NALS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV01239

BETWEEN	HAMPDEN ESTATES LIMITED	CLAIMANT
AND	THE SUGAR COMPANY OF JAMAICA HOLDINGS LIMITED	1ST DEFENDANT
AND	JOHN LEE	2ND DEFENDANT
AND	TRELAWNY SUGAR COMPANY OF JAMAICA	3RD DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	4TH DEFENDANT

Mr. Crafton S. Miller, Ms. Claire Miller and Ms. C. Barclay instructed by Crafton S. Miller & Co. for the claimant.

Mr. Lackston Robinson and Ms. Michelle Shand-Forbes instructed by Director of State Proceedings for the 1st, 3rd and 4th defendants.

Mr. R. Henriques, Q.C, Mr. Allan Wood, Mr. Richard Ayoub and Ms. Mellisa James instructed by Clinton Hart & Co. for the 2nd defendant.

Heard 6th and 10th July 2009

Campbell, J.

Background:

(1) When sugar was "king," the larger sugar producing islands of the West Indies were more valuable to the British monarch than the colonies in North America. Dr. Eric Williams, in his classic exposition, **Capitalism and Slavery**, details how the decline in sugar production ultimately resulted in the abolition of the British Slave Trade, at page 53 of that work, he writes:

> "In 1798 Pitt assessed the annual income from West Indian plantations at £4M as compared to £1M from the rest of the World. As Adam Smith wrote, the profit of a sugar plantation in any of our West Indian colonies are generally much greater than those of any other cultivation that is known either in Europe or America."

(2) The Hampden Estates Ltd. (HEL) is a Company registered in Jamaica. The estate consists of sugar factory, rum distillery, great house, 750 acres of sugar cane lands and two wells. The property is described as "a unique assembly of relatively flat lands with water and labour suitable for the growing of sugar cane. In Jamaica there are now few areas that could be assembled into one contiguous expanse similar to Hampden. In addition, with the surrounding Cane Farmers' acreages more than doubling the Hampden acreages, this adds to the potential for development in sugar and rum production."

(3) Since 1850 the estate and great house have been in the possession of the Farquharsons, seven generations have lived there and are laid to rest in a private cemetery adjacent to the great house. The present occupant of the great house, David Farquharson is the Managing Director of HEL. The estate claims to produce rums of great distinction which are well-known within the industry citing that the natural yeast and bacteria and access to water to ferment the wash makes HEL unique.

(4) The claimant adduced evidence that the estate had difficulties "in or around 1994." It was one of three sugar estates remaining in private hands. Hampden, along with Long Pond, were the only factories operating in the parish of Trelawny. HEL employed a workforce of 650 workers and was crucial to the sugar industry in the island and in particular to Trelawny, as Long Pond Sugar Factory could not be maintained as a

viable entity without the sugar from Hampden. There were meetings between the representatives of the 1st claimant and Agricultural Restructuring Company Ltd.

(5) The affidavit of David Farquharson, in support of this application, states at paragraph 8;

> "In the mid 1990's the Claimant Company which was then in the business of sugar and rum production entered into arrangements with its Bankers, the National Commercial Bank (NCB) to borrow funds from time to time to finance its operations and during the currency of that relationship the Claimant made repayment on account in discharge of its obligation."

On the 6th December 1996 the claimant executed a debenture for an aggregate indebtedness of (US$7,000,000.00) seven million dollars and another on the 3rd November 1997, charging the property with the secured indebtedness.

(6) On the 1st January 1999, HEL, after negotiations, entered into a Heads of Agreement (Agreement) with the Government of Jamaica, in which it was agreed that, the government, "in the interest of the Sugar Industry of Jamaica, is further prepared to commit to providing additional financial support to HEL which is required to enable HEL to continue its operations for the 1998-1999 crop year." HEL had accumulated debts with NCB. The debt was acquired by the government entity, Finsac, and later assigned to Recon Trust Ltd. David Farquharson, in his affidavit filed 27th April 2009 acknowledged that Recon Trust Limited demanded payment of a sum of two hundred and eighty-two million, three hundred and ninety-four thousand, six hundred and twelve dollars ($282,394,612.00) and eight million, two hundred and sixty thousand, nine hundred and eighteen US dollars (US$8,260,918.00).

(7) On the 21st December 1999, Recon Trust Limited and NCB, acting under the powers conferred by the two debentures executed by HEL in favour of NCB, appointed John Lee as receiver and manager of HEL. Maurice Jackson, who assumed control of HEL, pursuant to it being placed in receivership, totalled the debt on the debenture held by NCB at six hundred and fifty million dollars (J$650,000,000.00). On a full accounting being completed and the US Dollar debt converted to Jamaican dollars, the total indebtedness to NCB was reported at J$855,176,937.00. The NCB debt was not HEL's total indebtedness. Mr. Jackson evidence was that he recorded the total pre-receivership debts of HEL at $1.4 billion dollars.

(8) George Callaghan of the Ministry of Agriculture, in describing the condition of the estate prior to the receivers coming into control after acknowledging that the other privately owned estates were profitable, said that "Hampden factory was archaic and it appears that the owners were not re-investing and as such, the estate was not profitable. The government started injecting substantial money into Hampden to keep it afloat because of the social implications; that is, the significant loss of jobs in the adjoining communities. Despite government intervention, however, Hampden went into receivership". David Farquarhson, in reply to affidavit of George Callaghan stated that "I agree that privately owned sugar estates are generally profitable and that Worthy Park and Appleton Estates are to the best of my knowledge profitable meanwhile the Hampden Estates had been undergoing financial difficulties in the years 1994 through 1999 and sought assistance from the GOJ by way of a joint venture agreement with the claimants and the shareholders.

Hampden's Claim

(9) On the 19th April 2002, Trelawny Sugar Company entered into a contract to purchase Hampden Estates Ltd. On the 24th April 2009, HEL filed an Amended Claim Form, seeking:

(a) A declaration that HEL is the true and rightful legal and beneficial owner of the said lands registered at Volume 1136 Folios 385 to 389, Volume 1183 Folios 437 to 440, Volume 1026 Folio 290 and Volume 1183 Folios 437 to 440, Volume 1026 Folio 290 and Volume 1283 Folio 945 and is therefore entitled to recover possession of the lands contained in the said Certificates of Title.

(b) A declaration that the transfer of the claimant (HEL) said property was procured by the fraud and or conspiracy of the defendants.

(c) An order that the Register of Titles cancel transfer #1555733 entered on the Certificate of Title registered at Volumes 1136 Folios 385-389; Volume 1183 Folios 438 - 440, Volume 1026 Folio 290 Volume 1283 Folio 438 - 440, Volume 1026 Folio 290 and Volume 1283 Folio 945 of the Register Book of Titles and transfer #1571568 entered on the Certificate of Title registered at Volume 1183 Folio 437 of the Register Book of Titles.

(d) An injunction to restrain the 1st, 2nd and/or 3rd defendants, whether by themselves or their servants or agents from selling, transferring, leasing or otherwise disposing of the lands registered at Volume 1136 Folios 385 – 389, Volume 1183 Folios 437-440, Volume 1026 Folio 290 and Volume 1283 Folios 945 of the Register Book of Titles.

(e) An Order directing the 1st, 2nd and/or 3rd defendants to deliver up to the claimant the proceeds of any transaction whether by way of sale of the said assets of the claimant (HEL) or otherwise damages for fraud.

(f) Alternatively damages for conspiracy.

(g) Interest at the prevailing commercial rate.

(h) Cost.

(10) On the 28th April 2009, HEL filed a Notice of Application for Court Orders seeking an injunction to restrain the 1st defendant, whether by its servants/agents from selling, leasing, transferring or otherwise disposing of the assets of HEL.

Alternatively, an injunction to restrain the 1st defendant, whether by its servants/agents from selling, leasing or disposing of or in any way interfering with the lands registered at Volume 1026 Folio 290 of the Register Book of Titles which lands contain the Hampden great house presently occupied by HEL's managing director, David Farquharson and his family, the Hampden distillery, factory office and about (20) staff houses, until trial of this action.

(11) HEL now seeks an Interlocutory Injunction pending the determination of the matter. On the 28th April 2009, an Interim Injunction had been granted by Mr. Justice McIntosh. On the 19th May 2009, it was extended by Justice Smith. A further extension was granted on the 18th June 2009.

HEL had filed previously two claims which were described by the Deputy Solicitor General as being "strikingly similar" to the present action; the first of which HCV02382/2004 was filed on the 11th October 2004, second suit, then HCV 04083/2008 on the 21st August 2008.

The Claimant's Case

(12) In his argument before this court, Mr. Miller attack was directed firstly at the (a) Lack of performance of its obligations by the GOJ under the terms of the Agreement. (b) The termination of the receivership (c) Fraud and conspiracy, of the receiver and the inter-related government entities.

According to Mr. Miler, the GOJ failed to perform certain terms of the Agreement. There was a failure to appoint two shareholders of HEL to the Board of Trelawny Sugar Co. (TSC), in accordance with paragraph 4(a) of the Agreement. The Agreement at 7(a) mandates TSC to develop and implement a plan for the rationalization of the operations of the claimant with Long Pond; Mr. Miller complained that TSC failed to comply with its obligation under paragraph 7(a). TSC has also failed to institute a Management and Agency Agreement, setting out the terms and conditions relating to TSC control over HEL. HEL argued that pursuant to the Agreement, the government undertook to provide financial support through Trelawny Sugar Company to establish viability of HEL, this it failed to do.

(13) Mr. Miller assailed the acts of the receiver, done subsequently to his letter of 16th May 2002, in which he purported to terminate his receivership. He complained that the acts of transferring the property and applications, which he said must have been in the name of the receiver, were without authority and unlawful.

(14) The main thrust of Mr. Miller's argument was of fraudulent acts on the part of the 1st, 2nd and 3rd defendants. The fraud that was pleaded and the evidence that was led were directed at the receiver's letter of 16th May 2002. The 1st defendant was particularized with colluding and conspiring with the 2nd and 3rd defendants to prepare Instruments of Transfer in relation to the properties, and intentionally making misrepresentations to the Registrar of Titles. It was alleged that the 1st defendant's action caused a transfer to be effected when it was aware that the receivership under which the transfer was effected had been previously terminated. Further, that the 2nd defendant conspired with the 1st and 3rd defendants to transfer the title to the claimant's

land to the 1st defendant. The 2nd defendant wrongfully represented that he was receiver when he knew that the receivership had ended, and signing and executing Instruments of Transfer in respect of the 3rd defendant when his receivership had ended. That the 3rd defendant colluded or conspired with 1st and 2nd defendant to prepare and submit for registration Instruments of Transfer of the claimant's lands in favour of the 1st defendant.

The 2nd Defendant's Case

(15) Mr. Henriques argued that the linchpin of the claimant's case was the agreement entered into amongst the Government of Jamaica, HEL and the shareholders of HEL. Learned Queen's Counsel argued that, properly construed, the Agreement offered financial assistance support to provide working capital and rehabilitation of HEL's sugar factory and sugar cane only for a year and did not contemplate an on-going support. He said the Agreement was silent about FINSAC and there was no expression that there was to be a 'pay-off of existing debt'. Item 7 of the Agreement is clear that the efforts of the parties, "to diligently and prudently" develop a plan for the rationalization of the claimant was to be implemented within one year of the effective date.

(16) Queen's Counsel further submitted that the Agreement provided, at paragraph 3, for the appointment of persons with the necessary expertise to the positions in the management structure. That consistent with the Agreement, the management structure had two officers who were there previously, to the implementation of the Agreement, remaining in their positions of Managing Director and the Chief Financial Officer. NCB, it was, that made the decision on the 21st December 1999, to send in the receiver.

(17) In respect to the challenge raised that there was a failure to account, the letter from FINSAC, acting on behalf of NCB and Recon Trust Limited, of the 21st December 1999, gave an account of the debt. The claimant's Audited statements, prepared by Peat Marwick at 30th September 1997, reported that "the company has sustained losses and has working capital and net shareholders deficits as at 30th September 1997 of $432,730,548.00 (1996: $20,902,111.00) and $246,269,366.00 (1996; $69,818,123.00), respectively. The auditors opined that the claimant's "continuation as a going concern, therefore, is dependent on obtaining continued financing and, ultimately, on future profitable operations."

(18) The valuation of HEL in April 2000 showed a market value assessed at $562,140,000.00 and a potential value of $950,690,000.00. The valuation report stated that the cane production of the estate was way below its potential, both in its total acreage under cultivation and its low yield per acre due to inadequate cultural practices. The factory and distillery are old and need extensive repairs and replacements resulting in heavy "down time".

Anaylsis

Is there a serious issue to be tried?

(19) Mr. Henriques submitted that there was no serious issue to be tried, and relied on the authority of **American Cyanamid v Ethicon Ltd.** (12975) 1 ALL ER 504. That decision of the House of Lords overturned the Court of Appeal's decision that the applicant, Cyanamid, had not made out a prima facie case. Cyanamid appealed. The House held that there was no such rule which precluded the court from considering, whether, on a balance of convenience, an Interlocutory Injunction should be granted

unless the plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trial of the matter. The House held that, all that was necessary was that the court should be satisfied that the claim *was not frivolous or vexatious*, i.e. *that there was a serious question to be tried.* Lord Diplock at page 510 letter c and at letter f says;

> **"So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."**

Sun Fish Hatcheries Jamaica Ltd. v. Paradise Plum Ltd. (1970), *27 JLR 348. See page 350. Letter G – I and page 351, Letter A.* See also *paragraph 14* ***Trinidad and Tobago Civic Rights Association v. Patrick Augustus Meryrn Manley,*** where Mr. Justice Smith summarised the principles enunciated in **Cyanamid** as follows:

(a) The plaintiff must establish that he has a serious issue to be tried.

(b) If Damages are an adequate remedy, no injunction will be issued.

(c) If not, the court considers in whose favour the balance of convenience lies.

(d) If the balance of convenience is equal, the court will strive to maintain the status quo.

(e) In special cases, the court can look to the relative strength of a party's case.

(20) The court therefore has the task of conducting an examination on the available evidence, to determine whether there is a serious question to be tried or that HEL has any real prospect of succeeding in its claim for a permanent injunction. *Cyanamid*

makes clear that a detailed examination of the facts as would take place at trial is to be eschewed. The Deputy Solicitor General, in the course of this hearing, and without notice, had applied to cross examine David Farquharson, who had provided affidavits in support of the application and had been present in court throughout. The court refused the application, primarily for the reasons enunciated in this excerpt from the erudite judgment of Lord Diplock, at page 510 of the judgment in Cyanamid, letter d;

> **"It is no part of the courts function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claim of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."**

(21) Lord Diplock further counsels that courts at this stage should be mindful of the effect of it pronouncements on the subsequent trial. Towards the end of his judgment, the learned judge, states at page 512;

> **"In view of the fact that there are serious questions to be tried on which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospect of success of either party would only be embarrassing to the judge who will have eventually to try the case. The likelihood of such embarrassment provides an additional reason for not adopting the course that both Graham, J. and the Court of Appeal thought they were bound to follow, of dealing with the existing evidence in detail and giving reasoned assessments of their views as to the relative strengths of each party's cases."**

(22) It is with those strictures in mind that I approach, the examination of the threshold issue, the determination of whether there is a serious question to be tried. There are complaints of both attorneys for the defendants that there is not a scintilla of evidence to support the allegation of fraud. That the allegation rests solely on the receiver's letter of

the 16th May 2002, which purports to bring to an end the receivership. The submissions of learned Queen's Counsel remained within a narrow ambit, an exposition of the law as it concerns the termination or discharge of a receiver and an application of the facts of this case to the law. Mr. Miller response was similarly on this point focused on the relevant law as it concerns receivers.

(23) In order to demonstrate there were no serious issues to be tried, Mr. Henriques contended that there was no evidential backing for the primary question raised as to the effect of the receiver's letter of the 16th May 2002. The question raised was, "Does that letter have the effect of making invalid and unlawful, his subsequent act?" Mr. Miller is contending that, that letter terminated the receiver's appointment, therefore, the representations, transfer etc. effected in his name are fraudulent. Mr. Henriques answer is that the letter cannot terminate the receiver's appointment; therefore, his subsequent acts cannot be questioned as not having being done during the currency of the receiver's appointment.

(24) Mr. Henriques submitted that in respect of the Particulars of Claim, at paragraphs 16, the allegations centre on the charge that the receiver, having indicated in his letter of 16th May 2002 that his receivership would end on 18th May 2002, yet he lodged for registration with the Registrar of Titles instruments, on the 12th August 2008, and that he colluded with the 1st and 3rd defendants to transfer the title to the claimant's property and representing to the Registrar of Titles that he was still receiver on the 12th August 2008. Mr. Miler submitted that once the tour of duties as receiver is complete, the receiver is not permitted to intermeddle.

(25) Mr. Henriques further submitted that the receiver's appointment may be terminated in one of three ways; (a) Discharge by the debenture-holder. (b) If the receiver has done all that he has to do. (c) Removed by the court.

He argued that despite the receiver's letter of the 16th May 1998, it was open to the receiver to extend the time within which his functions under the debenture could be completed. The Agreement for Sale of Assets was made on the 19th April 2002, the sale and purchase of the assets to be completed at the offices of the receiver on the 20th May 2002. It was against this background that the receiver wrote that his appointment would end on the 18th May 2002. Queen's Counsel further submitted that the receivership is still on-going, that he has not been relieved of his function.

(26) The receiver cannot unilaterally discharge himself. Lee's expectation was that he would have completed his assignment by that date. The person who appoints him has the power of dismissal. The debenture-holder can dismiss the receiver. In England, the receiver now has a statutory right to resign pursuant to The Insolvency Act, 1986, S45. In Jamaica, The receiver is still regulated by the Company winding-up Rules, 1949.

(27) The principles that govern the determination of the receivership are stated in the **Law Relating to Receivers and Managers, Hubert Picarda, First Edition, 1984**. At page 188, the learned authors state,

> ***'The most obvious and frequent circumstance where a receivership ends is where the receiver's job is done and is appointor discharges him. Such termination is entirely consensual, and occurs after the receivership has run its course. But termination may also take place prematurely in the event of the death resignation or removal of the receiver.'***

A receiver has as yet no statutory right in England (which is presently the case in Jamaica) to resign from his receivership. In default therefore of a contractual provision in the debenture enabling him to resign he can only lawfully resign with the consent of the debenture holder who appointed him. Without such consent his resignation would constitute a breach of contract for which he might be held liable. In damages He would not however, be compelled to complete his receivership because the courts set their face against specific enforcement directly or indirectly of a contract to perform personal services.

(28) There is presently no statutory right of the receiver to resign from his receivership in Jamaica. There has been no evidence adduced that he had the consent of the debenture holder to resign. The evidence is in fact to the contrary. It is clear that when the letter of the 16th May 2002 was written, the receiver had not completed all his duties under the receivership. In the absence of evidence at this stage to support the termination of the receivership, the allegation of fraud which hinges on the termination of his contract by the letter of 16th May 2002 is unsustainable. The applicant for an Interlocutory Injunction must adduce sufficient precise factual evidence to satisfy the court he has a real prospect of succeeding in his claim for permanent injunction. See also **Re *Lord Cable deceased 1976 3 All 417.*** Slade J., at page 43, quoted with approval at paragraph 19 of **Trinidad and Tobago Civic Rights Association vs. Patrick Augustus Mervyn Manning**. High Court of Trinidad (2005 TTHC16)

(29) Although not pleaded, it was urged that the receiver could not transfer corporate property without the seal of the company. The debentures contained a general power of attorney, which, as Mr. Henriques submitted, was usually placed in a debenture to obviate the problem of non-compliance by the directors of the company. S47 of the Conveyance Act, empowers the donee of a Power of Attorney "to execute or do any

assurance, in his own name, and his own seal, 'where seal is required' and the thing so executed is effectual in law as if in the name and with the seal of the donee of the power".

(30) The base from which the complaint of fraud on the part of the receiver is launched is the letter of 16th May 2002. That letter cannot terminate the receivership. In the circumstances, to allege that the receivership came to an end on the 18th May 2002, is not sustainable. There is therefore a failure to satisfy the limb of the American Cyanamid, the requirement of a serious matter to be tried.

Adequacy of Damages

(31) The failure of the applicant to disclose that he has any real prospect of succeeding at trial precludes the court from considering whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought.

(32) However, in the event I am wrong on that ground, I will consider the adequacy of damages, which is the first consideration in weighing the balance of convenience. Lord Diplock at page 510, letter f, says:

> **As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage (Emphasis mine).**

(33) HEL urged that the reason for application for injunctive relief when the application was made to subdivide the great house lands, was, if accomplished, the subdivision would have taken "the substratum" out of the applicant's case. The subdivision of the land at Vol. 1026 Fol. 290 would be putting the claimant to a great injustice; he could be evicted at anytime. The court was reminded that the application for the great house lands was in the alternative to the other orders being sought. HEL was prepared to jettison the other relief sought in order to preserve the application in respect of the great house. The government would be undisturbed in their possession of the sugar lands. Both counsel submitted for the defendants that damages were an adequate remedy in the circumstances and doubted whether the claimant could provide the necessary undertaking.

(34) Mr. Miller, in an impassioned plea, urged the court that the Great House, the legacy of the Farquharsons, has been in the family since the 1850's, and their ancestors were buried there in the adjoining cemetery. The loss of the Great House is not compensable in Damages. The Deputy Solicitor General, in his response was to the effect that there was no precedent before the court in these matters, where a house is not adequately compensated by damages. Mr. Robinson argued that these are orders the courts make everyday. There was nothing peculiar to the Hampden Great House that would separate it from the other homes that have been treated by these courts as being adequately compensated in damages, should their application succeed at the final determination.

Delay

(35) Mr. Henriques submitted that the delay in applying for a remedy was a bar to the claimant obtaining the remedy sought. The action was filed in May 2002. The claimants knew that the Agreement for Sale was existing, yet no steps were taken to get an injunction. It was transferred on 12th August 2008, still no application for an injunction. The receiver could quite properly have transferred the property in August 2008. What is there for the court to stop?

(36) Mr. Robinson submitted that the debts of $282,394,612.00 and US$8,260,918.00 are acknowledged by Mr. David Farquharson. The complaint that NCB was put in as receiver without a proper statement of account is without substance. There is no denial of indebtedness from the claimant. A suit was filed for accounts to be rendered, five years later, nothing has been done. Similarly, a second suit was filed, no injunctive relief was pursued.

(37) The total debt of the vendors as at May 2002 stood at $1.654 billion. There were pre-receiver debts of $1.4 billion; that is debts incurred by the estate prior to the appointment of the receiver. The valuators, Langford & Brown, assessed the market value of HEL at $562,140.000.00 and its potential value at $950,690,000.00. Counsel for the Crown contended that based on the figures presented, the 1st claimant has not got "one red cent," therefore, if the court were minded to grant the injunction sought, they would be unable to give the usual undertaking as to damages. Hampden exists in name only, it is a paper company.

On the other hand, should they succeed, the government would be in a position to pay. The debts of the claimants have already been absorbed by the taxpayers of this country.

Balance of Convenience

(38) The claimant has not resisted the submissions that should the defendants succeed at the trial, the defendants could not be adequately compensated.

(39) In considering the balance of convenience, Deputy Solicitor General urged the court to balance the interest of the claimant against those of the country, the national interest and those involved in the sugar industry. The present conditions affecting the sugar industry are not the makings of the Government of Jamaica, but substantially come about as a result of the preferential treatment being withdrawn from ACP countries. Substantial payments have already been made by the GOJ, if injunction were to issue; the investors would not await the outcome.

(40) Mr. Robinson argued that HEL is insolvent. The receiver was put in lawfully pursuant to two debentures. The property was sold under those circumstances to FSC who are now the registered purchasers for value. He says the balance of convenience lies heavily in favour of the defendants because of the negative impact the grant of the injunction would create on the economy of the country and the lives of the people in the sugar industry.

(41) The court is required, in these matters, to take into consideration the public interest against the consequences to the applicant. In the Trinidad and Tobago Civic Rights Association case, where the substantive claim was for judicial review; the court

took into account the balancing of wider public interest. In balancing the convenience of the parities before me, I am mindful of the difficulty involved in trying to put a value on the public interest factor, as argued by the Deputy Solicitor General as against the financial or other consequences that are likely to be suffered by HEL. It is not for the courts to dictate policy to the Government. It is clear that serious attempts were made to bring viability to Hampden. The taxpayers of the country have invested heavily in Hampden, because of the social implications, which would flow from the loss of jobs consequent on its closure.

(42) The GOJ has embarked upon a policy of divestment sugar factories and all sugar lands. There is no complaint that the policy was not of general application or that it targeted the claimant. It was submitted by Deputy Solicitor General that the claimant can be compensated in Damages. I accept that HEL can be compensated in damages, should it subsequently succeed at trial. Also the defendants have the stronger case, a factor I am prepared to consider. However, if the process of the privatization of the sugar industry is stopped as a result of granting this injunction, it will be virtually impossible to quantify and therefore provide compensation for the consequences that will be caused to the wider public. The better course is the course that will create the least hardship, injustice and inconvenience or to put it in the language of the Privy Council in **National Commercial Bank (Jamaica) Ltd. v Olint Corp. Ltd.** (61/2008), delivered on the 28th April 2009, the course that "will cause the least irremediable prejudice to one party or the other." The balance of convenience lay in refusing the grant of the injunction.

(43) I refuse the application for the following reasons:

1. That the application does not raise a serious issue to be tried.
2. That in any event, damages are adequate to compensate the applicant should it succeed at trial.
3. That the balance of convenience, in any regard, lies in favour of refusing the application.

Cost to the defendant to be agreed or taxed.