JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 131/2008

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	KEN'S SALES & MARKETING LTD.	APPELLANT
AND	EARL LEVY	1ST RESPONDENT
AND	TRIDENT VILLAS AND HOTEL LTD.	2ND RESPONDENT
AND	PELICAN SECURITIES LTD.	3RD RESPONDENT
AND	MICHAEL LEE CHIN	4TH RESPONDENT
AND	CASTLEWOOD CORPORATION	INTERESTED PARTY

Abraham Dabdoub and Miss Gillian Mullings, instructed by Dabdoub, Dabdoub & Co. for the Appellant.

Maurice Manning, instructed by Nunes, Scholefield, Deleon & Co. for the 1st and 2nd Respondents.

Dr. Lloyd Barnett and Weiden Daley, instructed by Hart Muirhead Fatta for the 3rd Respondent.

Michael Hylton Q.C. and Kevin Powell instructed by Michael Hylton and Associates for the 4th Respondent.

Charles Piper for the Interested Party.

September 23, 24, 25, November 27, 2009 and March 19, 2010

HARRISON, J.A.

[1] This is an appeal from the judgment of Jones, J. made on December 3, 2008 in which he granted, inter alia, the following orders in respect of property known as Trident Castle located in Portland, Jamaica and registered at Volume 1012 Folio 543:

> "1. The Claimant's Amended Notice of Application filed January 30, 2008 is refused with costs to be agreed or taxed to the 1st and 2nd Defendants.
>
> 2. Order for Sale and Charging Order contained in the Order dated June 30, 2005 made by Mrs. Justice Cole-Smith and the consequential orders contained therein are hereby discharged.
>
> 3. Order for Sale contained in Order dated November 12, 2007 made by Mr. Justice Donald McIntosh and the consequential orders contained therein and all the extensions thereof are hereby discharged.
>
> 4. Endorsements on the Certificate of Title for the land registered at Volume 1012 Folio 543 in the Register Book of Titles endorsed pursuant to the orders made respectively on June 30, 2005 and November 12, 2007 and being Miscellaneous No. 1365789 entered on July 18, 2005 and Miscellaneous No. 1570300 entered on November 30, 2007 and all of the said extensions shall be cancelled and struck forthwith from the said certificate of title."
>
> ....."

On 27 November, 2009 this court made the following orders:

"The appeal is dismissed. It is ordered that:

> 1. Order for Sale and Charging Order contained in the Order dated June 30, 2005 made by Mrs. Justice Cole-Smith and the Consequential orders contained therein are hereby discharged.

2. Order for Sale contained in Order dated November 12, 2007 made by Mr. Justice Donald McIntosh and the consequential orders contained therein and all extensions thereof are hereby discharged.

3. Endorsements on the certificate of title for the land registered at Volume 1012 Folio 543 in the Register Book of Titles endorsed pursuant to the orders made on June 30, 2005 and November 12, 2007, respectively, being Miscellaneous No. 1365789 entered on July 18, 2005 and Miscellaneous No. 1507300 entered on November 30, 2007 and all the said extensions are hereby cancelled and struck forthwith from the aforesaid certificate of title.

4. It is declared that clause 2(iii) of the Mortgage is valid and enforceable.

5. Costs to the respondents to be agreed or taxed."

The court promised then to put its reasons in writing so this is a fulfillment of that promise.

The Background Facts

[2] The relevant background is set out in the chronology below:

June 1, 2005 - Summary judgment is entered against the 1st and 2nd respondents in favour of the appellant (the claimant below) for the sum of $28,500,000.00.

June 7, 2005 - Appellant files application seeking an order for sale and charging order in respect of Trident Castle owned by the 2nd respondent (p.71-75 of Record).

July 30, 2005 - Order for sale, charging order and consequential orders are granted by Cole Smith J. in respect of Trident Castle (p. 221-223 of Record).

August 11, 2005 - Stay of execution against judgment of June 1st is granted (p. 160-161).

February 2007 - Trident Castle is sold to the 4th respondent.

February 2, 2007 - Caveat is lodged by 4th respondent forbidding any change in proprietorship or dealing in Trident Castle (p.203) Caveator's attorney is Hart, Muirhead and Fatta.

July 13, 2007 - Appeal against June 1st judgment is dismissed.

October 4, 2007 - Appellant applies for orders consequential on the order for sale of June 30 (p.147).

October 8, 2007 - Appellant files an amended application for consequential orders (p.132).

October 2007 - Application is filed by appellant for the Registrar to make enquiries concerning the interests in Trident Castle.

31st January 2008 - Registrar's report regarding interests in Trident Castle is given November 12, 2007 - Consequential orders applied for in October are granted by McIntosh J. (pgs 224-5).

January 30, 2008 - Appellant applies for an extension of the order of the 12th November (pgs.47-48).

January 31, 2008 - Application is made by 3rd respondent to discharge the order for sale and the charging order of June 30 and the consequential order of November 12th (pgs 51-53).

February 8, 2008 - Order granting extension of 12th November order is made (pgs 15 1-153). 3rd respondent is added as a party.

February 26, 2008 - Application is made by the appellant for mortgage of the 3rd respondent to be set aside, for the caveat of the 4th respondent to be overridden and for an extension of the order for sale of November 12th.

February 27, 2008 - Application is made by 4th respondent to be added as a defendant and for the order for sale and charging order to be discharged, among other things. (pgs. 184-186).

March 14, 2008 - respondent added as a party and an extension of the order of 12th November to 12th May is granted.

The orders mentioned in paragraph one above were made on the appellant's application of February 26, 2008, the 4th respondent's application of February 27, 2008 and the 3rd respondent's application of January 31, 2008.

The Grounds of Appeal

[3] The appellant filed the following eight (8) grounds of appeal:

"a. The Learned Judge erred in refusing the Applications of the Appellant as set out in (sic) Claimant's Notice of Application dated 26th February, 2008

b. That the Learned Judge erred in considering that the Order for Sale made by the Hon. Mr. Justice McIntosh was consequential on the Order made by the Hon. Mrs. Justice Cole- Smith.

c. That the Learning (sic) Judge erred in considering the Order for Sale made by Hon. Mr. Justice McIntosh as being of no effect.

d. That the Learned Judge erred in finding that the Charging Order made by the Hon. Mrs. Justice Cole-Smith was not a provisional charging order.

e. The Learned Judge erred in effectively setting aside the charging order of the Hon. Mrs. Justice Cole-Smith, the said Order not having been appealed and

having been made by a Judge of equal and/or concurrent jurisdiction.

f. That the Learned Judge erred in finding that neither the 3rd or 4th Defendants were served with the Application for Order for Sale made by the Hon. Mr. Justice McIntosh.

g. That the Learned Judge erred in finding that the caveat lodged by the 4th Defendant protected its interest as a beneficial owner.

h. That the Learned Judge erred in refusing to set aside the mortgage of the 3rd Defendant as being illegal and/or unenforceable and contrary to the Bank of Jamaica Act and/or the Money Lending Act."

[4] Counsel for the appellant, Mr. Dabdoub, did not argue the grounds as delineated above, but instead, sought to persuade this court that the orders were valid and should subsist. In attempting to do this, he addressed the following issues arising out of the grounds and which are integral to a determination of the central question of the validity of the orders.

(a) Were the order for sale and charging order of Cole Smith J. made pursuant to the Registration of Titles Act (RTA) or to s28A and 28D of the Judicature Supreme Court (Amendment) Act and the Civil Procedure Rules (CPR)?

(b) If the orders were made pursuant to the Supreme Court (Amendment Act), were they obtained according to the procedures stipulated by the CPR?

(c) As a subsidiary issue, were the requirements with respect to service satisfied in respect of the 3rd and 4th respondents?

(d) What is the effect of a failure to comply with the Rules?

(e) Was the mortgage in favour of the 3rd respondent illegal and liable to be set aside?

[5] In light of its significance in this appeal, I think it necessary at this point to set out the relevant portions/paragraphs of the order made on the 30th June 2005:

"1. That there be an Order for Sale of the 2nd Defendant's land, being all that parcel of land registered at Volume 1012 Folio 543 of the register book of titles.

2 ...

3. That pending the sale the 2nd Defendant's said land stand charged with the judgment debt due to the Claimant herein.

4. That the purchase money from the sale be applied in satisfaction of all monies due under the judgment to the Claimant dated 1st June 2005, and all costs incident to the sale, this application and any enquiries or further application with respect to the sale herein.

5. That the issue of the interest in the said land of Pelican Securities Limited and Castlewood Corporation Inc., and the priority of same with respect to the judgment debt to the Claimant be set for determination by this Honourable Court.

6. That such enquiries be made by the Registrar of the Supreme Court to determine;

(a) The estate and interest of the 2nd Defendant in lands registered at Volume 1012 Folio 543 of the Registrar Book of Titles.

(b) Whether any person other than the Defendant is entitled to any charge or interest in the said premises.

(c) The exact amount due to the Claimant from the Defendants in respect of the judgment debt herein together with interests and costs.

7. That the time for leaving the certificate of sale under the writ herein with the Registrar of Titles for entry on the register pursuant to s134 of the Registration of Titles be directed be 3months or such longer time as is required to complete the sale of the 2nd Defendant's land."

I should also add that a perusal of the application of June 7, 2005 and the corresponding order of June 30, 2005, indicates that the order granted by Cole Smith was in the terms sought by the appellant in its application.

[6] I will now deal with the issues involved in this appeal:

Were the Order for Sale and Charging Order of Cole Smith J. made pursuant to the Registration of Titles Act (RTA or to s28A and 28D of the Judicature Supreme Court (Amendment Act and the Civil Procedure Rules (CPR)?

The nature of the arguments advanced makes it necessary to deal with the order for sale as being a separate order from the charging order although both orders were sought in the same application and granted in the same order and notwithstanding the fact that by virtue of section 134 of the Registration of Titles Act (RTA) and the Privy Council's ruling in **Beverley Levy v Ken Sales & Marketing Ltd** (No. 87 of 2006 delivered 24.01.08) both orders may be regarded as one.

The Order for Sale

[7] Mr. Dabdoub submitted that regardless of the jurisdiction under which the order was granted, the order was still valid and should be complied with until discharged by the court. The suggestion implicit in that submission, as I understand it, is that the order could be regarded as being made under either the RTA or the Judicature Supreme Court (Amendment) Act.

[8] Mr. Manning, counsel for the 1st and 2nd respondents, contended that the application was made pursuant to section 134 of the RTA. He adverted the court's attention to the application and the corresponding order made and the fact that nowhere in the application was there any mention of part 55 of the CPR. He pointed out that not even in later purported applications to extend the order did the appellant make reference to the relevant parts of the CPR. In fact, he argued that the language of the application and the order mirrors section 134 of the RTA. He submitted that the consequence of making the order under section 134 of the RTA and failing to apply for an extension before the expiry of three (3) months was that the order for sale had ceased to be valid. None of the purported extensions made subsequently were of any effect because the order could not be extended retrospectively.

[9] The appellant in its application dated June 7, 2005, set out the orders that were sought. The grounds on which it relied did not indicate any underpinning in the CPR or any statute. This notwithstanding, I am of the view that paragraph 7 of the application is unequivocal evidence as to the basis on which the application for the order for sale

was made. So too, is paragraph 7 of the order which is in the same terms (see paragraph 5 of this judgment). I agree with Mr. Manning that the language of the application mirrors section 134 of the RTA. It is beyond doubt that the application for the order of sale was made pursuant to section 134. It is difficult to see how, in the face of this clear evidence, the appellants can now argue that the application was not made pursuant to section 134 of the RTA. It follows then that the order for sale had ceased to bind the land as at October 1, 2005, there being no delivery of a certificate of sale of the property within the requisite three (3) month period or no extensions before the order expired.

The Charging Order

[10] Unlike the order for sale, there is no clear evidence that the charging order was made pursuant to section 134 of the RTA. Of course, if it had not been made pursuant to the CPR, it would have been an adjunct to the order for sale and would have suffered the same fate as the order for sale did. Mr. Dabdoub premised his arguments on the application for the charging order being made pursuant to Rule 55. Faced with the requirements of that rule that there should first be a provisional charging order and then a final charging order, Mr. Dabdoub seemed to base his arguments on two limbs: on the one hand, as indicated by ground "d" of the grounds of appeal, the order of Cole-Smith, J. was a provisional order and on the other, it was a final order which in light of the circumstances did not necessitate a provisional order being made.

[11] Mr. Manning submitted that if the application had been made pursuant to Part 48 of the CPR, the terms or language of the application would have referred to Part 48 and the application would have been made ex parte as stipulated by Part 48. However, no reference was made in the applications to the relevant provisions of the CPR. Further, he argued, on the certificate of title there was no charging order entered separately from the order for sale. This fact, he submitted, suggested that it was not separate from the order for sale. Consequently, the charging order had ceased to bind the land.

[12] Part 11.7 of the CPR deals with what an application (for court orders) must include. It states:

> "11.7 (1) An application must state -
>
> (a) what order the applicant is seeking;
>
> (b) briefly, the grounds on which the applicant is seeking the order; and
>
> (c) the applicant's estimate of the likely length of hearing
>
> (2) The applicant must file with the application or not less than 3 days before the hearing of the application, a draft of the order sought."

Although not expressly stated by the rules, it has become common practice for an application for court orders to allude to the relevant rule of the CPR in its grounds. This, I think, accords with good sense since the court as well as the respondent ought to

have an indication of the basis or jurisdiction under which the application is made. However, a failure to do so is not necessarily fatal since the tenor of the grounds included may indirectly allude to the provision in the CPR that is being relied on. I therefore agree with Mr. Manning that the application should have referred to the relevant rule which was being relied on if it had been made pursuant to the CPR. However, the failure to do so did not automatically mean that the appellants were not relying on the CPR. The question that must now be considered is whether notwithstanding the failure to refer to the specific provisions of the CPR, the application could be said to have been made pursuant to the CPR.

If the Orders were made pursuant to the Supreme Court (Amendment Act), were they obtained according to the Procedures stipulated by the CPR?

[13] It has already been established that the order for sale was quite clearly made pursuant to section 134 of the RTA. It is therefore now only necessary to consider this question in respect of the charging order. Part 48 of the CPR deals with charging orders. Rule 48.2(1) states:

> "48.2 (1) The application is to be made without notice but must be supported by evidence on affidavit."

Rule 48.5, in so far as relevant, states:

> "48.5 (1) 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) ...
>
> (3) ...

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

It is to be noted that the appellant's notice of the application dated June 7, 2005 indicated that notice would be given to the 1st and 2nd respondents, and the order granted by the learned judge discloses that their legal representatives were present at the hearing. It could not be said that this application was ex parte. It therefore was not properly a provisional order, for if it were, it should have been made without notice as stipulated by Rule 48.2. Further, the requirements with respect to service, notice and specifying the date for the hearing of the provisional order stipulated in Rule 48.5(4) were not complied with. However, was it a final order?

[14] Mr. Dabdoub submitted that the order was a final order and there had been no need for a provisional order to be made as required by Part 48.5. He submitted that this rule is procedural and not mandatory as the learned judge had found. If the rule were mandatory, he argued, a penalty for non-compliance would have been specified. No penalty for non-compliance has been stated in the Rules. The failure to obtain a provisional order was therefore a procedural defect that could have been remedied by the learned judge under Rule 26.9. The requirement for service had been satisfied since all the relevant parties, that is, the 1st 2nd and 3rd respondents had been served with the application and there had been no necessity to serve the 4th respondent. Further, all the relevant respondents were represented at the hearing.

Were the Requirements with respect to Service of the Notice satisfied in respect of the 3rd and 4th Respondents.

The 3rd Respondent

[15] Mr. Dabdoub maintained that service had been effected in accordance with part 5.7 on the 3rd respondent through its director, Mr. Hart. In an affidavit sworn to on January 31, 2008, Mr. Hart had admitted that he was aware that the application had been served on Hart, Muirhead and Fatta, a firm of which Mr. Hart was a partner. The fact that it had come to his attention was sufficient to satisfy the requirement of personal service, Mr. Dabdoub submitted. To support this submission he relied on **Nottingham Building Society v Peter Bennett (a Firm)** [1997] EWCA Civ. 1024.

[16] Dr. Barnett, on behalf of the 3rd respondent, Pelican Security Limited, submitted that the relevant rules in Part 48 were mandatory. Therefore the court had no jurisdiction to make a charging order other than in the manner provided. It followed that the court had no jurisdiction to make a final charging order in the absence of a prior provisional charging order. He argued that in any event, the application had not been served on the 3rd respondent in accordance with Part 5 because it had not been served personally on Mr. Hart. Mr. Hart's statement in his affidavit was not to be taken as an admission of personal service but was at best a statement that by virtue of the stamp, the firm had received the application. He argued that service on a clerk is not personal service and as such, the acknowledgment of service on the first page of the application would be insufficient for these purposes. Further, it could not be said that

service had been dispensed with since any such order by the court had to be done on specific terms. Service, he submitted, was not merely a procedural step; it was a fundamental step, the purpose of which was to give notice to parties. Failure to serve was an irregularity that necessitated the order being set aside.

[17] Part 48.7(1) deals with service of a provisional charging order. It states:

> "48.7 (1) Where the court makes a provisional charging order the judgment creditor must serve on the judgment debtor in accordance with Part 5."

Rules 5.1 and 5.3 of the CPR state:

> "5.1 (1) The general rule is that a claim form must be served personally on each defendant.
>
> 5.3 A claim form is served personally on an individual by handing it to or leaving it with the person to be served."

Further, Rule 5.7 states:

> "5.7 Service on a limited company may be effected -
>
> (a) ...
>
> (b) ...
>
> (c) by serving the claim form personally on any director, officer, receiver, receiver manager or liquidator of the company;
>
> (d) by serving the claim form personally on an officer or manager of the company at any place of business of

> the company which has a real connection with the claim ..."

It is common ground that personal service should have been effected on the relevant respondents. Thus, in respect of service on the 3rd respondent, it need only be decided whether, as Mr. Dabdoub has submitted, bringing it to the attention of the director at his place of work was sufficient to satisfy the requirement for personal service on a limited company as stipulated by part 5.7.

[18] In **Nottingham Building Society v Peter Bennett (a Firm)** (supra), a claim was to be served on a partnership that had been dissolved. It was agreed that for the purposes of personal service, service on one of the former partners of the firm would be sufficient. The process server attended the office of one of the former partners and handed over the claim to the partner. The partner objected that the defendant firm had been mis-described in the document. The process server took it back and later, on the instructions of the claimant's attorneys, returned to the partner's office. When he arrived there, the partner had already gone home. He therefore left the claim at the reception desk. The defendants sought to argue that that was not good service in accordance with the requirement that "personal service is effected by leaving a copy of the document with the person to be served". The Court of Appeal held that once the intended recipient (assuming him to have the required knowledge of its nature) has been given a sufficient degree of possession of the document to enable him to exercise dominion over it for any period of time, however brief, the document has been left with him.

[19] It seems to me that that case cannot be understood to mean that all that is necessary to satisfy the requirement of leaving the document with the defendant/respondent for the purposes of service is that the matter is brought to the attention of the person, regardless of the circumstances surrounding how the document was brought to his/her attention. Indeed, it is to be noted that the court in that case did not exclude the requirement that the person to be served exercise some degree of possession over the document, however brief. This requirement is of course waived if the respondent/claimant refuses to take the document. I find support for this conclusion in **Allison v Limehouse & Co**. [1992] AC 105. In that case a personal assistant, acting on the instructions of one of the partners, who was in another part of the premises, agreed to accept service and signed the appropriate form of acknowledgment. The House of Lords held that personal service involved handing the document to the person to be served, or telling him what it contained, and leaving it with him or near him and therefore the claim had not been served personally.

[20] In this case, there is no dispute that the firm of Hart, Muirhead and Fatta, of which Mr. Hart was a partner, was served with the application. It may also be said that the firm had a real connection with the respondent because, as Mr. Dabdoub pointed out, the firm was named as the place where interest on the loan granted by the 3rd respondent should be paid. However, I am not at all sure that the firm could be regarded as a place of business of the 3rd respondent so as to satisfy Rule 5.7(d). Nonetheless, it is still necessary to determine whether Rule 5.7(c) was satisfied.

[21] The application discloses that it was intended to be served on the firm of Hart, Muirhead and Fatta, as attorneys for the 1st and 2nd respondents, and that the firm was to be served as representatives of the 3rd respondent but there was no indication of the individual on whom it would be served. In light of the fact that the rules stipulate that it should be served on an officer of the defendant at the company, it seems to me that it was imperative that this information should have been included. Further, there was no evidence to show that the application had been served personally on Mr. Hart. All that the evidence discloses is that he was aware that the application had been served on the 20th June. I am not convinced that under these circumstances, it can be said that the document came to the attention of a director of the 3rd respondent, Pelican Securities Limited, sufficient for it to be regarded as service on him for the purposes of establishing personal service according to Rule 5.7(c). Indeed, at the hearing before Cole-Smith, J. only the 1st and 2nd respondents were represented. They were represented by the firm of Hart, Muirhead and Fatta, but there was no indication that the firm represented the 3rd respondent. The fact that that firm now represents the 3rd respondent is immaterial to the position that existed at the hearing. In my view, the learned judge was correct in his conclusion that the application had not been served in accordance with Part 5, that is, personally.

The 4th Respondent

[22] Mr. Dabdoub argued that the 4th respondent had had no interest at the time when the order was made, and as a consequence, he was not entitled to notice at that

time. In addition, he argued, it was doubtful whether the 4th respondent's agreement for sale was valid against the appellant who had a charging order. Relying on the case of **Burston Finance Ltd. (in liquidation) v Godfrey and others** [1976] 2 All ER 976, he submitted that the 4th respondent was not entitled to notice of the subsequent applications for extensions of the 2005 order. **Burston Finance Ltd (in liquidation) v Godfrey and others**, he submitted, is authority for the principle that a charging order ought to be defeated only by something that occurred prior to it and not subsequent to it. He submitted that if service was required, service of the notices of the applications for extension had been effected on the 4th respondent because the notice had been served on the firm of Hart, Muirhead and Fatta. That firm had been indicated on the caveat filed by the 4th respondent as the place for the service of any proceedings relating to the caveat. Mr. Dabdoub further submitted that the agreement for sale as well as the caveat on which the 4th respondent had based his claim to an interest in the property, should not have been considered by the learned judge since they had not met the statutory requirements, in that they had not been stamped.

[23] Mr. Hylton, Q.C. submitted that the appellant was aware that the 4th respondent had an interest in the property because the Registrar's report on January 2008, had disclosed that a caveat had been lodged by the 4th respondent in February 2007. Therefore, the 4th respondent should have been served. He further submitted that service had not been effected on the 4th respondent through the firm of Hart, Muirhead and Fatta, because at no time had the firm indicated that it was authorised to accept service for the 4th respondent. He also submitted that it was not open to the appellant

to challenge the validity of the agreement for sale or the caveat at this stage, since no issue had been made of this in the court below and it was not included in any notice of appeal filed by the appellant.

[24] It is certainly true that in 2005 when the charging order was made, the 4th respondent had no interest in the subject property. I therefore agree with Mr. Dabdoub that since the 4th respondent had no interest, he had no entitlement to be notified of an application for a charging order against the property. However, this conclusion is only sustainable if the charging order of 2005 was a final charging order, and did not need to be extended. It appears that there is nothing in Part 48 that indicates that a final charging order needs to be extended. The charging order would therefore subsist from June 2005 until the judgment debt had been satisfied. I find support for this in the fact that apart from the provisions with respect to obtaining a final charging order, Part 48 also allows for an application to be made to discharge or vary the order.

[25] If I am right in my conclusion that there was no need for an extension of the charging order, there would be no need to consider the case of **Burston Finance Limited (in liquidation) v Godfrey and others**. In the event that I am wrong in my conclusion that a final charging order subsists until the judgment is satisfied, this would mean that the subsequent extensions were necessary. However, I would agree with Mr. Hylton that the case of **Burston Finance Limited (in liquidation) v Godfrey and others** can still not assist Mr. Dabdoub as his submission is supported by the minority judgment only. The majority were actually of the view that in considering whether to

grant a final order, a court ought to take into consideration events that occurred subsequent to the order. The 4th respondent would have been entitled to notice.

[26] I am of the view that the 4th respondent was never served. He was not served personally or through his attorneys since, as Mr. Hylton has submitted, the firm had not indicated that it would accept service on his behalf. Further, the firm had been the place of service for proceedings relating to the caveat only. These proceedings however, could not properly be regarded as relating to the caveat for the purposes of section 140 of the RTA.

What is the Effect of a Failure to Comply with the Rules?

[27] Mr. Dabdoub maintained that a failure to satisfy the conditions in the Rules was a mere procedural irregularity. He argued that the purpose of a provisional order is to give all parties with an interest an opportunity to secure their interests. Since all the interested parties were present at the hearing or at least notified of that hearing, the essential purpose for the provisional order had therefore been achieved rendering the application for a provisional order a waste of judicial time.

[28] It has already been established that not all the parties were served with notices of the applications and therefore not all were present. Were these circumstances sufficient basis for the learned judge to have discharged the order, or should the learned judge have exercised his discretion to set things right?

[29] The answer to this depends on whether the provisions are directory or mandatory. It is my view that the provisions are mandatory. There is no sanction for non-compliance with the rules, as Mr. Dabdoub rightly pointed out, but it seems to me that this fact would tend to indicate that the rules are mandatory rather than directory. The absence of a sanction indicates that the rules do not contemplate that a party, who has disregarded the rules, should be allowed to proceed. I would therefore hold that the order of Cole-Smith, J. could not be regarded as a final charging order which was properly obtained. Indeed, the very language of the order seems to suggest that it was not final, in particular, paragraphs 5 and 6 which read as follows:

> "5. That the issue of the interest in the said land of Pelican Securities Limited and Castlewood Corporation Inc., and the priority of the same with respect to the judgment debt due to the Claimant be set for determination by this Honourable Court.
>
> 6. That such enquiries be made by the Registrar of the Supreme Court to determine;
>
> (a) The estate and interest of the 2nd Defendant in lands registered at Volume 1012 Folio 543 of the Registrar Book of Titles.
>
> (b) Whether any person other than the Defendant is entitled to any charge or interest in the said premises.
>
> (c) The exact amount due to the Claimant from the Defendants in respect of the judgment debt herein together with interests thereon and costs."

It seems to me that these provisions were aimed at ascertaining the interested parties and giving them the opportunity to object to the order made. The logical conclusion of all of this is that the charging order, not being provisional or final, cannot be regarded as being made pursuant to the Judicature Supreme Court (Amendment) Act and the CPR.

[30] The issue that must now be considered is whether the learned judge erred in proceeding on the assumption that the order made by McIntosh, J. was consequential on the June 30th order and was not independent. The order is worded as follows:

> "THE APPLICANT, KEN SALES & MARKETING LIMITED of 113 Constant Spring Road, Kingston 10, in the parish of St. Andrew, SEEKS THE FOLLOWING ORDERS and directions of this Honourable Court consequential on the Order for Sale made by the Hon. Mrs. Justice Cole-Smith on 30th June, 2005."

The Grounds of the Application read:

> "1. On the 1st June, 2005 the Claimant obtained Judgment against the Defendants in the sum of $28,500,000 with interest at 30% per annum from 7th January, 1998 to 1st June 2005.
>
> 2. That on 30th June, 2005, the Claimant obtained an Order for Sale of the 2nd Defendant's land registered at Vol. 1012 Fol. 543 of the Register Book of Titles.
>
> 3. That the Defendants appealed the Judgment obtained against them, and the said appeal was dismissed on 13th July, 2007. There has been no further appeal of the decision of the Court of Appeal.

4. The Claimant now wishes to proceed to implement the Order for Sale, and the consequential orders as set out are required for that purpose."

It is clear from the tenor of the application that it was made pursuant to the order of Cole-Smith, J., in that it sought orders of the court that would facilitate the carrying out of Cole-Smith, J's order. That this is the case, is clear from the fact that the application did not seek another order for sale or another charging order. Significantly, the appellants only began to regard the order granted pursuant to the application, as an order for sale and thereafter began to apply for extensions of this order only after the Privy Council decision of **Beverley Levy v Ken Sales & Marketing Limited** (supra). In that case, the Privy Council decided that the effect of section 134 was that an order for sale expired within three (3) months after the order of the court, unless an extension was applied for within the period of its validity.

[31] It follows that the appellant would not be able to rely on the protection provided by Part 48.9, that no disposition by a judgment debtor of an interest in property, subject to a provisional or final order is valid against the judgment creditor. Therefore, the sale of the property to the 4th respondent and the subsequent caveat were valid against the appellant.

[32] Mr. Dabdoub sought to challenge the interest of the 4th respondent in the property that was protected by the caveat. In his written submissions, he argued that the caveat had expressly stated that the interest being protected was the deposit that

had been paid. Therefore, the 4th respondent did not have a beneficial interest in the property. He further submitted that the agreement for sale was not valid.

[33] On the question of the interest of a purchaser under an agreement for sale, Campbell, J.A. in this court in **Riverton City v Haddad** (1986) 40 WIR 236 said:

> "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 ..."

So then, it is irrelevant that the caveat purported to protect only the interest equivalent to the deposit; once the agreement for sale is valid, any caveat lodged thereto would be to protect the equitable interest. It is clear that the learned judge was plainly right in concluding that the caveat protected the beneficial interest in the property once the agreement for sale had been valid. Since, as Mr. Hylton pointed out, the arguments concerning the validity of the documents had not been raised before Jones, J. below, nor had the appellant filed a counter notice in respect of these arguments, it is not necessary to arrive at a conclusion on the validity of these documents as evidence.

[34] Although no oral arguments were advanced concerning the ground that Jones, J. had no power to set aside the order, because it was an order made by a judge of concurrent jurisdiction, a brief comment will dispose of this issue. In his written submissions, Mr. Hylton referred to several provisions, particularly under Part 26 of the CPR which, he was of the view, conferred on Jones, J. the power to set aside an order

of a judge of coordinate jurisdiction. In my view, it is not necessary to look outside that provision. Rule 48.10 in giving a party the power to set aside the order, clearly contemplated the making of the application before a judge of coordinate jurisdiction.

Was the Mortgage in favour of the Respondent Illegal and Liable to be Set Aside?

[35] Mr. Dabdoub argued that the mortgage was in breach of sections 22A (2) and 22A (3) of the Bank of Jamaica Act and therefore unenforceable. In respect of 22A (2), he submitted that the loans were evidence that the 3rd respondent was carrying on the business of lending foreign currency although it was not an authorised dealer. He further submitted that in order to decide whether the 3rd respondent had been involved in the business of lending foreign currency, the court should look at all the circumstances instead of only considering whether the loan was an isolated transaction. The circumstances were such that the 3rd respondent had made three (3) loans, the first two (2) were to the 2nd respondent and the third was to the 3rd respondent, Mr. Levy. This was sufficient to establish that the 3rd respondent was involved in the business of lending foreign currency, he argued. He submitted further that the 3rd respondent was carrying on one of its objects as authorised by its Memorandum of Association. Also, by lending money, the 3rd respondent was receiving a profit which was indicative of a business being carried on. Therefore, he submitted, the 3rd respondent must be regarded as carrying on the business of lending foreign exchange.

[36] In respect of 22A (3), he submitted that the affidavit of Mr. Hart, a director of the company, indicated that the loan was disbursed to the 1st respondent to pay the appellant to satisfy the monies due by virtue of the judgment and further, the appellant had admitted receiving a payment of a sum in Jamaican dollars on account of the debt.

[37] Dr. Barnett submitted that the burden was on the appellant to establish that the 3rd respondent satisfied the conditions in the relevant section of the Bank of Jamaica Act. He pointed out that the evidence of Mr. Hart was that the loans were made as a special arrangement based on friendship. The loan to the 2nd respondent, Trident Hotel and Villas Limited had been made twenty six (26) years after incorporation and seven (7) years later, Mr. Hart still asserted that the company had made no further loans. He submitted that two (2) loans in thirty three (33) years could hardly amount to the carrying on of business. The carrying on of a business had an element of continuity. He further submitted that the Memorandum of Association of a company is no indication of the business that the company is involved in, but is merely indicative of the capacity of the company. He relied on cases such as **Grant v Anderson** [1892] 1 QB 108 and **In re Griffin; ex parte Board of Trade** [1891] 1 QB 235.

[38] It is true that the 3rd respondent made its first loan to the 2nd respondent twenty six (26) years after incorporation, the company having been incorporated in 1971 (See p. 240 - 3 of Record). I do not think however, that that necessarily leads to the conclusion that it was not carrying on business since as Mr. Dabdoub submitted, an isolated transaction can amount to carrying on business (see **Ebanks v Symmes** KY

1981 GC 6). Mr. Hart stated in his affidavit that there were two (2) loans, the first of which was disbursed in two (2) tranches and secured by a promissory note as well as a mortgage. However, there is no evidence to support this assertion that the loan secured by the promissory note and the loan secured by the mortgage were part and parcel of one loan. In fact, the resolution of the 2nd respondent Trident Hotel & Villas Limited that was exhibited in respect of obtaining a loan from the 3rd respondent spoke only to the loan secured by the promissory note. I am therefore of the view that the loan secured by the mortgage was a separate loan and that a further loan was advanced to Mr. Levy in 2005. The question is, was this sufficient to establish the carrying on of a business?

[39] There is merit in Dr. Barnett's submission that the fact that a company is carrying on one of the objects authorised by its Memorandum does not necessarily lead to the conclusion that the company is carrying on a business. Lord Diplock delivering the judgment of the Privy Council in **American Leaf Blending Co. Sdn Bhd v Director General of Inland Revenue** [1979] AC 676 said, at paragraph 19, of the judgment:

> "Their Lordships would not endorse the view that every isolated act of a kind that is authorised by its Memorandum if done by a company necessarily constitutes the carrying on of a business."

Later at paragraph 22 he said:

> "The carrying on of business, no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between..."

It seems to me that carrying on the business of lending money is one that requires some activity and one that does not involve long intervals of quiescence. The fact that the company loaned money after being in existence for twenty six (26) years does not necessarily result in the conclusion that it was not in the business of lending money, however, I do agree with Dr. Barnett that for the activity of lending money to be regarded as a business being carried on, it would require more than three (3) loans over a period of eight (8) years. The learned judge was therefore correct in finding that the 3rd respondent Pelican was not involved in the business of money lending.

[40] Section 22A (3) of the Bank of Jamaica Act, seems to me to apply to a situation where the transaction in which the foreign currency is bought, sold or lent should involve the payment of Jamaican currency. If the foreign currency loaned is then used as Jamaican dollars in another transaction, the section does not apply because that, I think, would be a separate transaction. It is noted that the word 'payment' is used and not repayment but it seems to me that since the section is aimed at addressing both buying/selling as well as lending, the word 'payment' must be giving its literal meaning in the context of buying/selling transactions but in the context of a loan transaction, it must be understood to mean repayment. In my view, based on the evidence, it cannot be said that the loans fall within the circumstances of the section. In this case, the transaction which involves the loan of money is the mortgage transaction. The satisfaction of the debt between Earl Levy and the appellant was a separate transaction. It is irrelevant whether the money used in the latter transaction was Jamaican currency.

[41] It is only if the mortgage document provided for repayment in Jamaican currency to satisfy the loan could the section be regarded as applying to these circumstances. The learned judge dealt with the issue in this way:

> "[44] ... 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 ($14,000,000.000) is stated to be (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."

In addition he said:

> "[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 can find no basis on which this finding should be disturbed.

[42] In respect of the Money lending Act, Mr. Dabdoub submitted that the charging of the compound interest rendered the mortgage agreement illegal and void. It is not disputed that the mortgage instrument allowed for the charging of compound interest. The learned judge found that on that basis, the agreement was illegal in so far as it provided for the charging of the compound interest. This finding was made the subject of ground one of a counter notice filed by the 3rd respondent. Dr. Barnett, submitted that by virtue of section 13 (f) of the Money lending Act and the Money Lending (Prescribed Rates of Interest) Order, 1997, the loans would be exempt.

Section 13 (f) of the Act provides:

> "This Act shall not apply to -
>
> (f) any loan or contract or security for the repayment of money lent at such rate of interest not exceeding such rate per annum as the Minister may by order prescribe..."

Section 3 of the Money Lending (Prescribed Rates of Interest) Order, 1997 provides:

> "3. For the purposes of paragraph (i) of section 13 of the Act, an interest rate of twenty-five percent per annum is hereby prescribed."

According to Item 7 of the schedule included in the mortgage, the interest rate to be charged is 12% per annum (p258 of Record). It seems therefore that Dr. Barnett's submission that the 3rd respondent is exempt has merit. Accordingly, the appellant must also fail on this ground and the 3rd respondent must succeed on this ground of its counter notice.

[43] There is one other matter to be dealt with, and that is the counter notice of appeal filed by the 3rd respondent. The following two grounds of appeal were filed in respect of that notice:

> "(1) The learned judge erred in finding that "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" inasmuch as the mortgage was registered on 22nd January 1998 on the Certificate of Title for the said land while the said appeal was filed on 13th June 2005.

(2) The learned judge erred in finding that section 2 (iii) of the said mortgage is unenforceable, since the mortgage is exempted from the provisions of the Moneylending Act, by virtue of section 13 (f) and (i) of that Act."

In light of the fact that ground two was already dealt with in paragraph [42] of this judgment, it is only necessary to consider ground one.

[44] A perusal of the certificate of title of the relevant property does in fact indicate that the mortgage of the 2nd respondent to the 3rd respondent was in 1998, long before the appellant had obtained any order in respect of the land. Thus, the learned judge had erred in stating that the 2nd respondent had mortgaged Trident Castle while it was awaiting the judgment of the Court of Appeal. I would however add that, as Mr. Dabdoub submitted, the amount secured by the mortgage was $400,000 with interest, as indicated by the certificate of title and not $485,000.00 with interest as claimed (see **Geon Contractors v NCB et al** (1991) 28 JLR 409).

[45] It is for the above reasons why the appeal was dismissed.

HARRIS, J.A.

I have read the judgment of my brother Harrison, J.A. and agree with his reasoning and conclusions. I have nothing to add.

DUKHARAN, J.A.

I too agree.