorkshire Holdings Ltd. Of the one part and Melinda T.

Lockhart of the other part and is recorded in the Registry of Records situate in Nassau on the Island of New Providence on the Islands of the Commonwealth of The Bahamas in Volume 10748 at page 315 to 319 and is thereon coloured PINK;

(2) A Declaration that the 1st Defendant, the 2nd Defendant and the 3rd Defendant whether by themselves or by their employees, servants or agents, be restrained from building upon selling or entering into any agreement disposing of or otherwise dealing with ALL THAT piece parcel or lot of land being Lot Number Twelve (12) comprising Six thousand Seven hundred Fifty-two (6,752) square feet situate in the Western District of the said Island of New Providence and being a portion of a larger parcel of land known as Crown Allotment Number Thirty-seven (37) and located approximately 547 feet South of Fire Trail Road and bounded Northeastwardly by Lot Number Seventeen (17) and running thereon Fifty (50.00) feet bounded Southwardly by land now or formerly the property of Janice Wallace and running thereon One Hundred and Thirty-five and Sixteen hundredths (135.16) feet bounded Westwardly by a Thirty (30) foot wide road reservation and running thereon Fifty (50) feet and bounded Northwestwardly by land now or formerly the property of Yorkshire Holdings Ltd. and running thereon One Hundred and Thirty-five and Sixteen hundredths (135.16) feet which said piece parcel or lot of land has such position boundaries shape marks and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated the 7th September, 2006 and made between Yorkshire Holdings Ltd. Of the one part and Melinda T. Lockhart of the other part and is recorded in the Registry of Records situate in Nassau on the Island of New Providence on the Islands of the Commonwealth of The Bahamas in Volume 10748 at page 315 to 319 and is thereon coloured PINK...”

70. The Claimant did not use the wording “interim declaration” in his Urgent Notice of Application nor in his Certificate of Urgency but as he seeks reliefs under part 17 of the CPR, he can only be seeking (at this stage) an interim declaration and not a final declaration.

71. This is a novel form of interim relief in our jurisdiction. Unsurprisingly, there does not appear to be any authorities emanating from our jurisdiction which address interim declarations. The Court does however note, that it has the power to grant an interim declaration as provided under **Rule 17.1(a) of the CPR**. It states:

“(1) The Court may grant interim remedies including —
(a) an interim declaration;”

72. According to the **Practice Guide** under the explanatory note for Part 17.1(a) (at page 116) Lord Woolf LCJ considered in detail the availability and appropriateness of the making of an interim declaration in **Bank of Scotland v A**

Ltd & Ors [2001] EWCA Civ 52. In that case, the following observations were made:

“In his first Hamlyn lecture given in 1949, "Freedom Under the Law", Sir Alfred Denning, as he then was, identified the challenge facing the court as being to develop "new and up-to-date machinery" (p. 116). The first element of the machinery identified in the lecture was the remedy of declaratory relief. The court's power to make a [declaration] (or 'declaration of right') was derived from the Court of Chancery and was originally supposed to be restricted to declaratory judgments as to existing private rights (see *Guaranty Trust Company of New York v Hannay* [1915] 1 KB 536, which sets out the early history). Sir Alfred Denning saw the need to develop its scope in order to control the abuse of executive power, and over the half-century which has elapsed since his lecture it has performed a crucial function in the emergence of the modern law of judicial review. The development of declaratory relief has not however been confined to judicial review. Doctors and hospitals have increasingly been assisted by the ability of the courts to grant advisory declarations. It was at one time thought, that an interim declaration could have no practical purpose. The developments in other jurisdictions showed this was not the situation. Now the CPR acknowledges that just as interim injunctions can be granted so can interim declarations...(emphasis added).”

73. In the Jamaican Supreme Court case of **Ralph Williams and Others v Commissioner of Lands and Another [2012] JMSC Civ 118** Justice Mangatal made the following observations in relation to interim declarations:

“53 Rule 17.1(1) (b) of the CPR provides that the Court may grant interim remedies, including an interim declaration. By virtue of an amendment to the Crown Proceedings Act in 2002, the CPR are incorporated into the Crown Proceedings Act. The CPR being incorporated into this Act constitute statutory authority empowering the court to grant interim declarations against the Crown—see the unreported decision of Marsh J. in Claim No. 2008 HCV 05710, *Caribbean Cement Co. Ltd. v. The AG et al*, delivered 16th July 2010.

54 Interim declarations still fall into largely unexplored territory in this jurisdiction. Indeed, in the English jurisdiction, Lord Diplock in *International General Electric Company of New York v. Customs and Excise Commissioners* [1962] Ch. 784 at page 790 expressed the view that by its nature an interim declaration is really a contradiction in terms. See also Hale J. in *Re S (Hospital Patients) Courts Jurisdiction* [1995] Fam 26, where she stated that ‘it was axiomatic that there was no such thing as an interim declaration.’ These statements appear to have been made at a time when there was not yet express statutory authority for making interim declarations. However, they nevertheless

express some conceptual discomfort with the creature of an interim declaration which in my view to some extent still lingers. Interim declarations have not yet proven popular either with our courts or with Counsel in Jamaica.

55 In the English decision of R v. Ministry of Agriculture, Fisheries and Food [2001] 1 C.M.L.R. 826, it appears to have been suggested that the courts will apply principles similar to those applicable to interim injunctions. At paragraph 49, it was stated that an interim declaration as to the legal position would have the same practical effect as an interim injunction, since the relevant Ministry could be expected to observe its terms. The court was reluctant to grant an interim declaration in that case because it would not maintain the status quo and might have led to confusion in relation to related final rights that were still pending and awaiting decision.

56 In the Caribbean Cement case, Marsh J., in determining that there was no justification for setting aside an interim declaration which Morrison J. had made ex parte, rejected the argument of the respondents that the interim declarations amounted to final orders having the effect of determining the issues between the parties being sought in the substantive application. My learned brother Marsh J. at page 20 pointed out that the declarations being sought in the substantive hearing were different from the interim declarations granted to the applicant. At pages 19-20 Marsh J. quoted with approval from “English Civil Procedure” page 1035 (per Neil Andrews), where it was stated:

‘Interim declarations should be granted only where the claimant has a prima facie case ...when considering the balance of convenience test; relevant factors and the strength of the claimant's case and the respective detriment to the parties should the interim declaration be granted or denied.’(emphasis added)”

74. Furthermore, the English Court of Appeal in **Milebush Properties Ltd v Tameside Metropolitan Borough Council [2011] EWCA Civ 270** addressed factors to consider when granting an interim declaration:

“88 In my view the authorities show that the jurisprudence has now developed to the point at which it is recognized that the court may in an appropriate case grant declaratory relief even though the rights or obligations which are the subject of the declaration are not vested in either party to the proceedings....The most important consideration is likely to be whether the parties have a legitimate interest in obtaining the relief sought, whether to grant relief by way of declaration would serve any practical purpose and whether to do so would prejudice the interests of parties who are not before the court (emphasis added).”

75. Lastly, in the more recent English Court of Appeal decision of **N v Royal Bank of Scotland plc [2017] WLR**, the court also explored the law in relation to interim declarations. There, Hamblen LJ opined:

“81 CPR r 25.1(1)(b) [the English equivalent to our 17.1(a)] provides that the court shall have the power to grant an interim declaration.

82 It was introduced following recommendations made in Law Commission Report Administrative Law: Judicial Review and Statutory Appeals (1994) (Law Com No 226) (Cmnd 669). Para 6.21 of that report stated as follows:

“Interim declarations

The advantages of these are that they are not coercive, they specially address the interim position and are better suited to clarify the position of third parties. There is no reason why they should not be granted on the same basis as interim injunctions. In New Zealand there is provision for interim declaratory relief in judicial review proceedings against the Crown in lieu of injunctive relief which is not available, and such relief is more generally available in Canada. Such declarations would refer to a right or obligation that exists prima facie and are not therefore illogical. In making a merely interim declaration, the judge reserves his or her right and admits an obligation to re-examine the question after a substantive hearing at the trial. In our view this consideration also meets the argument that a declaration in an interim form may inappropriately suggest that the court has already made up its mind as to the likely grant of final relief.”

85 On behalf of N it is submitted that the interim declaration operates in much the same way as an interim injunction. It is both provisional and suspensory in nature, making a temporary declaration as to the state of the law or a party’s rights whilst leaving the state of uncertainty to be determined at a full trial. Just as with any other interim remedy, whilst it is provisional in nature, actions carried out while it is in force will enjoy its protection for all time. Thus it will be an abuse of process to prosecute a party who has acted with the protection of an interim declaration, notwithstanding that the declaration is subsequently set aside. It is submitted that the remedy is essentially pragmatic in nature and that considerations of justice and convenience should lie at the foundation of its availability.

76. As I understand it, an interim declaration is a form of declaratory relief where the Court makes a declaration in relation to an issue, which would assist the parties in determining rights as between them in the interim until final determination on the matter. If, after considering the substantive merits of the case, it is

determined that the interim declaration ought not to have been granted, then the interim declaration will be set aside, a final declaration would then be made and an appropriate costs order would be granted.

77. In relation to the relevant factors that ought to be considered when granting an interim declaration, the authorities all seem to agree that the court should bear in mind factors for granting an interim injunction and consider the following: (i) Whether the parties have a legitimate interest in obtaining the relief sought? (ii) Whether to grant relief by way of declaration would serve any practical purpose? (iii) Whether to do so would prejudice the interests of parties who are not before the court (i.e. where does the balance of convenience lay)?
78. In addition to the usual factors to be considered for interim injunctions, it seems apparent that additional factors (as outlined in the above paragraph) must all be considered. In other words, I must be satisfied that all three limbs of the test are addressed together and answered in Mr. Strachan's favor, with no prejudice or unfairness to any other party resulting from such interim relief being granted.
79. In relation to the first limb, Mr. Strachan does appear to have a legitimate interest in the Property. Through his affidavit evidence, he has provided the Strachan Conveyance which evidences his ownership in the Property. Furthermore, none of the Defences filed deny such ownership. In relation to the first limb, I am satisfied that Mr. Strachan has a legitimate interest in the Property as evidenced in his uncontroverted affidavit evidence and the Strachan Conveyance, which was filed first in time before any other title deeds.
80. In relation to the second limb, I must now consider if there is any practical purpose in making such a declaration. In my view, I do not see any practicality in granting an interim declaration. Mr. Strachan's ownership of the Property is not in dispute. I see no utility in making any declaration on the point. In the circumstances, I do not see any practicality in granting the interim declaration.
81. The final limb is whether or not any parties who are not before the Court would be prejudiced by the making of such an order. It is undisputed that there are presently tenants occupying the triplex on the Property and that none of these parties are before this Court. It appears obvious that the tenants may very well be prejudiced if I made such an order in their absence without providing them an opportunity to address this Court on the matter. Consequently, I am not prepared to make any such interim declaration that may prejudice such tenants.
82. In relation to the factors typical for the granting of an injunction, I merely adopt the reasoning outlined earlier in my judgment when considering granting an interim injunction. I only add that granting such an interim declaration, in the present circumstances, is clearly superfluous.
83. Accordingly, I will not grant an interim declaration.

An Order authorizing a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under subparagraph (h)

84. Again, no authorities on this subject was provided to the Court. In any event, I will provide and explain the law. Part 17.1 (c), (h)(iv) of the CPR provide:

“17.1 Orders for interim remedies: relief which may be granted.

(1) The Court may grant interim remedies including —

(c) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under subparagraph (h);...

(h) an order for the —

(iv) payment of income from relevant property until a claim is decided;”

85. It should also be noted that **Part 17.1 (3) of the CPR** reads:

“(3) The fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the Court may have to grant that remedy.”

86. Under the **Practice Guide at page 110** at the explanatory notes for Part 17.1 of the CPR:

“CPR 17.1 Orders for interim remedies: relief which may be granted.

Whilst r. 17.1(1) is comprehensive, it is not and does not purport to be exhaustive given that r. 17.1(3) states that “[t]he fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the Court may have to grant that remedy.””

87. I am of the view that rents currently being collected by the tenants (as evidenced in the Rahming Affidavit and not refuted by any other evidence) ought not to be given directly to any party until final determination of this matter. In the premises, I direct that Mr. Simon and YHL’s counsel (or an authorized agent) collect the rents from the tenants on the Property and place such funds into an escrow account at the law firm of Munroe and Associates, which is not to be accessed by any party until final determination of this matter. Mr. Simon and YHL are also to keep records and accounting of all rental payments collected to date in relation to the Property and to provide same to their counsel and to the law firm of Capital Law Chambers.

An order for interim costs

88. According to the Urgent Notice of Application and Certificate of Urgency, Mr. Strachan seeks “costs”, not interim costs. Interim Costs is mentioned in counsel’s written submissions, but it was not specifically requested in the Notice of Application. Bearing in mind Charles J’s reasoning in **Montague** and as this was

not specifically requested in the Urgent Notice of Application, Certificate of Urgency nor has counsel provided any authority on the matter, I will not grant such an order.

An order for the — (iv) payment of income from relevant property until a claim is decided

89. Again, this was not expressly requested in Mr. Strachan's Urgent Notice of Application. This was only advanced in written submissions and the law was not provided on the matter.

90. In any event, under this head, I have already directed that payments made in relation to the Property are to be placed into an escrow account until final determination of this matter.

91. I see no reason, at this stage, for me to exercise such powers for any payment of income from the Property in the present circumstances.

A "freezing order", restraining a party from — (i) dealing with any asset whether located within the jurisdiction or not;

92. This too has been amply dealt with under the interim injunction head in this ruling. The subject matter of this dispute is the Property and the proceeds emanating from its use. No other evidence has been led in relation to any other asset. I need not expound upon this interim relief.

An "order for interim payment" under rules 17.14 and 17.15 for payment by a defendant on account of any damages, debt or other sum which the Court may find the defendant liable to pay

93. An interim payment was not expressly requested in Mr. Strachan's application either. This only came about in counsel's written submissions to the Court. Again, applying *Montague*, as this was not specifically asked for in the Urgent Notice of Application nor has counsel provided any authority stating that the Court may grant such relief in the present circumstances, I will not grant it.

Requests for Possession of the Property, Mesne Profits, Interest and other forms of relief

94. The Court is aware that it may make interim orders, despite such reliefs being sought also being final remedies. This is overtly expressed at **Part 17.1 (4) of the CPR**, which provides:

"(4) The Court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind."

95. Though the Court was not directed to this by any counsel, the Court also bears in mind the **Practice Guide at page 110 by the explanatory note for Part 17.1 of the CPR**, which reads:

“CPR 17.1 Orders for interim remedies: relief which may be granted.

Whilst r. 17.1(1) is comprehensive, it is not and does not purport to be exhaustive given that r. 17.1(3) states that “[t]he fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the Court may have to grant that remedy.””

96. With respect to Mesne Profits, Interest, Possession of the Property, and the multiple orders relating to services requested to be performed by an Appraiser at the behest of the Court, the Court is unaware of any power it has to grant Possession of the Property, Mesne Profits or the other aforementioned reliefs at an interlocutory application. Mr. Strachan’s counsel has not directed the Court to any such law/power it has to do so. Accordingly, I will not grant such reliefs being sought. It is incumbent upon Counsel to move and direct the Court on the law relevant to the application before it and overtly express the desired reliefs in their applications/pleadings in accordance with the said relevant law.

CONCLUSION

97. In the circumstances and based on the authorities referred to above, the Court grants an interim injunction (only upon Mr. Strachan providing an undertaking as to damages) and an order regarding the collection of funds relating to the Property. The Order shall read as follows:

“1. The Defendants, whether by themselves or by their employees, servants or agents, be restrained from building upon selling or entering into any agreement (save and except any settlement agreement or consent order) disposing of or otherwise dealing with ALL THAT piece parcel or lot of land being Lot Number Twelve (12) comprising Six thousand Seven hundred Fifty-two (6,752) square feet situate in the Western District of the said Island of New Providence and being a portion of a larger parcel of land known as Crown Allotment Number Thirty-seven (37) and located approximately 547 feet South of Fire Trail Road and bounded Northeastwardly by Lot Number Seventeen (17) and running thereon Fifty (50.00) feet bounded Southwardly by land now or formerly the property of Janice Wallace and running thereon One Hundred and Thirty-five and Sixteen hundredths (135.16) feet bounded Westwardly by a Thirty (30) foot wide road reservation and running thereon Fifty (50) feet and bounded Northwestwardly by land now or formerly the property of Yorkshire Holdings Ltd. and running thereon One Hundred and Thirty-five and Sixteen hundredths (135.16) feet which said piece parcel or lot of land has such position boundaries shape marks and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated the 7th September, 2006 and made between Yorkshire Holdings Ltd. Of the one part and Melinda T.

Lockhart of the other part and is recorded in the Registry of Records situate in Nassau on the Island of New Providence on the Islands of the Commonwealth of The Bahamas in Volume 10748 at page 315 to 319 and is thereon coloured PINK (“Property”) except as otherwise specified by this Order and/or until further order of the Court;

2. All funds relating to the Property, including, but not limited to rental payments, shall be held in an escrow account at the law firm of Messrs. Munroe and Associates, until further Order of the Court;

3. Mr. Simon shall keep records and accounting of all rental payments collected from inception of use of the Property until final determination of the matter. Such records and accounting shall be sent to Munroe and Associates and Capital Law Chambers on a monthly basis until final determination of the matter or further Order of the Court.

3. Parties are at liberty to apply.

4. Costs for this application are reserved.”

98. Mr. Strachan was only successful in obtaining one of the myriad of interim reliefs sought. Thus, the Defendants were able to resist the majority.

99. I will hear the parties on costs. Written Submissions in relation to costs shall be exchanged and laid over to the Court within twenty-one (21) days from the date of this ruling.

Senior Justice Deborah Fraser

Dated this 11 day of October 2023