JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 29 & 31/89

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

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| BETWEEN | KINGSLEY COOPER | 1ST APPELLANT (THIRD PARTY) |
| AND | FITZGERALD HOPE HOWARD<br>LOIS ANGELA HOWARD | 2ND APPELLANTS |
| AND | MANAGEMENT COMMUNICATIONS SYSTEMS LIMITED | RESPONDENT |

Miss Hilary Phillips & Mrs. Denise Kitson for 1st Appellant (the affected third party)

Dennis Morrison for the 2nd Appellants

Emile George, Q.C., & Rudolph Williams for Respondent

May 1, 2, 3, 4 & June 12, 1989

CAREY, J.A.:

These are appeals from orders made by Orr, J. (Ag.) in the Supreme Court dated 28th March, 1989 whereby he dismissed -

i) an application by the Howards (the defendants) to dissolve an injunction granted on 16th February, 1989 by Bingham, J.;

ii) an application by Kingsley Cooper, a third party affected by the said injunction, to have the said injunction granted as aforesaid, dissolved,

and removed

iii) an order for suspension of the said injunction made on 24th February, 1989 by Bingham, J.

The order for injunction has its genesis in an action which was begun in the Supreme Court by Management Communications Systems Limited (the plaintiffs) against Fitzgerald Hope Howard and his wife, Lois Angela. The plaintiffs claimed "specific performance of an agreement between the plaintiffs and the defendants dated the 12th of January, 1985 providing for the sale by the defendants to the plaintiff of property situated at No. 3, Hillcrest Avenue, Kingston 8." On 6th February, the plaintiffs obtained an interim injunction in the following terms:

> "IT IS ORDERED that
>
> 1. The Defendants be restrained whether by themselves, their servants or agents or otherwise from doing the following acts or any of them that is to say:
>
> (i) selling, negotiating for the sale of, disposing, leasing, parting with possession or dealing with the property situated at No. 3 Hillcrest Avenue, Kingston 6 otherwise then by selling the same to the plaintiff
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> (ii) trespassing on the said land by passing and repassing over it, changing the locks on the doors of the premises and committing any waste, or deterioration of the said property.
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> for ten days from the date hereof."

At the subsequent inter partes hearing before Bingham, J., on 16th February, that interlocutory injunction was ordered continued until after the trial of the action. On the 20th February, the defendants applied to have that interlocutory injunction dissolved and on the 27th February, a similar application was made by Kingsley Cooper described as the "affected third party". Those applications were resolved in a manner adverse not only to the defendants in the action, but also to the affected third party.

Each appeal will be considered separately and I begin with a chronicle of the facts relevant to the defendants' appeal from the affidavits and pleadings filed on behalf of the

parties. At the ex parte hearing on 6th February, 1989, the affidavit deposed to by Lloyd Beresford Hunter, President of the plaintiff company, showed, that by a 2 year lease agreement, the parties agreed to the rental of premises situate at 3 Hillcrest Avenue in the parish of St. Andrew. This agreement included an option to purchase and recited the manner and time for the exercise of that option, in these terms:

> "The Lessee may exercise the option to purchase the Leased Premises with ninety (90) days written notice to the Lessors of the intention to purchase at any time during the term of this LEASE AGREEMENT and upon the payment by the Lessee to the Lessors of ten per centum (10%) of the outstanding purchase price, after application of the total sums paid in monthly instalments under this Lease Agreement, in accordance with Paragraph two (2) herein, So long as said option to purchase be exercised no later than ninety (90) days prior to the expiry of this Agreement."

The plaintiffs took possession of the premises on 20th January, 1985. Both before and after the expiry of the lease, Mr. Howard expended considerable sums in respect of the premises, at the request of, and with the concurrence of the defendants. On 1st December, 1986 Dr. Hunter intimated to Mr. Howard that he intended to purchase the premises under the option and requested him "to make arrangements to close the sale." Mr. Howard promised to advise him when the sale would be closed and indeed on 21st December, 1986, they agreed to close the sale. On the 6th January, 1989, Dr. Hunter said he received a request to deliver the keys to the premises to a third party, whom he learnt, was also negotiating for the purchase of the property but he did not comply with the request. On 12th January when he spoke with Mr. Howard, he learnt that there were three other prospective purchasers, that he was first in time but that Mr. Howard desired a higher price. On the next day Mr. Howard advised him that his wife was no longer interested in selling to him. On the day following that

intelligence, the locks were changed.

When the matter came before Bingham, J., subsequently as an inter partes hearing, no further material was put before him. The only issue argued before him was whether the plaintiffs could maintain their claim for specific performance seeing that they had not exercised the option under the lease. Further, they had not given the required notice to exercise the option and when they sought to do so, it was then too late. The judge found as he was perfectly entitled to do, however, that there was a serious triable issue and granted the injunction. No appeal was taken from that order, but the defendants applied instead to dissolve the order. The ground upon which that application was made was stated thus:

> "11. That I am advised and verily believe that the interlocutory injunction herein was obtained on the basis of a material misrepresentation or omission in that the Affidavit of Mr. Hunter failed to disclose that all payments made by the plaintiff on the defendants' behalf were to be set off against the rental and that no rental has in fact ever been paid by the plaintiff directly to the defendants over the entire four year period. That this information is most relevant in that it shows that monies paid by the plaintiff were attributable to the relationship of landlord and tenant and not vendor and purchaser."

There is no doubt that one of the grounds for dissolution of an injunction is where it was granted on a suppression or misrepresentation of material facts. The learned judge was not impressed by that ground and dismissed the application holding that when the defendants were before Bingham, J., at the inter partes hearing, they were entirely at liberty to supply any facts suppressed by the plaintiffs.

Before us, Mr. Morrison pinned his faith not so much on the validity of any argument regarding suppression of material facts on the part of the plaintiffs but rather on the argument that where the material before the judge

disclosed no basis for success, then no injunction should be granted. On the evidence presented, it was plain, he said, that the option had not been validly exercised.

Attractive though they appear, those arguments advanced by Mr. Morrison are wholly irrelevant to any issue before us. We are concerned with an appeal from an order made dismissing a summons to dissolve an injunction; not an appeal against an order granting the injunction. The question before us therefore is whether there was material before Orr, J., (Ag.) which entitled him to dissolve the injunction granted by Bingham, J.

At the inter partes hearing, there was no question of suppression of facts. The fact of rental being paid by the plaintiffs was not mentioned by them in their affidavit it is true, but the omission was supplied by the defendants. The court was therefore in a position to consider all the material facts. Seeing that Orr, J. (Ag.), was of co-ordinate jurisdiction, with Bingham, J., he would have had no power to consider whether or not his brother had properly exercised his discretion. The proper question for him would be whether, apart from any question of suppression of facts which he did consider but rejected, in the light of any events between the inter partes hearing and the hearing before him, justice required that the injunction be discharged. See Attorney General v. Guardian Newspaper Ltd. & Ors. and related appeals [1970] 3 All E.R. 315 at p. 355d.

During that time, the statement of claim, defence and counter-claim and reply and defence to counter-claim were filed. The pleadings disclosed that the plaintiffs were no longer relying on the exercise of the option to ground their purchase, but on the fact that the defendants had waived the conditions in the option clause. The effect of that material

was that even if the case became a weakened case, it nevertheless remained an arguable case. There would not then exist any sufficient basis to discharge the injunction. It is not amiss to remind myself that the appeal is against the exercise of a judicial discretion and accordingly I am constrained to have firmly in my mind the cautionary words of Lord Diplock in Hadmor Productions Ltd. v. Hamilton [1982] 1 All E.R. 1042 at page 1046:

> " 'An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own'."

For that reason I came to the conclusion that Orr, J. (Ag.) had

not erred for any of these reasons and the appeal of the defendants should be dismissed.

I turn now to the appeal by the third party. In order to succeed, it was incumbent on him to show firstly, that the order of injunction had the effect of very materially injuring his rights as a third party not before the court. See per Kindersley, V.C., in Hartlepool Gas and Water Co. v. West Hartlepool Harbour and Railway Co. [1865] 12 L.T. 368 -

> ".....the court, upon principle, will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the court."

Secondly, it was also necessary to show that he was an innocent purchaser for value, that is, he had no notice of the transaction between the parties to the action. A clear example of this principle appears in Galaxia Maritime SA v Mineralimportexport The Eleftherios [1982] 1 All E.R. 796. It was held by the U.K. Court of Appeal, Civil Division, that -

> "Where the effect of granting a Mareva injunction would be to interfere substantially with an innocent third party's freedom of action generally or freedom to trade (for example, by interfering with his performance of a contract made between him and the defendant relating to the assets in question), the third party's right to freedom of action and freedom to trade should prevail over the plaintiff's wish to secure the defendant's assets for himself. Accordingly, it was an abuse of the Mareva jurisdiction to allow a plaintiff to serve a shipowner with a Mareva injunction relating to cargo owned, or alleged to be owned, by the defendant which was on board the shipowner's vessel in order to prevent the vessel sailing out of the jurisdiction with the cargo."

In Metropolitan District Railway Co. Ltd. v. Earl's Court Ltd [1911] 55 Sol. J. 807 the court in granting an injunction ensured that it was confined in its scope so as not to affect the sublessee; an innocent third party. There the lessor who had brought an action against his lessee for breach of the covenants contained in the lease, did not join the sublessee as a party to the action.

Mr. Cooper, the affected third party, filed an affidavit in support of his application. He recounted that

negotiations between himself and Mr. Howard began in October/November 1988. He made an external inspection of the premises on his own because they were locked. The property appeared badly overgrown and neglected. It should be borne in mind that the property, 3 Hillcrest Avenue consists of (1) 3 bedroom dwelling house and three external studio bedroom units. On the basis of that inspection, he entered into and executed an agreement for sale of the property on 15th December, 1988 and duly paid a deposit. Thereafter, he endeavoured to obtain the keys but the plaintiffs refused to hand them over. Eventually he was placed in possession of the property and then realized that three persons occupied the three studios.

Plainly, this was information which Mr. Cooper could have discovered with reasonable diligence. He shut his eyes to the obvious. In my view, he is deemed to have notice that the plaintiffs had an interest in the property. He had learnt from the persons occupying the flats that they were tenants of the plaintiffs.

Miss Phillips accepted as valid the dictum of Vice Chancellor Kindersley in Hartlepool Gas and Water Co. v. West Hartlepool Harbour and Railway Co. (supra) quoted earlier, but submitted that the plaintiffs at the "inter partes" hearing should have disclosed the fact that Mr. Cooper had an interest as they were aware of his interest.

But Dr. Hunter did mention the fact of a third party. In paragraph 16 of his affidavit dated 26th January, 1989 he deposed as follows:

> "16. On the 6th of January 1989 I received a hand written note dated 4th January 1989 from Mr. Fitzgerald Hope Howard requesting that I deliver the keys to the premises to a third party to enable him to coordinate a valuation of the premises. In conversation with the third party I became aware that he was negotiating with

"Mr. Howard to purchase the property, and I did not give up the keys.

17. On the 12th of January 1989 I called Mr. Fitzgerald Howard and told him of the visit of the third party, and I was told by Mr. Howard that there were three other potential buyers but I was first, however he wanted more money."

He did not identify the third party by name but it could not truly be said that there was any suppression of the fact of a third party.

In the result, the third party not having shown that he was an "innocent purchaser", would not be entitled to succeed. For these reasons, I was satisfied that the order of Orr, J. (Ag.) dismissing the application of the third party affected should not be disturbed. Accordingly, I agreed with others of My Lords that the appeal by the defendant and the third party affected should be dismissed with costs.

CAMPBELL, J.A.

Management Communications Systems Ltd, the plaintiff, issued a writ against Fitzgerald Hope Howard and Lois Angela Howard the defendants on January 26, 1989 seeking an order of specific performance of an agreement between them dated January 12, 1985 providing for the sale by the defendants to the plaintiff of property situated at No. 3 Hillcrest Avenue, Kingston 8. The writ further sought damages in the alternative. No statement of claim was issued with the writ elaborating the basis of the relief sought.

On the same day the plaintiff applied Ex parte for an order restraining the defendants their servants or agents or otherwise from doing the undermentioned acts or any of them namely:

> (i) Selling, negotiating for the sale of, disposing, leasing, parting with possession or dealing with the property situated at No. 3 Hillcrest Avenue, Kingston 6 otherwise than by selling the same to the Plaintiff,
>
> (ii) trespassing on the said land by passing and repassing over it, changing the locks on the doors of the premises and committing any waste, or deterioration of the said property.

An affidavit dated January 26, 1989 in support of this Summons was sworn to by Lloyd Beresford Hunter on behalf of the plaintiff in which, so far as is relevant, he deposed that:

> (1) The agreement entered into between plaintiff and the defendants dated January 12, 1985 was a lease agreement for two years commencing on February 1, 1985 with an option contained therein to purchase the property for the sum of $300,000.00.

(2) The rental was $21,600.00 per annum payable by monthly instalments which, in the event that the plaintiff exercised the option would be deducted from the purchase price.

(3) The plaintiff covenanted to pay the cost of general repairs to render the main three (3) bedroom dwelling house suitable for occupancy. This dwelling house together with three (3) studio units comprised the property which was the subject of the agreement. The costs of such repairs were to be deducted from the rental payments due under the lease agreement.

(4) The option to purchase was to be exercised by giving ninety (90) days written notice of the intention to purchase at anytime during the term of the lease and upon payment of 10% of the purchase price after deducting the monthly payments due under the lease and that the option was to be exercised no later than ninety (90) days prior to the expiry of the agreement.

(5) The plaintiff was let into possession on January 20, 1985. Between September 1, 1985 and September 3, 1986 it incurred general repair expenditure amounting to $58,000.00 during which time, the main dwelling house remained unoccupied. In addition as early as 29th March, 1985 at the request of the defendants it made a non-covenanted payment of mortgage arrears of $5000.00 to prevent the property from being sold by Jamaica National Building Society the mortgagees.

(6) The plaintiff made another non-covenanted payment of arrears of water rates to the National Water Commission in respect of the period prior to its entry into possession totalling $4,957.04.

(7) The plaintiff in or about August, 1986 at the request of the defendants again paid mortgage arrears amounting to $4,729.83 and thereafter kept the mortgage account up to date at the request of the defendants who represented to it that the property in fact belonged to it. The plaintiff in reliance on this representation has paid a total of approximately $39,000.00 in mortgage instalments between August 1986 and January 1989.

(8) The plaintiff with the concurrence of the defendants incurred further non-covenanted expenditure between September and October 1986 in the construction of a retaining wall to arrest erosion of the land and grillwork as security for prospective tenants. The total expenditure amounted to $17,015.00.

(9) On December 1, 1986 Mr. Hunter for the plaintiff and Mr. Howard for the defendants met and reviewed the work done by the plaintiff. At that meeting the plaintiff through Mr. Hunter 'reconfirmed' that the plaintiff would purchase the property 'under the option'. The plaintiff requested that arrangements be made to close the sale. Mr. Howard for the defendants promised to let the plaintiff know when the sale would be closed. At a subsequent meeting on December 21, 1986, Mr. Howard agreed with it, to close the sale in 1987.

(10) The plaintiff continued in possession after the expiration of the lease (which was on 31st January 1987. Thereafter at the request and with the concurrence of the defendants, it paid property tax for 1981 through to 1988/89 totalling $8330.00; it further improved the premises in 1988 by building a paved walkway to the studio units, a toolshed with consequential plumbing work totalling $11,266.17 in addition to paying to the National Water Commission $3009.00 for the installation of separate meters.

(11) On January 6, 1989 it received a handwritten note from Mr. Howard requesting it to deliver the keys of the premises to a third party to enable the latter to co-ordinate a valuation of the premises. This third party disclosed that he was negotiating with the defendants to purchase the property. As a result of this disclosure it refused to give up the keys.

(12) On January 12, it contacted Mr. Howard and told him of what the third party had said, Mr. Howard then informed it that there were three other potential buyers of which the plaintiff was first but that he wanted more money.

(13) On January 13, 1989 Mr. Howard informed the plaintiff that his wife was not interested in negotiating with the plaintiff and on January 14, 1989 he discovered that the locks on the premises had been changed.

The Ex parte injunction was granted in the terms sought on February 6, 1989 and on February 13, 1989 a summons for interlocutory injunction to continue the Ex parte injunction was issued for hearing on February 16, 1989. Service of the summons was effected on Messrs. Dunn, Cox and Orrett for the defendants on February 14, 1989 at 9.15 a.m.

This summons was heard by Bingham J on February 16, 1989 and the interlocutory injunction was granted until after trial or further order. The defendants filed no affidavit in opposition, but their counsel Messrs. John Givans and Hilaire Sobers of Messrs. Dun, Cox and Orrett were in attendance and the formal order recited that they were heard in opposition to the summons on February 16, 1989. There has

been no appeal against the order of Bingham J. Instead a summons to dissolve the interlocutory injunction was taken out on February 20, 1989 for hearing on March 6, 1989. In support of this summons the defendants filed an affidavit dated February 20, 1989 which deposed to no new facts or circumstances which had arisen or occurred subsequent to the date of the order of Bingham J.

On February 24, 1989 Mr. Kingsley Cooper applied by Ex parte Summons for the suspension until March 6, 1989 of the interlocutory injunction granted against the defendants, his vendors. In the affidavit in support, Mr. Cooper said that in or about October/November 1988 he intimated to Mr. Howard that he was seeking a suitable property for purchase. Mr. Howard said he had such a property available for sale. He was advised by Mr. Howard of the location of the property at No. 3 Hillcrest Avenue. He went on his own to inspect the property. He was only able to view the outside of the buildings as they were all locked. The grounds of the property were badly overgrown and appeared neglected. He thereafter entered into negotiation with Mr. Howard and on December 15, 1988 executed an Agreement of Sale in respect of the property. In the first week of January, 1989 he on the instruction of Mr. Howard went to the plaintiff to collect the keys of the property. The plaintiff refused to hand over the keys on the ground that it claimed an interest in the property on the basis of substantial expenditure incurred by it on the said property.

On a subsequent date in January, 1989 he Mr. Cooper was given keys for the premises by the defendants and he was put into possession by them. The defendants assured him that the plaintiff's lease had expired and that the said plaintiff had

failed to exercise an option to purchase which it had. On being put into possession he realised that three one bedroom flats on the premises were in the occupation of tenants who claimed to have rented them from the plaintiff. He has paid the deposits under the agreement of sale totalling $108,750 and in addition has expended $164,617.00 on the property. On February 14, 1989 he found affixed to the door of the main building a photocopy of an attested copy order on an Fx parte Summons restraining the defendants for 10 days from selling the property or trespassing thereon. On February 18, 1989 the plaintiff through Dr. Hunter attended on the property and served on him a photocopy of an attested copy of interlocutory injunction order granted to the plaintiff against the defendants restraining them from inter alia selling the property. He was then also served a notice by the plaintiff requiring him to remove from the property by Monday February 20, 1989 to which he responded that he would not be removing. The affidavit concluded thus:

> "I am severely prejudiced by the aforesaid order (Order of Bingham J dd 16.2.89) in this suit to which I was not joined although I am a material party and material facts pertaining to my possession of the said property were not disclosed to this Honourable Court at the time of the granting of the said order."

This Ex parte Summons came before Bingham J on February 24, 1989. The learned judge suspended his Order of February 16, 1989 until March 6, 1989 on which date the defendants' summons for the dissolution of the injunction was scheduled for the hearing. This summons was adjourned to March 28, 1989 for hearing and the suspension of the order of Bingham J was likewise extended.

On February 27, 1989 Mr. Kingsley Cooper describing himself as "an affected Third Party" issued a Summons to dissolve the injunction of Bingham J and relied in support thereof on the affidavit filed in support of the Ex parte Summons and on two further affidavits. In one of these dated 2nd March 1989 Mr. Cooper deposed to having since February 28, 1989 obtained mortgage finance commitment of $543,000.00 with resultant related expenses and that he had provided a further $7000.00 thus fulfilling the special condition in his agreement of sale. He was accordingly ready to complete the sale. In the other affidavit dated 3rd March Mr. Cooper answered certain matters impleading him which were deposed to by the plaintiff in answer to the defendants' affidavit in support of their summons for dissolution of the injunction. The only paragraphs which appear relevant are the undermentioned:

> "9. That I have obtained possession of the premises lawfully, that I have entered into a lawfully binding contract with the Defendants and I am a bona fide purchaser for value without notice, and ought to be permitted by this Honourable Court to continue my legal possession of the premises, and to conclude my lawful agreement at the end of the month with the Defendants so that I may pursue my business.
>
> That to the contrary the plaintiff came to this Honourable Court knowing that I was in possession of the subject premises conducting repairs and improvements thereto. That he was aware that I was also purchasing the property, yet he has come to this Honourable Court omitting to join me as a party to the suit without disclosing my obvious legal interest in the property.
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> 10. That in light of the above I would ask this Honourable Court to discharge the injunction granted herein."

The summons of the Defendants and that of the affected third party came on for hearing before Courtney Orr J (Ag.). On March 28, 1989 he dismissed both, with costs to the plaintiff against the defendants and the affected third party.

Before us, Mr. Morrison for the defendants submitted that no option had been exercised and that since on the plaintiff's affidavit it is not shown that the expenditures incurred have resulted in its altering its position to its detriment, it would not prima facie be entitled to an order for specific performance at trial and therefore Bingham J should not have granted the interlocutory injunction. Orr J (Ag.) was,he said,equally in error in not dissolving the same. Orr J (Ag.) in dismissing the summons of the defendants made specific findings namely that there had been no suppression of facts as the matter was not heard Ex parte meaning thereby that the defendants could and would have disclosed whatever facts they considered material and relevant at the hearing before Bingham J. He further found that there were triable issues. I see no reason to disagree with the learned judge on these findings nor for his dismissal of the summons on these grounds. I am of the view that the learned judge could equally and properly have dismissed the summons on the ground that there being no new facts and/or circumstances it was not competent for him to dissolve the order of injunction of a judge of co-ordinate jurisdiction because even the judge who made the order, similarly circumstanced, would not himself be entitled to vacate his order. The order in the absence of new facts and or circumstances could only be dissolved on review by an appellate court.

Turning to the Summons of Mr. Cooper, his case is that he has been severely prejudiced by the Order of Bingham J. He was improperly not joined in the suit and in the Summons by the plaintiff, and a material fact namely his actual possession of

the property was not disclosed to Bingham J by the plaintiff. Further, he was a bona fide purchaser for value without notice under a written agreement for sale. He had complied with all special conditions in the agreement and was ready to complete the sale.

Orr J (Ag) found as a fact that firstly the changing of the locks of the premises was equivocal and was not indicative of possession in the affected third party as it could equally indicate that as against the plaintiff, the defendant was retaking possession. Secondly, there was insufficient evidence on the affidavits from which necessarily to infer that at the date when the plaintiff sought the interlocutory injunction it knew of the agreement for sale with Mr. Cooper having regard to the defendants' behaviour (presumably the telephone conversation in December by Mr. Howard with his Attorneys) and that Mr. Cooper was not seen in ostensible possession. The learned judge concluded that the plaintiff would be taking a great risk in joining the affected third party in its suit and Summons. The defendants he said could have had the affected third party added, in the light of their knowledge of their relationship with him.

In effect the learned judge was saying that the affected third party had not established on the affidavits any suppression of facts, or that the plaintiff was obliged to join him in the proceedings. I find no cogent reason to disagree with the learned judge's findings. I would myself be inclined to the view that the affected third party may be said to have been represented before Bingham J by the defendants who on his own showing are his trustees of the disputed land. Further, the third party could timeously have applied to be heard on the

summons because he knew from February 14 of the result of the Ex parte summons and a contact with the defendants' attorneys would provide him with information of the pendency of the further summons on the 16th February.

Before us Miss Phillips submitted forcefully that the third party was a bona fide purchaser for value without notice under a written agreement for sale. His position in relation to the plaintiff would exclude the latter from securing specific performance. Since therefore the plaintiff could not get at trial the relief sought and the third party was being prejudiced by the order of Cingham J, Orr J (Ag.) ought to have dissolved the order. There would have been much merit in this submission if the third party on the affidavits was shown to have been such a bona fide purchaser without notice. But the third party failed and or neglected to obtain information which was readily and easily obtainable namely the interest claimed by the plaintiff in the property.

Mr. Cooper said he visited the property, all the buildings thereon were locked, he did not seek to obtain the keys from the defendants, his prospective vendors. Had he done so, and the keys were not forthcoming, he would have been put on his inquiry. He opted to enter into an agreement for sale and to pay substantial deposits thereunder, without as much as enquiring of his vendors who had the keys. To the extent that he relied on representations of his vendors as to who was in possession without asking for the production of these indicia of possession he prima facie did so at his peril. He may well establish at trial that in all the circumstances and on a review of all the evidence, he is to be considered as a bona fide purchaser without notice, but on the evidence before Orr J (Ag.) he certainly did not enjoy that status. Thus, as

between him and the plaintiff, it cannot be said that in equity he has a better claim, and since the effect of dissolving the interlocutory injunction would be to enable the defendants to complete the sale with him to the prejudice of the plaintiff who is claiming an estate prior in time, it would be just that the order of Bingham J remain to await the outcome of the trial. I am of the view that if this issue had been addressed fully by Orr J (Ag) he would inevitably have concluded that on the facts before him the third party could not secure a dissolution of the injunction on this ground.

It is for the above reasons that I agreed with the order of the Court on May 4, 1989 that both appeals be dismissed and the order of Orr J (Ag.) confirmed with costs in this Court for the respondent against each appellant to be taxed if not agreed.

LUCK, J.A.:

Can the 1st appellant Mr. Kingsley Cooper, the affected third party in these proceedings, rely on any recognised principle to persuade this Court to dissolve the interlocutory inter partes injunction issued at the instance of Dr. Hunter? Mr. Cooper is willing and ready to complete his contract with the Howards so as to have 3 Hillcrest Avenue conveyed to him. The Howards, the 2nd appellants, are equally anxious to complete their side of the bargain, but they are precluded from doing so by Dr. Hunter, the dominant figure behind Management Communications Systems Limited, the respondent in this appeal. He has secured an interlocutory injunction against the Howards, to block the sale until there is a trial and the necessary implication is that Bingham, J., who granted that order, found that he had an arguable case that the property should be sold to him. The resourceful Mr. Cooper eventually went before Orr, J. (Ag.) - his brother Bingham, J., being on Circuit - so as to have the injunction dissolved. Th Howards supported him by making a similar application at that hearing and the applications were heard together.

Why do the Howards prefer Mr. Cooper? His line of country is glamarous - Pulse Limited - which specialises in models and beauty contests and he has paid a deposit and started to adapt the main house for his usage. On the other hand, Dr. Hunter has alleged that he had an option to purchase the property and although it might not have been exercised in the manner stipulated, he claims that there was a waiver of the original option so that he has an equitable interest prior to Mr. Cooper, and it is this interest which is protected by the interlocutory injunction. He persuaded Orr, J. (Ag.) not to dissolve this injunction and before this Court, counsel for Mr. Cooper and the Howards have urged that the injunction should

be dissolved. Naturally, Dr. Hunter has resisted this. There is much at stake here, for if the injunction is dissolved by this Court, Mr. Cooper will be in a new home for Pulse Limited before the issues in dispute between the Howards and Dr. Hunter are resolved in Court. The Howards would have been in receipt of $725,000 and if Dr. Hunter were to succeed at the trial, damages, an inadequate remedy is all he could claim instead of the property being conveyed to him for $300,000. This is the background to this interesting and well argued interlocutory appeal.

What was the evidence before Orr, J. (Ag.)?

In order to resolve this appeal, the initial task must be to examine the evidence in the Court below. It is not an easy task because of the manner in which the record was prepared. Mr. Cooper's name does not appear in the captions in instances where he was a party and Summonses are divorced from the affidavits in support. The order appealed from is at page 94 of the record and it discloses that the summonses of Mr. Cooper and the Howards who are man and wife, to dissolve the injunction, were heard together and that both were dismissed. There was no appeal from that part of the order which ordained a speedy trial.

As a preliminary step to applying for the dissolution of the interlocutory injunction, Mr. Cooper applied ex parte to Bingham, J., for an order to stay that injunction. An order was therefore made for a stay until the 6th March, 1989. This is of importance because when the summons for dissolution came on for a hearing before Orr, J. (Ag.) by way of reference, the affidavits and exhibits relied on for the stay became the principal affidavits for dissolving the injunction. The salient features of that affidavit must now be noted.

Kingsley Cooper swore that on 15th December he executed an agreement with the Howards for the purchase of 3 Millcrest Avenue and paid $72,000 on deposit to the Attorneys for the Howards and although the agreement is not dated the receipt is dated 15th December, 1988. The next step was in accordance with instructions he had received from Mr. Howard was that he called on Dr. Hunter for the keys. He further reports that Dr. Hunter refused to deliver up the keys and said that he had an interest in the property. Further, he reported that Dr. Hunter told him that he had spent substantial sums on it. Mr. Cooper swore that he paid a further sum of $36,250.00 to the vendors Attorneys. In so doing, haste not prudence,was his guide. He ignored the intimations of Dr. Hunter. Crucial to him was that he was given the keys by the vendors, and when he went into occupancy he said he realised that the studio flats were tenanted. Mr. Cooper in the face of this obstacle still went on to spend $164,617.00 on improving the property, secured a mortgage of $543,000.00 from Mutual Security Merchant Bank and has been paying $9,000.00 interest on that loan.

The next significant feature of his affidavit was that on 14th February, 1989 he found a copy Order of an ex parte summons issued out of the Supreme Court, and he was then aware that this was an interim injunction restraining the vendors from selling or disposing of the property for 10 days. It is important to examine the reaction of Mr. Cooper at that stage to determine whether he had shut his eye to the obvious or he was an innocent third party as Miss Phillips submitted. The record discloses that the initial ex parte order was made on the 6th of February, 1989, the interlocutory order was made on the 16th of February, 1989 and the complaint is that he was not made a party to that order. He further complains that

Dr. Hunter did not inform the Court that he Kingsley Cooper had an interest in the property as he had told him that he had entered into an agreement with the Howards for purchase.

He has given no evidence that between 14th of February when he knew of the interim injunction and 16th when the interlocutory order was issued, that he requested his lawyers to act on his behalf to protect his interest. His lawyers could have secured an adjournment for him to file and serve the appropriate affidavits. Further he could have lodged a caveat to protect his interest. How can this failure to act be the basis of innocence? Further, he blames Dr. Hunter for not informing the Court of the sale agreement. But the Howards were the defendants at the interlocutory hearing. They chose not to put in an affidavit disclosing the contract although it was worth $725,000 to them. Instead of informing Mr. Cooper of the hearing and relying on the time honoured method of setting out their side of the dispute so that Bingham, J., would have countervaling evidence to that of Dr. Hunter, they sought to succeed on the ground that Dr. Hunter had not exercised his option. Orr, J. (Ag.) grasped this feature of the case as the note of his judgment at page 1 reads -

> "The defendants (the Howards) could have added the Third Party in light of their knowledge being greater than the Plaintiff."

Even on that aspect of the case, Dr. Hunter obviously pointed out that he had an arguable issue of law on the question of waiver of the option, a defence of equitable estoppel on the basis of negotiation and the conduct of Mr. Howard who told him that the place was his and that must be resolved by a trial court. These would be in addition to the arguable issue of which equity (Dr. Hunter's or Mr. Cooper's) was first in time and which ought to prevail.

It was not until after 21st February, 1989 when Dr. Hunter attempted to change the locks on the door that Mr. Cooper revealed that he consulted his lawyers and on 23rd of February, 1989 he moved the Supreme Court for an interlocutory injunction which Reckord, J., refused in the face of the injunction issued by his brother Bingham, J. The date is important; it was seven days after the interlocutory injunction of the 16th February which protected the equitable interest of Dr. Hunter.

There were two further affidavits before Orr, J.(Ag.). The first need not detain us but the second of the 3rd March, 1989 was pertinent in at least one respect. In paragraph 7 Mr. Cooper points out that he first became aware of the injunction on 14th February and by that time most of the conversation and improvement had already been completed. The inference therefore is that the $164,617 spent by him on the property was effected between the first week of January and February 14 despite the fact that during the first week of January Dr. Hunter had told him of his prior interest in the property.

The next affidavit to which it is appropriate to refer is that of Mr. Howard who also spoke for his wife. It is necessary to reiterate that the Howards did not give any evidence at the interlocutory proceedings before Bingham, J., and they ought not to be allowed an equitable remedy by relying on a second chance, because Mr. Cooper sought to move the Court to have the injunction dissolved. This is another aspect grasped by Orr, J., where in a much criticised passage in the note of his judgment he stated that suppression does not apply in this case as against the Howards as they were a party before Bingham, J. Moreover, as Dr. Hunter's affidavit was not challenged by them they must have been taken to accept

his evidence at that stage of the proceedings. This was the basis of the learned trial judge's refusal to dissolve the injunction in response to the Howard's claim.

It must be recalled that the Howards were trustees for both Dr. Hunter and Mr. Cooper. Both have alleged that they have paid purchase money for the property. So the duty to disclose both contracts to the Court lies on the Howards. Turner, L.J., puts it thus in Hadley v. The London Bank of Scotland Vol. III (1863-1865) De Gex Jones & Smith p. 63 at 70:

> "I think this rule well founded in principle, for the property is in Equity transferred to the purchaser by the contract, the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him."

In this case the Howards have ignored their obligations both to Dr. Hunter whose allegations are first in time and Mr. Cooper. As for the balance of convenience, if the property were sold, I reiterate all Dr. Hunter could claim is damages. It is fair, therefore, to regard Mr. Howard's affidavit as an odd document. He complains of material misrepresentations concerning the nature of the payments made by Dr. Hunter as to whether they were on a landlord and tenant basis or vendor and purchaser. But the appropriate time to have that issue before the Court was when Dr. Hunter made an application for an interlocutory injunction. It is not surprising that Orr, J., (Ag.) gave this evidence short shrift, so that it fared no better than the evidence of Mr. Cooper.

The other affidavit before the learned judge was that of Dr. Hunter. He swore that he was told by Mr. Howard on more than one occasion that he should make the mortgage payments. He further stated that he made improvements to the property and Mr. Howard was impressed with it. Significantly, he details his expenditure as $85,861.95 and emphasises that the

two studio apartments were and are still occupied by his tenants. There is the important paragraph of Dr. Hunter's affidavit where it is alleged that Mr. Howard told his Attorney, Mr. Morrison, to close the sale with Dr. Hunter. Mr. Morrison denies this but such conflicts can only be properly resolved in a witness action.

An interesting aspect of Dr. Hunter's affidavit is that when on 18th February he pointed out to Mr. Cooper that he had an interlocutory injunction; the response was that it did not apply to him. This perhaps is the explanation why Mr. Cooper did not take any action to protect his interest when he had knowledge of the ex parte injunction on February 14, 1989.

The relevant law as regards to the dissolution of injunction in relation to Mr. Cooper, the 1st Appellant

The basis of the trial judge's decision to refuse to dissolve the interlocutory injunction granted by Bingham, J., must be the exercise of his discretion on correct principles. Much criticism was made on the failure to mention the third party in his reasons for decision. In view of the fact that in his order he specifically mentioned that the application of the third party to dissolve the injunction was dismissed, that was conclusive evidence that the learned trial judge considered this specific claim.

Reliance was placed on Metropolitan District Railway Co. (Lim.) v. Earl's Court (Lim.) Vol. 55 Sol. Journal 807 where the plaintiff refused to add a sub-lessee as a party. The following passage in the summary of facts explains the reasons for Lush J., decision in that case; at page 807:

> "The defendants pleaded that they had underleased that portion of the premises where the contest was to take place to a certain James White for the day of the contest, and that the said James White should accordingly be made a party to the action, as the court would not grant an injunction in the absence of the tenant who is in actual possession of the property."

Lush, J., said:

> ".....,, but in view of the refusal of the plaintiffs to add the undertenants, he would confine the operation of the injunction to the defendants, their servants and agents."

Be it noted that the defendants, the Howards in this case, filed no affidavits and did not inform the Court of the third party's interest and did not ask Dr. Hunter to add Mr. Cooper as was done in this case. In the exercise of a discretion, much depends on the facts brought before the Court and this case is of no assistance to the appellant Cooper as no attempt was made to bring the relevant facts to the attention of the Court.

Galaxia Maritime SA v Mineralimportexport The Eleftherios [1982] 1 All E.R. 796 was also relied on by the 1st appellant, Cooper, but that case emphasised that -

> "Where ..... a Mareva injunction would be to interfere substantially with an innocent third party's freedom of action generally or freedom to trade ....., the third party's right to freedom of action and freedom to trade should prevail over the plaintiff's wish to secure the defendant's assets for himself."

In the instant case Mr. Cooper was not an innocent third party, in view of the fact that he had knowledge of Dr. Hunter's interest after he paid his initial deposit of $72,500.00. Moreover, the subject matter of the instant case is land not a debt and an interest in land could be protected by a caveat. Nor was Mr. Cooper a bona fide purchaser for value of the legal estate without notice as there was no conveyance of the property to him.

A relevant case cited by Mr. George was Attorney General v. Guardian Newspapers Ltd and Others and related appeals [1987] 3 All E.R. 316. This case proposes two tests in which to base a trial judge's discretion to dissolve. Firstly, that the injunction should not be dissolved if it protects an arguable case. In this case, there was an interlocutory injunction to restrain publication in newspapers. The newspapers on appeal sought to have the injunction dissolved. They failed in the Court of Appeal as well as by a majority (3-2) in the House of Lords. In the instant case there is a restraint on disposing of 3 Hillcrest Avenue, since if this property were to be sold before the trial of the witness action, Dr. Hunter would suffer irreparable loss. The other test adumbrated in this case was stated by Sir John Donaldson, M.R. at p.335 the Master of the Rolls said:

> "The government had obtained an injunction in terms approved by this court. The proper question was not whether, if the government had been applying for an injunction in July 1987, it would have succeeded, but whether, in the light of events between July 1986 and July 1987, justice required that the existing injunctions be wholly discharged or varied in any particular."

Ralph Gibson, L.J., at p. 341 and Russel, L.J., at page 342 expressly agreed with this formulation. In the House of Lords, Lord Ackner at p. 361 who was in the majority and Lord Oliver who was in the minority, at page 370 recognised the validity of the test. It is, therefore, pertinent to ask whether in the light of events since February 1989 when Bingham, J., issued an interlocutory injunction from which there was no appeal, justice required Orr, J. Ag.), on 30th March, 1989, to discharge or vary that injunction.

It is now pertinent to set out the terms of the injunction granted by Bingham, J. It reads:

> "IT IS ORDERED that the Defendants be restrained and an injunction is granted restraining them whether by themselves their servants or agents or otherwise from doing the following acts or any of them that is to say:
>
> (i) selling, negotiating for the sale of, disposing, leasing, parting with possession or dealing with the property situated at No. 3 Hillcrest Avenue, Kingston 6 otherwise than by selling the same to the plaintiff
>
> (ii) trespassing on the said land by passing and repassing over it, changing the locks on the door of the premises and committing any waste, or deterioration of the said property ....."

There was nothing in the affidavits before Orr, J. (Ag.) to indicate a change of circumstances and it is difficult to understand the basis of the attack on his order. Once it was concluded that Dr. Hunter had an arguable case on the basis of his equity being first in time and that his option can be supported on the basis that there is an equitable estoppel, then it would require a change of sufficient magnitude and significance to discharge or vary the injunction. Miss Phillips in her able argument did not persuade me that there was any change of circumstance to warrant dissolving the injunction.

The relevant law pertaining to the Howards' appeal for dissolution of the injunction

The 2nd appellants, the Howards, had a different approach as to why the injunction should be dissolved. It must be stressed that they were a party before Bingham, J., when he granted the interlocutory relief which they now seek to dissolve. They did not adduce any evidence before that learned judge and they failed to act as a prudent trustee for Mr. Cooper in not presenting the contract for sale they had with him in respect of the property. They relied on a point of law, which they repeated before Orr, J. (Ag.) and in this

Court, namely, that as regards the option, Dr. Hunter had not exercised it in the manner stipulated by the lease. Because they rested their case on law and they adduced no evidence, they must be taken to have accepted the evidence adduced by Dr. Hunter. They have approached this case as if Dr. Hunter had obtained only an ex parte injunction and they therefore failed to recognise the significance of evidence in the award of an interlocutory injunction. To speak of material misrepresentation in circumstances where they failed to put their contract with Mr. Cooper before the court was misconceived.

Even on the issue of exercise of the option, the approach was wrong in interlocutory proceedings. Mr. Morrison pointed out that as the option to purchase was not exercised in accordance with the strict terms of the agreement, then in law, it lapsed. Hare v. Nicoll [1966] 1 All E.R. 285 & Wolwell Securities Ltd. v. Hughes [1974] 1 All E.R. 161 were cited in support. Mr. George on the other hand contended that because of the intervention of equity, Dr. Hunter had an arguable case. Reliance was placed on Bruner v. Moore [1904] 1 Ch. 305 where the headnote in part, reads:

> ".....,, but an agreement to extend the time may be inferred from conduct which would make it inequitable to insist on the limit to lunar months."

This statement is based on the classic principle of Lord Cairns in Hughes v. Metropolitan Railway 2 App. Cas. 447, quoted in the judgment of Farwell, J., at page 313. It reads:

> "It was not argued at your Lordships' bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving

> "certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. My Lords, I repeat that I attribute to the appellant no intention here to take advantage of, to lay a trap for, or to lull into false security those with whom he was dealing; but it appears to me that both parties by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months dating from the month of October should afterwards be measured out as against the respondents as the period during which the repairs must be executed."

Another aspect of equity is that "time is of the essence" is not strictly enforced as in the common law. This is illustrated in options to purchase land, see Cockwell v. Romford Sanitary Steam Laundry, Ltd., [1939] 4 All E.R. 370 and Mills v. Haywood, [1877] 6 Ch.D. 196 cited in Hare v. Nicoll (supra). As Mr. George in his careful and accurate submissions argued, the issue of equitable estoppel was specifically pleaded in the reply and defence to the counter-claim and it is an issue to be tried on evidence tested by cross-examination. It is not an issue of pure law that could be decided by this Court so as to determine the rights of the parties.

CONCLUSION

It must be reiterated that the injunction granted by Bingham, J., was temporary. Orr, J. (Ag.), in his order refusing to dissolve that injunction, rightly made an order for a speedy trial. The submissions made on behalf of Mr. Kingsley Cooper have failed to persuade me that Orr, J. (Ag.) applied the wrong principle in refusing to dissolve the injunction. There was no material misrepresentation by

Dr. Hunter before Bingham, J., where Dr. Hunter established that he had an arguable case on the issue of his equity and equitable estoppel and in this Court he demonstrated that there was no significant change in circumstances to warrant dissolving the injunction. The case for the Howards was without merit. They had an obligation as trustees to put the contract of sale entered into with Mr. Cooper before Bingham, J. Yet they failed to do so and gave no explanation other than that they chose to rest their case in law. Moreover, Dr. Hunter established that he had an arguable case as regards the exercise of the option to purchaseand that he had an equity which the injunction protected. The issues must be decided at a trial and if necessary, an appeal so that the rights of the parties can be determined. So considered the order by Orr, J.(Ag.), was upheld by this Court on 4th May, 1989 and so both appeals were dismissed. The interlocutory injunction of Bingham, J., therefore, remains in force until a trial.