IN THE COURT OF APPEAL **Action No. CL-AP 02/23**
TURKS AND CAICOS ISLANDS

Between:
PARTHENON VENTURES LTD.
APPELLANT

-AND-

COMPASS POINT LTD.
RESPONDENT

Before:	**The Hon. Mr. Justice Adderley, JA, President (Ag.)**
	The Hon. Mr. Justice John, JA
	The Hon. Madam Justice Cornelius-Thorne, JA
Appearances:	**Mr. Clayton. S. Greene of Stanfield Greene for the Appellant**
	Mr. Jonathan Katan KC of Miller Simons O'Sullivan for the Respondent
Hearing Date:	**17 May 2023**
Delivery Date:	**24 May 2023**

JUDGMENT

ADDERLEY, JA

[1] This is an appeal against the exercise of the judge's discretion to discharge at the *inter partes* hearing an interlocutory injunction which had been granted *ex parte*.

[2] The substantive claim in the writ is stated as follows:

"The Plaintiff's claim is for the following declarations

1. The Charges registered against parcel 61100/18 in favour of the Intended Defendant is ineffective in law and not capable of enforcement

2. On the proper interpretation of the Loan Agreement dated the 24th day of December, 2010, the purported charge which the Intended Defendant seeks to enforce ought properly to have been discharged

3. A declaration that the charge if held to be valid was entered into under duress

4. and an order that the said charges be cancelled and or discharged

5. an order in the alternative that the Intended Defendant do provide an accounting"

BACKGROUND

[3] The facts were helpfully summarized by the Learned Judge at paragraphs 1-30 of the judgment, and I will rely on some pertinent facts from that summary.

[4] An *ex-parte* injunction was granted on the papers on the 28th July, 2022 ('the Order') by Hylton J (Ag). This was the day before an auction of parcel 61100/18 ("the Property") was to take place on 29 July. The interim injunction ("the Injunction") provides *inter alia* that:

> **"The Intended Defendant be restrained and an injunction is hereby granted restraining him (sic), whether by himself (sic), or by his (sic) servants or agents or any of them or otherwise from holding a public auction of parcel 61100/18 or otherwise acting to enforce its charge registered as an encumbrance against the property as entry numbers 2 through 8 until 9 August 2022."**

[5] Following that, a substantive *inter-partes* hearing took place before the Learned Judge whereby he set aside the Injunction on the 19 December, 2022.

[6] The Appellant now appeals that decision.

[7] Starting in 2006 and over the years the Property was charged as collateral for loans of various amounts.

[8] On 24th December, 2010, a loan agreement ('the Loan Agreement') was executed by the Defendant (as lender), Mr. Parnell, one of the beneficial owners

and director of the Appellant (as borrower), the Plaintiff (as first chargor) and Cay Supply Ltd.[1] (as second chargor). This loan was made up of 2 amounts, firstly the sum of US$7,500,000.00 described as "the current borrowing" and US$1,700,000.00 described as "the initial borrowing". The charges up to that point, in addition to various debentures to which the Appellant's property Parcel 51100/18, Bottle Creek North Caicos ("the Property") were subject, were to be assigned/transferred to the Defendant, together with charges over parcels 60706/9 and 60706/28, Cheshire Hall and Richmond Hills, Providenciales.

[9] The purpose of the loan is described in the Loan Agreement as follows:

> "3.1 The Borrower shall use Seven Million United States Dollars, US$7,000,000.00 of the Current Loan Proceeds for the purposes of satisfying existing loan repayments to BCB[2] on the Property.
>
> 3.2 The Borrower shall use Five Hundred Thousand United States Dollars, US$500,000.00 of the Current Loan Proceeds, less costs as envisaged in Clause 8[3] for working capital and to satisfy other indebtedness.
>
> 3.3 The loan proceeds under the initial borrowing ("**the Initial Loan Proceeds**") were provided by the Lender to the Borrower in accordance with a Loan Agreement dated 11 December, 2009, ("**the Initial Loan Agreement**")[4]. The amount of principal and accrued interest due to the Lender by the Borrower under the Initial Loan Agreement as at the date of execution of this Loan Agreement is an amount of One Million Eight Hundred and Sixty Nine Thousand Seven Hundred and Ninety Five United States Dollars and Thirty Four cents US$1,869,795.34. The amount currently due by the Lender to the Borrower in terms of the Initial Loan Agreement has been added to the amount of the Current Loan Proceeds, being a total amount of UD$9,369,795.34…"

[10] The loan was for a period of 36 months. Interest was to be charged at a rate of 8% calculated on a day-to-day basis. No payments were required to be paid until the end of the term of the loan, the interest being rolled up into the final repayment, making a redemption figure at the end of the loan period of US$11,901,861.21[5].

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[1] Another company believed to be under the control and/or ownership of Mr. Parnell.

[2] British Caribbean Bank Limited

[3] Wrongly referencing clause 9

[4] Not before the Court.

[5] Schedule C to the Loan Agreement

[11] In the events which have happened, by letter dated 31 August 2021 addressed to the Appellant and each of its Directors by name, counsel for the Respondent in relation to the charge over Parcel 51100/18, Bottle Creek North Caicos served notice pursuant to Section 64 of the Registered Land Ordinance ("RLO"). This was followed by a section 72 RLO default notice sometime later. No objection has been taken by the Appellant that the notice was not valid, but the Appellant is challenging the very validity of the transfer of the Charges which they say make them unenforceable.

[10] In the notice the Respondent claims Principal due was US$7,500,00.00, and interest of US$10,430,827.00 for a total of US$ 17,930,827 with interest accruing at US$3,930.04 per day.

[11] The Respondent sought to sell the Property by auction on 29 July, 2021, but the Appellant obtained an injunction a day before to block the sale.

[12] At the *inter partes* hearing the Learned Judge discharged that *ex parte* injunction.

THE LEARNED JUDGE'S DECISION

[13] At paragraph 55 of his judgment the Learned Judge delivered the following decision:

> " I am of the view that any harm which may come to the Plaintiff, can be adequately compensated in damages, the same is not true for the Defendant given the amount of indebtedness, the fact that the Plaintiff has no income generation and a sole asset which may well be in negative equity. As such I am of the view that the balance is best met by allowing the Defendant to move forward with the auction if it is so minded to do and accordingly, I discharge the order of 28th July 2022.

[14] At paragraph 44 of his judgment the Learned Judge concluded that at least three issues raised by the Appellant were triable issues:

> (a) as relevant to whether the charges could be transferred where the borrower under the Charges is the Plaintiff but under the Loan is Mr. Parnell.

(b) if the Charges could be transferred and it is being contended that the Charges secure the full balance of the US$7,000,000.00 then there is a triable issue as to the extent of the security, because under the Loan Agreement the lending is greater than the security, and

(c) why was not US$3,600,000 paid to BCB to release separate parcels 60706/9 and 60706/28 which were transferred to Leigh Rodney, a principal of the Respondent, not credited to reduce the loan balance with BCB.

[15] He therefore then proceeded to apply the principles in American Cyanamid Co. v Ethicon [1975] A.C. 396 ("**American Cyanamid**").

GROUNDS OF APPEAL

[16] Mr. Greene appealed the decision on the following grounds and relied on the submissions set out in support thereof**:**

Ground 1. **The Learned Judge misdirected himself insofar as he failed to give any or any sufficient weight to the following facts all of which had the potential of significantly reducing the debt:**

i. US$7,000,000.00 of the total borrowing from the defendant[6] by Douglas Parnell under the Loan Agreement dated the 24th December, 2010, of US$7,500,000.00 was for the express purpose of discharging the debt owed to BCB and secured by a Charge against the Property. The additional US$500,000.00 was not applied in the purported purchase of the debt by the Defendant and could not in the circumstances form any part of the monies purportedly secured by the defendant's purported charge.

ii. The initial loan of US$1,869,759.34 was not a debt secured by a BCB charge over the Property and so was not capable of being transferred under the Transfer of Charge if the same were found to be valid.

[6] "Defendant "in the context of the Loan Agreement refers to the Respondent and "Plaintiff refers to the Appellant

iii. The failure of the defendant to apply the $3,600,000.00 proceeds of the sale of parcels 60706/9 and 60706/28, both of which parcels were additional security for the debt, in reduction of the indebtedness while at the same time putting the properties, not in the name of the Defendant, but rather in the name of its principal.

iv. The failure of the defendant to apply the income which it generated from the rental of some of the properties charged as security in reduction of the debt.

v. As late as 2020 the defendant was negotiating a sale of the Property for US$12,000,000.00

Ground 2. **Further the Learned Judge failed to give any or any sufficient weight to the fact that the evidence in relation to 2(iv) above was exclusively in the domain of the Defendant and not available to the Plaintiff save through the process of interrogatories or discovery all of which are part of the trial process.**

Ground 3. **There was no evidence to support the finding of the Learned Judge at paragraphs 44 and or 47 to the effect that:**

i. "...the Plaintiff is in no position to discharge ***its*** indebtedness". This finding ignores the fact that no accounting having yet been given the Court is unable to determine the plaintiff's ability or otherwise to discharge the indebtedness. Further the uncontroverted evidence is that the debt is not the plaintiff's debt in any respect but that of Mr. Parnell and or companies controlled by him. At paragraph 25 of the decision the learned Judge again misdirects himself insofar as he asserts that the Plaintiff defaulted in repayment of the debt.

ii. "…the indebtedness is not disputed". The evidence is that the Plaintiff disputes the extent of the indebtedness and any obligation on its part to repay same.

iii. "…it is clear that the Plaintiff has had the benefit of at least US$7,000,000.00". This finding is against the weight of the uncontested evidence which is to the effect that (a) all funds were borrowed by or for the benefit of Mr. Parnell and or companies controlled by him; (b) none of the borrowed funds

were ever disbursed to the Plaintiff; (c) the funds were declared to be for the sole benefit of persons or entities other than the Plaintiff; and (d) the borrowings and the subsequent purported transfers of the charges (save the purported transfer to the defendant) was without the knowledge of a significant shareholder of the Plaintiff.

Ground 4. **In accepting the defendant's contention that the plaintiff benefited from the 2010 loan by the defendant the Learned Judge erred…**

Ground 5. **In the premises the Learned Judge was wrong to allow himself to be influenced at this stage by the matters to which he referred to at paragraph 49 of his decision all of which are ripe for determination at trial.**

Ground 6. **The Learned Judge was wrong in law in finding on the facts that damages would be an inadequate remedy if the Defendant succeeded at trial.**

Ground 7. **For the reasons adumbrated at ground 5 and for the reasons identified at paragraph 45(a), (d), (f) and (g) of the decision, and particularly given that the action involved the Plaintiff being divested of a valuable and unique parcel of land. The learned Judge ought to have found as a matter of law that damages would not be an adequate remedy if the Plaintiff were to succeed at trial.**

Ground 8. The learned Judge erred in law in finding that the defendant had the means to satisfy a money judgment in the event the plaintiff succeeded at trial there being no evidence before the learned Judge as to the defendants means generally or its liquidity specifically.

Ground 9. The Learned Judge was in all the circumstances wrong to go on to consider the balance of convenience and in any event misdirected himself to the extent that he took into consideration the following irrelevant matters:

i. that the determination of the validity of the charge is not the end of the matter as he did at paragraph 52 of the Decision.

ii. what should happen with respect to the monies advanced that were used to pay out BCB, the benefit of which the Plaintiff has had in the event he is

successful in getting the charges held invalid.

THE APPLICABLE LAW

[17] Both parties agree that the applicable law in relation to the grant of an interlocutory injunction is as contained in **American Cyanamid** as further explained in **Olint.** The judge relied on **American Cyanamid.** I will therefore straightaway set out what the applicable principles are.

[18] Relying on Lord Diplock's judgment in **American Cyanmid** the judgment cited **R v Secretary of State for Transport , ex p Factortame Ltd (No 2)** [1991] 1 All ER 70, 118, where Lord Goff summarized the principles as follows:

> "Nothing which I say is intended to qualify the guidelines laid down in Lord Diplock's speech [in the Cyanamid case]. But ... I must advert to the fact that Lord Diplock approached the matter in two stages. First, he considered the relevance of the availability of an adequate remedy in damages, either to the plaintiff seeking the injunction or to the defendant in the event that an injunction is granted against him. As far as the plaintiff is concerned, the availability to him of such a remedy will normally preclude the grant to him of an interim injunction. If that is not so, then the court should consider whether, if an injunction is granted against the defendant, there will be an adequate remedy in damages available to him under the plaintiff's undertaking in damages; if so, there will be no reason on this ground to refuse to grant the plaintiff an interim injunction.
>
> At this stage of the court's consideration of the case (which I will for convenience call the first stage) many applications for interim injunctions can well be decided. But, if there is doubt as to the adequacy of either or both of the respective remedies in damages, then the court proceeds to what is usually called the balance of convenience, and for that purpose, will consider all the circumstances of the case. I will call this the second stage. Again, I stress that I do not wish to place any gloss on what Lord Diplock said about this stage. I only wish to record his statement:
>
> 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relevant weight to be attached to them. These will vary from case to case.'
>
> And his further statement (after referring to particular factors), that-
>
> 'There may be many other special factors to be taken into consideration in the particular circumstances of individual cases.'"

[19] In **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UKPC16 [2009] 1W.L.R. 1405 ("**Olint**") Lord Hoffmann explained what the balance of convenience referred to in American Cyanamid means. At [19] he said this:

> "In both cases [prohibitory or mandatory], the underlying principle is the same namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other see Lord Jauncey in **R v Secretary of State for Transport, ex p Factortame Ltd (No 2)** [1991] 1 All ER 70.

[20] It is settled law that the judge should not conduct a mini trial, and that an appellate Court's power to set aside a judge's exercise of his discretion is clearly circumscribed and limited. (See **Hadmor Productions Ltd and Others v Hamilton and Others [1982]** 1 All ER 1042 at 1046, at 1046, per Lord Diplock, **Scherer and another v Counting Instruments Ltd and another** [1986] 2 All ER 529 the English Court of Appeal **and Dufour v Helenair Corporation Limited (**1996) 52 WIR 188 per the learned Chief Justice Sir Vincent Floissac, as he then was.)

SUBMISSIONS AND DISCUSSION

[21] Mr. Katan KC opposed the grounds of appeal and submitted that the Learned Judge had exercised discretion, had made no error of law, and had applied it correctly to the facts. On the authorities the Court should not interfere.

[22] He noted that as is apparent on the record from Mr. Harrison's affidavit there is a shareholder's dispute between Mr. Harrison and Mr. Parnell which has been going on for 13 years, and BCB has been threatening to sell the land since 2010. There are claims of fraud against Parnell as a director of the Appellant, and a fight by one partner to place the Appellant's sole asset in his name. (see

paragraph 8 of Harrison's affidavit dated 26 August, 2022). Therefore, he noted that in its writ the Appellant seeks equitable relief but has not acted equitably.

[23] He further asserted that the Respondent cannot be protected by an undertaking in damages from the Appellant and the delay of payment until a trial is likely to cost least US$200,000.00 in additional unpaid interest.

[24] Delaying the sale, he submitted, will only be delaying the inevitable, because the Appellant as a holding company does not have any income which would allow it to pay.

[25] Mr. Greene while admitting that the Learned Judge was exercising discretion, maintained that by taking into account matters which he ought not to have taken into account, and failing to take matters into account which he ought to have the Learned Judge exercised his discretion wrongly.

[26] Mr. Greene submitted that the Learned Judge was wrong to decide that the Appellant received a benefit from the US$7,000,000.00 loan because in the Loan Agreement Douglas Frederick Parnell, not the Appellant, is stated to be "the Borrower", and it was he who received the benefit.

[27] While it is true that Mr. Parnell was the borrower, as Chargor the Appellant had certain liabilities. Section 64 and 72 of the RLO specifically sets out those liabilities to the Chargor. One of those is that provided that the Lender has complied with those sections of the Ordinance the Chargee has the power to sell the collateral. The Learned Judge recognized this in paragraph 25 of his judgment where he stated:

> "The Plaintiff defaulted in repayment and a demand for repayment pursuant to sec. 64 Registered Land Ordinance (Cap. 9.01) ('RLO') was served on or around 31 August 2021 followed by a section 72 RLO default notice sometime later. No issue is taken with respect to the statutory required notice periods, so I conclude the notices were validly served."

[28] Although it was inaccurate for the Learned Judge to state that the 'Plaintiff', instead of Mr. Parnell as borrower, defaulted, the evidence does show that the statutory notices under the RLO were sent to the Chargor, namely, the Appellant. If the charges were valid, once those notices had been served the enforcement remedy would commence. One of the remedies that the lender has as against the Chargor is to sell the charged property. This means, as submitted by the Respondent and, in my judgment, correctly concluded by the Learned Judge, that the Appellant received a benefit by virtue of the loan because, but for the loan, that part of the debt to BCB would not have been settled and it stood to lose what has been acknowledged to be its only asset.

[29] The Appellant also stressed the unique nature of the property which the Learned Judge appeared to have acknowledged, and that by selling the property the Plaintiff would suffer irretrievable damage.

[30] While it is true that the common law presumes the uniqueness of land, statute can override the common law and allow the charged land, whether unique or not, to be sold. If this were not so a mortgagee of a dwelling house would never be able to exercise their power of sale in the case of a mortgage on an individual house.

[31] It follows that notwithstanding the presumption that land is unique it can be sold by the Chargee as an enforcement remedy provided the statutory provisions are complied with.

DID THE LEARNED JUDGE FAIL TO TAKE MATTERS INTO ACCOUNT THAT HE OUGHT TO HAVE?

[32] The Appellant in oral and written argument submitted that the Learned Judge failed to take into account and ought to have addressed the issue of sufficiency of damages to the plaintiff namely whether the Respondent would be

able to satisfy a money judgment in the event the injunction was discharged and the Appellant succeed at the trial. This was a requirement in considering the grant or refusal for the injunction.

[33] In light of the discussion of Ground 1 of the appeal, the effect of the triable issues found by the Learned Judge in respect of the balance owing by the Plaintiff can only be resolved by an accounting. This could affect the balance due and the extent to which the Plaintiff has a valuable equity of redemption in the Property which could fortify any undertaking in damages for the Defendant.

[34] In exercising his discretion The Learned Judge does not appear to have considered this. He never condescended to consider whether the Plaintiff would be at any risk and seems to have concluded, as complained of in Ground 8 of the appeal that the defendant had the means to satisfy a money judgement in the event the plaintiff succeeded at trial without any evidence as to the defendants means generally or its liquidity specifically**.**

[35] And so, the Learned Judge seems to have considered only the first stage in the exercise of his discretion whether or not to grant an interlocutory injunction. Had he Properly addressed his mind he would have considered the matters raised in Ground1, Ground 5 and Ground 8 of the appeal.

WHAT THE LEARNED JUDGE TOOK INTO CONSIDERATION AND WERE THEY RELEVANT

[36] These are some of the matters taken into account by the Learned Judge:

> at [44] "…it is clear that the Plaintiff has had the benefit of at least US$7,000,000 at [47], "It is apparent that the Plaintiff is in no position to discharge **its** indebtedness." (emphasis added), "…The indebtedness is not disputed…", "I accept Mr. Katan KC's submission that the Plaintiff did therefore receive a benefit"' 'at [48.]" Mr. Harrison has been unable to put together financing to buy the property from the Defendant [Appellant] over the last 5-6 years..", "It is also apparent that the plaintiff [Appellant] is in no position to be able to develop the property.

[37] Even if all of the above are true, if the transfers turn out to be invalid as the Appellant claims in his prayers for declarations (see the paragraph 2 above), that would mean that the current section 64 and 72 notices are ineffective and it would be premature to exercise the power of sale.

[38] However, in SCHEDULE B of the Loan Agreement the Appellant has given the Respondent a Power of Attorney over the Property "…to do anything and everything that we ourselves could do, and for us and in our name to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given".

[39] That Power of Attorney will allow the Respondent to execute new enforceable Charges but they will not be able to exercise the power of sale unless and until new enforceable charges have been executed. I take it that this is what the Learned Judge was referring to when at paragraph 44 he stated "Mr. Katan submits that even if the Charges are invalid, the terms of the Loan Agreement are such that the Defendant would be entitled to demand a new charge."

[40] It appears that The Learned Judge did not consider it, but had he done so it would have tipped the balance in favor of maintaining the injunction, because allowing a sale at this stage, could be legally premature based on Section 64 and 72 notices under void Charges. Notices would have to be sent out under the new valid charges in order to enforce a power of sale against the Chargor. The matters which the Learned judge mentioned in his decision namely, "…given the amount of indebtedness, the fact that the Plaintiff has no income generation and a sole asset which may well be in negative equity…" and others were irrelevant matters to take into consideration on this fundamental issue.

SUMMARY AND CONCLUSION

[41] In considering the Learned Judge's determination of the balance of convenience, we remind ourselves of Lord Hoffmann's dictum in **Olint** which helpfully sets out what the balance of convenience referred to in **American Cyanamid** means. At [19] he said this:

> "In both cases [prohibitory or mandatory] , the underlying principle is the same namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other see Lord Jauncey in **R v Secretary of State for Transport , ex p Factortame Ltd (No 2)** [1991] 1 All ER 70.

[42] "If damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction."[7]. However, in this case, with the sale of the Property the Appellant will be irremediably prejudice because due to its presumed uniqueness it will be lost to the Appellant forever. Damages are evidently not an adequate remedy.

[43] Both counsel agree that the damages that will probably accrue from the delay of the sale up to the time of trial will be about 8 months interest or approximately $200,000.00. In the absence of an evaluation, and other circumstances it cannot be said that an eventual sale will not yield sufficient equity of redemption to fortify the interest of the Respondent in circumstances where no consideration was given to the capability of the Respondent to make good on an undertaking in damages to the Appellant.

[44] The Learned Judge was undoubtedly exercising discretion in setting aside the injunction. However, for reasons stated he fell into error by failing to take into consideration certain matters he ought to have considered, and taking into consideration disputed facts and matters that he ought not to have considered, thereby not properly exercising his discretion.

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[7] The statement of Lord Hoffmann in **Olint** at [16]

[45] For all the above reasons we allow the appeal and reinstate the interlocutory injunction in terms first granted *ex parte* by Hylton J (Ag.) but to remain in effect until the determination in the trial or further order.

[46] Costs will follow the event to be taxed if not agreed.