[2011] JMCA Civ 8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 17 & 84/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRRIS JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**GEORGE ANTHONY HYLTON**	**APPELLANT**
A N D	**GEORGIA PINNOCK (as Executrix of the Estate of DOROTHY MCINTOSH, deceased)**	**1st RESPONDENT**
A N D	**LLOYD'S PROPERTY DEVELOPMENT LIMITED**	**2nd RESPONDENT**
AND	**LLOYD E. GIBSON**	**3rd RESPONDENT**

Michael Hylton QC and Sundiata Gibbs instructed by Michael Hylton & Associates for the appellant

Paul Beswick instructed by Ballantyne Beswick & Company for the 1st respondent

15, 16 December 2010, 4 March and 1 April 2011

PANTON P

[1] On 4 March 2011, we ordered as follows:

> "Appeal dismissed. Orders of Pusey J made on 21 October 2009 and 20 January 2010 affirmed. Costs of the consolidated appeal to the 1st respondent Georgia Pinnock to be agreed or taxed."

We promised then to put our reasons in writing. I agree with the reasons for judgment written by my learned sister Phillips, JA and have nothing to add.

HARRIS JA

[2] I too agree with the reasoning of my sister Phillips JA. There is nothing I wish to add.

PHILLIPS JA

Introduction

[3] This appeal concerns premises situated at Lot 4 on the approved subdivision plan for lands in Norbrook Heights, Saint Andrew, being part of the lands originally comprising lots 39 and 40 Norbrook Heights, Saint Andrew, and registered at Volume 999 Folio 4 and 5 respectively in the Register Book of Titles and now registered at Volume 1244 Folio 877 of the Register Book of Titles (the said property). The certificate of title for the said property is registered in the name of Lloyd's Property Development Limited (the 2nd respondent), and in 1989 that company entered into two agreements for sale in respect of the said property, with two different persons, namely, the appellant and Dorothy McIntosh (since deceased, and now represented in the action by the executrix of her estate, the 1st respondent). On the evidence thus

far, it appears that neither party was aware of the other transaction at the time the transactions were entered into. The matter ultimately ended up before the courts as the parties endeavoured to protect their competing equitable interests.

[4] On 21 October 2009, on the 1st respondent's application, Pusey J made an order directing the Registrar of Titles not to register any dealing with the said property for a period of six months from the date thereof, and in particular not to register transfer No.1573499 from the 2nd respondent to the appellant. He also ordered that the 1st respondent should institute proceedings for the court to determine the party with legal and equitable ownership of the said property, within three months of the order of the court. On 20 January 2010, Pusey J made a further order extending the time to institute proceedings until 4 February 2010. Both of these orders are the subject of appeal no 17/2010. On 27 April 2010, a further restraint for a period of three months was made, by Edwards J (Ag), on the Registrar from registering any dealings with the said property, and in particular the appellant's said transfer, which order became the subject of appeal no 84/2010. On 23 September 2010, Panton P made an order consolidating the appeals.

Background

[5] As indicated, the history to this very interesting appeal commenced in 1989. Whereas the agreement for sale of the said property to Dorothy McIntosh was dated 12 June 1989, the agreement for sale to the appellant was undated save for reference to the year 1989. The agreements bore certain similarities and certain differences. The

agreement with Dorothy McIntosh contained a purchase price of $120,000.00 payable by way of a deposit of $18,000.00 to the vendor's attorney- at-law as stakeholder, and the balance was payable on completion which was to take place within 180 days (12 December 1989), subject to the special condition which allowed the purchaser to obtain a mortgage, within the said 180 days, of up to 60% of the sale price. The vendor's attorney-at-law who had carriage of sale was Mr R. Hetram of 80 East Street. It was signed by Dorothy McIntosh as purchaser, and Lloyd Gibson, director of the 2nd respondent, as vendor, witnessed by Mr Hetram, and it bore the seal of the company. The agreement for sale with the appellant contained a purchase price of $125,000.00 payable as follows: first deposit of $1,500.00 on the signing; second deposit of $11,000.00 on or before 18 July 1989; third deposit of $12,500.00 on or before 14 October 1989; the balance of $100,000.00 to be paid by 6 July 1990. Completion was fixed for on or before 6 August 1990. Mr R. Hetram of 80 East Street, the vendor's attorney-at-law, also had carriage of sale and the agreement was signed this time by Yvonne Gibson, director of the 2nd respondent, as vendor and the appellant as purchaser.

[6] On 12 October 1992, Dorothy McIntosh lodged caveat no.729262 against any dealing with the said property at the Office of Titles. The caveat was exhibited and showed that her address for the purposes of the caveat, was in care of "BALLANTYNE, BESWICK & COMPANY, Attorneys-at-law," and stated that their address for service was 66 Barry Street, Kingston. The caveator appointed that firm of attorneys as the "place at which notices or proceedings relating hereto may be sent". The basis for the caveat

was set out therein, namely the agreement for sale with the 2nd respondent in respect of the said property, and it stated that she forbade any dealing with and/or registration of the said property without notice to her unless any intended registration would be subject to her claim. A statutory declaration was also lodged with the caveat.

[7] In 1993 suit no CLM 270 was filed, and on 30 April 1997 on the application of the 1st respondent, the court (Panton J, as he then was) granted a decree of specific performance of the agreement for sale dated 12 June 1989, and declared that as against the 2nd respondent, Dorothy McIntosh was the beneficial owner of the said property. Unfortunately however, she died on 25 December 1999. The court granted probate in her estate in the following year on 21 July 2000. Almost nine months later on 3 April 2001, Anderson J made an order directing the Registrar of the Supreme Court to sign the instrument of transfer to give effect to the order made on 30 April 1997, thereby directing enforcement of the order for specific performance. It was the evidence of the 1st respondent in her affidavit of 19 January 2009 filed in support of the application under section 140 of the Registration of Titles Act (the Act) before Anderson J, that no steps were taken pursuant to completion of the transaction as prior to the grant of probate there were no funds available in the estate, and thereafter the property of the estate had to be collected by the executors and portions thereof liquidated to settle the costs of administration of the same. Another difficulty arose in that the agreement had not been stamped as might have been expected since the vendor's attorney-at-law had been placed in funds to do so by the receipt of the

deposit, and any increased amounts due by way of penalty, could only be obtained subsequent to the grant of probate and through administration of the estate.

[8] Nothing further however appears to have taken place with regard to the completion of the sale to the 1st respondent until the notice to caveator issued from the Office of Titles was received by the 1st respondent's attorneys-at-law in January 2009.

[9] In the meantime, with regard to the other sales transaction between the 2nd respondent and the appellant, no steps seemed to have occurred subsequent to the execution of the agreement for sale, with regard to the completion of the transaction, until many years later. In the appellant's affidavit filed and sworn to on 19 January 2009, the appellant deposed that after execution of the agreement he became aware of a caveat lodged against the parent title of the said property by Barclays Bank International Limited, the executor, by one Robert McGregor, which he said prevented the completion of the sale. There is no indication when the appellant became aware of this caveat. He also deposed to a dispute with a joint venture partner; the fact that the 3rd respondent died in 1995; and that the 2nd respondent had been struck from the register of companies, all of which he said affected the completion of the transaction. The appellant stated further that after extensive negotiations with Yvonne Gibson, the 3rd respondent's widow, he was able to achieve the following: the reinstatement of the 2nd respondent to the register of companies; the release of the above caveat; the arrangement of an acceptable undertaking for the balance of the purchase price; the receipt of the duplicate certificate of title for the said property and possession of the

same. Indeed, the appellant said that he had "taken various steps in relation to the property" and set them out. He said that he had cleared the same and kept it cleared, re-established boundaries, obtained valuations and topographical and other surveys; had discussions with builders in respect of construction on the property and used the property as security for financing from National Commercial Bank. No specific time was given for all of these efforts but it appears the activities occurred between 2007 and 2008, and on 8 December 2008 the attorneys-at-law then representing the appellant lodged the necessary documents at the Office of Titles (including a stamped instrument of transfer, and the duplicate certificate of title) attempting to effect transfer of the said property to the appellant. A caveat warning to the 1st respondent was also enclosed.

[10] The lodging of those papers then caused the Registrar of Titles to issue the notice to caveator which triggered these proceedings. As so much turns on the issue and service of this document, I shall set it out in its entirety:

> "IN THE MATTER of an application for the registration of an instrument dealing with the land comprised in Certificate of Title registered at Volume 1244 Folio 877 of the Register Book of Titles.
>
> A N D
>
> IN THE MATTER of section 140 of the Registration of Titles Act.
>
> WHEREAS LLOYD'S PROPERTY DEVELOPMENT LIMITED is the registered (sic) proprietors of the abovementioned land part of NORBROOK HEIGHTS formerly part of CONSTANT

SPRING ESTATE in the parish of ST ANDREW being the Lot Numbered FOUR on the plan of part of Norbrook Heights formerly part of Constant Spring Estate aforesaid deposited in the Office of Titles on the 15th day of February, 1990 of the shape and dimensions and butting as appears by the said plan and being the land comprised in Certificate of Title registered at Volume 1244 Folio 877 has applied for the registration of Transfer No. 1573499 to George Anthony Hylton.

I HEREBY GIVE YOU NOTICE that upon the expiration of fourteen days from the service of this Notice on you the Caveat numbered 729262 lodged by you n the 12th day October, 1992 will be deemed to have lapsed and I shall proceed to register the said Transfer in accordance with the provision of the Registration of Titles Act unless you sooner obtain and serve on me an Order from a judge forbidding me so to do.

Dated this 23rd day September 2008.

Sophia Williams
Registrar of Titles

To: Dorothy McIntosh
c/o Ballantyne Beswick & Company
66 & 68 Barry Street
Kingston

c.c. Rattray, Patterson, Rattray
13 Caledonia Avenue
Post Office, Box 44
Kingston
St. Andrew"

[11] It is clear from email correspondence between the Registrar of Titles and the attorneys-at-law for the appellant which was exhibited in the proceedings below, that the Registrar of Titles confirmed that the practice adopted in that office was duly followed in this matter, namely by giving a notice to the caveator by posting a

registered letter to the caveator's address for service. The Registrar indicated that "the notice should not be treated as having been served until it would in the ordinary course of post reach the postal address to which it was directed. The Office of Titles has always included seven business days for the ordinary course of the post". Initially, the Registrar indicated that the "matter" was posted on 18 December 2008 and so, by the office's calculations the "matter" should have lapsed on 20 January 2009. In a later email, however, this was corrected and the Registrar indicated that "the date acknowledged by the post office is the 15th December and not the 18th. Therefore, the caveat would have lapsed on the 16th January 2009".

[12] When however, the attorneys requested an update with regard to the processing of the documents duly lodged and in the possession of the Registrar, the latter informed that it was her understanding that there was a final order in the court in suit no CLM 270/1993 forbidding the registration of the transfer of the said property to the appellant. It is unclear how this understanding came about, as the letter sent on 14 January 2009 to the Registrar of Titles from the attorneys-at-law representing the 1st respondent, gave information relating to the transaction between Dorothy McIntosh and the 2nd respondent, the fact that a caveat had been lodged, that suit had been filed, that she had died, that probate had been taken out in her estate, and that orders had been made in the suit protecting her interest in the said property. There was an indication of an intention to restrain the Registrar, if necessary, from acting adverse to the interests of the 1st respondent, but there was no indication that any restraint was in

place, and in fact there was none. What is of some importance to this appeal is that her attorneys stated in the opening line of the letter that the notice to caveator was "received by us on Tuesday 6th instant".

[13] The attorneys for the 1st respondent however, not sanguine that the Registrar would not process the documents and register the instrument of transfer to the appellant, made an application in the same suit (CLM 270/1993) seeking an order pursuant to section 140 of the Act restraining the Registrar of Titles and the 2nd respondent from dealing with the said property in any way adverse to the 1st respondent's interest in the said property, which on 20 January 2009 was granted by Anderson J for a period of 28 days. The learned judge appeared to be of the opinion that in order to make that order, it was necessary to and he did extend the time for making the application under section 140 of the Act to 20 January 2009, the day of the filing and hearing of the application. The application was made ex parte. Anderson J made an order that the matter should be further considered on 3 February 2009, and treated it as an injunction so that the 1st respondent had to undertake to abide any order made by the court in respect of damages suffered as a result thereof. The order made was to be served within three days on the Registrar of Titles and on the 2nd respondent. Within six weeks of that order the appellant had been made a party to the suit. Thereafter there were several extensions until the application was eventually heard inter partes by Pusey J in 2009, and then later in the following year a further extension was granted by him and the orders set out in paragraph 2 herein became the subject of this appeal. Eventually the 1st respondent filed suit (2010 HCV 02263) asking,

inter alia, that the court declare her the true beneficial owner of the said property and that she was therefore entitled to register her legal interest. Initially this action was filed in the earlier suit (CLM 270/1993) and an application was filed to strike it out which was granted by Edwards J (Ag). That order became the subject of appeal no 64/2010, which by consent of the parties, was reviewed on paper and will be dealt with in a separate judgment. At the same time, a further extension of time was given by Edwards J (Ag) for a fixed date claim form to be filed in a new suit and further restraint was placed on the Registrar in respect of the registration of any dealings with the said property, which as indicated previously, became appeal no 84/2010 filed by the appellant herein, and which was consolidated with appeal no 17/2010.

The Decision of Pusey J

[14] In coming to his decision Pusey J made certain findings which have been challenged on appeal. In respect of the interpretation to be given to section 140 of the Act, he stated that the recipient of the notice given under the section must obtain the order "before the expiration of the 14 days after service or such further period as is specified in any order of the court". In his view, as the order of Anderson J extended the time limited for the application under the said section to 20 January 2009, this complied with the provision in the section, which read "such further period as is specified in any order". He therefore concluded that "the question of service has been rendered irrelevant by the court's order". He recognized that the 1st respondent was asking the Registrar of Titles to register her interest in keeping with the 1997 judgment, but also indicated that although section 140 of the Act permits the court to

delay registration of any dealing or to make such other order as may be just, in his view, the section did not give the court the right to make a determination as to who should hold the property. He concluded, "It merely allows the court to stay the hand of the Registrar until the parties' interests have been determined". He stated that the orders under the section should be for a defined period, as they were not prescriptive of the rights of the parties. In his view, the parties ought to apply to the court for a declaration as to which party held the legal interest. He directed that the Registrar should not register any dealings in respect of the said property for a period of six months or further order, giving the parties time to seek a declaration from the courts. In any event, he ordered that the 1st respondent should institute those proceedings in the court within three months.

The Appeal

[15] Notice of Appeal No. 17/2010 was filed on 18 February 2010 and related to the decision of Pusey J, contained in the orders dated 21 October 2009 and 20 January 2010 respectively. Notice of Appeal No. 84/2010 was filed on 6 July 2010 and related to the decision of Edwards J (Ag) contained in the order dated 27 April 2010. At the hearing of the consolidated appeals, counsel for the appellant informed the court that the appellant would not be advancing any arguments with regard to appeal no 84/2010. The appeal however was not withdrawn.

The appellant filed and relied on six grounds of appeal which are set out below:

"(a) The learned judge erred in law when he determined that the date on which the notice of warning was served was made irrelevant by the court order extending time to apply.

(b) The learned judge erred in failing to hold that, due to lapse of the caveat, the Claimant no longer had locus standi to make an application under section 140 of the Registration of Titles Act.

(c) The learned judge erred in law when he determined that the court order extending the time for making an application under section 140 of the Registration of Titles Act could be made after the expiration of the 14 day time limit stipulated by that section.

(d) The learned judge erred in failing to find that damages would be an adequate remedy.

(e) The learned judge erred in law in granting injunctive relief on the hearing of a Notice of Application for court order in an action which had already been tried and in which a final judgment had already been given.

(f) The learned judge erred in law in finding that the balance of convenience supported the grant of the injunctions sought."

The appellant's submissions

Grounds (a), (b) and (c)

[16] Counsel submitted that the learned trial judge had misinterpreted section 140 of the Act. In essence, counsel argued that any appearance in court must take place before the expiration of the 14 day period, or before the expiration of such further period as is specified by an order made under the section, which meant before the 14 days had lapsed. The section specifically states that the caveat cannot be renewed and any other interpretation would make a mockery of the section, he argued. Counsel complained about the position taken by the learned judge that the order having been

made by Anderson J, made the issue of service of the notice to the caveator irrelevant. Firstly, he submitted that the order had been made ex parte and could therefore be reviewed by a judge of coordinate jurisdiction, and so Pusey J could have dealt with the issues raised extensively before him with regard to service. But he did not. So there was no finding with regard to "deemed" or "actual " service which was important for the matter before him and for the outcome of the appeal. It was argued that the Registrar of Titles had sent the notice by registered post on 15 December 2008 and the caveat had lapsed 14 days after seven business days of that date, the latter period being the time allotted by her for the ordinary course of post. The Registrar also utilized 14 business days for her calculation which the appellant argued would not be in keeping with the provisions of the Interpretation Act. Section 8 of that Act, he submitted, defined excluded days for the purposes of that section as "Sundays or a public holiday". Section 8 states that "when any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days, shall not be reckoned in the computation of the time". As the time allotted in the instant case was more than six days, it was submitted that Sundays and public holidays would be counted in calculating the days which would have resulted in the caveat lapsing even earlier, namely 8 January 2009 and the application before the court filed by the 1st respondent would have been 12 days outside the time permitted in the Interpretation Act.

[17] Counsel also argued in respect of actual service, that the 1st respondent had put three different dates before the court with regard to when the notice to the caveator had actually been received by her attorneys-at-law, namely:

(i) On page 2 of the amended notice of application filed on 20 January 2009, it was stated that "on 5th January 2009 the Registrar of Titles served on [my] attorneys a Notice to Caveator";

(ii) In paragraph 8 of the affidavit filed in support of that application she stated that she was informed that "on the 9th day of January, [her attorneys'] office was served with a Notice to Caveator...;"and

(iii) In a letter dated 14 January 2009 exhibited to the same affidavit from her attorneys to the Registrar, it was stated, "We write in respect of the captioned Notice to Caveator received by us on Tuesday 6th inst."

As a consequence, with such contradictions the court could not accept any date as being the date of actual receipt of the notice. Therefore, the Registrar's indication of her practice should be accepted and the document deemed served seven business days after acknowledgment by the post office, and the caveat deemed lapsed 14 days thereafter, computed as set out in the Interpretation Act. Counsel indicated that Anderson J recognized that the application before him under section 140 was out of time, but he was of the view that the time could be extended after the caveat had lapsed, which is why, counsel submitted, the learned judge had extended the time for making the application to 20 January 2009. This, counsel submitted, was incorrect in law. The caveat once lapsed, could not be either extended or renewed and the learned judge ought not to have restrained the Registrar in the circumstances, no order having been made by the court in the 14 day period prescribed in the Act.

Ground (d)

[18] Counsel argued that damages would be an adequate remedy in this case. Counsel was unable to assist the court however with any information as to the 2nd respondent's ability to pay any damages which could be awarded by the court as the company had been struck off the register and according to the appellant had been restored by his efforts. Additionally, the 3rd respondent had died and there was no indication of the current and or future prospects of the company. Counsel nonetheless argued that as there was no special value in respect of the said property to the 1st respondent (purchaser), and in any event, since there was no specific devise of the property, which as the full purchase price had not been paid perhaps there could not have been, then any benefit to which the testator may have been entitled would fall to the residue to be shared by the residuary beneficiaries, and in those circumstances, damages could suffice.

Ground (e)

[19] Counsel firstly submitted that the orders made by Pusey J were all in the nature of injunctions even if the language did not say so specifically, and as such were remedies governed by the principles enunciated in ***American Cyanamid v Ethicon Limited*** [1975] 1 All ER 504. Counsel then argued that the 1st respondent had not only applied for and obtained an injunction, but had done so when the claim had finally been determined, and although conceding that an injunction can be granted after final judgment, submitted that it was usually sought and obtained, "incidental to and in aid of the enforcement" of the judgment, which was not so in this case. Counsel relied on

Mercantile Group (Europe) AG v Aiyela and Others [1994] 1 All ER 110 for this proposition. In the instant case, it was submitted, instead of endeavouring to (i) restore the 2nd respondent to the register, (ii) obtain the withdrawal of the earlier caveat, (iii) pay the balance purchase price and (iv) have the Registrar execute the instrument of transfer, which could perhaps have been considered an aid to enforcement of the judgment, the 1st respondent had instead pursued a path to frustrate the appellant in the registration of his instrument of transfer. Indeed, it was submitted, that there was no reference in the application before Anderson J for permission to institute an action for the court to declare the rights of the parties. Yet such an order was made by Pusey J. The court ought not to assist the 1st respondent to "fix" Anderson J's order when made out of time, nor allow Pusey J's order to stand since, when made, there was no substantive claim existing. The extension was therefore granted not only when the caveat had lapsed, but when there was no longer any claim before the court.

[20] The appellant's further complaint was that two years had elapsed since the date of the warning of the caveat (15 December 2008) and the caveator's interest had still not been registered. The agreements were entered into in 1989, the 1st respondent had obtained orders in the court for specific performance, in 1997, and to enforce the judgment, in 2001. Over nine years had elapsed since the latter order. The delay, it was submitted, was inordinate, and in those circumstances no injunction should have

been granted and in the absence of the same, the appellant's instrument of transfer would have been recorded.

Ground (f)

[21] In dealing with the issue of the balance of convenience, counsel focused on the delay which had existed since the execution of the agreement over 21 years ago and relied on the equitable maxim, "**vigilantibus non dormientibus, jura subveniunt**"; that is, equity aids the vigilant not the indolent. Counsel referred to the dicta of Luckhoo C in ***Bephia v Sahijaram A Thani*** (1972) 18 WIR 248 wherein he stated quoting from the words of Lord Camden LC in ***Smith v Clay,*** 27 ER 419, that:

> "... a court of equity 'has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and diligence; where these are wanting the court is passive and does nothing.' The appellant, therefore, must be content for a remedy in damages."

Counsel also relied on the case of ***Easton and another v Brown*** [1981] 3 All ER 278, with regard to the approach of the court in the exercise of its discretion in a similar fact situation of long delay in the enforcement of an order for specific performance. The court, he stated, in its equitable jurisdiction, "would be as careful to preserve the equities between the parties as well after the decree as before it". Counsel then chronicled the delays in the matter for which there was no explanation from the 1st respondent, when applications for extensions were made on the day of the expiry of the orders of the court. Counsel accepted that there had been delay in respect of both

sides for some time, but asked the court to examine the recent years when the 1st respondent lay dormant and only awoke when the caveat was warned to admit registration of the appellant's transfer, when (he) the appellant had, through intense activity, cleared, valued and surveyed the said property, stamped the agreement, obtained undertakings to complete the purchase, secured the duplicate certificate of title and was put into possession. It was submitted that the grant of the injunction in those circumstances "had prejudiced a vigilant and innocent third party who took all the steps that were necessary to enforce his equitable rights to the property", and the balance of convenience did not support the grant of the same.

The Respondent's submissions

Grounds (a) , (b) and (c)

[22] It was the 1st respondent's contention that the modus operandi of the Registrar of Titles of serving the notice to caveator by registered letter and assuming service thereof seven business days thereafter, was incorrect and ought to be ignored. The court, counsel indicated, should proceed on "the unchallenged date of receipt of the Notice to Caveator" which was 9 January 2009, "at the offices of the attorneys –at-law appointed to receive notices pursuant to the Caveat lodged". It was submitted that that date could "be the only date of reference in relation to the disposition of the caveat", which would mean that the application under section 140 had been filed in time. Counsel submitted further that the words in the section "notice given" could not mean anything other than actual receipt of the notice. However, counsel referred to

the Civil Procedure Rules 2002 (CPR) and in particular rule 6.6 headed "Deemed Date of Service" to say that in that rule both ordinary and registered post are deemed delivered 21 days after the date of posting. He pointed out that " if the CPR serves only as a guide, it would then be startling to conclude that the Act, having not set out similar detail, may by an unpublished/ungazetted/ unauthorized by law edict of the Registrar or other officer, impose a notional assumption of service which is one-third of the deemed service period in the CPR". He relied on the cases of ***Holwel Securities Ltd v Hughes*** [1974] 1 All ER 161 for support of the interpretation he had ascribed to the words "notice given" in the section. He also relied on section 52 of the Interpretation Act to permit the alleged "unchallenged evidence" of actual service to be encompassed by the words "unless the contrary is proved" in the section, which he submitted, was almost ***verba ipsissima*** with the UK equivalent section, and relied on the case of ***Beer v Davies*** [1958] 2 All ER 255 for the true interpretation thereof.

[23] Counsel then submitted that in any event regardless of whether the actual or deemed date of service was utilized, the date became irrelevant once Anderson J made the order extending the time to make the application under section 140 of the Act. He then indicated that the order was appealable, and that having not occurred, the order would stand as effective. Additionally, on his interpretation of section 140 of the Act, "the section plainly provides that a judge of the Supreme Court will exercise power to extend the time for applications under the section," which counsel envisaged on a clear reading of the words in the section, could be after the caveat had lapsed, as there was no limitation on the applicant's ability to make the application before the expiration of

the 14 day period. The application could also be made within such extended time as granted. He submitted that the appeal before the court was not about whether the caveat had lapsed. Every caveat once warned must lapse. The real question was whether Anderson J had the power to make the order that he did, and whether he had exercised his discretion correctly. Counsel submitted that he had.

[24] In summary, therefore, he submitted that the court should reject grounds (a), (b) and (c), as the application under section 140 of the Act can be made after the 14 day period, but in any event, in the instant case, since actual service took place on 9 January 2009 and the application was heard on 20 January 2009, the application was made within the 14 day time period.

Grounds (d) (e) and (f)

[25] Counsel argued, relying on the principles set out in ***Mercantile Group (Europe) AG v Aiyela and Ors*** that post judgment relief was a concept recognized and accepted by the common law. Indeed, the court's power to grant such relief was seen as a necessary ancillary power to giving judgment. He submitted further that there was nothing in the CPR which forbids the application for protection after trial, and parties are always in need of the court's assistance at that time. This principle, counsel submitted, was also just as applicable to matters in relation to the specific performance of contracts in relation to land, and further extended to relief in respect of co-defendants against whom one may not even have a cause of action, provided that

the claim for the injunction was ancillary and incidental to the claimant's cause of action against the principal defendant. He referred to and relied on ***TSB Private Bank International SA v Chabra et al*** [1992] 2 All ER 245).

[26] With regard to the instant case, the 1st respondent had a judgment regularly obtained and the court ought not to hesitate to assist the 1st respondent to protect the fruits of her judgment as against the 2nd respondent which was endeavouring to practice a fraud upon her and in so doing frustrate an order of the court. The order made by Pusey J merely had the effect of preventing a party with knowledge of the caveat protecting another party's interest and the judgment of the court, from rendering the judgment nugatory. It was submitted further that the appellant could not properly contend that his transfer was undisputed, as the said caveat which the Registrar had warned on his behalf indicated that any instrument affecting the caveator's estate should not take place except subject to her interest. Additionally, the 1st respondent claimed that the appellant was the author of his own dilemma and could not plead that he was an innocent victim with regard to the conclusion of his own transaction. Counsel challenged the actions of the appellant to pursue the completion of the transaction after a delay of perhaps over a decade without proper explanation, and stated that the maxim "equity aids the vigilant rings hollow in the mouth of the appellant". Counsel therefore concluded that the learned judge was entitled to exercise the power granted under section 140 of the Act to provide post judgment relief.

[27] It was also the 1st respondent's contention that in any event, the order which was the subject of the appeal, was not an injunction "in the strict sense if the same was made pursuant to section 140 of the Act". Counsel indicated that it was "merely a statutory authorization to make a direction which has been invoked by the court at the instance of the 1st respondent". He relied on the fact that the words of the section do not contain the words "injunction" or "restraint". In keeping with this submission, counsel indicated that the issue of damages and/or the balance of convenience and the principles as enunciated in ***American Cyanamid*** were inappropriate in the circumstances of this appeal. The court therefore should proceed with great caution in its approach to the general principles in respect of the grant of an injunction, as section 140 of the Act relates only to the order of the court to direct the Registrar to delay the registration of any dealing with land. In any event, in the instant case, counsel submitted, damages could never be an adequate remedy as it must be a consideration whether those damages could be paid, and in this case, the evidence does not support that, and the estate would be left without any remedy whatsoever. In summary, counsel submitted that grounds (d), (e) and (f) should not succeed.

Analysis

Grounds (a), (b) & (c)

[28] In order to address these grounds, careful scrutiny of section 140 of the Act is required, particularly in relation to what is referred to as "warning the caveat". Section 140, which is titled "Effect of lodging caveat with the Registrar, and proceeding thereon", in so far as relevant, reads:

> "Except in the case of a caveat lodged by or on behalf of a beneficiary under disability claiming under any will or settlement, or by the Registrar, every caveat lodged against a proprietor shall be deemed to have lapsed as to the land affected by the transfer or other dealing, upon the expiration of fourteen days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing, unless in the meantime such application has been withdrawn.
>
> A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest, but if before the expiration of the said period of fourteen days or such further period as is specified in any order made under this section the caveator or his agent appears before a Judge and gives such undertaking or security, or lodges such sum in court, as such Judge may consider sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, then and in such case such Judge may direct the Registrar to delay registering any dealing with the land, lease, mortgage or charge, for a further period to be specified in such order, or may make such other order as may be just, and such order as to costs as may be just."

[29] I think it necessary to make some observations as regards the section and the application of the common law in relation to caveats, and which, it seems to me, are important for the purposes of the discussion to follow:

(i) Once notice is given to a caveator (that is, the caveat is warned), the caveat will lapse within 14 days, unless it is withdrawn.

(ii) Whether or not the caveator appears before the court for relief within the 14 day period, the caveat will lapse.

(iii) Where a caveat has lapsed, it cannot be renewed.

(iv) A caveat is not an interest in land. It does, however, protect the caveator's undetermined interest in the property (see ***Half Moon Bay Hotel v Crown Eagle Hotels Ltd*** PCA No. 31/2000 delivered 20 May 2002). It gives the caveator the right to relief given by the court under that section so that he may have his interest determined. If the caveat has lapsed, there is no caveat in place and therefore no basis upon which the court can grant any relief or order sought under the section.

(v) It follows from (iv) above that the caveator must approach the court for relief within the existence or life of the caveat, that is, within the 14 day period after the notice given.

(vi) Where the caveator appears before the court, the relief to be granted is not an extension of the caveat or an extension of the period in which to apply for relief, but rather an order restraining the Registrar from registering any dealings with the property in question for a particular period or any other appropriate relief within this period, the caveator would be expected to take steps to prove his interest in the property.

(vii) Where the caveator first applies to the court, the court may grant the order restraining the Registrar "for a further period to be specified in such order" or may grant any other order that may be just. The use of the word "further' suggests that there was an initial period during which the Registrar was restrained from registering any dealing with the property.

Since this would be the first appearance after the warning of the caveat, it must follow that the initial period of restraint was the 14 day period.

(viii) It must also follow that where the section provides that the caveator may approach the court before the expiration of "such further period as is specified in any order made under this section", this "further period" must be referrable to the period which was granted in the order made when the caveator first appeared before the court within the 14 day period. This conclusion inexorably flows from the strict interpretation of the words in the section that after 14 days, the caveat lapses and no application can be made where there is no caveat existing.

[30] Applying these principles to this case, it is my view that Mr Beswick's position that the 1st respondent as caveator could have applied for relief after the expiration of the 14 day period cannot be right. At that time, the caveat would have lapsed. There would be no basis on which the 1st respondent would be entitled to relief. The important question that must therefore be decided is whether the 1st respondent's application for relief was within the 14 day period. This seems to be the crux of these first three grounds of appeal, that is, that the relief was applied for after the expiration of the period and as a consequence, the respondent was not entitled to it.

[31] I think there is merit in Mr Hylton's submission that implicit in Anderson J's order was an acceptance that the application had been made outside the 14 day period, and I

would add, an acceptance that that period could have been extended. It appears that Pusey J was also of the opinion that the period for making the application could have been extended outside of the 14 day period and the application would then have been made in the further period that was granted by that extension. However, as I have endeavoured to show above, the application for a further period has to be made before the expiration of the 14 day period. Therefore the learned judge did err in concluding that the question of service was made irrelevant by the order of Anderson J because that was not an order that could properly have been made. Anderson J's order was made on the 1st respondent's ex parte application. This being so, the order was reviewable by Anderson J himself or a judge of coordinate jurisdiction at the inter partes hearing (see ***Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd*** (1989) 39 WIR 270; (1991) 28 JLR 198). Pusey J was therefore obliged to consider the question of the service of the caveat to determine if the application had been made in time and by extension, whether the order of Anderson J granting relief was properly made and should be extended or be set aside.

[32] However, a finding that Anderson J had erred in granting the order extending the time for making the application for the relief does not necessarily produce the result that the 1st respondent was not entitled to the relief. It would first have to be established that the application was in fact made outside the 14 day period.

[33] In the notice to the caveator (see para [6] supra) the Registrar stated that the 14 days would begin from the "service of this Notice". As indicated previously, in her

e-mail, she stated that the notice to the caveator was given by posting a registered letter to the address given in the caveat for service and that the notice was treated as being served when it would in the ordinary course of post reach the postal address to which it was directed, which, according to the practice of the Office of Titles was seven business days. Was the Registrar's approach correct?

[34] An examination of section 140 discloses no provisions relating to the method of service of the caveat. It is clear that the notice must be given but there is no indication of how this is to be done. I think, however, that section 139 may be of assistance. The relevant portion of this section states:

> "No caveat shall be received –
>
> (a) unless some address or place within the city of Kingston shall be appointed therein as the place at which notice and proceedings relating to such caveat may be served;
>
> (b) unless some definite estate or interest be specified and claimed by the caveator; and if such claim be under any document or writing, unless such caveat is accompanied by a copy of such document or writing, or in cases in which there is a mortgage or lease on the title sought to be affected, unless it is stated whether the claim is against the registered proprietor of the land or of the mortgage or of the lease. A caveator may, however, give an additional address out of the said city at the foot of such caveat, in which case a registered letter shall be sent through the post office to such address on the same day as that on which any notice relating to such caveat is served in Kingston. Every notice relating to such caveat, and any proceedings in respect thereof if served at the address or place appointed as

> aforesaid, shall be deemed to be duly served." (emphasis mine)

Section 139 (a) provides that a caveat must contain/include an address or place within Kingston for service of the notice and proceedings relating to the caveat. Section 139(b) provides that a caveator may, however, give an additional address out of Kingston in the caveat. If this address is provided, a registered letter should be sent through the post office to such address on the same day as that on which any notice relating to such caveat is served in Kingston. There are no further provisions in the Act that concern the manner in which service of the notice is to be effected. It seems to me to be clear that the posting of the registered letter is not the primary method of service. In fact, the sending of the registered letter through the post to the additional address out of Kingston does not obviate the need to send the notice to the address in Kingston. It is therefore an additional method of service for caveators residing outside Kingston. The effect of this is that the Act is silent as to the method of service other than to provide that the notice must be served at the address given for service. That being the case, it is my view that section 52 of the Interpretation Act does not assist. That section reads in part:

> "52. (1) Where any Act authorizes or requires any document to be served by post, whether the expression "serve", give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, to have been effected

at the time at which the letter would be delivered in the ordinary course of post."

[35] From this, it is seen that section 52 is intended to apply where the Act in question states that the method is to be by post but does not prescribe the manner of posting. The primary method for the service of the caveat is not required to be by post and even where the additional service is authorised to be by post, the Act prescribes the specific method of service by post that is to be employed, that is, service must be by registered post. In ***Mitchell v Mair & Ors*** SCCA No 125/2007, delivered 16 May 2008, Smith JA in considering the question of whether section 52 of the Interpretation Act could assist in the determination of whether an election petition had been served within the period stipulated by the Election Petitions Act posed the question, "One must ask why should it be necessary to invoke the deeming provisions of section 52 of the Interpretation Act as to service of a petition when section 6 clearly states the manner in which service is to be effected?" I too would employ this approach, the result of which is that section 139 provides its own mechanism for service in relation to the posting of the additional notice, that is, by registered mail, and therefore section 52 does not apply. This does not take the matter much further because this is only in respect of the additional service. I should however point out that the fact that the section does not have the service of the notice by post as the primary method would not have made the Registrar's approach to the sending of the notice bad. In ***Chiswell v Griffon Land and Estates Ltd*** [1975] 1 WLR 1181, Megaw LJ, in speaking of service under the English Landlord and Tenant Act of 1929, expressed the view that where a person has

sent a notice using a method that is not prescribed in the Act in question, this would nonetheless be good service provided that the person to whom it was sent received the notice. He said:

> "It is provided, as what I may call at any rate the primary means of effecting service, that it is to be done either by "personal" service or by leaving the notice at the last known place of abode, or by sending it through the post in a registered letter, or (as now applies) in a recorded delivery letter. If any of these methods are adopted, they being the primary methods laid down, and, in the event of dispute, it is proved that one of those methods has been adopted, then sufficient service is proved...But, as I think may be assumed for the purposes of this appeal, if the person who gives the notice sees fit not to use one of those primary methods, but to send the notice through the post, not registered and not recorded delivery, that will nevertheless be good notice, if in fact the letter is received by the person to whom the notice has to be given."

This brings us then to the all-important question of when must the notice be regarded as having been received by the 1st respondent.

[36] As we have seen, the Act does not speak to when the notice is to be regarded as being given to the caveator. Section 52 of the Interpretation Act is again not relevant because the Act does not provide that posting is the primary means of service. The deeming provisions of the CPR also do not assist since there is nothing in the Act that allows for those provisions to be invoked when dealing with questions of service. Nor can the Registrar's practice of seven business days be accepted because it has no basis in the law. I think however that there is merit in Mr Beswick's submission that "notice

given" cannot be based "on an assumed delivery after expiry of a designated period". Actual service is what is required. This, it seems to me, is clear from the very words of the statute that "every notice relating to such caveat…if served at the address or place appointed as aforesaid, shall be deemed to be duly served".

[37] The cases of ***Holwell Securities Ltd v Hughes,*** (supra) and ***Beer v Davies***, (supra) although not dealing with warning of a caveat, are instructive as they both concern the giving of notice. In ***Holwell Securities Ltd v Hughes,*** the Court of Appeal of England considered whether an option to purchase in a lease agreement had been validly exercised by notice in writing to the landlord. The solicitors for the tenant had written a letter giving notice of the exercise of the option. The letter had been posted, properly addressed and prepaid but it was never in fact delivered to the landlord or to his address. It was held that the requirement that the option was to be exercised by "notice in writing to" the landlord meant that the written document had to be communicated or notified to the defendant. Likewise, in ***Beer v Davies***, the issue was whether a notice of intended prosecution had been served. The statute in question provided that the notice could be served either personally or sent by registered post. The notice was sent by the police to the offender/respondent at his home address by registered post but it was not delivered as he was away on holiday and there was no one at home. The court, relying on ***R v London Quarter Sessions ex parte Rossi*** [1956] 1 All ER 670, held that the notice had not been served within the time allowed as it had not been delivered. At page 259, Hilbery J referred to dicta of Morris LJ in that case, where he said:

> " The Act of 1933 clearly permits or authorises the giving of a notice as to a hearing by sending a document by registered post. But if the primary obligation of giving notice means in this context the giving of some form of notice which reaches the party interested so that he may be present or represented at a hearing, then the permissive user of the post denotes a user so that notice may reach the party interested so that he may be present or represented at the hearing."

[38] The notice must therefore be delivered to and be received at the address given in the caveat. That, I think, is the most that can be done to ensure that the notice reaches the caveator. I do not agree that it should mean notice actually communicated. To insist upon such a requirement would be contrary to the clear words of the Act that service is duly effected once the notice reaches the address and it is received at that address. It therefore need not be further proved when the notice actually reaches the caveator's attention.

[39] I should also point out that even if the words of the section had not been so clear in respect of service being effected, since the Registrar had adopted a method that was not stipulated in the Act, it would be necessary to prove that the notice had actually been received at the address (see ***Chiswell)***.

[40] Such a result, in my view, accords with fairness. It must be remembered that a caveat is lodged to protect the caveator's interest. If the caveator does not appear to seek relief, then the Registrar will be obliged to enter the dealing with the property. The consequence of this would be that the caveator's interest in the property would

have been extinguished. In ***Half Moon Bay Hotel v Crown Eagle Hotels Ltd***, Lord Millett said at para 30:

> "The entry of a caveat merely operates to prevent the registration of a transfer or dealing without the consent of the caveator or the removal or withdrawal of the caveat. It does not of itself subject the title of the transferee to the interest or encumbrance which the caveat serves to protect. If, notwithstanding the failure to obtain the consent of the caveator or the withdrawal of the caveat, and in breach of section 142, the Registrar mistakenly registers a transfer without making the appropriate entry or notification of the caveator's interest on the Register Book, then subject to the Registrar's powers under Section 15(b) the transferee takes free from that interest."

In these circumstances, it would seem to me to be important that the caveator receive notice and be given the opportunity to protect his interest.

[41] Therefore, the relevant date of service in this case was the date on which it was served at the address for service, that is, at the offices of the caveator's attorneys-at-law. It is true that the 1st respondent gave three different dates for the receipt of the notice at her attorneys' office, namely 5, 6 and 9 January 2009. However, only the latter two dates are worthy of consideration as evidence since they were mentioned in the affidavit of the 1st respondent whereas 5 January was mentioned in the notice of application for court orders. Neither of the two dates was challenged by the appellant. In the absence of any such challenge or evidence to the contrary, I would think that those dates must be accepted. It is not necessary for the purposes of this appeal to

decide which is to be regarded as the correct date as, by my calculation, 20 January would have been within the 14 day period if either date is used as the date of receipt. The overall result must then be that the application for relief under section 140 was in fact made within 14 days after the giving of the notice by the Registrar. Since the application was made before the lapse of the caveat, Anderson J was well within his jurisdiction to grant the order restraining the Registrar from registering the dealing. Pusey J, having considered the matter at the inter partes hearing before the expiration of the "further period" granted by Anderson J, was also entitled to consider whether to grant the order for a further period. Therefore, grounds "b" and "c" are without merit.

Grounds (d), (e) and (f)

[42] The issues which arise on these grounds of appeal are:

(i) whether the court ought in the circumstances of this case to grant post judgment relief, and

(ii) whether the relief granted was injunctive relief, and therefore governed by the principles of ***American Cyanamid***; and if so, was the discretion exercised properly?

[43] It is clear on all the authorities, and the parties seem to agree, that the court does have the power to grant interim relief subsequent to the judgment or order of the court, which power lies in the inherent jurisdiction of the court to control its own process. I also agree that the power is usually exercised incidental and ancillary to and for the enforcement of the judgment. In ***Jet West Limited and another v Haddican***

and others [1992] 2 All ER 545, which was a case dealing with a mareva injunction in a matter relating to the payment of a costs order subsequent to judgment but prior to taxation, Lord Donaldson of Lymington, MR accepted the dictum of Robert Goff J (as he then was) in ***Stewart Chartering limited v C & O Managements SA, The Venus, Dearing*** [1985] 1 All ER 718, that:

> " ...a mareva injunction is to prevent a defendant from removing his assets from the jurisdiction so as to prevent the plaintiff from obtaining the fruits of his judgment; from this it follows that the policy underlying the Mareva jurisdiction can only be given effect to if the court has power to continue the Mareva injunction after judgment in aid of execution."

Lord Donaldson found commented further:

> "If you can continue a Mareva injunction, you can certainly grant one after an order for costs has been made or judgment has been given."

In the more recent English Court of Appeal case of ***Mercantile Group (Europe) AG v Aiyela and Others,*** relied on by both counsel, the issue related to whether the court could order mareva injunctive relief against the wife of the defendant, the plaintiff having previously abandoned the case against her, but having obtained a judgment against her husband, on the basis that her assets were mixed up with his. So, the injunction was incidental to, and in aid of enforcement of the substantive right against the husband, although there was no such right existing against the wife. The court found that it did have jurisdiction. Sir Thomas Bingham MR having stated that judges do have the jurisdiction in such circumstances to make such orders, indicated:

> "I am very pleased to reach that conclusion, for if jurisdiction did not exist the armoury of powers available to the court to ensure the effective enforcement of its orders would in my view be seriously deficient. That is in itself a ground for inferring the likely existence of such powers, since it would be surprising if the court lacked power to control wilful evasion of its orders by a judgment debtor acting through even innocent third parties."

[44] In the instant case the order made by Anderson J was made after the judgment in the same suit, (and was not a mareva injunction, but in my view the principle is the same). It was clear that at the time that it was made, it was the intention of the court initially, that the Registrar would not register, and the 2nd respondent (the registered proprietor) would not engage in any dealings with the said property. This included, as specific reference was made in the order, to the appellant's transfer, the registration of which was restrained for a period of 28 days, or until further consideration by the court. The order of Pusey J made later in the year, had the same effect but for a longer period as it also instructed the 1st respondent to institute proceedings for the court to determine the party with legal and equitable ownership of the said property. There is no doubt, in my opinion, that the court was using its inherent powers to ensure the effective enforcement of its order of 30 April 1997, once found to be extant and enforceable, in spite of the delay. Such action could therefore be incidental and ancillary to the enforcement of the judgment. The court could also, in the exercise of its supervisory powers to prevent abuse of its process, direct all parties to appear before it, so that the registered proprietor could not in the face of the judgment of the court, prima facie, attempt to conclude two transactions to sell the same property to two

different purchasers. In such circumstances post judgment relief would not only be prudent, it would be necessary. I therefore do not agree with counsel for the appellant that Pusey J's order was "to aid in the frustration of the registration of a transfer the validity of which has not been disputed".

[45] The position taken by counsel for the 1st respondent, based on the literal interpretation of the words of section 140, that the order made by Pusey J was "merely a statutory authorization to make a direction" may be correct, but the effect of the order is to impose a restraint on the parties to whom it was directed and operates therefore as an injunction prohibiting certain action. I do not think it is necessary for me to decide that particular point, and I do not think that counsel for the 1st respondent placed much significance on it, as he submitted in great detail, that in any event, if an injunction, although one should proceed with caution in the assessment of the ruling of the court in this regard, the learned judge did exercise his discretion properly in keeping with the principles of ***American Cyanamid***. It is therefore necessary to review the issues which arose. There was clearly a serious question to be tried. There were two competing equitable interests, and the court had already ordered that an action be initiated to determine the same. In my view, damages would be an adequate remedy as the value of the loss, (the said land) is calculable and therefore can be ascertained. However, the question still remains whether the 2nd respondent would be in a position to be able to pay them. It is true that the company has only recently been restored to the register, and that there was no evidence before the court with regard to

its functioning, trading and earning. So, at this stage, all one is able to say is that its financial capability to pay any damages sustained, relative to the breach of contract in respect of the purchase of a one-half acre lot in Norbrook Heights in the parish of Saint Andrew, has not been established. The company may or may not be able to satisfy any judgment of the court. We cannot speculate. However, in the circumstances of this case, the real issue and the operating factor must be the balance of convenience, in light of the competing interests of the appellant and the 1st respondent.

[46] Counsel for the appellant submitted that the balance of convenience lay with the appellant. He relied on the equitable maxim that equity aids the vigilant and not the indolent, which was correct, and prayed in aid that maxim, on the basis that the 1st respondent was guilty of much delay in the enforcement of her judgment. But I do not see how that maxim can avail the appellant. I agree with counsel for the 1st respondent that the appellant has also sat on his rights for many years, perhaps over a decade, and for which there does not, thus far, seem to be any plausible explanation. His intense and industrious activity appears to have occurred over the period 2007-2009. It will be a matter for the trial court and so I will not say much more about it, but one must ask the question: when did the appellant first become aware of the caveat of the 1st respondent? Was any of the work done by him to enhance the said property, done after that knowledge, and therefore with his eyes wide open? Does he come to equity with clean hands? In ***Bephia*** (supra) Luckhoo C stated at page 265 I:

> "... mere delay is not a bar if it can be satisfactorily accounted for, nor will a plaintiff be deemed to have

> acquiesced if, knowing that the defendant has a right to do a thing, he assumes that he is not going to use his right for an unlawful purpose."

The delay of the 1st respondent was also considerable, but would have to be viewed in the light of the reason given, if accepted (namely the death of Dorothy McIntosh and thereafter the illiquidity of the estate), and against the background of whether the deceased and then the 1st respondent who stands in her shoes, would have known about the appellant's interest. Would it have been reasonable for her to assume that the 2nd respondent would have ignored the delay, and awaited the completion of the transaction as there was a judgment of the court? Could she have expected the 2nd respondent to pursue a parallel path, elect the transaction she intended to conclude, or could she have expected that the 2nd respondent was perhaps unlawfully intending to collect twice for the same property? As Goulding J said in ***Easton and Another v Brown***:

> "The enforcement of the decree of specific performance after a long lapse of time will be refused on the coincidence of two elements, namely the lack of a sufficient explanation of the delay by the plaintiffs and the suffering of some detriment by the defendant."

That will be a matter for the trial court, but in my view, the exercise of the discretion of the learned judge to extend the order restraining the Registrar in respect of the dealing with the said property, and particularly the registration of the appellant's transfer, so that the issues between the parties could be fully ventilated and a determination made by the court as to the legal and equitable interest of the said property, and which has been further extended, must be correct. The balance of

convenience therefore lay in the grant of the restraining order and these grounds must also fail.

[47] In the light of the above I would dismiss the appeal, and affirm the orders made by Pusey J on 21 October 2009, and 20 January 2010. The parties must pursue the determination of their respective rights in relation to the said property. The 1st respondent would be entitled to her costs of the consolidated appeal.