

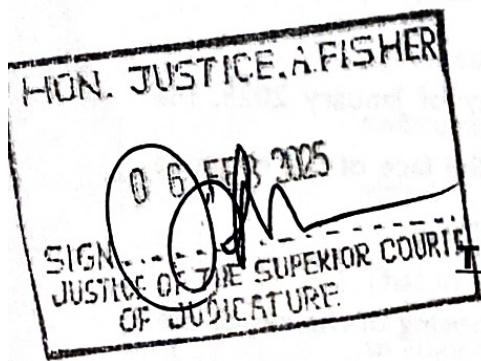
CC.366.21

S43

(Land, Property and Environmental Division)

Case No: CC 366/2021

**IN THE HIGH COURT OF JUSTICE
HOLDEN AT FREETOWN
LAND, PROPERTY, AND ENVIRONMENTAL DIVISION**



Law Court Building
Siaka Stevens Street
Freetown
Date: 6 February 2025

Before:

THE HONOURABLE MR JUSTICE FISHER J

Between:

Daphne Florence Solomon

Plaintiff

-and-

**Musa Cline Thomas
Teddy Cline-Thomas**

1st Defendant/respondent
2nd defendant/respondent

Mr T Kellie of counsel for the Defendant/Respondent

Hearing dates: 30 January 2025

APPROVED ORDER

I direct that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE FISHER J

The Honourable Mr Justice Fisher J:

1. In pending proceedings before me, I have given a number of rulings in this matter with another pending.
2. By way of an ex parte notice of motion dated the 27th day of January 2025, the defendants have sought an interim injunction, as set out on the face of the ex parte notice of motion. The orders sought can be summarised as follows:
 1. An interim injunction restraining the plaintiff from disposing of the res of the matter at 21 Wilkinson Road Freetown, pending the hearing and determination of this application.
 2. An interlocutory injunction in like terms.
 3. Any further order the court deems fit and costs.
3. The application is supported by the affidavit of Tamba Kellie sworn to on the 27th January 2025, with four exhibits attached. In summary, he deposed to the following matters:
 1. That as the solicitor in charge, he has conduct of the matter.
 2. That the action was commenced by a writ of summons dated 21 July 2021 to determine the ownership of 21 Wilkinson Road.
 3. That the matter was initially assigned to the Hon Justice AK Musa J who granted an injunction on the application of the plaintiff against the defendant who was in occupation and carrying on business at the property.
 4. That the matter was subsequently transferred to this court and by an order of court, the defendant was ordered to vacate the property and hand over the keys to the solicitor for the plaintiff and the plaintiff herself. The defendant complied with the court order.
 5. That with the keys in the possession of the plaintiff's solicitors, the plaintiff and her solicitor who had withdrawn her representation appears to have

read the injunction as giving them the freedom to sell the property, thereby rendering the ongoing proceedings otiose.

6. That an attempt was made to sell the property by Ms Pamela Richards who on several occasions after the matters stated in paragraph 6. Had taken prospective buyers to the property, activities that were reported to him by the security guard stationed at the property, one Matilda K Kamara who swore an affidavit deposing to what she had seen and heard during those visits.
7. That in order to stop further attempts to sell the property, an application for an injunction was made to restrain the respondent from disposing of the property and the application was refused to grant the application and instead extracted an oral undertaking from the p[plaintiff's solicitors that no sale of the property by the plaintiff or her agents would happen, pending the trial of the action.
8. That notwithstanding the undertaking from the plaintiff's solicitors agents of the plaintiff continue to attempt to sell the property, a matter reported to him by the security guard who informed her that on Saturday the 18 January 2025, while on duty, she saw three men arrive at the property, saying they were estate agents who had been instructed by Ms Pamela Richards to market the property.
9. That it is clear that unless an injunction is granted, the plaintiff or her agents would dispose of the property, the subject matter of the action, pending the trial and final determination of the action. The property situate at 21 Wilkinson Road would be disposed of or dealt with in a manner prejudicial to the interest and rights of the defendant. This has been demonstrated by the activities of the plaintiff, especially given the fact that her solicitors are in possession of the keys to the property, consequent upon an order of this

court and the plaintiff appears to be taking advantage of this fact to defeat the cause of justice.

10. That in the premises, it would be in the interest of fairness and justice that the injunction is granted, in order to preserve the subject matter of this action and prevent these proceedings being rendered otiose.

The relevant law on injunctions

4. The question of the grant of an interim injunction or otherwise is subject to the exercise of a discretion by the court. Order 35 of the High Court Rules 2007 provides the legal basis for the granting of interlocutory injunctions and the said Order 35 rule 1 sub rule 1 provides:

"(1) The Court may grant an injunction by an interlocutory order in all cases in which it appears to the Court to be just or convenient to do so and the order may be made either unconditionally or upon such terms and conditions as the Court considers just".

5. Order 35 rule 2 sub rule 1 of the High Court Rules 2007, further provides as follows:

2. (1) On the application of any party to a cause or matter, the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise in the action or for the inspection of such property in the possession of a party to the cause or matter.

6. In deciding whether to grant an injunction or an preservation of property order, the court must consider whether it is just and convenient to grant the order sought. The general principles underlying the grant of an injunction have been set out in the case of *American Cynamid v Ethicon 1975 A.C. 396*. The court held in that case that so long as an action was not frivolous or vexatious the only substantial factor the court considers is the balance of convenience.

7. The court must consider whether there is a serious issue to be tried and in which way the balance of convenience lies. The court must also consider whether damages

are an adequate remedy for the plaintiff. I have had regard to a decision of Alhadi J (as she then was) in *Pa Saidu Conteh and Others v AMR Gold (SL) Limited SLHC 2016*, where she held thus:

"Therefore, the court only needs to be satisfied that there is a serious question to be tried on the merits; and that it is just and convenient to make such an Order; Porter v National Union of Journalists [1980] IRLR 404 HL; Morning Star Co-operative Society Limited v Express Newspapers Limited [1979] FSR 113. With this in mind, the court is required to investigate the merits to a limited extent only, Sime, S. 'A Practical Approach to Civil Procedure', (2nd ed, 1995), Blackstone Press Limited at p 181".

Ex-Parte injunctions

8. In granting an interim injunction on an ex parte basis, a court has to be satisfied that there is extreme urgency in such cases. Generally, an injunction will only be granted ex parte in cases of emergency or urgency. It must be shown that there are strong grounds to justify the application being made ex parte. Another ground for the grant of such injunctions, is circumstances of secrecy.

9. The importance of the general principle that applications (including applications for injunctions) should only be made without notice, and outside court hours, in cases of "exceptional urgency" was emphasised in *Frances v Somar Al Assad and Ors (supra)*, 2007 EWHC 2442, at para 67. It is apparent from Henderson J.'s judgment that:

"urgency brought about by inaction on the part of the applicant is unlikely to attract much judicial sympathy": the reasons for proceeding without notice should not be confined to bare assertions; what is required is "a proper analysis of the issue and a reasoned explanation supported by references to the evidence".

10. An applicant making an ex parte application is under a "compelling duty" to make full and frank disclosure. The duty of full and frank disclosure applies to all applications made ex parte. The principle goes back to *Castelli v. Cook (1849) 7 Hare 89, 94* and

to the well-known case of *Rex v. Kensington Income Tax Commissioners, Ex parte de Polignac (Princess)* [1917] 1 K.B. 486, 509, in which Warrington L.J. said:

"It is perfectly well settled that a person who makes an ex parte application to the court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

Disposal

11. There are obviously serious issues to be tried in this case. At the heart of this dispute is the alleged attempt to sell or dispose of the property, which is the res of the matter in dispute. I have to be satisfied on the affidavit evidence that the applicant has made a case for the orders sought to be granted.
12. The plaintiff's solicitor had given an undertaking to the court, that the res would not be dissipated or disposed off. If there are reasonable grounds to believe that there is likely to be a breach of the undertaking given to the court, then the court has to exercise its discretion to grant an appropriate remedy in order to protect the integrity of the justice system. Even where no undertaking is given, the court has a discretion to grant an injunction for the same reasons.
13. There is one issue I need to deal with prior to concluding this matter. I have noted in Mr Tamba Kellie's affidavit certain emotional comments in the affidavit which are inappropriate. At para 6 of the affidavit, he uses the words "one sided injunction". At para 8 of the affidavit, he again uses the words "but this honourable court refused to grant the application and instead extracted an oral undertaking from the plaintiff's solicitors that no sale of the property by the plaintiff or her agents would happen".

14. I find those comments to be sullen and intemperate and laden with dissent. These comments are not appropriate for an affidavit. Order 31 rule 5 of the High Court Rules require that an affidavit shall only contain facts which the deponent can prove and not opinions. The grant of an injunction is not a mandatory remedy. It is a discretionary remedy. It is solely within the domain of the court to grant or not to grant a discretionary remedy. It is for the party who seeks an injunction to make that case. Even where the case for an injunction is made out, the court may still refuse to grant an injunction and accept an undertaking in lieu of the injunction.

15. In the case of **Smith v Backhouse 2023, EWCA Civ 874**, The Court of Appeal unanimously upheld the claimant's appeal, finding that the High Court was wrong to refuse to accept the relevant undertakings. Aspin LJ gave the leading judgment with which Arnold and Warby LJ agreed.

16. Aspin LJ confirmed the established principle that a court may decline to accept undertakings even if they form part of a settlement agreement but the circumstances in which it may do so are limited. It was therefore necessary to consider whether Nicklin J erred in law in identifying the limited circumstances which led him to refuse to accept the undertakings. She reiterated some general principles to assist with that analysis as follows:

1. An injunction is a discretionary remedy, and a court should be slow to make an order that it would not be willing to enforce;
2. The circumstances in which an injunction might be refused will turn on the facts of each case;
3. An injunction must be expressed in unambiguous language such that it is clear what is forbidden or required by the order and it will be enforceable, if necessary, by contempt proceedings; and
4. An undertaking to the court is a very serious matter, the breach of which can lead to a fine or imprisonment. Therefore, it should be recorded in clear

terms and the scope for arguments regarding its interpretation should be kept to a minimum.

17. Further, Aspin LJ noted that where undertakings are offered in lieu of an injunction, the court will be cautious about accepting them in terms that it would not itself have granted by way of injunction to restrain the conduct complained of. However, there is no firm rule about the extent of the undertakings the court might accept. She agreed with the formulation set out in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 that:

"although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case."

18. She also referred to *Mionis v Democratic Press SA* [2014] EWHC 4104 in which the Court of Appeal emphasized that there are strong public policy reasons to uphold a private agreement between parties to settle a dispute. That case made it clear that, when determining whether undertakings are to be accepted or enforced, proper weight must be given to the settlement agreement and the public interest in encouraging parties to settle litigation in the confidence that the terms of their settlement will be upheld.

19. In this case I accepted an undertaking from a solicitor, a breach of which would amount to serious professional misconduct, with serious consequences. An undertaking is enforceable in the same way as an injunction. A Respondent may also give a voluntary undertaking in order to avoid the necessity of a hearing. The claimant must be justified in refusing the offer of an undertaking and insisting on an injunction. Where there is a threatened breach of the undertaking given to this court, action will lie in terms of granting an injunction to restrain unlawful conduct.

20. Having regard to the matters I have referred to in the affidavit of Mr Tamba Kellie, which I consider to be scandalous or otherwise oppressive, I shall strike out the

offending paragraphs pursuant to Order 31 rule 6 of the High Court Rules. 2007. Intemperate or immoderate language should not find itself into an affidavit sworn for legal proceedings.

21. Notwithstanding, I am satisfied that an order for the preservation of 21 Wilkinson Road, ought to be made in this case to preserve the res of the action. In the light of the fact that this is an ex-parte application, this order will last for seven days, to give me an opportunity to hear from the Respondents in this case.

22. In the circumstances, I shall grant the following orders.

UPON HEARING Mr T Kellie of counsel for the defendant, **AND UPON** consideration of the notice of motion and affidavits and exhibits adduced,

IT IS HEREBY ORDERED AS FOLLOWS:

1. That an interim preservation of property situate, lying and being at 21 Wilkinson road, is hereby granted pending the hearing and determination of this application.
2. That the said property shall not be disposed off by the plaintiffs in this action or agents of the plaintiffs or other third party either by leasing, selling, renting, used as collateral or otherwise, pending the hearing and determination of this application.
3. The matter is adjourned to the **13th day of February 2025** for further proceedings.
4. Costs shall be in the cause.

