JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 111 OF 2008

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN:	LYNNE CLACKEN	1ST APPELLANT
	DWIGHT CLACKEN	2ND APPELLANT
AND	MICHAEL CAUSWELL	1ST RESPONDENT
AND	RICHARD CAUSWELL	2ND RESPONDENT

Mr. B. St. Michael Hylton, Q.C., Miss Anna Gracie and Miss Kalaicia Clarke instructed by Rattray Patterson Rattray for the Appellants.

Mr. W. John Vassell, Q.C., Mrs. Julianne Mais-Cox and Miss Cindy Lightbourne instructed by Dunn Cox for the Respondents.

29th, 30th April, 1st May and 2nd October, 2009

SMITH, J.A.:

1. This is an appeal from a judgment of Sykes, J dated 16th October, 2008 in which he refused certain declarations sought by the appellants.

2. The appellants, Dwight and Lynne Clacken are the minority shareholders in Equipment Maintenance Limited (the company) and the respondents, Michael and Richard Causwell are the majority shareholders.

3. In 2001 the appellants filed a petition to wind up the company. In May 2002, a consent order bearing the approval of Anderson, J was entered into between the appellants and the respondents. The consent order provided that the respondents would purchase the appellant's shares in the company and that the said shares would be valued for that purpose.

4. At the date of the consent order the company owned various properties including a wholly owned subsidiary, Rodeo Holdings Limited, which also owned property. Prior to the consent order, one of the company's properties, 25 Balmoral Avenue, was leased with an option to purchase. The lessee exercised the option subsequent to the consent order.

5. Clause 7 of the consent order provides that:

> "Pending the completion of the said valuation and purchase of shares and/or winding up of the Company as the case may be the respondents, Michael and Richard Causwell are hereby restrained whether by themselves, their servants and/or agents or otherwise, howsoever from removing, dissipating and/or otherwise disposing of the assets of the Company except in the ordinary course of business and from excluding the Petitioners from Directors and/or Shareholders meetings."

6. A dispute arose between the parties as to the interpretation of clause 7 of the consent order.

7. On 15th April, 2008 the appellants filed an amended Notice of Motion in the Supreme Court seeking:

> "1. A Declaration as to the meaning of the words "in the ordinary course of business" as appear in paragraph 7 of the Consent Order of the Hon. Mr. Justice Anderson dated 29th May, 2002;
>
> 2. A Declaration as to whether the property located at 25 Balmoral Avenue, Kingston 10, in the parish of St. Andrew (hereinafter referred to as "the said property") and/or the monies received in respect of the sale of the said property falls (sic) within the judicial interpretation of "in the ordinary course of business";
>
> 3. A Declaration that the restraining order set out in paragraph 7 of the said Order applies to:
>
> (a) The net proceeds of the sale of the said property;
>
> (b) The other real estate owned by Equipment Maintenance Limited and its subsidiaries as at May 29, 2002 and to the net proceeds of the sale of any of those properties;
>
> 4. An order that the net proceeds of the sale of any of the properties referred to in paragraph 3 above be paid into an interest bearing escrow account in the joint names of the Attorneys for the applicants Dwight and Lyn Clacken and the Respondents, Michael and Richard Causewell, on or before the 2nd May, 2008;
>
> 5. Costs of this application to the Petitioners/Applicants to be agreed or taxed; and
>
> 6. Such further or other relief as this Honourable Court may deem fit."

8. The Motion was heard by Sykes, J who on October 16, 2008 made the following order:

"1. The words "in the ordinary course of business" as appear in paragraph 7 of the Consent Order of Anderson, J dated May 29, 2002 mean business done in the usual flow of operations of the company.

2. The property located at 25 Balmoral Avenue, Kingston 10, in the parish of St. Andrew ("the said property") was sold by Equipment Maintenance Limited in the ordinary course of business and the company was free to use the monies received in respect of the sale of the said property as it saw fit in its ordinary course of business.

3. The restraining order set out in paragraph 7 of the said order does not apply to:

   (a) The net proceeds of the sale of the said property;

   (b) The other real estate owned by Equipment Maintenance Limited or by its subsidiaries, or to the net proceeds of the sale of any of those properties.

4. The order sought in paragraph 4 of the application is refused.

5. Costs to the Respondents to be taxed if not agreed, with certificate for two counsel.

6. Leave to appeal granted."

The Appeal

9. Some six (6) grounds of appeal were filed. However, the primary issue before the court below concerned the interpretation of the words "ordinary course of business" in the context of clause 7 of the consent order. Before this Court, the learned trial judge's interpretation thereof was challenged mainly on the following three (3) interconnected grounds:

1. The learned judge failed to consider the full "matrix of fact" available to the parties at the time of the consent order, or to give any or any sufficient weight to the fact that:

   (i) the consent order provided that the company would be wound up if the sale of the shares did not take place as agreed;

   (ii) the parties envisaged that the valuation and sale of shares would have been carried out in 90 and 360 days respectively;

2. The learned judge erred in that he treated the term "ordinary course of business" as being determined by the powers of the company as set out in its memorandum of association and failed to have any or any sufficient regard to the fact that "ordinary course of business" is different from "course of business".

3. The learned judge erred in concluding that the interpretation contended for by the appellants would amount to a "sterilization" of the company's assets.

The Submissions in Outline

The Appellant's Case

10. Mr. Hylton, Q.C. for the appellant submitted that the approach of the learned trial judge was incorrect. The authorities, he contended, indicate that the term "ordinary course of business" has the same meaning in law that it would have to a layman. In support of this contention he referred to **Ashborder BV and Others v Green Gas Power Ltd. and Others** (2004) EWHC 1517. He argued that when given such a meaning, the term "ordinary course of business" in the context of the consent order and the "matrix of fact" available to the parties at the relevant time would not involve the buying and selling of real

estate owned by the company. Accordingly, he submitted, the injunction (clause 7) would apply to real estate owned by the company and therefore the respondents would be restrained from disposing of the company's real estate.

11. It is also the contention of Mr. Hylton that the injunction applies to the proceeds of sale of any of the company's properties sold since the date of the consent order. Mr. Hylton submitted that it would defeat the purpose of the injunction and the protection which must have been intended for the minority shareholders, if the respondents and the company could use the proceeds of sale, as they see fit, in the interest of the company. In this regard, he relied on dicta of Lord Millett in **Richard Dale Agnew and Another v The Commissioner of Inland Revenue and Another** P.C. Appeal No. 35 of 2000 delivered June 5, 2001, (2001) 2 AC 710.

12. Further, Mr. Hylton contended that the injunction applies to real estate owned by the company's wholly owned subsidiary Rodeo Holdings Limited. Learned Queen's Counsel for the appellant submitted that although the assets of its wholly owned subsidiary were technically not the company's assets, given the terms of the agreement and the purpose of the injunction, the parties must have intended the injunction to also apply to real estate owned by its wholly owned subsidiary. He referred to paragraph 9 of the consent order which, he said, specifically referred to Rodeo Holdings Limited and its properties and

treated them in the same way that it treated the properties owned by the company.

13. Finally, Mr. Hylton submitted that whether or not the Court accepts his submissions (which I have summarized at paragraph 12), the receipt by the Company or the respondents of the proceeds of any sale by Rodeo Holdings Limited, whether by way of dividends or otherwise, would not represent funds received in the ordinary course of the company's business. Accordingly, the injunction would apply to such assets.

Submissions on behalf of the Respondents

14. Mr. Vassell, Q.C., for the respondents, submitted that the learned trial judge's decision was correct for the reasons given by the learned judge.

15. The purpose of clause 7, he submitted, was to ensure that the respondents did not, as directors of the company, procure the wanton or disadvantageous disposition or disposal of the assets of the company until the shares were valued and purchased. He agreed that the dissipation or removal of the assets would undermine the position of shareholders on winding up but added that the position on winding up is not necessarily undermined by disposition of real estate in the commercial interest of the company. The purpose of the clause, he said, "was not to sterilise the company's assets, which would threaten its continuity as a going concern, and involve a serious dereliction of fiduciary duty by the

respondents and even the petitioner who remained a director of the company".

16. As regards the subsidiaries, Mr. Vassell submitted that clause 7 of the order does not apply as a matter of ordinary construction. A term, he said, could not be implied into the order which would have the effect of extending it to subsidiaries without departing from the rules which prohibit a rewriting of the terms of a consent order on an application to clarify it pursuant to liberty to apply.

17. As regards the proceeds of sale of any of the Company's properties sold since the date of the consent order, Mr. Vassell contended that no rule of construction could possibly lead to the result contended for by the appellant. Learned Queen's Counsel for the respondent referred to paragraph 16 of the Privy Council's decision in **Attorney General of Belize et al v Belize Telecom Ltd. and Another** P.C. Appeal No. 19 of 2006 delivered March 18, 2009, which, he said, reflects the principle that the Court has no power to rewrite or improve upon any instrument it is called to construe.

The Construction of Clause 7

18. A useful starting point in this exercise is to set out Lord Hoffman's summary in **Investors Compensation Scheme Ltd. v West Bromwich Building Society** [1998] 1 WLR 896 of the five (5) principles by which contractual documents are construed. At pp 912 – 914, he said:

"1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

2. The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. ...

4. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the

wrong words or syntax (**See Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd.** (1997) 3 All ER 352, (1997) 2 WLR 945.

5. The 'rule' that words should be given their 'natural and ordinary' meaning reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in **Antaios Cia Naviera SA v Salen Rederierna AB, the Antaios** [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

> '... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense'."

20. These principles were applied by this Court recently in **Goblin Hill Hotels Ltd. v John and Janet Thompson** SCCA No. 57/2007 delivered 19 December, 2008. They were also applied by the House of Lords in **Bank of Credit and Commerce International SA (BCCI) v Munawar Ali and Others** [2002] 1 AC 251. The **BCCI** case was referred to by Sykes, J in the instant case and was described by Morrison, JA in the **Goblin Hill** case as providing a good example of the modern principles of interpretation.

21. One of the complaints of Mr. Hylton is that the judge failed to consider the full 'matrix of fact' available to the parties at the material time. In particular, Learned Queen's Counsel complained that the judge in holding that the parties could not have intended to prevent the company from using its assets as it saw fit failed to give any or any sufficient weight to the fact that the parties had agreed that the company should be wound up if the sale of the shares did not take place and that the parties had envisaged that the sale should take place within ninety (90) days. The injunction, he argued, was therefore intended to be a short term measure and in those circumstances, a restraint on disposing of real estate was perfectly understandable. I cannot agree in part with the learned Queen's Counsel. The learned judge in considering the background, referred to and indeed summarized the various terms of the order – see paragraph 20 of his judgment. He specifically referred to clause 3 which deals with the amounts to be paid and the time for payment and clause 4 which addresses the consequence of failure of the respondents to make payment within the specified time. In my view, there is no basis for the complaint that the learned judge, in finding that it could not have been the intention of clause 7 to prevent the company from using its own assets to conduct its business affairs, overlooked the fact that the shares should have been valued within 90 days. As to whether the judge is correct in his finding is another matter. I will return to this.

22. Another complaint of the appellant is that the learned judge erred in holding that the "ordinary course of business" includes the buying and/or selling

of real estate. Mr. Hylton's submission that the words "except in the ordinary course of business" in clause 7 restricted the company to activities that were its main or primary business operations despite what the memorandum may say, did not find favour with Sykes J. At paragraph 38 the learned judge said:

> "I cannot accept this narrow interpretation for a number of reasons. First, an examination of the memorandum of association of EML permitted the company to engage in a wide range of activities. Second, even if this were not so, a company must be able to dispose of its property to meet a legitimate business objective such as selling property in order to use the proceeds to retire expensive debt. I can see no good reason why this could not be an activity in the ordinary course of business."

At paragraph 45 of the judgment the learned trial judge said:

> "The fact that the company may not be in the business of real estate cannot by any stretch of the imagination prevent it from disposing of any real estate it may own if such disposition advances the best interest of the company. The memorandum of association makes this clear."

And at paragraph 47 the learned judge concluded that the expression "in the ordinary course of business" includes selling its own property should it be in the best interest of the company.

23. I have thought long and hard over the words used by the parties in clause 7 in the context of the whole document (the consent order) and against the factual and legal background which existed at or before the time of the consent order which embodied the agreement of the parties. The judgment of

Sykes J reflects a careful and erudite analysis of what he described as the "factual and legal environment in which it was drafted". This indeed is his wont. It is not easy, in my view, to differ from the learned trial judge's conclusion. But, I think, Mr. Hylton has a point which I am inclined to take. The point is this: If, despite the injunction, the company could "dispose of its assets as it sees fit provided that it is in the best interests of the company" the injunction would have no effect. The company's directors have a duty at all times to act in the company's best interests when dealing with its assets, thus there would be no need for an injunction to achieve that. The injunction is intended to prevent the respondents from doing something which they could otherwise do.

24. Mr. Vassell in supporting the learned trial judge's conclusion said that Clause 7 was to ensure that the respondents did not, as directors of the company, procure the wanton and disadvantageous disposition or disposal of the assets of the company until the shares were valued and purchased. But such a procurement would be unlawful and there could be no question of the parties consenting that the respondents would be restrained from so doing. The injunction in clause 7 would be of no effect.

25. If the parties and indeed the Court intended to prevent the Company and its directors from doing something which it could otherwise do, the critical question is what were they restrained from doing? In my judgment, Mr. Hylton's contention that the company was restricted by clause 7 to activities that were in

fact its main or primary business operations is valid. This must be so despite the fact that the memorandum of association permitted the company to engage in a wide range of activities including the buying and selling of real property. In the context of the Consent Order, any activity that was unusual or did not form part of the everyday or commonplace or 'usual flow of operations' of the company, even if permitted by the memorandum, would not be an act in the ordinary course of business. The reasons the learned trial judge gave for dismissing Mr. Hylton's contention are in my view, untenable, because if the company did not have the power to dispose of its assets there would have been no need for an injunction to restrain it from doing so. I think there is merit in Mr. Hylton's contention that the fact that the company was permitted by its memorandum of association to sell its real estate could therefore not be a reason, as the learned judge thought, for holding that the injunction did not prevent the sale of real estate.

26. In ***Ashborder BV v Green Gas Ltd.*** (supra), Etherton, J sitting in the Chancery Division of the English High Court of Justice had to determine, inter alia, whether a transaction fell within the ordinary course of a company's business for the purpose of a floating charge. After reviewing a long list of decided cases, he declined to adopt any particular formulation of the test for determining whether a transaction falls within the ordinary course of a company's business or to make any comprehensive statement of the criteria for determining when a transaction is to be held to have taken place in the

ordinary course of business. This was consistent with the approach of the Privy Council in ***Countrywide Banking Corporation Ltd. v. Brian Dean*** [1998] AC 338.

27. It is clear from the authorities that there can be no formulation or comprehensive statement suitable, for all cases, of the criteria for determining when a transaction is in the ordinary course of a company's business. It is also clear that to make such a determination the judge must first ascertain whether an objective observer with all the relevant background knowledge would view a transaction as having taken place in the ordinary course of the company's business. As Etherton J put it in **Ashborder** at paragraph 202:

> "The proper starting point is that the words in the expression "ordinary course of its... business" are ordinary words of the English language which must be given the meaning which ordinary business people in the position of the parties to the Facility Agreement and the Debentures would be expected to give them against the factual and commercial background in which those documents were made."

28. With this approach the words "ordinary course of business" in clause 7 must be given the meaning which ordinary business people in the position of the parties to the consent order would be expected to give them against the matrix of fact, that is, the "background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" - see ***Investors Compensation Scheme Ltd. v Bromwich Building Society*** (supra).

29. In this regard, it seems to me that, as Mr. Hylton contended, the learned trial judge's focus on the provisions of the memorandum of association was misplaced. The memorandum of association is, of course, a relevant part of the background, but the fact that it permits certain transaction does not necessarily mean that that transaction forms a part of a company's ordinary course of business.

30. The critical question must be whether in the context of clause 7, the sale of the company's real estate forms part of its ordinary course of business. In other words does the injunction apply to real estate owned by the company so as to restrain the respondents from disposing of such property? We have seen that in the eyes of the reasonable businessman who had the background information that was reasonably available to the parties at the time of the making of the consent order, clause 7 would restrict the company to its main or primary business operations.

31. It is not in dispute that although the company has the power to buy and sell real property, it was not in the business of buying and selling real estate. Indeed, the appellants in paragraph 6 of their petition filed October 5, 2001 swore that:

> "The business of the company was primarily equipment appraisals and motor vehicle rust–proofing. In 1981, your Petitioners and the Respondents agreed to expand the business of the Company to start selling autoglass albeit on a small scale. By 1982/1983, the Company bought premises at 17 Arnold Road, Kingston

> 5 which became the registered office and principal place of business of the Company."

At paragraph 7 they swore:

> "In 1995, the Company, at the instance of the First Respondent, Michael Causewell, entered into the used car business importing used cars from overseas into Jamaica and then selling them..."

32. The respondents in reply filed an affidavit on the 23rd January, 2002. At paragraphs 9 and 10 thereof they swore:

> "9. As regards paragraph 6, the primary business of the Company was only rust-proofing but the 2nd Respondent did a relatively small quantity of appraisals and it was in 1979 that the company's first shipment of windshields was received as a result of credit facilities set up by the 1st Respondent ...
>
> 10. As regards para 7, the 1st Respondent did make the suggestion that the Company should enter the used car business but there was no objection from the Petitioners nor the 2nd Respondent."

33. As Mr. Hylton correctly pointed out, nowhere in any of the above paragraphs of the parties' affidavits is there any suggestion that the business of the company included the buying or selling of real estate. It seems to me that the question as to what constitutes the business of the company is primarily a matter of evidence. The memorandum of association is relevant but not decisive since, as I have stated before, the fact that a company (or a person) has the power to buy or sell land does not necessarily mean that that Company

(or person) is engaged in the real estate business. It seems pretty clear to me that, if there is no evidence that the company is engaged in the business of buying and selling land, then the sale of land could not reasonably be said to be in the ordinary course of the company's business in the context of clause 7. Therefore, in my opinion, the parties and the Court must have intended by clause 7 to prohibit the sale of the company's real estate pending the valuation and purchase of the shares.

34. The next issue for consideration concerns the proceeds of sale of real estate owned by the company. Both parties are at one that the sale of 25 Balmoral Avenue would not be a breach of the consent order since the company was bound by contract to effect sale once the lessee exercised its option to buy. The question is: Does the injunction apply to the proceeds of sale?

35. In arguing that it does, Mr. Hylton cited **Richard Dale Agnew v The Commissioner of Inland Revenue** (supra) on appeal to the Board from the New Zealand Court of Appeal. That appeal concerns the question whether a charge over the uncollected book debts of a company which leaves the company free to collect them and use the proceeds in the ordinary course of its business is a fixed charge or a floating charge.

36. A floating charge is ambulatory – it attaches to the subject charged in the varying conditions in which it happens to be from time to time. It permits a

company to deal freely in the ordinary course of its business with the assets that are subject to the floating charge until some future step is taken by or on behalf of those interested in the charge. On the other hand, a fixed charge gives the holder of the charge an immediate proprietary interest in the assets charged. The company is unable to deal with the assets subject to such a charge unless it obtained the consent of the holder.

37. The trial judge in the **Richard Agnew** case considered that to create a fixed charge on the book debts, it was sufficient that the company should be prohibited from alienating them, but that it was not necessary to go further and also prohibit the company from collecting them and disposing of the proceeds. In rejecting this view, their Lordships thought that it was contrary to both principle and authority and to commercial sense and was inconsistent with previous decisions. Their Lordships expressed the view that a restriction on disposition which nevertheless allowed collection and free use of the proceeds was inconsistent with the fixed nature of the charge – see paragraph 36 of their Lordships' opinion.

38. At paragraph 43 their Lordships observed that property and its proceeds are clearly different assets. However they went on to say that "on a sale of goods the seller exchanges one asset for another. Both assets continue to exist, the goods in the hands of the buyer and the proceeds of sale in the hands of the seller". It seems to me that on principle, if clause 7 of the consent order

prohibits the sale of real property then the prohibition would apply legally to the proceeds of the sale of 25 Balmoral Avenue pursuant to the lessee's exercise of the option to purchase. To hold otherwise would, in my opinion, make no commercial sense in the particular circumstances of this case. Although the facts in the instant case are different from those in the **Agnew** case, their Lordships' comments and reasoning at paragraph 36 are, in my view, applicable.

Real Estate owned by Rodeo Holdings Ltd.

39. The question here is whether the injunction applies to real estate owned by the company's wholly owned subsidiary. Although Rodeo Holdings Limited is wholly owned by the company, its assets are not owned by the company – such assets belong to the subsidiary. The two (2) companies are separate legal entities and what is within the ordinary course of business of the company is not necessarily within the ordinary course of the subsidiary company's business. Clause 7 of the consent order, by its terms, only applies to the assets of the company. It is difficult to conclude from "the legal and factual environment in which the consent order was drafted", without more, that the parties must have intended the injunction to also apply to real estate owned by the company's wholly owned subsidiary.

Proceeds of the Sale of Real Estate owned by Rodeo Holdings Ltd.

40. The issue is whether the injunction applies to assets received by the company from the sale by Rodeo Holdings of any of its real estate. In other words, would the disposal of such assets be in the ordinary course of the company's business? It seems to me that each transaction must be examined within its factual circumstances to determine whether the proposed disposal of such assets would be within the company's ordinary course of business. It seems to me that the Court cannot determine this issue in vacuo. The Court would have to know, I should think, the intended use to which such proceeds of sale which the company received, would be put before it would be in a position to determine whether such disposal would be in the ordinary course of the company's business.

Conclusion

41. Accordingly, I would allow the appeal in part. I would hold that the phrase "in the ordinary course of business" restricts the company, Equipment Maintenance Limited, to its main or primary business operations.

1. I would grant the declaration that the restraining order set out in paragraph 7 of the consent order dated May 29, 2002, applies to:

   (a) The real estate owned by Equipment Maintenance Limited (EML) as at May 29, 2002, with the exception of 25 Balmoral Avenue, Kingston 10.

   (b) The net proceeds of the sale of 25 Balmoral Avenue, Kingston 10.

(c) The proceeds of sale of any other real estate owned by EML as at May 29, 2002.

2. I would refuse to grant the declaration that paragraph 7 of the consent order applies to real estate owned by the subsidiaries of EML as at May 29, 2002 and to the proceeds of the sale of any property owned by the subsidiaries.

3. The Court has no power to order that the proceeds of sale of any of the properties owned by the subsidiaries be paid into an interest bearing account in the joint names of the attorneys for the parties.

4. As to the proceeds of sale of 25 Balmoral Avenue, I can see no reason why this Court should not grant the request of the appellants that such proceeds be paid into an interest bearing escrow account in the joint names of the Attorneys. I would so order.

5. I would order that the respondents pay one half of the appellants costs in the Court below and in this Court.

HARRIS, J.A.

I agree and I have nothing further to add.

DUKHARAN, J.A.

I agree.

SMITH, J.A.

ORDER:

Appeal allowed in part.

(1) Declaration granted that the restraining order set out in paragraph 7 of the consent order dated May 29, 2002, applies to:

(a) the real estate owed by Equipment Maintenance Limited (EML) as at May 29, 2002, with the exception of 25 Balmoral Avenue, Kingston 10.

(b) the net proceeds of the sale of 25 Balmoral Avenue, Kingston 10.

(c) the proceeds of sale of other real estate owed by EML as at May 29, 2002.

(2) Proceeds of the sale of 25 Balmoral Avenue, Kingston 10, ordered to be paid into an interest bearing escrow account in the joint names of the attorneys for the parties.

(3) Respondents to pay one half of the appellants costs both here and in the Court below, to be taxed if not agreed.