

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA**

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2013/0313

BETWEEN:

GRENADA CO-OPERATIVE BANK LIMITED

Claimant

and

VALMA JESSAMY

Defendant

Appearances:

Ms. Deborah St. Bernard for the Claimant
Mr. Jerry Edwin for the Defendant

2014: January 20
March 6

DECISION

- [1] **MOHAMMED, J.:** There are two applications for determination by this Court. The first is an application filed on the 28th November 2013 (“the November 2013 application”) by the Defendant that the advertised public auction for the sale of the Defendant’s home and business (“Jessamine Eden”) be cancelled. The second application was filed on 11th December 2013 by the Claimant (“the December 2013 application”) to deem the Defendant a vexatious litigant with respect to her repeated applications to the Court for injunctive relief whenever the Claimant attempts to exercise its power of sale over Jessamine Eden as secured by mortgage deed dated 29th January, 2009 (“the mortgage”). The Claimant also seeks an order that

the Defendant be prevented from filing any further applications for such injunctive relief without first obtaining permission of the Court. I will now deal with the November 2013 application.

- [2] The basis of the Defendant seeking the injunctive relief can be summarized as: she has challenged the validity of the mortgage ; Jessamine Eden has been converted into her home therefore damages would be insufficient to compensate her; Jessamine Eden has a full schedule of activities for the 2013-2014 tourist season and the sale would jeopardize the Defendant's efforts to generate income; the Defendant has since November 2012 offered significant lump sum and other payments to the Claimant; the Defendant has tendered consecutive payments of \$5000.00 to the Claimant from the sale of honey products at Jessamine Eden over the past four months; the hearing of the quantum due by the Defendant to the Claimant under the mortgage is still to be scheduled by the Court and the Claimant has undervalued Jessamine Eden by advertising it at a value of approximately \$2.2 million although it is aware that there is another valuation which places it in the sum of approximately \$2.8 million.
- [3] The Claimant has opposed the November 2013 application for the following reasons: the Defendant has admitted to her indebtedness to the Claimant; the said indebtedness was secured by a mortgage; the Defendant was aware that the overdraft facility whereby the Defendant was advanced funds was later secured by the mortgage; the Defendant has continued to be in arrears; the Defendant's payments have been inconsistent during the tenure of the mortgage and usually occurs whenever steps are taken to realize the amounts due and owing to it; the total repayment as at 6th June 2013 is \$166,939.73; the Claimant is the party that is prejudiced in this matter and not the Defendant since it has loaned money to the Defendant and it is prevented from attempting to recover its money; the Claimant has always been willing to entertain the refinancing of the loan but it is premised on the Defendant providing information of her earnings and income which the Defendant has failed to provide; the Claimant's decision to advertise Jessamine

Eden for sale has always been due to the default by the Defendant in repaying the loan and the monthly sum of \$5,000.00 tendered by the Defendant represents less than 50% of the minimum repayment sum of \$12,902.00 per month.

[4] When deciding to grant an application for an interim injunction the House of Lords decision of **American Cyanamid v Ethicon Ltd**¹ stipulates that the court should as a general rule have regard to the following criteria:

- (a) Does the applicant have a real prospect of succeeding in his application for a permanent injunction? The test is sometimes expressed as “is there a serious issue to be tried?” If there is a serious issue to be tried then the court should examine (b).
- (b) Are damages an adequate remedy for the applicant for the loss he would have sustained as a result of the respondent continuing to do that which was sought to be enjoined between the date of the application and the date of the trial?
- (c) If so would damages be an adequate remedy for the respondent for the loss he would have sustained by being prevented from acting between the date of the application and the date of the trial?
- (d) If there is doubt as to the adequacy of the respective remedies, where would the “balance of convenience” lie?
- (e) Are there any “special factors”?

[5] More recently the Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd**² held that the purpose of an interim injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

¹ [1975] 1 All ER 504

² [2009] 1 WLR 1405

Is there a serious issue to be tried ?

- [6] In **Mothercare Ltd v Robson Books Ltd** ³ Sir Robert Megarry V.C. examined how serious is “serious” of the issue to be tried. He stated:

“The prospects of the Plaintiff’s success are to be investigated to a limited extent, but they are not to be weighed against his prospect of failure. All that has to be seen is whether the Plaintiff has prospects of success which, in substance and reality, exist. Odds against success no longer defeat the Plaintiff, unless they are so long that the Plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the Plaintiff fails, for he can point to no question to be tried which can be called “serious” and no prospect of success which can be called ‘Real’.”

- [7] In **Tetrosyl Ltd v Silver Paint and Lacqueur Co Ltd** ⁴ Lawton LJ said that:

“a serious question....can only arise if there is evidential backing of it”.

- [8] In the substantive action the Claimant seeks judgment against the Defendant for the sum of \$986,502.50, interest in the sum of \$340,804.89 at the rate of 9.5% per annum or \$256.7609 from the 6th June 2013 until payment. The basis of its claim is for monies due and owing to it by the Defendant secured by the mortgage. The Claimant alleges that the sum of \$1,050,000.00 was advanced to the Defendant and secured by a mortgage of Jessamine Eden. In the mortgage, the Defendant covenanted with the Claimant that on demand she will pay to the Claimant all monies outstanding under the loan. The Claimant alleges that demand letters requesting repayment have been sent to the Defendant calling upon her to pay the outstanding balance. The mortgage also expressly provides for the statutory power of sale. The Claimant insists that it is not selling the Defendant’s business but her personal property which she used to secure the loan facility.

- [9] To understand the Defendant’s defence to the substantive claim it is necessary to examine the six documents which were filed in opposition. Firstly, the Defendant filed an application to pay by installments on the 26th July 2013 where she only

³ [1979] FSR 466 at 474

⁴ [1980] FSR 68

admitted owing the Claimant the sum of \$878,060.27 which she stated that she cannot pay. Instead she applied to pay \$5,000.00 per month to liquidate the said sum. In support of her application to pay by installments she set out her annual take home income as \$168,000.00 which comprised of \$60,000.00 take home salary, \$60,000.00 income from spouse, rent of \$24,000.00 and car/travel allowance of \$24,000.00. She also stated that she pays the monthly sum of \$3,500.00 to the Grenada Public Service Co-operative Credit Union as ordered by the Court.

[10] In the affidavit in support of the Defendant's application to pay by installments also filed on 26th July 2013, the Defendant repeats her admission made in the application to pay by installments. She admits that she approached the Claimant in July 2008 for a loan and acknowledges that by 31st August 2008 she had received \$120,000.00 from the Claimant although she had not provided any security. She acknowledges receiving a letter by February 2009 for repayment of the loan. She alleged that the Claimant stopped giving her funds in December 2008 and in January 2009 she signed the mortgage "Under pressure" since she needed the Claimant to release funds to her as secured by the loan. She also asserted that the Claimant did not provide her with any explanation for refusing to continue to release funds to her and that during the period June to October 2011 she made regular payments to the Claimant on her understanding that the Claimant was willing to refinance the loan. She challenged the Claimant's application of the payments which she made between 2009 and 2010, the bailiff fees, legal fees and a payment of \$20,000.00. She requested a structured payment plan for a 30 year period and a waiver of interest accrued for the period January 2009-2013.

[11] In the Defendant's "Amended Affidavit" filed on 31st July 2013 in support of her application to pay by installments the new matters raised by the Defendant were: the Claimant's letter dated 4th November 2008 which stated that it had approved the loan in the sum of \$1,050,000.00 at the rate of interest of 9.5% per annum which in her view was arbitrary; she understood that the mortgage included a moratorium on the payment of principal for the first year; she said she submitted a proposal for a

business loan; by October 2009 she had made several payments to the loan; in 2010 she paid the Claimant approximately \$25,000.00; between the period June 2011 to November 2011 she paid the sum of \$55,000.00 since she understood that if she paid this sum the loan would be refinanced but it never was; and she has paid a total of \$192,939.73 to date. She changes from her previous position and asserts that she is only owing the sum of \$237,194.77 for “the land” and that she moved into the unfinished buildings at Jessamine Eden to reside since she was unable to pay for 24 hours security.

[12] The Defendant’s “Affidavit in support of Defence” filed on 9th August 2013 repeats her position as set out in her “Amended Affidavit”. In her Answer and Statement of Defence filed on 9th August 2013 she repeats her denial of owing the Claimant the sums of \$986,502.50 and interest in the sum of \$340,804.89 and at the rate of 9.5% per annum. She alleges that she was deceived by the Claimant who used coercion and misrepresentation to get her to sign the mortgage. She also alleges breach of contract and negligence on the part of the Claimant and that the Claimant permitted her expend the sum of \$500,000.00 without any security; it wrongfully called in the mortgage during a period when there was a moratorium on the principal and that the Claimant has violated the “Grenada Mortgage and Conveyancing Act” and the Eastern Caribbean Central Bank Enforced Prudential Guidelines which has caused her a projected loss of \$4,200,000.00.

[13] In the Defendant’s “Amended Reply and Defence the Fixed Date Claim” which was filed on 1st October 2013, the Defendant again admits that she mortgaged Jessamine Eden to the Claimant to obtain credit facilities from the Claimant. She repeated her allegation that she was wrongly induced to sign the mortgage and denies owing the sum claimed, interest, court fees and legal practitioners’ fees. She also sets out her reasons challenging the rate of interest claimed. She asks the Court to order that she is only liable to pay the Claimant for “the land mortgage” and not the mortgage, to remove the improper additions to the mortgage balance, to

treat the mortgage as a non-corporate loan with the appropriate time for repayment, for costs and any other further relief.

[14] Despite the several allegations made by the Defendant in the aforesaid six documents in opposition to the Claimant's Claim, on 4th December, 2013 and without any objection from the Defendant, judgment on admission was entered in favour of the Claimant with the Court to determine the sum to be paid by the Defendant to the Claimant.

[15] Although in each document filed in opposition to the Fixed Date Claim the Defendant's position appeared to change, the following are undisputed: the Claimant did advance to the Defendant a certain sum of money; the security used was the mortgage of Jessamine Eden which is owned by the Defendant; the Defendant has acknowledged owing the Claimant a certain sum of money; the Defendant has made some repayments but she has not been consistent in the repayment of the loan.

[16] In my view, the broad issue the Court has to decide is the sum the Defendant owes to the Claimant. Arising from that are several sub issues which directly impact on the broad issue such as:

- (a) Can the mortgage be set aside?
- (b) What is the total repayment made as at 6th June 2013?
- (c) Did the Claimant properly apply the sums paid by the Defendant towards the liquidation of the loan?
- (d) Was there a moratorium on the payment of principal for one (1) year?
- (e) What is the rate of interest to be applied to the loan?

[17] While the aforesaid may not be all the issues, they are still in my view serious issues which go to the central issue to determine this matter. Having decided that there are serious issues to be tried I will now consider the adequacy of the respective remedies in damages available to the parties.

Are damages an appropriate remedy?

[18] Sach LJ in **Evans Marshall & Co Ltd v Bertola SA**⁵ suggested that:

“The standard question in relation to the grant of an injunction, “are damages an adequate remedy?” might perhaps in the light of all the authorities of recent years, be rewritten: “Is it just in all the circumstances that a plaintiff should be confined to his remedy in damages?”

[19] The approach the Court should take in answering this question was explained by Buckley LJ in **Polaroid Corporation v Eastman Kodak Co**⁶:

“...but in every case of an application for an interlocutory injunction until trial the court must, in my judgment, approach the case with the object of making whatever order will be likely best to enable the trial judge to do justice between the parties, whichever way the decision goes at the trial. Their freedom of action should only be interfered with to an extent necessary to this end. This, as I understand the decision in the case of *American Cyanamid Company v Ethicon Limited* [1975] A.C. 396 is the reasoning underlying the decision of the House of Lords in that case. Accordingly, if the plaintiff can be compensated in damages for doing anything he may wrongfully suffer between the date of the application and the trial, the defendant should not be restrained save in exceptional circumstances.”

[20] However in the Trinidadian case of **Jetpak Services v BWIA International Airways**⁷ de la Bastide CJ had this to say on the formula to be applied by the Court in granting an injunction:

“I would consider the rule that an injunction ought never to be granted if damages can provide an adequate remedy to be one which is too narrow to be applicable in every case.”⁸

[21] In cases where it is difficult to determine the adequacy of damages Lord Hoffman in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd**⁹ stated that the basic

⁵ [1973] 1 WLR 349 at page 379

⁶ [1977] RPC 379 at 395

⁷ (1998) 55 WIR 362

⁸ Supra at page 368

⁹ [2009] 1 WLR 1405 at 1409

principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the order.

- [22] In considering the adequacy of damages the court is also called upon to examine the ability to pay by the party who obtains the benefit of the injunction and who has given such an undertaking. In **Evans Marshall v Bertolla**¹⁰ there fell for consideration the question whether the Defendant could satisfy a judgment for damages, in the event the court refused an injunction on the basis that damages were an adequate remedy. Sachs LJ said:

“So far the question of adequacy of damages has been discussed on the footing that if judgment was recovered the sum awarded would be paid. But whenever the adequacy of damages falls to be considered in this class of case, there arises the further question- are the defendants good for the money?”

- [23] Sir Robert Megarry V.C. in **Brigid Foley v Elliott**¹¹ reiterated this position where he stated:

“...I would emphasize that in applications for injunctions, especially since Cyanamid, one of the important matters always to be dealt with is the ability of a Plaintiff to meet an undertaking in damages”

- [24] While the Courts have generally been mindful of the ability to pay by the party obtaining the benefit of the injunction there is no rigid criterion that an applicant's inability to pay damages automatically prevents it from injunctive relief. This Court accepts that it is essential that this criterion is not abused so as to protect the financially mighty at the expense of the impecunious in the given circumstances.

- [25] In the November 2013 application the Defendant is the applicant and the onus is therefore on her to provide cogent evidence that she has assets to enable her to comply with any undertaking as to damages since failure to do so will fundamentally weaken her application.

¹⁰ [1973] 1 WLR 349 at 380 H

¹¹ [1982] RPC 433 at 435

- [26] The Defendant has not specifically stated in her affidavits in support of the November 2013 application that she is willing to give the appropriate undertakings with respect to damages to compensate the Claimant for any loss suffered between the time of the injunctive order to the date of the trial in the event. However she has asked the Court to grant “any and all further relief that this Court deems just and proper”. In light of this prayer, the Court is of the view that she is willing to give such undertakings in damages.
- [27] If the Claimant succeeds at the trial it will be entitled to recover the principal sum claimed in its Fixed Date Claim of \$986,502.50, outstanding interest of \$340,804.89 and continuing interest on the principal sum at the rate of 9.5% per annum from the 6th June 2013 until payment. At best to obtain the injunctive relief at this stage the level of undertaking in damages which the Defendant must be good for is at least the outstanding principal and the outstanding interest which is a total of \$1,327,307.30.
- [28] From the Defendant's evidence in support of the November 2013 application the value of Jessamine Eden is approximately \$2.7 million. Based on steady interest in the sale of honey products she has been able to pay the Claimant \$5,000.00 for the past five months; and she has future business opportunities such as guided tours and family reservations for weddings. However she has not provided the extent of the revenue which she expects from the continued sale of honey products and from future business opportunities. The only other sources of the Defendant's income is that which she stated in her application to pay by installments in opposition to the Fixed Date Claim which is an annual take home income of \$168,000.00. If this is the only evidence in support of the Defendant's ability to comply with any such undertakings it would be weak.
- [29] However, the value of the Jessamine Eden is at least \$2.2 million approximately \$1 million in excess of the outstanding principal and interest. In my view, if successful

at trial, the Claimant can still exercise its power of sale under the mortgage to recover all sums outstanding and any damages it may have suffered.

[30] On the other hand, if Jessamine Eden is sold and the Defendant succeeds at trial, the sum due to the Claimant from the sale of Jessamine Eden will be the sum alleged by the Defendant \$237,194.77 and the balance of the proceeds of the sale will be due to the Defendant. However the Defendant would have lost her business and her home.

[31] Being mindful that the test is broader than “are damages an adequate remedy?” and the test the Court is obliged to consider is “Is it just in all the circumstances that a Plaintiff should be confined to his remedy in damages?” I am of the view that it is not just that the Defendant should be confined to her remedy in damages. However in light of the history of this matter it is prudent for the Court to examine where the “balance of convenience lies”.

Where does the balance of convenience lie?

[32] Sir John Donaldson M.R. explained the nature of the test in **Francome v Mirror Group Newspapers**¹² as:

“I stress, once again, that we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders, if any, as are appropriate pending the trial of the action. It is sometimes said that this involves a weighing of the balance of convenience. This is an unfortunate expression. Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience.”

[33] There are no set factors which a Court must consider in trying to achieve a balance of justice but the preservation of the status quo has often been considered by the

¹² [1984]1W.L.R 892 at 898E

Courts in this regard. While the need to maintain the status quo will not be decisive in all cases, and the status quo may vary in different cases Lord Hoffman in **Olint**¹³ summed up the challenge the Courts face as:

“16... It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant’s freedom of action will have consequences for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after the determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.” (Emphasis mine)

[34] The existing status quo is the Defendant is in possession of Jessamine Eden where she lives and operates her business. The Claimant has a mortgage with a power of sale and it has duly notified the Defendant since 2009 that it has called in the loan which allows it to exercise its power of sale. If the Court grants the injunction and stops the Claimant from selling Jessamine Eden it will be preserving the status quo by allowing the Defendant to continue to operate her business and live there while at the same time it would not be setting aside the Claimant’s power of sale under the mortgage but rather temporarily curtailing its ability to exercise it until the determination at trial. If the injunction is refused, the Claimant would be allowed to exercise its power of sale of Jessamine Eden during a period where the determination of the sum due to the Claimant by the Defendant is still outstanding. In my judgment the preservation of the status quo lies in favour of the Defendant.

[35] In **Olint**¹⁴ Lord Hoffman stated that “Among the matters which the court may take into account are the prejudices which the Plaintiff may suffer if no injunction is

¹³ [2009] 1 WLR 1405

¹⁴ [2009] 1 WLR at 1405

granted or the defendant may suffer if it is¹⁵". Both parties submitted that they will suffer prejudice. The Claimant submitted that it will be prejudiced since it will not be able to exercise its power of sale under the mortgage to sell Jessamine Eden and recover moneys which were advanced to the Defendant and on which interest continues to accrue. The Defendant submitted that if Jessamine Eden is sold before the Court determines the sum she owes to the Claimant, she will lose her home, her business and her personal investment in Jessamine Eden.

[36] Before I address the prejudice by the parties, it is important at this juncture that I put to rest the issue of prejudice to the Defendant on the price the Claimant is proposing to sell Jessamine Eden. The reserve price in the Claimant's advertisement for sale dated 9th November 2013 is approximately \$2.2 million. The valuation attached to the Defendant's application places the "Total value estimated" at approximately \$2.8 million a difference of approximately \$.6 million. I see no prejudice in the Claimant's advertisement since all it does is set the lowest sum that it is prepared to accept. The Defendant's valuation does not state that the sum Jessamine Eden is valued for is the sum it will fetch on the open market and in any event the law protects the Defendant where the Claimant accepts any offer which is grossly undervalued.

[37] If the only prejudice to the Defendant is she would be displaced and removed from her home by the sale of Jessamine Eden, then I would have to agree with the Claimant's submission that the sale cannot be prejudicial to the Defendant since it is not uncommon for mortgagors homes to be sold by mortgagees where there is a default in repayment of a loan. However in this case the Defendant's prejudice appears to be more than just the loss of her home. In my view she stands to lose her business into which, according to her, she has invested substantial personal funds. She also stands to lose all business opportunities which she has set out are promising in the upcoming year.

¹⁵ [2009] 1 WLR 1405 at 1409 F

[38] The Claimant's prejudice is it is unable to recover substantial moneys advanced to the Defendant since 2009 which the Court accepts. However the Court must place the Claimant's prejudice in the context of the substantive issues in this matter. The sum the Claimant is seeking to recover from the Defendant is approximately \$1.3 million and counting since interest is accruing at the rate of 9.5% per annum on the principal. The Claimant has advertised Jessamine Eden for sale at approximately \$2.5 million (with a reserve price of \$2.2 million) which if sold, there will be an excess of \$1.2 million on the sum that the Claimant is claiming. The Claimant has admitted that this is not the first attempt to sell Jessamine Eden. Even when it has not been thwarted in its efforts to sell Jessamine Eden as recent as October 2013 it has failed to attract any prospective purchasers. It is not as if the Claimant has not had an opportunity to test the real estate market to determine the likelihood of procuring a prospective purchaser for Jessamine Eden. When I weigh the prejudice of both parties I find that the scales tip in favour of the Defendant being more prejudiced than the Claimant at this juncture.

[39] In **Olint**¹⁶ Lord Hoffman suggested that the Court should also examine "the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' case." This is a new approach from the traditional approach as adopted in **Francome**¹⁷. Like any other claim, the onus is on the Claimant to prove its pleaded case that the Defendant owes it the sums claimed and at the interest claimed. The Claimant will have to prove that it advanced the sum of \$1,050,000.00 to the Defendant at a rate of interest of 9.5% per annum and that to secure this advance the Defendant mortgaged Jessamine Eden. According to the Claimant's case the monthly installment was \$12,902.00 and that when Defendant made the payments they were never in the said monthly sum. Therefore the Defendant was always in arrears and the Defendant has only made a total of \$166,939.73 towards the repayment of the loan.

¹⁶ [2009] 1WLR 1405

¹⁷ [1984] 1WLR 892

[40] Having reviewed the six documents filed by the Defendant in opposition to the Claimant's claim, there are several challenges which the Defendant have alleged and which she will have to adduce evidence at trial to successfully challenge the Claimant's case. In particular her allegation of the propriety of the mortgage, the total sums paid, the wrongful application of the sums paid by the Claimant to the liquidation of the loan just to name a few. Therefore at this stage I find that both parties are on equal footing with respect to the merits of each case.

[41] As an equitable remedy, injunctions are granted in the discretion of the Court. Relevant considerations extend beyond the nature of the right to be enforced and the effect of the grant or refusal of relief to considerations personal to the applicant itself. In **Ministry of Justice v POA**¹⁸ Williams J held that for an applicant's conduct to disentitle it from obtaining injunctive relief the following had to be satisfied:

- (a) The applicant has engaged in conduct that should be regarded as inequitable;
- (b) That its conduct had an immediate and necessary relation to the relief sought;
- (c) Looked at in the round it would be unconscionable to grant the relief sought.

[42] The Claimant has stated that it has always been open to any serious offer by the Defendant to re-finance the loan repayment since it just wants to recover its money. However it has asserted that the conduct of the Defendant has been less than forthright. It claims that the Defendant failed to provide details of her consulting projects under her obligation of a mediation agreement in January 2012 and subsequently, any other serious indications that she is ready to negotiate a payment plan. Instead the Claimant asserts that every time it attempts to lawfully exercise its power of sale under the mortgage the Defendant has approached the Court's to block its actions. The Defendant has stated that she has always co-operated with the Claimant in order to refinance the loan.

¹⁸ [2003] EWHC 239

[43] Apart from the Defendant's personal income set out in her application to pay by installments filed on 26th July, 2013, there was no evidence placed before this Court that since July 2013 she has provided information on her personal income to the Claimant. In the circumstances, I accept the Claimant's position that it has always expressed its interest to discuss refinancing of the loan with the Defendant but it has been the Defendant who has not been forthcoming with providing information on her personal income and therefore it is reasonable for the Claimant to conclude that the Defendant is not interested in refinancing the loan.

[44] While the Defendant has protested otherwise, in particular with respect to her allegation against the Claimant on the nature of any information provided to her such as manual records, in my view the conduct by the Defendant in providing limited information on her personal income and general information on unspecified sums which she may earn based on planned activities at Jessamine Eden for 2014, in my view does not amount to an applicant who has made full disclosure to facilitate the process of refinancing. In this regard, I was not convinced that the Defendant has approached this Court with entirely "clean hands".

[45] However, even with the Court's reservation with respect to the Defendant's "clean hands" in making the November 2013 application, when I consider all of the aforesaid factors such as the serious issues to be tried, the doubt that damages can compensate the Defendant if Jessamine Eden is sold now and she is successful at trial and the prejudice to her if I do not grant the injunctive relief, in my view the course which will cause the least irremediable prejudice to one party or the other is to grant the relief sought in the November 2013 application.

Should the Defendant be deemed a vexatious litigant?

[46] Having granted the Defendant's injunction, the December 2013 application may appear to be moot now. However in my view it is still important that the Court address it. The grounds of the December 2013 application are: to date the

Defendant has made four ex parte and one oral application to stop the Claimant from exercising its legal power of sale; upon the first application made on 4th November 2011 the Claimant gave an undertaking to stay the exercise its power of sale pending the outcome of mediation. The parties executed a mediation agreement on 13th January 2012 but the Defendant failed to meet her obligation. The mediation agreement was subsequently set aside by the Court which refused the Defendant's oral request to reinstate the injunctive order; the Defendant applied on 1st October, 2013 for another order to stop the Claimant from selling Jessamine Eden. This was heard and dismissed. The Court also dismissed an oral application to stop the advertising of Jessamine Eden for sale. Again on 18th October 2013 the Defendant applied to stop the auction of Jessamine Eden but was dismissed after hearing oral submissions by Counsel for the Defendant.

[47] The Claimant has maintained that despite its requests, the Defendant has continued to refuse to provide the Claimant with the necessary information on her earnings and personal income thereby preventing it from assessing her current ability to repay the loan. Despite the Defendant's undertakings since 2011 to make regular payments she has only made sporadic payments when the matter is before the Court.

[48] I will not deem the Defendant a vexatious litigant with respect to her past repeated applications to the Court whenever the Claimant attempted to exercise its power of sale. In my view, the Court must always be careful in taking steps to automatically block a litigant from seeking redress before it. However, the Court cannot ignore the history of this matter, in particular with respect to the Defendant's repeated applications for injunctive relief. In the circumstances, I am of the view that a more fair position is to order that the Defendant must first obtain permission of the Court before she files any further applications for injunction relief in this matter and in default, such application will automatically stand dismissed.

Order

- [49] The Claimant is restrained from selling Jessamine Eden until the determination of the sum due and owing under the Judgment on admission obtained on 4th December 2013.
- [50] The Defendant to give the usual undertaking in damages.
- [51] The Defendant must first obtain permission of the Court before she files any further applications for injunctive relief in this matter and in default, such application will automatically stand dismissed.
- [52] In light of the history of this matter I make no orders for costs on both applications.

Margaret Y Mohammed
High Court Judge