COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

Common Law & Equity Division
2023/CLE/gen/00727

B E T W E E N

FINANCE CORPORATION OF BAHAMAS LIMITED

Claimant

AND

ARCHIBALD LOWELL MINNIS

First Defendant

AND

AISHA LETA MINNIS

Second Defendant

Before:	**The Honourable Madam Senior Justice Deborah E. Fraser**
Appearances:	**Mr. Audley D. Hanna Jr. of Higgs & Johnson for the Claimant**
	Mr. Rouschard Martin of Martin Global for the First and Second Defendants
Hearing Date:	**27 March 2024; 22 May 2024; 02 July 2024**

Money Lending Action - Striking Out – Fixed Date Claim – Breach of Mortgage terms – Limitation Defence – Section 32(1) of the Limitation Act, Ch. 83 – Frivolous, Vexatious and an Abuse of the Process of the Court – Plain and Obvious Case - Section 23(3) of the Conveyancing and Real Property Act, Ch. 138

Injunction Application – American Cyanamid v Ethicon – Serious Issue to be Tried - Adequacy of Damages – Balance of Convenience - Special Factors to Consider – Part 17 of the Supreme Court Civil Procedure Rules, 2022 - Interference with Sale of Land

RULING

FRASER, SNR. J:

[1.] There are two applications before the Court, namely: (i) A striking out application brought on behalf of the Defendants; and (ii) An application for injunctive relief by the Claimant. I shall address each in turn.

Background

[2.] The Claimant, the Finance Corporation of Bahamas Limited ("**FINCO**") is a company incorporated under the Companies Act, 1992 and a licensee under the Banks and Trust Companies Regulation Act, 2000, carrying on the business of banking and lending.

[3.] The Defendants, Archibald Minnis ("**Mr. Minnis**") and Aisha Minnis (collectively, the "**Defendants**") are customers of FINCO who are indebted to FINCO pursuant to an Indenture of Mortgage dated 12 September, 2005 and recorded in the Registry of Records in the City of Nassau in Volume 13907 at pages 221 to 229 between FINCO and the Defendants ("**the Mortgage**"). The Mortgage was secured by ALL THAT piece parcel or lot of land containing 8,583 square feet and being a portion of the 4,743 acres situate on the Northern side of Carmichael Road in the Western District of the Island of New Providence one of the Islands in the said Commonwealth which said piece parcel or lot of land is bounded Northwardly by land now or formerly the property of Michael Maxewell Cartwright and running thereon One Hundred and Sixty-five and Twenty-four hundredths (165.24) Feet Eastwardly by land now or formerly the property of Michael Maxwell Cartwright and running thereon Fifty-six and Twenty-two hundredths (56.22) Feet Southwardly by land now or formerly the property of Michael Maxwell Cartwright and running thereon One Hundred Fifty-six and Twenty-two hundredths (156.22) Feet and Westwardly by a Thirty (30) Feet wide Road Reservation leading South to the said Carmichael Road and running thereon Fifty-nine and Sixty-six hundredths (59.66) Feet which said piece parcel or lot of land has such position shape boundaries marks and dimensions as are shown on the diagram or plan attached to an Indenture dated the 31st day of August, AD., 2005 and made between Michael Maxwell Cartwright of the one part and Archibald L. Minnis and his wife Aisha Minnis of the other part and recorded in the Registry of Records in the City of Nassau on the Island of New Providence in Volume 13907 at pages 230 to 235 and thereon coloured PINK ("**the Property**").

[4.] On or about 12 September 2005, FINCO lent the Defendants the principal sum of $224,100.00. The Defendants agreed to repay the principal sum together with interest calculated on a daily basis at the rate of 8.75% per year. It was agreed that the Defendants would pay the loan by 300 equal monthly installments in the sum of $1,842.51 until the principal, the interest thereon and all other sums due under the Mortgage were paid in full.

[5.] It was also expressed in the Mortgage that: (a) the principal sum outstanding and all unpaid interest shall be payable on demand within 30 days of a demand; and (b) the Defendants would pay all costs and expenses incurred by FINCO in relation to any default by the Defendants.

[6.] It is alleged that the Defendants breached the terms of the Mortgage on 28 February 2011. The last documented payment was purportedly made by the Defendants to FINCO on 26 May 2011.

[7.] By letter dated 04 November 2019, FINCO notified the Defendants of their breach of the Mortgage. Another letter dated 08 May 2023 from FINCO to the Defendants informed the Defendants that the Property was appraised at $203,000.00 and was sold under FINCO's power of sale for the sum of $177,000.00. This letter also outlined how the proceeds of sale were applied.

[8.] As of 08 May 2023, the Defendants are indebted to FINCO in the total sum of $364,092.89 representing: (i) the sum of interest and principal outstanding as at that date of $495, 317.35; (ii) fees associated with the sale in the sum of $25,802.54; (iii) legal fees amounting to $5,353.00; (iv) taxes on the sale in the sum of $3,400.00; (v) commission fees in the sum of $11,200.00; less (vi) the proceeds of sale in the sum of $177,000.00.

[9.] FINCO is allegedly unable to deliver vacant possession of the Property to the purchaser due to Mr. Minnis purportedly continuing to enter the Property and interfere with it including issuing threats of violence.

[10.] On 30 August 2023, FINCO filed a Fixed Date Claim against the Defendants alleging breach of contract for failing to comply with the terms of the Mortgage and interference with the sale of the Property. FINCO requests the following relief:

(a) An Order for Judgment;

(b) An Order for an injunction;

(c) Judgment for sums outstanding in the sum of $364,092.89;

(d) Such further or other relief as the Court deems just; and

(e) Costs.

[11.] On 31 August 2023, FINCO filed an application requesting injunctive relief ("**the Injunction Application**") for the following reason:

(a) Mr. Minnis continues to be a nuisance and is interfering with the sale of the Property.

[12.] The Defendants filed a Defence on 24 October 2023. They deny the allegations made in the Fixed Date Claim Form and aver, inter alia, that the action is statute barred as the action was brought over 12 years after the initial breach of the Mortgage, being 28 February 2011.

[13.] Subsequently, the Defendants filed a Notice of Application on 25 October 2023 requesting the Court to strike out the Fixed Date Claim Form ("**the Striking Out Application**") for the following reasons:

(a) The action herein, having been instituted more than 12 years after the 28th February 2011 said breach and cause of action, is statute barred pursuant to section 5(2) of the Limitation Act 1995 which is supported by section 2.4 of the Claimant's Statement of Claim;

(b) The action is frivolous, vexatious and the continuation of this action will be an abuse of the process of the Court.

[14.] On 28 February 2024, this Court allowed FINCO to amend its Fixed Date Claim Form.

[15.] I will address the Striking Out Application first, then move to the Injunction Application.

Striking Out Application

Issues

[16.] The Court must determine the following issues:

(i) Whether the action ought to be struck out because it is statute barred?

(ii) Whether the action is frivolous, vexatious and an abuse of the process of the court?

Evidence

The Defendants' Evidence

[17.] On 14 February 2024, the Defendants filed the Affidavit of Shauntrice Seymour which provides that: (i) FINCO commenced this action on 30 August 2023 and that it was claiming legal action since 04 November 2019; (ii) there is no statement in any body of FINCO's Notice of Application or Affidavit of Antonio Roberts filed on 31 August 2023 indicating the date of the alleged breach, therefore not providing the Court with full and frank disclosure; and (iii) there is no evidence confirming that the Defendants were given advance notice of FINCO's intention to sell the Property. There is a letter dated 08 May 2023 indicating that the Property was sold.

FINCO's Evidence

[18.] FINCO filed the Affidavit of Antonio Roberts on 30 August 2023 which along with a history of the matter, states that: (i) the Property is vacant land; (ii) that two demand letters were sent to the Defendants (both dated 04 November 2019) from FINCO's attorneys demanding payment of the outstanding sums under the Mortgage and failure to pay the outstanding sums within thirty (30) days from receipt of the letters may expose them to legal proceedings (both letters are exhibited to the affidavit); (iii) by letter dated 08 May 2023 from FINCO's attorneys to the Defendants, the Defendants were notified that an appraisal of the property was done (valuing it at approximately $203,000.00) and of the sale of the Property for $177,000.00. The letter also details how the sale proceeds were applied (the letter is exhibited to the affidavit); and (iv) that Mr. Minnis is interfering with the sale of the Property by, inter alia, continuing to enter onto the Property.

[19.] FINCO also filed a second Affidavit of Antonio Roberts on 31 August 2023 ("**the Second Roberts Affidavit**") which, along with a history of the matter, provides that: (i) as of 05 July 2023, the Defendants are still indebted to FINCO in the amount of $285,207.65; (i) on or about 11 October 2022, FINCO accepted an offer to purchase the Property (a copy of the agreement for sale is exhibited to the affidavit); and (iii) Mr. Minnis is preventing the new purchaser and FINCO's agents access to the Property by

erecting a fence and Mr. Minnis threatened bodily harm to persons who enter the Property.

Law, Discussion and Analysis

[20.] I have read and considered the submissions of counsel. I will now address the issues for the Striking Out Application.

(i) Whether the action ought to be struck out because it is statute barred?
(ii) Whether the action is frivolous, vexatious and an abuse of the process of the court?

[21.] The issues are linked in my view and based on the wording in the Defendants' Notice of Application, they can be dealt with together.

Striking Out Generally

[22.] It is trite law that striking out is a draconian power imbued on the Court pursuant to its inherent jurisdiction as well as under the Supreme Court Civil Procedure Rules, 2022 ("**the CPR**").

[23.] **Rule 26.3(1) of the CPR** provides:

> "26.3 Sanctions – striking out statement of case.
>
> (1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that —
>
> (a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;
>
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
>
> (c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or
>
> (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

[24.] Striking Out is also appropriate where the action is brought after the limitation period and a limitation defence has been pleaded or where an application for Striking Out has been brought. **In Ronex Properties Ltd v John Laing Construction Ltd** (1983) Q.B. 398, Lord Donaldson stated:

> "Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue or, **in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence**. But in no circumstance can he seek to strike out on the ground that no cause of action is disclosed.
>
> [Emphasis added]"

[25.] With respect to striking out applications specific to limitation periods, such an application can be brought on the basis that the right to bring the cause of action has fallen away as such filing has taken place beyond the permitted limitation period, and permitting such an action to continue can be seen as frivolous, vexatious or an abuse of the process of the Court. The main principle to be gleaned from the above authorities are that such powers should only be exercised in appropriate, plain and obvious cases.

[26.] One must always also bear in mind the overriding objective (Rule 1.1 of the CPR) as the Court must ensure that the administration of justice is not stifled, delayed or used for purposes which ought not be allowed. Cases are to be dealt with fairly and expeditiously. To my mind, this also extends to ensuring that no precious judicial time and resources are utilized unnecessarily or frivolously.

Limitation Period

[27.] The main crux of the Defendants' submissions is that the action is statute barred pursuant to **section 5(2) of the Limitation Act, Ch. 83** ("**the LA**"), which provides:

> "(2) An action upon an instrument under seal shall not be brought after the expiry of twelve years from the date on which the cause of action accrued:
>
> Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act."

[28.] Though this is the section which the Defendants rely on, I believe the section which ought to be reviewed and considered is **section 32(1) of the LA**, which provides:

> "32. (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover the proceeds of the sale of land, after the expiry of twelve years from the date when the right to receive the money accrued…

[29.] Accordingly, no action can be brought for the recovery of the principal sum under a mortgage after the expiration of twelve (12) years from the date when the right to receive the money accrued. The Defendants' counsel asserts that the right of action accrued on 28 February 2011, which means that FINCO had until 01 March 2023 to bring any action to recover funds owing under the terms of the Mortgage.

[30.] FINCO's counsel submits that the cause of action arose from the date after the sale of the Property (being after 21 November 2022, which is when the Agreement for Sale was executed by all parties in the sale). It relies principally on its power of sale (pursuant to section 21 of the Conveyancing and Law of Property Ch. 138 – "CLPA") in concert with clause 5 of the Mortgage. **Section 21 of the CLPA** provides:

> "21. (1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely) —
>
> > (a) a power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby…"

[31.] Clause 5 of the Mortgage reads:

> "The Mortgagor hereby irrevocably appoints the Mortgagee to be his Attorney for him and in his name and on his behalf and as his act and deed to undertake

and complete any assurance agreement act or action which may be required or deemed proper for any of the purposes of these presents."

[32.] Essentially, FINCO's counsel asserts that, by virtue of Clause 5 along with section 21 of the CLPA, FINCO was empowered both by statute and by contract to not only sell the property to recover sums owing under the Mortgage, but to do so on behalf of the Defendants as their agents. This, FINCO's counsel submits, means that the limitation period was not 28 February 2011, but from the date of the sale of the property. Based on a letter dated 08 May 2023, the Defendants were informed that the Property was sold for $177,000.00 and that the sum of $364,092.89 remaining outstanding and owing. It appears that FINCO asserts that it has until 07 May 2035 to bring an action to recover the principal sums under the Mortgage.

[33.] The Defendants' counsel, however, contends that FINCO attempted to exclude the Defendants' right to rely on a limitation defence based on Clause 5 of the Mortgage. He further asserts that, for any right to be excluded under the terms of a contract, it must be clear and unequivocal. He relies on the Privy Council decision of **Bahamas Oil Refining Company International Limited (Appellant) v The Owners of the Cape Bari Tankschiffahrts GMBH & Co KG (Respondents)(Bahamas)** [2016] UKPC 20 ("**BRONCO**") where Lord Clarke made the following pronouncements at paragraphs 31 to 33:

> "31. The principles which are principally relevant in a case of this kind are those which are applicable where it is alleged that the agreement excludes a legal right, including a legal right under a statute. The Board accepts the submission that, for a party to be held to have abandoned or contracted out of valuable rights arising by operation of law, the provision relied upon must make it clear that that is what was intended.
>
> 32. This principle has been applied in very many contexts. For example, in **GilbertAsh (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689**, where it was said that the parties to a building contract had agreed to exclude, or contracted out of, the contractors' common law and statutory entitlement, under section 53(1)(a) of the Sale of Goods Act 1893, to set off breach of warranty claims in diminution for the price. Thus the right allegedly excluded was one which would go to diminish the value of the claim otherwise

maintainable against the contractor. It was in this respect not unlike a right to limit. Lord Diplock put the principle in this way at pp 717-718:

"It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law. … But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption … one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or work executed under the contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract…"

33. Reliance was also placed on similar principles in the House of Lords in **Trafalgar House Construction (Regions) Ltd v General Survey & Guarantee Co Ltd [1996] 1 AC 199**, per Lord Jauncey at 208C (alleged contracting out of incidents of suretyship); in **Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574**, per Lord Goff at 585C (shipyard's rights to recover purchase price instalments); and in **HIH Casualty & General Insurance Ltd v Chase Manhattan Bank [2003] 2 Lloyd's Rep 61; [2003] UKHL 6**, per Lord Bingham at para 11 (legal remedies for negligent misrepresentation). See also two similar statements by Moore-Bick LJ in the Court of Appeal: in **Stocznia Gdynia v Gearbulk Holdings Ltd [2009] 1 Lloyd's Rep 461; [2009] EWCA Civ 691**, para 23 and in **Seadrill Management Services Ltd v OAO Gazprom [2010] 1 CLC 934**, para 29. In the first of those cases he said:

"The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be."

The Board agrees."

[34.] The Defendants also submit that there was no full and frank disclosure by FINCO because, inter alia, FINCO did not evidence the date of the breach in its Notice of Application or the body of the supporting affidavit of Antonio Roberts both filed on 31 August 2023. I do not agree. The Second Roberts Affidavit makes mention of a letter dated 08 May 2023 confirming that the Property was sold and $364,092.80 remains due and owing to FINCO. Though it was not in the body of the affidavit, it was directly referenced in FINCO's pleadings (paragraph 2.8). In that regard, it seems apparent that this is the date the Defendants were notified of the sale of the Property and that funds still remained owing to FINCO. On that basis, it appears that the Defendants were aware as at 08 May 2023, that they still had moneys owed to FINCO. Accordingly, FINCO could pursue them as at that date.

[35.] In my view, Clause 5 of the Mortgage does not seek to exclude any right of the Defendants, but to allow a mechanism by which FINCO can recover funds owing to it under the terms of the Mortgage. It appears that it exercised its power of sale and has acted, under a power of attorney created under Clause 5 of the Mortgage, to sell the property in order to satisfy the outstanding debt. I believe that this, indeed established a new starting point for any limitation period to begin to run –being November of 2022. As the Defendants agreed to such a clause, it must be accepted that they understood its terms and consented to FINCO acting in such a capacity to recover funds owed to it under the Mortgage. In turn, FINCO provided the Defendants with a further opportunity to satisfy the outstanding sums (as funds remained owing after the sale of the Property). This was communicated to the Defendants by a letter dated 08 May 2023 and exhibited to the Roberts Affidavit.

[36.] I also reference **section 23(3) of the CLPA**, which reads:

> "(3) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances to which the sale is not made subject, if any, or after payment into court under this Act of a sum to meet any prior encumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest and costs, and other money, if any,

due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof."

[37.] In addition, Clause 10 of the Mortgage provides:

"The powers herein contained are in addition to and without prejudice to and not in substitution for all other powers and remedies vested in the Mortgage by Statute or Common Law for recovering or enforcing payment of the money's hereby secured."

[38.] Consequently, FINCO was empowered and obliged to hold the proceeds of sale in trust for the Defendants to: (i) firstly, be applied to pay all expenses associated with the sale of the Property; (ii) secondly, satisfy the outstanding debt under the Mortgage; and (iii) thirdly, return to the Defendants any excess funds from the proceeds of sale after all fees and the mortgage sums have been satisfied in full. As the debt under the mortgage remains due and owing, FINCO has the right to further pursue the Defendants to recover the remaining extant sums. It has done so by bringing this very action.

[39.] In the premises, I rule that the limitation period under section 32(1) of the LA has not yet expired, thus the action is not frivolous, vexatious or an Abuse of the Process of the Court.

Injunction Application

[40.] Having determined that this action ought not be struck out, I now turn to the injunction application. I need not reiterate the facts. I will outline the issue that I must determine along with evidence relied on by the parties.

Issue

[41.] The issue that the Court must determine is whether an interim injunction ought to be granted?

Evidence

FINCO's Evidence

[42.] FINCO filed the Affidavit of Antonio Roberts in support of the Application on 31 August 2023, which along with providing a history of the matter, states that: (i) On

or about October 2022, FINCO accepted an offer to purchase the Property; (ii) On or about 22 March 2023, FINCO entered into an agreement for sale of the Property (a redacted version of the agreement for sale is exhibited to the affidavit); (iii) upon learning of the sale of the Property, Mr. Minnis became a nuisance and has attempted to interfere with the sale of the Property and the prospective purchasers by: (a) preventing the new purchaser and FINCO's agents access to the Property by placing a fence; and (b) Mr. Minnis threatened bodily harm to persons who enter the Property; and (iv) FINCO requests that Mr. Minnis be restrained from further interference with the Property.

The Defendants' Evidence

[43.] The Defendants filed the Affidavit of Archibald Minnis on 14 February 2024 which provides that: (i) he was never notified of FINCO's intention to sell the Property as suggested in paragraph 9 of the Affidavit of Antonio Roberts filed on 30 August 2023; (ii) he remains in continuous possession of the Property, which he has fenced off and has maintained exclusive control and possession for more than twelve (12) years; and (iii) he did not threaten anyone with bodily harm. FINCO nor its agents were permitted on the Property as FINCO has no right of action against the Defendants.

Law Discussion and Analysis

[44.] The Court's power to grant an injunction can be found at section 21(1) of the Supreme Court Act, 1996 ("**the SCA**") as well as Part 17 of the CPR. **Section 21(1) of the SCA** reads:

> "21(1) The Court may be order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so…"

[45.] **Rule 17.1 (1)(b) of the CPR** provides:

> "17.1 Orders for interim remedies: relief which may be granted.
>
> (1) The Court may grant interim remedies including –
> (a) …
> (b) An interim injunction;…"

[46.] Factors which the court must consider in an injunction application were provided in the celebrated case of American Cyanamid Co. v Ethicon Ltd. (1975) A.C. 396 ("American Cyanamid"). The ***American Cyanamid*** principles were succinctly summarized by Klein J in **Samuel Bankman-Fried v The Honourable Frederick Audley Mitchell** BS 2023 SC 105 in paragraph 71 thusly:

> "71 The American Cyanamid principles are often explicated by way of a four-part sequential test or questions as follows: Is there a serious issue to be tried? Is so, will damages be an adequate remedy for either party pending the outcome of the trial? If not, or if there are doubts about the adequacy of damages, where does the balance of convenience lie?"

[47.] Accordingly, the factors that the Court ought to consider are as follows:

(a) Is there a serious issue to be tried?
(b) Is damages an adequate remedy?
(c) If not, where does the balance of convenience lay?
(d) Are there any special factors that the Court ought to consider?

[48.] I shall address each factor.

Whether there is a serious issue to be tried?

[49.] Based on the competing evidence before me and the serious allegations being made against Mr. Minnis (i.e. interference with the sale of the Property and continued occupation of same), it is clear that there is a serious issue to be tried. The Court certainly needs to determine the rights of the parties and who owns the Property. Accordingly, I rule there is a serious issue to be tried.

Is damages an adequate remedy?

[50.] Having satisfied myself that there is a serious issue to be tried, I now turn to the adequacy of damages. The adequacy of damages is a preeminent factor to consider when deciding whether or not an interim injunction ought to be granted. The phrase "adequate remedy" was expounded upon by Lord Diplock in ***American Cyanamid***. The learned judge opined:

> "…the governing principle is that the court should first consider whether if the plaintiff were to succeed at trial in establishing his right to a permanent

injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

[51.] It is important to note that land is a unique asset and damages may not necessarily be an adequate remedy. This was explored by Allen P (as she then was) in the Court of Appeal decision of **Sanchez v Western Securities Limited [2009] 2 BHS J. No. 7**, where the Her Ladyship opined:

> "Specific performance of an agreement for the sale of land, according to the authorities, will be enforced at the suit of a purchaser or vendor almost as a matter of course on the basis that in such a case, damages are generally insufficient to compensate the disappointed party."

[52.] FINCO's counsel argues that the Property has already been sold and Mr. Minnis' continued occupation of the premises is causing irreparable harm that cannot be remedied. The Defendants' counsel asserts that Mr. Minnis' occupation is lawful as he has had continued occupation for over twelve (12) years. In the premises, I believe that damages may not be an adequate remedy in the circumstances. By virtue of the evidence before me contained in the Roberts Affidavit, an agreement for sale has been executed and it was Mr. Minnis' inability to repay the Mortgage that has initiated this very action. To now assert that damages could possibly remedy the situation is illogical and unrealistic. Accordingly, I rule that damages is not an adequate remedy.

Where does the balance of convenience lay?

[53.] This Court had occasion to consider this factor in the case of **Sail Rock Ltd v Old Fort Bay Property Owners Association Ltd** - 2023/CLE/gen/00547. There, I referenced several authorities relative to this factor at paragraph 52 to 54:

> "52 In American Cyanamid, Lord Diplock made the following pronouncements in relation to the balance of convenience:

"…the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the Plaintiffs need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiffs undertaking in damages if the uncertainty were resolved in the Defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.

53 In the Privy Council decision of **National Commercial Bank of Jamaica v. Olint Corp. Ltd. [2009] UKPC 16**, Lord Hoffman opined:

"[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 the injunction should not have been granted or withheld, as the case may be. The basic principle is the same, namely, the court should take whichever course of action seems likely to cause the least irremediable prejudice to one party or the other."

54 Furthermore, in the case of **Fellowes v Fisher [1976] Q.B. 122**, Sir John Pennycuick considered the balance of convenience. He made the following pronouncements on the subject:

"It is where there is doubt to the adequacy of the respective remedies in damages… that the question of balance of convenience arises…. The extent to which the disadvantage to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.""

[54.] When considering the balance of convenience, a Court must take the course that is likely to cause the least irremediable damage. One must consider what disadvantage would be suffered by both parties if the Court were to grant an injunction and if the Court were not to grant an injunction.

[55.] In the instant case, I believe the balance of convenience lay in FINCO's favor. FINCO has confirmed that it has sold the property. Mr. Minnis' continued occupation appears to be not only a nuisance, but a possible encumbrance on title to the Property. Mr. Minnis does, however, deny any allegations of threats of harm by him. In any event, I do believe that it would be best if no one occupies the Property for the time being. The status quo ought to remain unless and until further order of the Court.

Whether there are any special factors to consider?

[56.] No submissions have been made relating to any special factors in this matter. Accordingly, I make no determination in relation to this.

[57.] In the premises, I grant the interim injunction as requested by FINCO.

Conclusion

[58.] Based on the foregoing, I make the following order:

(a) The Defendants' Strike Out Application is hereby dismissed.
(b) The Defendants shall pay the Claimant's costs of the Striking Out Application, to be assessed by this Court, if not agreed.
(c) The Court hereby grants an interim injunction in the terms as outlined in the draft Injunction Order attached to the Claimant's Notice of Application filed on 30 August 2023 requesting an interim injunction. The Claimant is also ordered to provide an undertaking as to damages, should it be determined that an interim injunction should not have been granted at the end of the trial.
(d) Costs in relation to the Injunction Application shall be costs in the cause.

Dated this 30th day of October 2024

Deborah E. Fraser
Senior Justice