[2022] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00033

BETWEEN	**SILVER SANDS ESTATES LIMITED**	**APPELLANT**
AND	**LORENZ REDLEFSEN**	**RESPONDENT**

Written Submissions filed by Livingston, Alexander & Levy on behalf of the appellant

29 July 2022

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

P WILLIAMS JA

[1] On 26 March 2021, Laing J ('the learned judge') refused to order the removal of caveats that had been lodged by Mr Lorenz Redlefsen ('Mr Redlefsen') against certain lots owned by the appellant, Silver Sands Estates Limited ('Silver Sands'). The learned judge also refused Silver Sands' request to impose conditions or require an undertaking as to damages to retain those caveats. This appeal explores the correctness of that decision having regard to whether the learned judge erred in his refusal to order the removal of the caveats; in his finding that damages would not be an adequate remedy; in determining where the balance of convenience lay; in failing to impose conditions or require an undertaking as to damages for the retention of the caveats; and in utilising an order for security for costs as a factor in refusing to require an undertaking as to damages.

Background

[2] Silver Sands is the registered proprietor of 16 lots situated in the parish of Trelawny. In 2019, the Development Bank of Jamaica Limited ('DBJ') had oversight of an invitation for offers to purchase the lots further to a directive from the Government of Jamaica to divest ownership of the properties. The properties were high-value lots with market values ranging from $12,000,000.00 to $70,000,000.00. Sagicor Property Services Limited ('SPSL'), acting as agents of DBJ, published advertisements inviting bids to purchase the lots. In what the learned judge described as a "commercially bizarre approach", the invitation to bid stipulated no reserve price, nor did it reserve the right not to accept the highest bid for any of the lots. Instead, it explicitly indicated that the "highest valid offer" would be the winning bid.

[3] Mr Redlefsen submitted bids on each of the 16 lots ranging from $1,600,500.00 to $1,612,600.00. The bids were rejected, and DBJ contended this was because Mr Redlefsen's proof of funds was not certified by his bank, and his customer information form was incomplete, violating the terms and conditions of the invitation to bid. Mr Redlefsen countered that there was no proper basis for the rejection as he had complied with the rules governing the bidding process. He maintained that he had submitted the highest valid bid (and in some cases, the only bid) for the 16 lots, and since his bids were in accordance with the requirements, as stipulated, Silver Sands, DBJ and SPSL were in breach of their contractual obligation to accept his bids.

[4] Those competing contentions sparked discussions among the parties that bore no fruit. Therefore, on 7 May 2020, Mr Redlefsen filed a claim against Silver Sands, DBJ and SPSL for "damages for breach of contract in lieu of specific performance or in addition to specific performance" with interest and costs. In his particulars of claim, he indicated that Silver Sands, DBJ and SPSL had breached their contractual obligations to him as they refused to honour the terms of the invitation to bid without a valid basis. Silver Sands, DBJ and SPSL filed defences to that claim.

[5] Six of the lots were sold to other persons, and nine were offered for sale from September to October 2020. In December 2020, Silver Sands entered into sales agreements with respect to two of those lots. Subsequently, on 13 January 2021, Mr Redlefsen lodged caveats against five lots on the basis that he had a legal and beneficial interest in them that arose from his bids. Those caveats were entered on 14 January 2021.

The application for removal of the caveats

[6] On 19 February 2021, Silver Sands filed a notice of application for the removal of those five caveats. It asserted that the claim to an interest in the properties that Mr Redlefsen asserted was the subject of proceedings before the court, and the question of whether Mr Redlefsen had made the highest valid bid was an issue to be determined at the trial. Further, it asserted that Mr Redlefsen had effectively circumvented the court's process to avoid having to establish a case for restraining Silver Sands from dealing with the properties as seen fit.

[7] In an affidavit in support of the application, Miss Sheron Henry, company secretary of Silver Sands, challenged Mr Redlefsen's assertion, in his declaration in support of applications for the registration of the caveats, that he had a legal and beneficial interest in the lots. She asserted that none of the offers he had submitted for the lots was valid, and the issue of whether he had made the highest valid bid was a factual matter in dispute before the court. Thus, she posited, Mr Redlefsen had pre-empted the court's determination of the matter by lodging the caveats. She asserted that Mr Redlefsen had utilised the caveats to avoid an application for an injunction, noting that although Mr Redlefsen was aware of the ongoing efforts to sell the lots, he did not seek to restrain the marketing and sale of the lots.

[8] In his affidavit in response, Mr Redlefsen asserted that his interest in the lots arose from 2019 when he was the highest bidder on the lots, and Silver Sands had neglected or otherwise refused to transfer the lots to him. He asserted that if Silver Sands were permitted to deal with the lots before a decision of the court as to his interest, he would

be irremediably prejudiced. He further asserted that his interest in the lots was not all motivated by or based on monetary value but that he had a strong emotional and sentimental attachment to the Silver Sands property. He intended to preserve as much of the character of the area and keep them as green space, and no amount of money could suffice, in the event he succeeded in his claim after the properties were sold.

[9] Mr Redlefsen also contended that there had been no proper basis for rejecting his bids. He averred that his bids included a statement from the Bank of America, which was not required to be verified, so his proof of funds was valid. Moreover, the incomplete portions of his customer information form related to place of business and employment, which were inapplicable to him as he was retired. He stated that based on the unequivocal promise made to him by Silver Sands, DBJ and SPSL that the "highest valid bid" would have been accepted, they had a contractual obligation to sell him the lots for which he was the highest bidder. He also indicated that the lots that had not yet been sold had been re-advertised for sale and the new invitations to bid specifically referenced the reserve price and the right not to accept the valid bid. He asserted that should Silver Sands, DBJ and SPSL be permitted to dispose of the lots, he would be irreparably prejudiced as he has a "very strong emotional and sentimental attachment" to the lots. He had spent every Christmas since 1979 on Silver Sands and wished them to be "transferred into a trust or some other entity that would be bound to preserve them as [a] green space in perpetuity". Consequently, he asserted that damages would not be an adequate remedy should he succeed on his claim and Silver Sands and DBJ were permitted to sell the lots.

[10] In response, Miss Henry noted that Mr Redlefsen had acknowledged that his bids were incomplete. She asserted that it was not for him to decide whether he should partially complete the customer information form, which was required as a part of the sellers' diligence, especially given that, as a financial institution, DBJ was subject to the Proceeds of Crime Act. She noted that the bidding instructions required "proof of purchase for cash purchase (a bank statement or letter verified by the bank)". She contended that

the wording, in its ordinary meaning, clearly required that whichever document was submitted as proof of funds for a cash purchase be verified by the bank.

[11] She asserted that Silver Sands Estate has already been designed with green spaces, and it would be "unreasonable to expect that the community should remain frozen at the current level of development at [Mr Redlefsen's] behest". She noted that, in any event, one of the lots contained a three-bedroom villa, and six of the lots were outside the Silver Sands gated community.

The learned judge's decision

[12] The learned judge heard the application for removal of the caveats on 15 and 16 March 2021. By the time the hearing commenced, Mr Redlefsen had lodged caveats against 10 lots. However, no application was made seeking an amendment to include the additional caveats that had been lodged.

[13] In his consideration of whether to order the removal of the caveats or to impose conditions for their retention, the learned judge noted that the Judicial Committee of the Privy Council in **Eng Mee Yong and Others v Letchumanan S/O Velayutham** [1979] UKPC 13; [1980] AC 331, indicated that there are similarities between the effect of a caveat and an interlocutory injunction. He, therefore, narrowed his assessment of the application to three issues: (i) whether there is a serious issue to be tried in the claim; (ii) would damages be an adequate remedy; and (iii) where does the balance of convenience lie.

[14] When assessing whether there was a serious issue to be tried, the learned judge explored the competing contentions surrounding the issue of whether Mr Redlefsen was indeed a valid bidder in respect of the lots and whether he had obtained an interest in them. In so doing, he acknowledged the dispute surrounding the customer information form and the bank statement. He concluded that he could not assess which party was correct regarding the customer information form since the form had not been exhibited before him. In relation to the question of whether the bank statement ought to have been

verified by the bank, the learned judge found that there was considerable merit in the submissions made on behalf of Silver Sands that the proper construction of the requirement could be resolved by the court without evidence. He concluded, however, that even if the court were to resolve the dispute about the unverified bank statement, there would remain unresolved the issue of the customer information form. He was satisfied, therefore, that there was a serious issue to be tried as to whether Mr Redlefsen's bids were valid.

[15] The learned judge found that there was also a serious question to be tried as to whether Mr Redlefsen's bids were the highest valid bids. Further, having acknowledged the legal principle that a contract exists upon submitting the highest valid bid, the learned judge considered what interest or right Mr Redlefsen acquired if he had submitted the highest valid bid. He concluded that there was another serious issue to be tried as to whether Mr Redlefsen had a right to specific performance. Flowing from this, the learned judge found that there was also a serious issue to be tried as to whether Mr Redlefsen had sufficient interest in the five lots which would entitle him to have the caveats remain in place.

[16] The learned judge found that once the court was satisfied that there was a serious issue to be tried, in considering the balance of convenience, the court had to have regard to whether damages would be an adequate remedy for either party. He ultimately found that damages were not an adequate remedy for Mr Redlefsen in this case. Although he expressed reservations about Mr Redlefsen's evidence as to why damages would not have been an adequate remedy, he nonetheless found that Mr Redlefsen's emotional and sentimental attachment was to the entire Silver Sands area and not any particular lot. Accordingly, he found that there was no evidence rebutting the presumption that damages would not have been an adequate remedy for Mr Redlefsen, who had claimed an interest in the lots owing to Silver Sands' unique, peculiar, and special value.

[17] Although the learned judge noted that Silver Sands had entered into sale agreements with respect to two lots, he found that the balance of convenience "would in

the normal way and the absence of any special circumstances be in favour of leaving the caveat in existence until the Claim is concluded".

[18] The learned judge was satisfied that Mr Redlefsen had succeeded in showing cause why the caveats should not be removed. He noted that when pressed as to whether an injunction would not have provided adequate and overarching protection, counsel for Mr Redlefsen, Mr Marc Williams, explained that the use of the caveats "was a calculated strategy because [Mr Redlefson] recognised that he would not be in a position to give an appropriate undertaking in damages for an injunction in respect of the Claim covering all the properties". The learned judge expressed some unease with this admitted strategic objective of using the caveat as a tool to obtain protection akin to an injunction while avoiding the provision of an undertaking as to damages. He, however, had reservations about whether he could order an undertaking as to damages as a condition to the caveat remaining in place, similar to the imposition of an injunction. Having previously made an order on 15 March 2021 that Mr Redlefsen provides security for costs in the amount of $1,500,000.00, the learned judge was ultimately satisfied that that order was sufficient and indicated that it would be inappropriate to impose an additional security obligation on Mr Redlefsen. Thus, the learned judge refused the application for an order to remove the caveats but granted leave to appeal his decision.

The appeal and the issues thereon

[19] Being aggrieved by the learned judge's decision, Silver Sands appealed against it. Its notice of appeal, filed on 8 April 2021, lists six rather long grounds of appeal, which are as follows:

> "(a) The learned judge erred in the exercise of his discretion in refusing to order the Registrar of Titles to remove the Caveats in light of [Mr Redlefsen's] admission that the lodgement of the caveats was a strategic move to avoid applying to the Court for an injunction restraining [Silver Sands'] marketing and sale of the Lots in circumstances where a claim was already in existence, the dispute was before the Court and [Mr Redlefsen's]

stated objective was to avoid being in the situation of having to give an undertaking as to damages on the grant of any such injunction. In doing so, the learned judge allowed [Mr Redlefsen] to abuse the process of the Registration of Titles Act.

(b) In concluding that the [sic] damages were not an adequate remedy, the learned judge erred in failing to properly assess and gave undue weight to [Mr Redlefsen's] averment that the land in Silver Sands Estates had sentimental value to him and that he wished to acquire the land for the purpose of preserving the character of Silver Sands Estates as a green space and in failing to have any or sufficient regard to the facts that:

(i) six of the lots which [Mr Redlefsen] expressed an interest in and lodged caveats against are located outside of the Silver Sands Estate gated community;

(ii) one lot is already developed with a three bedroom villa and swimming pool;

(iii) [Mr Redlefsen] is not resident in Jamaica and from his evidence, he visits annually for Christmas;

(iv) [Mr Redlefsen's] bid on all sixteen lots which suggests that he does not have any particular attachment to any lot or location within the Estate;

(v) In the course of 2020, [Mr Redlefsen] had acquired two lots in Silver Sands Estates which were well within the gated community and not in any close proximity to any green space.

(c) Even having found that damages were not an adequate remedy for [Mr Redlefsen], the learned judge erred in failing to conduct a proper assessment of where the balance of convenience lay and did not take into any or any proper account the inconvenience to [Silver Sands] in having its marketing and sale of Lots being delayed, with [an] actual sale under contract being

adversely impacted. Had the learned judge made a proper assessment of the relative balance of convenience, he would have determined that the balance of convenience lay in ordering the removal of caveats or at least some of them.

(d) Having determined that the balance of convenience lay with allowing the caveats to remain against the Lots, the learned judge erred in failing to impose any conditions for their continuation, particularly in light of the fact that it was known to the learned judge that five of the lots were under contract for sale. The learned judge failed to properly take into account the strategy that [Mr Redlefsen] admittedly employed in order to frustrate [Silver Sands'] sale of its properties and the damage that would be suffered as a result thereof.

(e) Despite the clear language of Section 140 of the Registration of Titles Act that on an application by a proprietor for a caveator to '*show cause why such a caveat should not be removed, the Court make such order as may seem fit'* and that a judge may direct the Registrar to delay in registering any dealing with the land where a caveator appearing before the Court '*gives such undertaking or security, or lodges such sum in court as such Judge may consider sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed',* the learned judge by error of law, failed to exercise the powers granted to him to impose the condition of an undertaking in damages for the continuation of the caveats against [Silver Sands'] Lots.

(f) The learned judge erred in concluding that having ordered security for costs, there was no further need for an undertaking in damages. In doing so, the learned judge misapplied the law in equating security for costs of the proceedings in circumstances where [Mr Redlefsen] was ordinarily resident outside of the jurisdiction with an undertaking in damages to indemnify [Silver Sands] against damage that it may sustain by reason of the disposition of Lots being delayed by the Caveats." (Italicised as in original)

[20] The issues which therefore arise for consideration in this appeal are as follows:

1. Was the lodgement of the caveats an abuse of the process of the Registration of Titles Act ('RTA'), in the light of Mr Redlefsen's admission that the lodgement of caveats was a strategic move to avoid seeking an injunction that would require him to provide an undertaking as to damages? (ground (a))
2. Did the learned judge err in concluding that damages was not an adequate remedy? (ground (b))
3. Was there a proper assessment of where the balance of convenience lay? (ground (c))
4. Given the language of section 140 of the RTA, did the learned judge err in failing to impose conditions, particularly an undertaking as to damages for the retention of the caveats? (grounds (d) and (e))
5. Did the learned judge err in concluding that, having ordered security for costs, there was no further need for the imposition of an undertaking as to damages? (ground (f))

Discussion and analysis

Preliminary issue on the consideration of Mr Redlefsen's submissions

[21] On 23 April 2021, Silver Sands filed its submissions, which they served on counsel for Mr Redlefsen on the same date. The submissions on behalf of Mr Redlefsen were filed on 17 January 2022 and served on counsel for Silver Sands on 26 January 2022. Therefore, the bundle containing submissions on Mr Redlefsen's behalf were filed and served approximately nine months after the time stipulated in the Court of Appeal Rules ('CAR'). Rule 2.4(2) of the CAR states that a "respondent may within 14 days of receipt of the appellant's submissions file and serve on the appellant any written submissions in opposition to the appeal or in support of any cross appeal".

[22] The failure of Mr Redlefsen to comply with the stipulated timelines in rule 2.4(2) of the CAR required an application for an extension of time (see **RBC Royal Bank (Jamaica) Limited and Others v Ocean Chimo Limited** [2016] JMCA App 22 and **Sean Greaves v Calvin Chung** [2019] JMCA Civ 45). Rule 1.7(2)(b) of the CAR empowers this court to extend the time for compliance with any rule even if the application for extension has been made after the time for compliance has passed. This court is also empowered to make any incidental decision pending the determination of an appeal (rule 2.14(b)(g) of the CAR) or may make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal (rule 2.14(b)(h) of the CAR). However, to date, despite objections from counsel for Silver Sands, Mr Redlefsen did not file an application for the extension of the relevant times.

[23] In **Sean Greaves v Calvin Chung**, this court decided that it could not consider submissions that had been filed late without an application for an extension of time being made. In a similar vein, without the appropriate application, this court will not be considering Mr Redlefsen's late submissions.

<u>Setting aside the learned judge's decision</u>

[24] This appeal will be determined having regard to the principles of law applicable to the review of the exercise of the learned judge's discretion on an interlocutory application. The approach of appellate courts in reviewing the exercise of discretion in interlocutory proceedings was explained by Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042 and has been cited with approval in several cases before this court. Morrison P explained the approach this way in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, at para. [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground

> that no judge regardful of his duty to act judicially could have reached it'."

[25] Accordingly, before this court can set aside the learned judge's decision, it must be satisfied that the exercise of his discretion was based on a misunderstanding of the law or the evidence before him or that his decision is palpably wrong.

Issue 1: Abuse of Process of the RTA (ground (a))

[26] Mr Redlefsen admitted that he had utilised the lodgement of caveats to protect his interests in the lots as a strategic move to avoid seeking an injunction. This would have required the provision of an undertaking as to damages, which he would have been unable to satisfy. The learned judge expressed some unease with this admission, acknowledged that Mr Redlefsen had the benefit of the claim he had already filed, and accepted that Mr Redlefsen was aware of Silver Sands' attempts to market and sell the lots on the assumption that agreements for sale could be entered into at any time. However, he found that lodging a caveat as opposed to applying for an injunction was not expressly prohibited and, in any event, the reason for the lodgement of the caveat was only important to the court's assessment of whether to attach conditions to the caveats or to remove them entirely.

[27] In written submissions, counsel for Silver Sands contended that in the circumstances outlined by the learned judge, by allowing the caveats to remain in place or by failing to impose conditions, the learned judge allowed Mr Redlefsen to abuse the process of the RTA. Counsel cited the definition of abuse of process as outlined in **Hunter v Chief Constable of West Midlands and Another** [1981] 3 All ER 727 and noted that "[a]ny legal process can be abused and is abused when it is employed in its proper form for an ulterior collateral purpose", and when damage results, abuse of process is a tort. Counsel indicated that Mr Redlefsen knew that Silver Sands had been marketing the lots and contracting sales. Therefore, his conduct of lodging the caveats was "manifestly unfair and detrimental to [Silver Sands]", who was left without "proper reciprocal protection". Although counsel referenced the learned judge's unease with Mr Redlefsen's

actions, counsel indicated that the learned judge erred when he failed to appreciate that that strategy amounted to an abuse of the process of the RTA.

[28] The Judicial Committee of the Privy Council in **Brandt v Commissioner of Police and Others** [2021] 4 All ER 637 indicated that "abuse of process must involve something which amounts to a misuse of the process of litigation". The Board in **Brandt** relied on dicta from Lord Diplock in **Hunter v Chief Constable of West Midlands**, where at page 729, he said that a case about abuse of the process of the court:

> "… concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless **be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people**." (Emphasis added)

[29] Lord Diplock noted that the list of circumstances that could amount to an abuse of process is vast and varied, so he rejected any attempt to limit those circumstances. A category that may apply to the instant case is where a party complies with the strict literal terms of the law but does so for improper or ulterior motives or purposes. This was the case in **Castanho v Brown & Root (UK) Ltd and Another** [1981] AC 557. In February 1977, the plaintiff, a resident in Portugal, was seriously injured in an accident on a ship registered in the United States of America ('USA') lying in an English Port. In September 1977, he filed a claim in England against the defendant companies for damages for his injuries. In March 1978, he entered into a consent order with the defendant's solicitors and accepted two interim payments. During that year, the plaintiff was contacted by attorneys from Texas, USA, who persuaded him to bring proceedings in Texas, where higher damages could be obtained. In April 1979, after proceedings on the plaintiff's behalf had been commenced in a Texas court, the defendants delivered a defence in the English action. On 14 May 1979, the plaintiff's English solicitors served an *ex parte* notice of discontinuance on the defendants and filed a fresh action claiming compensatory and punitive damages in the USA. The notice of discontinuance was issued pursuant to order

21, rule 2(1) of the United Kingdom Rules of the Supreme Court ('RSC'), which allowed notice to be given without leave at any time up to the expiry of 14 days after service of the defence. On the defendants' application, the notice of discontinuance was struck out as an abuse of process of the court. The court also granted an interim injunction restraining the plaintiff from commencing or continuing proceedings in the USA.

[30] On appeal, the Court of Appeal set aside the order striking out the notice of discontinuance and discharged the injunction. The appeal was dismissed on further appeal to the House of Lords (as it was then). The court held that the *ex parte* notice of discontinuance was an abuse of the court. It also found that the notice of discontinuance was rightly set aside because the court should not entertain the plaintiff's effort to discontinue his action to obtain advantages by suing in a foreign court without being put on terms. Accordingly, leave to discontinue the claim was given in keeping with the amended RSC. Lord Scarman found that service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court. He reasoned thus at page 572:

> "… It is inconceivable that the court would have allowed a plaintiff, who had secured interim payments and an admission of liability by proceeding in the English court, to discontinue his action in order to improve his chances in a foreign suit without being put upon terms, which could well include not only repayment of the moneys received but an undertaking not to issue a second writ in England.
>
> The notice being an abuse of process, Parker J was right, in my judgment, to strike it out. It does not, however, follow that the court may not thereafter give the plaintiff leave upon terms to discontinue.…"

[31] Ultimately, the plaintiff was allowed to proceed with his claim in the USA since the Law Lords formed the view that to restrain him from proceeding in the USA would have "deprived him of a legitimate, personal and juridical advantage", even in circumstances where there was found to be an abuse of process.

[32] In the instant case, the learned judge was correct when he found that nothing precluded Mr Redlefsen from seeking the lodgement of caveats against the lots as opposed to seeking an injunction. It was entirely permissible for Mr Redlefsen to utilise the process that would have given him a "legitimate, personal and juridical advantage". In any event, it seems to me that it could not be said that his actions were "manifestly unfair or were such that they would bring the administration of justice into disrepute". Mr Redlefsen's admission that he had utilised the lodgement of caveats to avoid having to give an undertaking as to damages and, further, that he would be unable to satisfy an undertaking as to damages on all the lots, demonstrated that he was utilising the process of the RTA for an ulterior motive. Significantly, this was done after Mr Redlefsen had filed a claim against Silver Sands to declare his interests in the lots and was at financial risk to Silver Sands, which was attempting to sell the lots and, in some instances, had even entered into agreements for sale. In these circumstances, I find that the learned judge could not be faulted for deciding that this admission could fairly be taken into consideration when determining whether to impose conditions to an order that the caveats should not be removed. However, it cannot be said that the learned judge erred when, despite his unease, he refused to order the removal of the caveats for the sole reason that Mr Redlefsen chose, strategically, to apply for a caveat instead of an injunction.

[33] In any event, the lodging of a caveat does not require the utilisation of any process of the court. Rattray P in **Life of Jamaica Limited v Broadway Import & Export Limited and Others** (1997) 34 JLR 526, said at page 532 that:

> "In my view the purpose of the caveat in the Jamaican jurisdiction is the same as in the Australian jurisdiction under the torrens system common to both systems… the case of *J. & H. Just (Holdings) Pty Limited v Bank of New South Wales and Others.* Vol. 45 Australian Law Journal at page 625… in which Barwick CJ examined the nature and purpose of the caveat at page 627 … stated as follows:
>
> > 'Its purpose is to act as an injunction to the Registrar-General to prevent registration of

> dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealing for registration. The purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest though if noted on the certificate of title, it may operate to give such notice.'"

Therefore, in all these circumstances, ground (a) is without merit and fails.

Issue 2: Whether damages would be an adequate remedy for Mr Redlefsen (ground (b))

[34] As indicated, the learned judge found that damages would not be an adequate remedy for Mr Redlefsen. He relied on **Tewani Limited v Kes Development Co Ltd and Another** (unreported), Supreme Court, Jamaica, Claim No 2008HCV2729, judgment delivered 9 July 2008, where Brooks J (as he then was) indicated that:

> "The significance of the subject matter being real property, raises a presumption that damages are not an adequate remedy, and no other enquiry is made in that regard. The reason behind that principle is that each parcel of land is 'unique' and [of] 'a peculiar and special value'."

However, the learned judge went on to cite **Lookahead Investors Limited v Mid Island Feeds (2008) Limited and Others** [2012] JMCA App 11, where Brooks JA (as he then was) acknowledged that there were cases which had different considerations, and which made them exceptions to the principle that the land and its location are unique. The learned judge, therefore, properly recognised that each case must be taken on its own facts because the presumption that damages are not an adequate remedy is rebuttable.

[35] In reviewing the facts of the case, the learned judge noted that, in the light of Mr Redlefsen's claim that he wished to preserve the lots as a green space in perpetuity, no suitable explanation had been given as to why he had placed a bid on a developed lot containing a villa and a swimming pool. The learned judge also indicated that he placed

no weight on Mr Redlefsen's assertion that evidence of this wish "can be seen in his offer of settlement to have the [p]roperties held by an appropriate trust unchanged for perpetuity". The learned judge found the offer itself to be general in nature and lacking in detail as to how such a venture could be made a "realistic possibility". The learned judge acknowledged that Mr Redlefsen was not ordinarily resident in Jamaica, only visited on Christmas, and had expressed no intention to live here and that Mr Redlefsen may have had an interest in two additional lots in Silver Sands. However, he indicated that he would draw no inferences from that latter assertion for the purposes of this application.

[36] The learned judge also acknowledged submissions made by counsel for Silver Sands that Mr Redlefsen's action of placing bids on all 16 lots, including the developed lot, "suggests that his interest is not non-commercial as he claims". The learned judge accepted as correct that the developers of the project had built into it adequate green spaces for all owners. However, he found at para. [59] that:

> "... Nevertheless, it would be inappropriate for this Court, based on the conflicting evidence before it, to make a finding as to whether [Mr Redlefsen's] interest in the Five Lots genuinely stems from the emotional attachment which he describes or whether his interest is commercial in nature but masquerading as a romantic attachment to the way things are and a desire to have the status quo remain. In the absence of evidence which clearly refutes [Mr Redlefsen's] assertion, the Court is required to accept his evidence as true on a balance of probabilities for the purposes of this Application."

[37] In weighing Mr Redlefsen's sentimental attachment, the learned judge found that "[t]his situation is far removed from a homeowner wishing to preserve his childhood home or a person who wishes to acquire a particular lot of land to build his home". He noted that the emotional attachment Mr Redlefsen asserted was not to a particular lot or the five lots but to the entire Silver Sands area. He found that the fact that the five lots are separate did not affect the principle that each lot is "unique". He found further that Mr Redlefsen's interest in multiple lots, as opposed to a single lot, was not a distinguishing feature which created an exception to the principle that the land and its location are

unique. He concluded that, in the absence of any evidence refuting the general presumption, damages would not provide an adequate remedy for Mr Redlefsen.

[38] Counsel for Silver Sands contended that the learned judge erred when he made that finding, primarily because he failed to give due weight to the undisputed facts and documentary evidence. Counsel highlighted the inconsistencies between Mr Redlefsen's alleged motivation for bidding on the lots and his actions and also posited that, in the light of the documentary evidence, the learned judge erred when he failed to make a finding as to whether Mr Redlefsen's interest in the lots genuinely stemmed from an emotional attachment or was commercial in nature.

[39] It seems to me that Silver Sands' complaint about this aspect of the learned judge's decision makes it necessary to review the findings of fact that were made on these issues and the conclusion arrived at. Appellate courts are reluctant to disturb findings of fact made by a body entrusted with that duty unless there is a material or demonstrable error in the findings made or it cannot be reasonably explained or justified (see **Watt (or Thomas) v Thomas** [1947] AC 484 and **Paymaster (Jamaica) Limited and Another v Grace Kennedy Remittance Services Limited; Paymaster (Jamaica) Limited and Another v Grace Kennedy Remittance Services Limited and Another** [2017] UKPC 40). Lord Reed of the United Kingdom Supreme Court in **Henderson v Foxworth Investments Ltd and Another** [2014] UKSC 41, explained at para. 67 that:

> "...in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[40] However, in **Clarence G Royes v Carlton C Campbell and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005, Smith JA reminded us that, in assessing findings

of fact, regard ought to be had to whether they are made on oral evidence or documentary evidence. Where oral evidence has been given, appellate courts are far more reluctant to disturb findings based on that evidence, but where the findings made were based entirely on documentary evidence, the relevant principle, as outlined by Smith JA in **Clarence Royes**, at page 22, is as follows:

> "… In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the findings of the trial judge – See Rule 1.16(4) [of CAR] ..."

[41] The Privy Council in **Eng Mee Yong** also gives the following guidance at page 341:

> "… Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."

[42] In all these circumstances, I am satisfied that there is a need to assess the documentary evidence to see whether the findings of fact made by the learned judge were made in error or cannot reasonably be explained or justified and whether the decision he ultimately made was palpably wrong.

[43] Firstly, I am compelled to note that the first order sought in Mr Redlefsen's claim against Silver Sands was an order for "**damages for breach of contract in lieu of specific performance or in addition to specific performance of the contract**" (emphasis added). In the particulars of claim filed and certified by counsel on behalf of Mr Redlefsen, there was a bald assertion that "as a result of [Silver Sands', DBJ's and SPSL's] breach of contract, [Mr Redlefsen] has suffered loss and incurred costs". It is

immediately pellucid that an order for an award of damages on Mr Redlefsen's claim was sufficient for him.

[44] It was in his affidavit in response to the application for removal of the caveats that Mr Redlefsen had first asserted that his interests in the lots were not motivated or based on monetary value. It was in Mr Redlefsen's affidavit in response outlining why the caveat should not be removed that he asserted an emotional and sentimental attachment to Silver Sands, an assertion not relied on in his claim.

[45] It is undisputed that Mr Redlefsen had placed bids on all 16 lots, six of which are located outside the Silver Sands gated community. Silver Sands contended, without objection from Mr Redlefsen, that the market value of each lot ranged from $12,000,000.00 to $70,000,000.00 and that a prospectus was issued on each lot outlining its market value. The fact that Mr Redlefsen placed bids on each lot that was significantly below market value (ranging from $1,600,500.00 to $1,612,600.00) surely raised questions as to the actual value he placed on this emotional and sentimental attachment to the area. The learned judge commented that Mr Redlefsen "no doubt recognising the significance of the absence of any reserve price, shrewdly submitted 16 offers to purchase the [p]roperties".

[46] Mr Redlefsen indicated that he wanted to preserve the lots as a green space in perpetuity. Still, he placed a bid on a developed lot containing a three-bedroom villa and a swimming pool, which, in my view, directly contradicted his purported desire to maintain a green space. He made bids on six lots which were outside the Silver Sands Estates gated community. The evidence clearly suggested that Mr Redlefsen was bidding on lots without regard for their location. The learned judge admitted, and I agree, that Mr Redlefsen took a widespread scattershot approach to the acquisition of the lots, which the learned judge observed, tended to suggest that Mr Redlefsen's interest in the lots "is not non-commercial" as he claimed. The learned judge accepted that the developers of the project had built into it adequate green spaces for the benefit of the owners. I also agree with the learned judge that Mr Redlefsen's claim that he wished to place the

properties in trust in perpetuity was "general in nature" and lacking in detail as to how such a venture could be made a "realistic possibility".

[47] A survey diagram was exhibited on Silver Sands' behalf, clearly indicating that green spaces existed for the benefit of all homeowners. Having been familiar with Silver Sands for years, Mr Redlefsen would have known of these designated green spaces; in fact, as counsel for Silver Sands pointed out, Mr Redlefsen had even placed a bid on a lot which abuts one such green space. Significantly, the learned judge accepted that the green space in the Silver Sands Estate was adequate.

[48] The learned judge commented that Mr Redlefsen's situation was "far removed from a homeowner wishing to preserve his childhood home or a person who wishes to acquire a particular lot of land to build his home". He, however, accepted that the starting point remained the general legal principle that each parcel of land is said to be "unique" and has "a peculiar and special value".

[49] To my mind, the documentary evidence and Mr Redlefsen's own assertions did not credibly corroborate his claim of an emotional and sentimental attachment to Silver Sands, nor did it support his desire to preserve the lots as a green space in perpetuity. Being faced with the fact that Mr Redlefsen's claim included one for damages and the plethora of evidence which tended to raise serious doubts about Mr Redlefsen's claim to any emotional or sentimental attachment, I am unable to reconcile the learned judge's finding that damages would not be an adequate remedy for Mr Redlefsen.

[50] In my view, the learned judge, in recognising that there was conflicting evidence, ought to have made a finding as to whether Mr Redlefsen's interest in the lots stemmed from his emotional attachment or whether his interest was commercial, especially since this was the primary basis on which Mr Redlefsen maintained that the caveats should not be removed. This was extremely important in resolving the question of the adequacy of damages and was not a matter that would have required further investigation to be addressed and determined on Mr Redlefsen's claim as filed. Further, the learned judge

made no reference to the fact that Mr Redlefsen had claimed damages for breach of contract, which itself was evidence that damages would be an adequate remedy for Mr Redlefsen.

[51] Although Silver Sands did not indicate an intention to give an undertaking as to damages, the fact the lots were being sold in conjunction with the DBJ increases the likelihood that both Silver Sands and the DBJ would be able to adequately compensate Mr Redlefsen for any loss he would sustain should the caveats be removed, and he succeeds in his claim.

[52] I am satisfied that the way in which the learned judge addressed this issue, leading to the conclusion that he did, was palpably wrong. It follows, therefore, that since damages would have been an adequate remedy for Mr Redlefsen and given the high likelihood that Silver Sands and DBJ could satisfy an order for compensation made against them, in my view, on this basis, the learned judge erred when he refused the application for the removal of the caveat. Ground (b) therefore succeeds.

Issue 3: The balance of convenience (ground (c))

[53] In relying on **David Tapper v Heneka Watkis-Porter** [2016] JMCA Civ 11, the learned judge indicated that once it has been established that there is a serious issue to be tried, in considering the balance of convenience, the court must have regard to whether damages would be an adequate remedy to either party. He went on to determine that damages would not provide an adequate remedy to Mr Redlefsen. The learned judge considered the approach suggested in **Eng Mee Yong**, which suggested that once the caveator established that there was a serious issue to be tried, the balance of convenience would, in the normal way, lie in favour of keeping the caveats in place until the claim is determined. Apart from mentioning that Silver Sands had entered into a sale agreement for two lots when the caveats had been lodged, the learned judge did not assess where the balance of convenience lay. He was satisfied that having found that Mr Redlefsen had established a prima facie case and that damages would not be an adequate remedy for him if he succeeds, the balance of convenience was in favour of having the caveats

remain in place. He did not address his mind to the harm to Silver Sands should it be unable to fulfil its obligations under those agreements for sale.

[54] In **Eng Mee Yong**, at page 337, the observation of the Board was as follows:

> "This is the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 [of the Malaysian National Land Code] for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.
>
> …
>
> In the case of a refusal by the vendor to complete a contract for the sale of land, the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial.
>
> So too in an application by the caveatee under section 327 for removal of a caveat, once the caveator has met the first requirement of satisfying the court that the claim on which the caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of special circumstances be in favour of leaving the caveat in existence until proceedings brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried."

[55] The learned judge was therefore correct in holding that, in the normal way and in the absence of any special circumstances, the balance of convenience would lie in keeping the caveats in place. However, it seems that there are special circumstances in this

matter. Silver Sands had entered into contracts with third parties in respect of some of the properties. As already stated, contrary to the learned judge's decision on the issue, damages would provide an adequate remedy, especially given that Mr Redlefsen was seeking damages in lieu of or in addition to specific performance. Mr Redlefsen's clear admission to an inability to give any undertaking as to damages if his action should fail ought to have factored into the learned judge's consideration of this issue. Thus, I am of the view, that the learned judge erred in his assessment of where the balance of convenience lay. It now falls to this court to make that assessment.

[56] The Privy Council in **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16 indicated that at the interlocutory stage, the primary consideration is "whether [the] granting or withholding an injunction is more likely to produce a just result". Lord Hoffmann, at paras 17-19, gives guidance on how to assess the balance of convenience as follows:

> "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.'
>
> 18. **Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and 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' cases.**

> 19. … **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.** If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, 'a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted'." (Emphasis added)

From Lord Hoffmann's dicta, it is apparent that, in assessing the balance of convenience, regard must be had to the likelihood of prejudice to each party should the caveat be removed and the extent to which either party could be adequately compensated by an award of damages.

[57] If the status quo remains and the caveats were retained, Mr Redlefsen would be able to preserve any interest he had in the lots until a determination of the claim, whereas Silver Sands would be free to sell the lots before trial if they were removed. Mr Redlefsen faces the risk of losing the lots but would be left with a remedy in damages only, which he sought. As I have already indicated, the evidence does not support Mr Redlefsen's claim of an emotional and sentimental attachment to Silver Sands. Abundant green space already exists in the Silver Sands Estate, so the loss of extra green space would not substantially prejudice Mr Redlefsen.

[58] Miss Henry deponed to the effect of retaining the caveats on Silver Sands in her affidavit filed on 19 February 2021. She indicated that the marketing efforts were being made in accordance with a directive from the Government of Jamaica to divest Silver Sands of the lots. The retention of the caveats, she said, prevents the implementation of the Government's directive.

[59] Silver Sands entered into agreements for sale in respect of two lots in December 2020 and January 2021, each requiring completion within 90 days. Miss Henry averred

that Silver Sands is likely to suffer damage and loss, including, potentially, the loss of actual sales amounting to $100,000,000.00, should it be unable to complete the sales due to the retention of the caveats. It must also be noted that the retention of the caveats may also adversely affect the interests of third-party purchasers.

[60] In the application before the learned judge, counsel for Mr Redlefsen indicated that Mr Redlefsen was not able to give an appropriate undertaking with respect to all the lots. Consequently, he would delay the application for an injunction until it was necessary and give an undertaking as to damages on a particular lot or lots on an ad hoc basis, having regard to whether that lot was in danger of being sold. Accordingly, by his own admission, Mr Redlefsen would be unable to give an undertaking as to damages with respect to all the lots, so it is doubtful that he would be able to satisfy any significant compensation award made against him.

[61] In all these circumstances, it is evident that Silver Sands is likely to suffer far greater irremediable prejudice than that which would accrue to Mr Redlefsen. While Silver Sands may be able to compensate Mr Redlefsen for any damages he may sustain, Mr Redlefsen would be strained to compensate Silver Sands by his own admission. In those circumstances and given the substantial prejudice to Silver Sands by virtue of the retention of the caveats, it would be more just to remove the caveats, as this is the course that carries the least irremediable harm. Consequently, in my view, ground (c) must succeed, and the balance of convenience is clearly in favour of the removal of the caveats.

Issue 4: Failure to impose conditions, particularly an undertaking as to damages (grounds (d) and (e))

[62] I must first indicate that, in its application to remove the caveats, Silver Sands never sought, in the alternative, that an undertaking as to damages or any other condition ought to be imposed as a condition for the retention of the caveats. This seems to be a request made during the currency of submissions. However, as the learned judge addressed the issue, and as it has been filed as a ground of appeal, this court must embark upon a consideration of that issue.

[63] After expressing his unease with Mr Redlefsen's admitted strategic objective of using the caveat as a tool akin to an injunction while avoiding an undertaking as to damages, the learned judge noted a suggestion by counsel for Silver Sands that the court had the power, pursuant to section of 140 of the RTA, to order Mr Redlefsen to do so. Counsel further submitted to the learned judge that such an undertaking be fortified. While the learned judge accepted that a court can, in appropriate circumstances, order that an undertaking as to damages be fortified, he expressed uncertainty as to whether he was empowered to order an undertaking as to damages as a condition to the caveat remaining in place. He stated that he had not been presented with any case law supporting that approach. He had reservations about whether he could so order under section 140 of the RTA, any other provision, or by virtue of his inherent jurisdiction.

[64] Counsel for Silver Sands also noted that the learned judge had, in one instance in his judgment, appreciated that he could impose conditions, including those which would serve a similar purpose to an undertaking as to damages, if the caveats were to remain in place. Counsel pointed out that he subsequently stated that it was open to him to weigh the reasons for lodging the caveat when considering whether to attach conditions to the order that the caveat should not be removed. Counsel contended that notwithstanding the learned judge's unease with Mr Redlefsen's strategic objective in applying for a caveat instead of an injunction, he refused to impose conditions on the caveat, which could include an undertaking as to damages. In so doing, counsel complained that he gave Mr Redlefsen the protection of the caveat without giving Silver Sands any corresponding protection should it succeed on its claim against Mr Redlefsen and incur damages due to the caveats. Counsel also submitted that the learned judge erred when he found that he had no basis for imposing conditions or requiring an undertaking as to damages as section 140 of the RTA gives him a wide discretion to make such orders.

[65] An undertaking as to damages is usually required on an application for an injunction. In **Eng Mee Yong**, the Privy Council indicated that a caveat under the Torrens system of land registration and conveyancing (which exists in Jamaica) can be likened to

an interlocutory injunction, as it restrains the defendant, in the interim, from dealing with the land until a determination of the claimant's claim of an interest in that land. However, the Board noted that a caveat differs from an interlocutory injunction in that it is issued *ex parte* by the Registrar of Titles, acting in an administrative capacity without the intervention of the court and is wholly unsupported by evidence. In our jurisdiction, the Registrar of Titles does not issue a caveat, but she issues a notice that the caveat has been lodged. The caveat is, in effect, a warning to the Registrar of Titles. If required, it is supported by a declaration by the caveator and is noted on the title as a notice to the world of the claimed interest. In any event, as the issuance of the notice of caveat does not require the intervention of the court, the Registrar of Titles would not be concerned with the validity of the claim on which the caveat purports to be based.

[66] Section 140 of the RTA states that:

> "Upon receipt of any caveat under this Act, the Registrar shall notify the same to the person against whose application to be registered as proprietor, or as the case may be, to the proprietor against whose title to deal with the estate or interest such caveat has been lodged, and such applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he thinks fit, summon the caveator to attend before the Supreme Court, or a Judge in Chambers, to show cause why such caveat should not be removed, and such Court or Judge may, upon proof that such caveator has been summoned, make such order in the premises, either *ex parte* or otherwise, and as to costs as to such Court or Judge may seem fit.
>
> Except in the case of a caveat lodged by or on behalf of a beneficiary under disability claiming under any will or settlement, or by the Registrar, every caveat lodged against a proprietor shall be deemed to have lapsed as to the land affected by the transfer or other dealing, upon the expiration of fourteen days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing, unless in the meantime such application has been withdrawn.

> A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest, but if before the expiration of the said period of fourteen days or such further period as is specified in any order made under this section the caveator or his agent appears before a Judge, and gives such undertaking or security, or lodges such sum in court, as such Judge may consider sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, then and in such case such Judge may direct the Registrar to delay registering any dealing with the land, lease, mortgage or charge, for a further period to be specified in such order, or may make such other order as may be just, and such order as to costs as may be just."

[67] In **Venus Investment Limited v Wayne Ann Holdings Limited** [2015] JMCA App 24, Morrison JA (as he then was), at para. [19], in considering the effect of this section, had this to say:

> "Section 140 does three things. First … it provides a mechanism by which the registered proprietor or persons claiming under him may summon the caveator to show cause why the caveat should not be removed. The court may, upon proof that the caveator has been summoned, make such order as it think fit, whether ex parte or otherwise. Second, it provides that the caveat will lapse 14 days after notice to the caveator that the registered proprietor has applied for the transfer or other dealing with the land… Third, once such notice has been served, the caveat will not be renewed, unless within the same 14 day period the caveator or his agent appears before the court and gives an undertaking or security sufficient to indemnify every person against any damage that may be suffered by reason of delay in the registration of any disposition of the property."

[68] The section, therefore, expressly confers upon the court the power to impose an undertaking in specific circumstances. The giving of any "such undertaking" would be at the instance of the caveator or his agent appearing before a judge, seeking to have a caveat renewed. The undertaking would be the remedy that can sufficiently "indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed". Significantly, the learned judge relied on the observations

of Morrison JA in concluding that what was before him was the caveator initiating a claim without adopting the "unusual course" of applying for an injunction to restrain the registered proprietor from transferring or dealing with the five lots.

[69] However, counsel for Silver Sands highlighted that in dealing with the issue of whether a caveat should be removed, the court or judge is empowered to "make such order in the premises, either ex parte or otherwise, and as to such costs as to such Court or Judge may seem fit". This, it was contended, gives the learned judge a wide discretion as to the orders he may make. Counsel submitted that Commonwealth countries with provisions similar to section 140 of the RTA have held that the provisions confer jurisdiction on the court to impose terms on a caveator. This, counsel noted, can be done where the court determines that the caveator has established a serious issue to be tried, and the balance of convenience favours the continuation of the caveat. Counsel submitted that decisions out of these jurisdictions are persuasive. Counsel referred to two cases from New Zealand: **MJ Begley and GJG Baxter v PHV Bravo and FKV Bravo** (unreported), High Court of New Zealand, CP NO 1433/1987, judgment delivered 21 September 1987 and **Michael Raymond Holmes and Alan Stuart Tippett v Australasian Holdings Limited** (unreported), High Court of New Zealand, CP NO 33/1986, judgment delivered 31 March 1988; one from Australia: **Jeanette Harvey v Ian Emery, Maxine Emery and the Registrar of Titles** [2020] VSC 153; and one from New South Wales: **2-6 First Ave Pty Ltd v Aquamore Credit Equity Pty Ltd** [2018] NSWSC 980.

[70] There seems to be merit in the submission that the words "such Court or Judge may … make such order in the premises, either ex parte or otherwise, and as to costs as to such Court or Judge may seem fit" gives a wide discretion to the court or judge in dealing with applications of this nature. Certainly, in the natural meaning of these words, this interpretation is logical and reasonable. The learned judge's reservation as to whether the court had the power to require an undertaking as to damages in these circumstances appears to have been misplaced since section 140 gives him the power to make such orders as may be just.

[71] In **Boensch (as trustee of Boensch Trust) v Pascoe** 22 ITELR 735; [2019] HCA 49, the Australian High Court indicated that the issuance of an undertaking as to damages in the caveat setting is unusual since:

> "… ordinarily, the price of a quia timet injunction is an undertaking as to damages, and that such an undertaking is ordinarily enforceable regardless of whether the claimant had an honest belief on the basis of reasonable grounds in the strength of his or her cause. But the more limited protection afforded by s 74P(1) of the Real Property Act [equivalent to section 143 of the RTA] against the financial consequences of a misdirected caveat may readily be explained on the basis that the holder of an unregistered interest in land under the Torrens system is more vulnerable to inconsistent dealings, and so permitted reasonably to lodge and maintain a caveat without incurring liability to pay compensation, at least unless and until a lapsing notice is served and extension sought under ss 74J and 74K of the Real Property Act." (See para. [113])

[72] Section 143 of the RTA provides that:

> "Any person lodging any caveat with the Registrar, either against bringing land under this Act or otherwise, without reasonable cause, shall be liable to make to any person who may have sustained damage thereby such compensation as a Judge on a summons in Chambers shall deem just and order."

This section provides a statutory liability that a person lodging a caveat without reasonable cause is likely to face. This section makes the caveator liable to pay any person who has sustained damage such compensation deemed just. A person in Silver Sands' position, who suffers loss because of the lodging of the caveat, may resort to this remedy if "there is no reasonable cause" to lodge the caveat. Hence, it may be understandable why making orders, as provided by section 140 of the RTA, is rarely done.

[73] On the facts of this case, given Mr Redlefsen's admission that the lodgement of the caveats was a strategic objective to avoid having to give an undertaking as to damages, the justice of the situation may well have demanded that an order be made

requiring Mr Redlefsen to provide an undertaking as to damages. However, the fact that I have found that damages would be an adequate remedy for Mr Redlefsen and that the balance of convenience laid with the removal of the caveat, there is ultimately no need to consider making any other orders. The learned judge, in concluding that the caveat should remain, to my mind, erred when he declined to consider whether to impose conditions for the retention of the caveat or what conditions to impose, believing he did not have the jurisdiction to do so. There is, therefore, merit in grounds (d) and (e).

Issue 5: Consideration of an order for security for costs in deciding whether to impose conditions on a caveat (ground (f)

[74] After expressing reservations about whether he was empowered to impose an undertaking for damages, the learned judge found that, in any event, an order had already been imposed that provided for security for costs. Consequently, he stated that with regard to the close association between the claim and the caveats, he would refrain from imposing an additional security obligation on Mr Redlefsen.

[75] Counsel indicated that the learned judge misapplied the law in equating security for costs of the proceedings in circumstances where Mr Redlefsen is not ordinarily a resident of Jamaica with an undertaking as to damages that seek to indemnify Silver Sands against damage sustained due to the imposition of the caveats. Counsel contended that each order provides a different form of protection and is based on different considerations. Any potential damage that Silver Sands would sustain could far exceed the amount for security for costs paid by Mr Redlefsen.

[76] This court in **Mount Zion Apostolic Church Jamaica Limited v Joycelyn Cash and Another** [2017] JMCA Civ 44, quoted dicta from Browne-Wilkinson VC **Porzelack KG v Porzelack (UK) Ltd** [1987] 1 All ER 1074, at page 1076, where he said:

> "The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a **fund available within the**

jurisdiction of this court against which it can enforce the judgment for costs." (Emphasis added)

[77] An order requiring an undertaking as to damages seeks to compensate a defendant for the loss he would have sustained by being prevented from doing what he sought to do between the time of the application and trial (see **American Cyanamid Co v Ethicon Ltd** [1975] AC 396, at page 408).

[78] The effect of both orders and the protection they provide are entirely different: an order for security for costs protects the respondent on a judgment for costs, and an undertaking as to damages offers protection for damages sustained due to some restraint placed on a defendant. I agree with counsel for Silver Sands that should Silver Sands succeed in the claim, an order could be made for both costs and damages, with the potential damage sustained by Silver Sands far exceeding an order for security for costs (which relates to costs of the claim and not damages). Consequently, I find that the learned judge erred when he considered the imposition of an order for security for costs as a relevant factor in his determination of whether to impose conditions on a caveat such as an undertaking as to damages. Therefore, ground (f) must also succeed.

Conclusion

[79] In all the circumstances, Mr Redlefsen's choice of lodging a caveat instead of applying for an injunction because the latter option would require an undertaking as to damages is not an abuse of the process of the RTA.

[80] In assessing the evidence with respect to whether damages would be an adequate remedy for Mr Redlefsen, the learned judge failed to consider and, in some instances, admitted to failing to consider relevant evidence. His conclusion based on some of the evidence he considered, in my view, cannot be reasonably explained or justified. After critically assessing the evidence presented, it was apparent that damages were indeed an adequate remedy for Mr Redlefsen.

[81] There was no proper consideration of where the balance of convenience lay. In weighing the likely prejudice to each party, it is apparent that Silver Sands is likely to suffer far more significant irremediable harm than that which would affect Mr Redlefsen should the caveats be removed. Mr Redlefsen, having sought an order for damages in lieu of specific performance, clearly acknowledges that he can be adequately compensated in damages should he succeed on his claim. At the same time, it is questionable whether he could provide adequate compensation to Silver Sands should it succeed on the claim and incur loss, damages, and costs due to the imposition of the caveats. The course that seems more just, in the circumstances, was to remove the caveats.

[82] Although there are similarities between a caveat and an injunction, there are significant differences. Nonetheless, section 140 of the RTA does not preclude the court requiring an undertaking as to damages in court proceedings concerning the retention of the caveat. The reference to "undertaking" in that section may include an undertaking as to damages. However, whether this condition is to be imposed will depend on the facts of each case.

[83] The learned judge's finding that he would not impose an undertaking as to damages as an order for security for costs had already been imposed was palpably wrong. The effect of both orders and the protection they provide are entirely different. Given the substantial value of the lots and the likelihood of significant prejudice to Silver Sands, if the caveat is retained, circumstances could arise where substantial damages may be awarded against Silver Sands, and the attendant costs exceed the amount ordered as security. Accordingly, the order for security for costs ought to have had no bearing on the learned judge's consideration of whether to impose conditions that included an undertaking as to damages.

[84] In the light of the above, while ground (a) of the appeal fails, grounds (c)-(f) succeed. I would order that the appeal be allowed, and the learned judge's decision made on 26 March 2021 be set aside. Although Silver Sands did not seek an amendment to its

application to include the additional caveats and the learned judge made orders relating to the first five caveats, the learned judge noted that caveats had been lodged against 10 lots. The overriding objective in rule 1.1 of the CAR urges courts to deal with cases justly, saving time and expense and not wasting the court's resources. With that in mind, to prevent another application in a similar vein, I would also order that the Registrar of Titles be directed to remove all the caveats that Mr Redlefsen had lodged against the lots owned by Silver Sands.

[85] I see no reason to deviate from the principle that costs should follow the event. Consequently, I would award costs to Silver Sands to be taxed if not agreed.

EDWARDS JA

[86] I have read in draft the judgment of my sister P Williams JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

SIMMONS JA

[87] I too have read the judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA

ORDER

1. The appeal is allowed.
2. The decision made by Laing J on 26 March 2021 is set aside.
3. The Registrar of Titles is hereby directed to remove all the caveats lodged by Mr Lorenz Redlefson against lots owned by Silver Sands.
4. Costs of the appeal to Silver Sands Estates Limited to be taxed if not agreed.