IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division

Claim No.
2015/CLE/gen/No.01451
2014/CLE/gen/No.01620

BETWEEN:

JUNKANOO ESTATES LTD

First Claimant

AND

YURI STAROSTENKO

Second Claimant

AND

IRINA TSAREVA-STAROSTENKO

Third Claimant

AND

UBS (BAHAMAS) LTD. (In Voluntary Liquidation)

Defendant

(Actions and Counterclaim consolidated by Order of the Judge dated 4 November 2015)

BEFORE: The Honorable Madam Justice Carla D. Card-Stubbs

APPEARANCES: Irina Tsareva Starostenko and Yuri Starostenko, Claimants, pro se

Marco Turnquest and Chizelle Cargill, Defendants\

Mortgagors in default – Summary Judgment Order against Mortgagors - Mortgagee's application to list and market property – Considerations by the court
Mortgagors' applications to permit entry and surrender benefits and for Mortgagee to deliver up possession - Mortgagors' application for an interim injunction preventing sale of land

HELD: The application of the Defendant/Mortgagee is allowed. The applications of the Claimants/Mortgagors are dismissed

In determining whether a court should grant an order for sale, a court ought to consider: (i) whether the prospects of the mortgagor's successfully impeaching the sale are utterly remote; (ii) whether the mortgagor's conduct, during the application as well as before it, justifies the apprehension that it will not hesitate to threaten proceedings against the purchaser if that will spoil the sale; (iii) whether the mortgagee's fear that the sale will be lost unless an order is obtained is not unreasonable and (iv) whether the objective economics as to sale or retention strongly point to the advisability of a sale and where any reasons given by [an interested person] to resist sale are totally unconvincing.

RULING

Card-Stubbs J:

INTRODUCTION

[1.] On July 14, 2023, this Court made an order by way of a case management exercise. That order included directions for the hearing of 3 related applications. The relevant part of the order reads as follows:

> **THIS COURT DIRECTS AND ORDERS as follows:**
>
> 1. The Hearing of all interlocutory matters and trial in this matter shall proceed under the Civil Procedure Rules 2022 (as amended) ("CPR").
>
> 2. On **December 8, 2023**, the Court will hear the following filed applications (referred to together as three (3) applications) in accordance with the further directions herein set out:
>
> i. Defendant's application to list and market property, filed July 27, 2021
> ii. Claimant's applications to permit entry and surrender benefits, filed July 7, 2023 and November 20, 2018 – as a joint application
> iii. Claimant's application for an interim injunction, filed September 9, 2020.

[2.] This Court rendered an oral ruling on December 16, 2024. The decision and the reasons for the decision in each application, are herein set out, seriatim.

[3.] For the reasons set out below, the Defendant's application to list and market property is allowed.

[4.] For the reasons set out below, the Claimant's applications to permit entry and surrender benefits, filed July 7, 2023 and November 20, 2018 – submitted as a joint application – are refused.

[5.] For the reasons set out below, the Claimant's application for an interim injunction, filed September 9, 2020 is dismissed.

BACKGROUND AND CHRONOLOGY

[6.] Given the longevity of this matter and the several number of applications that have arisen along the way, it is particularly useful in this case to summarize the background and chronology of events.

[7.] The applications under consideration arise out of a suit brought by the Defendant (UBS), viz Action CLE/Gen/1620 of 2014. In 2015, the Claimants commenced a countersuit against the Defendant by way of Action 2015/CLE/gen/1451. By order of November 4, 2015, the actions were consolidated.

[8.] In Action CLE/Gen/1620 of 2014, the Defendant (UBS) sought, and obtained, judgment against the First, Second and Third Claimants for payment of sums due under a mortgage. On March 23, 2015, the learned Hon. Mr. Justice Milton Evans, as he then was, ordered the Claimants to pay the Defendant (UBS) "the sum of USD$920,164.87 for principal money and interest, due and owing as of 5th December, 2014 secured by the Mortgage dated 18th September, 2012 ('the Mortgage") over Lot Number Five (5) in Block Number Seven (7) of the Number One (1) Subdivision of Lyford Cay in the Western District of New Providence in the Commonwealth of the Bahamas ("the Property")…"

a. That March 23, 2015 Order also provided for vacant possession and for the Claimants to deliver up all documents relating to the property in their possession and control if the judgment were not paid by April 13, 2015.
b. It is undisputed that the judgment debt was never paid.
c. The Claimants sought leave to appeal the Order and sought a stay pending appeal. On December 21, 2017 Hon. Mr. Justice Milton Evans refused the stay but granted leave to appeal. He also ordered that UBS was entitled to vacant possession of the

Property. The judge further ordered that "The Property not be sold without further Order of the Supreme Court or the Court of Appeal".

[9.] Through a series of appeals, up to the Privy Council, the Claimants sought to have the March 23, 2015 order overturned. The appeals were unsuccessful. The Chronology (up to that time) is captured in the March 5, 2019 judgment of the the learned Hon. Mr. Justice Ian Winder, as he then was.

[10.] On February 27, 2018, the Defendant (UBS) obtained possession of the Property pursuant to a Writ of Execution filed on February 15, 2018. The property is described as "ALL THAT piece parcel or lot of land situate in the Western District of the said Island of New Providence one of the Islands of the Commonwealth of The Bahamas being Lot Number Five (No.5) in Block Number Seven (No. 7) of the Number One (No.1) Subdivision of Lyford Cay in the Western District of New Providence in the Commonwealth of the Bahamas known as "Jazz House"

[11.] The Defendant (UBS) then filed an application (on November 7, 2018) for leave to market the Property for sale. The learned Hon. Mr. Justice Ian Winder, (as he then was) heard the application and delivered his ruling on March 5, 2019. By that judgment, the learned judge determined, inter alia,:

(a) given the summary judgment of Evans, J, the issue of the default of the mortgage has been determined and "does not arise for any re-consideration";

(b) Since 2015 to 2019, the property value "has diminished and continues to diminish…";

(c) the order of Evans, J required UBS to make a formal application for the sale of the mortgaged property;

(d) the power of sale in UBS had arisen and was exercisable and

(e) UBS has an enforceable judgment and, as mortgagee, had the power to sell both under the mortgage deed and by law.

[12.] In his judgment, the learned judge refrained from giving leave to UBS to market and sell. The judge's reasoning is captured in paragraph 15 of that ruling:

> "I am not satisfied however that it is appropriate to exercise my discretion in that direction where the trial of this matter is fixed for trial on September 22, 2019, some months away." The learned judge concluded, *"I will however revisit the issue if the trial does not proceed as scheduled in September."* [Emphasis supplied]

[13.] Since then, the Claimants proceeded with a series of unsuccessful attempts at appeal. For this purpose, I accept and adopt the chronology of events as set out by the Defendant (UBS) which shows:

> (i) August 11, 2020, the Court of Appeal dismissed the Claimants' appeal of the Summary Judgment Order.
> (ii) September 4, 2020, the Claimants apply to the Privy Council for special leave.
> (iii) On November 10, 2021, special leave was refused.
> (iv) December 14, 2021The Claimants apply to the Court of Appeal seeking leave to appeal the August 11, 2020 dismissal of their appeal of the Summary Judgment Order.
> (v) On April 4, 2022, the application was refused by the Court of Appeal.
> (vi) On April 25, 2022, the Claimants apply to the Privy Council for leave to appeal the August 11, 2020 decision.
> (vii) On May 3, 2022, the Claimants were informed that the Privy Council would not issue their application, as it had already been considered by the Board and refused.
> (viii) On 26 October 2022, the Court of Appeal refused the Claimants' request to revive the appeal of the Summary Judgment Order.

[14.] The trial in the consolidated actions did not proceed in September 2019 and, to date, has not taken place. This is largely the result of the appeal processes undertaken by the Claimants.

[15.] In the meantime, several pre-trial applications were filed by the Claimants. On July 27, 2021, the Defendant filed an application for leave to market the Property for sale.

[16.] On July 14, 2023, this Court made a directions order to hear 3 interlocutory applications together, viz: the Defendant's application to list and market property, filed July 27, 2021, the Claimants' applications to permit entry and surrender benefits, filed July 7, 2023 and November 20, 2018 – as a joint application and the Claimants' application for an interim injunction, filed September 9, 2020.

[17.] On July 26, 2023 the Claimants filed a Notice of Motion appealing the Directions Order. By that Notice of Motion, the Claimants sought "leave to appeal from or for reconsideration of the directions of a draft order dated 14 July 2023 (the "14 July 2023 directions"):

> (1) to hear the Defendant's application to sell the Appellant's mortgaged property prior to the trial or the Applicants' application for a separate trial of the issues, the disposal of which would dispense with the need for a full

trial, pursuant to Part 26.1(2)(i) of the Civil Procedure Rules, 2022 ("CPR"); and

(2) that further proceedings be heard in private without the consent of the Applicants, contrary to Part 2.4(c) of the CPR."

[18.] On March 1, 2024, by way of a written judgment, this court refused leave to appeal the directions order.

[19.] On September 12, 2024, the Court of Appeal refused leave to appeal the directions order.

APPLICATION 1: The Defendant's application to list and market the property.

[20.] By summons filed on July 27, 2021, the Defendant (UBS) seeks an order in the following terms:

1. That the power of sale conferred upon the Defendant under the terms of the Mortgage dated 18 September, 2012, over Lot Number Five (5) in Block Number Seven (7) of the Number One (1) Subdivision of Lyford Cay (also known as the Jazz House) in the Western District of New Providence in the Commonwealth of the Bahamas ("the Property"),which has been lodged for record in the Registry of Records in Volume 11712 at pages 87 to 98, made between the Defendant and the First Claimant, has arisen and is exercisable.

2. That the Defendant be at liberty to market the Property from the date of determination of this application and to invite unconditional offers, subject to contract and the approval of the Court, for the sale of the Property;

3. The Defendant be at liberty to determine a reserve sale price for the Property.

4. That the Defendant be at liberty to accept the highest offer that meets, or exceeds its reserve sale price for the Property.

5. That provision be made for the costs of this application.

[21.] The Defendant's application is supported by the following affidavits:

a. Affidavit of Lena Bonaby, filed November 7, 2018
b. Affidavit of Lena Bonaby filed July 27, 2021

c. Supplemental Affidavit of Lena Bonaby filed August 31, 2023
d. Second Supplemental Affidavit of Lena Bonaby filed September 15, 2023

The Defendant's submissions

[22.] The Defendant makes its application pursuant to Section 27(2) of the Conveyancing and Law of Property Act and Order 31, Rule 1 of the RSC.

[23.] The Defendant submits that Section 27(2) of the Conveyancing and Law of Property Act gives the court an unfettered discretion in wide terms to make the order sought. The Defendant submits that this is an appropriate case because the Summary Judgment Order in its favour "has not been overturned by either the Court of Appeal or the Privy Council, therefore there can be no argument as to the Claimants' likelihood of successfully defeating this order." Relying on the matters set out in the affidavits, the Defendant submits that the Claimants' conduct affirm that they are likely to commence proceedings against prospective purchasers and the Defendants therefore wish the protection and safeguard of a court order.

[24.] The Defendant relies on the order of Evans J and the judgment of Winder J as showing that the power of sale is exercisable in this case but subject to court of approval. The Defendant argues that there is no reason why the Court should hesitate to grant the Order sought in this case. The Defendant argues that the authorities are clear that notwithstanding the existence of the counterclaim, the Court should exercise its discretion to grant the Mortgagee the power to sell the property in this case.

[25.] The Defendant relies on the cases of **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd** SCCivApp No.57 of 2014 **and on Arab Bank Plc v Mercantile Holdings**

[26.] The Defendant submits that the summary judgment order has been outstanding from 2015 and that the judgment amount is well in excess of $1.4 million in interest. The evidence by affidavit is that the Defendant is incurring substantial fees in maintaining the property, as well as legal fees, while awaiting the court's order for sale. The Defendant argues that it is seeking the court's approval for a process of marketing and listing for sale and that since the Court would have to approve the final sale (i.e. any offer accepted by the Defendant) the Claimants would have the opportunity to raise objections at that time if they so desire.

The Claimants' submissions

[27.] The Claimants appear pro se but have demonstrated much experience in navigating the court processes. I accept that this is a matter very personal to them. For the reason that they appeared *pro se* and that this matter affected them personally, this court granted them great latitude in making their submissions. However, this court will, and can, only take into account the submissions relevant to the applications before it. Much of the submissions was repetitive and sought to revisit past determinations in this action. Unfortunately, on occasion, the Claimants resorted to personal attacks. Such attacks are impermissible and are not condoned by this court. I repeat and minute this here for the record. Those incidents were dealt with at the time of the submissions.

[28.] I also note that in response to the Defendant's application, the Claimants sought to rely, without notice, on a number of skeleton arguments previously submitted in this matter, a number of affidavits and a witness statement despite the clear direction of this Court as to how the matter should proceed. I again attribute this to the litigants being *pro se* but such conduct is disruptive of the process and contributes to delay.

[29.] The Claimants sought, in each of the listed applications, to rely on the following documents and their contents directly or by cross-reference:

1. Expanded list of Hearing Documents filed October 27 2023 and the 23 documents referred therein
2. Skeleton Arguments – Dismissal of Application for Relief Under Order 31
3. Skeleton – Application for a Declaration – Power of Sale – The Question of Default
4. Skeleton – Application for Leave to Market Property – Inherent Jurisdiction
5. Skeleton Application for a Declaration – Power of Sale – The Question of Default
6. Skeleton – Application for Leave to Market Property – Inherent Jurisdiction
7. Skeleton Arguments – Remedies for Breach of Undertaking given to the Court
8. Skeleton Arguments – Remedies for Breach of Undertaking given to the Court
9. The Objection by Claimants – Defendants Application – Declaration – Power of Sale
10. Skeleton Arguments – Dismissal of the Defendant's Application as Oppressive
11. Skeleton Arguments – Dismissal of Application for Relief Under Order 31
12. The Objection by Claimants – Defendants Application – Declaration – Power of Sale
13. Skeleton Arguments – Dismissal of the Defendants Application as Oppressive
14. Skeleton Arguments – Dismissal of Application for Leave – Question of Expediency
15. Skeleton Arguments – Dissimilarity of and Guidance in Chandler v. Church
16. Skeleton Arguments – Dismissal of Application for Leave – Question of Expediency

17. New Release – French Supreme Court refers UBS Legacy matter to Appeals Court
18. Skeleton Arguments – Dissimilarity of and Guidance in Chandler v. Church

[30.] The essence of the Claimants' submissions are captured in various skeleton arguments as well as their oral submissions. The Claimants submit that

1. The Defendant's application has been oppressive and is being used as an instrument of oppression in order to stifle the Claimants' genuine claim.
2. The true purpose of the application is to frustrate the Claimants in their claim.
3. The power of sale relied on by the Defendant is the statutory power under section 21(1)(a) of the Conveyancing and Law of Property Act, Chapter 123 ("section 21") on which the Defendant does not rely in its Submissions.
4. The court has no jurisdiction to entertain this under Order 31 which deals with land and not a business agreement. The Defendant has no rights over land per *Smith v. Gibson - [2009] 4 BHS J No. 22* nor should there be recourse to inherent jurisdiction since there are express rules dealing with the court's jurisdiction *Daxon v. Kerzner International (Bahamas) Limited - [2012] 1 BHS J. No. 92 and* since the Claimants have a reasonable prospect of success on their claim.
5. There is an outstanding issue before the Court as to whether any default in the payment of the mortgage debt has been made by the Claimants ("the question of default") and the question of default was never decided in the action CLE/gen/No.01620 of 2014
6. By the Order of Evans J dated 21st December 2017 ("Order 2017") the Court granted leave to appeal against the Order 2015 and restrained the Defendant from exercising its statutory power of sale.
7. The value of the property is in question.
8. In action CLE/gen/No.01620 of 2014 ("Action 2014"), the Court did not allow a sale by the Defendant, hence the statutory power of sale had become non-exercisable.
9. There is power of sale issue before the Court of Appeal which cannot be broken prior to the determination of that issue.
10. The power of sale in this Supreme Court cannot arise before the trial is completed or if trial does not proceed, as scheduled. Delay is not the fault of the Claimants but of the Defendants.
11. The Claimants also argue that the authorities relied on by the Defendant are to be distinguished as they relate to simple loan agreements and not investment agreements which they argue their contract with the Defendant was.
12. The Claimants also seek "fixed cost".

LEGAL DISCUSSION AND ANALYSIS

[31.] The issue on this application appears to be a simple one. This court must determine whether to exercise it discretion in in granting the Defendant approval to sell the subject property by listing and marketing same in exercise of its power of sale.

[32.] **Order 31 Rule 1 of The Rules of the Supreme Court, 1978 *('*RSC') ** provides as follows:

> Where in any cause or matter relating to any land it appears necessary or expedient for the purposes of the cause or matter that the land or any part thereof should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct. In this Order "land" includes any interest in, or right over, land.

[33.] The Defendant (UBS) further relies on **Order 31, Rule 2(4) RSC** ,which provides that:

> On the hearing of the summons the Court may give such directions, as it thinks fit for the purpose of effecting the sale, including, without prejudice to the generality of the foregoing words, directions —
>
> (a) appointing the party or person who is to have the conduct of the sale;
> (b) fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, tender or some other manner;
> (c) fixing a reserve or minimum price;
> (d) requiring payment of the purchase money into court or to trustees or other persons;
> (e) for settling the particulars and conditions of sale;
> (f) for obtaining evidence of the value of the property;
> (g) fixing the security (if any) to be given by the auctioneer, if the sale is to be by public auction, and the remuneration to be allowed him;
> (h) requiring an abstract of the title to be referred to conveyancing counsel of the Court or some other conveyancing counsel for his opinion thereon and to settle the particulars and conditions of sale.

[34.] The Defendant's application was filed prior to the coming into effect of the Supreme Court Civil Procedure Rules, 2022, as amended ('CPR') on March 1, 2023. IN the CPR, the court's jurisdiction to order the sale of property is set out at Part 52. Section 1 of Part 52 deals with a sale of land by order of the court. The provisions under Rule 52.1 and (2) do not replicate Order 31 Rules (1) and 2(4), but are in similar terms, to the provisions under Order 31 Rule 1. I set it out here for completeness. Rules 52.1and 52.2 provide:

52.1 Power to order sale of land.

(1) Where in any cause or matter relating to any land it appears necessary or expedient for the purposes of the cause or matter that the land or any part thereof should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

(2) In this Part, "land" includes any interest in, or right over, land.

52.2 Manner of carrying out sale.

(1) Where an order is made, whether in court or in chambers, directing any land to be sold, the Court may permit the party or person having the conduct of the sale to sell the land in such manner as he thinks fit, or may direct that the land be sold in such manner as the Court may either by the order or under paragraph (4) direct for the best price that can be obtained, and all proper parties shall join in the sale and conveyance as the Court shall direct.

(2) The party entitled to prosecute the order must —

(a) leave a copy of the order at the judge's chambers with a certificate that it is a true copy of the order; and

(b) subject to paragraph (3), take out an application to proceed with the order.

(3) Where an order for sale contains directions with regard to effecting the sale, the party entitled to prosecute the order shall not take out a summons under paragraph (2) unless and until he requires the further directions of the Court.

(4) On the hearing of the application the Court may give such directions, as it thinks fit for the purpose of effecting the sale, including, without prejudice to the generality of the foregoing words, directions —

(a) appointing the party or person who is to have the conduct of the sale;

(b) fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, tender or some other manner;

(c) fixing a reserve or minimum price;

(d) requiring payment of the purchase money into court or to trustees or other persons;

(e) for settling the particulars and conditions of sale;

(f) for obtaining evidence of the value of the property;

(g) fixing the security, if any, to be given by the auctioneer, if the sale is to be by public auction, and the remuneration to be allowed him;

(h) requiring an abstract of the title to be referred to conveyancing attorney of the Court or some other conveyancing attorney for his opinion thereon and to settle the particulars and conditions of sale.

[35.] **Section 27 of the Conveyancing and Law of Property Act** deals with the sale of mortgaged property in an action for foreclosure or redemption. The Court's power to direct a sale of land on such terms as it thinks fit on the request of the mortgagee, notwithstanding the dissent of another person, is confirmed by **Section 27(2) of the Conveyancing and Law of Property Act. Section 27(2)** provides:

> (2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms.

[36.] The statutory provisions together with the procedural rules provide that this court has the jurisdiction to make the type of order sought.

[37.] The question as to whether the Defendant has an exercisable power of sale has already been determined. This court must now determine whether the Defendant may proceed to exercise that power of sale which has effectively been stayed in favour of the Claimants.

[38.] That the mortgagee has a contractual power of sale is not in issue at this point. The grant of a court order for the exercise of the power is often invoked to serve to put an end to the contentious nature of a dispute between a mortgagee and another with an interest in the land. The nature of such an order was examined in **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd** SCCivApp No.57 of 2014, a decision of the Bahamas Court of Appeal.

[39.] In **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd**, the Respondent loaned the appellant some $30 million dollars (exclusive of interest) to pursue a condominium development on Paradise Island. The Appellant defaulted on the loan. In 2012 the Respondent called in the loan and subsequently appointed receivers to initiate sale proceedings. The appellant commenced litigation, alleging, inter alia, that the Debenture was invalid and unenforceable. The Appellant sought to prevent the sale of the property. An order for sale was made at first instance, the judge acting pursuant to section 27(2) **Conveyancing and Law of Property.** The Appellant appealed. The appeal was dismissed. The judgment of the court was delivered by Mrs. Justice Allen, President, as she then was.

[40.] At paragraphs 25 to 27 of the judgment, President Allen considered the nature of an order for sale. There she said:

> 25. In essence, and as noted, the grant of the statutory power of sale makes the sale unimpeachable. Moreover, the sale extinguishes the mortgagor's equity of redemption and from that date the mortgagor is interested only in the surplus proceeds of sale. Indeed, the sale proceeds are held by the mortgagee in trust to be applied first in payment of all costs, charges and expenses incurred in the sale; secondly in discharge of the mortgage money, interest and cost, and thirdly to pay the residue, if any, to the person entitled to the mortgage property. See **Deverges v Sandeman, Clarke & Co.** [1902] 1 Ch 593.
>
> 26. In our view, the grant of an order for sale under section 27 (2) supports the intention of the legislature to bring finality to mortgage actions in exceptional circumstances, and where the Court is satisfied that the mortgagor will continue to unreasonably resist and interfere with the exercise by the mortgagee of its contractual power of sale.
>
> 27. Applying Lord Esher's test to the order for sale in the instant case, we are of the view that if the order stands it will dispose of any question of the respondent's right to sell the property under the Debenture, and if it were not given, the respondent would still have its contractual power to sell the property secured by the Debenture, which in either case will dispose of the Mortgage action. …

[41.] In considering the factors that a court ought to take into account in exercising its discretion as to whether or not to make the order, the court in **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd** cited the case of **Arab Bank Plc v Mercantile Holdings** [1994] Ch 71 with approval. Allen P wrote (paragraph 18):

> 18. Millet J. in **Arab Bank plc v Merchantile Holdings** [1994] Ch 71, in considering section 91 (2) of the 1925 Law of Property Act, which is identical to our section 27(2) set out the factors which a court considering such an application must satisfy itself of. The factors are, that the court must be satisfied that the prospects of the mortgagor successfully impeaching the sale are utterly remote; that the mortgagor's conduct during the application as well as before it, justifies the apprehension that he will not hesitate to threaten proceedings against the purchaser if that will spoil the sale; and the mortgagee's fear that the sale will be lost is not unreasonable.

[42.] In the case of **Arab Bank Plc v Mercantile Holdings** [1994] Ch 71, a mortgagee bank sought a court order for sale in circumstances where the mortgagor disputed the

bank's power of sale and a potential purchaser refused to enter a contract with the bank unless there was a court order confirming its title and right to sell. Millet J granted the bank an order for sale and addressed the jurisdiction of the court in that case at pages 89 to 90. There he opined:

> The jurisdiction
>
> The defendants concede that the court has jurisdiction under the section to make the order but submit that it would not be a proper exercise of the discretion to make it. They rightly submit that the issue is not whether the proposed sale is one which it would be proper for the bank to enter into in the exercise of its statutory power of sale; nor whether, on the present evidence, such a sale would be capable of being impugned either as against the bank or against the purchaser. The issue is whether the court should take the exceptional and unprecedented step of sanctioning a sale and thereby rendering the sale unimpeachable in circumstances where the mortgagee has full power to affect the sale without an order and where the purchaser has the statutory protection afforded by section 104(2) of the Law of Property Act 1925.
>
> I accept that the application breaks new ground, though it is none the worse for that. It means only that the bank must make out a proper case not only for the proposed sale but for the court to lend its assistance by making the sale unimpeachable. I also accept that in both respects it is for the bank to make out its case. In *Marley v. Mutual Security Merchant Bank Trust Co. Ltd.* [1991] 3 All E.R., where a trustee sought an order from the court authorising it to sell the trust property the Privy Council held that the question was not whether the trustee had exercised due diligence but whether there was sufficient evidence before the court to enable it to exercise its jurisdiction. The analogy is far from exact; but I agree that a similar approach ought to be adopted in the present case. Where a mortgagee seeks the assistance of the court in order to allay the fears of its purchaser, the court must be satisfied that it has sufficient evidence to enable it to exercise the jurisdiction. On the evidence before me I am completely satisfied of that. But I would go further than that. The court must also be satisfied that it is a proper case for the invocation of its jurisdiction; it must be satisfied that it should exercise its discretion rather than leave it to the mortgagee to exercise his own power of sale. *The court must strike a balance between the interests of the mortgagor and those of the mortgagee. It will, I think, only be in exceptional circumstances that the balance will come down in favour of making the order. The court ought not lightly or unnecessarily to take the step of rendering a transaction unimpeachable where a party with an adverse interest wishes to impeach it. But where the court is satisfied, as I am satisfied (i) that the prospects of the mortgagor's successfully impeaching the sale are utterly remote; (ii) that the mortgagor's conduct, during the application as well as before it, justifies the apprehension that it will not hesitate to threaten proceedings against the purchaser if that will spoil the sale; and (iii) that the mortgagee's fear that the sale will be lost unless an order is*

> *obtained is not unreasonable, then, in my judgment, there are sufficient grounds for exercising the jurisdiction.* In such circumstances, the mortgagee's statutory power of sale is of no practical use to him. He might just as well have no such power.
>
> Accordingly, I will make the order as asked.
>
> [Emphasis supplied]

[43.] Another useful case as to considerations that a court ought to bear in mind is **Re Islamic Press Agency (official transcript) 29 November 1993**. That case was also cited with approval in the March 5, 2019 judgment of Justice Winder (at paragraph 14).

[44.] In **Re Islamic Press Agency (official transcript) 29 November 1993**, the court considered an application for the receivers to list and market property even before the substantive resolution of the suit. Justice Lindsay found that a Court indeed has jurisdiction to order a sale at an interlocutory stage. He considered the dicta by Lord Justice Nourse in the Court of Appeal decision of Chandler and others v Church and others and came to the following position (page 10)

> It seems to me that, having seen Church, I must conclude, both as to the existence of a jurisdiction and as to a justified exercise of discretion, that under Order 31, Rule 1, the Court has jurisdiction, even at the interlocutory stage, at its discretion to sell land at the suit of one party to disputed proceedings, against the wishes of the legal owner of the land, another party, despite that legal owner possibly having a complete defence in the action, where the objective economics as to sale or retention strongly point to the advisability of an early sale and where any reasons given by the legal owner to resist sale are totally unconvincing, if not, of itself, sufficing for a good reason to resist sale that the legal owner does not wish it. The jurisdiction, I hold, exists even where, absent the success of the disputed claim, there would be no power of sale at all, as that was the position in Church v Chandler.

[45.] In coming to that determination, Justice Lindsay noted Lord Justice Nourse's description of the court's "task" under Order 31 where the court at the interlocutory stage does not yet know which party has interest. Even so, Justice Lindsay considered that it "would be possible to determine whether it would be necessary or expedient for an asset to be sold in the interests of its owner, even if that owner fiercely opposed its sale…"

[46.] The Claimants rely on the cases of ***Smith v. Gibson*** *- [2009] 4 BHS J No. 22* which considers the type of judgment which creates a charge on the land and to ***Daxon v. Kerzner International (Bahamas) Limited - [2012] 1 BHS J. No. 92*** in relation to a court's inherent jurisdiction. Those principles are irrelevant for the purposes of this application. To my mind, ***Smith v. Gibson*** speaks to the type of judgment which creates a charge on the land.

Not only is there a judgment debt here but, beyond that, a mortgage document with mortgagee rights over the mortgaged property.

[47.] In this matter, I am satisfied that this court has jurisdiction to make the order for sale.

[48.] I note that the grounds in the skeleton arguments put forward by the Claimants and dated November 8, 2018 and January 3, 2019 documents were relied on by the Claimants in the matter before Justice Winder and were dismissed by him. As far as they relate to this application under consideration, I find the submissions of the Claimants without merit. Nor I do not intend to revisit same where the judgment of the learned judge of concurrent jurisdiction has already pronounced on a point.

[49.] The Claimants submit that this was not a normal mortgage transaction but an investment transaction. However the matter of the default on the mortgage to which this application pertains has already been decided in favour of the Defendant. The matter of the Mortgagee's exercisable power of sale has already been determined in this matter. Those matters are res judicata. I reiterate that the question is whether the court should grant an order for sale that would confirm the mortgagee's right to proceed to exercise its contractual power.

[50.] It is not in issue that the Defendant has held a judgment order which has been outstanding from 2015. The judgment amount continues to accrue interest against the Claimants. The evidence is that the amount of interest has surpassed $1.4 million.

[51.] On review of the evidence before me, I consider the following factors:
(i) whether the prospects of the mortgagor's successfully impeaching the sale are utterly remote; (ii) whether the mortgagor's conduct, during the application as well as before it, justifies the apprehension that it will not hesitate to threaten proceedings against the purchaser if that will spoil the sale; and (iii) whether the mortgagee's fear that the sale will be lost unless an order is obtained is not unreasonable. I also consider (iv) whether the objective economics as to sale or retention strongly point to the advisability of a sale and where any reasons given by [an interested person] to resist sale are totally unconvincing.

[52.] The Claimants engaged the appeals procedure to have the March 2015 order in favour of the Defendant set aside. They were unsuccessful.

[53.] The Claimants rely on the judgments of Justice Milton Evans and of Justice Winder as an injunction preventing the power of sale from being exercised, or, in the alternative, a

stay until trial. This, to my mind, is a clear misconstruction of the judgments of both learned judges.

[54.] In his March 2019 judgment, Justice Winder refrained to exercise the discretion in March 2019 when there was a trial fixed for September 2019. The learned judge expressly indicated that the matter could be revisited if the trial did not take place on September 22, 2019.

[55.] The Claimants complain that any delay in proceeding to trial should lie at the feet of the Defendant. This Court directed the parties to supply evidence of the several applications filed them in this matter. Both parties complied. I find the evidence of the Defendant as supplied in the affidavit of Lena Bonaby sworn and filed on May 6, 2024 to be more credible. That affidavit sets out in detail the number of applications filed by the parties up to May 6, 2024. The Affidavit shows that, together, the Claimants filed a total of 39 interlocutory applications. The Defendant filed 7 applications. Several of those applications have yet to be heard. I also consider that the Claimants engaged the appeal process in relation to several matters, as they are entitled to. I relay this context to show that it does not lie in the mouth of the Claimants to complaint about delay. I consider that the pattern of filing consecutive applications is not attributable to legal inexperience. Having considered the nature of the applications filed, including a newly constituted application to set aside the March 2015 order on the ground of fraud (Notice of Application filed February 20, 2024), it seems inevitable that the strategy engaged by the Claimants will continue to forestall a trial and thus a determination as to the exercise of the power of sale of that determination were to be left as a question at trial.

[56.] I am satisfied that the Claimants have so conducted themselves, and will continue to act in a manner, likely to disrupt any sale and to dissuade potential purchasers. I consider that the Claimants have since the order in favour of the Defendants, embarked on a series of litigation, have conducted the business of these proceedings in public fora and have sought by correspondence to discredit persons involved with the litigation and or with the steps taken by the mortgagee in exercise of its power of sale.

[57.] There is credible evidence, not denied by the Claimants, that since their eviction they have launched a series of actions not merely against the bank but against the lawyers with conduct of the matter and Provost Marshall and locksmith and others (2018/CLE/GEN/0029) as well as the moving company (2018/CLE/GEN/01240).

[58.] Subsequently, several related actions were commenced.

[59.] The evidence as shown in the affidavit evidence of Lena Bonaby, sworn and filed July 27, 2021, is that the Claimants have created a website used "to disparage UBS and chronicle the numerous Court proceedings that are ongoing." I accept that evidence.

[60.] The Second Supplemental Affidavit of Lena Bonaby sworn and filed on September 15, 2023 avers that on August 30, 2023, the Official Liquidator for the Defendant engaged Sotheby's International Realty, a real estate firm, to carry out an appraisal of the subject property. An Appraisal Report was prepared by George Damianos. The Appraised Value per the report as at September 14, 2023 showed the appraised value at $1,015,00.00.

[61.] In response to the Second Supplemental Affidavit of Lena Bonaby sworn and filed on September 15, 2023 which exhibited the Appraisal report, the Claimants responded by Affidavit of Yuri Starostenko sworn and filed on September 29, 2023. The Affiant avers that "the Second and Third Claimants sent to George Damianos a LETTER OF REQUESTS AND REMEDIAL PROPOSLA dated 29 September 2023 with attachments". The letter and attachments are exhibited to the affidavit as "Exhibit 1". A perusal of the letter reveals not only a challenge to the valuation but a challenge to the qualifications of the Appraiser and an assault on his professional practice, including an allegation professional misconduct. Paragraphs 6 to 9 of the letter read:

> "6. Remedial Proposal to solve the problem created by the professional misconduct described above is for you to cancel the evaluation and withdraw the Appraisal Report.
> 7. We are not aware if you still have the same legal representation that recently represented you in the Supreme Court Action No.2018/CLE/gen/001129 for $432,000 in real estate fees against Bank of The Bahamas, Windemere Island North Development, and others, in which you were the unsuccessful party, but we would advise that you seek and obtain professional legal advice before you choose not to comply with either First and Second Requests or Remedial Proposal above.
> 8. If you ignore the First and Second Request or Remedial proposal, we will initiate legal and administrative proceedings allowed by law or policies by bringing the matter to the attention of all bodies, of which you claim to be a member as a person or business entity, both in this jurisdiction and in the United States, and of course, we will share all relevant updates on all available media.
> 9. Particularly, be assured that, if any real estate closing for this transaction ever occurs, we will challenge its legitimacy and handling, and we will bring the matter to the attention of the Supreme Court, the Court of Appeal, and the Privy Council."

[62.] The clear thrust of the letter is that unless the Appraiser complied with the requests and remedial proposal i.e. "cancel the evaluation and withdraw the Appraisal report", then he would be subject to "legal and administrative proceedings allowed by law or policies by bringing the matter to the attention of all bodies, of which you claim to be a member as a

person or business entity, both in this jurisdiction and in the United States, and of course, we will share all relevant updates on all available media".

[63.] The letter, to my mind, is a thinly-veiled threat. I agree with the Defendant's characterization of the letter as an attempt to intimidate the Appraiser.

[64.] While one may legitimately disagree with an expert's opinion, the manner of challenge and nature of attack as set out in the Claimant's letter is inappropriate.

[65.] The letter also serves as evidence that it is the Claimant's intention to stymie any exercise of the power of sale. The nature of the actions embarked upon since the summary judgment order demonstrates that persons who perform a role in the "march to sale" are open targets for the Claimants. The Claimants have not merely embarked on consecutive litigation proceedings as a means of vindicating what they believe to be their legal rights, but they have also employed in their armory, attack by social media. It is not unreasonable to conclude that this behavior would also be meted out to any prospective purchaser nor is it unlikely that this behavior would be employed to deter potential purchasers.

[66.] In their submissions to the court, the Claimants threatened further litigation and foreshadowed more applications. The Claimants submitted that "Now, if after appraisal, we will see that the house somehow lose something in revenue, this will be added to our claims against UBS because Honorable Justice Milton Evans, when in December of 2017, didn't stay a possession order." (Transcript)

[67.] The loss of the subject property is a personal loss for the Claimants as they have presented to this court from time to time. Nevertheless, the actions of the Claimants are not, in my mind, designed to enhance a speedy resolution by a substantive trial of what they say are the issues between the parties. The Defendant holds a judgment of this court. That judgment has been tested on appeal by the Claimants. It is not fair or just for a Defendant to be denied its contractual right of enforcement for an indeterminate time in these circumstances.

[68.] The Claimants/mortgagors entered a contract with the Defendant/mortgagee which resulted in an encumbrance on the subject property. That encumbrance puts it outside of the mere wishes of the Claimants as to what remedy ought to be afforded to the Defendant.

[69.] I am satisfied that the unoccupied property continues to deteriorate and to lose value and that there are attendant sums (such as home owners' fees and taxes) that continue to accrue and attach to the property. By the Supplemental Affidavit of Lena Bonaby sworn and filed on August 31 2021, The Defendant avers that "UBS has spent approximately

$207,064.60 on cleaning, securing, insuring and generally maintaining the Property and other associated costs" since it took possession of the Property (on February 27, 2018). Bonaby avers that the Defendant "estimates its monthly costs for the maintenance and upkeep of the Property to be approximately $5,000.00." The affiant also avers that further expenses continue to accrue, including real property taxes, homeowners' insurance and Lyford Cay Homeowners Association Fees.

[70.] The objective economics point to allowing the sale to proceed at this time. It is expedient for the subject property to be sold. I note that it would also in the Claimant's interest that a sale be concluded before further deterioration in value of the asset since it is the Claimants that have a judgment order to satisfy. There is no persuasive argument before me for the refusal of the grant of an order in these circumstances.

[71.] To my mind, this is a simple matter made complex because of the myriad number of ancillary issues and applications raised. However, it is uncomplicated because the current application before me is a renewed application where the issue of the Defendant's right to an exercisable power of sale has already been determined. Judgment in favour of the Defendant consequent on a default of payment on a mortgage has already been made. Those fundamental findings and issues are part and parcels of rulings that have been subject to appeal. The rulings and orders remain undisturbed. What remains is whether this court ought to exercise its discretion to allow the Defendant to sell the property.

[72.] By the ruling of Justice Evans, it appears to me that he made the direction for court approval given the intention of the Claimants to appeal the ruling and on considering the effect that the Defendant selling the house would have if there were to be a successful appeal. That is explored by Justice Winder in his ruling. That balancing of the interests of the parties likewise appeared to have influenced the judgment of Justice Winder to refuse the order sought since a full trial was scheduled to be months away from the date of his own ruling. Notably, and importantly, the learned judge also determined that he would revisit the decision if the trial did not proceed in that time frame. That was in 2019.

[73.] At the beginning of this judgment, a chronology is set out in brief. It shows how much time has elapsed without a trial. Further it shows the several avenues of appeals launched by the Claimants. The Claimants have had the benefit of time and court processes to challenge the orders and rulings. They have done so. They have done so unsuccessfully. The Claimants have also filed numerous pre-trial applications that ought, as a matter of case management, to be determined by the court prior to trial. Taken together, the appeal processes and various applications would have contributed, in no small part, to the delay of a trial of the Claimants' counter action. It seems disingenuous to me, that the Claimants would attribute blame to the Defendant for the ensuing delays.

[74.] At this time, there are no pending appeals in respect of the orders of Evans, J and Winder, J. In the absence of an imminent trial date and given the several pre-trial applications to be heard, I ask myself whether the restraints on Justice Evans and Justice Winder hold. The answer seems to be a resounding no. The circumstances are different. The Claimants have had several bites at the proverbial cherry with no change to the existing orders and rulings which confer upon the Defendant an exercisable right of sale pending court approval.

[75.] The CPR also provides an Overriding Objective. In determining how to exercise this court's discretion, I must bear in mind the overriding objective "to deal with cases justly and at proportionate cost".

[76.] For completeness, Part I of the CPR 2022 provides in part -

> 1.1 The Overriding Objective
>
> (1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.
>
> (2) Dealing justly with a case includes, so far as is practicable:
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate to —
>
> (i) the amount of money involved;
>
> (ii) the importance of the case;
>
> (iii) the complexity of the issues; and
>
> (iv) the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly;
>
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with rules, practice directions and orders.

[77.] In this case, when one considers the extensive proceedings engaged by the parties, largely triggered by the applications, and related appeals, of the Claimants, it becomes clear that significant resources have been expended on this consolidated action. While the value of the matter is not insignificant, the issues are not complex. This matter began as an action in 2014 for a default in a loan. There was a summary judgment in that matter in 2015. There was no extensive litigation leading to that resolution. This has now morphed into a lengthy decades-old legal battle. Is it fair that the Defendant continues to be denied the enforcement of a judgment first made in 2015? My conclusion is that it is not. This takes

into account, that on the record before me, the Claimants have availed themselves of the opportunities to exhaustively challenge the judgment and subsequent orders and rulings made. On their own submissions, the Claimants intend to challenge and "add to their claims" any perceived shortfall in revenue if the house is sold. While a litigant is entitled to pursue those avenues available to it for the enforcement of his rights, it seems to me that given the Claimants' demonstrated appetite for pre-trial applications and appeals thereof, it is unlikely that a trial resolving the outstanding issues is on the horizon. While a court may set a trial window, which has not yet been set in this matter, there is no certainty that that window will hold in the atmosphere which has driven this litigation.

[78.] Further, to my mind, the Claimants' submissions and stance are largely to relitigate matters already determined. This is a misuse of judicial time.

[79.] I am satisfied on the evidence before me, that as this matter continues, the property continues to diminish in value. A loss in value is, in my view, detrimental to the Claimants who are faced with the judgment of Evans, J. I am also satisfied that costs associated with possessing and maintaining it continue to be incurred. Legal costs also attach to this matter.

[80.] A court order for sale is also a protection for the Claimants. The Defendant is not at liberty to sell without regard to their fiduciary duty of the direction of the court. The Defendant is required to have a proper appraisal conducted and to sell at market value. The Defendant will be required, as per the order sought, to sell at the highest offer subject t a reserve price. The final sale is to be endorsed/approved by the court. Via this process, the Claimant will be entitled to information about the sale and are free, at an appropriate time, to challenge how the power is being exercised.

[81.] Having considered the evidence before me and bearing in mind the factors that a court must consider, it is my determination that this case is an appropriate case for the exercise of the court's discretion in favour of the Defendant.

[82.] I make the order prayed for by the Defendant.

APPLICATION 2: Claimant's applications to permit entry and surrender benefits, filed July 7, 2023 and November 20, 2018 – as a joint application

[83.] By motion, filed July 7, 2023 the Claimants seek an order requiring that the Defendant "permits entry to the property in its possession …to the Second and Third Applicants and persons acting on the Appellants' behalf."

[84.] By summons, filed November 20, 2018, ("Surrender Application") The Claimants seek an order that the Defendant surrenders benefits of the execution requiring the same:

> "to deliver up possession of Lyford Cay property known as Jazz House [("Premises")] belonging to Junkanoo Estates Ltd to the Claimants taken in execution on behalf of the Defendant under a Writ of possession dated 14th February 2018 directed to the enforcement officer Jack Davis;"
>
> "all necessary accounts and inquiries;"

[85.] The Claimants' application is brought pursuant to Part 26.1(3)(e) of the Supreme Court Civil Procedure Rules, 2022 (the "CPR") for an order that the Defendant permit entry to the property by the Second and Third Claimants and by persons acting on the Claimants' behalf.

[86.] The Claimants rely on CPR Part 17 subject to CPR Rule 17.1(c) and CPR Rule 17.1(h) and CPR Part 26 subject to CPR Rule 26.1(3) and CPR Rule 26.1(4)(e) for the jurisdiction of the court to authorize a person to enter land which is in the possession of another.

[87.] The grounds on which the Applicants rely are stated as:

(1) it is in the interests of justice to favor the compliance with court decisions; and
(2) thus, it is in the interests of justice to do the order that the Defendant permits entry to the property to the Second and Third Applicants and persons acting on the Appellants' behalf to enable them to verify the compliance with the condition precedent of taking possession of the property imposed by the Ruling of this Court delivered on 21 December 2017.

<u>The Claimants' submissions</u>

[88.] The Claimants' submissions are comprehensively captured in their skeleton arguments dated April 12, 2024 and headed, "Skeleton Arguments — Two Applications — 22 and 29" as well as another dated 3 December 2018 and headed "Remedies for Breach of Undertaking Given to the Court".

[89.] The Claimants argue that a condition precedent to the Defendant's taking possession of the property was laid down in the Ruling by Justice Evans delivered on 21 December 2017. At paragraph 27 of the ruling, Justice Evans stated:

> *"27. In these circumstances of this case and for the reason given above I grant leave to the Defendants to lodge an appeal but I refuse the application for a stay of the Order for*

possession. This would allow the Claimant if they so desire to take possession and carryout the necessary repairs/steps to safeguard the value of the premises. However, I further order that there be no sale of the premises without a further Order from this Court or from the Court of Appeal."

[90.] The Claimants arguments are summarized as follows:

1. It is in the interests of justice to permit the Claimants to enter the Premises and to enable them to verify to the satisfaction of the Court:
    a. the compliance with the condition precedent to taking possession of the same imposed by Evans J. in the Ruling of this Court dated 21 December 2017 at paragraph 27
    b. the facts of the inadequately low value of the Premises indicated by George Damianos in his appraisal report alleged by the Claimants as being fraudulent (on their application now pending before this Court, filed 20 September 2024).
2. The Ruling of this Court dated 21 December 2017 at paragraph 27 imposed a *"negative covenant"* or undertaking on the Defendant who was prepared to give such an undertaking, and who did not appeal the imposition of the condition precedent to taking possession of the Premises.

3. The principle of protection of the mortgagee's right of possession must give way to the principles of fairness and equity by requiring the Defendant to surrender benefits of the execution and deliver up possession of the Premises to the Claimants for the reason because the execution itself was fatally defective and void in that:
    1. Writ of Possession was issued by the Registrar of the Supreme Court without "*jurisdiction [vested] in the Judge, Magistrate, Justices of the Peace or Coroner"*, instead of a Judge of the Supreme Court;
    2. Police officers forcibly entered the Premises *without a warrant lawfully issued by "a judge, magistrate or justice of the peace"* and without *"the right, power and authority to execute every such warrant"*, and the illegal entry by the Police was challenged by the Claimants by submitting their information to the Airport Police Station on 4 March 2018.
4. Further retention of possession of the Premises would be unjust without first deciding whether the Order granting possession ("Possession Order") was procured by fraud (on the Claimants' application now pending before this Court, filed 21 February 2024, for an order setting aside the Possession Order, relying on the legal principle articulated in the judgment of David Steel, J. in **Kuwait Airways v Iraqi Airways**, [2005] EWHC 2524 (Comm), considered by Barnett,

P in the Judgment of the Court of Appeal in **Murphy v Hot Pancakes et al.** - SCCivApp No. 95 of 2020.

5. This Court has inherent power to enforce the condition precedent to taking possession imposed by Evans J. in the Ruling of this Court dated 21 December 2017 at paragraph 27.
6. The prejudice to the Claimants was found in the Ruling in this case prepared by Bowe-Darville J. and signed by Winder CJ. on 8 May 2023. It would be unjust to the Claimants, if the Defendant as a party standing in a substantial advantaged financial position, is continue in possession of the Premises after breach of the conditions imposed by Evans J. in the Ruling dated 21 December 2017 and after their unreasonable application had caused delay of almost 4 years and *"deprived the Claimants [Claimants] of a trial date"*.
7. The Claimants also submit that "after being homeless for the past six years, with the trial date intentionally delayed by the Defendants (per a Ruling by Bowe-Darville J. and signed by Winder CJ. on 8 May 2023), and no new trial date appointed yet, they should be granted repossession in the interest of justice.
8. The Claimants submit that the Defendant should be ordered to return the house to the condition it was in when they took possession. Alternatively, the Claimants submit that the Defendant could be compelled to pay the Claimant the monthly rent fees for renting a similar house until the conclusion of the trial."
9. The Claimants also submit that given the Defendant's non-compliance with the court order, that the Court ought to impose a sanction or otherwise put things right.
10. The Claimants submit that it first has to be determined whether the Order granting possession ("Possession Order") was procured by fraud per **Kuwait Airways v Iraqi Airways**, [2005] EWHC 2524 (Comm), considered by Barnett, P in the Judgment of the Court of Appeal in **Murphy v Hot Pancakes et al.** - SCCivApp No. 95 of 2020. They further submit that a court ought to enforce compliance with its orders: **Elkind v. The Private Trust Corporation Limited and others** - [2017] 1 BHS J. No. 107 and **Wesley International Limited and others v. Actis Consumer Grooming Products Ltd. -** [2018] 1 BHS J. No. 1

The Defendant's submissions

[91.] The Defendant takes the preliminary objection that the application to enter the property (application of July 7, 2023) brought by way of by Notice of Motion is not properly before the Court. They argue that the CPR does not allow for an application to be brought by Notice of Motion.

[92.] In answer to the substantive applications, the Defendant responds that it is the Summary Judgment Order against the Claimants which allowed UBS to take possession of the Property and that the Summary Judgment Order has not been overturned or stayed. The Defendant submits that UBS took possession of the Property pursuant to a validly issued Writ of Possession.

[93.] The Defendant denies giving any undertaking to maintain or improve the value of the Property upon taking possession and denies that the judgment of Justice Evans imposed a condition precedent on the Defendant (UBS) taking possession of the Property. The Defendant argues that it has taken all necessary steps to safeguard the value of its security and that it is unnecessary for the Claimants to enter the Property in order to verify whether or not UBS has maintained it. The Defendant referred to the evidence of upkeep as set out in the Bonaby Affidavits. The Defendant also submits that the state of the Property is discernible from the photos attached to the Appraisal Report.

[94.] The Defendant argues that "the Claimants' heightened concern about UBS maintaining the Property is disingenuous, since at the time that UBS took possession of the Property it was already in an advanced state of disrepair." In this regard, they rely on the averments in the Affidavit of Lena Bonaby sworn and filed on December 10 2018.

[95.] The Defendant argues that it is not obliged by law to take any steps to repair the Property nor to improve the value of the Property. It relies on the case of **Silven Properties Ltd and another v Royal Bank of Scotland plc and others** [2004] 1 WLR 997

LEGAL DISCUSSION AND ANALYSIS

[96.] Part 11 CPR provides for the mode of making of applications to the court. Specifically, Rules 11.1 and 11.2 provide

> 11.1 Scope of this Part.
>
> This Part deals with interlocutory applications for court orders being applications made before, during or after the course of proceedings.
>
> 11.2 Application to be in writing.
>
> (1) Subject to paragraph (2), an application must be in writing in Form G14.
>
> (2) An application may be made orally if —
>
> (a) the Court dispenses with the requirement for the application to be made in writing; or
>
> (b) this is permitted by a rule or practice direction.

[97.] I accept the Defendant's submission that an application as laid by the Claimant ought not to be by way of Notice of Motion. The Defendant submits that the Claimant's application by Notice of Motion is not properly before this court.

[98.] This court has the power to rectify procedural errors with or without an application of a party. Part 26. 9 CPR provides:

> 26.9 General power of the Court to rectify matters.
>
> (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction, court order or direction.
>
> (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the Court so orders.
>
> (3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the Court may make an order to put matters right.
>
> (4) The Court may make such an order on or without an application by a party.

[99.] I consider that this matter started prior to the coming in force of the CPR and that the Claimants acted pro se in the presentation of these particular applications. I also bear in mind that the Defendants were not taken by surprise by the application for an order that the Defendant "permits entry to the property" and were able to make a full and comprehensive response. For that reason, this court orders that the relevant application be deemed as an application in writing pursuant to Part 11, with the necessary amendments.

[100.] I will proceed to consider and determine both applications on their substance.

[101.] Part 17 of the CPR provides for the making of interim orders. Rule 17.1 provides:

> 17.1 Orders for interim remedies: relief which may be granted.
>
> (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);
>
> (d) an order directing a party to prepare and file accounts relating to the dispute;
>
> (e) an order directing a party to provide information about the location of relevant property or assets or to provide

information about relevant property or assets which are or may be the subject of an application for a freezing order;

(f) an order for a specified fund to be paid into Court or otherwise secured where there is a dispute over a party's right to the fund;

(g) an order for interim costs;

(h) an order for the —

(i) carrying out of an experiment on or with relevant property;

(ii) detention, custody or preservation of relevant property;

(iii) inspection of relevant property;

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

(v) sale of relevant property, including land, which is of a perishable nature or which for any other good reason it is desirable to sell quickly;

(vi) taking of a sample of relevant property;

(i) an order permitting a party seeking to recover personal property to pay a specified sum of money into court pending the outcome of the proceedings and directing that, if the party does so, the property must be given up to the party;

(j) a "freezing order", restraining a party from —

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

(ii) removing from the jurisdiction assets located there;

(k) an order to deliver up goods;

(l) a "search order" requiring a party to admit another party to premises for the purpose, among other things, of preserving evidence;

(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.

(2) In paragraph (1)(e) and (h), **"relevant property"** means property which is the subject of a claim or in relation to which any question may arise on a claim.

(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.

(4) The Court may grant an interim remedy whether or not there has

been a claim for a final remedy of that kind.

(5) The Chief Justice may issue a practice direction in respect of the procedure for applying for an interim order including, in particular, interim injunctions, search orders and freezing orders.

[102.] The Applications under consideration are said to be made "in the interest of justice" and based on the court's power to make interlocutory orders pursuant to **Part 17** and **Part 26** of the CPR. They also invoke the inherent jurisdiction of the court to enforce a condition precedent laid down in a judgment by another judge.

[103.] Much of the Claimant's argument is based on what they characterize as an undertaking, or, alternatively a condition precedent laid down by Justice Evans in his ruling. At paragraph 27 of the ruling, Justice Evans stated:

> *"27. In these circumstances of this case and for the reason given above I grant leave to the Defendants to lodge an appeal but I refuse the application for a stay of the Order for possession. This would allow the Claimant if they so desire to take possession and carryout the necessary repairs/steps to safeguard the value of the premises. However, I further order that there be no sale of the premises without a further Order from this Court or from the Court of Appeal."*

[104.] I find that the Claimants have mischaracterized the nature of the judge's holding in that paragraph. The Defendants had a summary judgment which was upheld and recognized by the learned judge. The learned judge refused the Claimants' application for a stay of possession and so the path was cleared for the Defendant to enter into possession. However the judge required that the Defendant return to court to obtain an order before proceeding with a sale. It had already been determined that the Defendant held an exercisable power of stay.

[105.] To my mind there is no undertaking, nor was there a condition precedent, that was directed by the judge. There is no factual evidence of an undertaking by the Defendant. The Defendant on pursuing an application heard by Justice Winder and one renewed before this court complied with the very terms of Justice Evan's order. The Defendant was required to apply to the court for an order of sale. That they have done. For the reasons given above in relation to that application, I have granted the order.

[106.] I find that the Claimants have not made put a case under **Rule 17.1(h)**. There is no role to be accorded to them under those provisions. The Claimants indicate that they would like to make an inspection of the property to see the condition of it and that the Defendant ought to restore the property to the same condition it was in.

[107.] The law is clear in this regard. The law is that the mortgagee is under a duty to obtain the best price reasonably obtainable at the date of sale. However this does not impose an obligation to improve the value of the property for this purpose. As a general rule, a mortgagee is entitled to sell the mortgaged property in whatever state it is in.

[108.] In **Silven Properties Ltd and another v Royal Bank of Scotland plc and others** [2004] 1 WLR 997**,** a case relied on by the Defendant, the court considered the duties of receivers regarding mortgaged properties. In that case, the Claimants defaulted on several mortgages with the bank. The bank, in accordance with the terms of the mortgages, appointed receivers who sold the mortgaged properties. In the suit, the Claimants claimed that the properties had been sold at an undervalue. While it was found that the receivers had obtained the best prices for the properties in the condition they were, the Claimants argued that the receivers should have taken certain steps prior to sale which would have effectively improved the value of the properties in order to obtain the best price obtainable. The judge at first instance dismissed the claim without determining the obligation of the receivers. The Claimants appealed. Justice Lightman delivered the judgment of the court. The appeal was dismissed.

[109.] Finding that the receivers did not have to take the pre-marketing steps contended for in an effort to increase the price obtainable, Justice Lightman found (at paragraph 28, page 1008):

> Having regard to the fact that the receiver's primary duty is to bring about a situation where the secured debt is repaid, as a matter of principle the receiver must be entitled (like the mortgagee) to sell the property in the condition in which it is in the same way as the mortgagee can and in particular without awaiting or effecting any increase in value or improvement in the property. This accords with the repeated statements in the authorities that the duties in respect of the exercise of the power of sale by mortgagees and receivers are the same and with the holding in a series of decisions at first instance that receivers are not obliged before sale to spend money on repairs…

[110.] Justice Lightman also set out the limits of the duties of a mortgagee and found at paragraph 13:

> A mortgagee has no duty at any time to exercise his powers as mortgagee to sell, to take possession or to appoint a receiver and preserve the security or its value or to realise his security. He is entitled to remain totally passive. If the mortgagee takes possession, he becomes the manager of the charged property: see ***Kendle v Melsom*** [1998] 139 CLR 46 at 64 (High Court of Australia). He thereby assumes a duty to take reasonable care of the property secured: see ***Downsview Nominees Ltd v First City Corp*** [1993] AC 295, [1993] 3 All ER 626 ("Downsview") at 315A per Lord Templeman; and this requires him to be active in protecting and

> exploiting the security, maximising the return, but without taking undue risks: see ***Palk v Mortgage Services Funding Plc*** [1993] Ch 330, [1993] 2 All ER 481 at 338A per Nicholls V-C ("*Palk*").

and found at paragraph 16:

> **[16]** The mortgagee is entitled to sell the mortgaged property as it is. He is under no obligation to improve it or increase its value. There is no obligation to take any such pre-marketing steps to increase the value of the property as is suggested by the Claimants. The Claimants submitted that this principle could not stand with the decision of the Privy Council in ***McHugh v Union Bank of Canada*** [1913] AC 299. Lord Moulton in that case (at p 312) held that, if a mortgagee does proceed with a sale of property which is unsaleable as it stands, a duty of care may be imposed on him when taking the necessary steps to render the mortgaged property saleable. The mortgage in that case was of horses, which the mortgagee needed to drive to market if he was to sell them. The mortgagee was held to owe to the mortgagor a duty to take proper care of them whilst driving them to market. *The duty imposed on the mortgagee was to take care to preserve, not increase, the value of the security.* The decision accordingly affords no support for the Claimants' case.
>
> [Emphasis supplied]

[111.] The principle therefore is that the mortgagee is under a duty to preserve the property but no duty to improve it.

[112.] There is no cogent evidence before me that the Defendant has failed to take reasonable steps to preserve the property. The Claimants complain that the "photo-evidence within the Defendant's Affidavit of 15 September 2023 shows the house in major decline instead of repairs being taken." The Claimants submitted that "once [the Defendants] decided to took [sic] possession, they assume[d] all the expenses and they ought to make repair, which, from the horrible photographs produced by George Damianos, was not taken at all. The house is -- have huge damages. If we were staying in this house, there would be never such expenses…." This is their submission without more.

[113.] The evidence laid is that the property was in disarray at the date of possession. By Second Affidavit of Lena Bonaby sworn and filed on December 10, 2018, she gives evidence of the eviction process and the state of the property on possession. By her paragraph 11, she avers that the property was "in a filthy state" and that "there had been no electricity or no [sic] running water for an extended period of time during their occupation [sic] Property. There was also substantial fire damage… to the interior of the home. The

exterior grounds of the Property was severely overgrown and cluttered with fallen trees and other debris." These averments have not been directly traversed.

[114.] The evidence of the Defendant is that certain expenses – taxes, insurance and home owners' fees continue to accrue. The Claimants have not persuaded me that these expenses would not be payable were they to possess the property.

[115.] There is no suggestion that the pictures contained in the Appraiser's report are not a true depiction of the current state of the property and there is no evidence that it reflects a wasting away of the property or a breach of the mortgagee's duty.

[116.] The Claimants complain that the Defendant never allowed them to access the property and that they are unaware of repairs made. I find that such matters that can be addressed by way of an accounting. The mortgagee has a fiduciary duty in that regard.

[117.] The Claimants also submitted that there is an outstanding issue to be resolved in relation to the attaining of a Writ of Possession and its execution on the ground of fraud. The pending application to set aside the writ of possession on that ground is one of the more recent applications. It has not yet been heard and it seems to me that to deliver up possession in the face of a bare application pending determination of that matter is not in the interest of justice. Nor do I consider the remedies sought as appropriate remedies in any event. I remind the Claimants that the Defendant has a judgment in its favour. Delivery up of possession to the Claimants who have been adjudged indebted to the Defendant and which Defendant holds an order in its favour would not be just or equitable.

[118.] In oral argument, the Claimants submitted that they ought to be allowed on the premises to ensure that any appraiser is correctly performing their duty. It seems to me unnecessary for a previous home owner to be physically present in order for an appraiser, an expert, to complete an appraisal. I also find that given the history of the matter, it would be rather disruptive to have the Claimants enter the premises.

[119.] I am satisfied that there is no condition precedent set out at paragraph 27 of the ruling of Justice Evans. I find no reason pursuant to the CPR rules relied on for this court to exercise its discretion in favour of the Claimants.

[120.] I find no merit in the Claimants' applications and the applications, submitted as a joint application, are dismissed.

APPLICATION 3: The Claimant's application for an interim injunction, filed September 9, 2020.

[121.] By summons, filed September 9, 2020, the Claimants seek an order for the continuation of a permanent injunction that any and all of the Defendants will be restrained:

> *"(a)from taking any step contrary to the terms of both the Undertaking and the Injunction, as quoted above;*
>
> *(b) from acting in any manner which would diminish the value of the Premises, the Fair Market Value of which was appraised at $3,684,000 as of 26 December 2016, including but not limited to entering into any agreement or contract for marketing or sale pledge, mortgage, encumbering or disposal of the same directly or indirectly whether via subsidiaries, or its nominees; and, therefore,*
>
> *(c)from all actions and conduct carried out in breach of and contrary to both the Undertaking and the Injunction."*

The application identifies the permanent injunction : A permanent injunction *"that there be no sale of the premises without a further Order from this Court or from the Court of Appeal"* ("Injunction") was imposed by paragraph 5 of the Order and paragraph 27 of the Ruling in this case both dated 21 December 2017 by Evans J., restraining the power of sale of the Premises:

> *"5. The Property shall not be sold without further Order from Supreme Court or the Court of Appeal"*; and
>
> *"27. ... However, I further order that there be no sale of the premises without a further Order from this Court or from the Court of Appeal."*

<u>The Claimants' submissions</u>

[137.] The Claimant's submissions for this application are also included in their skeleton arguments dated April 12, 2024 and headed, "SKELETON ARGUMENTS — TWO APPLICATIONS — 22 AND 29"

[138.] The Claimants submit that the ruling (paragraph 27) and order (paragraph 5) of 21 December 2017 by Evans J that *"that there be no sale of the premises without a further Order from this Court or from the Court of Appeal"* amount to an injunction which restrained the power of sale. They argue further that this "injunction" was continued by Winder J., as he was then, in his ruling dated 5 March 2019 .

[139.] The Claimants submit that

(a) the Injunction unconditionally restraining the power of sale is permanent and substantial and it expires at the trial or appeals related to the consolidated actions.

(b) the principle of protection of the mortgagee's right of possession must give way to the principles of fairness and equity by entering an order for the continuation of the Injunction pending the conclusion of the trial.

[140.] The Claimants rely on the principles regarding "the continuation of an injunction, which has expired" as set out in ***Wesley International Limited and others v. Actis Consumer Grooming Products Ltd.*** **-** [2018] 1 BHS J. No. 1.

[141.] The Claimants also submit that the usual principles that apply to the mortgagee-mortgagor relationship ought not to apply here. They rely on the case of **Macleod v. Jones** (1883) 24 Ch.D. 289 and on National Westminster Bank Plc v Skelton [1993] 1 WLR 72. The Claimants submit that where a special relationship exists between the mortgagee and the mortgagor, the usual rules do not apply. The Claimants submit that the cases relied on by the Defendant are distinguishable on this basis. They also submit that the cases which relate to receivers ought to be distinguished.

The Defendant's submissions

[144.] The Defendant submits that the Claimants' several applications to stay the Summary Judgment Order Court have been dismissed. The Defendant submits that the Claimants should first be made to pay the sums owed under the Mortgage, specifically the Judgment Debt, into Court if they are to seek an injunction to restrain the sale of the property.

[145.] Relying on the cases of **Macleod v Jones** (1883) 24 Ch. D 289 and **Allure Bahamas v North Andros Assets Ltd et al** CLE/GEN 0805 OF 2009**,** the Defendant submits that it is a general rule that the Court will not grant an interlocutory injunction restraining a mortgagee from exercising its power of sale except on the terms that the mortgagor pay the money due to the mortgagee into Court.

[146.] The Defendants further submit that the Claimants cannot rely on the existence of their counterclaim to justify restraining UBS' power of sale per **Strategic Nominees Ltd (in receivership) v Gulf Investments (Fiji) Ltd and Others** [2011] FJCA 23

[147.] In relation to the factors that a court ought to consider in determining an application for an interlocutory injunction, the Defendants rely on the case of ***American Cyanamid Co. Ltd v***

Ethicon Ltd [*1975] AC 396*. They submit that the Court in deciding whether to grant an injunction must consider:

a. *Whether there is a serious issue to be tried;*
b. *Whether damages are an adequate remedy;*
c. *Where the balance of convenience lies;*

The Defendant submits that in this case no injunction should be granted as:

d. there are no serious issues to be tried between the parties which will affect the Summary Judgment Order, as the Mortgage Action is at an end.
e. the Claimants' Counterclaim is a dispute about money and therefore damages would be an adequate remedy; and
f. the balance of convenience does not lie in favor of granting the injunction."

LEGAL DISCUSSION AND ANALYSIS

[149] In this application, the Claimants proceed on the basis that the dicta of Justice Evans established a "permanent injunction." For the reasons previously given, I find that there is no such permanent injunction in place. This ought to serve to dispose of any application for a "continuation" of a permanent injunction.

[150.] There is no final injunction as alleged by the Claimants. By the orders of both Evans J and Winder J, it is envisaged that the Defendant could get leave to proceed with the sale. Both rulings recognize the right of the Defendant to exercise its power of sale in the event of a default. The default was determined by summary judgment.

[151.] The position of the Claimants, as I understand it, is that (1) this was not an ordinary mortgage, it was an investment agreement and so any question of default is to be construed differently and (2) the defendants caused the default. They rely on the words of Evans J as imposing an "injunction" against the exercise of the power sale. I find that the Claimants have misconstrued the judgment and that their arguments are misconceived.

[152.] The Claimants appear, by the use of the cases, to mount an attempt to litigate whether the defendant is entitled to a judgment, and by extension an order for sale, there being a special type of mortgage between the parties. As noted before, that determination is res judicata and not open for examination by this mechanism or in this forum. Therefore there is no necessity for this court to review and address the cases so advanced. The parties do not seem to disagree on the principles of law in this regard. My decision is that an examination of same is not necessary where a determination has already been made by a concurrent court.

[153.] The application of the Claimants also seems premised in the ground that they have a serious issue to be tried. I find that the law is as set out in **Strategic Nominees Ltd (in receivership) v Gulf Investments (Fiji) Ltd and Others** relied on by the Defendants.

[154.] In **Strategic Nominees Strategic Nominees Ltd (in receivership) v Gulf Investments (Fiji) Ltd and Others,** the court considered the business of the securitisation of loans and guarantees of debt and the right of the lender to realize the security upon an established default. On allowing an appeal from an order restraining the mortgagee's exercise of its power of sale, Marshall, JA after review of a number of cases, opined (page 183):

> (1) The law is that cross-claims and equitable set-offs do not apply to the mortgagee's rights when there is default by the debtor.
>
> (2) This applies whether the cross-claim or equitable set-off is claimed by a mortgagor debtor or by a third-party guarantor and indemnifier of the debtor who has mortgaged his property to the creditor in respect of the debt.
>
> (3) The courts will not restrain the mortgagee from his remedies of possession or sale pending a trial on the alleged cross-claim or equitable set-off.
>
> (4) The only way that the mortgagor can buy time and have his cross-claim or equitable set-off heard is by bringing all the moneys claimed by the mortgagee into court.

[155.] The Defendant in this instance holds a judgment in its favour following the default of the Claimants. As a result, the Defendant enjoys the right to obtain certain remedies at law and under the deed it holds. One of those is the realization of its security. The Claimants brought their own claim against the Defendant. The two actions were consolidated but only after the Defendant held an order for judgment.

[156.] I accept that "cross-claims and equitable set-offs do not apply to the mortgagee's rights when there is default by the debtor". The Claimants, by the March 23, 2015 Order of Justice Evans, could have "paid to the [Defendant] the money hereby adjudged to be recovered and all other money (if any) secured to the [Defendant] by the … Mortgage" in order to prevent a sale of the property. That was not done. In these circumstances and at this stage, for a court to grant the equitable remedy of injunction, then the Claimants "can buy time and have [their] cross-claim or equitable set-off heard ….by bringing all the moneys claimed by the [Defendant] into court."

[157.] The Claimant's application is dismissed.

CONCLUSION

[158]. The Defendant's application filed July 27, 2021 is allowed. The Claimants' applications of July 7, 2023 and of November 20, 2018 and of September 9, 2020 as herein set out, are dismissed.

COSTS

[159.] The Defendant has been successful in its application. The Claimants have been unsuccessful in their applications. The Defendant has successfully resisted the applications of the Claimants. Taking into account the provisions of Part 71, CPR and in particular the provisions of Part 71, Rule 71.6, I find no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party. Therefore, in this matter, the Claimants shall pay the related costs of the Defendant in each application, such costs to be taxed if not agreed.

ORDER

[160.] For the foregoing reasons, the order and directions of this Court are as follows.

IT IS HEREBY ORDERED THAT:

1. The Defendant's application to list and market property, filed July 27, 2021 is allowed on the following terms:

I. The power of sale conferred upon the Defendant under the terms of the Mortgage dated 18 September, 2012, over Lot Number Five (5) in Block Number Seven (7) of the Number One (1) Subdivision of Lyford Cay (also known as the Jazz House) in the Western District of New Providence in the Commonwealth of the Bahamas ("the Property"), which has been lodged for record in the Registry of Records in Volume 11712 at pages 87 to 98, made between the Defendant and the First Claimant, has arisen and the Defendant is at liberty to exercise same.

II. The Defendant is at liberty to market the Property and to invite unconditional offers, subject to contract and the approval of the Court, for the sale of the Property. For this purpose, the Defendant shall secure

a current Appraisal report, viz, an Appraisal report no older than March 1, 2025.

III. The Defendant is at liberty to determine a reserve sale price for the Property.

IV. The Defendant is at liberty to accept the highest offer that meets, or exceeds, its reserve sale price for the Property.

2. The Claimant's joint application (of applications filed July 7, 2023 and November 20, 2018) to permit entry and surrender benefits is dismissed.

3. The Claimant's application for an interim injunction, filed September 9, 2020 is refused.

4. The Defendant's costs of the various applications are to be paid by the Claimants, to be taxed if not agreed.

Dated this 4th day of March 2025

Carla D. Card-Stubbs, J

Court