COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 4 of 2022

B E T W E E N

ELISHA B. MILLER

Appellant

AND

PAULINA MARTHA SIMONE GLINTON

MARLON U. MILLER

GORBACHEV MILLER

Respondents

BEFORE: **The Honourable Madam Justice Crane-Scott, JA**
The Honourable Mr. Justice Jones, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Paul Wallace-Whitfield, Counsel for the Appellant**
Ms. Constance McDonald Q.C., Counsel for the Respondent

DATES: **28 February 2022; 9 June 2022**

****

Civil Appeal – Appeal from grant of interlocutory injunction – Appeal from refusal of cross-application for vacant possession – Whether judge misapplied principles for grant of interlocutory injunction – Whether judge took irrelevant considerations into account - Whether judge erred in dismissing the Appellant's cross-application for vacant possession - Order 29 rr. (1) and (2) – Order 59 RSC, 1978.

The Appellant appealed against a written Ruling delivered by a Supreme Court judge which, *inter alia*, acceded to the Respondents' application under **O. 29 r. 1** of the Rules of the Supreme Court ("RSC") and granted an interlocutory injunction directing the Appellant, his agents, servants or employees, to cease from interfering with the Respondents' quiet enjoyment (specifically the water, power and cable services) to the house situated at Lot No. Coral Reef Estates Subdivision,

Phase 2, in the City of Freeport, in the Island of Grand Bahama until the determination of the Respondents' substantive action.

The Appellant further appealed the judge's further order which dismissed his Cross-Summons pursuant to **Order 29 r. 2** and the inherent jurisdiction in which he sought an order granting him vacant possession of the above property.

The Appellant filed 14 grounds of appeal which sought to impugn the exercise of the learned judge's discretion in various ways.

After hearing arguments, the Court took time to consider its decision.

Held*:* For all the reasons set out in this judgment, the appeal is dismissed. The usual order is that costs follow the event. Accordingly, the Appellant shall pay the Respondents' costs of the appeal, such costs to be taxed if not agreed.

In the circumstances of this case the judge's decision to grant the interlocutory injunction was not unreasonable and discloses no error of law. The evidence shows that after voluntarily leaving the house, the Appellant had repeatedly caused the utilities to the house where the Respondents still lived, to be disconnected.

In seeking an interlocutory injunction, albeit for a second time, all that the Respondents really sought from the judge was an order which would restrain the Appellant from interfering with their previously unhindered enjoyment of the amenities to the house until trial of the substantive action. Damages would obviously not provide them with an adequate remedy for the inconvenience they would suffer in the interim pending resolution of the dispute; and in any event, the balance of convenience clearly lay in favour of the grant of interlocutory relief.

The Appellant's Cross-Summons for vacant possession was clearly ill-conceived. It was instituted under **O. 29 R.S.C.,** which, as the title suggests, is intended to facilitate, *inter alia*, the grant of interlocutory injunctions; as well as the detention and preservation or inspection of any property which is the subject matter of the cause or matter, or as to which any question may arise therein.

On an application for interlocutory relief, some resort to the pleadings and to the evidence will be inevitable. The fact that the judge has referred to the pleadings and to the affidavit evidence on the Court file without more does not automatically mean that the judge has taken account of irrelevant material, or that a "mini-trial" has erroneously been held.

We are further satisfied that nothing in the learned judge's Ruling suggests that she was influenced to dismiss the Appellant's Cross-Summons by findings she had earlier made in relation to the Respondents' Summons. On the contrary, the judge's decision to dismiss the Cross-Summons was based on her finding (at paragraph 26 of her Ruling) that the Appellant's cross-application sought a remedy which lay at the heart of the substantive dispute and which will be determined at trial.

American Cyanamid v. Ethicon Limited, [1975] A.C. 396; considered
Business Ventures Solutions Inc v. Anthony Tharpe [2022] JMSC Civ. 15; mentioned
Chaplain v. Barnett (1912) 28 T.L.R. 256; mentioned
Franses v. Somar Al Assad and others, [2007] EWHC 2442 (Ch); *considered*
National Commercial Bank Jamaica Limited v. Olint Corp. Limited, [2009] UKPC 16; considered
Regina v. Secretary of State for Transport ex parte Factortame Ltd et al (No. 2) [1991] 1 AC 603; mentioned
Scott v. Mercantile Accident Insurance Co., (1892) 8 T.L.R. 320; mentioned

---

JUDGMENT

Decision delivered by The Honourable Madam Justice Crane-Scott, JA

Introduction

1. This is an appeal by the Appellant against a written Ruling of the Honourable Madam Justice Hanna-Adderley handed down in the Supreme Court on 20 December, 2021 in which she, *inter alia*, acceded to the Respondents' application under **O. 29 r. 1** of the Rules of the Supreme Court ("RSC") and granted an interlocutory injunction directing the Appellant, his agents, servants or employees, to cease from interfering with the Respondents' quiet enjoyment (specifically the water, power and cable services) of the house situated at Lot No. 26 Coral Reef Estates Subdivision, Phase 2, in the City of Freeport, in the Island of Grand Bahama ("the property") until the determination of the substantive action.

2. The Appellant further appeals the judge's further order which dismissed his Cross-Summons pursuant to **Order 29 r. 2** and the inherent jurisdiction which sought an order granting him vacant possession of the property.

3. After hearing the parties' respective arguments, we reserved to consider the grounds of appeal.

4. We have dismissed the appeal. The detailed reasons for our decision appear below.

5. The following background to the appeal, including excerpts from the judge's written Ruling, will set the stage for examination of the grounds of appeal.

Background

6. According to the affidavit evidence, the Appellant and the 1st Respondent had lived together in a common law relationship for some 35 years. In or about October 1999, the Appellant

purchased the property in question in his sole name and the house served as their residence and that of their children for over two decades.

7. In 2019 the Appellant vacated the residence and informed the Respondents that he was getting married. The 1st Respondent was subsequently advised by way of letter addressed to her by the Appellant's attorney-at-law that the house had been appraised for the sum of $150,000.00 and that she and the children had the right of first refusal to purchase it for that sum failing which the house would be sold. The Respondents were given 90 days to secure financing. They were also informed that if the property were sold to a third-party, they would have to vacate the property before the sale.

8. On 27 November 2020, the Respondents having not accepted the offer, the Appellant wrote to the 1st Respondent once again. He confirmed, *inter alia*, that on 24 September 2020 he had told her that his offer for the Respondents to purchase the house still stood but that the electricity and all other utilities would be turned off with effect from 15 December 2020. He enclosed a cheque for $ 2,000.00 to assist her with relocating and gave his permission for her to remove certain items from the home.

9. On 17 December 2020, the Appellant left the house for good and disconnected the electricity followed by the cable service. On 16 March 2021, he commenced eviction proceedings against them in the Magistrate's Court.

10. On or about 18 June 2021, the Respondents commenced proceedings against the Appellant by way of Originating Summons seeking a declaration as to their entitlement to an equitable interest in the property. The proceedings were subsequently converted to a Writ action by an Order of Court and directions given for the filing and service of the pleadings.

11. On or about 29 June 2021, the 1st Respondent discovered that the water to the property had been disconnected. On 9 July 2021 she obtained an interlocutory injunction from Justice Andrew Forbes in the Supreme Court for the restoration of all the utilities. The utilities were restored in obedience to the Court's Order. The injunction, however, expired after 30 days and was not renewed.

12. In September 2021, the Appellant again disconnected the electricity, water, and cable services to the property. On 8 October 2021, the Respondents applied by Summons once again for an interlocutory injunction returnable on 19 October 2021. Their Summons sought the following interlocutory relief:

> **"1. An order pursuant to <u>Order 29 Rule 1</u> of the Supreme Court that the Defendant, his agents, servants or employees cease from interfering**

with the Plaintiff's quiet enjoyment (particularly that the Plaintiff cease from interfering with the water, power and cable) of the house located at no. 26 Coral Reef Estates Subdivision, Phase 2, in the City of Freeport until the matter herein is determined by the Court.

2. An order that the Defendant restore the electricity, cable and water to the house. Alternatively, an Order that the Grand Bahama Utility Company Limited, The Grand Bahama Power Company Limited and Cable Bahamas be authorized to connect utilities in the Plaintiff's names.

3. And (sic) Order that the Defendant pays the costs of this Application.
4. Such further or other relief as to this Honorable Court shall seem just pursuant to Order 29 rule 2(4)." [Emphasis added]

13. The Appellant filed a Cross-Summons on 13 October 2021. The Cross-Summons was also returnable on 19 October 2021. He sought an order for vacant possession of the house pursuant to **O. 29 r. 2 RSC** and the inherent jurisdiction of the Supreme Court:

> **"1. <u>Granting the Defendant vacant possession</u> of all that house and property situate at and known as Lot No. 26 Coral Reef Estates Subdivision, Phase 2, in the City of Freeport, in the Island of Grand Bahama forthwith.**
>
> **2. That all the parties be at liberty to apply.**
>
> **AND that the Costs of this application may be costs in the cause." [Emphasis added]**

The Judge's Order

14. As noted, both applications came on for hearing before the learned judge on 19 October 2021. After hearing the contending arguments, the learned judge reserved her decision. On 20 December 2021, she handed down her written Ruling. Between paragraphs 25 and 29, she disposed of both applications in the following terms:

> **"Disposition**
>
> **Plaintiff's application**

25. Therefore, having considered all of the relevant facts, having accepted the submissions of Counsel for the Plaintiffs and having applied the principles laid out in *American Cyanamid* I have come to the determination that the Plaintiffs' application for injunctive relief ought to be granted. The Defendant is to restore immediately the power, cable and water services to the house and the Plaintiffs are to continue to pay for those services until the completion of the trial in this action.

Defendant's application

26. Having decided the Plaintiffs' application in their favor, the Defendant having had an opportunity to vehemently oppose the same, I am of the view that I need not go on to consider the Defendant's application for injunctive relief, which in my view has fallen away and which perhaps ought not to have been taken out as it seeks a remedy which is the crux of and which will be determined in the substantive hearing. The Summons is dismissed.

Costs

27. Costs are always in the discretion of the Court and as such costs usually follow the event save for unusual circumstances or exceptions to justify the departure from that rule exist. I see no such unusual circumstances or exceptions.

28. Therefore, the Plaintiffs are awarded their costs occasioned by their application to be taxed if not agreed, such costs to be determined at the conclusion of the trial of this action. However, the Defendant's application has fallen away and I therefore, make no order as to costs in respect of the Defendant's application for injunctive relief.

29. The Defendant is granted leave to appeal this discretion." [Emphasis added]

The Grounds of Appeal

15. In his Notice of Appeal Motion filed on 4 January 2022, the Appellant raised 14 grounds of appeal. The grounds all seek to impugn the exercise of the learned judge's discretion in various ways. For ease of discussion, they are reproduced in full below:

> **"1. That the learned judge erred or was wrong in law for hearing the Plaintiffs' Summons for an Order for an interlocutory injunction**

without the Plaintiffs having filed an Affidavit in support of their application;

2. That the learned judge erred or was wrong in law for having misconstrued and misapplied the principles of AMERICAN CYANAMID v ETHICON LTD. [1975] A.C. 396;

3. That in arriving at her decision to order the grant of an interlocutory injunction to the Plaintiffs the learned judge erred or was wrong in law for taking irrelevant matters into consideration and for failing to take relevant matters into consideration;

4. That in arriving at her decision to order the dismissal of the Defendant/Appellant's Summons for an interlocutory injunction the learned judge erred or was wrong in law for taking irrelevant matters into consideration and for failing to take relevant matters into consideration;

5. That the learned judge erred or was wrong in law for failing to correctly apply the principles contained in AMERICAN CYANAMID v ETHICON LTD. [1975] A.C. 396 to the Plaintiffs' application for an interlocutory injunction, particularly the principle with respect to the adequacy of damages as an adequate remedy for the Defendant in the event that the interlocutory injunction was wrongly granted to the Plaintiffs;

6. That the learned judge erred or was wrong in law for failing to correctly apply the principles contained in AMERICAN CYANAMID v ETHICON LTD. [1975] A.C. 396 to the Plaintiffs' application for an interlocutory injunction, particularly the principle with respect to the undertaking in damages given by the Plaintiffs to the Defendant, and /or its adequacy or sufficiency in the circumstances of the case;

7. That the learned judge erred or was wrong in law for holding that the Defendant had adduced no evidence in his Affidavit in opposition to the Plaintiffs' application as to what loss he is incurring by the Plaintiffs' continued occupation of the house, when the Defendant by Paragraph 2 of his Affidavit filed the 13 October 2021 stated that his sole income was his pension in the sum of $932.55 per month, and that

he was, as a consequence of the said occupation of the house, obliged to pay rent in the sum of $700.00 per month;

8. That the learned judge erred or was wrong in law when she concluded at Paragraph 21 of her Ruling that *"it is not known what the house would fetch on a sale on the open market"*, when there was evidence of an Appraisal Report of which the learned judge makes mention at Paragraph 4 of her said Ruling, appraising the said house at $150,000.00 in the currency of The Commonwealth of The Bahamas;

9. That the learned judge erred or was wrong in law for ruling that the balance of convenience lay in favour of the Plaintiffs and maintaining the *status quo*, when in fact the *status quo* was that the power water and cable services were (and therefore remain) disconnected;

10. That the learned judge erred or was wrong in law for failing to give any or any proper consideration to the Defendant/Appellant's application for an interlocutory injunction for vacant possession of the property and premises situate at and known as Lot No. 26 Coral Reef Estates Subdivision Phase 2, Freeport, Grand Bahama;

11. That the learned judge erred or was wrong in law for ruling that the application was the crux of the substantive action when in fact the Plaintiffs' action is concerned with an alleged equitable interest in the house and/or an alleged half-share interest in the proceeds of any sale of the property, less the expenses of any sale;

12. That the learned trial judge erred or was wrong in law for concluding and ruling that *"urgency is not a criteria [sic] which the court considers in determining whether to grant injunctive relief in inter partes proceedings"*, which is inconsistent with the provisions of Order 29 Rules 9(2) and 9(3), Rules of the Supreme Court;

13. That the learned trial judge erred or was wrong in law for misconstruing and misapplying the principle(s) enunciated in paragraph 67 of FRANSES v SOMAR AL ASSAD et al [2007] EWHC 2442,

14. That the learned trial judge erred or was wrong in law for pronouncing that Costs usually follow the event and then making the Costs Order which she in fact made."

16. For convenience the grounds of appeal may be grouped and examined under the following broad headings:

    i. Challenges to the exercise of the judge's discretion to grant the Respondents' application for an interlocutory injunction – *(grounds 1, 2, 3, 5, 6, 7, 8, 9, 12 & 13)*

    ii. Challenges to the judge's refusal to hear the Appellant's Cross-Summons seeking vacant possession – *(grounds 4, 10 & 11)*

    iii. Challenge to the Costs Order – *(ground 14)*

Grounds 1, 2, 3, 5, 6, 7, 8, 9, 12 & 13 – Challenges to the exercise of the judge's discretion to grant the Respondents' application for an interlocutory injunction

17. *Ground 1*: On Ground 1 the Appellant contends that the Respondents failed to file and serve an affidavit-in-support of their Summons of 8 October 2021 seeking an interlocutory injunction. He submits that this was a procedural irregularity which disadvantaged him in defending the application.

18. In response, Counsel for the Respondents, Ms. McDonald says that the record will show that this was the Respondents' second application for an injunction and that their Summons was in fact supported by 3 affidavits filed on 18 June, 2 July, and 23 September 2021 respectively. The 3 affidavits were already on the Court file and the Appellant could not seriously contend that he was disadvantaged by the Respondents not filing fresh affidavits as alleged.

19. Having considered the contending submissions and examined the transcripts of the hearing before the learned judge, we are satisfied that the ground has very little merit. The transcript of 19 October 2021 reveals that at the start of the hearing, Counsel for the Appellant, Mr. Wallace-Whitfield complained to the judge that he had not been served with a supporting affidavit. [See pages 17-20 of the Record.]

20. Following an inquiry by the judge, the following exchange between the judge and both attorneys is observed:

"THE COURT: Okay. Ms. McDonald, what's happening?

MS. MCDONALD: My Lady, we are relying on the three Affidavits that we already filed in the Application. <u>There was no need to file an additional Affidavit because there's no additional factual situation that we have to put before the Court</u>.

THE COURT: Okay.

…

THE COURT: … <u>So, Mr. Wallace-Whitfield, that clears up the evidence she's going to be relying on</u>?

…

MR. WALLACE-WHITFIELD: Well, very well. But my Lady, what she could or should have done, in my humble submission, is file a simple affidavit saying that she's relying on these other…

THE COURT: <u>No. That's not required. They're on record and you have them.</u>" [Emphasis added]

21. In short, the learned judge over-ruled Mr. Wallace-Whitfield's complaint regarding the non-service of fresh affidavits to support the application. Ms. McDonald then identified the 3 affidavits on which she relied and proceeded to move the Respondents' application under **Order 29 r.1 RSC**.

22. The following excerpts from the transcript located at pages 19-20 of the Record, speak for themselves:

"THE COURT: …run through the materials…the documents relied on, please.

…

Ms. MCDONALD: My Lady, this is an Application for an injunction. The Summons was filed October 8, 2021. <u>The Plaintiffs are relying on three affidavits</u>, my Lady. The three affidavits were filed on the 2nd of July, 2021; the 18th July, 2021; and the 23rd September, 2021. And my Lady,…the Application is made under Order 29 rule 1…" [Emphasis added]

23. As the Record shows, after Ms. McDonald had moved her application for the interlocutory injunction, Mr. Wallace-Whitfield replied. As appears from the transcripts located between pages 31 through 38 of the Record, he drew the judge's attention to the Appellant's affidavit

of 14 October 2021 opposing the grant of the injunction. He cited the well-known authority of **American Cyanamid v. Ethicon Limited,** [1975] A.C. 396 and submitted that the Respondents had failed to establish that the interlocutory injunctions they applied for were required as a matter of urgency.

24. The extract of the transcript seen at page 37 of the Record reveals that Mr. Wallace-Whitfield referred to the Appellant's affidavit and drew attention, *inter alia*, to the 2-month delay which had transpired between the lapse the 30-day injunction granted by Forbes J in July 2021, and 8 October 2021 when the Respondents' filed their second Summons seeking the same relief. He further submitted that the contents of the Respondents' various affidavits were contradictory as to exactly when the utilities to the house had in fact been disconnected by the Appellant as the Respondents alleged.

25. While the Respondents in this case did not see the need to file fresh affidavits to support their second Summons of 8 October 2021, we are satisfied that the Appellant was not prejudiced or disadvantaged in anyway. This is obvious from the Appellant's affidavit of 14 October 2021 filed in opposition to the Summons. In his affidavit the Appellant referenced the Respondents' earlier affidavits on the Supreme Court file and sought to undermine the second Summons on the basis that the interlocutory relief which they again sought was not urgent due to delay.

26. While an affidavit-in-support is invariably required to ground an application for relief under **O. 29 r. 1 R.S.C.,** given the facts of this case where the supporting affidavits were already on the Court file and there were no additional facts to be placed before the judge, the filing of a fresh affidavit was unnecessary. While the Summons might have included a notation to the effect that it was supported by affidavits already filed and served and in the court file, this is not required by the rules. The Appellant also relied on the earlier affidavits and was clearly not disadvantaged in any way. As noted, the contents of the Appellant's affidavit opposing the second application clearly attests to this. Ground 1 is without merit and is dismissed.

27. Grounds 2, 3, 5, 6, 7, 8, 9, 12 & 13 all clearly overlap. Collectively they all relate to the Appellant's general complaint about the correctness of the learned judge's decision and specifically to the exercise of her discretion under **O. 29 r. 1** to grant the Respondents an interlocutory injunction pending the outcome of the substantive proceedings.

28. *Ground 2:* Counsel for the Appellant, Mr. Wallace-Whitfield, relied on his written Submissions filed on 21 February 2022. In relation to ground 2 he submitted that the judge had misconstrued and misapplied the principles for the grant of interlocutory injunctions enunciated in **American Cyanamid** *(above*). He also laid over for our consideration the observations of Lord Goff of Chieveley in **Regina v. Secretary of State for Transport ex parte Factortame Ltd et al (No. 2),** [1991] 1 AC 603; the Privy Council decision of **National**

Commercial Bank Jamaica Limited v. Olint Corp. Limited, [2009] UKPC 16 and the Jamaican Court of Appeal decision in **Business Ventures Solutions Inc v. Anthony Tharpe** [2022] JMSC Civ. 15.

29. In her response, Ms. McDonald pointed out (correctly so) that apart from simply laying over the above authorities, Mr. Wallace-Whitfield failed to specify the specific paragraph or paragraphs of the Ruling to which ground 2 related. Nor was there any indication as to what principle or principles had allegedly been misconstrued or misapplied by the judge. Regrettably, we found ourselves in a similar position as Ms. McDonald as due to the broad manner in which ground 2 is drafted, it is impossible for us to discern the specific error (or errors) about which complaint is made. In the circumstances, ground 2 is dismissed.

30. *Ground 3:* In ground 3, Mr. Wallace-Whitfield complained that the judge had erroneously summarized the parties' pleadings and the contents of their affidavits which are to stand as their Witness Statements at the trial of the substantive action. He suggested that these documents were irrelevant matters which the learned judge had erroneously taken into account. He further submitted that by having regard to the pleadings and the evidence, the judge had erroneously embarked on a "mini-trial" and accordingly, her decision to grant the interlocutory injunction was plainly wrong.

31. In response, Ms. McDonald submitted that the parties' respective pleadings in the substantive proceedings were already before the Court together with their respective affidavits. In essence, she said that the evidence which the judge had adverted provided the necessary background to the parties' dispute and was recounted in the judge's Ruling between paragraphs 5 through 11 under the heading "The Evidence".

32. Having considered ground 3 and the contending submissions, we find the Appellant's complaint to be without merit.

33. We agree with Mr. Wallace-Whitfield that (as Lord Diplock clearly explained in delivering the decision of the House of Lords in **American Cyanamid**) it is no part of the court's function at the interlocutory stage of the litigation **"…to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature. These are matters to be dealt with at the trial…"**

34. However, we do not agree that the judge's references to the pleadings and the evidence means that she conducted a "mini-trial" or that she had thereby committed an error of law as Mr. Wallace-Whitfield contends. Based on the Board's decision in **American Cyanamid,** it is obvious that while refraining from deciding the underlying claim, any court which is hearing

an application for interlocutory relief, must nonetheless seek to obtain a broad appreciation of the claim as well as nature of the dispute which is to be ultimately determined at the substantive trial. Indeed, as Lord Diplock himself observed, **"the court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."**

35. It seems to us that on an application for interlocutory relief, some resort to the pleadings and to the evidence will be required. Mere references by the judge to the pleadings and to the affidavit evidence on the Court file without more will not automatically mean that the judge has taken account of irrelevant material or that a "mini-trial" has been held.

36. Having read the Ruling, we are satisfied that it clearly demonstrates that the learned judge was keenly aware of the limits of her inquiry on the hearing of the Respondent's Summons for interlocutory relief. The Ruling shows that after considering the contending submissions and examining the pleadings and the evidence, the judge satisfied herself (as required) regarding the nature of the dispute and the parties' respective contentions which were to be determined before her at trial.

37. At paragraphs 15 and 16 of the Ruling the judge stated:

> **"15. The first consideration that must be given before granting an interim injunction is whether there is a serious issue to be tried.**
>
> **16. Having considered both parties' submissions and the evidence before the Court <u>I am satisfied that there is a dispute as to the beneficial ownership of the house by the Plaintiffs</u> which can only be determined at trial." [Emphasis added]**

38. Furthermore, after expressly adverting to **American Cyanamid** and to Lord Diplock's exhortations against courts attempting at the interlocutory stage, to resolve *"conflicts of evidence"* on the affidavits or to decide *"difficult questions of law"*, the learned judge made the following finding:

> **"18. In the circumstances, on an application for injunctive relief the Court needs to be satisfied ONLY (emphasis mine) that there is a serious issue to be tried on the merits. So, <u>I therefore conclude that there are triable issues to be determined by the Court</u>." [Emphasis added]**

39. In short, in exercising her discretion on the application for interlocutory relief, the judge was entitled to examine the pleadings and the evidence before her for the purpose of satisfying

herself that the underlying claim was not frivolous or vexatious and that there was indeed a serious issue to be determined at trial. We are satisfied that she dutifully did so and that she committed no error of law. Ground 3 is dismissed.

40. *Grounds 5, 6, 7, 8 & 9*: On Grounds 5 and 6 the Appellant alleges that the judge applied the wrong test when evaluating the adequacy of damages. At ground 7, he claims that the judge erred in failing to consider his affidavit evidence which set out his pension and his outgoings in relation to rent following his departure from the house. At ground 8 he alleges that the judge's statement at paragraph 21 of her Ruling that it was not known what the house would fetch on the open market was plainly wrong as there was in fact an Appraisal Report in evidence before the court to which the judge had referenced in her Ruling. In ground 9, the complaint was that at the time of the second Summons the *status quo* was that the utilities were in fact disconnected and so strictly speaking, an Order maintaining the *status quo* would mean that the utilities ought to remain disconnected. As there is some overlap, these 5 grounds will be considered together.

41. Between paragraphs 7 through 8 of his written Submissions, Mr. Wallace-Whitfield sought to impugn two aspects of the judge's decision located at paragraphs 7(b) and 19 respectively of the written Ruling. These paragraphs, he said, would show that the judge had applied the wrong test by erroneously only considering whether damages were an adequate remedy for the Respondents. In his view, the correct test was whether damages were adequate remedy for either party. In support of this submission, he referred to Lord Hoffman's observations at paragraph [16] of the Board's decision in **Olint.**

42. In relation to ground 6, he submitted that the judge ordered the undertaking in damages in the absence of any evidentiary material from the Respondents and without exploring their earnings or salaries to enable her to determine whether they would be in a position to pay in the event that they were to be ordered to pay damages to the Appellant. As for ground 7, Mr. Wallace-Whitfield submitted that the judge's statement at paragraph 22 that the Appellant had adduced no evidence to show what loss he was incurring by the Respondent's continued occupation of the house was clearly erroneous in view of paragraph 2 of the Appellant's affidavit where he had stated that his only income was his pension of $932.55 out of which he paid a monthly rental of $700.00.

43. In response, Ms. McDonald drew attention to Lord Hoffman's further observations at paragraphs [17] and [18] of **Olint** which, she claimed, would provide the context to paragraph [16] on which Mr. Wallace-Whitfield relied. She submitted that the learned judge had correctly assessed the question of the adequacy of damages; and had considered the evidence and correctly determined where the balance of convenience lay. In her view, the grounds of appeal are without merit and should be dismissed. We agree.

44. Having considered the authorities and the contending submissions, we are satisfied that the judge's statement at paragraph 7(b) of her Ruling that one of the issues for her determination on the Summons was whether the Respondents could be compensated by damages is clearly correct. This is also true of the judge's further statement at paragraph 19 of her Ruling that having first determined that there are triable issues, she next had to consider whether damages would provide an adequate remedy for the Respondents.

45. Both paragraphs of the judge's Ruling are a correct statement of the law and are in keeping with the Board's guidance in **American Cyanamid** as follows:

> **"…the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. …" [Emphasis added]**

46. We do not agree with Mr. Wallace-Whitfield's suggestion that paragraph [16] of **Olint** has modified the test or changed the approach to the court's inquiry on an application for interlocutory relief. Properly understood, in **Olint** the Board was not purporting to modify the principles of **American Cyanamid** in relation to the adequacy of damages for the plaintiff, but rather, simply explaining how the court might assess the balance of convenience and address any likely prejudice to a defendant by the grant of a cross-undertaking in damages if it were later to turn out that the interlocutory injunction ought not to have issued.

47. We are fortified in our view in the light of the Board's discussion at paragraphs [17] and [19] of **Olint** where their Lordships explained:

> **"17. …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. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:**
>
> > **"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 relative weight to be attached to them."**

> **19. There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, 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. …What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be." [Emphasis added]**

48. Between paragraphs 19 through 24 of her Ruling the learned judge adverted (as required) to the relevant law in relation to the adequacy of damages. Out of an abundance of caution, she also considered the balance of convenience. Having accepted the evidence and the submissions made on behalf of the Respondents, she found that the balance of convenience lay in the Respondents' favour and in maintaining the *status quo* until trial.

49. As we see it, in the circumstances of this case her decision to grant the interlocutory injunction was not unreasonable and discloses no error of law. The evidence shows that after voluntarily leaving the house, the Appellant had repeatedly caused the utilities to the house where the Respondents still lived, to be disconnected.

50. In seeking an interlocutory injunction for a second time, all that the Respondents really sought from the judge was an order which would restrain the Appellant from interfering with their previously unhindered enjoyment of the amenities to the house until trial of the substantive action. Damages would obviously not provide them with an adequate remedy for the inconvenience they would suffer in the interim pending resolution of the dispute. In any event, the balance of convenience clearly lay in favour of the grant of interlocutory relief.

51. The evidence before the judge was that the Appellant's decision to leave the house was completely voluntary. Shortly put, he decided to leave the home where he had lived for more than 30 years, allegedly because he wanted to get married. As the judge found, the underlying dispute between the parties involved the beneficial ownership of the house which raised serious issues to be determined at trial. In those circumstances, any financial hardship the Appellant may have been experiencing by reason of the Respondents' occupation of the house was entirely of his own making. Ground 7 has absolutely no merit. The judge cannot be faulted for not taking into account in his favour the fact that since leaving the house the Appellant had found himself obligated to pay rent in the sum of $700.00 out of his pension of only $932.55 per month.

52. As for ground 8 and the Appellant's complaint that the judge failed to have regard to the Appraisal Report, it should go without saying that until such time as the beneficial ownership of the house is ultimately determined at trial, it would be premature to say whether the Respondents would have an interest in it; or whether it would ultimately be sold. In our view, the learned judge was therefore correct when she found at paragraph 21 of her Ruling that she would not have regard to the Report and, in essence could not say whether the proceeds of the house would provide an adequate remedy for the Respondents.

53. For all the above reasons, the judge was clearly correct in finding (as she did) at paragraph 24 of her Ruling that the balance of convenience lay on the side of the Respondents; and in favour of the grant of an injunction to maintain the *status quo* pending the trial of the substantive claim. Grounds 5, 6, 7, 8 and 9 have no merit and are accordingly dismissed.

54. *Grounds 12 & 13*: These 2 grounds are connected and can be considered together. On ground 12 Mr. Wallace-Whitfield submits that the learned judge erred in stating as she did at paragraph 13 of her Ruling that *"urgency is not a criteria (sic) which the Court considers in determining whether to grant relief in inter partes proceedings."* He says that this statement is not only inconsistent with **O. 29 rr.(1)(2) and (3),** but is also inconsistent with the judge's observation at paragraph 12 of her Ruling that *"there can be to my mind nothing more urgent than restoring the supply of water to a house…"*

55. In response, Ms. McDonald pointed out that there is no inconsistency between the judge's various statements. According to her, the observation at paragraph 13 is correct as the judge was not hearing an *ex parte* application under **O. 29 r. 1** where the rules clearly stipulate urgency as a matter to be taken into account when determining whether the application for injunctive relief should be heard *ex parte*. We agree.

56. There is no question that sub-rules **(2)** and **(3)** of **rule 1** of **O. 29** facilitate the filing of an *ex parte* application for injunctive relief in case of urgency; as well as the grant on terms of an *ex parte* injunction before issuance of the writ or originating summons where the case is one of urgency. As the judge correctly observed, the Respondents' Summons was before her on an *inter partes* basis and as such urgency was not a factor to be taken into account.

57. Properly understood, the judge's observation at paragraph 12 that there can be nothing more urgent than restoring the supply of water to the house was made against the background of Mr. Wallace-Whitfield's contention that the grant of the injunction was not a matter of urgency for the Respondents in view of their inordinate delay in seeking injunctive relief. There is no merit in ground 12 which is dismissed.

58. On ground 13, Mr. Wallace-Whitfield suggested that the learned judge misconstrued and misapplied the principles enunciated at paragraph [67] of **Franses v. Somar Al Assad and others,** [2007] EWHC 2442 (Ch). In response, Ms. McDonald says that the case of **Franses** deals with *ex parte* applications and is distinguishable from the current case.

59. We have examined the case of **Franses** on which Mr. Wallace-Whitfield relied. We agree with Ms. McDonald that the case is concerned with "without notice applications" or using the "old" terminology, with "*ex parte* applications" for urgent injunctive relief pending trial. Paragraph 67 of the judgment discusses the operation of CPR Parts 23.7 and 25 respectively and refers as well to an English Practice Direction governing urgent applications and "without notice applications". Neither the CPR nor the Practice Direction apply in The Bahamas.

60. In our view, the case of **Franses** does not assist the Appellant in his bid to impugn the judge's decision on ground 13 which is dismissed.

Grounds 4, 10 & 11 – Challenges to the judge's refusal to hear the Appellant's Cross-Summons for vacant possession

61. The focus of these 3 grounds is on the dismissal of the Appellant's Cross-Summons for vacant possession. The grounds may be considered together.

62. *Ground 4:* As we understand it, the thrust of Mr. Wallace-Whitfield's submissions on ground 4 is that the judge had had regard to irrelevant matters namely, the pleadings and the evidence; and further, that her findings in relation to the Respondents' Summons had erroneously "influenced" her decision to dismiss the Appellant's Cross-Summons. In her response, Ms. McDonald supported the judge's decision. She adverted to paragraphs 8 to 25 of the Ruling and submitted that the judge's decision to dismiss the Cross-Summons was reasonable and cannot be impugned.

63. As we have already observed in our discussion in relation to ground 3, on an application for interlocutory relief, some resort to the pleadings and to the evidence will be inevitable. The fact that the judge has referred to the pleadings and to the affidavit evidence on the Court file without more does not automatically mean that the judge has taken account of irrelevant material, or that a "mini-trial" has erroneously been held.

64. We are further satisfied that nothing in the learned judge's Ruling suggests that she was influenced to dismiss the Appellant's Cross-Summons by findings she had earlier made in relation to the Respondents' Summons. On the contrary, the judge's decision to dismiss the Cross-Summons was based on her finding (at paragraph 26 of her Ruling) that the Appellant's cross-application sought a remedy which lay at the heart of the substantive dispute, and which is to be determined at trial. Ground 4 is dismissed.

65. *Grounds 10 & 11:* The complaint on these 2 grounds is that the judge failed to give any, or any proper consideration to the Appellant's Cross-Summons for vacant possession resulting in her erroneously dismissing his cross-application without a hearing. In response, Ms. McDonald submitted that the grounds are without merit, as the learned judge was keenly aware that to order the Respondents out of the house by granting the Appellant vacant possession of the house would not only have occasioned immeasurable harm to the Respondents but would have essentially determined the proceedings at an interlocutory stage when there are still serious issues to be determined at trial.

66. We have considered the respective submissions. It seems to us that the Appellant's Cross-Summons for vacant possession was clearly ill-conceived. It was instituted under **O. 29 R.S.C.,** which, as the title suggests, is intended to facilitate, *inter alia,* the grant of interlocutory injunctions - **(r.1);** as well as the detention and preservation or inspection of any property which is the subject matter of the cause or matter, or as to which any question may arise therein - **(r. 2).**

67. According to the practice notes located in Volume 1 of the 1988 English Supreme Court Annual Practice, Orders granted under **O.29 r. 2** are granted in respect of property which is *bona fide* the subject matter of the action. **Scott v. Mercantile Accident Insurance Co.,** (1892) 8 T.L.R. 320. However, the rule extends to ***"every case where the Court is satisfied that as between plaintiff and defendant there is something which ought to be done for the security of the property."*** See **Chaplain v. Barnett** (1912) 28 T.L.R. 256.

68. While the house is unquestionably the subject matter of the substantive dispute, nothing in the Appellant's affidavit of 14 October 2021 remotely suggests that it needed securing or needed to be preserved or inspected pending the hearing of the substantive action. We completely agree with the learned judge's observation at paragraph 26 of her Ruling that the Appellant's Cross-Summons for injunctive relief *"perhaps ought not to have been taken out as it seeks a remedy which is the crux of the case and which will be determined in the substantive hearing."* Grounds 10 and 11 have no merit and are dismissed.

Ground 14 – The Costs Order

69. This ground may be disposed of shortly. Mr. Wallace-Whitfield says that the judge's Costs Order is plainly wrong because while recognizing that costs usually follow the event and awarding the Respondents costs of their application, she nonetheless ordered that the costs be determined at the conclusion of the substantive action. For her part, Ms. McDonald had absolutely no difficulty with the judge's award of costs to her clients.

70. As we see it, this complaint is one which ought more appropriately have been made by the Respondents since the Costs Order effectively precludes the Respondents from taxing their costs against the Appellant until the outcome of the substantive trial.

71. As provided by **O. 59** of the Rules, costs lie within the complete discretion of the court. As the Respondents have not appealed the Costs Order, and as the point raised on this ground does not inure in any practical way to the benefit of the Appellant, ground 14 has no merit and is dismissed.

Disposition and Order

72. For all the reasons set out in this judgment, the appeal is dismissed. The usual order is that costs follow the event. Accordingly, the Appellant shall pay the Respondents' costs of the appeal, such costs to be taxed if not agreed.

_____

The Honourable Madam Justice Crane-Scott, JA

_____

The Honourable Mr. Justice Jones, JA

_____

The Honourable Mr. Justice Evans, JA