COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/CLE/gen/01129

BETWEEN

GEORGE DAMIANOS
D/B/A DAMIANOS SOTHEBY'S INTERNATIONAL REALTY

Plaintiff

AND

BANK OF THE BAHAMAS LIMITED

First Defendant

AND

WINDERMERE ISLAND NORTH DEVELOPMENT LTD

Second Defendant

AND

JOSEPH CARRY RICH

Third Defendant

AND

CH WINDERMERE LENDING LLC

Fourth Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mrs. Sophia T. Rolle-Kapousouzoglou with Mr. Valdere J. Murphy of Lennox Paton for the Plaintiff
Mr. Luther McDonald and Mr. E. Terry North of Alexiou, Knowles & Co. for the First Defendant
Mr. Sean Moree with Mrs. Erin M. Hill of McKinney Bancroft & Hughes for the Second and Third Defendants
Mrs. Giahna Soles-Hunt of Glinton Sweeting O'Brien for the Fourth Defendant

Hearing Dates: 18 May, 19 May 2021, 12 October, 26 October 2021

Exclusive Listing Agreement - Commission payable on Sale of the Property – Loan Sale Agreement - Transfer of Debenture and Mortgage - Meaning of 'Sale of land' - Conveyancing and Law of Property Act - Procuring breach of contract – Conspiracy - Pleadings - Allegations of conspiracy to injure - Must be specifically pleaded, particularised and proven – Tortious Interference – Contractual Interpretation

On 6 June 2016, the Plaintiff, a licensed real estate broker in The Bahamas entered into an Exclusive Listing Agreement ("the Listing Agreement") with the First Defendant, in its capacity as mortgagee for the sale of property situate on Windermere Island, Eleuthera ("the Property") due to the default of the Second Defendant, as mortgagor of the Property and Third Defendant, as guarantor of all present and future debts which were due to the First Defendant from the Second Defendant under various security documents. The Property was listed for a sale price of US$15.5M. In the event that the Property was sold, the Plaintiff was to receive, among other things, six percent of the sale price as commission.

At all material times, the Second Defendant was a real estate developer, the principal of which is the Third Defendant.

In June 2016, the Plaintiff took steps to market the Property and there were several inquiries from third parties and at least one subsequently made offers to purchase the Property, which were rejected by the First Defendant.

On or about 20 March 2017, the Second Defendant, and CrossHarbor Capital Partners LLC ("CrossHarbor") informed the First Defendant that the Second Defendant was desirous of satisfying the debt owed to the First Defendant and that the Fourth Defendant (a special purpose vehicle incorporated by CrossHarbor) would be the source of the funds used to refinance the debt.

On 12 October 2017, an employee of the First Defendant informed the Plaintiff that the Second Defendant was repaying the First Defendant in full.

On 22 September 2017, a Mortgage Loan Sale Agreement ("Loan Sale Agreement") was entered into between the First Defendant and the Fourth Defendant in the amount of US$7.2M.

On 6 March 2018, pursuant to the Loan Sale Agreement, a Transfer of Debenture and First Legal Mortgage and Supplemental Debenture and assignment of Guarantee were entered into between the First and Fourth Defendant relative to the Property.

The Plaintiff sued the Defendants alleging that the transaction between the First and Fourth Defendants constituted a sale of the Property for the purpose of the Listing Agreement and demanded the payment of a commission pursuant to the Listing Agreement. The First Defendant asserted that the Loan Sale Agreement and subsequent Transfer of Debenture and Mortgage did not constitute a sale of the Property for the purpose of the Agreement.

The Plaintiff also alleged that the Second, Third and Fourth Defendants jointly conspired to tortiously interfere with the Listing Agreement between the Plaintiff and First Defendant. This was denied by the Defendants.

In determining whether the Plaintiff is entitled to the claimed commission, the first issue to be determined by the Court is whether the aforementioned Transfer of Debenture and Mortgage legally constituted a 'sale of the Property' for the purposes of the Listing Agreement. If such claim fails, all claims against the Defendants must fail.

HELD: dismissing the Plaintiff's claim against all the Defendants with costs to the Defendants to be taxed if not agreed

[1] In interpreting a contract, words are to be given their plain and ordinary meaning. The Court, in its interpretative exercise must identify what the parties meant, *"…through the eyes of a reasonable reader, and save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision:"* **Arnold v Britton** [2015] UKSC 36 at para.17. See also: Lord Hoffmann in **Investors Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 WLR 896 and **Avery-Gee and others v Sibley and others** [2021] EWHC 798 (C).

[2] The Transaction did not constitute a sale of the Property and consequently it does not fall within the Listing Agreement. The Plaintiff is therefore not entitled to be paid any commission. There was no breach of contract by the First Defendant.

[3] Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader: **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018.

[4] Allegations of conspiracy to injure by unlawful means must be specifically pleaded, particularized and clearly proved by convincing evidence. The more serious the allegation, the more important it is for the case to be set out clearly and with adequate particularity. To plead it requires at least alleging each of the essential ingredients of the tort. Nothing less will suffice. In the present case, that was not done: **Rollingson v Hollingsworth and others** [202[] EWHC 3568 (QB) at paras [58] and [60] relied upon. See also **Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edn.** (1975) at pp 340-34 and **White Book (1999)** at 18/12/10.

JUDGMENT

Charles Snr. J:

Introduction

[5] On 6 June 2012, the First Defendant ("the Bank") entered into a Multiple Listing Service Agreement ("the Listing Agreement") with the Plaintiff ("Mr. Damianos") to list, market and sell a high end residential resort community on the Island of Windermere, Eleuthera ("the Property") for the listed price of USD$15,500,000.00. The Listing Agreement provided, among other things, that: (i) Mr. Damianos would have the sole and exclusive right, power and authority to act as the Bank's agent for the listing, marketing and sale of the Property; and (ii) the Bank would pay to Mr. Damianos a commission of 6% of the sale price plus VAT if a sale of the Property was completed.

[6] During the currency of the Listing Agreement, the Bank entered into an agreement with the Second Defendant ("WIND") for the repayment of the loan by funding from another financial institution.

[7] Sometime after May 2017, Mr. Damianos discovered that the Bank had conveyed the Property to the Fourth Defendant ("CH Windermere") and had sold, assigned and transferred (i) the debt due by WIND under the loan; (ii) the Debentures, Mortgage, Further Charge, Promissory Note and Guarantee ("the Security Documents") and (iii) all powers rights and remedies contained in these documents to CH Windermere.

[8] Mr. Damianos has taken the position that the transaction between the Bank and CH Windermere ("the Transaction") constituted a "sale" of the Property and he is therefore entitled to his commission. As such, he sued the Bank claiming commission of 6% or BSD$432,000.00 under the Listing Agreement. He also accuses WIND, the Third Defendant, Mr. Rich and CH Windermere of a common intention to conspire to cause him loss through the Bank's breach of the Listing Agreement and seeks damages against them for tortious interference.

Dramatis personae

[9] Mr. Damianos is the President of Damianos Sotheby's International Realty and a licensed broker under the Real Estate (Brokers and Salesman) Act, 1996. Damianos Sotheby's International Realty is a real estate company which specializes in private islands, luxury homes and waterfront properties and is an affiliate of Sotheby's International Realty.

[10] The Bank, is a Bahamian bank. It is incorporated under the laws of the Commonwealth of The Bahamas and, at all material times, was licensed to carry on banking services under the Bank and Trust Regulation Act, 2000.

[11] WIND is a company incorporated under the laws of the Commonwealth of The Bahamas engaged (or formerly engaged) in the proposed development of a high end residential resort community on the Island of Windermere, Eleuthera ("the Property").

[12] Mr. Rich, is the sole beneficial shareholder of WIND.

[13] CH Windermere is a Delaware limited liability and special purpose vehicle ("SPV") incorporated for the purpose of taking title to the rights, title and interest in a loan secured by a debenture and mortgage provided by the Bank to Mr. Rich relative to the Property. CH Windermere is also an affiliate of CrossHarbor Capital Partners of Boston, Massachusetts ("CrossHarbor").

Background facts

[14] These facts are agreed by the parties in their Agreed Statement of Facts and Issues filed on 6 April 2021.

[15] On or about 2003, the Bank advanced a loan ("the Loan") to the developer, WIND. At that time, the Loan was secured by a Debenture and First Demand Legal Mortgage from WIND to the Bank over the Property. Subsequently, in 2005, the Loan was increased and further secured by a Supplemental Debenture and Further Charge of the Property from WIND to the Bank.

[16] WIND defaulted in relation to the Loan and the Bank agreed to forbear its collection of the sums due under the Loan in consideration of (1) a Promissory Note **(**the "Promissory Note") dated 27 June 2011 issued by WIND to the Bank and (2) a Guarantee (the "Guarantee") by Mr. Rich of the same date. For convenience, the Debentures, Mortgage, Further Charge, Promissory Note and Guarantee are henceforth referred to as the "Security Documents".

[17] In the events that followed, WIND apparently faced financial difficulties relative to the proposed development of the Property. Specifically, WIND defaulted in its loan payments to the Bank and, as a result, the Bank became entitled to exercise its powers of sale under the Debenture.

[18] The Bank thereafter sought to enforce its security interest under the relevant Security Documents, which led to the Bank engaging Mr. Damianos as its real estate agent to market and sell the Property.

[19] On 6 June 2016, Mr. Damianos entered into the Listing Agreement with the Bank for the sale of the Property. The Listing Agreement was set to expire on 5 June 2017 subject to an express term that the agreement would be automatically renewed in three (3) month increments unless written termination of the same was received thirty (30) days prior to the expiration date ("exclusivity period"). At all material times the Listing Agreement was valid and effective.

[20] Under the terms of the Listing Agreement, Mr. Damianos possessed "*the sole and exclusive right, power and authority to Act as the owner's real estate agency for the listing, marketing and sale of the property*". The Property was listed for a sale price of USD$15,500,000.00.

[21] In accordance with Clause 1 of the Listing Agreement, the Bank agreed to direct all inquiries concerning the Property from whatever source to Mr. Damianos during the period of the Listing Agreement, which included inquiries from the general public and all other real estate agents.

[22] Further, the Bank was prohibited from listing and marketing the Property with any other broker or salesperson.

[23] In accordance with Clause 2 of the Listing Agreement, the Bank agreed that Mr. Damianos would be paid a commission in the amount of six (6) percent of the sale price plus Value Added Tax ("VAT") on the commission. The Bank further agreed to pay the said commission if, during the term of the Listing Agreement, the Property was sold or the Bank entered into an agreement for the sale of the Property and all closing contingencies to be performed by the purchaser under such agreement were satisfied in accordance with the terms thereof.

[24] The term of the Listing Agreement was twelve (12) months subject to Mr. Damianos and the Bank mutually agreeing in writing to such cancellation or termination of the agreement earlier and/or cancellation by the Bank with 30 days' notice due to non-performance. The Listing Agreement was subject to automatic renewal, in three-month increments, after 5 June 2017, unless written termination was received thirty (30) days prior to the expiration date: Clause 9 of the Listing Agreement.

[25] In June 2016, Mr. Damianos took steps to market the Property. There were several inquiries from third parties.

[26] On 29 June 2016, Mr. Damianos toured the Property with Mr. Rich and the Noteware Group, an interested potential purchaser.

[27] On 3 July 2016, Mr. Rich sent an e-mail to Mr. Damianos and the members of the Noteware Group stating that he looked forward to working with the Noteware Group to move the transaction to an expedited and successful closure.

[28] On 25 January 2017, the Bank was provided with a copy of an offer from another group, "the Bronstein Group" dated 23 January 2017 expressing an interest to purchase the Property in the amount of USD$6,500,000.00.

[29] On 27 February 2017, the Bank made a counter-offer to the Bronstein Group for the sale of the Property in the amount of US$7,600,000.00 plus stamp duty and VAT.

[30] On 14 March 2017, Mr. Damianos provided the Bank with an update via e-mail in respect to the sale of the Property, specifically, the fact that the Bronstein Group had advised that they were in discussions with their lawyers and intended to submit an offer to the Bank.

[31] On 15 March 2017, the Bronstein Group made a gross offer to purchase the Property for USD$7,325,000.00.

[32] On or about 20 March 2017, WIND and CrossHarbor informed the Bank that WIND was desirous of settling its liability and that CH Windermere would be the source of funds used to refinance the debt. On the same date, CrossHarbor wrote to the Bank in support of the offer of repayment made by WIND and advised they would lend the sum of USD$5,100,000.00 in order to retire the Promissory Note and obtain a full release and discharge of all liabilities and obligations of WIND and any of the Bank's guarantors.

[33] By letters dated 5 April 2017 from both WIND and CrossHarbor to the Bank, the offer was amended by WIND and CrossHarbor to repay the loan in full.

[34] On 23 May 2017, the Bank advised Mr. Damianos and the Bronstein Group that they were approached by Mr. Rich to repay the debt in full and that the parties were in discussions. The Bank advised that, in the event that the discussions with Mr. Rich failed, the Bank would re-engage the Bronstein Group if there was still interest.

[35] WIND and CrossHarbor stated to the Bank that they would pay the outstanding balance and that in lieu of a Satisfaction of Mortgage and a subsequent issue of a Debenture and Mortgage by WIND to CrossHarbor, they desired that the Bank transfer the Security Documents to CrossHarbor.

[36] On 12 October 2017, Mr. Earl Beneby, the Corporate Manager of the Corporate and Commercial Banking Department of the Bank, advised Mr. Damianos that WIND was repaying the Bank in full.

[37] On 22 September 2017, a Loan Sale Agreement ("the Loan Sale Agreement") was entered into between the Bank and CH Windermere nominated by CrossHarbor for the purpose. The purchase price for "*all rights, obligations, title and interests of the Seller (Bank) as of the Closing Date, in, to and under the Loan and the Loan Documents"* was USD$7,200,000.00.

[38] On 6 March 2018, pursuant to the Loan Sale Agreement, a Deed of Transfer of Debenture and First Legal Mortgage and Supplemental Debenture and Assignment of Guarantee were entered into between the Bank and CH Windermere in relation to the Property.

[39] The Bank has failed to pay the commission of BSD$432,000.00 to Mr. Damianos on the ground that the Loan Sale Agreement and subsequent Transfer of Debenture and Mortgage did not constitute a sale of the Property for the purpose of the Listing Agreement. Mr. Damianos argued that the Property was sold to CH Windermere. Mr. Damianos also accuses the Defendants of a common intention to cause him loss through the Bank's breach of the Listing Agreement and also seeks damages against WIND, Mr. Rich and CH Windermere for tortious interference.

The issues

[40] The following issues, agreed by the parties, arise for determination:

(1) Whether the Transaction between the Bank and CH Windermere constituted a sale of the Property for the purposes of the Listing Agreement?

(2) If the answer to (1) is yes, whether Mr. Damianos is entitled to the 6% commission; or alternatively, damages as against the Bank for breach of the Listing Agreement?

(3) If the answers to (1) and (2) above are yes, whether Mr. Damianos is entitled to additional damages as a result of the Defendants' collusion relative to the sale of the Property transfer, in particular, was the sale intentionally structured under the guise of a "transfer" in an attempt to assist the Bank in avoiding its obligations under the Listing Agreement to pay the commission to Mr. Damianos and to reduce various transaction costs which may have been required if the loan had been released satisfied and new loan documents prepared and executed?

(4) Did WIND and/or Mr. Rich and/or CH Windermere jointly conspire to result in tortious interference with the Listing Agreement between the Bank and Mr. Damianos?

(5) If the answer to (3) and (4) above are yes, is Mr. Damianos entitled to additional damages as against WIND and/or Mr. Rich and/or CH Windermere for tortiously interfering with the Listing Agreement between the Bank and Mr. Damianos? If so, what is the measure of damages?

The evidence

[41] Mr. Damianos gave evidence and called Jonathan Morris as his witness. The Bank called Mr. Earl Estes Leonard Beneby as its sole witness; Mr. Rich testified on behalf of WIND and, on his own behalf; Samuel T. Byrne and Eric Christensen testified on behalf of CH Windermere.

Discussion

Issue 1: Was the transaction between the Bank and CH Windermere a sale of the Property?

[42] Mr. Damianos submitted that the Transaction amounted to a sale of the Property for the purpose of the Listing Agreement and, in accordance with Clause 3 of that Agreement, he is entitled to commission in the amount of six percent (6%) of the purchase price [i.e. BSD$432,000.00 as at 6 March 2018]. The Bank together with

the other Defendants all argued that the Transaction did not constitute a sale for the purposes of the Listing Agreement.

[43] The Court therefore has to first consider whether or not the Transaction between the Bank and CH Windermere constitutes a sale of the Property for the purposes of the Listing Agreement. This is, strictly speaking, a legal issue.

[44] The parties have all agreed that, in interpreting a contract, words are to be given their plain and ordinary meaning. The Court, in its interpretative exercise must identify what the parties meant, *"…through the eyes of a reasonable reader, and save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision:"* **Arnold v Britton** [2015] UKSC 36 at para.17. This is trite law.

[45] A landmark case which expounded the principles governing the construction of a document is **Investors Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 WLR 896. Encapsulating, Lord Hoffmann stated: *'**Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract**' and "The meaning which a document … would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; **the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean."** The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.' However: 'if one would nevertheless conclude from the background that something must have gone wrong with the language, **the law does not require judges to attribute to the parties an intention which they plainly could not have had***.'

[46] Lord Hoffman's sage advice has been frequently used and restated. In **Avery-Gee and others v Sibley and others** [2021] EWHC 798 (Ch), the court had to determine several disputes with respect to the interpretation of a commercial contract. Pearce J. applied the following summary of general principles:

> **"27. The principles of contractual construction are well-established. In brief:**
>
> **(a) The aim of interpretation is to determine what the parties meant by the language that they used in the contract. The Supreme Court put it thus in Rainy Sky SA v Kookmin v Bank [2011] 1 WLR 2900 at paragraph [14]:**
>
> > **"the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant."**
>
> **(b) In determining the intention of the parties, the Court may have regard to the relevant factual context in which the contract was agreed, as described by Lord Hoffmann in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at 912:**
>
> > **"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."**
>
> **(c) While the circumstances in which the contract was agreed may be considered by the Court in determining the objective intention of the parties to that contract, the Court will not have regard to pre-contractual negotiations (Chartbrook Ltd v Persimmon Homes [2009] 1 AC 1101).**
>
> **d) The usual rule is that, where parties to an agreement reduced that agreement to writing and agreed or intended that the writing should be their agreement then external evidence of earlier oral discussions or written communications is excluded: see Chitty on Contracts 1, 13-109.**
>
> **e) The usual rule may be excluded if the Court concludes that the parties agreed and intended that there should be terms additional to those contained in the written agreement but,**

absent this, where an agreement has been reduced to writing then the rule will apply. But, in practice, where there is a complete written contract, it is likely to be difficult to conclude that the parties also intended that there be some further or different unwritten terms applicable: see Chitty on Contracts, 13-111.

(f) Only those facts or circumstances that existed at the time the contract was made and were known, or reasonably available to, both parties may be taken into consideration for the purposes of interpreting a contractual provision (Arnold v Britton [2015] AC 1619 at [21]).

g) In the case of commercial agreements, a relevant consideration is whether the construction is consistent with a commercially sensible outcome. In Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 at 771, Lord Steyn held:

> **"In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties."**

(h) Construction is an iterative process, that involves checking the rival meanings against other provisions of the document and investigating the commercial consequences (Re Sigma Finance Ltd [2010] 1 All ER 571, per Lord Mance at [12]).

(i) It is important that due weight is given to the context in which words appear. In Wood v Capita Insurance Services Ltd [2017] AC 1173, Lord Hodge held (at [10]):

> **"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."**

(j) The objective view taken of the intention of the parties means that a contract cannot be avoided simply because the

> **subjective belief of one of the parties as to the effect of the agreement made differs from the view that a reasonable person would take: see Chitty on Contracts, 13-058 and Smith v Hughes (1871) LR 6 QB 597.**
>
> **28. In support of its proposed construction, the Opposing Respondents invoke the contra proferentem doctrine. In Tam Wing Cheun v Bank of Credit and Commerce Hong Kong Ltd [1996] 2 BCLC 69 at 77, Lord Mustill put it thus:**
>
> > **"… The basis of the contra proferentem principle is that a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not."**

[47] Learned Counsel Mrs. Rolle-Kapousouzoglou, who appeared as Counsel for Mr. Damianos, submitted that upon a consideration of the language used and ascertaining what a reasonable person who has all the background knowledge would have understood the parties to the Listing Agreement to have meant leads to only one conclusion, which is, the Property was *"sold"* to CH Windermere.

[48] Mrs. Rolle-Kapousogzoglou alluded to a plethora of cases at common law which provide useful guidance relative to the meaning of the word "sale" and succinctly concluded that, in English law, a sale means the exchanging of property for money. She bolstered her argument by citing the case of **Inland Revenue Commissioners v Littlewoods Mail Order Stores Ltd** [1963] AC 135. There, the House of Lords considered the cancellation of a lease in return for the transfer of a freehold. The issue was whether this constituted a conveyance, or transfer, within the meaning of a sale in the Stamps Act. The House of Lords held that it was not. Viscount Simonds stated at pages 151-152 that:

> "**If stamp duty is to be assessed on the instrument as a "conveyance or transfer on sale" an extended meaning must be given to the words "on sale**." For neither in form nor substance is the exchange a sale according to ordinary legal terminology. I quote, as did Harman L.J., from Benjamin on Sale, 8th ed, p.2: It [a sale] may be defined "to be a transfer of the absolute or general property in a thing for a price in money. **Hence it follows that, to constitute a valid sale, there must be a concurrence**

> **of the following elements, viz : (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised."** [Emphasis added]

[49] According to Mrs. Rolle-Kapousouzoglou, in the present case, the four (4) elements as referred to in Viscount Simonds' speech are undeniably present vis-à-vis the Transaction between the Bank and CH Windermere, namely:

(1) The Bank and CH Windermere were competent to contract;

(2) The Bank and CH Windermere agreed to enter into the Transaction relative to the sale of the Property;

(3) The Bank (the seller) transferred the Property to CH Windermere (the buyer) and;

(4) CH Windermere paid the Bank US$7,200,000.00 for the Property.

[50] Mrs. Rolle-Kapousouzoglou also referred to section 2 of the Conveyancing and Law of Property Act, 1909 ("the Act") for the statutory definition of a 'conveyance', 'purchaser' and 'property'. She argued that, as a matter of construction, based on statute as well as at common law, the Property was sold to CH Windermere.

[51] She also alluded to Clauses 1 and 2 and Recital H and of the Conveyance which provides:

> **"1. In pursuance of the said agreement [i.e. Loan Sale Agreement] and for the consideration aforesaid now paid by the Transferee to the Transferor (the receipt of which sum the Transferor hereby acknowledges) the Transferor as Mortgagee and at the request of the Mortgagor hereby sells, assigns and transfers to the Transferee ALL THAT the Loan Documents and the outstanding amounts of the Loan and all other sums of money secured by or otherwise payable to the Transferor under the Loan Documents and all interest now owing or henceforth to become due thereon and the full benefit of all powers rights remedies and securities contained in the Loan Documents and thereby expressly or impliedly or by law conferred upon mortgagees TO HOLD the same unto the Transferee and its successors in title and assigns absolutely."**

> **2. In further pursuance of the said agreement and for the consideration aforesaid the Transferor as Mortgagee at the request of the Mortgagor hereby grants conveys assigns and transfers unto the Transferee ALL THAT the Existing Collateral Property contained or otherwise comprised in the Loan Documents TOGETHER WITH all rights and benefits appurtenant thereto…but subject to such right or equity of redemption now subsisting with regard to the Existing Collateral Property by virtue of the Loan Documents and subject also to the RBC Debenture."**
>
> **Recital H provides as follows:**
>
> **"(H) The Transferor [i.e. the Bank] and the Transferee [i.e. CH Windermere] have entered into that certain Mortgage Loan Sale Agreement dated the 22nd day of September A.D., 2017, pursuant to which the Transferor has agreed to sell, assign, transfer and convey to the Transferee, and the Transferee has agreed to purchase and assume all of the Transferor's right, title, interest, obligations and liabilities in, to and under the Loan, the Loan Documents and the Existing Collateral Property for the net purchase price of Seven Million Two Hundred Thousand Dollars (US$7,200,000.00) in the said currency."** [Emphasis added]

[52] Mrs. Rolle-Kapousouzoglou argued that the language of the Conveyance clearly and explicitly reflects that the Property was sold to CH Windermere and that all rights and security interests have been transferred to CH Windermere as purchaser. CH Windermere purchased and assumed all of the Bank's rights, title, interest, obligations and liabilities relative to the Property.

[53] Learned Counsel further argued that when one considers that the Listing Agreement refers to the Bank as the *'Owner'*, it is impossible to contend that the Conveyance of the Property was not a sale within the meaning of section 2 of the Act and the Listing Agreement for the following reasons:

1. It is trite law that, as the original mortgagee, the Bank held the legal interest in the Property. This legal interest was extinguished as evidenced in the Conveyance and Assignment of Guarantee vis-à-vis the Bank and CH Windermere both of which were lodged and recorded on 26 April 2018. Mr. Beneby accepted during cross-examination that the Bank no longer has an interest in the Property;

2. CH Windermere obtained a mortgagee's permit in accordance with the International Persons Landholding Act which means that CH Windermere was, at all material times, a mortgagee in relation to the Property. Having paid valuable consideration in the amount of $7,200,000.00 to the Bank, CH Windermere took over the Bank's legal interest in the Property. As such, CH Windermere is a 'purchaser' for the purposes of the Act since a purchaser includes a mortgagee who takes property for valuable consideration and;

3. Pursuant to the terms of the Loan Sale Agreement and the Conveyance, the Bank conveyed, assigned and transferred the Property to CH Windermere.

[54] Mrs. Rolle-Kapousouzoglou next submitted that the completion of the Conveyance between the Bank and CH Windermere (i.e. the signing, sealing and delivery of the Conveyance) shows that there was a *'sale'* of the Property for the purposes of the Listing Agreement and Section 2 of the Act. She also relied on the case of **Robert Ferguson & Co Ltd v Jane Ferguson** [1924] 1 IR 22 at page 30 which, in my opinion, does not assist her. Andrews LJ, at pages 29-30 had this to say:

> **The Act of 1892 (similar to section 2 of our Act) contains no definition of the term "sale," but such a definition is to be found in sect. 2, sub-s. 8, of the Act of 1881. This section contains a very wide definition of the word "purchaser," including a lessee or mortgagee and an intending purchaser, with a corresponding meaning for the term "purchase". The section concludes with the words: "But sale means only a sale properly so called." The contrast is clear. As the term "purchase" included intended purchase, one would naturally expect that the term "sale" would include intended sale. The contrary is the case. The definition of "sale" is introduced by the arrestive conjunction "but," which clearly conveys that the word does not bear that meaning which would be expected to follow from the definition of "purchase," which immediately precedes. It is not sufficient, therefore, to satisfy the expression "sale" that premises should be intended to be sold, as are the premises in this case, if the Court grants the necessary relief against forfeiture. There must be a sale completed by conveyance, or at least an unconditional contract capable of being enforced by a decree for specific performance. Nothing less than this could, in my opinion, be described as "a sale properly be called."**

[55] Section 2 of our Act mirrors the UK Act. In **Robert Ferguson**, the Court of Appeal, considering all the circumstances of the case, held that **a sale** within sect 2, sub-s. 3(a) of the Conveyancing Act, 1892 **must either be completed by conveyance or be an absolute contract for sale.**

[56] In pressing on with her arguments, Mrs. Rolle-Kapousouzoglou submitted that the fact that the parties constructed the Transaction under the guise of a *"transfer"* does not adversely impact the position advanced by Mr. Damianos as this was done to ensure that CH Windermere preserved the lien priority over the Property and reduce various transactions costs such as stamp tax which was admitted at paragraph 8 of the Affidavit of Samuel T. Byrne ("the Byrne Affidavit") filed on 27 January 2021 where Mr. Byrne deposed that "[T]he purchase of the Loan was a simple loan sale transaction, structured to ensure the Fourth Defendant [i.e. CH Windermere] preserved the lien priority of the Loan over other potential claimants and reduced various transactions costs, which may have been required if the loan had been released, satisfied and new loan documents prepared and executed…."

[57] Mrs. Rolle-Kapousouzoglou also referred to the evidence adduced under cross-examination of Mr. Beneby, Mr. Rich and Mr. Byrne where these witnesses accepted that the transaction was structured to ensure CH Windermere preserved the lien priority over the Property and reduce various transactions costs for the parties.

[58] Learned Counsel insisted that, despite the manner in which the Transaction was structured, once the word *"sale"* is given its natural and literal meaning in the context of this case, the Bank and CH Windermere cannot alter the effect of the Conveyance by insisting that it was not a *"sale"* but only a *"transfer"* to evade contractual liability and other potential subsisting obligations.

[59] Mrs. Rolle-Kapousouzoglou fought hard to persuade the Court that the Transaction entered into by the Bank and CH Windermere can best be described as a mere accommodation in that the Bank acceded to a request of WIND in relation to the transfer so as to recover the monies due and owing to it under the mortgage and

such a decision cannot absolve the Bank to shirk from its contractual obligations to Mr. Damianos.

[60] Mrs. Rolle-Kapousouzoglou also took issue with the fact that WIND, Mr. Rich and CH Windermere have not disclosed any documentary and contemporaneous evidence in these proceedings which confirms that CH Windermere paid the funds to the Bank on behalf of WIND. She submitted that, during cross examination, Mr. Beneby testified that he had not seen any agreement between WIND and CH Windermere nor was he aware of any separate or private arrangement between WIND and CH Windermere.

[61] Mrs. Rolle-Kapousouzoglou next contended that the Transaction between the Bank and CH Windermere does not fall within the ambit of Section 17 of the Act on the basis that the mortgagor was not *"entitled to redeem "at the date of the Transaction [i.e. 6 March 2018*]", nor did the mortgagor redeem based on Mr. Beneby's evidence.

[62] According to her, the Bank was exercising its own power to assign the mortgage debt and its interest in the Property to CH Windermere for valuable consideration on the basis that it [the Bank] was not bound to assign and/or convey the Property at the direction of WIND and/or Mr. Rich.

[63] In her very comprehensive submissions, Mrs. Rolle-Kapousouzoglou also alluded to the failure of the Bank to direct the inquiries from CH Windermere to Mr. Damianos during the subsistence of the Listing Agreement which, in her opinion, amounted to a breach of contract. She stated that, at all material times, the Listing Agreement was in force and therefore, the Bank breached the Listing Agreement. She refuted Mr. Beneby's evidence that the Bank ended its relationship with Mr. Damianos because, quite correctly, any termination of the Listing Agreement has to be in writing. In this case, it was not.

[64] Now, a convenient starting point is to look at certain provisions of the Act. Under the Act, mortgages are created by a conveyance of the legal estate to the

mortgagee, subject to the mortgagor's right to a reconveyance on payment of the debt.

[65] Section 2 provides that:

> **""conveyance" includes assignment, appointment, lease, settlement and other assurance, and covenant of surrender, made by deed, on a sale, mortgage, demise or settlement of any property, or on any other dealing with or for any property; and "convey" has a meaning corresponding with that of conveyance;**
>
> **"property" includes real and personal property and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest.**
>
> **"purchaser" includes a lessee or mortgagee, and an intending purchaser, lessee or mortgagee, or other person, who, for valuable consideration takes or deals for any property; and "purchase" has a meaning corresponding with that of purchaser; <u>but "sale" means only a sale properly so called</u>."**"[Emphasis added]

[66] Conspicuously, the Act does not define what it meant by "**a sale properly so called**" but it seems reasonable to extrapolate that it must mean a transfer, other than by mortgage, for consideration which would be consistent with both the usual commercial meaning of the word "**sale**" and the distinction that the Act frequently makes between a conveyance of property by way of a sale and a conveyance of property by way of mortgage. The distinguishing feature of a conveyance by way of mortgage is the insertion of an express proviso for redemption: The transfer of debenture and First Demand Legal Mortgage from the Bank to CH Windermere makes the conveyance of the "Existing Collateral Property" subject to such right or equity of redemption now subsisting with regard to the Existing Collateral Property by virtue of the Loan Documents and subject also to the RBC Debenture.

[67] As learned Counsel Mr. McDonald who appeared for the Bank correctly suggested, section 3(14) uses the same phrase. It provides: **"This section applies only to titles and purchasers <u>on sales properly so called</u>, notwithstanding any interpretation in this Act**". Section 3 deals generally with matters which are more relevant to conveyances other than by way of mortgage.

[68] Mr. McDonald also correctly submitted that section 7 – Implied Covenants - is yet another example of the Act making such distinction. Section 7(1)(a) provides that "*[I]n a conveyance for valuable consideration, other than a mortgage", the following covenant by a person who conveys and is expressed to convey as beneficial owner namely – "…that subject-matter shall remain to and be quietly entered upon, received and held, occupied, enjoyed and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys…"* This means, among other things, that the vendor covenants that the purchaser under such a contract is entitled to undisturbed possession of the property that is conveyed.

[69] In contrast, section 7(1)(c) implies different covenants in cases where property is conveyed by way of mortgage. For example, under the implied covenant in section 7(1)(c), the person to whom the property is conveyed (the mortgagee) cannot take possession of the property unless the mortgagor defaults in paying the money intended to be secured by the conveyance.

[70] Additionally, in a codification of the common law equity of redemption, under section 7(1)(c) the mortgagor has the right to recover the property from the mortgagee on payment of the debt. Learned Counsel contended that a good illustration of this point in respect of unregistered land is to be found in the treatise **Irish Land Law (Second Edition)** by J.C.W. Wylie where the learned editor stated, at para. 12.04 that:

> **"The starting point of equity's approach to a mortgage transaction was to regard it as being in substance a secured loan only. To the extent that the mortgagee obtained an interest in property it should be a device to provide him with security and nothing more. This approach led to the establishment of several principles which remain to this day cornerstones of the law of mortgages."** [Emphasis added]

[71] Later on, at para. 12.32, the learned editor, in dealing with conveyance of fee simple stated:

> **"As the name indicates, this form of mortgage involves the borrower (mortgagor) in transferring the legal title to his land to the lender (mortgagee) so as to confer legal ownership on the lender. Such a conveyance is distinguished from a sale by insertion in the conveyance of an express proviso for redemption..."**

[72] In addition, since a mortgage by conveyance transfers the legal title to the land to the mortgagee, it follows that any subsequent mortgages created out of the same land by the mortgagor are, or necessity, equitable only, that is, they are mortgages of the interest in the land retained by the mortgagor after the first legal mortgage, his equity of redemption.

[73] As mentioned earlier, Clause 2 of the Conveyance provides as follows:

> **"In further pursuance of the said agreement and for the consideration aforesaid the Transferor as Mortgagee at the request of the Mortgagor hereby grants conveys assigns and transfers unto the Transferee ALL THAT the Existing Collateral Property contained or otherwise comprised in the Loan Documents TOGETHER WITH all rights and benefits appurtenant thereto…but subject to such right or equity of redemption now subsisting with regard to the Existing Collateral Property by virtue of the Loan Documents and subject also to the RBC Debenture."**

[74] Section 17 is particularly significant to the Transaction. It outlines that where a mortgagor is entitled to redeem, he can require the mortgagee to assign the mortgage debt to a third party instead of re-conveying the property itself. Section 17(1) expressly states:

> **"Where a mortgagor is entitled to redeem he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third persons, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly**."[Emphasis added]

[75] In my opinion, Mr. McDonald is correct in submitting that this is exactly what happened in this case. When Mr. Damianos and the Bank entered into the Listing Agreement, against the background of this legislative scheme, they would have

intended “sale” to mean “**a sale properly so called**”, a real sale (so to speak) and not a conveyance by way of mortgage.

[76] In my judgment, the Transaction was an assignment, amendment and restatement of the Loan Documents and at no point did WIND forfeit its beneficial interest in the Property or its right of redemption.

[77] Mrs. Rolle-Kaposouzoglou argued that the nub of the Bank’s defence on the applicability of section 17 of the Act is unsustainable and doomed to fail because that section only arises when a mortgagor is *“entitled to redeem”.* A mortgagor is only “*entitled to redeem*” the mortgage if the mortgagor has made proper tender of the entire amount payable under the mortgage. Counsel buttressed her argument by relying on the decision of **Haddow v Simala** [2010] QSC 245 at para. 16. She submitted that, in the event that Mr. Rich was entitled to redeem, which Mr. Damianos denied, Mr. Beneby stated during his cross-examination that based on his knowledge, Mr. Rich never exercised his right to redeem and Mr. Beneby’s evidence is consistent with the contemporaneous documentary evidence.

[78] Notwithstanding, argued Mrs. Rolle-Kapousouzoglou, a mortgagor does not qualify to exercise a right to request a mortgagee to convey the property as directed by merely tendering the mortgage monies (which is not the case here in any event). The mortgagor must also become entitled to a surrender or a re-conveyance. She relied on **Cousins, The Law of Mortgage,** (Third Edition) at para. 5-12 to validate her argument. She further argued that WIND was never in any such position as, at all material times, it had been in default. She alluded to Mr. Beneby’s evidence during cross-examination where he confirmed this. Therefore, insisted Counsel, WIND as mortgagor was not entitled to redeem in accordance with Section 17 of the Act. The mere use of the word *‘request’* in Clause 1 of the Conveyance could not alter these principles of law and confer on a mortgagor rights, he is not entitled to claim by virtue of being in default.

[79] In my judgment, the submissions advanced by Mrs. Rolle-Kapousouzoglou that the thrust of the Bank's defence is that the Transaction between the Bank and CH Windermere falls within section 17 of the Act appear misconstrued. As I understand the Bank's argument, it [the Bank] is saying the Property continues to be owned by WIND subject to a mortgage. A transfer of mortgage as required by section 17 of the Act cannot be a "sale" of the Property for the purposes of the Listing Agreement. In his evidence, Mr. Beneby encapsulated that the payment represented the repayment of the loan in full.

[80] Mr. McDonald fortified his argument that the Transaction between the Bank and CH Windermere was not a 'sale' of the Property by citing the case of **Thompson v. British Berna Motor Lorries Limited** [1917] Vol. 33 TLR page 187. In that case, the plaintiff sought commission for motor chassis "sold" by the defendants and the question arose whether the Plaintiff was entitled to claim commission on a number of chassis that had been commandeered by the British Government. At page 188, the Court held:

> **"[T]hat the word "sold" in clause 12 of the agreement must receive its ordinary business and legal interpretation. It denoted and connoted a contract. It indicated that there had been a *consensus* between the buyer and seller. Impressment or commandeering was the negation of contract. The chassis in question were requisitioned by the War Office in pursuance of their statutory authority…. There was no contract with regard to them, and there was no *consensus.* He was bound to hold that there was no sale within the meaning of the clause, and the plaintiff was not entitled to commission…"**

[81] It is agreed by the parties that the language used in the Listing Agreement must be given a commercially sensible construction which no doubt, is more likely to give effect to the intention of the parties.

[82] In considering the language of the Listing Agreement, Mr. McDonald listed a number of factors which, according to him, support a conclusion that the parties did not intend that the commission would be payable in the event that (as happened), the Bank transferred the mortgage to another lender namely:

1. The Listing Agreement provides that commission will be payable if "**the Property is <u>sold</u> or the [Bank] <u>enters into an agreement for the sale</u> of the Property.**" It does not indicate if the Property is "transferred" or "conveyed". The parties must have been aware that both in ordinary commercial usage and under the Act, the words "sold" and "conveyed" are not synonymous;

2. The Listing Agreement prohibits the listing and marketing of the Property "**with any other broker or salesperson**" during the currency of the agreement. It does not mention financial institutions, which arguably it should have if the parties had intended to capture a refinancing transaction and;

3. The Listing Agreement includes a representation by the Bank that it has provided, and the agreement sets out, all relevant information in relation to the Property. There is no information about the mortgage or the debt.

[83] I agree with these points. In addition, the Listing Agreement does not even mention the fact that the Bank is a mortgagee. If the parties had intended to capture a sale of the debt and the consequential conveyance by way of mortgage, the fact of the mortgage would plainly be a relevant factor.

[84] Furthermore, if Mr. Damianos is correct that the Transaction constituted a sale of the Property, the commission would be payable if the debtor repaid the debt and exercised his equity of redemption. In that event, the Bank would have had to convey the Property to the debtor. It follows that Mr. Damianos' argument would apply equally to that transaction and it would be equally wrong as that interpretation would be inconsistent with business common sense.

[85] Undeniably, the Stamp Act, Ch. 370 also recognizes the distinction between a conveyance by way of sale and a conveyance by way of mortgage; the former attracts 10% and the latter 1%.

[86] For all of the above reasons, I agree with the Bank that the Transaction between itself and CH Windermere was not a sale of the Property for the purposes of the Listing Agreement and, accordingly, Mr. Damianos is not entitled to a commission.

Buttressing the Bank's position

1) Submissions advanced on behalf of WIND and Mr. Rich

[87] Learned Counsel Mr. Moree, who appeared for WIND and Mr. Rich, submitted that it is accepted by all parties that any claims against WIND and Mr. Rich only arise if the Court finds that the Transaction constitutes a "sale" of the Property for the purposes of the Listing Agreement. Since the Court has found that the Transaction did not constitute a "sale" of the Property, the claims by Mr. Damianos against WIND and Mr. Rich for conspiracy and tortious interference must fail.

[88] Mr. Moree alluded to **Stroud's Judicial Dictionary of Words and Phrases**, Vol. 3 Q-Z, Sixth Edition, 2000 at page 2352 where the learned authors describe "sale" as:

> **"[T]he exchanging of property for money and applies to a sale of land and to a sale of chattels equally. <u>An agreement to extinguish an existing debt if land is transferred is not a contract for the sale of land.</u>"** [Emphasis added]

[89] The learned authors referred to **Simpson v Connolly** [1953] 1 W.L.R. 911 to support their contention which, learned Counsel Mrs. Rolle-Kapousouzoglou argued, is wholly distinguishable from the present case. She argued that, in **Simpson**, the Court held that the transaction between the parties did not constitute a sale of land because the consideration between the parties was not monetary but rather an agreement to extinguish an existing debt. In the present case, Counsel contended that the consideration was monetary in that CH Windermere paid $7,200,000.00 million to the Bank to purchase the Property. Mrs. Rolle-Kaposouzoglou intimated that if the consideration in **Simpson** was monetary, the Court would have held that the transaction between the parties constituted a sale.

[90] It is therefore pertinent for me to look at **Simpson.** The brief facts are that the defendant owed the plaintiff funds and agreed to transfer a parcel of land to the

plaintiff in settlement of the debt. When the defendant did not transfer the parcel of land to the plaintiff, the plaintiff sued for the debt owed. The court was asked to determine whether the agreement between the parties was a contract for the sale of land or a contract relating to the debt due. The court held that it was not, properly so called, a contract for the sale of land, because it was not really an agreement to hand over land in return for money; it is an agreement to extinguish an existing debt if land is transferred.

[91] Finnemore J stated:

> **'It is argued for the plaintiff that a sale means in the case of land, as in the case of goods, an exchange of land (or goods) for money. It is laid down clearly in the books which deal with sale of personal chattels that a sale or a contract of sale is an agreement to exchange goods for money, although it is possible that part of the consideration might be something other than money, as for example, when a person buys a new car for an agreed price, part of which he pays in money and part of which he satisfies by means of surrendering another car. <u>But the general principle of English law in regard to sale is that a sale means the exchanging of property for money. That applies – to a sale of land and to a sale of chattels equally. The real problem is whether it is still a sale if no money passes but one person says to another, to take this case, if you give me a piece of land, I will excuse you your debt which you owe me.</u>' That is the point, put as shortly and compactly as I can put it on this particular part of the case. <u>Is it the conditional discharge of a debt by the handing over of land, or is it the sale of land, that is to say, the handing over of land or a contract to transfer land in return for money</u>?**
>
> **<u>In my view it is a fine point, but, doing the best I can, in the absence of authority, on the principles so far as I understand them, I have come to the conclusion that it is not, properly so called, a contract for the sale of land, because it is not really an agreement to hand over land in return for money; it is an agreement to extinguish an existing debt if land is transferred.</u>"** [Emphasis added]

[92] Mr. Moree submitted that the transaction which was the subject matter of **Simpson** contemplated the transfer of beneficial ownership from the defendant to the plaintiff in settlement of a debt. Despite the transfer of legal **<u>and</u>** beneficial ownership, the English Court did not find that it amounted to a sale of land for the reasons set out above. He submitted that, in the present case, considering the Transaction did not result in the transfer of beneficial ownership of the Property, but was limited to the

transfer of the legal ownership, it is even more apparent that the Transaction could not properly be called a sale of land. I agree.

[93] Mr. Moree next submitted that, unlike in a sale of property, the Bank was not interested in realizing the market value of the Property; rather its sole objective was to recover the full amount due under the Loan (or as close to the full amount as possible). It is not disputed that the sum which was paid in satisfaction of the Loan was far less than the market value of the underlying security.

[94] Mr. Moree next submitted that, in his evidence, Mr. Damianos stated that the Bank rejected an offer of $7,000,000.00 for the sale of the Property but later accepted $7,200,000.00 from CH Windermere. According to him, this is incorrect and represents a gross misunderstanding of the Transaction and it is entirely understandable that the Bank would reject an offer of $7,000,000.00 for the outright sale of the Property which was valued by Mr. Damianos at more than double that price ($15,500,000.00). I agree with Mr. Moree that had the Bank agreed to an offer of $7,000,000.00 (or thereabouts) for the sale of the Property, that would have undoubtedly exposed it Bank to a claim against them for selling the Property at a grossly undervalued price. Therefore, the amount of the consideration for the sale of the Loan ($7,200,000.00) supports the position that the sale was of the debt and not the Property (which was listed by Mr. Damianos at $15,500,000.00).

[95] Mr. Moree further argued that the Transaction could not have constituted a sale of the Property as there was no change in beneficial ownership. The beneficial interest in the Property remained unaltered and was always held in WIND as was the equity of redemption. He argued that Mr. Damianos is silent on this point that there was a transfer of both the legal and beneficial estate of the Property from the Bank to CH Windermere. In this case, the beneficial interest was never disturbed. Nor was the equity of redemption.

[96] In this regard, Mr. Moree referred to the case of **Underwood v Revenue and**

Customs Commissions [2009] STC 239 where the Court of Appeal held that a disposition of land occurs when there is a disposal of the entire beneficial interest. Lawrence Collins LJ stated at para. 40:

> **"…A house owner who has contracted to sell the house might well regard himself or herself as having disposed of the house. Plainly "disposal" is used in a special sense to refer to a legal concept (just as in the familiar discussion of the meaning of "possession" or "ownership" in the traditional texts on jurisprudence), and it was common ground on this appeal that <u>it meant disposal of the entire beneficial interest in the asset</u>."** [Emphasis added]

[97] Mr. Moree further substantiated his arguments by referring to section 23 of the Act which provides that where a mortgagee exercises its power of sale, it "*convey[s] the property sold,* ***for such estate and interest therein*** *as is the subject of the mortgage.*" He insisted and, quite correctly that, at all material times, and even today, the beneficial ownership of the Property is still with WIND. Furthermore, WIND retained the equity of redemption at all material times.

[98] Mr. Moree further stated that Mr. Damianos is legally unable to receive a commission following the assignment, amendment and restatement of the Loan Documents as he is not a licensed mortgage broker. Section 4 of the Financial and Corporate Service Providers Act 2020 ("FCSPA") states that no person shall carry on the business of "financial and corporate services" in or from within The Bahamas without a license. The definition of "financial services" at section 2 of FCSPA includes mortgage broking. The Listing Agreement was entered into in 2016. However, the same applied under the FCSPA, 2000. As of March 2021, Mr. Damianos was not licensed under the FCSPA nor the Securities Industries Act, 2011 and thus, not able to act as a mortgage broker. Therefore, he would not be entitled to receive a commission pursuant to the Listing Agreement or otherwise as the Transaction amounted to the sale/transfer of debt, not real estate.

[99] During cross examination by learned Counsel Mrs. Soles-Hunt, who appeared for CH Windermere, Mr. Damianos conceded that he does not hold a license as a mortgage broker.

[100] For all of the reasons advanced by Mr. Moree, once again, I come to the same conclusion that the Transaction did not constitute a sale of the Property for the purposes of the Listing Agreement. Consequently, Mr. Damianos' claims of conspiracy and tortious interference against WIND and Mr. Rich must fail.

2) Submissions advanced on behalf of CH Windermere

[101] Like the other Defendants, Mrs. Soles-Hunt, appearing as Counsel for CH Windermere, also submitted that the Transaction did not constitute a sale of the Property within the Listing Agreement. She also relied on **Simpson** and invited the Court to apply the same reasoning in that case to find that the Transaction in this case was not a sale of the Property.

[102] Mrs. Soles-Hunt argued that, in the present case, there was a refinancing of a mortgage, which ought not to be classified as a sale of land since all parties confirmed that WIND remained the owner of the Property at all material times.

[103] To substantiate her submissions, learned Counsel referred to the fact that Mr. Damianos appraised the value of the Property at $15,500,000.00 while the debt was ultimately sold for $7,200,000.00. The sale of the Loan Documents which was valued at $7,200,000.00 was collateralized by the Property valued at $15,500,000.00. The value of the Property far exceeded the value of the debt and therefore, they could not be the same. The transfer of the Property accompanied the sale of mortgage debt. The Property itself was in no way "sold".

[104] She correctly submitted that, at no time did Mr. Damianos market the debt, nor could he have, since he was not a licensed mortgage broker. According to her, the debt and the land cannot be said to be one of the same. Parliament itself has made a distinction as noted in the Stamp Act, Ch. 370 in which there is a difference between the rate charged for a transfer of a mortgage and that charged for the sale of real estate, i.e. 1% and 10% respectively.

[105] Mrs. Soles-Hunt next submitted that this is a classic case of the transfer of the mortgage and such mortgage refinancing commonly takes place in The Bahamas.

[106] As the Transaction did not constitute a sale of the Property for the purposes of the Listing Agreement, the claims against all of the Defendants must fail. Therefore, the claims of conspiracy and tortious interference against WIND, Mr. Rich and CH Windermere consequently fail.

[107] Given my finding, I can end this Judgment here but, in the event that I were wrong to come to this finding, I shall carry on.

Conspiracy

[108] Learned Counsel Mrs. Rolle-Kapousouzoglou submitted that the Defendants knowingly conspired to circumvent Mr. Damianos and intentionally structured the sale of the Property under the guise of a '*transfer'* in an attempt to aid the Bank in avoiding its obligations under the Listing Agreement to pay commission to Mr. Damianos and/or for tax benefits for both the Bank and CH Windermere. Accordingly, Mr. Damianos suffered loss and damage as a result of the actions of the Defendants.

[109] In paragraphs 43 and 44 of his Amended Writ of Summons with Statement of Claim filed on 25 May 2021, Mr. Damianos alleged that:

> "43. The Defendants well knew that the Plaintiff had been engaged by the First Defendant to market and sell the property and in combination with a common intention conspired to cause the Plaintiff loss by the First Defendant's breach of the listing agreement.
>
> 44. In combination, the Second to Fourth Defendants have knowingly induced the First Defendant to breach its agreement with the Plaintiff by the sale of the property with the intention of causing loss and damage to the Plaintiff.
>
> AND THE PLAINTIFF CLAIMS
>
> 1. ……
> 2. ……

3. Damages against the Second to Fourth Defendants for tortious wrongdoing against the Plaintiff;
4. ……"

[110] In response, the Defendants averred:

a. The Bank:

i. "The Bank makes no admissions to the facts and matters alleged in paragraphs 38-43 of the Statement of Claim and to the suppositions of law contained therein to which the Bank is not required to plead."

ii. "The Bank denies paragraph 44 of the Statement of Claim."

b. WIND and Mr. Rich averred:

i. "The Second Defendant denies paragraphs 43 and 44 of the Statement of Claim and puts the Plaintiff to strict proof of the allegations contained therein."

ii. "The Third Defendant denies paragraphs 43 and 44 of the Statement of Claim and puts the Plaintiff to strict proof of the allegations contained therein".

c. CH Windermere:

i. "The Fourth Defendant denies paragraphs 43 and 44 of the Statement of Claim and puts the Plaintiff to strict proof."

[111] On 30 November 2018, WIND and Mr. Rich requested Further and Better Particulars of the Statement of Claim. On 4 January 2019, Mr. Damianos provided his Response to this request. CH Windermere alleged that it was unaware of his Response.

The law

[112] There is no dispute between the parties with respect to the tort of conspiracy. It is well established that there are two types of conspiracy actionable in tort: (i) conspiracy to injure by the use of lawful means and (ii) conspiracy to perform an unlawful act or to use unlawful means. These two forms of conspiracy are outlined

in **Bullen & Leake & Jacobs's Precedents of Pleadings**, (15th edn), Vol 2, at 50-01 as:

(1) An "unlawful means" conspiracy in which the participants combine together to perform Acts which are themselves unlawful;

(2) A combination to perform acts which, although not themselves per se unlawful, are done with the sole or predominant purpose of injuring the claimant: "it is the fact of the conspiracy that the unlawfulness resides", per Lord Watson in **Allen v Flood** [1898] A.C. 1 at 108… [Hereinafter referred to as "**lawful means**" conspiracy]".

[113] The difference between the two types of conspiracy was explained by Lord Bridge in **Lonhro plc v Fayed and others** [1992] 1 AC 448 at page 466:

> **"Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful."**

[114] This notion was further developed by the UK Supreme Court in its unanimous judgment in **JSC BTA Bank v Khrapunov** [2018] UKSC 19. At paras. 10-11, Lord Sumption and Lord Lloyd-Jones (with whom Lord Mance, Lord Hodge and Lord Briggs agree) stated:

> **"10. What is it that makes the conspiracy actionable as such? To say that a predominant purpose of injuring the claimant in the one case and the use of unlawful means in the other supply the element of unlawfulness required to make a conspiracy tortious simply restates the proposition in other words. A more useful concept is the absence of just cause or excuse, which was invoked by Bowen LJ in *Mogul Steamship Co v McGregor Gow & Co* (1889) 23 QBD 598, 614, by Viscount Cave LC in *Sorrell v Smith* [1925] AC 700, 711-712, and by Viscount Simon LC with the support of his colleagues in *Crofter Hand***

> ***Woven Harris Tweed Ltd v Veitch*** **[1942] AC 435, 441-444 (cf Viscount Maugham at pp 448, 449-450, Lord Wright at pp 469-470, and Lord Porter at p 492). A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful but the predominant intention of the defendant was to injure the claimant rather than to further some legitimate interest of his own. This is because in that case it cannot be an answer to say that he was simply exercising a legal right. He had no interest recognised by the law in exercising his legal right for the predominant purpose not of advancing his own interests but of injuring the claimant. In either case, there is no just cause or excuse *for the combination*.**
>
> **11. Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant…."** [Emphasis added]

[115] In either category of the tort of conspiracy, a cause of action arises where the plaintiff pleads and proves that there was an agreement or combination between two or more individuals with intent to injure pursuant to the agreement and with intention, certain acts were carried out which resulted in loss and damage to the Plaintiff.

Discussion:

Issue 4: Did WIND and/or Mr. Rich and /or CH Windermere jointly conspire to result in the tortious interference with the Agreement between the Bank and Mr. Damianos?

[116] In the present case, Damianos argued that the Defendants conspired to use unlawful means vis-vis in relation to him. He described the unlawful means as (i) the breach of the Listing Agreement by the Bank and (ii) the procurement of the said breach by the other Defendants i.e. WIND, Mr. Rich and CH Windermere.

[117] Here, we are only now concerned with a single proposed cause of action, namely conspiracy to injure by unlawful means. The basic ingredients of this tort are not in dispute. They are conveniently summarised by Morgan J in **Digicel (St Lucia) Ltd v Cable & Wireless plc** [2010] EWHC 774 at Annex 1 to his judgment para. [2] as follows:

> **"The necessary ingredients of the conspiracy alleged are: (1) there must be a combination; (2) the combination must be to use unlawful means; (3) there must be an intention to injure a claimant by the use of those unlawful means; and (4) the use of the unlawful means must cause a claimant to suffer loss or damage as a result."**

[118] Both Mr. Moree and Mrs. Soles-Hunt attack the pleading. Both Counsel submitted that Mr. Damianos has pleaded that all Defendants knew of the terms of the Listing Agreement and together with a common intention conspired to cause loss to him by the Bank's breach of the Listing Agreement. However, he has failed to (i) particularize which form of conspiracy applies (he did so in submissions when he chose unlawful conspiracy); (ii) set out the basis of his allegations against the Defendants in his pleadings and (iii) provide any evidence as to the intention of all Defendants to injure him.

[119] The particulars of conspiracy must be specifically pleaded as provided in the **Notes of the White Book** (1999) at 18/12/10 which states:

> **"(7) Conspiracy- In an Action for conspiring to induce certain persons by threats to break their contracts with the plaintiffs, the defendant is entitled to particulars, stating the name of each such contractor, the kind of threat used in each case, and when and by which defendant each such threat was made, and whether verbally or in writing; if in writing, identifying the document; but he is not entitled to the names of the workmen in the employ of those contractors, whom it is alleged the defendant threatened to "call out" (*Temperton v Russell* (1893) 9 TLR 318 at 319).**

[120] In addition, in **Bullen and Leake and Jacob's Precedents of Pleadings,** 12th Edn. (1975) at pp 340-341, the learned editors stated:

> **"*Pleading*. The Statement of Claim should describe who the several parties are and their relationship with each other. It should allege the**

> **agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy, and lastly, it must allege the injury and damage occasioned to the plaintiff thereby."** [Emphasis added]

[121] In **Rollingson v Hollingsworth and others** [2020] EWHC 3568 (QB) at para [58] Master Dagnall stated that:

> **"…In particular, allegations of certain serious matters, including both conspiracy to injure and fraud (and dishonesty), must be clearly pleaded with adequate particularity and allegations of relevant subjective elements (i.e. states of mind) must be supported by allegations of primary facts from which (without anything else) it is more likely than not that an inference of the relevant matter would be drawn."**[Emphasis added]

[122] Further, at para.[60] of the Judgment, Master Dagnall, stated:

> **"60. From, Ivy Technology v Martin [2019] EWHC 2510 (Comm) where at paragraph 12 it was held that:**
>
> **"12. Conspiracy to injure must be pleaded to a high standard, particularly where the allegations include dishonesty:**
>
> **i) Allegations of conspiracy to injure "must be clearly pleaded and clearly proved by convincing evidence" (Jarman & Platt Ltd v I Barget Ltd [1977] FSR 260, 267). ii) The more serious the allegations made, the more important it is for the case to be set out clearly and with adequate particularity: Secretary of State for Trade and Industry v. Swan [2003] EWHC 1780 (Ch) §§ 22-24; CPR PD 16 § 8.2 in respect of the obligations on a party pleading dishonesty; Mullarkey v. Broad [2007] EWHC 3400 (Ch), [2008] 1 BCLC 638 §§ 40-47 on the burden and standard of proof for such claims and reiterating the well-established principle that an allegation of dishonesty must be pleaded clearly and with particularity (citing Belmont Finance Corp v Williams Furniture [1979] Ch 250, 268). iii) Unlawful means conspiracy is a grave allegation, which ought not to be lightly made, and like fraud must be clearly pleaded and requires a high standard of proof: CEF Holdings v. Mundey [2012] EWHC 1534 (QB)"** [Emphasis added]

[123] Particulars of "Intention" and "Knowledge" [See Notes to White Book pp 331-332] are also required:

> **"(17) Intention- If an allegation is made that a person, including a part, had or did not have a particular intention, particulars will be ordered of any overt acts and any other facts relied on to support the allegation."**
>
> **"(20) Knowledge- If knowledge or the absence of it is material, it should be expressly pleaded… Where knowledge is pleaded as a fact, particulars of the facts on which a party relied in support of such allegation may, but need not, be contained in the pleadings itself, but such particulars should be given on request or the Court may order them to be given…."**

[124] With respect to intention, Lords Sumption and Lloyd-Jones when providing a summary of the unlawful means conspiracy tort in **JSC BTA Bank** [supra] held at para. 13 that *"a conspiracy may be directed against the claimant notwithstanding that its predominant purpose is not to injure him but to further some commercial objective of the defendant."*

[125] It is trite that a defendant needs to be aware of what is essentially alleged against him. Further, where the Statement of Claim does not set out the necessary facts to establish the principles essential to constitute unlawful interference, the Plaintiff's claim is unsustainable: **Morley v Nash/ S.M. Bahamas Ltd** [1998] BHS J. No. 167.

[126] Not so long ago, in **Glendon E. Rolle t/a Lord Ellor & Co. v Scotiabank (Bahamas) Limited** 2017/CLE/gen/01294, the Bank raised a preliminary issue that the parties are bound by their pleadings and therefore, the Plaintiff cannot generally seek to advance a case that is not expressly raised in his pleadings. The Court stated at paras [37] - 39:

> **"[38] It is therefore necessary for me to say something on pleadings. The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of**

action. Evidence need not be pleaded because that will come from the affidavits and cross-examination thereon or by oral evidence.

[39] In Bahamas Ferries Limited v Charlene Rahming SCCivApp & CAIS No. 122 of 2018, our Court of Appeal held that the starting point must always be the pleadings. At paras. 29-33 and 37-39 of the judgment, Sir Michael Barnett JA (as he then was) stated:

> **"29. The real difficulty in the judgement of the court below is that the finding of negligence was not one that was pleaded by the respondent. This is ground 10 of the appellant's grounds of appeal.**
>
> **30. <u>The trial judge rejected the particulars of negligence pleaded and founded liability on a ground not pleaded in the statement of claim</u>.**
>
> **31. <u>In our judgment this is not proper and manifestly unfair to the appellant</u>.**
>
> **32. Negligence was clearly pleaded and particularised as set out in paragraph 6 above.**
>
> **33. That was the case the appellant had to meet. <u>There was no assertion that it was negligent in failing to delay boarding because of the rain. If that had been the case the appellant may have been able to lead evidence explaining why it did not delay further the boarding process or stop the respondent from attempting to board.</u>**
> **…..**
>
> **37. This is not an arid pleading point..."**

[127] At paragraph 40 of the Judgment, Sir Michael went on to state:

> **"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial."**

[128] The purpose of pleadings is not to play a game at the expense of the litigants but to enable the opposing party to know the case against him. So, in a claim based on conspiracy, as in this case, Mr. Damianos was bound to set out the particulars of claim including details of who is alleged to have acted and what they did. For an

'unlawful means' conspiracy, each unlawful act should be set out and pleaded as a separate cause of action. Shortly put, parties are bound by their pleadings and a party cannot generally seek to advance a case that is not expressly raised in his pleadings. It is not sufficient simply to plead a claim and hope something turns out in disclosure.

[129] In the present case, Mr. Damianos asked the Court to draw adverse inferences from the failure of the Defendants to disclose any documentary and contemporaneous evidence in these proceedings which confirms that CH Windermere paid the funds to the Bank on behalf of WIND. Despite the apparent existence of this document between CH Windermere and WIND, the Defendants failed to disclose same.

[130] Mr. Damianos is the plaintiff. He who asserts must prove. He must prove his case on a balance of probabilities. He must be able to plead full particulars of all elements of the claim that he has brought.

[131] I therefore agree with the submissions advanced by Mr. Moree and Mrs. Soles-Hunt that Mr. Damianos has failed to plead the necessary and required elements of conspiracy against the Defendants.

[132] Both Counsel relied heavily on the Ruling of Cooper-Burnside J (Ag) in the Application by CH Windermere to strike out the entire claim against them. While the judge did not strike out the application, she did criticize Mr. Damianos for failing to properly particularise the claim of conspiracy.

[133] In paras [20] to [23] of her Ruling delivered on 25 March 2021, the learned judge said:

> **"[20] I agree with Ms. Soles-Hunt that the claims against the LLC [CH Windermere] are not sufficiently particularised. Given that conspiracy is a serious allegation, it is especially important for the claim to be set out clearly and with adequate particularity.**
>
> **[21] In *Alesco Risk Management Services Ltd and other companies v Bishopgate Insurance Brokers and other* [2019] EHWC 2839**

Freeman J endorsed the following comments of Megaw LJ in *Jarman & Platt Ltd v I Barget Ltd. and Others* [1977] FSR 260, with which I wholeheartedly agree:

> **"…a charge of conspiracy in civil proceedings is generally to be regarded as a grave charge; and that, particularly where the allegation is made against persons of hitherto unblemished reputation, the standard of proof which has to be satisfied before the court can properly hold that the charged is established is a high one, commensurate with the seriousness of the charge. *Hornal v Neuberger Products Ltd*. [1957] 1 QB 247, *Blyth v Blyth* [1966] A.C. 643. Unless for some good reason on the particulars facts an allegation of conspiracy in civil proceedings is to be treated, substantially, only as a technical matter, <u>such an allegation, equally with an allegation of fraud, must be clearly pleaded and clearly proved by convincing evidence</u>."(my emphasis)**

[22] **<u>In my view, the Statement of Claim does not clearly set out the basis upon which the Plaintiff alleges a conspiracy to cause him loss. Firstly, it does not provide particulars of the LLC's alleged agreement to conspire, or the specific acts committed by the LLC in pursuance and in furtherance of that agreement. Secondly, the Statement of Claim does not plead any primary facts to support the claim that the LLC" knowingly induced' a breach of contract as alleged in paragraph 44.</u>**

[23] **Nonetheless, I am of the view that the averments in paragraphs 43 and 44 plead the essential elements of the torts alleged to have been committed. For the conspiracy – a combination of two or more persons (including the LLC) to injure the Plaintiff; and for the claim of inducement of breach of contract – knowledge on the part of the LLC that it was inducing a breach of the Listing Agreement with the intention of causing loss. There (sic) averments against the LLC in paragraphs 43 and 44 are unequivocal and assuming the allegations are true, they clearly raise issues which are fit to be tried by a judge. I am also of the view that, where a pleading is defective merely because, as in this case, it does not contain particulars to which the other side is entitled the usual remedy is an application for further and better particulars and not an order that the action be struck out: see *Paragraph 18/19/13 of The Supreme Court Practice, 1999."*** [Emphasis added]

[134] The learned judge continued at para [33]:

> **"It may well be that the Plaintiff will face difficulties in proving his case. <u>A claim of conspiracy is such that cogent and convincing evidence will be required to prove it</u>. Furthermore, if the trial judge determines at trial that the Bank breached the Listing Agreement, it appears that the Plaintiff may be challenged in providing that the LLC knowingly induced a breach."**[Emphasis added]

[135] It cannot be disputed that, in the Amended Writ of Summons, the only paragraphs that made mention of an allegation of conspiracy are paragraph 43 and 44 which, for emphasis, are repeated here:

> "43. The Defendants well knew that the Plaintiff had been engaged by the First Defendant to market and sell the property and in combination with a common intention conspired to cause the Plaintiff loss by the First Defendant's breach of the listing agreement.
>
> 44. In combination, the Second to Fourth Defendants have knowingly induced the First Defendant to breach its agreement with the Plaintiff by the sale of the property with the intention of causing loss and damages to the Plaintiff."

[136] As already alluded to, the necessary ingredients of the conspiracy alleged are: (1) there must be a combination; (2) <u>the combination must be to use unlawful means</u>; (3) there must be an intention to injure a claimant by the use of those unlawful means; and (4) the use of the unlawful means must cause a claimant to suffer loss or damage as a result.

[137] The second ingredient, "the combination to use unlawful means" is an essential allegation – indeed it could be said to be at the very heart of the tort.

[138] No such allegation is expressly found in the pleading. Mr. Damianos has therefore asked this Court to scrutinize the nature of the Transaction and the dealings between the parties to draw inferences as to the existence of the alleged conspiracy or combination.

[139] Mrs. Rolle-Kaposouzoglou argued that the Court must look at the commercial objective of the Defendants. With respect to the Bank, she submitted that it [the Bank] was concerned with maximizing the amount it could receive relative to the sale of the Property. For example, similarly to its request that the Bronstein Group pay all stamp duty and taxes, the sale between the Bank and CH Windermere provided that CH Windermere would pay all transfer fees, and any applicable documentary stamp or other taxes, required to be paid by either the Seller or the Buyer in connection with the transactions. This Court has already found that the Transaction did not constitute a "sale" for purposes of the Listing Agreement.

[140] She also submitted that the Bank also appeared to be concerned that Mr. Rich would institute legal proceedings against it relative to the sale of the Property. Reference to that was made by Mr. Barnett of the Bank in an e-mail to Mr. Damianos that, "*…We [i.e. the Bank] wish to be assured that any agreement entered into can withstand scrutiny and legal Action by either Mr. Rich or RBC."*

[141] Mrs. Rolle-Kapousouzoglou then argued that, in the circumstances, the Bank seized the opportunity to sell the Property on the terms proposed by Mr. Rich and CH Windermere and divest its interest in the Property so as to obviate the potential institution of proceedings as against the Bank by Mr. Rich. Further, the Bank recovered its money sooner rather than later than having to wait for Mr. Damianos to locate a purchaser. In other words, it received consideration at an earlier date.

[142] Mrs. Rolle-Kaposouzoglou then surmised that the Bank allowed itself to become a part of the conspiracy with the purpose of furthering its commercial objective [i.e. the sale of the Property, the removal of the bad debt from its Balance Sheet and limiting potential exposure to liability] and thereby disregarded its contractual obligations to Mr. Damianos.

[143] Mrs. Rolle-Kapousouzoglou next submitted that the commercial objectives of WIND and Mr. Rich were clear. She suggested that Mr. Rich admitted that he did not want to relinquish his equitable interest in the Property. Thus, Mr. Rich's

commercial objective was to ensure that the Bank entered into an agreement with a party, such as CH Windermere, to make certain that he would have been able to have some type or kind of involvement relative to the development, by joint venture or otherwise. According to her, if Mr. Rich did not procure the breach of the contract and Mr. Damianos was free to sell the Property without interference in accordance with the Listing Agreement, Mr. Rich's interest in the Property would have been extinguished. This is a startling submission as at no point did Mr. Rich and/or WIND forfeit its beneficial interest in the Property or its right of redemption.

[144] With respect to the commercial objectives of CH Windermere, Mrs. Rolle-Kapousouzoglou contended that CH Windermere at all material times saw a potentially profitable investment opportunity with respect to the further development of the Property and its primary commercial objective was to minimize costs and maximize profit without undue interference and/or non-cooperation from Mr. Rich. Once again, she surmised when she argued that it would appear that CH Windermere required the cooperation of Mr. Rich in order to advance its commercial objective, namely that the development was structured in such a manner that Mr. Rich would retain certain rights such as planning, transaction researching and construction even if his equitable interest was relinquished. It therefore benefitted CH Windermere to keep Mr. Rich involved and entered into a transaction that Mr. Rich considered favorable for himself to ensure that Mr. Rich did not attempt to stifle and/or adversely impact CH Windermere's commercial objective.

[145] On that basis, Mrs. Rolle-Kaposouzoglou asked the Court to draw adverse inferences from such non-disclosure.

[146] At trial, Mr. Damianos admitted that there was no evidence to substantiate a claim for conspiracy. This is what he said during cross examination by Mr. Moree: Transcript of Proceedings dated 18 May 2021 at p. 51 lines 11-32 and p. 52, lines 1-10:

"Q: Now, I want to take you to -- …paragraph 49 of your witness statement, and you talked about, you say, that the defendants were involved in an elaborate scheme to outsmart you out of your entitlements of the commission, do you see that?

A: I do.

Q: Do you have --- and you placed conspiracy in your pleadings or attempted to, that would be another question for closing submissions. But do you have any evidence, e-mails, voice recorded meetings, minutes from meetings, which will support this belief in a scheme, to outsmart you the payment of your commission?

A: No.

…..

Q: Clearly, your claim, you accept that in no world, in no scenario, could anybody pay this commission to you except for the bank?

A: Correct.

Q: And what I wanted to ask you is, and I am putting this on the record. I am not saying –why do you think, Mr. Rich, would care if you get paid your money; what benefit would it be to him, if you are not getting paid?

A: I have no reason to believe that he would care if I got paid or not.

[147] There is no evidence that any of the Defendants were engaged in any form of conspiracy against Mr. Damianos, whether lawful or unlawful. Mere speculation will not suffice. There is also no evidence that the Defendants were aware of the Listing Agreement or any of the terms contained in it. There was no knowledge or intention among the Defendants to injure or cause harm to Mr. Damianos. Furthermore, none of these Defendants would have derived any benefit from the alleged conspiracy as any commissions would have had to be paid by the Bank who was the party to the Listing Agreement.

[148] In my judgment, Mr. Damianos has neither pleaded nor proven how the Defendants allegedly conspired using unlawful means to induce the Bank to breach its contract with him.

[149] Succinctly put, the facts of this case are not complex. CH Windermere entered into the Loan Sale Agreement with the Bank to purchase its mortgage held with WIND and Mr. Rich. This was a simple loan sale transaction (a normal transaction), structured to ensure that CH Windermere preserved the lien priority of the Loan over other potential claimants and reduced various transaction costs, which may have been required if the loan had been released, satisfied and new loan documents prepared and executed.

[150] The structuring to ensure that CH Windermere preserved the lien priority of the loan is supported by contemporaneous documentary evidence. In a letter written to Attorney North on 26 May 2017, CH Windermere and Mr. Rich explained the reason for the structure. I quote selectively from that missive:

> **"CrossHarbor requires an assignment of the Bank's collateral for two reasons. First, in order to have a proper collateral position, which the Bank now enjoys, particularly in relation to all the claims which might have arisen since the Bank's mortgage was filed with the Registry of Records, and second, in order to have a collateral position that is senior to that held by Royal bank of Canada. Until such time as the Royal Bank of Canada collateral is either acquired or extinguished, the simple repayment of the Bank's loan to WIND would result in Royal Bank of Canada holding a first lien position."**

[151] In Mr. Byrne's oral testimony, he further stated: (See: Transcript of Proceedings dated 18 May 2021 at p. 97 line 23 and p. 98 at line 5):

> Q: And I put it to you, Mr. Byrne, that is the same evidence also that CH—sorry, that Carry Rich and WIND has set out, as the basis of their structuring or wishing to structure the loan in that manner. Do you agree?

A: I do. I don't know that it was their choice to do so. I mean, we weren't prepared to make an investment without retaining a priority of the loans over the properties because it would be very difficult for us to find out if there were any intervening creditors—

Q: And you—

A: So we always intended to structure the –a loan and preserving the existing collateral allowed us to preserve the existing priority of those loans."

[152] Thus, as Mrs. Soles-Hunt correctly stated, there is a reasonably sound reason for the manner in which the loan was structured. In addition, the manner of structuring the loan is extremely common when there is a refinancing of a mortgage. Mr. Beneby, an experienced banker of more than 20 years, also agreed and explained that there is nothing unusual or extraordinary about a distressed mortgagor obtaining refinancing from another financial institution.

[153] Although Mr. Damianos invited the Court not to believe Mr. Byrne's testimony that he was unaware of the existence of the Listing Agreement, on a balance of probabilities, I do believe him. I was able to see, hear and observe his demeanour as I did with all of the witnesses. He struck me as an astute businessman and I found him to be frank and straightforward.

[154] There is a further point. Even if Mr. Byrne became aware of the existence of the listing of the Property in February 2018, this was more than 5 months after the parties had entered into the Loan Sale Agreement; therefore the passing of knowledge after the fact could not support Mr. Damianos' claim that CH Windermere knew of him and the Listing Agreement as he had not provided it to Mr. Byrne or Mr. Christensen, neither of whom he had met. The fact that the Property was widely advertised on the internet is not probative that these men would have known of the exclusivity of the Listing Agreement with Mr. Damianos relative to the Property since Mr. Damianos himself stated that it is possible to have a non-exclusive listing agreement in The Bahamas. Mr. Damianos, whom I found

to be a very straightforward witness, even when the odds seemed to be against him, stated that he was aware of other real estate agents or companies, who visited the Property during the time that the Listing Agreement was extant. This is what he said in cross examination: see Transcript of Proceedings dated 18 May 2021 at p. 44 lines 6-15:

> "Q: And were you aware of other real estate agents or companies who visited the Windermere property, during, I guess, the material times your listing agreement was extant?
>
> A: By putting it on Bahamas MLS, you invite all members of the MLS real estate agents, to participate in the sale, or bring you a buyer, and if you know that Braunstein [sic] group was by a company, by the Bahamas Island Realty, in particular. So yes, it is an open offering under the Bahamas MLS listing agreement.

[155] Then, at p. 53, lines 13-15 of the Transcript, under cross examination by Mrs. Soles-Hunt, Mr. Damianos stated:

> "A: If it was on the Bahamas MLS website, it would have to be an exclusive agreement, and every agent in the Bahamas would know it is exclusive.
>
> Q: But laymen or public in the public wouldn't know that?
>
> A: No."

[156] While Mr. Damianos did not plead conspiracy by unlawful means in his pleadings, the evidence adduced fell short of proving the necessary ingredients of conspiracy to injure by unlawful means. All that paragraphs 43 and 44 of the Amended Writ of Summons did, was to make allegations which was unsupported by evidence.

[157] As conspiracy to use unlawful means is a serious allegation, the facts must be stated with especial particularity and care. To plead it requires at least alleging each of the essential ingredients of the tort. Apart from paragraphs 43 and 44, almost all of the factual allegations are concerned with the Bank and not the other

Defendants. Paragraph 43 merely alleged that the Defendants well knew that Mr. Damianos had been engaged by the Bank to sell the Property and with a common intention conspired to cause loss to him by the Bank's breach of the Listing Agreement. Even the Response given in the Request for Further and Better Particulars did not add much to particularise how the Defendants knew that the Property was listed by Mr. Damianos, how they knew, at the time of the contemplated sale that he was still listing the Property and even if they knew, how they knew that the Bank did not terminate the Listing Agreement.

[158] Paragraph 44 is couched in similar speculative language. Knowledge, an essential ingredient, has not been proven overtly or otherwise. While the Court is entitled to draw reasonable inferences from the facts of the case, the Court is not entitled to speculate. Allegations of conspiracy to injure must be clearly pleaded and clearly proved by convincing evidence. The more serious the allegation, the more important it is for the case to be specifically and clearly pleaded with adequate particularity. Unlawful means conspiracy is a grave allegation which ought not to be lightly made, and like fraud, must be clearly pleaded and requires a high standard of proof.

[159] For all of the above reasons, I find that Mr. Damianos has not fully and specifically plead, particularize and prove the claim of conspiracy by unlawful means and therefore this aspect of the claim must also fail.

Tortious interference to induce a breach of contract

[160] The allegation of tortious interference only arises if the Court had found that the Transaction was a "sale" of the Property and that the Bank breached the Listing Agreement.

[161] Since the Court has found that the Transaction was not a sale of the Property, it logically follows that no such breach occurred.

Conclusion

[162] Mr. Damianos has the burden of proving that the Transaction constitutes a sale of

the Property. None of the cases which he relied upon have suggested that a reassignment or refinancing of a debt could possibly be called a 'sale' at law.

[163] In my judgment, when Mr. Damianos and the Bank entered into the Listing Agreement, against the background of the Act, he would have intended "sale" to mean "**a sale properly so called**" and not a conveyance by way of mortgage.

[164] The Transaction was an assignment, amendment and restatement of the Loan Documents and at no point did WIND forfeit its beneficial interest in the Property or its right of redemption.

[165] I therefore find that the Transaction did not constitute a sale of the Property and consequently it does not fall within the Listing Agreement. Mr. Damianos is therefore not entitled to be paid any commission. There was no breach of contract by the Bank.

[166] With respect to the allegation that the Defendants conspired to use unlawful means, besides the fact that this allegation arose in submissions, this is a serious allegation which needed to be specifically pleaded, particularized and proven. To plead it requires at least alleging each of the essential ingredients of the tort. Nothing less will suffice. In the present case, that was not done.

[167] This claim also fails.

Costs

[168] Mr. Damianos is the unsuccessful party in this action and he must therefore pay costs to the Defendants to be taxed if not agreed.

Dated this 29th day of December 2022

Indra H. Charles
Senior Justice