JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 67/81

BEFORE: THE HON. MR. JUSTICE KERR - PRESIDENT (AG.)
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)
THE HON. MR. JUSTICE WRIGHT, J.A. (AG.)

BETWEEN: NATIONAL COMMERCIAL BANK JAMAICA LIMITED - DEFENDANT/APPELLANT

A N D : DOROTHY WHITELOCKE - PLAINTIFF/RESPONDENT

Dr. L.G. Barnett instructed by Milholland, Ashenheim & Stone for the Appellant.

Mr. W.B. Frankson, Q.C. and Mrs. M. Forte for the Respondent.

May 26 and 27; July 30, 1982.

KERR, PRESIDENT (AG.):

I have had the benefit of reading the draft judgment of Campbell, J.A. (ag.) in which he has comprehensively reviewed the rival contentions of the Attorneys on either side and identified the important issues to be tried.

I am of the view that the learned trial judge was correct in applying the liberal test advocated by Lord Diplock in American Cyanamid v. Ethicon (1975) 1 All E.R. page 504.

Accordingly, it is enough to say that there are serious issues to be tried and complex questions of law to be determined and having regard to the factors set forth in the plaintiff's affidavit and to the fact that if the appellant was to succeed it would be adquately compensated under the plaintiff's undertaking. I am in agreement with Campbell, J.A. (ag.) that the status quo should be maintained.

I would dismiss the appeal.

CAMPBELL, J.A. (AG.):

The respondent by her Writ in Suit C.L. W. 166 of 1981 sought certain declarations and consequential reliefs against three defendants namely, Horace Cuthbert, the appellant, and Bluefields Properties Limited.

As regards Horace Cuthbert and Bluefields Properties Limited, the first and third defendants, the declarations sought in substance are that:

(i) All the properties real and personal which are vested in them or either of them including two parcels of land being part of Bluefields in the parish of Westmoreland registered at Volume 998 Folios 55 and 57 of the Register Book of Titles and a herd of Holstein cattle are held in trust for the respondent.

(ii) The first defendant has fraudulently, unlawfully and wrongfully procured a mortgage and or charge over the properties registered at Volume 998 Folios 55 and 57 in favour of the appellant. This mortgage and/or charge is fraudulent, ultra vires the third defendant, illegal and void.

As regards the appellant the declarations sought are in substance that:

(i) It knew or ought to have known that in dealing with the first and/or third defendant, it was facilitating breaches of trust by them.

(ii) It acted unlawfully and wrongfully in obtaining a mortgage and/or charge over the properties registered at Volume 998 Folios 55 and 57 because it knew or ought to have known that the first defendant was acting fraudulently and in breach of trust also that the transaction was ultra vires the third defendant and so was illegal and void.

(iii) It acted wrongfully and unlawfully in removing and possessing itself of the respondent's herd of Holstein cattle as this item of property was free of all charges and/or encumbrances.

(iv) It acted negligently in advancing the sums of J$411,000.00, and J$199,000.00 to the first and/or third defendant without ascertaining that the said advances were properly authorised by the third defendant. The borrowings were ultra vires the said third defendant.

The respondent alleged that the appellant intended, unless restrained, to sell or otherwise dispose of the mortgaged lands as well as the herd of cattle. She accordingly in addition to seeking an order that the assets held by the third defendant be transferred to

her and that the mortgage held by the appellant be discharged, asked for an order restraining the appellant from disposing of or in any way dealing with the aforesaid properties until the hearing of the action.

The respondent after issuing her Writ took out a summons for an interim injunction against all three defendants to restrain them from selling or otherwise disposing of the properties registered at Volume 998 Folios 55 and 57 or any other assets, goods or cattle.

The affidavit in support of the summons sets out the following alleged facts summarised for conciseness:

(i) Dorothy Whitelocke a widow aged 71 years was up to about May, 1979, the sole registered proprietor of unencumbered estates in fee simple in lands at Bluefields, Westmoreland registered at Volume 998 Folios 55 and 57. She acquired the lands by devise under the will of her late husband Roland Whitelocke deceased. She in addition had other properties real and personal including a herd of Holstein cattle.

(ii) In or about February, 1980, the first defendant Horace Cuthbert fraudulently induced her:-

(a) to enter into a management agreement dated 8th February, 1980, appointing him manager of all her real and leasehold estate including the lands registered at Volume 998 Folios 55 and 57 also a property known as 'Oristano' in Westmoreland;

(b) to appoint him her Attorney in the Island of Jamaica;

(c) to incorporate Bluefields Properties Limited (the third defendant) with a share capital of $1,000.00 with him as the single largest shareholder having 499 shares of $1 each in respect of which he has paid nothing and with him as Chairman and Managing Director;

(d) to transfer to the said company, the properties registered at Volume 998 Folios 55 and 57;

(iii) Influenced by these fraudulent inducement she complied and inter alia instructed Messrs. Coke and Coke, Attorneys-at-Law to have the company incorporated. To this company was transferred by registered transfer the aforesaid properties for a recited total purchase price of $101,542.00 no part of which has ever been paid to her. The company is accordingly a trustee for her holding these properties on a resulting trust for her.

(iv) That in the light of the foregoing the first defendant Horace Cuthbert is also a trustee for her of all her other properties, goods, chattels, monies and cattle which came into his possession or under his control by virtue of the power of Attorney and management agreement executed in his favour.

(v) That the appellant at all material times knew or ought to have known that the first and third defendants were trustees for the respondent. Despite this knowledge it wrongfully and unlawfully took a mortgage or charge on the properties registered at Volume 998 Folios 55 and 57 to secure sums of $411,000.00 and $199,000.00 advanced by it to the first defendant and/or to the third defendant or one or other of them.

(vi) That the appellant in March 1981 called in the mortgage which the third defendant was unable to pay in consequence of which the appellant unlawfully and wrongfully removed and converted the respondent's herd of Holstein cattle to its own use and benefit. She is informed and verily believes that the appellant intends selling the herd.

(vii) That she is informed and verily believes that the appellant also intends selling, and has negotiated or is negotiating a sale of the properties registered at Volume 998 Folios 55 and 57.

The summons came on for hearing in Chambers before Wolfe, J. on November 9, 1981. The appellant alone appeared in opposition thereto. Though the appellant appeared, it filed no affidavit in opposition. The record of proceedings is regrettably scanty. It however disclosed that the appellant apparently rested its opposition solely on the alleged vagueness of the allegations of fact in the respondent's affidavit. The record shows learned attorney for the appellant citing Wallingford v. Mutual Society (1880) H.L. (E) A.C. Vol. 5 page 685 in support of his submission that the allegations were vague. The references by him to statements in the speeches in that case of Lord Selbourne, Lord Hatherly and Lord Blackburn which in the above reference are at pages 697, 701 and 704 respectively show that learned attorney was referring to vagueness in relation to the allegations of fraud against the first defendant and was relying on the principle that an allegation of fraud which does not condescend

upon particulars on which it is based must be disregarded by a Court and if this is the sole basis on which the pleader or deponent relies in support of his claim to relief he must necessarily be denied relief.

The respondent at the hearing did not however appear to have relied on the aspect of fraud deponed to in the affidavit. The submission by learned attorney on her behalf is recorded thus:

> "Refers to endorsement on Writ. Refers to affidavit of Dorothy Whitelocke. Second defendant knew that first and third defendants held on trust for plaintiff. Second defendant had knowledge of relationship between plaintiff and first and third defendants when properties were mortgaged.
>
> Paragraphs 13 and 14 of affidavits show that second defendant intends to dispose of plaintiff's properties. Contract entered into. Court has power to grant relief by section 461 of the Civil Procedure Code. Plaintiff will suffer injury if relief is denied. Damages not proper remedy in this case. Serious question to be tried."

The learned trial judge in granting the order said:

> "Court guided by principles in American Cyanamid Co. v. Ethicon Limited (1975) 1 All E.R. 504. Order granted in terms of summons. Order granted in terms until the determination."

The appellant appeals this order on the undermentioned grounds:

> "(i) There was no material before the learned judge to show that the plaintiff had any reasonable or sufficient prospect of succeeding in her claim and/or in obtaining a permanent injunction at the trial.
>
> (ii) The only material before the learned judge consisted of a vague and generalised allegation of fraud without any particulars or other material capable of supporting the allegation.
>
> (iii) The appellant had a statutory right to sell in the circumstances of the mortgagor's default in payment under a registered mortgage and there was no evidential material which suggested that the statutory right could be impeached or defeated;
>
> (iv) By reason of the foregoing the learned trial judge erred in law and on the facts in granting an interlocutory injunction and in particular by failing in the absence of a Statement of Claim by the plaintiff to impose appropriate terms on the grant of the interlocutory injunction."

Before us Dr. Barnett for the appellant in relation to Ground 1 of the appeal, submitted in effect that the learned trial judge, though he stated that he was guided by the principles enunciated in American Cyanamid Co. v. Ethicon Limited (1975) 1 All E.R. 504 failed to be so guided, because had he done so, he would necessarily have concluded that there was no material before him showing that the respondent had any reasonable or sufficient prospect of succeeding in her claim and/or in obtaining a permanent injunction at the trial.

Mr. Frankson for the respondent submitted that, contrary to the submission of Dr. Barnett in relation to this ground of appeal, American Cyanamid Co. v. Ethicon Limited (supra) established no such principle that an applicant for an interlocutory injunction had to establish a reasonable or sufficient prospect of succeeding in her claim and/or in obtaining a permanent injunction at the trial. All that was necessary under the principles extractable from the above case was that an applicant for an interlocutory injunction must submit to the judge hearing the application, material showing that there was a serious question for trial.

Mr. Frankson in this regard is correct as to the principle stated in American Cyanamid Co. Ethicon Limited. Lord Diplock at page 510 deprecated the prevalent application of the supposed rule that before a Court can consider the "balance of convenience" in determining whether it should grant an interlocutory injunction it must first be satisfied that if the case went to trial on no other evidence than is before the Court at the hearing of the application, the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought. He was there declaring that the rule that a prima facie case must be made out was never established law. Continuing at the said page 510 he said:

> "Your Lordship should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability" "a prima facie case" or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried." (Emphasis mine).

It is true that Lord Diplock went on further to express himself in words which are incorporated with addition by Dr. Barnett in this ground of appeal. The Noble and learned Lord continued thus at page 510:

> "It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. ..... So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought." (Emphasis mine).

It seems to me that Lord Diplock was not stating another principle different to the "serious question for trial" principle as being the one applicable to the grant or refusal of an interlocutory injunction. What I understand him to mean is that in cases where a permanent injunction is sought as a relief in a claim which reveals a serious question to be tried, the judge must proceed to consider the "balance of convenience" unless on the basis of the material before him it is patently clear that even if the plaintiff succeeds in his claim he would never get the relief of permanent injunction sought but only damages in lieu thereof, in which circumstance the application for the interlocutory injunction will be refused outright. Where relief by way of permanent injunction is not being sought this subsidiary principle, if such it is, will in any case be inapplicable.

In N.W.L. Limited v. Woods (1979) 3 All E.R. 614 at page 625 Lord Diplock in commenting on American Cyanamid Co. v. Ethicon Limited took the opportunity of reiterating that the applicable principle was that there should be a serious question to be tried.

In the light of the foregoing, Ground 1 of the appellant's grounds of appeal does not correctly state any principle of law within the context of which the learned trial judge was required to consider the material before him. He thus did not err in not applying this supposed principle of law.

However Dr. Barnett actually developed his submission on the basis that the respondent was required to show no more than that there was a serious question to be tried. Accordingly I will consider Grounds 1 and 2 on that basis.

Dr. Barnett submitted that the respondent had failed to satisfy the judge from the material placed before him that any serious question arose for trial. This was because she failed to provide (a) basic particulars in support of material allegations which thus rendered the allegations useless (b) satisfactory alternative evidence to support any claim against the appellant.

As regards the failure to provide basic particulars Dr. Barnett referred to (1) the allegations of fraudulent inducements without any statement of the particulars which made the inducements fradulent; (2) the allegation of knowledge in the appellant of the trust relationship between the respondent on the one hand and the first and third defendants on the other, without specifying the source of knowledge. This was absolutely necessary Dr. Barnett says, because insofar as the third defendant's title was registered it would not, under the Registration of Titles Act, disclose any trust which may exist in relation to the land. It could not therefore be inferred that the appellant had knowledge of any such trust relationship by the mere fact of the Register Book of Title being open to inspection by the public; (3) the allegation that the appellant "wrongfully and unlawfully" took a mortgage or charge of the properties did not

particularise in what manner the act was wrongful or unlawful.

Mr. Frankson in substance conceded that the allegations of fraudulent inducements were vague and lacked particularity. This issue he submitted would be dealt with in the Statement of Claim. He submits however that the appellant was not being charged with fraud but rather with knowledge of fraud and/or breaches of trust. As regards the other matters referred to by Dr. Barnett, Mr. Frankson submitted that the allegations in the respondent's affidavit were sufficiently factual. His submission was that the respondent's affidavit which is now being denigrated as vague constituted the only factual evidence placed before the Court by the parties. The appellant though he had the opportunity, failed and/or neglected to supply the learned judge with any material detracting from the respondent's affidavit. The appellant ought not now to carp on the inadequacy or insufficiency of the material contained in the affidavit or that it recited conclusions instead of primary facts on which the conclusions are based.

Insofar as Dr. Barnett's submissions are based on fraud in the claim or fraudulent inducements adverted to in the affidavit he is correct that without particulars of such fraud or fraudulent inducements being given a tribunal cannot entertain or act on them. But in this case neither fraud nor fraudulent inducement is expressly or impliedly alleged against the appellant. The claim endorsed on the Writ shows that the fraud alleged is against the first defendant. Paragraphs (g) and (h) of the claim state:

> "(g) That the first defendant has fraudulently converted the assets of the plaintiff and of the third defendant to his own use and benefit.
>
> (h) That the charges and/or mortgages and/or other securities procured against the plaintiff and/or the third defendant are fraudulent, ultra vires the third defendant and are illegal and void."

The affidavit also discloses that the fraudulent inducements complained of are those of the first defendant. The person who properly was entitled to particulars and could challenge the allegations of fraud for vagueness was the first defendant. He did not see fit to oppose the respondent's application.

What is alleged against the appellant is that it had knowledge of the fact that the first and third defendants were trustees of the respondent in respect of the properties. It had knowledge that the dealings of the first defendant in relation to the properties constituted breaches of trust and were in addition fraudulent. It had knowledge that the mortgage transaction involving the transfer of the sums of J$411,000.00 and J$199,000.00 to the first defendant or to the third defendant was ultra vires the third defendant. Alternatively it was negligent in not discovering this.

With regard to the appellant's knowledge of these facts it was not necessary for the respondent to particularise the source of knowledge. It was thus not fatal that she did not do so. Sections 185 and 186 of the Judicature (Civil Procedure Code) Law provide:

> "185 - Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred."
>
> "186 - Wherever it is material to allege notice to any person of any fact, matter or thing it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material."

In Burgess v. Beethoven Electric Equipment Limited (1942) 2 All E.R. 658 the Master of the Rolls (Lord Greene) dealing with Order 19 Rule 22 of the Rules of the Supreme Court (U.K.) which is ejusdem generis Section 185, said at page 660:

> "Rule 22 seems to me to lay down as clearly as anything can be laid down that the pleading which alleges a condition of mind as a fact is a sufficient pleading and, therefore, is one in respect of which particulars cannot be ordered."

In Cresta Holding Limited v. Karlin (1959) 3 All E.R. 656 the Court distinguished between "notice" and "knowledge" and stated that in the case of "notice" particulars can be asked for and must be supplied but in the case of "knowledge" no particulars can be asked for.

The respondent having in her claim and affidavit alleged knowledge and not "notice" she was under no obligation to state particulars as to the source of knowledge and could not be ordered to do so.

Insofar as the respondent alleged negligence on the part of the appellant, she sufficiently particularised the same by reference to her Writ and affidavit namely, that it consisted in not making due enquiries from which it would have ascertained that the moneys advanced on mortgage were not properly authorised by the third defendant and were in fact ultra vires the said defendant.

With regard to the allegation that the appellant acted unlawfully and wrongfully, the circumstances making the acts wrongful and unlawful are equally sufficiently stated in the affidavit when read in the context of the claim endorsed on the Writ. The act of the appellant in removing and converting the herd of Holstein cattle is alleged to be unlawful and wrongful because this asset is not subject to any charge or encumbrance in favour of the appellant. This circumstance did not escape Dr. Barnett who accordingly pitched his submission thereon no higher than by saying that if this property is secured by debenture in favour of the appellant there would be nothing wrongful in its exercising the rights conferred thereunder. There is however no evidence that there was a debenture in favour of the appellant. The mortgage transaction is alleged to be wrongful and unlawful because it is ultra vires the third defendant. Due enquiry by the appellant she alleges would have disclosed that it was ultra vires, if such was not in known fact as alternatively alleged.

The submission of Dr. Barnett that there was no material before the learned trial judge based on the vagueness of the allegations, the absence of particulars and on the affidavit having stated conclusions instead of primary facts are not substantiated.

The other submission of Dr. Barnett was that distinct from the complaint on the defect in the affidavit there was no satisfactory evidence to support any claim against the appellant. Dr. Barnett relied heavily on the Registration of Titles Act as establishing that the appellant acquired by transfer from the third defendant a valid mortgage. This could be defeated only on a specific plea of fraud against it which not having been pleaded negatived the existence of any "serious question for trial."

Section 71 of the Registration of Titles Act reads:

> "71 - Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer from the proprietor of any registered land, lease, mortgage or charge shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for which such proprietor or any previous proprietor thereof was registered ..... or shall be affected by notice actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not by itself be imputed as fraud."

In addition Dr. Barnett submits that particulars of the fraud had to be pleaded as enjoined by Section 170(1) of the Judicature (Civil Procedure Code) Law which reads:

> "170(1) - In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence and in all other cases in which particulars may be necessary ..... particulars (with dates and items if necessary) shall be stated in the pleading."

The effect which the Registration of Titles Act may have on the claim endorsed on the respondent's Writ was not disclosed in any affidavit of the appellant nor was it canvassed before the learned trial judge, and though it was not incompetent for it to have been canvassed before us, the inviolability of Section 71 relied on by Dr. Barnett would certainly have to be considered in relation not only to the issue of fraud but also to the ultra vires principle which allegedly affected the mortgage and loan transaction effected with the third defendant a

limited liability company. This aspect of the matter by itself provides a timely reminder of the words of Lord Diplock in American Cyanamid Co. v. Ethicon Limited at page 510:

> "It is no part of the court's function at this stage of the litigation ..... to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

Before the learned trial judge was a claim endorsed on a Writ which sought declarations that the first and third defendants were trustees of properties therein mentioned. That the first defendant acted fraudulently and in breach of trust in relation to the said properties. One of such acts it is alleged resulted in a mortgage and loan transaction with the appellant which the respondent alleges to be ultra vires the third defendant.

The appellant is alleged to have knowledge of all these facts which allegedly vitiated the mortgage and rendered it void. The appellant is further alleged in the absence of any debenture to have unlawfully and wrongfully removed the respondent's herd of Holstein cattle and threatens to sell the same. It also threatens to realise the mortgage by sale of the properties covered thereunder.

The affidavit of the respondent sets out the circumstances which she alleged resulted in the first and third defendants becoming trustees. It disclosed that the transactions creating the alleged trust took place in or about February, 1980, when the third defendant was incorporated. The respondent's real estates hitherto unencumbered were transferred to the third defendant for a recited but unpaid purchase price of J$101,543.00. Within a year of the incorporation of the third defendant, the real estates transferred to it were mortgaged and sums totalling J$610,000.00 advanced by the appellant to the first defendant or to the third defendant. The first defendant was Managing Director and Chairman of the third defendant. He was also the holder of approximately 50% of the shares of the third defendant on which he had paid nothing. Within less than a year of granting the loan the appellant is calling in the mortgage and the third defendant has no funds with which to repay, and

there is no evidence of acquisitions of property by the third defendant by way of utilisation of this hugh advance. The appellant has allegedly possessed itself of the respondent's herd of cattle which she alleges was unencumbered. In my view serious questions of fact and law are raised for trial against all three defendants as disclosed in the claim and affidavit considered together. Dr. Barnett's submission that there is no evidence to sustain a claim against the appellant and that consequently no serious question against it arose for trial is untenable and must be rejected having regard to its alleged unlawful detention of the respondent's cattle and also to the serious question of law posed from the impact of the ultra vires principle on the Registration of Titles Act if the respondent's claim that the mortgage transaction is ultra vires the third defendant is established at the trial.

Dr. Barnett next submitted that even if this submission that no serious question arose for trial was rejected, the evidence available to the learned trial judge as disclosed in the respondent's affidavit itself, was such that the learned trial judge's discretion ought to have been exercised in refusing the order for interlocutory injunction. The affidavit evidence, Dr. Barnett submits, revealed that the respondent had treated her properties as investments by transferring the same to the third defendant in consideration for a price. This being the case, even if the appellant in selling the mortgaged properties should at the trial be found to be wrong and so liable to the respondent, damage was the undoubted compensatable relief and there was and could be no doubt that the appellant would be able to pay the damage awarded. Hence the balance of convenience weighed in favour of the order being refused.

Mr. Frankson to the contrary submitted that the learned trial judge exercised his discretion correctly in granting the order as in strictness no "balance of convenience" principle arose for consideration because:

(a) There was no evidence from the appellant that it would suffer irreparable damage if the order was made and/or that it would be able to pay the damage occasioned the respondent if the order was refused;

(b) Having regard to the intrinsic nature of the property namely, trust property it was of paramount importance that the said property be preserved and the status quo maintained pending the hearing and determination of the legal issues at the trial.

While it is true that the respondent can in a sense be said to have treated her properties as investments by transferring them to the third defendant, it is equally true that if in fact the third defendant was holding on a resulting trust for her exclusively she could demand that the properties be transferred back to her instead of being sold and the proceeds handed over to her. In fact this is exactly what the respondent has asked for as permanent relief.

What the learned trial judge in my view was required to do was to consider the effect in the particular case before him of a refusal of the order against a background that there was no evidence of irreparable damage which the appellant would sustain if the order was made. The respondent sought orders that her properties be transferred back to her and that the mortgages and charges thereon be discharged. To refuse the order would facilitate the appellant in selling the properties and so extinguish the properties in relation to which the relief sought by the respondent is based. The respondent submitted before the trial judge that damages would not be an adequate compensatable relief if the properties were sold. This on the record was not challenged and there was not before the learned trial judge any evidence from the appellant that it would suffer any damage, muchless irreparable damage if the sales were postponed pending the trial.

This state of facts favoured the respondent, or at the worst showed that the factors were evenly balanced, in either of which case the suggestion of Lord Diplock in American Cyanamid Co. v. Ethicon Limited at page 511 was most apposite namely, that "it is a counsel of prudence to take such measures as are calculated to preserve the status quo." The learned trial judge in stating that he was guided by

American Cyanamid Co. v. Ethicon Limited must have had in mind this exhortation and in relation to the practical realities of the situation before him exercised his discretion correctly in granting the order of interim injunction sought by the respondent.

It is unnecessary to consider the complaints that in the absence of a Statement of Claim the learned trial judge erred in not imposing appropriate terms on the grant of the interlocutory injunction because as appears from the formal order drawn up an undertaking acceptable to learned attorney who represented the appellant at the hearing of the application was in fact given by or on behalf of the respondent.

For the reasons given I would dismiss the appeal.

WRIGHT, J.A.(AG.):

I agree that the appeal should be dismissed.

PRESIDENT, (AG.):

The appeal is dismissed with costs to the respondent - such costs to be taxed if not agreed.