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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 14/2003

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.

BETWEEN	**BASTION HOLDINGS LIMITED**	**2ND DEFENDANT/ APPELLANT**
AND	**BARDI LIMITED**	**1ST DEFENDANT**
AND	**JORRIL FINANCIAL INC.**	**PLAINTIFF/ RESPONDENT**

Mr. R. Manfood Q.C., Mr. M. Manning and Miss A. Thomas instructed by Nunes, Scholefield and DeLeon & Co., for the 2nd Defendant/Appellant

Mr. Allan Wood and Miss D. Gentles instructed by Livingston Alexander and Levy for the Respondent

Mr. V. Bignall observing on behalf of the Trustee in Bankruptcy

January 24, 25, 26, 27, 31 February 1, 2 & July 29, 2005

FORTE, P.

I have had the opportunity of reading in draft the judgments of Cooke, J.A. and K. Harrison, J.A. and agree with their reasoning and conclusion that the appeal ought to be dismissed. Nevertheless, I make a few comments of my own.

The allegation of fraud against the appellant arose on an application by the appellant for variation of a Mareva injunction granted to the respondent Jorril Financial Inc., on the 8th November 1999 and which restrained Bardi from disposing or transferring its assets wherever situated. The details of the order granted by Theobalds J read as follows:

> "IT IS HEREBY ORDERED THAT:
>
> 1. The Defendant be restrained until the determination of this action or further order whether by themselves or by their servants, agents or otherwise howsoever from removing from the jurisdiction any of their assets within the jurisdiction.
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> 2. The Defendant be restrained until the determination of this action or further order whether by themselves or by their servants, agents or otherwise howsoever from disposing, mortgaging, pledging, transferring, assigning, charging or otherwise dealing with any of their assets whether real or personal wherever situated and whether within the jurisdiction or outside of the jurisdiction.
>
> Provided that this Order is declared to be of no effect against and is not intended to bind any third party outside of the jurisdiction of this Court unless and until this Order shall be declared enforceable or recognized and enforced by any Court of the jurisdiction in which the Defendant's assets are situated."

Among the assets which were owned by Bardi Ltd, were Ten Million, Nine Hundred Forty-Nine Thousand Four Hundred and Forty-Six (10,949,446) Stock Units in Desnoes and Geddes Ltd. These shares were the subject of an agreement for sale between Bardi Ltd and Bastion Holdings Ltd, a Caymanian

Registered Co., which made the application for variation of the Mareva injunction ordered on the 8th November 1999. The application rested on the assertion that the shares were the subject of an agreement entered into on the 1st October 1999, a date preceding the Mareva injunction, and therefore should not be included in the assets referred to in the Order. Bastion Holdings Ltd on its own application was joined as a party to the action. It is the refusal of the application to vary the Mareva injunction that is now the subject of this appeal.

The application for the variation resulted in Jorril contesting the genuineness of the agreement. This in my opinion, necessitated a resolution by the Court as to the validity of the agreement and in particular whether the agreement was in fact entered into before the Mareva injunction was ordered on the 8th November 1999. This view is supported by the following dicta of Lloyd, L.J. in the case of ***SCF Finance Co. Ltd. V. Masri*** (1985) 2 All E.R. 747:

> "So I see no difficulty in the court's resolving any dispute which may arise between a plaintiff and a third party as to the ownership of assets to which the Mareva injunction has been applied. If that is so, then I can see no reason whatever why the court should be obliged to discharge the injunction on the mere say-so of the third party. If the court were so obliged, then the Mareva jurisdiction would be in danger of being nullified at the whim of the unscrupulous. If a court were not permitted to inquire into a third party's claim, but were bound to accept it at its face value, how could the court be satisfied that any transfer of assets to the third party had occurred before rather than after the injunction?"

In such an inquiry, the Court must be entitled to look into all the circumstances surrounding the purported transfer of assets to a third party in

order to determine its validity e.g. whether, as Lloyd L.J. (supra) questioned, the transfer of assets took place before or after the order for the Mareva injunction.

How did the learned trial judge resolve that issue? Without apologies, I set out the learned judge's conclusion in that regard. She stated:

> "It is my view that the material before me gives rise to some very serious concerns particularly about the genuineness of the Sales Agreement. To list but a few of those concerns there is:
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> (i) Mrs. Geddes' assertions that the arrangement for the sale of the principal assets of the 1st Defendant company was to quickly raise funds to meet the Plaintiff's demand on the promissory notes. She mentions the four week time frame which she was given as an indication of the need to act quickly yet she proceeds to enter into an agreement with a 5 year deferred payment plan.
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> (ii) The fact that on receiving the deposit of J$20,000,000 no attempt is made to communicate with the Plaintiff and commence payment on the debt.
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> (iii) That no approach was made to the Plaintiff when a decision was made to sell the principal assets of the company. The decision was not even disclosed to the Plaintiff. Instead the Plaintiff was told about a Suit in the Privy Council which on the face of it, bore no relation to the Plaintiff's claim.
>
> (iv) The fact that the offer for the sale of the shares was made only to her friend Mr. Albun Whittaker.
>
> (v) The payment of that deposit by Mrs. Geddes herself, a factor which only came to light in cross-examination.

Before us, however, Mr. Mahfood, Q.C. attorney-at-law for Bastion Holdings Ltd argued strongly that it is necessary for an allegation of fraud to be pleaded, and for the details of the alleged fraud to be contained in the pleadings. He contended, that the procedure adopted by the learned judge was incorrect, and maintained that because of the allegation of fraud, the issue should be tried in a separate trial, commenced by writ and by process of pleadings.

In support of this contention Mr. Mahfood relied on the provision of section 170(1) of the Judicature (Civil Procedure Code) Law which provides:

> "In all cases in which the party pleading relies on any misrepresentation; fraud, breach of trust, willful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the terms aforesaid, particulars (insert date and time if necessary) shall be stated in the pleadings."

It should be noted that these were not circumstances in which Jorril was "pleading" in support of a Claim or Defence. Its assertion was solely in response to the application for variation of the Order for Mareva injunction arising out of a suit between Jorril and Bardi Ltd in which summary judgment was ordered. It is doubtful therefore, whether the provisions of Section 170(1) would be relevant in these circumstances.

In any event, however, the requirement of the section is aimed at the giving of proper notice and disclosure of the detailed allegations of fraud upon which the party alleging the fraud intends to rely. In my view, there can be no question that such details were specified in the affidavits filed on behalf of the

respondent, and that these were brought to the knowledge of the appellant before the enquiry entered into by the learned judge. Significantly while it must be agreed that the respondents in their opposition to the application for variation, did use the words "sham" and "fraud" it appears that the learned judge concentrated on determining whether or not the agreement for the sale of the shares was made before the order for the Mareva injunction. In addition, there was nothing to be gained by dealing with the genuineness of the agreement by way of writ and statement of case in a separate hearing, as all the alleged acts supporting the contention that the agreement did not precede the order for the Mareva injunction were contained in the affidavits. Once the appellant alleged that it had a beneficial interest in the shares and that that interest preceded the order for Mareva injunction, the learned judge was compelled to make the enquiry in order to ascertain whether the appellant's application should be granted.

In doing so, she allowed for the cross-examination of all the witnesses and after a thorough assessment of their evidence, came to her conclusion.

In my view, the learned judge did all that was required of her, and having come to the conclusion, based on the evidence before her, that the agreement was entered into subsequently to the order for the Mareva injunction, correctly refused the application to vary the order.

Her decision cannot be faulted, and consequently I would dismiss the appeal, confirm the orders made below, and order that the costs of the appeal be paid by the respondents; such costs to be taxed, if not agreed.

COOKE, J.A.

1. I have had the opportunity of reading in draft the judgments of Forte, P. and K. Harrison, J.A. and I agree that the appeal should be dismissed. I will not be embarking on a historical excursion as to the development of the factual circumstances. That has been sufficiently done by K. Harrison, J.A. I will be concerned only with certain aspects of this appeal.

2. The two issues before the learned trial judge for her adjudication were (a) whether there should be summary judgment on the claimant's summons; and (b) whether on the application of Bardi Limited there should be a variation of the Mareva injunction then in existence. The outcome of (a) was a foregone conclusion as Bardi Limited had not filed a defence to the claimant's summons for summary judgment. For all practical purposes, the only live issue was (b). This turned on the court's decision as to the genuineness of the purported agreement for the sale of shares between Bardi Limited and Bastion Holdings Limited. If this agreement was genuine then the sought for variation of the Mareva injunction to complete the "sale" would be successful. If not, then the

application to vary would fail. At all times the court below and the parties involved were dealing only with issue (b).

3. Ground 3 of the appellant was stated thus:-

> "The Learned Judge erred in failing to order that the issue of the validity and bona fides of the agreement of October 1, 1999 be tried separately and give directions for such trial:"

It was submitted that:-

> "The Learned Judge erred in failing to order a separate inquiry into the validity of the Agreement for Sale of Shares. She should have ordered that the Mareva Injunction remain in place on condition that the Claimant file and serve a Writ of Summons and Statement of Claim (now Claim Form and Particulars of Claim) on the Defendants within a stated period of time. Directions as to the filing of defences, discovery and a speedy trial should also have been ordered."

Reliance was placed on ***SCF Finance Co. Ltd. v Masri*** [1985] 2 All ER 747.

4. I am unable to appreciate why in the instant case there should be a separate "trial" or "inquiry". Separate from what? As stated in paragraph 2 (*supra*) there was only one issue which in fact fell for active determination of the court below. Perhaps the stance of the appellant may have resulted from a less than full understanding of the ***Masri*** case (*supra*). The appellant seized upon the summary of Lloyd, L.J. in his judgment in ***Masri*** at p. 753 c-f which was put forward as "guidelines the court should apply". I set out hereunder the relevant part of the judgment.

> " (i) Where a plaintiff invites the court to include within the scope of a Mareva injunction assets which

> appear on their face to belong to a third party, eg a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant.
>
> (ii) Where the defendant asserts that the assets belong to a third party the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an application to intervene.
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> (iii) In deciding whether to accept the assertion of a defendant or a third party, without further inquiry, the court will be guided by what is just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party.
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> (iv) Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, again depending in each case on what is just and convenient."

Emphasis was placed on (iv) *supra*. In this case there was no "main action". The issue as to the authenticity of the purported sales agreement was tried and all the relevant parties were given a hearing within the law. The complaint that the learned trial judge had no regard to the proffered "guidelines" is without merit.

5. There were observations by Lloyd, L.J. in ***Masri*** (*supra*) which in my view may be more relevant to this case than "the guidelines the court should apply".

These observations, with which I agree, speak to the approach of a court in the consideration of the issue such as that which faced the court below. Because of the significance of those observations I now reproduce them. They are found at 750 d-f.

> "It is now well settled that an injunction will be varied where necessary so as to enable a defendant to pay his ordinary trading debts as they fall due, or to meet his ordinary living expenses. If there is a dispute as to the extent of his living expenses, or whether the defendant has other assets out of which he ought to pay his debts, there is a ready solution. Such disputes are resolved every day in the Commercial Court or by the judge in chambers. I can see no difference in principle between a defendant who says, 'These are my assets and I need them to pay a third party in the ordinary course of business,' and one who says, 'These are not my assets at all.' In each case the question can and should be resolved without too much difficulty or elaboration by the court. Nor can it make any difference if the defendant's assertion 'These are not my assets' is backed up by the assertion of a third party or if the third party intervenes on his own. If such questions, when they arise between plaintiff and defendant, can be resolved by the court, so they can when they arise between plaintiff and a third party."

6. The submission of the appellant that the resolution of the issue demanded the filing and service of a writ and consequential directions is not in harmony with the observations of Lloyd, L.J. The appellant would seek an "elaboration" which on the face of it Lloyd, L.J. would eschew. This, however, is not the end of the matter. It is necessary to determine if as is stated in Ground 5 that:-

> "The learned judge lacked jurisdiction to try the issue since it involved allegations of fraud."

7. The application for the variation of the Mareva injunction was made by Bardi Limited. Bastion Holdings Limited subsequently entered the arena to buttress the contention of the former, and, of course, to protect its "interest". Quite clearly, the burden of proving the genuineness of the purported agreement for the sale of the shares lay on those who thus asserted. In this case there was no action that was being brought by the claimant which "involved allegations of fraud". In this regard I respectfully agree with the view of our President that the provision of 170(1) of the *Judicature (Civil Procedure Code) Law* was not material to the adjudication on the issue. The rival positions of the contending parties were put before the court with sufficient precision. The evidence to support those positions was fulsome albeit by way of affidavits. There was the opportunity for cross-examination. I am at a loss to conceive of any deficiency occasioned by the procedural framework utilized in this case which would have been cured had there been the course suggested by the appellant. I reject the submission as put forward in Ground 5 of this appeal. The filing of a writ by the claimant and the consequential process would have been an unwarranted "elaboration" in the adjudication of the issue before the court. As to this, the weight of the evidence (considered by Forte, P. and K. Harrison, J.A.) indicated the inevitability of the conclusion of the learned trial judge. It may be that the stance of the appellant, here, as well as in the court below was a ploy dressed up in insubstantial legalistic garb, calculated to postpone for as long as possible the realization of Mr. Geddes' wishes. This ground fails.

8. Ground 8 of this appeal was couched in these terms:-

> "The Learned Judge erred in ruling that Mr. Whittaker was in contempt of Court without citing him for contempt, and in rejecting the explanation of his Counsel as to the reason for his non-attendance and also in refusing to hear submissions from Counsel for the Second Defendant on the substantial matter."

On the 8th April 2002 Bastion Holdings Limited successfully intervened in the proceedings and was added as the second defendant. The pith of counsel's submission in the application for the joinder was "to avoid multiplicity of actions as if the Court is to make an order which will affect a third party who was not a party to that order, that party may bring a separate suit". Further, the requested joinder would preclude "duplicity and increased costs". On the 10th April 2002, the court ordered that Mr. Albun Whittaker, the principal of Bastion Holdings Limited, and whose affidavit grounded the application to intervene, should be present on the 13th of May 2002 for cross-examination. On that day he was absent. The reason given for his absence was a medical condition. There was next an order of the court for Mr. Whittaker to attend for cross-examination on the 7th of October 2002. He flatly refused to comply with this order. Through his counsel, Mr. Whittaker's defiance of the order of the court was based on the view that his presence for cross-examination would be of no assistance to the court. It would have been of no assistance because the procedural framework within which the adjudication was being conducted was wrong in law. So Whittaker, on behalf of Bastion Holdings Limited intervened in the proceedings

fully aware of the issue to be determined, anxious to avoid any multiplicity of actions and to limit "duplicity and expense", decided, apparently in consultation with his legal advisers, that he would flout the order of the court. It would seem to me that Whittaker regarded the court as a forum for his personal convenience which he could engage or jettison at will according to his perceived prospect of success or lack thereof. In the light of the totality of the evidence it would have been quite interesting to have seen how Whittaker would have stood up to cross-examination not least as to the financial capacity of Bastion Holdings to pay for "the sold shares".

9. In advancing this ground it was argued that the summary jurisdiction pertinent to contempt proceedings had to be exercised according to strict procedural requirements. In this case the procedural requirement which was said to be absent was that Mr. Whittaker was not "made aware of the specific charge brought against him and be given an opportunity to answer the charge before a finding of guilt is pronounced". ***Re Pollard*** (1868) LR 2 PC 106 and ***Maharaj v Attorney-General for Trinidad and Tobago*** [1977] 1 All ER 411 were cited in support of this submission. These authorities are not relevant to this case. Mr. Whittaker knew of the order for him to attend. He disobeyed this order and said why he was disobedient. In these circumstances there was no want of clarity. Counsel for Whittaker readily and candidly, and correctly, admitted that the disobedience of the order was a contempt of court (p.6 of 37 of the transcript). In ***Hadkinson v Hadkinson*** [1952] 2 All ER 567 at p.569 D-E,

Romer, L.J. cited with approval a passage from the judgment of Lord Cottenham, L.C. in ***Chuck v Cremer*** (1846) 1 Coop. temp Cott. 342). This passage bears repeating:-

> "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

In the context of this case I would add that a party who disagrees with the procedural framework must comply with any orders of the court made within that framework until it has been decided that the court was in error.

10. Section 375 of the *Judicature (Civil Procedure Code) Law* provides as follows:-

> "Any person willfully disobeying any order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court and may be dealt with accordingly."

The appellant sought to say that the learned trial judge did not satisfy herself of Mr. Whittaker's mental state of mind as to whether there was "willful disobeying". This criticism is untenable. Mr. Whittaker said through his counsel that he was not obeying the order of the court and gave his reason for his

disobedience. There could have been no other conclusion, but that Mr. Whittaker had willfully disobeyed the order of the court.

11. It is further complained that the learned trial judge was wrong in refusing to hear submissions from counsel for the second defendant. The essential consideration is to appreciate the nature of the contempt. In effect, Mr. Whittaker was saying that he did not recognize the jurisdiction of the court. Accordingly, he would take no further part in its proceedings. If this is so, it is indeed a very strange complaint that the very court that he has rejected has refused to give his counsel audience. His dual stances are wholly contradictory.

12. The leading authorities which were brought to the attention of the court dealing with the right of a contemnor to be heard, pertained to being heard in appellate proceedings. See ***Hadkinson v Hadkinson*** (*supra*); ***Gordon v Gordon*** [1904-1907] All ER Rep. 702; ***The "Messiniaki Talmi"*** [1981] 2 Lloyd's Rep. 595; and **X *Ltd. and another v Morgan-Grampian (Publishers) Ltd. and others*** [1990] 2 All ER 1. This was not the issue before this court. This court has applied the principles relative to appellate hearings as being applicable to trials at first instance. See ***Dexter Chin v Money Traders & Investment Ltd.*** (SCCA No. 113/97 – unreported).

13. In ***Hadkinson v Hadkinson*** (*supra*) Denning, L.J. at p.574H-575B expressed his opinion as follows:-

> "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 effective means of securing his compliance. In this regard I would like to refer to what SIR GEORGE JESSEL, MR., said (46 L.J.Ch. 383) in a similar connection in ***Re Clements & Costa Rica Republic v. Erlanger*** (14):
>
> 'I have myself had on many occasions to consider this jurisdiction, and I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction.'
>
> Applying this principle, I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, 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."

This dictum has been approved by the House of Lords in **X *Ltd.*** (*supra*). It, I should add, was approved in our court in ***Dexter Chin*** in which apparently **X *Ltd.*** was not brought to the attention of the court. Mr. Whittaker's contempt was an impediment to the course of justice in that the cross-examination of Mr. Whittaker was an integral part of the proceedings. But it is worse than that. This was a situation where a party to the proceedings wantonly withdrew from the proceedings where his presence was initiated by himself. The learned trial judge was not in error in refusing to hear submissions from Mr. Whittaker's counsel.

14. Bardi Limited is now in liquidation. It had previously paid over to the appellant a considerable sum of money as dividends pursuant to the purported agreement for the sale of shares. The appellant, but not before the aid of this court was invoked, despite the order of the court below to the same effect, remitted some US$1,523,021.00 to Jamaica. These funds were deposited into a United States dollar interest account at the Bank of Nova Scotia in the names of Nunes Scholefield DeLeon & Co. and Livingston Alexander & Levy (the respective Attorneys-at-law engaged in this matter) pending the determination and further order of this court. The respondent has requested that if the appeal is dismissed, this court should make an order that the said funds, now held in a joint account by the Attorneys-at-law, be paid over to the Trustee in Bankruptcy as the provisional liquidator of Bardi Limited. This is so because these funds represent a wrongful payment which had been made from the account of Bardi Limited. I would make the requested order.

15. In conclusion, I would dismiss the appeal and affirm the orders of the court below. The respondent should have its costs, if not agreed, then to be taxed.

K. HARRISON, J.A:

Introduction

This is an appeal from the judgment of Mrs. Justice Norma McIntosh delivered on the 16th January 2003. The appeal raises interesting points of law. The main issue in the case relates to the validity of a sales agreement with respect to the purported sale of approximately 10.9 million Desnoes & Geddes shares.

The Background facts

Paul Geddes and his wife Margie Geddes, each held 50% of the shares in the first defendant/appellant company (hereinafter referred to as "Bardi"). Between June and August of 1994, Paul Geddes had a series of promissory notes prepared and issued to him by Bardi. They were endorsed and transferred to Securities Trust and Management Services Limited ("Securities Trust") to be held in trust for the benefit of his children and grandchildren.

The notes were payable on demand and were subsequently endorsed by Securities Trust to the claimant/respondent (hereinafter called "Jorril"). Paul Geddes died on the 9th day of June 1999, and Mrs. Geddes became the sole beneficiary of his estate.

On August 9, 1999, the Attorneys at Law for Jorril made a written demand on Bardi with respect to the promissory notes but were

unsuccessful. Jorril eventually filed an action in the Supreme Court against Bardi on the 8th November 1999 in order to enforce the demand. Jorril also sought and obtained a mareva injunction on 8th November 1999, which restrained Bardi from disposing or transferring its assets wherever situated.

No defence was filed to the action and Jorril applied for summary judgment on the 1st November 2000.

Bardi filed an application to vary the mareva injunction. An affidavit sworn to by Paula Jackson on the 17th October 2001 exhibited an agreement for sale of the Desnoes and Geddes shares. The agreement was purportedly excecuted on the 1st October 1999, between Bardi and Bastion Holdings Limited, a company incorporated in the Cayman Islands. Bardi sought permission of the court to complete the agreement made between Bastion Holdings Ltd. and itself.

Jorril's summons for summary judgment and Bardi's summons to vary the mareva injunction came before Anderson J on the 6th December 2001 but were adjourned. Margie Geddes was ordered to attend the hearing in Chambers, for cross-examination on the 22nd February 2002 and to produce the annual report and minutes of the directors' meetings for Desnoes and Geddes in respect of the year 1999.

A further affidavit of Lance Hylton, Attorney at Law, sworn to on the 18th January 2002, was filed on behalf of Jorril. This affidavit alleged that

the purported sale of the shares to Bastion was not genuine and was an attempt to place those assets beyond the reach of Jorril.

Affidavits in response to Hylton's affidavit were filed by Bardi and were sworn to by Malcolm McDonald, Margie Geddes and Christopher Berry.

The hearing in respect of both applications was heard by Norma McIntosh J. Cross-examination of Margie Geddes commenced on the 20th February and on the 21st February the hearing was adjourned to the 8th April 2002. At this stage, Bastion Holdings Ltd. (hereinafter referred to as "the appellant") sought leave to intervene and to be joined as a second defendant to the action. An affidavit, sworn to by Albun Whittaker, the principal of the appellant, was filed in support of its application to intervene. Whittaker deposed to the genuineness of the alleged sale agreement and it was contended that the appellant had a beneficial interest in the shares sold to it by Bardi. The learned judge made an order for Mr. Whittaker to attend Chambers in order to be cross-examined upon his affidavit. He refused to attend and his non-attendance is the subject matter of an issue that will be dealt with later in the judgment.

On the 16th January 2003, the first defendant's application to vary the injunction was dismissed. Summary judgment was obtained against Bardi in the sum of US$7,280,987.02 on the basis of the promissory notes which had been issued by Bardi to Paul Geddes. The mareva injunction

granted on the 8th November 1999 was ordered to remain in place and to continue until execution of the Judgment and payment made to Jorril.

The summary judgment against Bardi remains unpaid. Bardi, was placed in liquidation and the Trustee in Bankruptcy appointed liquidator. In the circumstances, Bardi withdrew its notice of appeal that was lodged in the Registry of the Court of Appeal.

The issues

There are three major issues for consideration in this appeal. First and foremost, is whether allegations of fraud ought properly to be specifically pleaded and proved in open Court in an action commenced by a writ of summons? Second, was the alleged Agreement for Sale of the shares executed by the parties before the 8th November 1999? Third, should Counsel appearing on behalf of the appellant continue to make submissions on its behalf having regard to Albun Whittaker's disobedience of an order to attend court to be cross-examined upon his affidavit?

THE FRAUD ISSUE AND THE PROCEDURE ADOPTED TO DEAL WITH IT

The appellant's principal complaint in this appeal is that the learned judge ought to have embarked upon a separate trial in open Court, between Jorril and the appellant, so as to determine whether the transaction in relation to the sale agreement was fraudulent.

The original action was commenced by a specially endorsed writ of summons. No allegation of fraud regarding the purported fraudulent

transaction with respect to the shares held by Bardi was pleaded in the statement of claim. The issue concerning fraud arose on the affidavit evidence of Lance Hylton when Bardi sought to vary the mareva injunction.

The submissions

Mr. Mahfood, Q.C, submitted that all allegations of fraud must be specifically pleaded and litigated against clearly defined lines. He argued that where allegations of fraud are stated in general terms as it was in the instant case, they ought to be disregarded by the court since a litigant should not be required to respond to an allegation of fraud unless he knows precisely the allegations of fact being made against him. Furthermore, he submitted that the learned judge ought to have directed that there should be a separate trial in respect of this issue in open court.

Mr. Wood submitted on the other hand, that while there is a general rule that issues involving allegations such as grave misconduct, dishonesty or fraud should be determined in an action with pleadings, there is at most, a procedural irregularity in the instant proceedings. He said that this did not necessarily invalidate the proceedings particularly where the issue of fraud is distinctly and unequivocally alleged in the affidavit of the opposing party. He referred to section 679 of the Judicature (Civil Procedure Code) Law (" the CPC") that provides as follows:

> " No application to set aside any proceeding for irregularity shall be allowed unless made within a

> reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity."

Mr. Wood further submitted that the entry of an unconditional appearance constitutes a submission to the jurisdiction of the court: see **The August 8** (1983) 2 AC 450 Privy Council. He also submitted that where a defendant or prospective defendant intends to raise a bona fide challenge to either the jurisdiction of the court or as to any irregularity in the proceedings, the proper course is to obtain leave to enter a conditional appearance and this was not done in the instant case.

Mr. Wood argued that one month before the hearing to vary the mareva injunction, Jorril filed a detailed affidavit and exhibited documents in support of the allegations of fraud. He said that no objections were raised then, as to the necessity for pleadings. He further argued, that the appellant could not say it was taken by surprise. Furthermore, affidavits were also filed in answer to Hylton's affidavit and in particular there was an affidavit sworn to by Albun Whittaker which was tendered in evidence in support of the genuineness of the alleged sale agreement.

In summary, Mr. Wood submitted:

1. That there is no rule that precludes a Judge in Chambers from dealing with an application where an issue of fraud arises.

2. That there is no rule to exclude evidence of fraud once the matter is raised before the court. The court would be duty bound to act on it and to determine the issue.

3. That the issue of fraud/dishonesty arises daily in Chambers and if every time it arises, a court has to run away from it and to direct the party to file a writ and pleadings, these matters would never be determined speedily.

4. That the appellant's submissions fly in the face of the case of **Robert Honiball & George Brown v Christian Alele** (1993) 30 JLR 373, a decision of the Privy Council.

5. That where the issue arises in Chambers the judge has a discretion whether to proceed to open court.

6. That in civil proceedings the parties can freely agree on the procedure.

7. That the procedure was agreed to by Bastion when it came into the proceedings. Furthermore, Bastion had participated in the proceedings and cross-examined witnesses.

8. That the evidence shows that Bardi knew what they were coming into and ought not to object to the jurisdiction and procedure adopted.

A number of individuals were cross-examined upon their affidavit evidence at the hearing before the learned judge. At the conclusion of the cross-examination of Margi Geddes it was proposed by Counsel on behalf of Jorril that the proceedings continue on the basis of the procedure laid down in **SCF Finance Co. Ltd. v Masri** [1985] 2 All E. R 747 whereby as between Jorril and the appellant, pleadings would be delivered and the hearing continued in open court. There was strong objection to this proposal and the learned judge decided that the

hearing should continue in accordance with the procedure laid down when the matters commenced hearing in chambers.

It would appear that out of an abundance of caution, an application was made by Jorril to amend its summons for summary judgment. The summons stated that the mareva injunction should not be varied or modified for the following reasons:

> "1. the said agreement dated 1st October 1999 for the sale by the first defendant to the second defendant of the aforesaid stocks in Desnoes and Geddes Limited was not an arms length or bona fide sale agreement nor was such agreement made in the ordinary course of duty;
>
> 2. further or alternatively, the said agreement dated 1st October 1999 for the sale of the aforesaid stocks in Desnoes and Geddes Limited is a sham and a fraud made for the purpose of placing the 1st defendant's aforesaid assets out of the reach of the plaintiff's claim and any judgment or Order of the Court resulting therefrom;
>
> 3. further or alternatively, the said agreement dated 1st October 1999 for the sale of the stocks in Desnoes and Geddes Limited by the first defendant was made wrongfully for the purpose of placing the first defendant's aforesaid assets out of the reach of the plaintiff's claim in circumstances where the first defendant and particularly the first defendant's director and principal shareholder, Mrs. Margie Geddes, knew or ought to have known that the plaintiff was a trustee and that such assets were intended to pass to the trust created by her husband, Paul H. Geddes for the purpose of benefiting his children and grandchildren upon his death;

> 4. further or alternatively, the said agreement dated 1st October 1999 for the sale of the aforesaid stocks in Desnoes and Geddes Limited is wholly illegal and unenforceable as same was made by the first defendant and the first defendant's director and principal shareholder, Mrs. Margie Geddes in contravention of the provisions of section 51 of the Securities Act."

Mr. Wood submitted that the amended summons and affidavit sworn to by Lance Hylton had set out full particulars with respect to the case being put forward by Jorril and were indeed pleadings within the wide definition of section 2 of the CPC which states as follows:

> "2. Pleading shall include any petition or summons and shall also include the statements in writing of the claim or demand of any plaintiff."

SCF Finance (supra) is a case where the plaintiff had obtained a freezing order against the first defendant, which order was extended to assets in the name of the defendant's wife who was joined in the action. The wife sought to remove a substantial sum, held in her name, from the jurisdiction and applied to discharge the injunction. The application was refused and the learned judge ordered a preliminary issue to be tried. This order was affirmed by the Court of Appeal. The judgment of Lloyd, LJ is instructive. It deals with the development of the law concerning mareva injunctions. He states inter alia:

> "……
>
> It is important that the jurisdiction should be kept flexible, so that the courts can continue to do what is 'just and convenient' in any given case.

The discretion of the court should not be hedged about with too many rules.

It is now well settled that an injunction will be varied where necessary so as to enable a defendant to pay his ordinary trading debts as they fall due, or to meet his ordinary living expenses. If there is a dispute as to the extent of his living expenses, or whether the defendant has other assets out of which he ought to pay his debts, there is a ready solution. Such disputes are resolved every day in the Commercial Court or by the judge in chambers. I can see no difference in principle between a defendant who says, 'These are my assets and I need them to pay a third party in the ordinary course of business,' and one who says, 'These are not my assets at all.' In each case the question can and should be resolved without too much difficulty or elaboration by the court. Nor can it make any difference if the defendant's assertion 'These are not my assets' is backed up by the assertion of a third party or if the third party intervenes on his own. If such questions, when they arise between plaintiff and defendant, can be resolved by the court, so they can when they arise between plaintiff and a third party. It is true that the third party may be put to some inconvenience. But, where the assets appear to belong to a third party, the court will not have granted the order in the first place without good reason. Moreover, the third party who applies successfully to have the injunction discharged will be protected by the plaintiff's undertaking in damages: see the additional undertaking incorporated in the order which I made in the present case on 8 May 1984.

So I see no difficulty in the court's resolving any dispute which may arise between a plaintiff and a third party as to the ownership of assets to which the Mareva injunction has been applied. If that is so, then I can see no reason whatever why the court should be obliged to discharge the injunction on the mere say-so of the third party. If

> the court were so obliged, then the Mareva jurisdiction would be in danger of being nullified at the whim of the unscrupulous. If a court were not permitted to inquire into a third party's claim, but were bound to accept it at its face value, how could the court be satisfied that any transfer of assets to the third party had occurred before rather than after the injunction? Every consideration of policy and convenience points, in my view, against the principle which counsel for the second defendant asserts."

The allegations of fraud

With this background in mind, I now turn my attention to the affidavit evidence of Lance Hylton. He deposed in his affidavit sworn to on 18th January 2002 as follows:

> **"Purported sale to Bastion is a fraudulent sham designed to put the D&G shares beyond the reach of the Plaintiff.**
>
> 12. In her affidavit Mrs. Geddes states that she and the other director of the defendant, Mrs. Felicity Croswell Brandt considered how best to settle the admitted debt to the Plaintiff. The gist and effect of her affidavit is that they concluded that the best option was to:
>
> 12.1 sell the shares to Bastion as at October 1, 1999 for the then trading price of J$7 per share (a total of J$76,646,122.00).
>
> 12.2 go by private contract instead of trying for a better price on the stock exchange for fear of "swamping the market".
>
> 12.3 Pay J$6,514,929.00 in tax instead of J$0.00 on the Stock Exchange.
>
> 12.4 Provide that Bastion need not pay approximately 74% of the price (J$56,646,122.00)

for five years, September 30,2004, yet also provide that from October 1, 1999 all rights as to capital and income (including dividends and bonus issues) shall go to Bastion.

13. By reason of the facts set out above and below, I verily believe that the Bastion Agreement amounts to a fraudulent and/or illegal sale at an undervalue, which was a sham, entered into by Mrs. Margie Geddes, purporting to act on behalf of the defendant, in an attempt to put the assets of the defendant beyond the ambit of this suit. I note in particular that:

13.1 Mrs. Geddes was present at, and participated in, a meeting of the Board of Directors of Desnoes & Geddes Ltd. ("D&G") held on September 21, 1999, where the company's financial performance for the year was reviewed and declared to be "excellent", with the budgeted Operating Profit being achieved. At this meeting it was decided that dividends would be paid to all shareholders based on these results and that a Round Robin Resolution would be circulated to all Directors. I attach hereto as "LSH 7" a copy of the Minutes of the said Directors meeting of September 21, 1999.

13.2 I attach as "LSH 8" a copy of a Round Robin Resolution dated October 1, 1999 and signed by Margie Geddes in her capacity as a director of D&G whereby a capital dividend of 22 cents per share and an ordinary dividend of 28 cents per share were declared. This total payment of J$0.50 per share was payable on December 17, 1999 and meant that the owner of the 10,949,446 shares held by the defendant would receive a dividend of J$5,474,723.00 on that day.

13.3 I attach as "LSH 9" a copy of another Resolution dated October 1, 1999 also signed by Margie Geddes in her capacity as a director of D&G. By virtue of this Resolution the company

approved a bonus issue of shares whereby each shareholder would receive two additional shares for every share held on December 30, 1999. This means that the defendant would receive an additional 21,898,892 shares. The dividends and bonus issue were reported in the October 6, 1999 issue of the Jamaica Gleaner....

13.4 I attach as "LSH 11" a Round Robin Resolution of D&G signed by Margie Geddes in her capacity as a director thereof, and dated October 7, 1999. By this Resolution the Board of D&G authorized the execution by the company of various sale and other agreements with Pepsi Cola. I believe that the Directors of D&G would have had knowledge of such an important contract well in advance of the date of the final documentation. The sale was announced to the public on October 13, 1999 at a press conference and was considered significantly beneficial to the company....

13.5 The effect of these events on the share value was predictably very good. On October 4, 1999 the shares had a market value of J$7 each, which was the highest trading value for that year to date....The price increased steadily and by October 20, 1999 had increased to J$12.50 and even achieved a high of J$14 on that day....

13.6 On January 5, 2000 (after the bonus issue of shares) when there were 3 times as many shares, each commanded a price of J$5.50, equivalent to J$16.50 per share before the December 30, 2000 bonus issue. The shares purportedly sold by Mrs. Geddes to her admitted "friend", Mr. Whittaker for J$76.6 million (which he did not have to pay for five years) were now worth over J$180 million.

13.7 All of the events mentioned in the foregoing sub-paragraphs were known to Mrs. Geddes as a member of the board of D&G prior to the signing of the purported sale of the D&G

shares to Bastion Holdings and her "friend", Mr. Whittaker. This is the case even if the Bastion Agreement was actually signed on the stated date of October 1, 1999. I verily believe however, based on the facts below, that the Bastion Agreement was signed sometime later, and back dated.

13.8 Mrs. Geddes' Affidavit indicates at paragraph 12 that between September 3, 1999 and September 27, 1999 she sought advice on whether to sell the shares on the stock exchange. She states that she and the other Directors then considered the advice received and decided not to pursue that route. She then considered the possibility of a private buyer. She says she contacted Mr. Whittaker, and an agreement was sent to him and received back "on or about November 24, 1999, after due execution by Bastion Holdings Ltd."

13.9 By her own admission therefore, on September 27, 1999 Mrs. Geddes was still in the process of discussing the merits of a stock exchange transaction with her broker. At some date after that she began to consider the option of a private buyer and some time later she decided that a sale transaction of this magnitude would have taken some time to negotiate and for legal documents to be prepared. All of this could not have happened in four days.

13.10 Having regard to the above I verily believe that the purported date of October 1, 1999 is a fiction and was inserted into the Bastion Agreement as a part of the fraud to secure the shares and their upcoming benefits, for someone other than the plaintiff. As the Bastion Agreement was returned by courier on November 24, 1999 after being signed, it is likely that it was only sent to Whittaker for signature a week or so before, by which time suit had been filed, an injunction was in place and the share price had moved from

> J$7 to J$12.50. I verily believe that the date October 1, 1999 was inserted to create the impression that the sale took place before the public announcements of the dividends on October 5, 1999 and of the sale to Pepsi.
>
> 13.11 In response to Mrs. Geddes' statement that she had no choice but to try and sell the shares to Bastion, I say, in rejecting this, that she could have offered them to the Plaintiff. In any event she could have publicly advertised the shares or sought a better price by placing them on the market with a broker, if she truly wanted to get the best price.
>
> ....
>
> 14. The purchaser, Bastion Holdings Ltd, is not a true and bona fide independent purchaser for value without notice, as Margie Geddes admits in her Affidavit that the principal shareholder of that company is a friend, Albun Whittaker. Additionally, the conduct of Margie Geddes in the whole matter is tainted, for she is Paul Geddes' executrix, as well as Director of the Defendant and was at the time of the contract with Bastion, a Director of D&G."

Application of the principles of law

Section 170 (1) of the Judicature (Civil Procedure Code) Law provides as follows:

> "170. (1) In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the Forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading:"

The mere averment of fraud in general terms is not sufficient for any practical purpose in the prosecution of a case. It is necessary for

particulars of the fraud to be distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. The English Rules of the Supreme Court Order 18/12/13 states that:

> ". . . it is now provided that the necessary particulars of fraudulent intention must be contained in the pleading. The pleader should accordingly set out the facts, matters and circumstances relied upon to show that the party charged had or was actuated by a fraudulent intention. Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts [Davy v. Garrett (1878) 7 Ch. A D. 473 p. 489] . . .

See also **Wallingford v. Mutual Society and Official Liquidator** (1800) 5 App. Cas. 885; **Re Rica Gold Washing Co.** (1879) 11 Ch. D. 36 and **Thomas v Morrison** (1970) 16 WIR 280. In **Wallingford's** case, Lord Selborne LC stated at p. 697:

> "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded."

The question whether the matter can proceed on the basis of the summons before the court, ought in my view to be approached in a practical way and with the view, if possible, of avoiding added expense

that can result from surrendering to technical objections. There are two cases that can be of some value in the determination of the question.

The first, **Honiball v Alele** (1993) 43 WIR 314; (1993) 30 JLR 373, was a case in which an allegation of fraud was raised by way of a motion. Lord Oliver of Aylmerton, delivering the advice of the Board said of that procedure (at page 319):

> "At first sight the raising of an issue of fraud by way of a motion in the action may appear to be an unusual, or even an eccentric, method of proceeding and their lordships do not wish to say anything which might be thought to encourage it as a permissible substitute for the normal procedure for setting aside a judgment obtained by fraud by means of an action commenced by writ. A motion supported by affidavit evidence is not an ideal way of defining or trying issues of fraud and misrepresentation. ....
>
> The motion was, in truth, more in the nature of an originating motion. Nevertheless, the issue to be determined was fairly and squarely raised and the method of bringing it before the court was, in the final analysis, no more than a procedural irregularity. It did not invalidate the proceedings and in their lordships' judgment the Court of Appeal of Jamaica was right not to attach critical importance to a purely procedural objection."
>
> [emphasis supplied]

In **Eldemire v Eldemire** (1990) 38 WIR 234, Lord Templeman delivering the advice of the Board, dealing with a case brought by originating summons (which perhaps should have been brought by way of writ) stated (at page 238):

> "As a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts. The modern practice varies. Sometimes when disputed facts appear in an originating summons proceedings, the court will direct the deponents who have given conflicting evidence by affidavit to be examined and cross-examined orally and will then decide the disputed facts. Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim. Sometimes, in order to ensure that the issues are properly deployed, the court will dismiss the originating summons proceedings and leave the applicant to bring a fresh proceeding by writ. In general, the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification." [emphasis supplied]

The dicta cited above, demonstrates that where, given the circumstances of the case, the issues can be fairly resolved in spite of the irregularity in procedure, the courts will allow the matter to proceed in order to determine the substantive issues.

In the **Alele** case, Lord Oliver cited with approval the following *dicta* of Carey JA (43 WIR at page 319):

> "The practical effect of the [respondent's] procedure of a motion ... amounts to the same as if he had proceeded directly. This circuitous route which the [respondent] chose pales into insignificance and merges into the real issue which fell to be determined, namely whether the [respondent] could prove fraud."

It seems to me, that the appellant in the instant matter experienced no prejudice or detriment by the procedure that was adopted. The amended summons and affidavit of Lance Hylton in support that were filed by Jorril, are in my opinion, adequate pleadings with respect to the issues of fraud in the case. The appellant had the opportunity to examine and cross-examine all of the witnesses. Further, the appellant was allowed to present evidence and it did so by filing and serving the affidavit of Albun Whittaker. The appellant had also submitted documents ordered by the court and this was exhibited to the affidavit of Donovan Jackson sworn to on the 3rd October 2002.

I am of the opinion, that the learned judge was obliged to hold an enquiry into whether or not the injunction should be varied. She was called upon to make a determination whether the agreement was a bona fide transaction. The appellant, by joining in the proceedings and failing to make any independent application opposing the matter being heard in Chambers, had subjected itself to the jurisdiction and procedure of the Court. It is further my view that the appellant ought not to complain at this stage about any procedural irregularity. The allegations of fraud in the affidavit of Lance Hylton were not general and vague. They have set out distinct and careful particulars. It could be said therefore that the practical effect of the procedure carried out on behalf of Jorril,

amounted to the same as if it had proceeded by way of a Statement of Claim.

At what point in time was the agreement for sale of the shares executed?

Mr. Wood submitted that on a totality of the evidence, the alleged agreement for the sale of the D & G shares was not bona fide. He submitted that the learned judge had more than ample evidence before her to conclude that there was no agreement in place on the 8th November 1999.

The evidence before the learned judge reveals the following:

1. The purported agreement for sale of the shares was signed by Albun Whittaker on the 1st October 1999.

2. The certificate of incorporation of Bastion Holdings Ltd. was issued on the 30th day of September 1998.

3. Tamil was the sole shareholder on incorporation.

4. The first Directors of Bastion who were G.P Ltd and Cayman Directors Ltd. resigned on the 8th November 1999.

5. Cayman Management Services Ltd. was Secretary for Bastion Holdings Ltd. from 30th September 1998 to 8th November 1999.

6. A resolution was passed on the 8th November 1999 and Whittaker was appointed Director and Secretary of Bastion Holdings Ltd.

7. On 8th November 1999 the former Directors confirmed their resignations.

8. Letter dated 8th November 1999 was sent to the Registrar of Companies confirming the resignations of

> the former Directors and the appointment of Whittaker as Director and Secretary respectively of Bastion Holdings Ltd..

I am in complete agreement with the submissions of Mr. Wood that the evidence outlined above, clearly indicates that Whittaker could not have signed the Agreement on 1st October 1999 as a Director of Bastion.

The learned judge was correct in my view when she stated inter alia:

> " It clearly is agreed by the parties that in exercising its discretion in this matter the court must have regard to all the circumstances in order to arrive at what is just and convenient.
>
> That, in my view, demands that the court should not only take the affidavits and supporting documents into account but also the demeanour of the witnesses who gave viva voce evidence assessing how each stood up to the test of cross-examination.
>
> I agree with Mr. Wood's submission that the court is not obliged to take the Sales Agreement at face value but should carefully scrutinize 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"

She then concluded:

> " ...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 the second defendant and no payment of dividends ought to have been made to the 2nd Defendant after that date."

I am in total agreement with the learned judge's conclusion. The purported date of execution of the sale agreement is questionable. It seems to me from the evidence, that no agreement was in place on the 8th November 1999 in order to have passed a beneficial interest in the shares to Bastion Holdings Ltd.

The contempt issue

The facts here, reveal that Albun Whittaker failed to attend the hearing in Chambers in order to be cross-examined on his affidavit evidence. At page 181 of the transcript, Counsel for the appellant advised the Court as follows:

> "My instructions are that Mr. Whittaker is not in attendance this morning that he had taken legal advice both here and abroad in Cayman, the result of which he is not in attendance. The decision for him not to be in attendance has not been taken lightly by the deponent. I wish to put before the Court by way of written submissions as to the Defendant's absence."

The learned judge did not formally deal with the contempt by Mr. Whittaker but she condemned the appellant in costs for the dates Whittaker failed to attend the hearing. She also refused to hear further submissions from the appellant's Counsel and he took no further part in the hearing.

In deciding whether the approach of McIntosh J., was correct on the contempt issue, it is convenient to determine first, whether she had a

discretion to hear submissions from the appellant's Counsel and; secondly, if she had such a discretion, whether she exercised it properly.

The authorities have made it very clear that the court has discretion whether to hear a contemnor who has not purged his contempt and in deciding this issue, whether to bar a litigant or his Attorney at Law, the court should adopt a flexible approach.

In **Hadkinson v Hadkinson** [1952] 2 All ER 567 Lord Denning M.R stated that the starting point is that to refuse to hear a party, even a contemnor, is:

> " ... a strong thing ... 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 effective means of securing his compliance."
>
> ....
>
> Applying this principle, I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, 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."

The above dicta was approved by Lord Bridge of Harwich in **X Ltd v Morgan Grampian** [1990] 2 All ER 1; [1991] AC 1 at 46. Lord Bridge added by way of clarification however, that:

> "Certainly in a case where a contemnor not only fails wilfully and contumaciously to comply with an order of the court but makes it clear that he will continue to defy the court's authority if the order should be affirmed on appeal, the court must, in my opinion, have a discretion to decline to entertain his appeal against the order."

Mr. Wood has relied strongly on the above passages and submitted that the learned judge was correct in the manner in which she dealt with Whittaker's contempt. Mr. Mahfood Q. C on the other hand, expressed the view that Counsel should have been allowed to make his submissions regardless of Whittaker's contempt. I disagree with these submissions.

I am of the opinion, that the learned judge correctly exercised her discretion in refusing to hear further submissions from the appellant's Attorney at Law until there was compliance with the order of the court. Whittaker's refusal to attend is, indeed, impeding the course of justice.

Conclusion

In my judgment, the appeal ought to be dismissed with costs to Jorril to be taxed if not agreed.

ORDER:

FORTE, P.

(1) Appeal is dismissed.

(2) The funds held in joint account by the attorneys-at-law be paid over to the Trustee in Bankruptcy as the provisional liquidator of Bardi Limited.

(3) Orders of the court below affirmed.

(4) Costs to the Respondent be taxed if not agreed.