

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO 2004 HCV 1978**

**IN CHAMBERS**

<b>BETWEEN</b>	<b>KEN SALES &amp; MARKETING LIMITED</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>EARL LEVY</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>TRIDENT VILLAS &amp; HOTEL</b>	<b>2<sup>nd</sup> DEFENDANT</b>
<b>AND</b>	<b>PELICAN SECURITIES LIMITED</b>	<b>3<sup>rd</sup> DEFENDANT</b>
<b>AND</b>	<b>MICHAEL LEE CHIN</b>	<b>4<sup>th</sup> DEFENDANT</b>
<b>AND</b>	<b>CASTLEWOOD CORPORATION</b>	<b>INTERESTED PARTY</b>

Carol Davis and Gillian Mullings instructed by Carol Davis & Company for the Claimant

Maurice Manning instructed by Messrs. Nunes, Scholefield, DeLeon & Company for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Dr Lloyd Barnett O.J and Weiden Daley instructed by Hart Muirhead Fatta for the 3<sup>rd</sup> Defendant

Michael Hylton Q.C and Kevin Powell instructed by Messrs. Michael Hylton and Associates for the 4<sup>th</sup> Defendant

Charles Piper and Tamika Tomlinson for Castlewood Corporation, an interested party

**HEARD: May 5, 7, and December 3, 2008**

**JONES J:**

[1] It is said that in business, timing is all. Move too late and find yourself unable to capitalize on an opportunity; too early, and find yourself

exposed to your opponent. That is the fate that seems to have befallen the Claimant in this case. While awaiting a Court of Appeal ruling on an Order for Sale, Trident Villas and Hotel Limited mortgaged the property (subject of the sale) to Pelican Securities Limited and ultimately entered into an Agreement for Sale of the property to Michael Lee Chin.

### **FACTS**

[2] The facts briefly are that Ken Sales & Marketing Limited (hereinafter called the Claimant) obtained judgment against Earl Levy (hereinafter called the 1<sup>st</sup> Defendant) and Trident Villas and Hotel Limited (hereinafter called the 2<sup>nd</sup> Defendant) in the Supreme Court on June 1, 2005. The Claimant in execution of that judgment applied for and obtained the orders on June 30, 2005, from Mrs. Justice Cole-Smith for the property of the judgment debtor (the 1<sup>st</sup> and 2<sup>nd</sup> Defendant) to be sold and for the property to be charged with the payment of the judgment debt.

[3] The Claimant also applied for an order that:

"The time for leaving the certificate of sale under the writ with the Registrar of Titles for entry on the register pursuant to section 134 of the Registration of Titles Act be directed by 3 months or longer time as is required to complete the sale of the 2<sup>nd</sup> Defendant's land."

[4] The 1<sup>st</sup> and 2<sup>nd</sup> Defendant appealed the judgment and sought a stay of execution thereby preventing the Claimant from selling the 2<sup>nd</sup> Defendant's property under the order for sale obtained from

Mrs. Justice Cole-Smith. The stay of execution was granted on August 11, 2005.

[5] While the Court of Appeal was considering the matter and the stay of execution was still pending, the 2<sup>nd</sup> Defendant entered into an agreement for sale of the property to Mr. Michael Lee Chin, (hereinafter called the 4<sup>th</sup> Defendant). The appeal of the judgment in favour of the Claimant was dismissed by the Court of Appeal on July 13, 2007, and the Claimant then sought to execute their judgment against the 2<sup>nd</sup> Defendant. The Claimant obtained a new order for sale from Mr. Justice Donald McIntosh on November 12, 2007. Mr. Justice Donald McIntosh made orders and directions consequential on the order for sale made by the Hon Mrs. Justice Cole-Smith on June 30, 2005.

[6] The Claimant obtained on November 7, 2007, an injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants restraining them from dealing with their assets and specifically restraining the 2<sup>nd</sup> Defendant from "...disposing of, pledging or otherwise dealing with..." the Trident Castle. This injunction was extended by the court until February 15, 2008, when Mr. Justice Marsh, set it aside. Marsh J. however granted another injunction pending an application to the Court of Appeal for an injunction to be granted pending appeal. That injunction remains despite the fact there is no application to the Court of Appeal for an injunction to be granted pending appeal. The Claimant appears to have filed an appeal against the refusal to

extend the injunction obtained on November 7, 2007, but this has not been scheduled for a hearing to date.

### **THE APPLICATIONS BEFORE THE COURT**

[7] The 2<sup>nd</sup> Defendant, by an amended Notice of Application for Court Orders, seeks the following orders:

- a) A declaration that the order for sale contained in paragraph 1 of the order made on June 30, 2005, by the Hon. Mrs. Justice Cole-Smith has ceased to bind, charge or affect the land at Volume 1012 Folio 543 in the Register Book of Titles;
- b) A declaration that the Charging Order contained in paragraph 3 of the order, has ceased to bind, charge or affect the land;
- c) An order discharging the orders made by the Hon. Mr. Justice Donald McIntosh on November 12, 2007;
- d) An order that the endorsement entered on July 18, 2008, as Miscellaneous No 1365789 on the Certificates of Title for the Land, pursuant to the Order, be cancelled;
- e) costs and such further and other orders.

[8] Similarly, Pelican Securities Limited (hereinafter called the 3<sup>rd</sup> Defendant) seeks to have the charging order of Mrs Justice Cole - Smith set aside on the basis that:

- a) There was procedural irregularity, in that the provisions of Part 48.5 of the Civil Procedure Rules was not complied with, and;
- b) They were not served with the Application.

[9] The irregularity complained of by the 3<sup>rd</sup> Defendant was that a provisional charging order should have been made before a final charging order was issued.

[10] The 4<sup>th</sup> Defendant, seeks to have the charging order of Mrs. Justice Cole-Smith set aside on the basis that:

- a) it has lapsed under the Registration of Titles Act;
- b) It did not comply with the relevant provisions of the Civil Procedure Rules , 2002;
- c) non-service of documents;

[11] The 4<sup>th</sup> Defendant also seeks an Order discharging or varying the injunction granted by Mr Justice Marsh on February 15, 2008, restraining the 2<sup>nd</sup> Defendant from disposing of the property pending the hearing of the application to the Court of Appeal for an injunction to be granted pending appeal.

[12] The Claimant has also applied to this court to set aside the mortgage of the 3<sup>rd</sup> Defendant on the basis that it is security for an illegal loan, and in contravention of "Part IV A Section 22 A (3) – (Dealing in Foreign Currency) of the Bank of Jamaica Act and Section 9 – (Prohibition of Compound Interest) of the Money Lending Act". In addition, the Claimant has asked this court to "override" the caveat of the 4<sup>th</sup> Defendant.

### **ISSUES**

- a) Whether the order for sale and the charging order made by Mrs. Justice Cole-Smith together with the consequential orders made

by Mr. Justice Donald McIntosh should be set aside on the basis that:

- (i) They have ceased to bind, charge or affect the land?
  - (ii) In relation to the charging orders, in breach of the mandatory requirements of Part 48 of the CPR 2002.
  - (iii) In relation to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, that they were not served?
- b) Whether the mortgage should be set aside on the ground that the 3<sup>rd</sup> Defendant has breached the Bank of Jamaica Act and the Money Lending Act
- c) Whether the caveat of the 4<sup>th</sup> Defendant should be overridden?
- d) Whether the injunction granted against the 2<sup>nd</sup> Defendant on February 15, 2008, should be discharged or varied?

**Issue (a): Whether the order for sale and the charging order made by Mrs. Justice Cole-Smith together with the consequential orders made by Mr. Justice Donald McIntosh should be set aside on the basis that (1) They have ceased to bind, charge or affect the land (2) In relation to the charging orders, in breach of the mandatory requirements of Part 48 of the CPR 2002; and (3) In relation to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, that they were not served?**

As to (a) (1):

[13] It is common ground amongst the parties that the order for sale granted by Mrs Justice Cole-Smith has lapsed and, therefore, has "ceased to bind charge of affect the land". The effect of this is that although the order of sale remains, the creditor has lost its priority to

other persons who have registered their interest. The Claimant contends that the charging orders are still effective. It is necessary then to examine the issues relating to the effect of the charging orders and the applications to set it aside.

[14] The Privy Council in the case of ***Beverley Levy v Ken Sales & Marketing Limited PC Appeal No 87 of 2006***, (Delivered January 24, 2008) commented on the legality of a charging order made before March 25, 2003, and on the court's power to create a charging order over land. They said:

"there appears to have been no statutory power for courts in Jamaica to make charging orders until the recent enactment of legislation enabling courts to do so, which came into effect on 25th March 2003."..."many years prior to the 25th of March 2003 it has been a practice in Jamaica for courts, when making a section 134 of the Registration of Titles Act order for sale for the purpose of execution against a debtor's land, to complement the order by the addition of a charging order" (page 10).

[15] However, they expressed the view that at the time the order was made there was an absence of statutory authority and as such the charging order was "as an adjunct to the proprietary effect of the execution order for sale and cannot be given a life of its own divorced from the proprietary effect."

[16] Section 134 of the Registration of Titles Act provides that the entering of an order of sale in the Register Book at the Titles Office has the effect of binding or charging the land in respect of which title it is registered. It provides, however, that the order for sale, ceases to:

"bind, charge or affect" any land unless a Certificate of Sale is lodged with the Registrar within three months from the day on which the copy of the order of sale was served on the Registrar or such longer period as the Court shall direct.'

[17] If the order for sale granted by Justice Cole-Smith is not effective it must follow that the consequential order for sale made by Justice Donald McIntosh must of necessity be of no effect.

As to (a) (2):

[18] As I said before it is common ground that paragraph 1 of the order of Justice Cole-Smith lapsed and has ceased to bind, charge or affect the land. However, the Claimant contends that the charging order in paragraph 3 of the order of Cole-Smith J is still effective as these orders were made after March 25, 2003, and thus would be made pursuant to Section 28D of the **Judicature (Supreme Court) (Amendment) Act 2003** and CPR 2002 Rule 48. The Claimant also contends that as there are no time limits prescribed in Rule 48 the charging orders made by Cole-Smith J cannot expire nor have they lapsed. As a result, they argue that there is no basis for the applications for the charging orders to be discharged by this court.

[19] To view the Claimant's argument as meritorious, however, is to miss the elephant in the room. First, the **Judicature (Supreme Court) (Amendment) Act of 2003** Section 28D provides that:

"The court may, on application of the person prosecuting a judgment or order for the payment of money, make a



charging order in accordance with the Civil Procedure Rules, 2002 in relation to the enforcement of judgments".

[20] Part 48, of the CPR 2002 deals with the procedure for making provisional and final charging orders. Specifically, Part 48.5 (1) in dealing with a provisional charging order says:

"In the first instance the court must deal with an application for a charging order without a hearing and may make a provisional charging order.

(2) On the application of the judgment creditor the court may grant an injunction to secure the provisional charging order.

(3) an application for an injunction may be made without notice and may remain in force until 7 days after the making of an order under 48.8 (4)

(4) The provisional charging order must state the date, time and place when the court will consider making a final charging order"

[21] On the Claimant's own admission a provisional charging order was never made. Part 48.7 of the CPR 2002 requires the judgment creditor to serve interested persons; Part 48.8 sets out the procedure for the making of a final charging order; and, Part 48.10 sets out the procedure for the discharge or variation of a final charging order. I will deal with the issue of service at a later time.

[22] Now then, it is clear that these are all mandatory provisions for the purpose of protecting persons having an interest in the property the subject of the charging order. In my judgment, the failure to make a provisional charging order by itself is fatal to the Claimant's argument that the charging order made on June 30, 2005, ought not to be discharged.

As to (a) (3)

[23] The Claimant maintains that the further order for sale granted by Mr Justice Donald McIntosh remains valid and effectual. This order dated November 12, 2005, is registered on the title and the Claimant contends that on this basis the sale of the property can still proceed. Paragraph (iii) of the order provides:

"That there shall be a sale of [the Trident Castle] by way of sealed bids by interested purchasers to be submitted to the Claimant's Attorney at Law"

[24] The Claimant asserts that the notice of application for the order of sale was served on the attorneys for the 3<sup>rd</sup> Defendant, Hart Muirhead Fatta on June 20, 2005. This, they say, is the address provided to them by the 3<sup>rd</sup> Defendant as the address for service of their attorneys at law within the jurisdiction. In addition, they say that the attorneys were present at the hearing before Justice Cole-Smith when the charging order was made. They say that the 3<sup>rd</sup> Defendant has always been represented by Messrs Hart Muirhead and Fatta in these matters. The Claimant contends here that when the orders were made, their attorneys raised no objection nor did they seek to appeal the ruling of Justice Cole-Smith.

[25] The Claimant contends that proper service was effected on the 4<sup>th</sup> Defendant as the address for service for warning of the caveat and also the address on the Agreement for Sale was given as that of Hart Muirhead and Fatta, his attorney at law. They say this was sufficient to bring the matter to the 4<sup>th</sup> Defendant's attention.

[26] Part 5 of the CPR provides for service of the Claim Form and Part 6 for service of other documents. Specifically, Part 6.3 provides that other documents can be served by delivery to an address for service given by a party.

[27] There is clearly a distinction between the provisions of Part 5 of the CPR (which require personal service of the claim form) and those of Part 6 which allow service of other documents by other means. In this case, the Claimant relies on service in accordance with rule 6.3.

[28] Service by the Claimant in this matter plainly cannot be correct. Part 55 of the CPR 2002 sets out the procedure for the sale of land by order of court. Specifically, Rule 55.1 (1) (b) provides that:

"[Part 55] deals with the sale of land when it appears to the court to be necessary or expedient that the land should be sold whether to enforce a judgment or for any other reason."

[29] Rule 55.2(4) provides that:

"The application and copies of any evidence in support must be served in accordance with Part 5 on the judgment debtor and every person who has an interest in the land."

[30] This Rule requires that the application be served "in accordance with Part 5", i.e., as if it were a claim form. Part 5 does allow for service on an attorney-at-law, but only where the attorney is authorized to accept service of the particular document and where the attorney "has notified the claimant in writing that he or she is so authorized". That is clearly not the situation here.

[31] There is nothing in Part 55 that defines a person "who has an interest in the land". I accept as correct the observation of the 4<sup>th</sup> Defendant that the owner of the beneficial interest in the land would plainly be a "person who has an interest in the land" for the purposes of Part 55, and so, should properly be served with the application and any evidence in support.

[32] Furthermore, caveat number 1454335 was lodged against the Certificate of Title for the Trident Castle on February 5, 2007, to protect the 4<sup>th</sup> Defendant's interest as purchaser under an agreement for sale. The caveat was lodged pursuant to section 139 of the Registration of Titles Act which allows:

"any...person claiming an estate or interest in land [to]...lodge a caveat...forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest ..."

[33] The Claimant's application for an order for sale of the Trident Castle was filed on October 8, 2007 – some eight (8) months after the 4<sup>th</sup> Defendant's interest in Trident Castle was noted on the certificate of title. Despite this, the 4<sup>th</sup> Defendant was never served with the application for the order for sale or the evidence in support. This was in breach of the mandatory provisions of rule 55.2(4). As a result, the 4<sup>th</sup> Defendant was not allowed an opportunity to be represented and to be heard on the application for the order for sale on November 12, 2007.

[34] The Claimant's argument that proper service was effected because the address on the caveat and agreement for sale was that of the firm of Hart Muirhead Fatta cannot be sustained as there is no evidence that that firm had ever tried to represent the 4<sup>th</sup> Defendant in these proceedings or that the 4<sup>th</sup> Defendant has ever held himself out to be represented by them.

**Issue (b): Whether the mortgage should be set aside on the ground that the 3<sup>rd</sup> Defendant has breached the Bank of Jamaica Act and the Money Lending Act**

[35] The Claimant has asked this court to find that the mortgage registered on the title at Vol. 1012 Folio 543 by the 3<sup>rd</sup> Defendant, is security for an illegal loan and, therefore, null and void. The Claimant has also asked this court to find that Pelican Securities Limited breached Section 22A (2) and (3) of the Bank of Jamaica Act and also Section 9 of the Money Lending Act.

[36] The Claimant's first line of attack is in relation to Section 22A (2) of the Bank of Jamaica Act. This section provides as follows:

"No person shall carry on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorized dealer".

[37] This section prohibits the "carrying on of the business" of "lending foreign currency" "in Jamaica" otherwise than by an authorised dealer. The question here is whether or not Pelican Securities Limited was "carrying on the business" of lending foreign currency "in Jamaica".

[38] In pursuing this argument the Claimant says that the business of the 3<sup>rd</sup> Defendant is clearly one of the objects in its memorandum and articles of association. Item 3 (20 ) of the Memorandum of Association of the 3<sup>rd</sup> Defendant provides as follows:

"To lend and advance money to such persons, firms or companies, and on such terms as may seem expedient and in particular to customers and others having dealings with the company....."

[39] The Claimant alleges that the 3<sup>rd</sup> Defendant admits to two loans to Trident, and a further loan of United States One Million and Five Thousand Dollars (US\$1,005, 000.00), to Mr. Levy, in his personal capacity. They say that Mr. Biersay in his affidavit refers to a loan by Pelican to "Regardless" for the sum of United States Seven Hundred Thousand Dollars (US\$700,000.00) secured on a charge on its lands.

[40] The Claimant contends that the promissory note contravenes Section 22A (2) of the Bank of Jamaica Act as Pelican was carrying on the business of lending foreign currency, as it engaged in a number of foreign currency loan transactions in Jamaica. Although the number of transactions are small in number, the Claimant tries to make the case that the mortgage document seems to have considered a "repetition of acts" which may be implied in the carrying on of business.

[41] The 3<sup>rd</sup> Defendant has rubbished this argument. They contend that the 3<sup>rd</sup> Defendant is a limited liability company registered in the Cayman Islands. It is principally a family business and had only two

loan transactions with Mr. Levy and the 3<sup>rd</sup> Defendant. They say that they have no business in Jamaica apart from the two transactions, and so cannot be considered to "carry on the business of ...lending foreign currency or foreign currency instruments in Jamaica". This court takes the view that looking on one, two or three transactions by itself cannot be conclusive of whether a person "carries on a business". I endorse the views of Lord Esher in

***Griffin ex-parte Board of Trade* 1890 (1890) 60 LJQB 235 at page 237**

where he dealt with the issue of whether one or two transactions can be considered to be carrying on a business. Here is what he had to say:

"I take the test to be this: if an isolated transaction, which if repeated would be a transaction in a business, is proved to have been undertaken with the intent that it should be the first of several transactions, that is with the intent of carrying on a business, then it is a first transaction in an existing business. The business exists from the time of the commencement of that transaction with the intent that it should be one of a series..."

[42] The Claimant's second line of attack is in relation to Section 22A

(3) of the Bank of Jamaica Act. This section provides as follows:

"It shall be unlawful for any person to buy, sell, borrow or lend foreign currency or foreign currency instruments in a transaction involving the payment of Jamaican currency, unless the payment is made to or, as the case may be, by an authorized dealer."

[43] The Claimant here argues that the disbursement by the 3<sup>rd</sup> Defendant of United States Four Hundred Thousand Dollars (US\$400,000.00), for the purpose of enabling the 2<sup>nd</sup> Defendant to

repay the Claimant the sum of Jamaican Fourteen Million Dollars (J\$14,000,000.00) for a loan account indicates that the transaction involved the payment of Jamaican currency. They also argue that paragraph 3q of the Mortgage document provides that payments may be "made in a currency other than United States currency" which is further indication that the parties contemplated payment in Jamaican dollars. As the argument goes these two situations indicate that the transaction is illegal as it is common ground that the 3<sup>rd</sup> Defendant was never and is not now an authorised dealer.

[44] Regretfully, these arguments are supported by the available evidence. First, Item 9 of the Schedule to the Mortgage document makes it clear that this is a United States dollar transaction. Reference there to the sum of Jamaican Fourteen Million Dollars (J\$14,000,000.00) is stated to be (for stamp duty purposes). Paragraph 2 (i) and (ii) of the Mortgage document also makes it clear that all principal and interest payments under this mortgage is to be in United States currency.

[45] Second, the Claimant has ignored the full provisions of paragraph 3q of the mortgage. I shall set it out in full. Here it is:

That any tender to the Mortgagee of money in a currency other than United States currency shall be treated as reducing the indebtedness of the Borrower hereunder only to the extent of the amount of money in United States currency which is actually obtained by the Mortgagee as the case may be, on converting into United States currency the sum tendered and the reduction of the Borrower's indebtedness shall be deemed to have occurred on the date or dates that the Mortgagee actually receives



money in United States currency from the conversion of the sum tendered"

[46] It is clear from this provision, that any tender in a currency other than United States currency is deemed payment only to the extent that it is converted into United States currency. I find the Claimant's arguments in respect of Section 22 A (2) and (3) of the Bank of Jamaica Act entirely without merit. It fails.

[47] The Claimant's third line of attack is that the 3<sup>rd</sup> Defendant breached section 9 of the Money Lending Act. Section 9 of the Money Lending Act provides as follows:

"Subject as hereinafter provided, any contract made after the commencement of this Act for the loan of money shall be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract:

Provided that provision may be made by any such contract that if default is made in the payment upon the due date of any sum payable to the lender under the contract, whether in respect of principal or interest, the lender shall be entitled to charge simple interest on that sum from the date of the default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from any default and any interest so charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan."

Provided further that any such provision for the payment of simple interest in the circumstances aforesaid shall be in writing and signed personally by the borrower."

[48] The Claimant points out that this statute specifically makes a contract with a provision for compound interest illegal. In this case, the Mortgage instrument at clause 2(iii) provides for an increased rate of interest to be "compounded at monthly rest" in the event of

default. Consequently, the Claimant argues that the promissory note and the underlying mortgage cannot be effective against it as it is illegal.

[49] That argument is flawed for two reasons. First, money lending contracts are as a rule legal. What the law provides is that they are unenforceable (not illegal) if they provide for an interest rate above a prescribed minimum and is not accompanied by the prescribed memorandum in writing signed by the borrower for the monies lent.

[50] Second, a money lending contract which provides for compound interest is unenforceable only "in so far as it provides" for compound interest or for an increase in the interest rate when the borrower defaults. In **Malcolm Muir Limited v Jamieson [1947] SC 314** a contract for the loan of money by money lenders provided for the repayment of principal and interest by monthly instalments over a period of 15 months. The contract also provided that in the event of default in payment the lenders should have the option of requiring immediate payment of the balance of the principal sum together with interest at the stipulated rate. The borrowers having failed to make payment the moneylenders brought an action against them. The borrowers pleaded that the contract was illegal as it contravened section 7 of the Moneylenders Act which provided that:

"any contract made after the commencement of this Act for the loan of money by a money lender shall be illegal in so far as it provides directly or indirectly for the payment of

compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract".

[51] It was held that the illegality on the part of the default clause did not render the remainder of the contract illegal. Lord Jamieson had this to say:

"It is only in so far as a contract provides for compound or a higher rate of interest on default in payment that it is declared illegal. The section does not say that the contract is illegal if it so provides. We were told that there is no authority on the matter, but the wording of the section seems to make it clear that the illegality extends only to a provision entitling the moneylender to obtain more interest than he would have received if no default in payment had been made."

[52] In this case the initial interest rate is set at 12% per annum which is within the exempted limit of 25% fixed by the **Moneylending Prescribed Rates of Interest Order 1997**.

[53] Section 2 (iii) of the Mortgage document which provides for compound interest is a separate provision from Section 2(ii) which provides for the initial interest rate. In my judgement Section 9 of the Money Lending Act applies to Section 2(ii) which is not illegal but unenforceable. It is also my judgment that it can be severed to allow the principal sum and the initial simple interest which has accrued to be recoverable.

**Issue (c): Whether the caveat of the 4<sup>th</sup> Defendant should be overridden?**

[54] The Claimant has applied for the caveat of the 4<sup>th</sup> Defendant to be set aside on the basis that "he did not file an appropriate caveat

and paid the requisite fees." On this basis, the Claimant argues that the caveat does not protect the 4<sup>th</sup> Defendant's beneficial interest as purchaser. Additionally, the Claimant submitted that the 4<sup>th</sup> Defendant is not a bona fide purchaser for value without notice as he has purchased the property at an undervalue.

[55] The 4<sup>th</sup> Defendant, on the other hand, submits that he is a bona fide purchaser for the value of the property – Trident Castle- having entered into an agreement for sale with the 2<sup>nd</sup> Defendant in February, 2007, and having paid United States Two Hundred and Ten Thousand Dollars (U.S. \$ 210,000.00) representing part of the purchase price of United States Two Million One Hundred Thousand Dollars (U.S. \$2.1M). He submits that the application of the Claimant must fail on the basis that the applicant has no status to make such an application; such an order cannot be made in these proceedings and the caveat protects a valid and subsisting agreement for sale.

[56] Let us examine this. Section 139 of the Registration of Titles Act provides:

" any beneficiary or other person claiming any estate or interest in land under the operation of this Act... may lodge a caveat with the Registrar...forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting such estate or interest, either absolutely or until after notice of the intended registration or dealing be given to the intended caveator, or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat." of any instrument affecting such estate or interest..."

[57] For the removal of a caveator, Section 140 of the Act states:

" upon the receipt of any caveat under this act, the registrar shall notify the same to the person against whose application to be registered as proprietor, or as the case may be, to the proprietor against whose title to deal with the estate or interest such caveat has been lodged, and such applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he thinks fit, summon the caveator to attend before the Supreme Court, or a Judge in Chambers, to show cause why such caveat should not be removed.."

[58] An interested person is defined in part 48.6 (g) of the Civil

Procedure Rules as "any other person who has an interest in the personal property to be charged." In this case, the caveat numbered 1454335 was lodged against the Certificate of Title for the Trident Castle on February 5, 2007, to protect to protect the 4<sup>th</sup> Defendant's interest as purchaser under an agreement for sale. The caveat was lodged pursuant to section 139 of the Registration of Titles Act which allows "any person claiming an estate or interest in land [to]...lodge a caveat...forbidding the registration of any person as transferee of proprietor of, and of any instrument affecting such estate or interest". In my judgment the Claimant has no legal basis to make an application for the caveat to be discharged or "overridden".

[59] The Claimant also submits that the only interest protected by the caveat is the deposit paid and further that the Agreement for Sale was breached with the result that the 4<sup>th</sup> Defendant cannot rely on it.

[60] In *Riverton City Ltd v Haddad* (1986) 40 WIR 236, the Court of

Appeal upheld a first instance decision that:

"the immediate effect of a binding contract for sale of land is to pass the equitable estate in the land to the purchaser; the legal estate remains in the vendor until conveyance has been executed, but meanwhile equity regards the vendor as a trustee for the purchaser and is prepared to decree specific performance at the instance of the latter..." (Page 258)

[61] I accept that the 4<sup>th</sup> Defendant lodged a caveat based on section 139 of the Registration of Titles Act to protect his equitable interest not simply his deposit. I also accept that the 4<sup>th</sup> Defendant entered into an Agreement for Sale of the property owned by Trident Hotel and Villas Limited and he has an equitable interest in that property. In my judgment, this is a valid caveat, properly lodged with the Registrar of Titles to protect an equitable estate in the property. The Claimant's argument fails.

***Issue (d): Whether the injunction granted against the 4th Defendant on February 15, 2008, should be discharged or varied?***

[62] The Claimant asserts that an appeal has been filed in relation to the injunction and this is to be argued before the Court of Appeal. From the affidavit evidence, Marsh J. allowed the injunction to continue pending an application to the Court of Appeal for an injunction pending appeal. The basis of that injunction was to allow the Claimant to file an appeal against his order setting aside the

injunction and the hearing of an application to the Court of Appeal for an injunction pending the hearing of the appeal.

[63] I cannot help but agree with the 4th Defendant that if there is no appeal and no application to the Court of Appeal for an injunction pending appeal, the injunction granted by Mr Justice Marsh could continue without an end, and that would not do justice between the parties. I do not propose to discharge the injunction of Mr Justice Marsh granted on February 15, 2008, but to vary it to provide a time limit to have the application for the injunction pending appeal to be heard and determined. In doing so I am mindful of the fact that the Claimant had from February 15, 2008, to make the application for the injunction pending appeal of the injunction discharged.

#### **DISPOSITION**

[64] For all the reasons that have been set out above the court makes the following orders.

- a) The Claimant's Amended Notice of Application for Court Orders filed on January 30, 2008 is refused with cost to be agreed or taxed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- b) Order in terms of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Amended Notices of Application for Court Orders filed on March 11, 2008, and January 31, 2008, respectively with costs to be agreed or taxed.

c) Order in terms of paragraphs 1, 2, 3, 5, and 6 of the 4<sup>th</sup> Defendant's Notice of Application for Court Orders filed on February 27, 2008.

i) In relation to paragraph 4 of the 4<sup>th</sup> Defendant's Notice of Application for Court Orders filed on February 27, 2008, it ordered that:

"Paragraph 4 of Order dated February 15, 2008, by Mr Justice Marsh is hereby varied as follows:

'Injunction granted until December 17, 2008, pending the hearing by the Court of Appeal of an injunction pending appeal'.

ii) Cost to the 4<sup>th</sup> Defendant to be agreed or taxed.