Privy Council Appeal No 29 of 2006

(1) Bastion Holdings Limited
(2) Bardi Limited *Appellants*

v.

Jorril Financial Inc. *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 8th November 2007

Present at the hearing:-

Lord Scott of Foscote
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Mance
Sir Henry Brooke

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*[Delivered by **Lord Scott of Foscote**]*

1. It is not possible to describe the issues for decisions on this appeal without first outlining the history that has given rise to this litigation and describing the manner in which the litigation was dealt with in the courts below. Their Lordships will start with the history.

The history

2. Paul Geddes was a man of considerable wealth, a man of financial power and influence in many places and, certainly, in a number of Caribbean countries. He was described by McIntosh J as "a giant in the Jamaican business sector". As is often the case with individuals of great wealth many of his assets were held by and controlled via a network of nominee companies. Some were incorporated in Jamaica, some in the Cayman Islands. These assets included a substantial shareholding in Desnoes and Geddes Ltd ("D&G"), a company incorporated in Jamaica and whose shares were quoted on the Jamaica Stock Exchange.

3. The D&G shareholding, nearly 11 million shares representing about 10 per cent of the issued shares, stood in the name of Bardi Ltd ("Bardi"). Bardi, too, was incorporated in Jamaica. There were two issued shares in Bardi, one in the name of Mr Geddes, the other in the name of his wife, Mrs Margie Geddes, whom he had married in 1991. Bardi had two directors, namely, Mr and Mrs Geddes. Its only corporate function appears to have been to hold investments for Mr Geddes. The D&G shareholding was by some distance Bardi's most valuable asset but it did hold other investments as well. Mrs Margie Geddes was not Mr Geddes' first wife. He had been married before and had two adult daughters.

4. Over the period June to August 1994 Bardi issued to Mr Geddes a number of promissory notes (18 accordingly to the Agreed Statement of Facts) for the total sum of US$4,474,326 payable on demand with interest accruing at the rate of 12 per cent per annum. Each promissory note was expressed to be given "in consideration of value received". There is no evidence as to what that value had consisted of, but it is a fair inference that it consisted of, or related to, advances of the costs of acquisition of the investments standing in Bardi's name.

5. Mr Geddes endorsed the promissory notes over to Securities Trust & Management Services Ltd (which later changed its name to Coverdale Trust Services Ltd.) and Coverdale endorsed and transferred the notes to its wholly owned subsidiary, Jorril Financial Inc. ("JFI"). JFI, the respondent to this appeal, is a trust company holding assets on trusts for Mr Geddes' two daughters and their respective children. It seems clear, therefore, and the contrary has not been suggested, that Mr Geddes intended his daughters and grandchildren to have the benefit of the assets held by Bardi, subject to any future appreciation in the value of those assets over and above the amount outstanding under the promissory notes. The benefit of any such appreciation would, of course, accrue to Bardi and, thus, to Bardi's shareholders.

6. Mr Geddes died on 9 June 1999. Under his Will Mrs Geddes became the sole beneficiary of his considerable estate and, therefore, the owner of both the issued shares in Bardi and in sole control of Bardi.

7. By three letters, each dated 9 August 1999 and served on Bardi on 23 August 1999, attorneys for JFI made a written demand for the payment within 14 days of the amount outstanding under the promissory notes. Payment was not made and on 8 November 1999 JFI issued a Writ against Bardi for US$7,280,987 ($4,474,326 principal and $2,806,661 accrued interest). That sum exceeded the combined market value of the investments held by Bardi. At the same time as issuing the Writ, JFI applied for, and obtained *ex parte* , a Mareva injunction restraining Bardi from removing from Jamaica or disposing of or dealing with any of its assets wherever situated and of whatever kind. The Writ and Order were served on Bardi on 10 November 1999 and on 28 November Bardi entered an appearance. There was then a long delay during which, their Lordships were told, there were negotiations between the parties. The negotiations evidently came to nothing for on 1 November 2000, nearly a year later, JFI issued a summons for summary judgment.

8. The application for a Mareva injunction had been supported by an affidavit of 5 November 1999 sworn by Mr Lance Hylton, a director of Coverdale. Mr Hylton swore a second affidavit, on 30 October 2000, to support the application for summary judgment and, on 29 June 2001, a third affidavit seeking the continuance of the Mareva injunction until satisfaction by Bardi of any judgment in favour of JFI.

9. Apart from anything said in the failed negotiations, and their Lordships know nothing of their content, the first opposition to JFI's claims came in an affidavit sworn on 17 October 2001 by Paula Jackson, describing herself as "manager" of Bardi. In her affidavit she put JFI to proof that Mr Geddes had endorsed the promissory notes over to Coverdale and, secondly, asserted that Bardi had

> "...sought to satisfy the demand by entering into a contract to sell its principal asset at market value, its shares in [D&G]".

She exhibited an Agreement for Sale ("the Agreement") as the contract to which she had referred. The Agreement, bearing the date 1 October 1999, was expressed to be between Bardi and Bastion Holdings Ltd ("Bastion"), the appellant in this appeal, and to set out the terms for a sale to Bastion of the D&G shares for a sum

of J$76,646,122. Their Lordships will refer to the terms of this Agreement in more detail later.

10. On 16 November 2001 Bardi issued a summons to vary the Mareva injunction so as to allow it to complete the sale of the D&G shares to Bastion pursuant to the Agreement. In the summons the Agreement was described as "made" on 1 October 1999. It certainly bore that date but the question whether it had been made on that date or made subsequently and back-dated was to become the principal issue in the litigation. The summons to vary the Mareva injunction was supported by an affidavit sworn by Mrs Geddes on 23 November 2001. She deposed that Bardi had never had assets adequate to meet the amount outstanding under the promissory notes (para.9), that the sale of the D&G shares was "...the only secure avenue for [her] to realise a substantial sum to be paid towards the debt claimed by [Bardi]" (para.12) and that, accordingly, she had agreed on a sale of the shares at a price of J$76,646,122. She said she had agreed the terms of sale with a Mr Albun Whittaker. He was, she said, a friend of hers and was "the principal" of Bastion, a company incorporated in the Cayman Islands. The Agreement had, she said, been sent to Mr Whittaker in George Town, Grand Cayman, for signing and had been received back in Jamaica for stamping on or about 24 November 1999. The tenor of Mrs Geddes' evidence about the sale of the D&G shares was that the beneficial interest in the shares had passed to Bastion before the Mareva injunction had been granted and, therefore, that completion of the sale should be allowed to take place with the Mareva injunction applying to the proceeds of sale of the shares and not to the shares themselves.

11. Mrs Geddes' evidence about the Agreement led Mr Hylton to suspect skulduggery. He swore an affidavit on 18 January 2002 in which, after dealing with Paula Jackson's challenge to the endorsement of the promissory notes to Coverdale, he addressed himself to Mrs Geddes' evidence about the Agreement. He characterised it as "a fraudulent sham designed to put the D&G shares beyond the reach of [JFI]" and thus, of course, beyond the reach of Mr Geddes' two daughters and their children. He set out his reasons for this characterisation in paragraphs 12 to 14 of his affidavit. He alleged, first, that Mrs Geddes, a director of D&G, had been in possession in that capacity of price sensitive information about D&G's intentions to declare dividends on the D&G shares of J$0.50 per share payable on 17 December 1999 (the total dividend attributable to the D&G shares would be, and in the event was, J$5,474,723), and to issue to each shareholder two additional shares for every share held on 30 December 1999. The news about the dividends and bonus issue was reported in the 6 October 1999 issue of the Jamaica Gleaner but previously, Mr Hylton suggested, had not been public knowledge. In addition Mr Hylton referred to knowledge by Mrs Geddes of

commercially important contracts entered into by D&G that had not become public knowledge until mid October 1999. The effect of the public acquiring knowledge of these matters, Mr Hylton suggested, had been to produce a rise in the value of D&G shares on the Jamaica Stock Exchange. The shares had stood at J$7.00 each on 4 October 1999 but stood at J$12.50 each by 20 October 1999. On 5 January 2002, a few days after the bonus issue, the D&G shares (3 times as many as before) stood at J$5.50, equivalent to J$16.50 per share before the bonus issue. The shares sold to Bastion for J$76.6 million odd had become worth J$180 million on these figures. Mr Hylton asserted, secondly, his belief that the 1 October 1999 date was a false date and that the Agreement had in fact been signed a week or so before 24 November 1999, the date on which it had been received in Jamaica for stamping. He expressed the belief that the back-dating to 1 October was intended to create the impression that the price of J$76.6 million odd had been agreed before the price sensitive information he had referred to had caused the value of the shares to rise. In summary Mr Hylton's affidavit raised serious questions, first, as to whether the Agreement was to the knowledge of the parties a sale of the shares at a considerable undervalue and, secondly, as to the date of the Agreement.

12. A point not referred to by Mr Hylton, but that arises if his back-dating allegations are well-founded, is that if the Agreement had been made after the Mareva injunction had been granted it would have constituted a dealing with assets of Bardi in breach of the terms of the injunction. Any party who had entered into the Agreement with knowledge that that was so would appear *prima facie* to have committed a contempt of court. If that were so, it would follow that the Agreement would be unlawful, as constituting an attempt to defeat the purpose of the injunction and, accordingly, to interfere with the administration of justice (see *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191).

13. It is convenient at this point to refer in more detail to the terms of the Agreement.

(1) The sale of the shares, including all rights as to capital and income, was to take effect from 1 October 1999. So any post 1 October 1999 dividends were to belong to Bastion (para.1).

(2) The consideration of J$76,646,122 was to be payable as to J$20 million as a "deposit" and receipt of that sum by Bardi was acknowledged (para.2(a)).

(3) Completion of the sale was to take place on 30 November 1999 but the balance of the purchase price, J$56,646,122, did not have

to be paid by Bastion until 30 September 2004 (para.3). Interest at 10 per cent per annum on the balance was to be paid as from 30 November 1999 (para.11).

(4) Bastion was to execute in favour of Bardi a Promissory Note for the payment of the balance of the purchase money and the interest thereon and, as security, the new D&G stock certificates, when issued in the name of Bastion, share certificates representing all the issued shares in Bastion and a transfer of all the issued shares in Bastion "duly executed but undated" were to be delivered to Bardi (para.3). The effect of this would be that, if Bastion failed to pay, Bardi could in the last resort obtain payment by recourse to the D&G shares standing in the name of Bastion.

(5) The Agreement was signed by Mrs Geddes on behalf of Bardi and by Mr Whittaker on behalf of Bastion. Each was described as "Director" of the company in question. Mr Whittaker also signed the transfer of the Bastion shares referred to in the foregoing sub-paragraph. Each signature was witnessed by the same person.

The course of the litigation

14. It is important to bear in mind that the existence of the Agreement did not become known to JFI and the issues relating to the Agreement did not become apparent until Bardi applied for a variation of the Mareva injunction so as to enable it to complete the sale of the D&G shares. This was an interlocutory application by Bardi; the only respondent to the application was JFI. JFI's objection to the requested variation was based on the contentions that the Agreement was for a sale of the shares at an undervalue, for a consideration fixed otherwise than after an arms' length negotiation, and that the Agreement had been back-dated. If the judge hearing the application were persuaded that a sufficiently arguable case for impugning the Agreement had been shown by JFI, it would be expected that the judge would have maintained the Mareva injunction until the merits of that case could be determined in proceedings with Bastion as a party. The issues could not be finally settled without Bastion as a party.

15. On 6 December 2001 an order was made for Mrs Geddes to attend court to be cross-examined on her affidavit of 28 November 2001 and on 20 February 2002 JFI's summons for summary judgment and Bardi's summons for variation of the Mareva injunction were called on for hearing before McIntosh J. Mrs Geddes was

cross-examined. The cross-examination continued over 21 February 2002. Interesting facts that emerged were

1. that dividends totalling some J$56 million had been received by Bardi since 1 October 1999 in respect of the D&G shares (p.102 of the Record);
2. that the discussions between Mrs Geddes and Mr Whittaker about the sale of the D&G shares had been entirely oral; there were no letters or notes or other written records of the discussions (p.106 of the Record);
3. that Mr Whittaker was the only person Mrs Geddes had approached as a potential purchaser of the shares (p.106/7 of the Record);
4. that Mrs Geddes had signed the Agreement in Mr Whittaker's office in the Cayman Islands (p.109 of the Record);
5. that the promissory note executed by Bastion in favour of Bardi had been sent to Mr McDonald, Mrs Geddes' and Bardi's lawyer, on 22 November 1999 and received by him on 24 November (p.112 of the Record);
6. that Price Waterhouse Coopers had valued the sum of J$56 million payable by the end of September 2004 as worth no more than J$34 to 36 million as at 1 October 1999 (p.124 of the Record);
7. that Mrs Geddes had taken no steps at all to investigate the financial resources of Bastion (p.129 of the Record); and
8. that the dividends on the D&G shares that had been received by Bardi (see subpara.1 above) had been remitted by Bardi to Bastion after the grant of the Mareva injunction (p.133 of the Record) and that Mrs Geddes had authorised that to be done.

As a result of Mrs Geddes' evidence about the dividends on the D&G shares, the judge, before adjourning the hearing to 8 April 2002, ordered that no further payments be made by Bardi to Bastion.

16. On 4 April 2002 Bastion issued a summons for leave to intervene in JFI's action as an interested party and to be joined as a second defendant. Bastion's application was supported by an affidavit sworn by Mr Whittaker. Mr Whittaker said that Bastion had entered into the Agreement to purchase the D&G shares in good faith and "would suffer irreparable harm if prevented from completing the

agreement ..." (para.4). The nature of the "irreparable harm" was not disclosed. Mr Whittaker went on to say this in paragraph 6:

> "I am an investor and the principal of Bastion Holdings Limited. My company was approached by Mrs Margie Geddes on behalf of Bardi Limited to buy shares in [D&G] and terms were agreed for the sale at their market prices. An agreement for sale was entered into on October 1, 1999..."

He denied (in para.8) that he or Bastion were involved in any fraud or sham.

17. When the hearing before McIntosh J resumed on 8 April 2002, Bastion's application to intervene was the first substantial matter to be dealt with. Mr Maurice Manning, counsel for Bastion, supported the application by referring to the procedural desirability of avoiding multiplicity of actions. He pointed out that, if the court were to make an order that affected a third party, the third party would not be bound by the order and a separate action by or against the third party would be necessary. This, he said "lends to duplicity and increased costs". He urged the judge to accede to Bastion's application "so that you may comprehensively and effectually ... adjudicate upon, and settle, all of the questions involved in this matter" (pp.155/156 of the Record). The response of Mr Wood, counsel for JFI, was to say that his client would have no objection to Bastion's joinder as a second defendant provided that Mr Whittaker's affidavit in support were promptly filed and that Mr Whittaker attended for cross-examination. Counsel for Bardi supported Bastion's application. The judge then granted the application and gave various consequential procedural directions. Bastion, accordingly, became a defendant to JFI's action. The hearing was then adjourned to the following day, 9 April. Their Lordships think it clear from what was said by counsel on 8 April that an important purpose of the joinder of Bastion was, as Mr Manning had said, to avoid the need for separate proceedings between JFI and Bastion to be instituted.

18. When the hearing resumed on 9 April, Mr Wood asked that Mr Whittaker attend court for cross-examination on his affidavit. Mr Manning said that Mr Whittaker would not be available that week but could attend later. Cross-examination of Mr Malcolm McDonald, Bardi's and Mrs Geddes' attorney who had drawn up the Agreement, then took place. He said he had placed the date, 1 October 1999, on the document and that it had been dated before it had been signed. He said Mrs Geddes had taken the unsigned document with her to Cayman and that the signed document had been returned to him by Mr Whittaker for stamping. He had received it back on 24 November 1999. In answer to questions

about the deposit of J$20 million payable under the Agreement, he said that his firm had received a cheque from Bastion for US$500,000 (the rough equivalent of J$20 million) but that the cheque had never been cashed and, on Mr Whittaker's instructions, had been cancelled. Instead, he said, J$20 million had been paid to his firm by Mrs Geddes and was held in his firm's client account. On the following day, 10 April, after another witness had been cross-examined, the hearing was adjourned to 13 May 2002. The judge ordered that Mr Whittaker attend for cross-examination and ordered that he produce a number of documents. These included copies of Bastion's Register of Directors and Register of Shareholders for the period 1 September 1999 to 30 November 1999 and a copy of Bastion's bank statements for the same period.

19. On 19 April, pursuant to leave granted by McIntosh J on 10 April, an amended summons for summary judgment was filed by JFI. The amendments included, first, an application for a declaration that the Mareva injunction applied to all the D&G shares standing in the name of Bardi and to all bonus shares and dividends paid or accrued in respect of the shares since the grant of the injunction; second, an application for a declaration that the Agreement dated 10 October 1999 was not a *bona fide* sale agreement but was a sham and a fraud made for the purpose of placing the D&G shares out of the reach of JFI; and, third, an application for an order that US$1.5 million odd (representing the dividends paid by D&G to Bardi and remitted by Bardi to Bastion) be paid by Bastion into court to await the result of the litigation. The obvious purpose of these amendments, consistent with the reasons why Bastion had applied to be joined as a party, was to enable the hearing of JFI's summary judgment application and Bardi's application for variation of the Mareva injunction to lead to a final order settling all issues not only between JFI and Bardi but also between JFI and Bastion. There is no record of any objection to these amendments being made either by Bardi or by Bastion.

20. On 13 May 2002 the hearing before McIntosh J was resumed. Mr Wood opened the proceedings by asking for Mrs Geddes to be recalled for further cross-examination on additional material that had come to light since her cross-examination in February. Bardi's counsel, Mr Morrison QC, did not object and the judge agreed. Mr Manning, counsel for Bastion, then told the judge that Mr Whittaker was unable for medical reasons to be present in Jamaica for cross-examination. He spoke on instructions and no medical certificates were produced. The judge agreed to postpone the cross-examination until Mr Whittaker was able to attend court. Some of the documents Mr Whittaker had been ordered to produce were, however, available and copies were supplied to Mr Wood. The court then adjourned until the afternoon when Mrs Geddes attended and was further cross-examined.

21. There then followed a discussion between the three counsel and the judge about the nature of the inquiry relating to the Agreement that the court had embarked upon and the procedure that should be adopted. Mr Wood emphasised JFI's contention that the Agreement "was not a valid and bona fide agreement ... and was fraudulent" and reminded the judge that Bastion had been joined so that it could be given "a full opportunity to present its claim in its entirety so that we do not after your Ladyship's determination have any doubt that your Ladyship is determining that matter with finality" (p.222 of the Record). He referred the judge to *SCF Finance Co. Ltd v Masri* [1985] 2 AER 747, a case in which the Court of Appeal of England and Wales had given guidance as to the procedure to be adopted where an issue needed to be decided between a plaintiff and a third party. Mr Morrison, for Bardi, commented that Bardi had no defence to JFI's claim on the promissory notes and suggested that the issue as to the validity of the Agreement should be tried separately, with directions given for pleadings, discovery etc. (p.227 of the Record). Mr Manning, for Bastion, similarly suggested that JFI needed to commence a fresh action (p.228). These suggestions were inconsistent with the basis on which Bastion had applied to be joined as a party to the action and with the basis on which Bardi had supported that application. Mr Wood, in response, said that directions for pleadings could be given, that the affidavits could stand as pleadings and the hearing resumed in open court rather than in Chambers. The judge expressed reservations about directing the affidavits to stand as pleadings but otherwise thought Mr Wood's suggestions as to procedure should be pursued. She said that the issue as to whether Bastion had become the beneficial owner of the D&G shares needed to be disposed of and ordered that the matter be adjourned to Wednesday 15 May 2002 "for draft consent order re further conduct of the matter" (p.233).

22. On 15 May Mr Wood informed McIntosh J that the parties had been unable to agree on the order to be made. He invited the judge to adjourn the hearing into open court for the determination "of the issue as to the validity and enforceability" of the Agreement and suggested a number of procedural directions to be given for that purpose. One of the suggested procedural directions (paragraph 7 of the order that Mr Wood suggested should be made) was that

> "The evidence given in Chambers by the witnesses for the parties hereto at the hearing of the Summonses ... is to stand."

The evidence referred to would have included the affidavit evidence (including Mr Whittaker's) and the oral evidence given by the witnesses who had been cross-

examined on their affidavits. Mr Manning objected to Mr Wood's paragraph 7. He also objected to Mr Wood's proposed paragraph 8, an order for Mr Whittaker to attend court for cross-examination on his affidavit. He was, in effect, repeating his submission that the issue about the Agreement should be determined in new and separate proceedings, independent of JFI's action on the promissory notes against Bardi. Mr Morrison, for Bardi, again supported him. Mr Wood, in response, submitted that the issue about the Agreement arose from JFI's claim, made both in its writ and in its application for summary judgement, for a Mareva injunction over, *inter alia*, Bardi's D&G shares. He submitted that Bastion had elected to become a party to those proceedings and that the court had a wide discretion to adopt a procedure "just and convenient to all parties". After further somewhat inconclusive interjections from each of the three counsel McIntosh J, understandably in their Lordships' opinion, lost patience and said "we will continue the matter as is and order Mr Whittaker to attend Court to be cross-examined" (p.252/253 of the Record).

23. At this point Mr Wood asked that documents be produced identifying what interest Mr Whittaker had in the shares in Bastion. The Share Register of Bastion showed that its only shareholder was Tamil Ltd, a company with an address in Grand Cayman, and the Register of Directors showed that Mr Whittaker had not become a director of Bastion until 8 November 1999 but on that date had become Bastion's sole director and secretary. Mr Wood wanted to know, with some justification in their Lordships' opinion bearing in mind that Mr Whittaker had deposed in his affidavit to the fact that the Agreement had been entered into on 1 October 1999, who was the beneficial owner of the Tamil shares. It is to be borne in mind that an undated transfer of the Bastion shares that described Mr Whittaker as the "Transferor" and had been signed by him was held by Mr McDonald, the attorney for Mrs Geddes and Bardi (see p.21 of McIntosh J's judgment). McIntosh J rejected Mr Manning's objections and made an order for the discovery sought by Mr Wood. On that footing the matter was adjourned to 7 October 2002 for a 10 day hearing.

24. When the judge sat on 7 October Mr Manning informed her that Mr Whittaker

> "... has taken legal advice both here and abroad in Cayman the result of which is that he is not in attendance" (p.258 of the Record).

In short, Mr Whittaker had decided not to obey the judge's order to attend court to be cross-examined on his affidavit and to supply the additional discovery

disclosing the beneficial ownership of the Tamil shares. Mr Manning attempted to excuse his client's decision. He said "... at the end of this hearing nothing would have been decided between Bastion Holdings Limited in relation to the agreement". The judge responded by saying "I thought that was what I had to decide". She went on to say this:

> "An order was made for Mr Whittaker to come to Court and be cross-examined. If he has a problem with that then he must come here in response to the order and say so ... Mr Whittaker is in contempt of court."(p.262 of the Record)

Mr Manning responded:

> "I am well aware of the contempt of court. It is not an effort to thwart the application before the court."

The judge:

> "But it must be Mr Maurice Manning. Why would Mr Whittaker not come and say when being cross-examined, do I need to answer that? Mr Whittaker put himself in this case as he thought the outcome would affect him. Mr Whittaker has refused to attend for cross-examination. He has indicated that acting on legal advice he does not see his input would be of assistance to the Court. I will hear nothing further from the Second Defendant. Let us continue with the matter."

25. The hearing then continued on 8 October 2002. The documents regarding Bastion that had been produced earlier were formally put in evidence. They showed among other things that Bastion was a company with virtually no assets. Mr Wood made submissions about their implications and the inferences about the Agreement that should be drawn from the evidence and the documents and, at the conclusion of his submissions, asked for orders to be made in the terms sought by JFI's amended summons for summary judgment. Mr Morrison then made submissions on behalf of Bardi. As had been previously foreshadowed no attempt was made by Mr Morrison to resist the application for summary judgment for payment of the amount due under the promissory notes. He was concerned simply to defend the Agreement and, accordingly, to seek a relaxation of the Mareva injunction so as to enable Bardi to complete the Agreement. At the conclusion of Mr Morrison's submissions the judge said that she would adjourn the case to 11

October in order to give Mr Whittaker an opportunity to purge his contempt (p.282 of the Record).

26. On 11 October 2002 the judge reiterated her decision to decline to hear submissions on behalf of Bastion while Mr Whittaker remained in contempt. Mr Manning told the judge that her decision had been communicated to Mr Whittaker but "as you can see, he is not here." Mr Wood commenced his submissions in reply but Mr Morrison took the procedural point that

> "... your Ladyship cannot make the finding that the Agreement was a sham on the application to vary the injunction."

Mr Wood addressed himself to that procedural issue and submitted that the judge, in deciding whether or not to accede to the application to vary the Mareva injunction, was entitled to make findings about the Agreement.

27. McIntosh J gave judgment on 16 January 2003. She granted JFI final judgment for payment by Bardi of the amount outstanding on the promissory notes. That was not contentious. She also made a declaration that the Mareva injunction was to continue until payment to JFI in full had been made and was to continue to apply to all the D&G shares and to all dividends and bonus shares paid or accrued since the grant of the injunction. And she ordered Bardi and Bastion to pay into court the US$1.5 million odd representing the D&G dividends remitted by Bardi to Bastion and that "the sum so paid into Court shall abide any further order of the Court." Liberty to apply was given.

28. On 30 January 2003 Bardi filed notice of appeal. But an inevitable consequence of the order for payment by Bardi of the amount outstanding under the promissory notes was that Bardi was insolvent and on 18 December 2003 a winding-up order was made against Bardi. On 11 February 2004 Bardi's trustee in bankruptcy and provisional liquidator filed notice of withdrawal of its appeal.

29. On 25 March 2003 Bastion, having obtained leave to do so, filed notice of appeal and grounds of appeal and on 28 January 2004 applied for a stay of McIntosh J's order that the US$1.5 million odd be paid into court. That application was dealt with by a consent order under which the money was paid into a Jamaican bank account in the joint names of JFI's and Bastion's respective attorneys to await the order of the court.

30. Bastion's appeal was heard over seven days in January and February 2005 by Forte P, Cooke JA and Harrison JA but was dismissed. The judgments were delivered on 29 July 2005. As well as dismissing the appeal the Court of Appeal ordered that the US$1.5 million odd held on joint account by the parties' attorneys be paid over to the trustee in bankruptcy and provisional liquidator of Bardi. Bastion has now appealed to the Board.

The issues

31. Bastion contends, first, that McIntosh J in deciding whether to accept or to refuse the application for a variation of the Mareva injunction was not making any final decision as to whether or not the Agreement was a sham, or a fraud, or for any other reason unlawful but was simply deciding whether to maintain the Mareva injunction in place until that issue could be decided in separate proceedings. It is accepted that the Court of Appeal treated her order as a final order, as is evidenced by their direction that the US$1.5 million be paid to Bardi's trustee in bankruptcy, but the Court of Appeal were not entitled, it is submitted, to turn an essentially interlocutory order into a final one.

32. Alternatively, if McIntosh J was purporting to decide finally as between JFI and Bastion whether the Agreement was effective, Bastion contends that she should not have done so. It is not contended that she lacked jurisdiction to decide the issue but that it was not fair to Bastion to have done so. The allegation made against Bastion, and for that matter against Bardi, was that the two companies had participated in creating a sham transaction, a transaction that was not what it seemed, for the purpose of extracting the D&G shares from the assets of Bardi against which JFI could enforce its remedies for obtaining payment of the debt owing to it by Bardi. Such an allegation, being one involving deception and dishonesty, a conspiracy to frustrate the purpose of the Mareva injunction and, accordingly, the administration of justice, required, it was submitted, to be pleaded and particularised before any answer by Bastion (or Mr Whittaker) could be called for. Bastion had not had justice was the *cri de coeur* of Mr Lyndon-Stanford QC, counsel for Bastion before the Board. A further issue, but relevant also to the question whether the procedure adopted by McIntosh J was fair to Bastion, is whether she was right to respond to Mr Whittaker's contempt of court by declining to hear submissions from Mr Manning in defence of Bastion's interest under the Agreement.

The order made by McIntosh J

33. There is, their Lordships accept, a degree of ambiguity about the intentions of McIntosh J regarding the issue about the validity, as against JFI, of the Agreement. If one looks only at the language of the order she made, the order,

apart from the final judgment for JFI on the promissory notes, can be read both ways. She ordered that the Mareva injunction remain in place, applicable to the D&G shares as well as to Bardi's other assets, until payment in full of the judgment debt. It was common ground that Bardi did not have assets to enable it to pay the judgment debt in full. Mrs Geddes had said so in her affidavit. So, presumably, the judge contemplated that the D&G shares would be assets to which JFI could have recourse. But, if the beneficial interest in the shares had passed to Bastion under the Agreement before the Mareva injunction had been granted, the judge's order that the injunction remain in place would not resolve that issue. On the whole their Lordships read McIntosh J's order as indicating an intention that the D&G shares were to be available to JFI but do not regard the order as wholly clear. The order did not include an express declaration that the Agreement was unlawful or invalid notwithstanding the application in JFI's amended summons for a declaration to that effect to be made.

34. In these circumstances it is permissible, in their Lordships' opinion, to look at the course of the litigation and, in particular, at the judge's judgment in order to clarify her intentions. As to the course of the proceedings, there is no doubt that it was intended when Bastion was joined as the second defendant to JFI's action that a final decision as between JFI and Bastion/Bardi on the efficacy of the Agreement would be taken by McIntosh J. Bastion's joinder application had been urged on the judge by its counsel, Mr Manning, expressly on that footing. However, after counsel had failed to agree the terms of the proposed consent order about procedure, the judge had said that the case would continue "as is". Is she to be taken as indicating that she would not be deciding finally whether JFI's objections to the Agreement were well founded, or was she simply saying that she would proceed to decide the issues about the Agreement without any change in the procedures that had been adopted for the hearing of Bardi's summons? Their Lordships turn to her judgment for elucidation.

35. The judge, after referring to Mr Whittaker's refusal to attend court to be cross-examined, summed up the situation :

> "The applications concerning the Mareva Injunction therefore fall to be determined on the basis of the several affidavits filed on behalf of [JFI] and [Bardi] as well as the *viva voce* evidence of Mrs Margie Geddes, Mr Malcolm McDonald and Mr Christopher Berry, who all attended for cross-examination ... The documents produced on behalf of [Bastion] also form part of the material for the consideration of the court."

She then referred to some of the evidence, to some of the authorities about variation of Mareva injunctions and recorded a submission of Mr Morrison, for Bardi, that it was

> "no part of the business of the court at this interlocutory stage of the proceedings to pronounce upon the validity of the agreement. The court should only be concerned with the question of whether in all the circumstances it would be a proper exercise of its discretion to vary the injunction." (p.312 of the Record)

She recorded also Mr Wood's submission to the contrary that the court should decide whether the Agreement was a *bona fide* agreement for sale of the D&G shares or was a fraud or sham, made for the purpose of placing the D&G shares out of the reach of JFI as a creditor of Bardi. She referred to Mr Wood's submission that the court "may embark upon an inquiry into the beneficial ownership of the [D&G] shares and is not obliged to accept the defendant's assertion as to ownership of the shares" and continued:

> "So it was that the court embarked upon an enquiry as to the beneficial ownership of the [D&G] shares which was claimed by the second defendant in his affidavit evidence".

The "second defendant" was, of course, Bastion and the affidavit referred to was the affidavit that had been sworn by Mr Whittaker. She then reviewed the evidence and, under the heading "Conclusion", said this:

> "I agree with Mr Wood's submission that the court is not obliged to take the Sales Agreement at face value but should carefully scrutinise all the surrounding circumstances in order to determine its *bona fides* – in order to determine whether this was an agreement made in good faith. This must be one of the factors, which the court should take into account in the exercise of its discretion.
>
> It is my view that the material before me gives rise to some very serious concerns particularly about the genuineness of the Sales Agreement."

The judge then listed ten of the "serious concerns", expressed stringent criticisms of Mrs Geddes as a witness: she had exhibited evasiveness and a lack of candour, and "... generally her demeanour was not that of a witness of truth". She said that

there was a "more than sufficient basis for the court to refuse to exercise its discretion ... to vary the terms of the Mareva injunction, as prayed" and concluded by saying this:

> "Further, I am of the view, on the evidence presented to me in this hearing, that there was not such an agreement on November 8, 1999 as would pass the beneficial ownership in the shares to [Bastion] and no payment of dividends ought to have been made to [Bastion] after that date."

36. Mr Lyndon-Stanford submitted that the judge's use of the words "I am of the view" in the passage last cited showed that she was not making a definitive finding of fact but was simply expressing an opinion. Their Lordships are unable to agree. The judge had embarked upon an inquiry as to whether Bastion had become beneficial owner of the D&G shares before the Mareva injunction had been granted. Bardi and Bastion had relied on the Agreement and its 1 October 1999 date for their contention that Bastion had indeed so become. Bastion had applied to be joined so that the issue about the efficacy of the Agreement could be decided finally between all three parties. But the judge not only did not accept their evidence in support of the Agreement but expressed the positive view, derived from the evidence before her, that the Agreement produced to her bearing the date 1 October 1999 had not passed any beneficial interest in the shares to Bastion prior to the grant of the Mareva injunction. In their Lordships' opinion, the terms of McIntosh J's order, coupled with the terms in which she expressed herself in her judgment and read against the background of Bastion's joinder in order to achieve finality, justify the conclusion that she had intended her order to achieve that finality.

37. This conclusion is supported by the terms of Bastion's notice of appeal to the Court of Appeal. The notice described the judge's expression of her "view", cited in the foregoing paragraph, as a "finding of fact". The notice had been settled by Mr Mahfood QC who, with Mr Manning, had appeared for Bastion on the appeal and their Lordships consider that the notice of appeal correctly characterised the judge's expression of her "view". Consistently with the terms of the notice of appeal, the appeal hearing proceeded throughout on the basis that McIntosh J had indeed made a finding of fact. The justification for that finding was, as is evident from the Court of Appeal judgments, vigorously attacked, although in the event unsuccessfully, by Mr Mahfood. There was no suggestion that all the judge had done was to express a non-binding opinion and it is not surprising that, as Mr Lyndon-Stanford accepted was the case, the Court of Appeal

treated McIntosh J's order as a final order. Their Lordships do not accept Mr Lyndon-Stanford's submission that the issues about the Agreement remain, as between JFI and Bastion, undecided.

Was the procedure adopted by McIntosh J fair to Bastion?

38. Their Lordships must now consider Mr Lyndon-Stanford's alternative submission that the procedure adopted by McIntosh J was inappropriate to a trial of issues that involved charges of fraud, was not fair to Bastion, and that the judge's findings of fact about the Agreement should be set aside and litigated in a separate action.

39. The essential requirement in litigation if adverse findings are to be sought against a party, and particularly if the proposed findings are to be based on allegations of fraud, deception or dishonesty, is that the party should be given prior notice of the allegations and a sufficient opportunity to challenge them and submit evidence, if so advised, in answer to them. Rules of Court prescribe how this is to be done where the allegations are part of a plaintiff's case against the defendant, or, for that matter, a counter-claiming defendant's case against the plaintiff. But where, as happened in this case, the need for the findings arises tangentially out of a claim made by a third party to the ownership of assets in relation to which the plaintiff has claimed, and obtained, an interlocutory remedy against the defendant, the procedures prescribed by the Rules of Court need to be adapted to cater for the circumstances that have arisen. A similar problem to that which arose in the present case arose in *SCF Finance Co. Ltd v Masri* [1985] 2 AER 747. A Mareva injunction had been granted but the defendant's wife claimed to be the beneficial owner of some of the assets caught by the order. The plaintiff did not accept that the claim was well founded and the judge, Hirst J, directed the trial of a preliminary issue to determine the beneficial ownership of the assets in question. Counsel for the second defendant (as the wife had become) appealed against that direction and submitted that a third party in the wife's position should not be required "to justify his claim by giving information as to the circumstances in which he came by those assets" (p.749). The Court of Appeal rejected that submission. Lloyd LJ (as he then was), with whose judgment Sir George Waller agreed, made clear his opinion that, where a question arose whether assets subject to a Mareva injunction belonged to a third party, the issue as between the plaintiff and the third party needed to be resolved and that, unless the answer to the issue were obvious, the judge would need to undertake an inquiry into the facts in order to determine whether the third party's claim to the assets should prevail.

40. In the present case McIntosh J, having been referred to the *SCF Finance & Co. Ltd* case and having agreed to the joinder of Bastion, embarked upon just such

an inquiry. The allegation that the Agreement was a fraud and a sham, designed to remove a valuable asset from the assets against which JFI could enforce its expected judgment against Bardi, was spelled out clearly in Mr Hylton's affidavit of 19 February 2002. Bastion, through Mr Whittaker, applied to join the action to assert its interest in the D&G shares and must be taken to have known that the judge would be embarking on an inquiry into the circumstances in which and the date on which the Agreement had been made. Bastion had not been a party when, in February 2002, Mrs Geddes and other witnesses had been cross-examined on their affidavits. But there was no reason whatever why Mr Manning, for Bastion, should not have asked for them to be re-called if there had been questions he would have wished to put to them. No such request was ever made. Mrs Geddes was re-called on 13 May 2002 to give further oral evidence. This was after Bastion had become a party but Mr Manning told the judge he had no questions he wished to put to her (p.221 of the Record).

41. It was on 15 May 2002 that Mr Wood suggested to the judge some very sensible procedural directions that she might give in relation to the further conduct of the inquiry into the efficacy and validity of the Agreement that she had embarked upon. Unfortunately these suggestions were opposed by Bastion. The reasons given by Mr Manning for that opposition are recorded at pages 237 to 241 of the Record and, in their Lordships' opinion, were insubstantial and inconsistent with the basis on which Bastion had applied to be joined in the action. Faced with that opposition, however, the judge decided to continue with the inquiry "as is" (see para.22 above). Their Lordships think it would have been preferable for the judge to have overridden Bastion's objections, given the directions suggested by Mr Wood and proceeded accordingly. It was, however, still open to Bastion, and Mr Whittaker, to make some counter suggestions about the procedure to be followed. None was made. And on the next occasion when the court sat, 7 October 2002, Mr Manning announced Mr Whittaker's decision to decline to attend for cross-examination on his affidavit notwithstanding the judge's previous order that he do so. As Mr Manning realistically recognised, this was a contempt of court and the judge responded by declining to allow Mr Manning to make submissions to her on Bastion's behalf. Opposition to the orders sought by JFI was offered by Mr Morrison on behalf of Bardi but the judge delivered the judgment and made the order to which reference has already been made. So the questions posed by Mr Lyndon-Stanford must be answered. Was the procedure adopted by the judge inappropriate and unfair, so that the findings adverse to Bastion and the order for the release of the US$1.5 million odd to the provisional liquidator of Bardi ought to be set aside?

Was the procedure fair?

42. As has been indicated, their Lordships are of opinion that the procedure suggested by Mr Wood would have constituted a preferable procedure for resolving the issues between JFI and Bastion than the continuance by the judge of the procedure that was being employed at the time Mr Wood made his suggestions. But Bastion had joined in the proceedings in order to produce finality and, having opposed the adoption of Mr Wood's procedure and having suggested no other alternatives than, in effect, the commencement of a new action with all evidence that had already been given having to be given again, is in a weak position to complain about the lack of fairness in the procedure the judge was following. Mr Lyndon-Stanford complained that the allegations against Bardi and Bastion, in effect against Mrs Geddes and Mr Whittaker, had been insufficiently particularised. Their Lordships do not agree. The essential allegations were that the Agreement was not an arms' length agreement, was an agreement for a sale at a considerable undervalue, had been made after the grant of the Mareva injunction and had been back-dated in order to enable Bastion to claim that it had acquired a prior beneficial interest in the D&G shares (see paragraphs 12, 13 and 14 of Mr Hylton's affidavit of 15 January 2002). Evidence in support of this allegation emerged from the cross-examination of Mrs Geddes and from the documents produced by Mrs Geddes and Mr Whittaker in response to orders of the Court. Their Lordships do not accept that Mrs Geddes and Mr Whittaker could have been in any doubt as to the allegations being made against them.

43. The complaint about the fairness of the procedure was not raised before the Court of Appeal (save in relation to the judge's refusal on 7 October 2002 to hear submissions on behalf of Bastion, a matter which their Lordships will deal with separately) but their Lordships are satisfied that the procedure would, if Mr Whittaker had obeyed the judge's order to present himself for cross-examination, and had co-operated in the conduct of the hearing in the manner to be expected of a party who had been added as a party on his own application, have satisfied the requirements of fairness.

Mr Whittaker's contempt

44. Mr Lyndon-Stanford submitted that notwithstanding Mr Whittaker's admitted contempt Mr Manning ought to have been permitted, on Bastion's behalf, to make submissions to the judge as to the orders to be made on the evidence before her. He referred their Lordships to a number of authorities reported in 1846 in notes to *Chuck v Cremer* SC.1 Coop.T.Cott.205, namely, *Parry v Perryman* at 207, *Wilson v Bates* at 209 and *King v Bryant* at 212, for the proposition that a party in contempt was entitled to be heard in his opposition to orders sought against him. In *King v Bryant* Lord Cottenham had said that -

> "... it would be a most unjust extension of the rule against parties in contempt, to take away a man's estate without giving him an opportunity of coming in and protecting himself ..."

Their Lordships accept the proposition as a general guide but would emphasise that the judicial response to a contempt of court must depend on the circumstances of the case and that rigid rules are not appropriate. In *Gordon v Gordon* [1904] P 163 Vaughan Williams LJ said this:

> "... it has not been disputed in the discussion before us that this rule, that a person who is in contempt cannot be heard, *prima facie* applies to voluntary applications on his part – when he comes and asks for something, and not to cases in which all that he is seeking is to be heard in respect of matters of defence."

but went on to say:

> "... I do not for one moment suggest that every matter of defence entitles a person in contempt to be heard; for instance, if an order has been made in the exercise of the discretion of the Court, and someone who is oppressed or thinks himself oppressed by that order, appeals, saying that the Court has exercised its discretion wrongly, that person if he is in contempt cannot be heard to say anything of the kind until he has purged his contempt."

Denning LJ (as he then was), in *Hadkinson v Hadkinson* [1952] P 285, referred, at 297, to the rule of the ecclesiastical courts that:

> "... if a party was in contempt for disobeying an order, and his disobedience impeded the course of justice in the suit, the court might in its discretion refuse to allow him to take active proceedings in the suit until the impediment was removed."

He said that "... the same rule has been applied in the bankruptcy courts ..." and continued at 298

> "Those cases seem to me to point the way to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the

> course of justice and there is no other means of securing his compliance."

and, at 298, that

> "... if his disobedience ... impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth ... then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

45. These passages from Denning LJ's judgment in *Hadkinson* seem to their Lordships to fit this case. Mr Whittaker's contempt, in refusing to allow himself to be cross-examined on his affidavit and on the documents he had produced pursuant to the court's discovery order, impeded McIntosh J's endeavours to ascertain the truth about the Agreement. The allegation made against Mr Whittaker, and Mrs Geddes, was a grave one. It was an allegation that they had conspired to put forward a falsely dated document in an endeavour to frustrate the purpose of the Mareva injunction that had been granted on 8 November 1999. Mr Whittaker may have been well advised not to present himself to be cross-examined but, whether that is so or not, his refusal to do so unquestionably made it more difficult for the judge to decide whether or not the allegation was made out. She was obliged to rely on inferences from documents instead of hearing the oral evidence of one of the parties to the alleged conspiracy. In their Lordships' judgment McIntosh J's decision to decline to hear submissions from Mr Manning was a decision that, in her discretion, she was entitled to take. Their Lordships agree with the Court of Appeal's rejection of Bastion's appeal on this point.

46. In any event, Bastion was permitted to appeal against McIntosh J's judgment and order. Mr Mahfood QC was given a full opportunity to make to the Court of Appeal the submissions on behalf of Bastion that McIntosh J had declined to allow to be made to her. Whatever degree of unfairness might be thought to attach to McIntosh J's refusal to hear Mr Manning was, in their Lordships' opinion, remedied by the full audience given by the Court of Appeal to Mr Mahfood.

47. In the Court of Appeal the findings of fact made by McIntosh J were fully reviewed and were upheld. There have, therefore, been concurrent findings of fact adverse to Bastion at first instance and on appeal. There was, in their Lordships' opinion, ample evidence before McIntosh J to support those findings and their Lordships will humbly advise Her Majesty that this appeal should be dismissed. Bastion must pay the costs of the appeal.