IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. K009 OF 2001

BETWEEN	KEN'S SALES & MARKETING LIMITED	CLAIMANT
AND	EARL LEVY	IST DEFENDANT
AND	TRIDENT VILLAS & HOTEL LIMITED	2ND DEFENDANT
AND	CASTLEWOOD CORP. INC.	INTERESTED PARTY
AND	DEHRING BUNTING & GOLDING LIMITED	GARNISHEE
AND	PELICAN SECURITIES LIMITED	3RD DEFENDANT
AND	BEVERLEY LEVY	4TH DEFENDANT
AND	PERCY JUNOR LIMITED	5TH DEFENDANT

Ms. C.Davis and Mr. J. Graham for the Claimant.

Mr. M. Manning instructed by Nunes Scholefield DeLeon & Co. for the 1st and 2nd Defendants.

Mr. C. Piper and Ms. K.Tomlinson for the Interested Party.

Garnishee- unrepresented.

Dr. L.Barnett and Mr. W . Daley instructed by Messrs. Hart Muirlead Fatta for the 3rd and 4th Defendant.

Mr. W.Scott and Miss E.Salmon instructed by Rattray Patterson Rattray for the 5th Defendant.

Heard : 10, 11 and 15 September 2008.

MANGATAL J.:

1. On the 10th September a number of applications came on for hearing, one of which was an application for the Court to consider making final a provisional attachment order made ex parte on the 20th February 2008.

2I think it is useful to set out a rough chronology of some relevant occurrences. I say "rough" because this matter, or at any rate, aspects of it, have been around for a long time. The proceedings have been complex and convoluted, and I do not pretend to be summarizing all aspects of the matter.

3. Six parcels of land, known as Trident Villas and Hotel " the Trident land" in the Parish of Portland, were lands registered under separate Titles in the name of Mr. Earl Levy as owner. Mortgages securing loans from several corporate lenders were registered against a number of the registered titles.

4. By way of Suit No. 1996 K-062 Ken Sales and Marketing Ltd. "Ken Sales" sued Mr. Levy for a large sum of money in respect of goods sold and delivered. This debt was unsecured. Ken Sales obtained judgment on 20 December 2000 for over $30 Million plus interest. Not having received payment, Ken Sales commenced execution proceedings against the Trident land.

5. In the execution proceedings on the 23rd October 2001 an order for sale was made pursuant to Section 134 of the Registration of Titles Act. This order was extended a number of times.

6. However, Ken Sales in the meantime commenced a new action, K-009 of 2001, the present law suit, against Mr. Levy. I can do no better than to quote from the Board of the Judicial Committee of the Privy Council's judgment, delivered on the 24th January 2008 in respect of one of numerous interlocutory applications in this Suit. The Privy Council there described the Suit K-009 as

> *....based, apparently, on the same debt for which judgment had been obtained in K-062. How this was possible has not been properly explained but need not be pursued for, on 24 July 2002, Ken Sales obtained a judgment, accepted to be a valid judgment, for $56 million and interest. This new judgment must have satisfied the judgment obtained under action K-062 and have required fresh execution proceedings against the Trident land to be commenced.*

7. On the 15 January 2003 an order was made for the sale of the Trident lands and directing an enquiry as to the respective interests of parties in the Trident lands. This order for sale was noted on the Titles on the 17 January 2003. On 14 May 2003 an extension of 6 months from 11 April 2003 for completion of the sale was granted. On 19 January 2005 an order was made extending the sale ordered "until completion of the sale of the lands or in the alternative for 6 months from the date hereof".

8. Again I turn to the Privy Council Judgment, paragraphs 6, 7, 8 and 9, for ease of reference, and for the sheer clarity with which events are summarized by Lord Scott of Foscote:

> *6. In the meantime, however, a number of relevant things had happened. First, there had been developments regarding the mortgages affecting the Trident land.*
>
> *(1) A mortgage, No. 905674, granted by Mr. Levy in favour of Capital and Credit Merchant Bank to secure a $315,000 loan, had been registered against one of the six registered parcels that comprised the Trident land. On 27 February 2002 the secured debt was repaid to the Bank ..... The registration of the mortgage on the land register was discharged by the Bank on March 1 2002. However, the appellant, Mrs. Levy, has contended that it was she who repaid the Bank and that she is consequently entitled by subrogation to the benefit of the*

Bank's security. On the 3rd October 2003 she lodged a caveat (No. 125961) against the parcel in question to protect her interests. There is an outstanding issue about this between Mrs. Levy and Ken Sales.

(2) Mrs. Levy claims, also, that on 30 October 1998 she lent her husband US $150,000 secured by a mortgage of that date over one of the six parcels. This mortgage has never been registered at the Land Registry but a caveat lodged by Mrs. Levy to protect her interest was entered on the Register on 6 June 2002 against the parcel, registered at Volume 552, Folio 32. Mrs. Levy's claims in this regard are not accepted by Ken Sales. This is another issue between them.

(3) Mortgage No. 1167102 in favour of Half Moon Bay Ltd. to secure US $ 861, 880 was registered on 15 November 2001 against one of the Trident land parcels. A company associated with Mr. and Mrs. Levy, Pelican Securities Ltd.,"Pelican" claims to be the transferee of this mortgage. This, too, is not accepted by Ken Sales. It is convenient to note here that on 1 June 2005 Mr. Levy gave Pelican " for value received" a promissory note for payment of US $ 1.2. million and interest thereon and charged the Trident land with payment. A caveat was on the same day lodged by Pelican against the several registered titles of the parcels constituting the Trident land to protect Pelican's interests.

(4) Another company associated with Mr. and Mrs. Levy ,Percy Junor Ltd., claims to be owed US $325,000 by Mr. Levy and to have a charge over a number of the Trident parcels to secure payment. A caveat lodged by the Company to protect this alleged charge was entered on the Register on 6 June 2002. Ken Sales does not accept this claim.

7.Second, a Report dated 23 October 2003, prepared by the Registrar pursuant to .... the order of 15 January 2003 for enquiries to be made to determine the extent of the interests of Mr. Levy and any other persons in the Trident land, was produced. The Report noted, inter alia, the various caveats affecting the Trident land.....

9. Thirdly, and perhaps as a consequence of the Registrar's Report, Ken Sales commenced proceedings (action 243) ...claiming that its (Ken Sales') equitable charge over the Trident lands pursuant to the order for sale (of 15 January 2003) *ranked in priority to any equitable interest claimed by either Mrs. Levy or Pelican.....*

9. The fourth matter, following the expiry on 10 October 2003 of the six month extension for sale of the Trident land... that happened was that successful negotiations for the sale of the Trident land to a Mr. Chin took place. Both Ken Sales and Mr. Levy, or representatives of them, were involved in the negotiations. The negotiations having prospered an order was made on 10 December 2004...The judge approved the offer to purchase the Trident land that Mr. Chin made, ordered that the land be sold to Mr. Chin accordingly, directed Ms. Carol Davis, attorney for Ken Sales, to have carriage of the sale and directed the net proceeds of sale to be paid into a joint account in the names of Ken Sales' and Mr. Levy's respective Attorneys. This order for sale was not registered. A copy was not served on the Registrar. It did not, therefore, bind the land. ...

10. In relation to the interested party Castlewood, there is a Claim No. HCV 01325 of 2004 in which Castlewood claims against Earl and and Beverley Levy for breach of a contract dated March 28 2002, for the Sale to Castlewood of all the ordinary shares in Trident Villas and Hotel

Limited. By the terms of that Agreement, it is claimed that Mr. and Mrs. Levy warranted that certain lands, in fact the Trident land, was owned by Trident Villas and Hotels Ltd. That Suit, Mr. Piper informs, is for trial next year November.

11. A judgment which was in effect a default judgment was entered in Claim No. 243 of 2004, **Ken Sales v. Beverly Levy and Pelican Securities** on or about 27 July 2004. An application to set aside a judgment was refused. An Appeal was filed. However, the Court of Appeal adjourned the appeal pending the outcome of the Appeal to the Privy Council in respect of orders made in the present matter in respect of orders for sale and charging orders.

12. On 24th January 2008, in the said interlocutory appeal brought before the Privy Council by Mrs. Levy, the Privy Council held amongst other matters, that on a proper interpretation of Section 134 of the Registration of Titles Act, certain extensions of time ordered in relation to orders for sale in this Suit were invalidly made. It was held that an extension of time could not be extended with retrospective effect. It was also held that a charging order would have the same life as an order for sale. It was held that the order for sale, and charging order made on 15 January 2003 at latest, ceased to bind the Trident lands, and did not continue in effect after 10 October 2003. After an order for Sale ceases to bind the land, the creditor loses his priority and becomes simply an unsecured creditor.

13. On February 11 2008 the Court of Appeal, allowed the appeal against the dismissal of an application to set aside the default judgment in the Suit No. 243 of 2004, and ordered that that matter be heard.

14. On the 15th February 2008 Ken Sales applied ex parte, as Part 50 of the Civil Procedure Rules 2002 "C.P.R." allows it to do, for a provisional order of Attachment in relation to the self-same proceeds of sale of the Trident lands which had been ordered paid into a joint account in the names of the Attorneys at Law for Ken Sales and Mr.

Levy's respective Attorneys . At some point the name of the Attorney-at Law for the interested party Castlewood Corp. Inc. was also added to the account. This account is in the sum of US $ 2,653,861.80 plus interest held at Dehring Bunting and Golding Limited.

15. This provisional order was made on the 20th February 2008.

16. As required by the Rules, the matter of consideration of Making the Provisional Order Final was set down for hearing. The date fixed for the Court to consider the making of a final order of attachment was originally fixed for 2nd April 2008.

17. The garnishee Dehring Bunting and Golding have not expressed any interest in the proceedings and have been unrepresented.

18. On the 7th March 2008, having been served with the ex parte provisional order, Mrs. Levy and Pelican filed an application inter alia, to be joined in this Suit and to have the provisional attachment order discharged. One of the bases cited by these parties for setting aside the provisional order was material non-disclosure, in particular the alleged failure of Ken Sales to point out a number of matters, including the fact of the existence of Claim HCV 243 of 2004 in which claims regarding the priorities were raised.

19. On the 14th March 2008, Ken Sales discontinued Claim No. HCV 243 of 2004.

20. When the matter came up for hearing on the 2nd April 2008 it was ordered by consent, amongst other orders, that *Beverley Levy, Pelican Securities Limited, and Percy Junor Limited be joined as Defendants to Claim by Claimant in relation to garnishee proceedings.*

By consent it was also ordered that further Affidavits be filed by a certain date, and discovery orders were made in favour of Ken Sales against the added parties.

21. On the 9th April 2008 it was also ordered that the affiants on behalf of Beverley Levy, Percy Junor and Pelican attend for cross-examination on affidavits filed for these garnishee proceedings. It was further ordered

that Dr Phyllis Green (for Castlewood) and Mr. Earl Levy be made available for cross-examination.

22. On the 2nd April 2008 the hearing for consideration of the final attachment order was adjourned to the 2nd May 2008.

23. On the 2nd May 2008, the time allotted for the hearing was woefully inadequate and the matter was set specifically, with all parties' legal representatives present, for hearing in the Vacation before me on the 10th and 11th September 2008. The hearing for the Consideration of the Final Attachment Order as well as all other applications filed by the parties were set for hearing during this period. Amongst the applications filed are applications by Mrs. Levy, Pelican, and Percy Junor for payments to be made to them of the amounts due and owing to them by Earl Levy. The application filed on behalf of Pelican and Mrs. Levy for the provisional order to be discharged was also set for hearing at the same time.

24. I heard a certain amount of argument on the question of the order in which to proceed with the applications. Ms. Davis, attorney for Ken Sales insisted that she had come prepared to deal with the hearing for consideration of the Final Attachment Order, and not for the application to set aside the provisional order. I also heard from Dr. Barnett, Counsel for the parties who had filed an application to set aside the provisional order, Mrs. Levy and Pelican, that his clients' position was that that application could be considered in the course of hearing the application for the final order, based upon the wording of Rule 50.10 of the C.P.R. I decided that the application by Ken Sales for the Final Order dated 26 February 2008 should be heard first. In keeping with earlier orders for cross-examination, and the availability of witnesses, the hearing was commenced with Mr. Hugh Hart, Attorney-at Law, Senior Partner in the firm of Hart Muirhead Fatta and a Director of Pelican, being cross-examined by Ms. Davis on his Affidavits. However, based on the tenor of the cross-examination, I stopped the proceedings and requested of the

parties that they address me on the question of the appropriateness of the issues that I was seemingly being asked to adjudicate on, i.e. what in my view amount to substantive issues between the parties as to priorities, being dealt with in these Attachment proceedings. It is on this point that I now render my Ruling.

25. In order to properly consider the point I have to look at the application which was filed seeking to make the provisional order final and see what grounds have been set out in the application. As Dr. Barnett submitted, Rule 11.7 of the C.P.R. 2002 "the C.P.R." requires an applicant to set out the order being sought, and to briefly state the grounds on which the order is sought.

26. All that was stated in the application on behalf of Ken Sales as grounds for seeking to make the provisional order final is as follows:

> *...The Claimant has a judgment against the 1st Defendant which remains unsatisfied. The Claimant is aware of other persons making claims against the sums held in account, and requires a determination of what sums are available to satisfy the judgment awarded to it.*

27. It is necessary to scrutinize the terms of Rule 50.10:

> *50.10 At the hearing fixed by the provisional order the court, if satisfied that the order has been properly served may-*
> *(a) make a final attachment of debts order;*
> *(b) discharge the provisional order; or*
> *(c) give directions for the resolution of any dispute.*

28. I stopped and asked the parties to make submissions to me because of the nature of the cross-examination, and the contents of Mr. Ken Biersay, Ken Sales' Managing Director's Affidavits in response to the other parties' Affidavits, in particular his Affidavit in Response sworn to on the 28th April 2008. It appears to me that what Ken Sales is really trying to do by way of these execution proceedings, is to have the Court determine complex issues of priorities, which as Mr. Scott, for Percy

Junor submitted, may involve the Court in not only resolving disputes between parties as to their rights to the funds as is, but would require the Court to pronounce upon the validity of admitted debts(my emphasis). Indeed, Mr. Levy has admitted that he signed a promissiory note in favour of Percy Junor and a charge has been registered in their favour against one or other of the Trident land titles. Percy Junor has entered Judgment on admissions against Mr. Levy in Claim No. HCV 01602 0F 2008. In other words, Mr. Scott argues, Whilst Rule 50.10 is to deal with priorities, it cannot be used to attack the debts themselves. A Claimant, he submits must therefore go back to Part 8 of the C.P.R. which governs the bringing of Claims. It is trite that where the allegations are of bad faith, the Claim ought to be properly pleaded and brought by way of, under the New Rules, Claim Form. I think that these are an important points and involve procedural issues upon which I have not found a great deal of guidance in the case law.

29. Not only is the Claimant Ken Sales, trying to say its claim is in priority to the others, but, without any pleading, or any ground being expressly set out in the application, Ken Sales is impliedly asking the Court to make findings and declarations, which, if they are to succeed, would perhaps involve very serious allegations of bad faith, illegality, fraud and conspiracy to defraud creditors.

30. Although one does not have to use the word "fraud", for example, the cases are replete with authoritative statements that allegations of this nature must be specifically pleaded. See for example, the **Belmont Finance** case, [1979] 1 All E.R. 118, **Mullarkey and others v. Broad** [2007] E.W.H.C. 3400, **Vogon International v. the Seroius Fraud Office** [2004] E.W.C.A Civ. 104.

31. The cases of **Three Rivers District Council v. Bank of England(No. 3)** [2001] 2 All E.R. 513, and **SES Contracting Ltd. v. U.K.Coal** [2007] E.W.H.C. 161, make it clear that the English Judges take the view that even with their new Rules, with the stated overriding objective,

greater flexibility, and statements of truth, fraud and allegations to do with bad faith must be specifically pleaded. I think it is obvious that this is a correct approach which we also adopt in Jamaica. This requirement is based on principles of fairness. The more serious the allegation, the greater the need to set out specifically, with particularity, and conviction, the basis of the allegations. A judge is under the same duty as Counsel and indeed the parties, not to venture into that murky area of bad faith, or to make findings along those lines unless these allegations are specifically set out. This is because that is the only basis upon which the party against whom the allegations are being made can properly and comprehensively deal with them and the consequences of such allegations being made out are serious and can be far-reaching.

32. In response to the matters which I raised Mr. Graham on behalf of Ken Sales submitted that although it is clear that these proceedings do in fact involve the Court making decisions as to the validity and substance of certain priority claims, including security documentation, registered charges, and equitable mortgages, he submitted that Rule 50.10 of the C.P.R. contemplates that there can, and indeed ought to be, a full hearing . He submitted that the Court has power to try the several issues and that orders previously made in this matter are adequate for dealing with the issues between the parties. In the alternative, Mr. Graham submitted that if necessary, the Court could now give directions or prescribe what type of documentation is required for the issues to be identified and decided.

33. Mr. Graham referred me to the English Rule 72. 8.of the C.P.R. 1998. He conceded that the wording of the English Rule is more specific than our own, but he submitted that the English position can provide guidance as to how our own Rule should be interpreted and utilized.

34. Rule 72.8.(6) reads as follows:

At the hearing the court may-

(a) make a final third party debt order;

(b) *discharge the interim third party debt order and dismiss the application;*

(c) *decide any issues in dispute between the parties, or between any of the parties and any other person who has a claim to the money specified in the interim order; or*

(d) *direct a trial of any such issues, and if necessary give directions.*

35. Mr. Graham also helpfully referred me to the English case of **Kensington International Ltd. v. The Republic of Congo** [2005] EWHC 2684, an authority which I shall return to.

36. All of the Counsel for the Defendants and the interested party have submitted that there is a fundamental question which the Court must consider. Indeed this submission has really led back to a point of concern which I had initially, and that is to do with the question whether an enquiry into the validity of the provisional order itself ought to be made first. The submission is that Part 50.10 (c) which deals with the Court giving directions to resolve disputes, proceeds on the basis that there is a valid provisional order in existence. In other words, the Court should first consider whether the provisional order was validly made before going on to consider whether to give any directions to resolve disputes. I think that this submission is logical and correct. It would not be a proper use of the Court's case management powers to set about establishing a framework or time table for resolving disputes if the ex parte provisional order should be discharged. It may well prove to be a waste of court time if the parties were to go off and deal with directions about resolving disputes if the provisional order ought not to have been made in the first place, or ought to be discharged.

37. In the circumstances, although the Attorneys for the Defendants and interested party have already raised some issues as to why they say the provisional order should not have been made, there really has not

been full argument on that point and so that is the point that in my view should, if necessary, be set down for hearing on a future occasion.

38. In the event that the Court should exercise, or does have the power to exercise its jurisdiction to make directions without first enquiring whether the provisional order should be discharged, I set out the considerations which I consider relevant below.

39. At paragraph 72.8.2. of the English Rules it is stated:

> *"The Court may"*
>
> *The use of the word "may" indicates that there is a discretionary power. ...It may be inequitable to prefer one creditor over another where the judgment debtor is clearly insolvent (Pritchard v. Westminster Bank Limited [1969] 1 W.L.R. 547.*

40. At paragraph 72.8.1 it is pointed out that it is only exceptionally that it will be necessary for the court to give directions and order a trial pursuant to the English Rule 72.8 (6) (d).

41. This cross roads that we have reached in this matter is an unfortunate one. It is a hard situation, and it seems to me that which ever way one turns, there are bound to be some disadvantages occasioned to someone.

42. I agree with Dr. Barnett that in most cases where there are issues arising or disputes in attachment proceedings, they are not like the present issues which ask the Court to resolve issues of priority by evaluating the validity of each claim itself. I am inclined to the view that in general, the Court ought not to exercise its discretion to try, during execution proceedings, issues that involve challenging the validity of debts, particularly for example security documentation and instruments registered on Titles under our Torrens system.

43. I was initially quite attracted to Mr. Scott's submission that it would "carte blanche" be inappropriate for the Court under Rule 50.10 to resolve such issues at all. However, the case of **Kensington** has given me

pause. In that case, Mr. Justice Cooke, sitting in the English Commercial Court proceeded to determine issues that had to do with claims involving fraud, attacking alleged contracts, purported assignments of debts, lifting the corporate veil and schemes to defraud creditors during the course of Attachment proceedings. However, I note that his Lordship found himself engaged in a full-fledged trial that appears to have lasted nine days! Hardly to my mind what is usually contemplated as encompassed in an exercise to resolve disputes in Attachment Proceedings. Indeed, I am quite prepared to accept, and to hold, that our Jamaican Rule makers, by making Rule 50.10 of our C.P.R. less specific about trial of issues on attachment proceedings, have gotten it right. Even in the context of the English Rules it is acknowledged that such trials should be exceptional. Our Rules in my view rather sensibly suggest that complex substantive issues, such as the ones in reality involved in this case, are not suitable for resolution in the course of execution proceedings.

44. In the event that I am wrong in taking that view, there are nevertheless a number of points of departure between the **Kensington** case and the instant one. It is clear that in the **Kensington** case, the issues involved were directly raised. It is not clear to me whether they were raised in Statements of Case or in what form the documentation before the Court presented itself. However, it is plain that the grounds were clearly set out for the Judge's consideration. See for example, paragraph 24 of the Judgment where the learned Judge comments that the party claiming the final attachment order was straightforward in saying that it was a fraud case. The case also ensued after many directions were given, the terms of which directions are not all revealed in the Judgment. I am of the view that the directions made thus far in this case have not covered the issues. The Claimant Ken Sales' has completely failed to set out any proper grounds in the application, and

certainly does not delineate precisely, or at all, what exactly the Court is being asked (a) to adjudicate and (b) to order.

45. I am very conscious of the fact that the parties, or some of them at one time or another, have been battling over different aspects of this case for a very long time and that there is a real concern about time seemingly lost. I am mindful of the fact that it is by consent that a number of parties have been joined in this case and other orders made. Indeed, it has not gone unnoticed that there are parties other than Ken Sales who now want the Court to order payment out of the funds to them by virtue of their individual respective applications. If I thought it at all proper to direct for example, that the parties each file grounds for their respective cases so that the resolution of the issues could be attempted in this case, I would do so. However, for reasons above stated I do not think that would be right. This is not just a matter of form, but of substance.

46. In addition, the discretion, if it is to be exercised must take shape on the basis of some principles. I agree with Dr. Barnett and Mr. Manning that absolutely no material has been put before the Court as to why the proceedings in which the parties had originally been claiming priorities, i.e. Claim HCV 243 of 2004, or some other proceedings, perhaps proceedings brought by Claim Form and not Fixed Date Claim Form, were not pursued. Why is the Court being asked to strain and struggle to facilitate this unorthodox approach of resolving substantive issues in execution proceedings? Indeed, a trial in separate substantive proceedings was clearly what the Privy Council contemplated would happen after it made its order. At paragraph 15 of the Privy Council Judgment it was anticipated that if the Judgment in Action 243 was set aside, as it has been by our Court of Appeal, then " the Proprietary and priority issues raised by Ken Sales' application in action 243 must be tried in the High Court with evidence and argument in the usual way" . At paragraph 15 it is stated:

The pot of gold, so to speak, now consists of the purchase money in the joint account. There are disputed claims to that money.... The resolution of these claims will depend on who can establish proprietary claims and whose proprietary claims are entitled to priority. Subject to possible claims by Percy Junor Ltd, a company not, so far as their Lordships are aware, party to any proceedings instituted, the issues that arise all fall within the scope of the priority proceedings brought by Ken Sales...(in Action 243).

47. I accept Mr. Mannings' submission that those proceedings not having been discontinued by consent, it is difficult to see on what justifiable basis the court could exercise its discretion to facilitate the Claimant in achieving the same objective in what are execution proceedings. Since the discontinuance of those proceedings the Claimant has not applied for any directions setting out issues such as impugning the validity of securities or promissory notes. This dovetails with Dr. Barnett's submission that there are no grounds clearly set out on the basis of which I should order or give further directions.

48. I agree further with Dr Barnett's submission that there are two features to the instant case that make it distinguishable from the **Kensington** case. In the first place the fund in the present case was already the subject of a court order securing it. This was also submitted by Mr. Piper on behalf of Castlewood. Also, in **Kensington** there was no evidence that there were other proceedings in existence, or which had been in existence, raising the very issues that the Court was prepared to embark on in those Attachment proceedings.

49. There is another important point which I must raise. I recognize and appreciate the soundness of Mr. Graham's submission that the Court must not take a blinkered approach, and must examine closely to see that the real matters in issue are being resolved. I am also cognizant that in **Kensington** the Court took the approach it did so as to examine whether there was a scheme to defraud the judgment creditors, by the

device of setting up false assignment of debts to fraudulently take priority over assets secured under Third Party Attachment orders. In other words, a sham. However, in the instant case, some of the documents and transactions which Ken Sales is seeking to challenge actually pre-date the Judgment in the instant Suit which was entered July 2002. Some of the documents being challenged may purport to have been in existence when there were orders made, or being made in the original Suit K-062 of 1996. In my judgment, this provides an additional reason that the Court would not be minded to make orders, if it could, to have these issues dealt with in the K-009 of 2001 proceedings, since some of the allegations which Ken Sales seem to be making overreach the entry of Judgment in this case. This affords yet another reason why these issues should properly be raised in substantive proceedings.

50. I must add that although the Rules allow for the making of an application for a provisional attachment of debt order ex parte, it seems remarkable to me that in the circumstances of this case the application should have been made ex parte. Here was a fund which had been placed, in the names of Attorneys at Law, indeed including the Claimant's Attorneys at Law, not by accident, or merely by agreement, but by order of the Court. (my emphasis). As recently as January 2008, the Privy Council in its judgment, implied its disapproval of an earlier ex parte application made on behalf of Ken Sales. I find it exceedingly difficult to see what difference there could be in relation to this application for attachment of the fund that would make it proper for this application to be made ex parte when the application under consideration by the Privy Council was not. At paragraph 21 it is stated that an application, the intention of which was to obtain an order that would assist Ken Sales in asserting a proprietary interest in the Trident land and its proceeds of sale that would enjoy priority over any proprietary interest that Mrs. Levy might succeed in establishing was, an application in which Mrs. Levy had an obvious interest in opposing.(my

emphasis). Could not the same be said of the ex parte application for the provisional attachment order? I consider this a relevant matter in considering how to exercise my discretion.

51. I also agree with Mr. Manning that in seeking to promote the Court's overriding objective of dealing with cases justly, I must take into account not only the amount of money involved(1.1(2) (c)(i), the importance of the case(1.1(2) (c) (ii), and the complexity of the issues, (1.1(2) (c) (iii), but also the Court must allocate to this case an appropriate share of the court's resources, while taking into account the need to allocate resources to other cases(1.1 (2) (e). It cannot be an appropriate allocation of resources to try to strain the execution procedures in order to wrangle out of them a trial on the substantive issues, the resolution of which, for whatever reason, the Claimant abandoned without the consent of the other parties, in other proceedings.

52. All told, I am therefore of the view that no directions ought to be made by the Court and that the next step in this matter is for the Court to consider whether the Provisional Order ought to be discharged.

53. I note that it is the duty of the parties to help the court to further the overriding objective (Rule 1.3). This means the parties must clearly identify what they want the Court to do, chose the appropriate proceedings, and where necessary, consider abandoning proceedings that may not achieve the desired goal, or where their attempted resolution is not the best use of the Court's resources. I note that one of the notes to Rule 72.8.1. of the English Rules states:

> *Often it will not be worthwhile for the judgment creditor to contest an issue and he may prefer to cut his losses and abandon the application either prior to or at the hearing, in which case he may be liable in costs....*

54. I really do look forward to the cooperation of the parties in seeking to find the best way forward in dealing with the true issues between

them. I trust that my decision manifests the old adage that "A stitch in time saves nine."