



In The Supreme Court of Bermuda

CIVIL JURISDICTION (COMMERCIAL COURT)

2010: No. 53

BETWEEN:

ROBERT GEORGE GREEN MOULDER

Judgment Debtor/Plaintiff

- and -

COX HALLETT WILKINSON (A FIRM)

Judgment Creditor/First Defendant

-and -

STEPHEN P. COOK

Judgment Creditor/Second Defendant

-and -

MICHAEL ALAN CRANFIELD

Judgment Creditor/Third Defendant

-and -

PAUL JEREMY SLAUGHTER

Judgment Creditor/Fourth Defendant

-and -

JANET MURRAY SLAUGHETER

Judgment Creditor/Fifth Defendant

RULING

Date of Hearing: 28 June 2021
Date of Ruling: 10 August 2021

Appearances: Michael Taylor, Attorney General’s Chambers for the Provost Marshall General

Plaintiff Robert Moulder in Person with his McKenzie Friend Judith Chambers

David Kessaram, Cox Hallett Wilkinson Limited, for First Defendant

Paul Harshaw, Canterbury Law Limited, for Second Defendant

Third Defendant Michael Cranfield in person

Jonathan White, Marshall Diel Myers Limited, for Fourth and Fifth Defendants

RULING of Mussenden J

Introduction

1. This matter came before me as follows:
 - a. The Second Defendant Stephen Cook’s Summons dated 8 March 2019 for orders and/or directions as may appear proper with a view to his writs of execution being given effect to. This application is based on the Seventh Affidavit of Paul Harshaw sworn on 18 February 2019 (“**Harshaw 7**”) with Exhibit “**PAH-7**”, in which, at paragraph 13 of the affidavit, Mr. Harshaw asked the Court for an order granting leave to issue a writ of *venditioni exponas* (“**vend.ex**”¹) so that the Deputy Provost Marshall General² (the “**DPMG**”) would only be required to obtain the best price for the sale and purchase of the Plaintiff’s real property known as “Tanglin”, 15

¹ Black’s Law Dictionary, 6th edition, at 1555. *Venditioni exponas* was frequently abbreviated to “*vend.ex*”

² The Provost Marshal General Act 1965 provides for the Governor to make appointments of the Provost Marshal General (section 1) and the Deputy Provost Marshal General and bailiffs (section 3) and provides that any duty of the Provost Marshal General may be performed by the Deputy Provost Marshal General or bailiff so authorized (section 4). Herein the terms of Provost Marshal General (“**PMG**”) and Deputy Provost Marshal General (“**DPMG**”) are used interchangeably unless otherwise stated.

Bridge View Lane, Sandy's Parish (the "**Property**"), following consultation with the Defendants/Judgment Creditors (the "**Defendants**").

- b. The First Defendant Cox Hallett Wilkinson's ("**CHW**") *ex parte* Summons dated 10 December 2020 in which it applied *inter alia* for it to be granted leave to cause a writ of *vend.ex* to issue in respect of each of the three existing writs of execution.
2. Mr. Christopher Terry is the DPMG and Head Bailiff, that is, the official charged with executing writs of the Supreme Court including the writ of *vend.ex*. He had concerns about the applications for the writ of *vend.ex* and has now sought the directions of the Court on a number of issues as set out below. His application is supported by his First Affidavit sworn 21 May 2019.
3. I ordered that there be an *inter partes* hearing on the issues.
4. The Plaintiff/Judgment Debtor Mr. Moulder (the "**Plaintiff**") opposes the application for a writ of *vend.ex* in relation to the sale of the Property which he still occupies. He relies on his affidavit sworn on 28 November 2019.
5. The Second to Fifth Defendants support the application by CHW in respect of the judgments in their favour against the Plaintiff.

Background

6. On 17 February 2010 the Plaintiff launched an action against the Defendants. That action was struck out on 26 November 2010 by (then) Ground CJ. Costs were awarded against the Plaintiff.
7. The Plaintiff appealed the 26 November 2010 order of Ground CJ to the Court of Appeal for Bermuda and his appeal was dismissed on 17 June 2011. Again, costs were awarded against the Plaintiff.

8. On 8 July 2011 the Plaintiff sought leave to appeal to Her Majesty in Council the dismissal of the appeal by the Court of Appeal. That application for leave was dismissed on 14 November 2011 and costs were awarded against the Plaintiff.
9. Mr. Moulder has failed to pay judgment debts owing to the Defendants.
10. Writs of Execution (*feri facias*) (“*fi fa*”) in respect of all three costs orders issued from the Supreme Court on 19 June 2012 were executed by the Provost Marshal General on 25 September 2012. The Writs of Execution of the Defendants have been renewed from time to time. The duties of the Provost Marshal General are set out in the Supreme Court Act 1905 in the part entitled “*Officers of the Court*” as follows:

Duties of Provost Marshal General

47 (1) The Provost Marshal General shall receive writs and process of the Court addressed to him, and be charged with the service and execution thereof, and with making returns thereto.

(2) In any case where the Provost Marshal General is charged with a writ of execution, and having executed the same he has reason to believe that a person other than the person at whose instance such writ was issued lays a claim to the property seized or the proceeds of sale thereof, then—

(i) if the Provost Marshal General is still in possession of the property so seized, he shall in writing notify the Court of this fact and of the conflicting claims of property; or

(ii) if the Provost Marshal General has sold the property in execution of the writ, he shall pay the proceeds of the sale (after deduction of his fees, costs and expenses) into Court and shall in writing notify the court of the conflicting claims thereto,

and a copy of any such notification as aforesaid shall be delivered to all parties interested.

(3) Any person claiming an interest in the property or in the proceeds of sale of the property may take out a summons for directions calling on all other persons

claiming any interest therein to appear and to state the nature and particulars of their claims and to maintain or relinquish them.

11. From the date of 9 August 2012, onwards various Summonses have been issued by one or more Defendants seeking directions for sale of the Property by public auction. On 16 November 2012 (then) Hellman J made an order authorizing the DPMG to take possession and sell the Property by private treaty. On 18 July 2013 Hellman J made an order, *inter alia*, that the said real property of the Plaintiff be sold by private treaty or public auction at the option of the Defendants. Since that time there have been demands to the Plaintiff for money. Also, there have been efforts by the DPMG to sell the Property by private treaty and auction, valuations were made, and an offer of \$300,000 was declined by the DPMG as it was far below the market value for the Property. Correspondence flowed between the DPMG and the Defendants/Judgment Debtors. An auction scheduled for 13 April 2019 was cancelled due to a pending hearing in the Supreme Court on 21 May 2019 to settle the issue of the writ of *vend.ex*. Aside from the declined offer described above, no other offers have been forthcoming for the Property.
12. Based on two valuation reports provided to the DPMG on or around 6 January 2014, the open market value of the Property at that time was between BM\$550,000 and BM\$565,000.
13. Mr. Kessaram submitted that the First Defendant, under the various orders made in the Supreme Court and the Court of Appeal, is owed \$213,280 in costs as of 29 June 2021. This includes interest from the date of the orders for costs.
14. Mr. Harshaw submitted that the Second Defendant is owed \$200,130.88 in taxed costs as at 12 April 2021 plus an untaxed Bill of Costs from the Court of Appeal.
15. The Third Defendant Mr. Cranfield submitted that he is currently owed \$59,732 in costs.
16. Mr. White submitted that the Fourth and Fifth Defendants were owed \$256,232.92 in costs plus an untaxed Bill of Costs.

17. By my calculation, the total costs against the Plaintiff amount to approximately \$729,374, significantly in excess of the 2014 valuations.

The Deputy Provost Marshall General's Submissions

18. Mr. Taylor submitted that the DPMG seeks directions of the Court for several reasons as set out below on the following issues:

- a. Does the DPMG have legitimate authority to sell an owner's real property –
 - i. through a process that does not provide the fundamental right of protection against deprivation of property without compensation guaranteed under sections 1 and 13 of the Bermuda Constitution Order 1968 (the "**Constitution**"); and
 - ii. without the owner's knowledge and involvement in breach of natural justice?
- b. Do common law writs of *vend.ex* apply to Bermuda to empower the DPMG to sell an owner's real property at undervalue, in breach of natural justice, in a manner that justice is not seen to be done and contrary to the owner's fundamental rights under the Constitution.

The Constitution

19. First, Mr. Taylor submitted that an individual has constitutional rights of (a) protection of the law; (b) protection from deprivation of property without compensation; and (c) execution of judgments or orders of the Court be reasonably justified in a democratic society.

20. Section 1 of the Constitution states:

Fundamental rights and freedoms of the individual

"1 Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of

origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation, ...”

21. Section 13 of the Constitution states:

Protection from deprivation of property

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say— ...

(2) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right—

...

(vi) in the execution of judgments or orders of a court;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or ...

22. Mr. Taylor submitted that the Privy Council case of *Minister of Home Affairs and another v Fisher and another* [1979] 3 All ER 21 assists with the interpretation of the Constitution at page 21 as follows:

“Held (i) A constitutional instrument was a document sui generis, to be interpreted according to the principles suitable to its particular character and not necessarily according to the ordinary rules and assumptions of statutory interpretation.

(ii) Provisions in a constitutional instrument dealing with individual rights were therefore to be interpreted according to the language used and the traditions and usages which had influenced that language. Having regard to the broad and ample style of Chapter 1 of the Constitution of Bermuda which laid down principles of width and generality in regard to the protection of fundamental rights and freedoms of the individual ... the provisions in Chapter 1 ... were to be generously interpreted to give full recognition and effect to the fundamental rights and freedoms referred to.”

23. Mr. Taylor submitted that in light of several factors namely, (a) the protections in the Constitution, (b) the *Fisher* case principles of interpreting the provisions of the Constitution and (c) that the value of real property is its open market value, that a writ of *vend.ex* can lead to arbitrary and repugnant results and also lead to undesirable consequences shown not to be reasonably justifiable in a democratic society.

24. Mr. Taylor gave an example where a person owning property with a high value who owes a small sum can have his property sold for an amount equal to the sum owed or less than the sum owed or at a pittance in order to satisfy the debt; this can result in a purchaser receiving self-enrichment or unjust enrichment by acquiring the property at a fraction of the value which then enables the purchaser to sell at a higher price whilst the original owner is deprived of his property and also loses his equity. Such a situation would not be reasonably justifiable in a democratic society, hence the writ of *vend.ex* is unconstitutional.

The framework for selling real property under statute and Rules of the Supreme Court

25. Second, Mr. Taylor submits that the DPMG does not have inherent jurisdiction. His duties are prescribed by law as set out in the Provost Marshal General Act 1965 (the “**1965 Act**”) which gives powers to and imposes duties on the DPMG for the proper discharge of his functions as a servant of the Crown. Under section 5 of the 1965 Act, actions can be brought against the DPMG who could be liable for acts and defaults, e.g. selling real property at less than market value. Section 5 of the 1965 Act states as follows:

Liability of Provost Marshal General

5 All actions arising out of the acts or defaults of the Provost Marshal General the Deputy Provost Marshal General and the bailiffs in the discharge of or failure to discharge the duties of the Provost Marshal General shall be brought against the Provost Marshal General who shall be liable for the acts and defaults of the Deputy Provost Marshal General and the bailiffs in like manner as is the Sheriff of an English County for the acts or defaults of his under-Sheriff and bailiffs.

26. Mr. Taylor, noting that the DPMG does not represent either the Plaintiff or the Defendants, cited paragraph 93 of the case *Ziping Zhou v Ronald Geoffrey Kousal and the Sheriff for the State of Victoria Supreme Court of Victoria* [2012] VSC 187, quoting a passage from *Owen v Davey* (1955) VLR 442 , where it states “*The duty of the sheriff to act reasonably with due regard to the interest of both sides and his liability in damages if he fails to exercise reasonable care has been frequently stated*”.
27. Third, Mr. Taylor submitted that where immovable property is being sold, it should be sold at the current market price and the Court can also set a reserve price. It is implied that in Order 31/2 of the Rules of the Supreme Court 1985 (“**RSC**”) “*the best price that can be obtained*” means the market value and the way to determine this is a valuation and sale by public auction where a price that is more that market price can be offered. He relied on the case of *Walker and Lundborg* [2018] UKPC as follows:

“As Order 31 makes clear there is no need for there to be a contract of sale or a consent by the owners to a sale. Once a buyer has been identified who is prepared to pay the best price to the satisfaction of the court, the procedural provisions for the sale can be invoked. Mr. Collie’s attempt to resile from the terms of the order which he consented to, and in which the purchaser’s name is mentioned, cannot be a ground for setting the order aside. Relying on Mr. Collie’s representation that the offer of the Appellant was acceptable to Mr. and Mrs. Walker, the court was satisfied that the price offered was the best one in the circumstances, so as to properly make an order of sale disposing of Mr. Walker’s beneficial half interest,

which must necessarily involve a sale of the property. Furthermore, the purchaser had partly conformed or complied with the order by paying over the purchase price to the persons appointed to conduct the judicial sale. Liberty to apply could not in our view give the court a jurisdiction to set aside the order in the circumstances of this case that all the requirements of a judicial sale have been satisfied.”

28. Mr. Taylor submitted that the RSC do not mention the writ of *vend.ex*. Also, the orders being sought were not consistent with RSC Order 31 as leave of the Court is required as RSC Order 46/3 states:

46/3 Leave required for issue of writ in aid of other writ

A writ of execution in aid of any other writ of execution shall not issue without the leave of the Court.

29. Mr. Taylor submitted that if it were intended for writs of *vend.ex* to be permissible in Bermuda, then they would be included in the RSC similar to the Rule that is set out in the Supreme Court Practice 1999 (the “**White Book**”) which does provide for writs of *vend.ex* at page 812:

46/3/3 Writ of venditioni exponas –

*This is a writ in aid of execution by writ of *fi fa*. It can only be issued after the sheriff has made a return that he has seized goods under the writ of *fi fa* which he has been unable to sell “for want of buyers”. Emphasis added*

30. Fourth, Mr. Taylor submitted that the process of sale of real property in execution of judgments is set out at RSC Order 46/7 and Practice Direction A/50 Circular No. 8 of 2013 issued by Chief Justice Kawaley dated 8 August 2013 (the “**Practice Direction**”). Similarly, those documents do not provide for the writ of *vend.ex*. Further, the White Book does not contain a RSC Order 46/7 which does expressly provide for sale by auctions and states:

46/7 Sale of property in execution of judgment

(1) The following property is liable to attachment and sale in execution of a judgment, namely, land, houses, goods, money, bank notes, cheques, bills of exchange, promissory notes, government securities, bonds, or other securities for money, debts, shares in the capital or joint stock of any company and all other property whatsoever, whether movable or immovable belonging to the judgment debtor, and whether the same is held in his own name or by another person in trust for him or on his behalf.

(2) Every sale in execution of a judgment shall be made under the direction of the Registrar and shall be conducted according to such orders, if any, as the Court may make on the application of any party concerned and shall be made by public auction:

Provided that the Court may in any case authorise the sale to be made in such other manner as it may deem advisable.

31. The Practice Direction states:

Practice Direction Circular No. 8 of 2013

Order 46 rule 7 (2)

“1. Order 46 rule 7(2) provides as follows ...

Manner of conducting sales of real property in execution of judgment

2. Order 46 rule 7(2) prescribes sale by private auction as the standard mode of sale in the judgment execution process.

3. Current real estate market conditions have made the public auction an ineffective sale mechanism in the judgment execution context, be it a sale by the Provost Marshal General or a sale by the mortgagee in possession.

4. The proviso to Order 46 rule 7 (2) empowers the Court to authorize the sale of property by way of execution otherwise than by public auction.

5. With a view to saving judgment creditors the cost and inconvenience of applying for leave to sell real estate on a case by case basis, the Court hereby authorises all

sales of real property by way of execution to be carried out by private treaty or such other method as the Provost Marshal General and/or the judgment creditor, as the case shall be, may deem advisable.

6. *Where private sales are conducted by mortgagees in possession, regard must still of course be had for the duty to obtain the best possible price at the time of the sale: Edness –v- Bank of Bermuda Ltd [1998] Bda LR 51.*

7. *Where private sales are conducted on behalf of a judgment creditor by the Deputy Provost Marshal, regard must still of course be had to the desirability of consulting the judgment creditor and the judgment debtor on the terms of any proposed sale, and the advisability of seeking Court approval of any potentially controversial private sale terms: Vaucrosson –v- Appleby Spurling Hunter [2005] Bda LR 35.*

Involvement of the Judgment Debtor

32. Fifth, Mr. Taylor submitted that paragraph 7 of the Practice Direction shows that the DPMG should involve judgment debtors in proposed sales of their property. The Second Defendant’s Summons was on an *ex parte* basis and did not seek the involvement of the Plaintiff. However, he submitted that the Plaintiff should at least be present at a hearing dealing with the sale of his property to provide him the opportunity to make representation as natural justice dictates. Mr. Taylor submitted that in the Practice Direction, reference was made to the case of *Vaucrosson v Appleby Spurling Hunter* [2005] Bda LR 35 where the Court said:

“Bearing in mind that judgment debtors whose real property is being sold will invariably be losing a valuable asset and that their financial position may not enable them to effectively instruct Counsel to take vigorous action on their behalf during the execution process, it may be desirable for this Court in future cases to exercise more supervision over private sales, particularly in any case where a judgment debtor is unrepresented or otherwise appears ill-equipped to protect his rights, limited as they are in the execution context. The right not to be deprived of private property is

constitutionally protected, and is only permissible with respect to the execution of judgments as long as the relevant steps taken are ‘reasonably justifiable in a democratic society’: Bermuda Constitution, section 13(2)(a)(vi).

...

Where private sales are to be negotiated by the Deputy Provost Marshall General pursuant to a Court order without the active participation of the judgment debtor himself, it seems to me that consideration should usually be given to the need for any initial leave to be conditional upon subsequent Court confirmation of the proposed sale terms. This might seem onerous in administrative terms, but it would likely help to ensure that in cases such as the present, justice is manifestly seen to be done. This approach will likely have greater justification when real property of a substantial commercial and emotional value is involved, such as a principal family home, than if commercial goods or other property is being sold.”

Vend.ex does not apply to immovable property

33. Sixth, Mr. Taylor submitted that the common law writs of *vend.ex* only applied to goods seized by the sheriff/marshal but did not apply to the sale of immovable property since Bermuda’s legal system had legislative provisions and a mechanism for sale of immovable property under RSC Order 46/7(2) that was put in place by the Courts. Consequently, the applications fail as they have no basis in Bermuda.

Value of land is open market value

34. Seventh, Mr. Taylor submitted that the principles applicable to valuing land is stated in the House of Lords case *Transport for London (formerly London Undergrounds Ltd) v Spirerose Ltd (in administration)* [2009] UKHL 44 where the claimant’s land was the subject of compulsory acquisition and he was to be compensated. At page 1797 of the judgment it states:

“Held, allowing the appeal, that the principles applicable were that the value of land the subject of compulsory acquisition was its open market value, any depression in the

price that it might be expected to fetch caused by the scheme was to be disregarded ...”. Emphasis added.

35. Mr. Taylor submitted that the Court can take judicial notice of how property is sold in Bermuda where a valuer provides a market value of land and the DPMG uses that value to determine the amount at which the movable property should be advertised for sale and the minimum amount that should be accepted. Therefore the request of the Second Defendant to sell the property under the judgment of the Supreme Court at a price that is not necessarily a reasonable price does not appear justified or supported in law. He stressed that the Court should not order the sale of the property for an amount less than its open market value as it would not be reasonably justifiable in a democratic society.

DPMG being asked to fund activities of the sale

36. Eighth, Mr. Taylor submitted that the Second Defendant was asking for the DPMG to execute a sales and purchase agreement as well as fund specific activities of such a sale. He submitted that under no circumstances should the DPMG be required to execute agreements or fund any activities of the sale of a property.

Liability of the DPMG

37. Ninth, Mr. Taylor submitted that the DPMG had legitimate concerns that there would be implications for his office and his staff if the Plaintiff's property was sold through his office at less than market value where the price was not agreed to by the Plaintiff or the sale was not supervised by the Court. There was no scope in the Second Defendant's application for the DPMG to involve the Plaintiff since the Second Defendant's Summons was *ex parte* and the orders being sought did not provide for consultation with the Plaintiff or for the sale to be conditional upon terms agreed by the Court.

38. In the case of *De Zouche v Cook* date 1920-04-26 Saskatchewan Supreme Court which involved an action against a sheriff for negligence, the action was dismissed without costs

and it was held “*That it is the sheriff’s duty to sell goods for a reasonable price and that the prices that had been obtained were not reasonable, but that the sheriff being a civil servant was not personally liable for the negligence of his bailiff.*” The case illustrated the principle that property ought not to be sold for a price that is “*not necessarily a reasonable price*”. Paragraph 3 of *De Zouche* stated:

“The duty of the sheriff in selling property seized under the execution is laid down in Halsbury’s Laws of England, vol 14, page 56, as follows: “It is the duty of the sheriff within a reasonable time at the seizure, to sell the goods for a reasonable price.” And he cites as authority for that proposition the case of Keightley v Birch (1814) 3 Camp. 521, the headnote of which in parts reads: “The sheriff, having taken goods in execution under fieri facias is not justified in selling them to the highest bidder, but if he cannot obtain a reasonable price should return that they remain in his hands for want of buyers.” In giving judgment in that case, Lord Ellenborough said: “If the goods taken in execution were really worth £300 or £400, I think the sheriffs are liable for selling them at £72 15s 10d. The return ought to have been that they had taken goods which remained in their hands for want of buyers. If a chattel, worth a thousand pounds is put up for sale and only 5 pounds bid for it, the sheriff ought not to part with it for that sum, and he may fairly say it remains in his hands for want of a buyer. He ought to wait for a venditioni exponas, the meaning of which is, “Sell for the best price you can obtain.”

39. In *Zhou* several paragraphs highlight the point where in the circumstances of common law writs of *fi fa* and *vend.ex*, a sale by the Sheriff was set aside as follows:

“12. Zhou seeks a declaration that the Sheriff breached his legal duty by selling his interest in the property at the auction for an amount which was illusory, unfair, unreasonable in that it bore no relation to the evident worth of his interest in the property, and he seeks an order that that purported sale be set aside. He also seeks damages against the Sheriff.

33. *At the time of the second auction the market value of the property was accepted by the Sheriff as being approximately \$630,000.*

39. *Kousal then bid \$1000. There being no further bids, Mr. Griffin knocked the property down to Kousal.”*

Further Consultation Required

40. Tenth, Mr. Taylor submitted that in light of the above, the Chief Justice should consult the Bermuda Bar Council for input on the way forward in respect of writs of *vend.ex* or other similar mechanisms.

Costs

41. Mr. Taylor submitted that the matter is of public interest as the case assists in determining whether an owner’s real property can be sold by use of writs of *vend.ex* not shown in RSC Order 46/7 or a process not covered in the Practice Direction or at an undervalue without the owner’s knowledge, input or involvement and without protection of the Constitution.

42. Mr. Taylor submitted that the counsel for the Second Defendant had contended that the DPMG should be asked to pay costs. However, the public interest issue of the case ought to preclude costs against the DPMG. The Attorney General’s Chambers represents the DPMG as well as the interest of the public and the Constitution noting that the Attorney General does not represent the Plaintiff. Further, he submitted that attorneys are guardians of our fundamental freedoms and play an important role in the modern democratic state in upholding the rule of law which is mutually reinforcing with the Constitution.

The Plaintiffs’ Submissions

43. Mrs. Chambers for the Plaintiff opposed the application for several reasons and aligned herself with the submissions for the DPMG including that the Plaintiff’s constitutional rights were being breached in respect of the application for the *vend.ex* orders.

Additionally, Mrs. Chambers submitted that in the Plaintiff's affidavit, he stated that the proceedings have had a serious impact on him.

44. Mrs. Chambers submitted that the Plaintiff had not been involved in these proceedings from the outset and it was by chance that he was present for the hearing as they found out about it whilst researching another aspect of the matter. It appeared that the *vend.ex* orders were being sought without any input from the Plaintiff. However, she submitted that the Plaintiff should have input in respect of any proposed sale price offered for the Property.
45. At the invitation of the Court at the end of the hearing, due to the shortness of remaining time for the hearing, the Plaintiff submitted some submissions in reply in writing after the hearing had adjourned.
46. First, Mrs. Chambers reiterated Mr. Taylor's submissions that writs of *vend.ex* were not known to Bermuda. She objected to the submissions of Mr. Kessaram, set out below, about the use of such writs, noting that counsel were not able to provide any case authorities or examples where the writs of *vend.ex* had been used in Bermuda previously.
47. Second, the Mrs. Chambers reiterated Mr. Taylor's submission that writs of *vend.ex* did not apply to immovable property.
48. Third, Mrs. Chambers submitted that the Defendants intended to seek an order to allow them to sell the Property at the best price that can be obtained by the DPMG instead of for a reasonable price. Such an order was in breach of the rights of the Plaintiff.
49. Fourth, Mrs. Chambers submitted that it was clear that the Defendants intended by their conduct that the Plaintiff have no input in the aspects of any potential sale prices. She stressed that justice required the protection of the Court to ensure the Plaintiff participated in any process to sell the Property. To do otherwise would be an act that no democratic society should allow.

The First Defendant's Submissions

50. The First Defendant submitted that leave to issue writs of *vend.ex* should be granted for several reasons. First, Mr. Kessaram submitted that it was not necessary to consult the Chief Justice or Bar Council as the law was clear on the procedures to be followed in respect of the sale of immovable property. He stressed that although a judgment debtor may not like an order to sell his property, the judgment creditor had rights along with the DPMG and the judgment debtor himself.
51. Second, Mr. Kessaram submitted that in this matter, RSC Order 31 was not the relevant order and that RSC Order 46 was the relevant order. He submitted that Order 31 was used for the sale of land but in the present case there was no order for the sale of land, there were judgments to be satisfied by executing the sale of the Plaintiff's assets. As it turns out, the Plaintiff has an asset which is the Property. Therefore, the DPMG is required to fulfill his duty to enforce the writs of execution.
52. Mr. Kessaram referred to RSC Order 45 in respect of the enforcement of judgments and the execution of writs of *fi fa* as follows:

45/1 Enforcement of judgment, etc. for payment of money

(1) Subject to the provisions of these rules, a judgment or order for the payment of money, not being a judgment or order for the payment of money into court, may be enforced by one or more of the following means, that is to say—

(a) writ of fieri facias;

(b) garnishee proceedings;

(d) the appointment of a receiver;

e) in a case in which rule 5 applies, an order for committal;

(f) in such a case, writ of sequestration.

(4) In this Order references to any writ shall be construed as including references to any further writ in aid of the first mentioned writ.

45/12 Forms of writs

(1) A writ of fieri facias must be in such of the Forms Nos. 53 to 63 in Appendix A as is appropriate in the particular case.

53. Mr. Kessaram submitted that Form No. 53 Writ of *fi fa* was a command to the PMG to seize assets including land and houses and to cause them to be sold to satisfy the debts owed to the judgment creditor. However, in the United Kingdom, *fi fa* was not used for land, only for goods. Also Form No. 54 Writ of *fi fa* on order for costs was also for assets including land and houses. Mr. Kessaram stated that the *vend. ex* was a common law remedy for Bermuda as based on the English common law, referring to the White Book Order 46/3/3.

54. Mr. Kessaram submitted that the Practice Direction contemplated input by the judgment debtor and for the Court to give its approval. RSC Order 46/7 (2) allowed for any party, including the DPMG, to seek the assistance of the Court by way of application to the Learned Registrar. This course of action provided direction and protection to the DPMG because he can be held liable for his actions in the absence of approval by the Court.

55. Mr. Kessaram submitted that in the First Defendant's writ of *vend. ex* dated 2 June 2015 it clearly commanded the PMG to sell the Plaintiff's assets "*for the best price that can be gotten*". He cited the case of *Zhou* where the sale price was knocked down significantly and such sale was eventually not approved by the Court:

"Legal Principles – Sale of Assets Conducted by the Sheriff – a Short History to the Modern Form

82. The writ of fieri facias, or fi fa as it had become known, was one of the old, common law writs which had the object of facilitating execution on a judgment. A judgment creditor could seek to satisfy his or her judgment by the issue of writs in the alternative to fi fa, including capias, sequestration and attachment. Other writs were also available which could be issued in aide of the principal writs of execution, such as the venditioni

exponas and distringas nuper vice comitem. For convenience, and in accordance with a long legal tradition, I will refer to the writ of fieri facias as the writ of fi fa.

...

84. *One of the writs which could be issued in aid of the writ of fi fa was the writ of venditioni exponas, which in the Latin meant literally “you expose for sale”. Because this writ was supplementary to the writ of fi fa there needed to be in existence a current writ of that type to support the writ of venditioni exponas.*

...

86. *This [command to the Sheriff] was commonly viewed as permitting the Sheriff, amongst other things, to sell the relevant property without a reserve price in place.*

87. *There is early authority which suggests that, even where a writ of venditioni exponas was issued the Sheriff was not entirely relieved of his duty in relation to price. In Slye’s Case (1619) Dodderidge J is reported as observing: “... where the sheriffe by vertue of the writ venditioni exponas sels the thing under the value, there he shall be discharged” [17th century spelling replicated].*

88. *However, later learning points to the writ as constituting a direction to the Sheriff to get the best price he can get on the day of sale, regardless of the market value of the property. In effect, the Sheriff is protected from redress on the part of the judgment debtor by the direction given to him contained in the writ of venditioni exponas.*

89. *Nevertheless, in the absence of a writ of venditioni exponas, the Sheriff could be held liable in respect of sales conducted at an undervalue.*

90. *A case determined in England in 1814 during the Napoleonic Wars makes the point. In Keightley v Birch and Anor Lord Ellenborough observed:*

If a chattel, worth a thousand pounds is put up for sale and only 5 pounds bid for it, the sheriff ought not to part with it for that sum, and he may fairly say it remains

in his hands for want of a buyer. He ought to wait for a venditioni exponas, the meaning of which is, "Sell for the best price you can obtain."

56. Mr. Kessaram also submitted that at paragraph 93 *Zhou* set out that the Sheriff had a duty of care in selling the property to act reasonably in the interests of both the judgment creditor and the judgment debtor in order to obtain a fair price noting that a sale made by the Sheriff pursuant to a writ of *fi fa* may be set aside if the Court is satisfied that it has not been properly conducted or that it has not been a real sale. Further, *Zhou* set out support that the DPMG is an officer of the Court and is subject to the supervision and inherent jurisdiction of the Supreme Court in his duties to sell under the writ of *vend.ex*. Finally, *Zhou* (at paragraph 124) sets out the principles of common law to be applied to a Sheriff's sale as follows:

"(a) The sheriff is bound to act reasonably in the interest of both the judgments creditor and the judgment debtor in order to obtain a fair price;

(b) A fair price is not necessarily the market value, for it is well recognised that compulsory sales under legal process rarely bring the full value of the property sold. In making a determination as to the adequacy of the highest bid, the Sheriff is entitled to take into account that the sale, being a compulsory a process, is usually one in which a full and fair market value for the property will not be expected and some allowance must be made for low prices being obtained at such sales;

(c) In determining the fair price and all the circumstances, matters from the prospective buyer's perspective must be weighed. Such factors may include: the fact that buyers must be prepared to complete their purchases on the spot; the fact that buyers, particularly in the case of real estate, will not have usually have had the opportunity to inspect the property sold (at least internally); the fact that the title to the property may be encumbered or it may be physically occupied, giving rise to risks for the purchaser in acquiring clear title or rights of occupation without undue expense or delay; and other such risks which may be attendant for the purchaser on the purchase;

(d) Another factor to be weighed in the balance will be the amount, if any, obtained for the judgment creditor after the expenses of the sales have been deducted;

(e) If it is apparent to the Sheriff that in fact or in all probability the highest bid received is so far below the true value of the property offered for sale that he would be acting unreasonably if he was to accept it, the Sheriff should not accept the bid and pass in the property;

(f) If the sheriff breaches his common law duty and sells property at a price which, in all the circumstances is unfair, the following consequences may follow:

(i) The transaction may be set aside. On setting the transaction aside, no damages would arise in the usual case for which the Sheriff could be liable; or

(ii) Where the price obtained on the highest bid is so low that it could be said that there was no sale at all, or there's not a real sale or that it was in fact illusory, there would be no sale within s24 of the Sheriff Act, and therefore no sale within Division 5 with the result that the immunity of the Sheriff from a suit in damages conferred by s25 would be removed. There would not in truth be a "sale of property under this Division" for the purpose of section 25(2). In these circumstances, if the transaction is not set aside and loss and damage is in fact sustained, the Sheriff could be exposed to an award of damages at common law."

57. In light of the principle set out in *Zhou* above, Mr. Kessaram submitted as follows:

- a. The writ of *vend.ex* does exist in Bermuda law as part of the writ of *fi fa*;
- b. The duty of the DPMG is to obtain the best price in the interests of the judgment creditor and judgment debtor; and
- c. There is no duty under writ of *vend.ex* to obtain the market price as it is unlikely to obtain such in a forced sale.

58. Mr. Kessaram submitted that the writ of *vend.ex* was not unconstitutional. He submitted that the Constitution provided protection against deprivation of property. However, there were specific exceptions, such as the right of a person to enter land subject to a writ of execution, which is reasonable in a democratic society. There were also protections provided by the Court, for example in a Vancouver Court of Appeal case *First Western Capital Ltd v Wardie* Date 1984-12-12 (Vancouver No. CA002537) which dealt with sale of a matrimonial home, it stated:

“15. There are other reasons. Suppose the sale made by the sheriff be one that is collusive. Would the court be powerless to set such a sale aside? In McGill v McGlashan (1857), 6 Gr 324, Vice Chancellor Elsten said at p 329

That a court of equity has jurisdiction to interfere and declare void the sale of this description, I apprehend cannot be disputed”.

59. Mr. Kessaram submitted that in respect of the issue of DPMG potentially funding the sale process, previously in this matter, when funds were required, the Defendants provided the funds, and going forward, would most likely continue to do so as it was in their interest to execute a sale. Additionally, in respect of the DPMG executing sales and purchase agreements, there was no requirement for the DPMG to execute any such documents. In any event, the DPMG can always obtain protection by seeking the guidance of the Court including in respect of the price of a sale.

The Second Defendant’s Submissions

60. The Second Defendant also submitted that leave should be granted for writs of *vend.ex* to be issued and/or given effect to for several reasons. First, Mr. Harshaw submitted that neither the Second Defendant nor other Defendants have asked for the DPMG to be required to enter agreements with financial institutions such as banks who are financing purchasers. He referred to his statement in Harshaw 7 where he requested that the DPMG be “*authorized and permitted*” to enter into a contract for sale and purchase of the Property. He submitted that such wording was giving the DPMG the option to sell by private treaty and not just by auction.

61. Second, Mr. Harshaw submitted that the DPMG is wrong to assert that the writ of *vend.ex* is not known to Bermuda law and the RSC. He submitted that Bermuda law consists of the common law of England pursuant to section 15 of the Supreme Court Act 1905 which states:

Extent of application of English law

15. *Subject to the provisions of any Acts which have been passed in any way altering, amending or modifying the same, and of this Act, the common law, the doctrines of equity, and the Acts of the Parliament of England of general application which were in force in England at the date when these Islands were settled, that is to say, on the eleventh day of July one thousand six hundred and twelve, shall be, and are hereby declared to be, in force within Bermuda.*

62. Mr. Harshaw relied on Halbury's Laws of England Fourth Edition Vol 17 paragraph 518 where it stated "*Where it appears upon the return of a writ of *fi fa* that the sheriff has seized goods of the judgment debtor which he has not sold or has been unable to sell "for want of buyers", the judgment creditor may apply for leave to sue out a writ of *venditioni exponas*. This writ is a part of the *fi fa*, directing the sheriff to execute it in a particular manner, namely to sell for the best price obtainable.*" Mr. Harshaw strongly submitted that there were two sides of the coin, on the one hand there was protection afforded to the DPMG in acting in accordance with the order of the Court and on the other hand if he did not act, then he could be liable. He relied on the case of *Ives v Lucas* (1823) 1 C. & P. 7 where it stated that "*As long as a judgment exists, it protects those who seize property, under an execution founded on it; and if the judgment and execution are set aside, no action lies against the sheriff for anything he did under it, while it remained in existence.*" Therefore, the writ of *vend.ex* was a part of the writ of *fi fa*, not separate and distinct from it. He also referred to RSC Order 46/3 which stated that "*A writ of execution in aid of any other writ of execution shall not issue without the leave of the Court.*" This would include the writ of *vend.ex*.

63. Third, Mr. Harshaw submitted that the application for the writ of *vend.ex* is not about a sale of land pursuant to RSC Order 31 where immovable property should be sold at the "*current market price*" and where the Court can set the reserve price based on all the circumstances. So too, the writ of *fi fa* has nothing to do with RSC Order 31. On the contrary, the application is about what directions the Court should give in relation to giving

effect to writs of execution and writs in aid of those writs of execution. The case of *Walker* relied on by the DPMG was an RSC Order 31 type of case.

64. Fourth, Mr. Harshaw made submissions in respect of the constitutional argument and section 1 of the Constitution where it provides protection of the fundamental rights and freedoms of the individual. He stressed that the burden of proof falls on the objector – the DPMG – to show that enforcing the writs of execution against the judgment debtor have been “*shown not to be reasonably justifiable in a democratic society*”. Further, he submitted that the DPMG is wrong to reverse the language and burden of proof in section 7 of the Constitution by stating that the Constitution provides that the enforcing of a judgment or order of a court in any civil proceedings “*is to be*” shown to be reasonably justifiable in a democratic society. In any event, Mr. Harshaw submits that there has been no evidential basis put before the Court that the use of a writ of *vend.ex* is “*shown not to be reasonably justified in a democratic society*”. On the contrary, the Second Defendant has been deprived of his property rights as a judgment is a property right.
65. Further, Mr. Harshaw submitted that under Section 1 of the Constitution, the fundamental rights and freedoms of the individual were expressly “*subject to respect for the rights and freedoms of others and for the public interest ...*”. He stated that “*others*” included judgment creditors and that there was an important public interest in that judgment creditors would have their judgments satisfied. He stated that in section 7(2) of the Constitution entitled “*Protection for privacy of home and other property*”, the element of “*protecting the rights and freedoms of other persons*” was again provided for, with the exception “*except so far as that provision or, as the case may be, the thing done under the authority therefore is shown not to be reasonably justifiable in a democratic society.*”
66. Fifth, Mr. Harshaw submits that it is wrong to describe the Property as high value and that the Plaintiff only owes a small sum. In fact, he owes over \$729,000, not an insignificant sum, of which he has not paid one penny in more than 7 years.
67. Sixth, Mr. Harshaw submits that the DPMG should consider the rights of the Defendants to be paid their costs as well as the protection of the Supreme Court to any person, including

the DPMG, acting in accordance with an order of a Superior Court with unlimited jurisdiction. Further, he submits that the DMPG may be liable to the Defendants for any loss due to the diminution in value of the Property whilst the DPMG is in default of his duty to cause the Property to be sold in execution of the writs of *fi fa*.

68. Seventh, Mr. Harshaw submits that there is nothing in section 47 of the Supreme Court Act 1905 that excludes the Plaintiff from being involved in the process of sale under the writ of *vend.ex*.

69. Eight, Mr. Harshaw submitted that as this was a straightforward case in respect of the rights of the judgment creditors, there was no need for the extraordinary request of consultation with the Bar Council.

The Third Defendant's Submissions

70. The Third Defendant Mr. Cranfield adopted the submissions of Mr. Kessaram and Mr. Harshaw. He added two other points. First, he disagreed with the Plaintiff's contentions that the Defendants were trying to sell the Property at a low price on the basis that that did not make any sense as a high sale price was desired in the circumstances.

71. Second, he submitted that the media statements by Mr. Moulder and his conduct with the real estate agents were most likely reducing any potential sale prices.

The Fourth and Fifth Defendants' Submissions

72. Mr. White for the Fourth and Fifth Defendants adopted the submissions of Mr. Kessaram and Mr. Harshaw.

Analysis of the Defendant's Applications

73. In my view, for the reasons set out below, a writ of *vend.ex* is part of the common law of Bermuda and is not unconstitutional. Therefore, leave should be granted to issue writs of

vend.ex subject to consultation with the Plaintiff and subject to the approval of the Court of any sale. Further, the DPMG should be directed to give effect to writs of *vend.ex*.

Writ of *vend.ex* as part of Bermuda Law

74. First, I am of the view that the common law writs of *vend.ex* are part of the common law of Bermuda. I accept that the Bermuda RSC do not expressly provide for such writs but it seems to me that the framework for satisfying judgments is designed to provide a judgment creditor with tools and mechanisms to have his judgment satisfied. The RSC Order 45/1 provide various pathways for the satisfaction of judgments. The option of a writ of *fi fa* is one such pathway that in general terms allows possession of property for the purpose of sale in order to satisfy the judgment. In the present case, writs of possession were executed and attempts at a sale were not successful due to several reasons including a scheduled auction being cancelled and an offer being declined because it was too low, that is, it was not the best possible price in all the circumstances.
75. The issue then arises as to what should be done at this stage of proceedings. Should the judgment creditors wait forever for the best possible price to materialise, if ever? Should the judgment creditor endure an unpaid judgment whilst the judgment debtor enjoys the property – in this case his real property? In my view, justice and fairness calls for more, in particular to ensure that in the public interest judgments should be satisfied. I am persuaded that the legal framework allows for a next step to take place in the form of a sale of property on the *vend.ex* basis “*for the best price which can be obtained*” subject to the approval of the Court. In my view, I am bound to accept the submission of Mr. Harshaw that pursuant to section 15 of the Supreme Court Act 1905 the common law of England which was in force in England on 11 July 1612 are in force within Bermuda. Therefore, in following the case authorities, I accept that, per the White Book Order 46/3/3 set out above, the common law writ of *vend.ex* “*is a writ in aid of execution by writ of fi fa*”. I also rely on Halsbury’s as set out above that “*This writ is a part of the fi fa ...*” and the principles set out in *Zhou* where it recited the “*Legal Principles – Sale of Assets Conducted by the Sheriff – a Short History to the Modern Form*” as set out above.

76. I have also considered RSC Order 46/7 and the Practice Direction. Kawaley CJ issued the Practice Direction under the proviso of RSC Order 47/7 which empowered the Court to authorise a sale of property by way of execution otherwise than by public auction. He therefore authorized sale of real property by private treaty and gave further directions for such sales. In my view, the proviso clearly provides the Court with the power to authorise various methods of sale, which in my view includes a writ of *vend.ex* by name or indeed on terms similar to a writ of *vend.ex*.

77. Further, it is clear that the Practice Direction contemplates that the judgment debtor should be consulted in respect of any proposed sale. In my view, such consultation should also apply for writs of *vend.ex*. Further, I accept that any sale for the best price that can be obtained should only proceed with the sanction of the Court.

The Constitutional provisions

78. Second, having found above that the writ of *vend.ex* is part of the common law of Bermuda, it is now necessary to turn my consideration to the contention by the DPMG that the writ of *vend.ex* is unconstitutional in that it breaches section 13 of the Constitution, “*Protection from deprivation of property*”. In respect of the relevant test for such an assertion, in the very recent judgment in *Brewster et al –v- the Premier of Bermuda et al* [2021] SC (Bda) 57 Civ Hargun CJ set out the approach and relevant test as follows:

“13. The framework of the Constitutional provisions relating to fundamental rights, including section 11, contemplates that in the first instance it is for the applicant to show that there has been a prima facie breach of a fundamental right and in this regard the applicant bears the burden of proving this breach. [Footnote 2: See page 439 of Fundamentals of Caribbean Constitutional Law by Tracy Robinson, Arif Bulcan and Adrian Saunders; and Benevides v The Attorney General [2014] SC (Bda) 22 Civ (28 March 2014), Hellman J at [34].]”

14. *Once the applicant has discharged the burden of showing a prima facie breach of a fundamental right set out in Chapter 1 of the Constitution, the respondent must prove that the measures limiting the protected right are reasonably required in the interests of defence, public safety, public order, public morality or public health (section 11 (2)(a)(i) of the Constitution). [Footnote 3: See page 439 of Fundamentals of Caribbean Constitutional Law; and Hellman J at [35] in Benevides.]*

15. *The requirement of showing that a measure restricting the protected right is reasonably required was considered by the Privy Council in de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, an appeal from Antigua and Barbuda, where the Privy Council accepted and adopted the threefold analysis of the relevant criteria set out the judgment of Gubbay CJ in the Supreme Court of Zimbabwe in Nyambirai v National Social Security Authority [1996] 1 LRC 64. According to this three-part analysis the respondent must prove (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right of freedom are no more than is necessary to accomplish the objective.*

16. *As pointed out by Lord Reed in Bank Mellat v Her Majesty's Treasury [2013] UKSC 39, at [73], the de Freitas formulation of the concept of proportionality has been applied by the House of Lords and the Supreme Court of the United Kingdom as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in Huang v Secretary of State of for the Home Department [2007] UKHL 11, at [19] that the formulation was derived from the judgment of Dickson CJ in R v Oakes [1986] 1 SCR 103 (Supreme Court of Canada), and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups.*

17. *The fourth requirement referred to in Huang appears to be reflected in section 11 (2)(a)(ii) of the Constitution: “except so far as that provision or, as the case may be,*

the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.” [Footnote 4: See page 444 of *Fundamentals of Caribbean Constitutional Law*.]

18. When the burden of establishing that the measure limiting the protected right is reasonably required has been discharged by the respondent, it is for the applicant to show that the measure is nevertheless not reasonably justifiable in a democratic society. [Footnote 5 - see page 439 of *Fundamentals of Caribbean Constitutional Law*; and *Benevides* at [40].”

79. I am also mindful of the guidance given in *Fisher* that the Court should be “guided by the principle of giving full recognition and effect to the fundamental rights and freedoms.” I do note that the challenge in *de Freitas* and in *Brewster* are in respect of assertions that legislation impinged on the fundamental rights, although in the present case, unusually, the assertion is that a common law remedy, the writ of *vend.ex*, impinges on the fundamental rights. Therefore, in my view the *de Freitas* test is still the relevant test although it will be necessary to adapt it accordingly from being about legislation to being about the writ of *vend.ex*.

80. The first issue is to consider whether the DPMG and/or the Plaintiff have shown that the writ of *vend.ex prima facie* breaches the Plaintiff’s fundamental right of protection from deprivation of property under section 13 of the Constitution. It is of some significance that section 13 of the Constitution itself provides at 13(2)(a)(iv) that the law makes provision for the execution of judgments or orders of the Court. Therefore, a writ of *fi fa* and a writ of *vend.ex* fall within this section. Further, as stated above, the Court is empowered to give approval to a sale bearing in mind the factors set out in *Zhou*. However, I am satisfied that a sale by a writ of *vend.ex* does *prima facie* interfere with the Plaintiff’s fundamental right to protection from deprivation of property under section 13 of the Constitution.

81. It is now necessary to consider whether the Defendants can discharge the burden of establishing that the writ of *vend.ex* is reasonably required in the interests of satisfying a judgment of the Court. The consideration of this issue requires the Court to apply the three-

part *de Freitas* test, namely, whether (1) the legislative objective is sufficiently important to justify limiting a fundamental right; (2) the measures designed to meet the legislative objective are rationally connected to it; and (3) the means used to impair the right of freedom are no more than is necessary to accomplish the objective. I will now address those limbs in turn.

82. In respect of the first limb of the *de Freitas* test, I adapt the question to be whether the objective of judgment creditors having their judgment satisfied by payment is sufficiently important to justify limiting a fundamental right, that is, the deprivation of property. In my view, the answer to this must be in the affirmative for the simple reason that the rule of law exists so that members of society can resolve their differences in a court of law, obtain judgments and be paid on them to bring finality to their disputes. The drafters of the Constitution clearly had this in mind when they expressly allowed for the provision of the execution of the orders of the Court in section 13.

83. In respect of the second limb of the *de Freitas* test, I adapt the question to be whether the measure, that is, the writ of *vend.ex*, designed to meet the objective is rationally connected to it. In *Brewster*, Hargun CJ stated:

“52. In discussing the concept of “rational connection” Lord Reed in Bank Mellat referred, at [92], to the Canadian decision in Lavigne v Interior Public Service Employees Union [1991] 2 SCR 211, where Wilson J observed at 291:

“The Oakes inquiry into ‘rational connection’ between objectives and means to attain them requires nothing more than showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt.”

53. Lord Reed considered that the words “furthered by” point towards a causal test: a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective. In the following paragraph at [93] Lord Reed stated that legislation may be based on an evaluation of complex facts, or considerations which are contestable and may be controversial and

in such situations, the Court has to allow room for the exercise of judgment by the executive.”

84. The purpose of the writ of *vend.ex* is that, as a part of the writ of *fi fa*, it is the next step to be taken when the property in possession has not been sold for the best price, meaning the market price. I am of the view that this makes logical sense because if a property cannot be sold at market price then it may possibly be sold at a price less than the market price, subject to the approval of the Court. It follows that the proceeds would then be available to satisfy judgment creditors. In other words, the objective of the satisfaction of judgments is furthered by executing writs of *vend.ex*. Also, I rely on Section 1 of the Constitution where it expressly states that the fundamental rights and freedoms entitled to a person are subject to respect for the rights and freedoms of others and for the public interest for two points: (a) judgments creditors have the right to be paid; and (b) it is in the public interest for judgment creditors to have their judgment satisfied by payment pursuant to the law.

85. Further, as stated above, section 13 of the Constitution makes provision for the deprivation of a person’s property when it is for the execution of judgments and orders of a Court. In my judgment, I answer the second limb in the affirmative that the writ of *vend.ex* is rationally connected to the objective of having judgments satisfied by payment.

86. In respect of the third limb of the *de Freitas* test, the means used to impair the right of freedoms are no more than is necessary to accomplish the objective, in *Brewster*, Hargun CJ stated as follows:

“87. This is the third limb of the de Freitas test. In Scottish Ministers case, Lord Braid, at [105], stated that a measure will be disproportionate if it is clear that the desired level of protection could be attained equally well by measures which were less restrictive. Lord Braid also said that the mere assertion that some other measure is equivalent and less intrusive is not sufficient; and equally the fact that some other measure can be envisaged is not enough. What is required is evidence of such measures by the Applicants.”

87. The writ of *vend.ex* commands the DPMG to sell the Property “*for the best price that can be gotten*”, the Property having failed to be sold at a market price. As I have already stated, such a sale would be subject to the approval of the Court. Also, as stated above, the case authorities, in particular *Zhou*, give examples where a sale would be struck down by the Court if the sale price was too low, or unreasonable. In determining whether to grant approval for a sale, the Court would have to take into account the various factors listed in detail in *Zhou* that the Sheriff would have had to take into account including all the other circumstances. This invariably includes that a property under sale by a Court order is not likely to fetch the market price in any event. A further complication affecting the sale price that the Court will have to consider is that the Plaintiff is in occupation and steps may have to be taken by a new owner to obtain vacant possession. Therefore, the approval of the Court brings protection to the DPMG as well as to the Plaintiff whose views would also be taken into consideration.

88. In respect of any evidence by the Plaintiff or the DPMG, the evidence of Mr. Terry is that all other options have been exhausted, namely an auction was cancelled and a low offer was declined despite all efforts to obtain a sale. The other measures that are less intrusive have been tried and have not succeeded. In my view, the execution of the writ of *vend.ex* is no more than is necessary to accomplish payment of the judgment.

The measure is “not reasonably justifiable in a democratic society” issue

89. As stated above, once the Defendants have established that the writ of *vend.ex* is reasonably required in the interest of payments to satisfy a judgment, it is still open to the Plaintiff or the DPMG to show that nevertheless the writ of *vend.ex* is not reasonably justifiable in a democratic society. The burden of proof of establishing this is upon them. In *Brewster*, Hargun CJ stated:

“95. In *Robinson v Sealey* [1974] 1 CCCBR 94 (HC TT), *Georges J* commented, *obiter*, that it is “difficult to conceive of a case in which a law would be held to be reasonably required... but not reasonably justifiable.” [Footnote 7: In *Fundamentals of Caribbean Constitutional Law* the learned authors suggest that “the overriding test of a

reasonably justifiable in a democratic society would survey the broader implications of that society of limiting the protected rights. It would give more consideration to balancing the protected rights against the interests of society, asking “is the infringement too high a price to pay for the benefit of the law”... Simply put, the overriding test of a reasonably justifiable in a democratic society requires further scrutiny to achieve an appropriate balance between the interests of the society and those of the individuals and groups affected, the element that is missing in the three-part de Freitas test.”

90. The DPMG submitted that the writ of *vend.ex* was not reasonably required as a sale at any price that could be gotten could lead to arbitrary and repugnant results and undesirable consequences in that the Plaintiff could lose more of his equity than he should whilst a purchaser could benefit from unjust enrichment. In my view, if a sale was unsupervised by the Court, then that result might be possible. However, for the reasons already stated, any proposed sale by way of the writ of *vend.ex* should be subject to the approval of the Court with all its considerations and protections. Such approval would seek to minimize any unreasonable loss in equity to the Plaintiff over and above what will be lost in any event by payment of the judgment. This would in turn address any unjust enrichment. Further, the objective would be satisfied in that proceeds of the sale would be paid to the Defendant. Therefore, in my view, the Plaintiff has failed to show that the writ of *vend.ex* is not reasonably justifiable in a democratic society. Also, on this point, I rely on *Vaucrosson v Appleby Spurling Hunter* as set out above.

91. In light of the above reasons, it is necessary to clarify various issues raised by the DPMG as follows:

- a. I find that RSC 31 is not relevant in this matter;
- b. I find that the writ of *vend.ex* applies to land in Bermuda;
- c. I find that the Property can be sold by execution of a writ of *vend.ex* for the best price that can be obtained, which might be a price lower than the market value, subject to consultation with the Plaintiff and subject to the approval of the Court;

- d. The DPMG is not required to fund the expenses of the sale of the property. My preliminary view, subject to any further submission from the parties, is that such reasonable expenses should be funded by the parties with any expenses by the Defendants to be recovered from the proceeds of any sale of the Property on a priority basis; and
- e. The DPMG is protected from liability in respect of a sale by writ of *vend.ex* for a price which is lower than the open market price once the Court has granted approval for such sale.

Conclusion

92. In respect of the directions requested of the Court by the DPMG, in light of the above reasons, my judgment and directions are as follows:

- a. Common law writs of *vend.ex* do apply to Bermuda to empower the DPMG to sell the Property at under value subject to the Court's approval; and
- b. The DPMG has legitimate authority to sell the Property by way of a writ of *vend.ex*, to obtain the best price that can be obtained at the time of the sale, subject to all parties and in particular the Plaintiff, having the right to be consulted and to have their views considered and subject to the approval by the Court for such sale.

93. In respect of the Second Defendant's Summons dated 8 March 2019, I direct the DPMG to give effect to the writs of execution in this matter, including the writs of *vend.ex* pursuant to the directions to the DPMG as set out above.

94. In respect of the First Defendant's *ex parte* Summons dated 10 December 2020, I grant the application for leave to cause a writ of *vend.ex* to issue in respect of each of its three existing writs of execution in order to obtain the best price that can be obtained subject to consultation of all parties including the Plaintiff and subject to the approval by the Court of any such sale.

95. In respect of the current value of the Property, my preliminary view, subject to any further submission from the parties, is that updated valuations should be obtained to assist the parties and the Court in considering any application for approval for the sale of the Property, costs of the valuation to be recovered from the proceeds of any sale of the Property on a priority basis.

96. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that the parties bear their own costs in respect of the hearing of 28 June 2021 and the relevant preparation for it.

Dated 10 August 2021

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**