In the Supreme Court of Judicature of Jamaica

Suit No.E.211 of 1976

Between	Rose Hall Limited Rose Hall (Developments) Limited	Plaintiffs
And	Chase Merchant Bankers Ja. Limited Rose Hall (H. I.) Limited	Defendants

Heard: October 26, 27, 28, 29

November 2, 3, 4, 22, 1976

Richard Mahfood, Q. C., and Lloyd Barnett, instructed by Clinton Hart and Company for plaintiffs.

Norman Hill, Q. C., instructed by Judah, Desnoes and Company for first defendant.

David Muirhead, Q. C., instructed by Judah, Desnoes and Company for second defendant.

Rowe, J. :

By writ filed on the 4th October, 1976, the plaintiffs sought an injunction against the defendants to restrain both of them from:

(a) selling, transferring or otherwise disposing of 3000 acres of land comprised in Certificate of Title registered at Volume 962 Folio 387 of the Register Book of Titles;

(b) from selling, transferring or otherwise disposing of lands (the site of the Holiday Inn Hotel) comprised in Certificates of Title registered at Volume 814 Folio 21 and Volume 975 Folio 136 of the Register Book of Titles;

(c) from selling, transferring or otherwise disposing of the shares in Rose Hall (H. I.) Limited.

On the Tuesday, 4th October, on the application of the plaintiffs, a judge in chambers granted an interim injunction for ten days. The summons before me sought an interlocutory injunction to continue in force until the trial of the action.

Mr. John Rollins who describes himself as an investor and entrepreneur directly or indirectly controls a number of companies including the two plaintiff companies and prior to 1976 the second defendant company. Rose Hall Limited owned all the shares in Rose Hall (H.I.) Limited and Rose Hall Limited is the registered owner of the 3000 acres of land comprised in Certificate of Title Volume 962 Folio 387. Rose Hall (H.I.) Limited, the second defendant, owns the hotel named "Rose Hall Holiday Inn" and approximately eleven acres of the land surrounding the hotel.

In 1974, the second defendant was indebted to the Bank of Nova Scotia, Toronto, in the sum of U.S.$6,250,000.00. As security for this loan, the Bank of Nova Scotia had a first mortgage on the hotel and the guarantee of the Government of Jamaica for repayment. The plaintiffs and their holding Company, Rollins Jamaica Limited, wished to secure additional funds for the development of lands owned by the plaintiffs into a commercial and residential subdivision. They entered into an agreement with the first defendant to borrow $5,000,000, giving as security:

(a) a first legal mortgage over 3000 acres of land owned by the first plaintiff;

(b) an equitable charge over the lands on which the hotel was built;

(c) an assignment of all the issued shares of the second defendant company;

(d) assignment of the contracts for sale of any part of the 3000 acres of land.

A loan agreement was duly entered into and in June, 1974, the plaintiffs drew down $3,000,000 from the first defendant. Prior to the draw down, Rose Hall Limited entered into the legal mortgage as provided for in the loan agreement; Rose Hall (H.I.) Limited, gave the equitable charge in respect of the hotel lands and Rose Hall Limited pledged all the shares it held in Rose Hall (H. I.) Limited as collateral security for repayment of the loan. The pledge expressly gave a power to the first defendant to sell the shares by public or private sale in the event that default was made in repayment of the loan.

The second defendant, Rose Hall (H. I.) Limited had one primary source of income. Its hotel"Rose Hall Holiday Inn" was operated by the well-known chain of hoteliers, Holiday Inns of the Bahamas Limited, under a lease whereby Holiday Inns Bahamas Limited agree to lease and operate the hotel in the name of 'Holiday Inn' for a term of 20 years with options to renew and to pay rent amounting to 28½ percent of gross annual guest room rentals, plus five percent of gross annual food and beverage sales with some minor exceptions. The obligations of Holiday Inn Bahamas Limited were guranteed by their parent company Holiday Inns, Incorporated, a Tennessee Corporation.

Under the loan agreement the plaintiffs were obliged to repay to the first defendant, principal in quarterly instalments commencing on 31st May, 1975, at the rate of $187,500 per quarter. The plaintiffs found it impossible to pay interest on due dates from their own resources and could not meet the first instalment of principal on the due date or on a rescheduled basis. On the 21st October, 1976, the

plaintiffs were indebted to the first defendant for arrears of the principal account in the sum of U.S.$ 1,046,046.64 and in respect of the interest account to 25th September, 1976, in the sum of U.S.$ 131,512.43.

Efforts were made by the plaintiffs to dispose of portions of the land mortgaged to the first defendant so as to put themselves in funds to service their indebtedness to the first defendant. All efforts, to which I shall make detailed reference hereafter, were fruitless and then the plaintiffs endeavoured to sell the Rose Hall Holiday Inn Hotel to the Government of Jamaica. This sale was not concluded for a variety of reasons all of which will have to be looked at later.

Following the breakdown of the negotiations for the sale of the hotel to Government, the first defendant, acting under the powers of sale contained in th legal mortgage in respect of the 3000 acres of land and the powers of sale contained in the Hypothecation Agreement, on the 14th September, 1976, offered for sale to the Government of Jamaica the 812,084 shares in the Rose Hall (H.I.) Limited for U.S.$2,255,000 and the approximately 3000 acres of land for U.S. $1,000,000.00. Government accepted the offer and in terms thereof full settlement is to be made by 31st December, 1976.

The plaintiffs now claim that the defendants should be restrained from concluding the sale to Government on the ground that its actions and in its conduct in or about the realisation of the securities the defendants acted negligently, fraudulently and or in bad faith and or in breach of their duties as mortgagees and chargees and or as directors of the second defendant company in relation to the plaintiffs, the legal and or beneficial owners of the securities and or in breach of their powers as such.

Certain facts were common to both sides. The defendants accepted that the plaintiffs made numerous abortive efforts to raise the necessary funds to settle their indebtedness under the loan agreement. The proposed sale of "Rhyne Park" for J$ 700,000 failed. The proposed sale of "Old Mill" for $500,000 failed. The sale of "Cinamon Villas" and "Lilliput Cottages" as housing projects did not materialise. The sale of a portion of the mortgaged lands to the Sheraton Corporation for $1,000,000 got nowhere. An attempt to raise $5,000,000 on a second mortgage of the hotel property failed. Finally, a sale of the hotel to the Government for $14,250,000 by 31st December, 1976, did not materialise.

Somewhere between July and August, 1975, discussions began between the Chairman of the Urban Development Corporation and Mr. Rollins, representing the plaintiffs

and the second defendant, whereby Government would purchase the Rose Hall Holiday Inn Hotel. After lengthy negotiations the sale price was agreed at $14,250,000. The sale was subject to the approval of the Jamaican Government.

Anticipating such approval, the attorneys-at-law, for the Urban Developement Corporation, and for the plaintiffs, did extensive work in preparation of the contract documents.

By November, 1975, the first defendant was pressing the plaintiffs for payment of arrears of interest and an interim agreement was concluded between the parties whereby the first defendant would refrain from enforcing the securities on the following conditions:

(a) the plaintiffs would arrange for the transfer of the shares in the second defendant company to the first defendant and facilitate changes in the composition of the Board of Directors of the second defendant company;

(b) the Urban Development Corporation and all parties dealing with Rose Hall (H.I.) Limited would be advised of the new shareholders and directors;

(c) provided the negotiations regarding the sale of the hotel were progressing satisfactorily in the sole discretion of the first defendant, the first defendant would not advertise the land for sale;

(d) all income from shop rentals as well as rental income from the lessees of of the Rose Hall Holiday Inn should be assigned to the Bank of Nowa Scotia, Toronto;

(e) John Rollins be authorised by the new board of directors to continue the negotiations for the sale of the hotel with the Urban Development Corporation.

The hotel shares were duly registered in the name of the first defendant, and the board of directors of the second defendant was in due course so re-arranged that nominees of the first defendant gained control of the second defendants board of directors as from the end of February, 1976.

The first defendant was intensely interested in the distribution of the proceeds of sale of the hotel and refused to release its equitable charge unless the Bank of Nova Scotia, Toronto agreed to pay out of the $10,000,000 cash it was providing to facilitate the purchase of the hotel, an amount of $1,250,000 to the first defendant. Between the 28th May and 6th June, 1976, this question was agreed.

Unfortunately for these parties, the sale to the Government did not proceed on untroubled waters. On 18th March, 1976, Mr. Matalon representing Urban Development Corporation, Mr. Rollins representing the plaintiffs and Mr. Brown (Managing Director of the first defendant company) but acting in his capacity as Director of the second defendant company) met to discuss the progress of the sale. At that time government had taken a basic decision that in acquiring hotels, the earnings should be sufficient to support whatever amount was borrowed to acquire that hotel. The rental income earned by Holiday Inn was :

1971:	$787,000
1972:	$1,023,000
1973:	$1,075,000
1974:	$1,334,000

and the rental income for 1975, was estimated at $1,584,000. Based on the experience which the Urban Development Corporation had with other hotels, in Jamaica, it had set a norm for the industry of nine percent return on investment with approximately 40 percent in equity and approximately 60 percent in borrowed capital. When the actual returns of the 1975 rental income of the hotel became available, they showed a short-fall as compared with the projections and would then only support a return of 8.6 percent. In the meeting, Mr. Matalon having explained the basis on which he negotiated, advised that Cabinet would not approve a purchase at the price of $14,250,000. Thereafter, at a meeting of the board of directors of the second defendant company, the sale price was reduced t $13,000,000, and this reduced offer was communicated to the Urban Development Corporation.

Quite apart from a fall in hotel occupancy which was not fully compensated for in increased rates, the lessees of the hotel sought to renegotiate the lease. The position of Holiday Inns Incorporated was succinctly set out in its letter to Mr. Matalon on July 19,1976:

> " To reiterate our discussion, Holiday Inns Incorporated has been, is and will be committed to meeting all its legal obligations under the lease and related documents to Rose Hall (H. I.) Limited in consideration of its lessor or the lessor's assigns meeting obligations undertaken by them. Holiday Inn Inc. recognises the desire and ability of Rose Hall (H.I.) Inc. to assign its interest and its lease with Holiday Inns Inc. Holiday Inns Inc. has not interfered nor will it interfere with such assignment to the extent that such transfer does not deminish our rights or increase our obligations.
>
> I further confirm to you the position of Holiday Inns. Inc. that we have suffered financial reverses as a result of our lease of the Montego Bay Holiday Inn and that we desire through every legal means to reduce or eliminate our continued exposure

" to loss under such lease.

To the end of reducing our exposure to continued losses we are preparing in writing a Presentation confirming our previous requests made to Rose Hall Holiday Inn Limited through John Rollins to modify our lease agreement with it."

Holiday Inns Inc. wrote to Mr. Rollins on the 23rd July, 1976, proposing amendnents to the lease of the hotel. Under the proposed amendment rental would be paid out of the gross operating profit of the hotel and the term "gross operating profit" was given a specific meaning. This formula would destroy any certainty of revenue for the lessors. Mr. Rollins rejected this proposal out of hand.

Up to the end of July, 1976, Holiday Inns Inc. was representing itself as an unwilling tenant in that it had sustained substantial documentary losses. It is not suprising then that on the 27th August, 1976, Mr. Matalon of the Urban Development Corporation wrote to the first defendant saying:

" This confirms our conversation of even date when I advised that in view of the very changed circumstances, this Corporation is no longer prepared to consider the acquisition of the Rose Hall Holiday Inn as previously discussed with Mr. John Rollins."

Indeed by that time as the letter went on to state, the Bank of Nova Scotia had withdrawn its offer of credit for the purchase of the hotel.

Following the collapse of the negotiations between the first plaintiff and the Urban Development Corporation for the sale of the hotel, the defendant decided to realise its securities. Mr. Brown, the Managing Director of first defendant company, in a lengthy affidavit gave some fifteen separate reasons why the first defendant concluded that the time was opportune to realise the securities. During a long and detailed cross-examination by counsel for the plaintiffs, Mr. Brown was able to substantiate the points he made in the affidavit on the question of the real reasons for calling in the securities. The first defendant maintains that when it took control of the second defendant's board of directors it discovered that the second defendant company was in grave financial difficulty. The second defendant company was in substantial default in its obligations to the Bank of Nova Scotia, Toronto, and that bank was pressing for overdue payments, which the second defendant company was finding it difficult to meet. Secondly, the proposed cash flow of the second defendant company for 1976 and 1977 disclosed that it would not be able to meet its financial obligations as they fell due. Thirdly, the tourist industry was in a deeply depressed state. Fourthly, the real estate market was deeply depressed with prices continually falling. Fifthly, the first defendant had been advised by C. D. Alexander Company in May, 1976, that no useful purpose could be served in advertising the 3000 acres of land for sale by public auction. Sixthly, money for private land development was almost non-existant; Seventhly, any delay could gravely jeopardise the value of the securities and increase the borrower's liability in respect of interest to the first defendant which was occurring at the rate of $20,000 per month. The first defendant through its Managing Director, swore that the only

purchaser for such a large tract of land and the hotel shares was government or one of its agencies.

In determining the market value of the Rose Hall lands the first defendant took into consideration and was influenced by the sale of Roaring River property, in the parish of Saint Ann about fifty miles from the Rose Hall Property. There 1000 acres of land was offered for sale at $2,000,000 but eventually 2000 acres were in fact sold for $ 500,000. The plaintiffs contend that the defendant misconducted them by using this irrelevant information while neglecting to pay proper regard to the valuable infrastructure at the Rose Hall property.

While not denying that they were in substantial default on their obligations to the first defendant, the plaintiffs say that on the basis of the negotiations between themselves and the Urban Development Corporation, the hotel alone was valued at $13,000,000. On this valuation, after the debts due to Bank of Nova Scotia, Toronto, and the first defendant were fully satisfied, the plaintiffs' equity would be in excess of $3,000,000. In relation to the 3000 acres of land the plaintiff say that the C.D. Alexander Company valued it for $40,000,000 in 1973, on the basis of its development potential and in October 1976 those same valuators taking current economic and financial factors into consideration appraised the land including buildings roads and water system at between $7,000,000, and $8,000,000. The plaintiffs would place the combined value of the hotel and the 3000 acres of land at between $20,000,000 to $21,000,000.

The price at which the first defendant offered the hotel for sale to the Government is $8,505,000 taking into account the amount of $6,250,000 due to Bank of Nova Scotia, Toronto. The first defendant contended that the proposed earnings of the hotel could not service a debt of more than $8.5 million but agreed that the net earnings of the hotel would represent a 23.6 percent return on capital after payment of interest but without making provision for certain capital repayments. There was disagreement between the plaintiffs and the first defendant as to whether the calculation of the "nine percent norm" return on investment was based on gross earnings or on net profits. A further contention of the first defendant is that the cash flow of the second defendant should be sufficient not only to pay interest but also to make provision for capital repayments as they fall due. When the hotel's accounts are realistically analysed, the position revealed is that its earnings are insufficient for these two purposes.

The three basic questions arising for determination were correctly summarised by Dr. Barnett to be:

(a) Is the price proposed for the hotel shares and the 3000 acres of land so low as to be evidence of fraud?

(b) Are the circumstances and manner of the sale indicative of a reckless disregard of the interests of the plaintiff?

(c) Did the first defendant place itself in a position in which its position as directors of the second defendant company conflict with its interest as mortgagees?

The plaintiffs did not set out to dispute the first defendant's right to enforce its securities by sale but rather the manner in which and the terms on which they propose and threaten to sell.

Is the price so low as to be evidence of fraud? It is well settled law that the court will restrain a mortgagee from selling where the circumstances constitute equitable fraud. In Warner v. Jacob (1882) 20 C.L.D. 220 at 224, Kay J. said:

> " The result seems to be that a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realise his debt. If he exercises it bona fide for that purpose without corruption or collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."

Crossman, J cited the above dictum with approval in Waring vs. London and Manchester Ass. Co. (1935) Ch.310. See also Haddington Island Quarry vs. Hudson (1911) A.C. 727 (P.C.)

The onus of proof that the sale price is at an undervalue rests upon the plaintiffs and it is not for the defendants to justify their acts and/or omissions. In Cuckmere Brick Co. vs. Mutual Finance Ltd. (1971) 2 W. L. R. 1207 at 1217 - Salmon L. J. said:

> " The plaintiffs whole case at the trial was that a fair price had not been obtained because of the defendant's default and negligence. The palintiffs naturally accepted that the onus was upon them to establish the default and negligence of which they complained."

Cairns, L. J. in that same case at p.1232, said:

> " Once the judge accepted the task of assessing the value he had to do the best he could on inadequate materials, but this does not mean that the figure he arrived at is necessarily sustainable. It was for the plaintiffs to prove their case."

To what extend must the plaintiff prove his case so as to establish his right to an injunction? McGregor, C. J. held in the Jamaican case of Yavers v. Standard Development Corporation and others (1961-62) 4 West Indian Reports 520 at 534; that to establish the right to an injunction the plaintiff must establish a strong or clear prima facie case, or as Cotton, L.J. put it; a probability that the plaintiffs are entitled to relief. That case concerned the Marrakesh hotel, now the Playboy, and the question was whether the defendants had the right to determine the plaintiff's lease of the hotel and to re-enter and take possession of the same and to assign the lease to another. The palintiff was contending that it had advanced more than $\$\frac{1}{4}$ million dollars to the first defendant and had offered every indulgence to the first defendant who could not complete the hotel in the stipulated time.

In deciding that the plaintiff must establish " a strong or clear prima facie case "McGregor, C.J. cited with apparent approval the dicta of Cotton, L.J. in Preston v. Luck (1884) 27 C.L. D., Atkin, L. J. in Smith v. Grigg (1924) 1 K.B. 659 and of the Lord Chancellor in Hilton v. Granville. (1841) 10 L.G. Eq.401.

The Chief Justice, however, went on to cite without comment a passage from 21 Halsbury's Laws (3rd Ed.) para. 765 on page 365; and Offendorff v Black (1850) 4 De Gex and Smale 210-211. Those authorities introduced the element of "matter for serious attention," as the alternative to the requirement of a strong prima facie case.

As explained by Lord Diplock in American Cynamid v. Ethicon Limited.(H.L. (E) 1975))2 W. L. R.316, a strict application of the "strong prima facie case" so-called rule, would mean that a court could not grant an interlocutory injunction unless it was first satisfied that if the case went to trial upon no other evidence that is before the court at the hearing of the application the plaintiff would be entitled to a permanent injunction in the same terms as the interlocutory injunction.

In my view such a test would place too great a burdon of proof upon the plaintiff at the interlocutory stage of the proceedings and I respectfully adopt the following passage from the judgment of Lord Diplock at p.323 of the report:

> " 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 nature 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 interloctory relief that is sought."

Earlier in his judgment, Lord Diplock in declaring that the so-called "strong prima facie rule" did not exist said:

> " 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."

At the end of the hearing of the application before me, I held that there is a serious question to be tried as between the first plaintiff and the first defendant as to whether the offer for sale by the first defendant of the shares in Rose Hall (H.I.) Ltd. and the 3000 acres of land the property of the first plaintiff is at such a gross under-value as in itself to be evidence of fraud.

Before turning to the factual situation which led to this ruling, it is convenient to deal with the legal principles governing the conduct of a mortgagee who exercises his powers of sale. I can do no better than quote from the judgment of Cross, L. J. in Cucknere Brick Co. v. Mutual Finance Ltd. at p.1221:

" A mortgagee exercising a power of sale is in an ambigious position. He is not a trustee of the power for the mortgagor for it was given to him for his own benefit to enable him to obtain repayment of his loan. On the other hand, he is not in the position of an absolute owner selling his own property but must undoubtedly pay some regard to the interest of the mortgagor when he comes to exercise the power.

Some are clear. On the one hand, the mortgagee, when the power has arisen can sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it. On the other hand, the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at."

A mortgagee, must not, however, fraudulently or willfully or recklessly sacrifice the interests of the mortgagor. Salmon L.J. said in this same case that:

" I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decided to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

Attorneys for both the plaintiffs and the defendants relied on the several judgments in the Cuckmere case as correctly expressing the law. The entire contest was as to the proper application of the law as laid down in that case to the set of facts in dispute in the instant case.

Using a highly speculative or one might prefer to say "highly optimistic set of assumptions provided by the plaintiffs, the C. D. Alexander Company provided a valuation of the 3000 acres of land to be $40,000,000 as at December 1973. These assumptions were inter alia:

(a) that an unencumbered freehold exists;

(b) that the main road shown on the plan and now nearing completion will be finished (including all necessary bridges, drainage and other engineering works) by July 31, 1974, also that areas now occupied by the old main road will be transferred back to Rose Hall Plantation ownership;

(c) that the highest and best use for all the land will be realised in accordance with the land use and Development Plan (with the exception of lands designed and held for agricultural purposes only);

(d) that adequate water supplies are available for full progressive development of the various areas as also an adequate public electricity supply and telephone services for hotel, commercial and residential areas;

(e) that in addition to the local real estate market an international market exists and will continue to exist throughout the programme

of over 15 years for the sale of these lands to non-residents of Jamaica and that Bank of Jamaica's approval or Ministry of Finance's approval as the case may be will be forthcoming for all such sales;

(f) that five year term financing with a minimum deposit requirement of ten percent of the purchase price will be made available to intending purchasers;

(g) that approved mortgage financing will be available for the purchasing of such blocks of land at current interest rates and usual equitable mortgage loan terms.

Rose Hall Holiday Inn was to be taken as valued at US $17,652,500.

In October, 1976, the same valuators provided an appraisal for the 3000 acres of land. In doing so they said:

> " To a large extent the qualifications and assumptions contained therein will remain the same in respect of this current opinion. We have, however, in arriving at our expression of value taken into full consideration the present depressed state of the real estate market in Jamaica as a whole and the difficulties which may be encountered by a developer (the most likely purchaser of a block of land of this size) in obtaining both long and short term finance.
>
> It is our opinion, however, that a ready market would exist for this block at the extremely low figure which we have now placed upon it as compared with our estimated value in 1973."

The current market value of the land was placed at J$ 5.4 million - J$6 million.

Buildings	J$ 300,000.00
Roads	J$ 200,000.00
Water Supply	J$ 1,500,000.00

making a total of J$ 7.4 million - J$ 8 million.

The valuators were not called in for cross-examination. The basis of the valuation could not be tested and, nor the validity of the assumptions. Mr. Brown for the defendants was of little assistance as to how the per acre value of the land was determined and he had little knowledge of the working, extent, or profitability of the water system on the Rose Hall property.

I concluded that the true market value of the land was greatly in dispute and could not possibly be determined by me on the evidence called on the application. The difference between the plaintiffs' valuation and defendants' valuation is so enormous, as in itself to give rise to a very serious question for trial. Although

I am critical of the quality of the evidence produced by the plaintiffs to the market value of the 3000 acres of land when I apply the principle that the onus of proof is on the plaintiffs to show a proposed sale at a gross undervalue, I am satisfied that the plaintiff's contention is neither vexatious nor frivolous.

With regard to the proposed sale of the hotel shares, that is somewhat more complicated. Any rapid decline in the tourist industry could see a total obliteration of the fairly valuable equity which the shares now represent. Any action by Bank of Nova Scotia, Toronto, to realise its first mortgage on the hotel and its lands, would effectively destroy the value of the shares, making them worthless. Any action by the sundry creditors of the second defendant to put the company into liquidation would be a magnetic pull to draft in the Bank of Nova Scotia Toronto and have a similar effect in rendering the shares valueless. The evidence seems indisputable that at this time there is no purchaser for the hotel except the Government and that the government's terms are that the purchase price must be tied to capability of the hotel's earnings to service its own debts.

I could find no warrant for saying that the conduct of the first defendant in excluding Mr. Rollins from the final stages of the negotiations for the sale of the hotel to Government, or its willingness to hold discussions with Holiday Inns, the lessors of the hotel, gave rise to a conflict as between the first defendant as mortgagees, on the one hand, and as directors of the second defendant company, on the other.

Mr. Rollins' relationship with Holiday Inns had dramatically deteriorated as is evidenced by the acrimonious nature of the correspondence passing between them. Control of the board of the second defendant company was with the first defendant and I accepted the reasons advanced by the first defendant as to why it thought Mr. Rollins should be dropped as leader of the negotiating team.
Complaint is made by the plaintiffs that the second defendant refused permission for the plaintiffs to bring an action against Holiday Inns in the name of the second defendant, for unlawful interference in the plaintiffs' negotiations with the Urban

Development Corporation. That refusal, taken by itself, or cumulatively with the plaintiffs other complaints is in my view no evidence of bad faith on the part of the defendants. The defendants must perforce continue to do business with Holiday Inns and it would be inimical to the defendants interests to be engaged in a lawsuit against Holiday Inns. For arriving at a valuation of the hotel shares the plaintiffs relied on the previous negotiations with the Urban Developement Corporation and the earnings of the hotel. If the norm laid down by government for its acquisition of hotels was faithfully followed, the plaintiffs say that the proposed sale price is some J$ 4.5 million below the true market value. Notwithstanding the myriad imponderables, this is a serious question, having regard to the magnitude of the money claim, for determination at the trial.

The defendants strongly defended the measures they adopted to bring about a sale of the shares and the 3000 acres of land and urged that nowhere could it be said that they have shown a disregard for the plaintiffs' interest or were acting recklessly in disposing of the plaintiffs' assets at the negotiated price. I was impressed by the admission of the Plaintiffs' counsel that the conduct of Mr. Matalon of the Urban Development Corporation throughout the various negotiations was at all times fair and prudent and non-collusive with the defendants.

The first defendant was faced with a real likelihood that unless it acted promptly, the securities which it held from the plaintiffs could either become in part valueless and in part so reduced in value that it could never recoup the mammouth sum due from the plaintiffs. So far as I view the evidence the first defendant is completely blameless in seeking to persuade the government to reconsider a proposition which it had earlier rejected. Had the offer for sale been at the original figures, one can confidently predict that it would have failed to stimulate interest on the part of the government. When the trial court resolves the questions as to the true market value of the land and the shares, the answer to the second question may be affected if the court holds that the price was so low as itself

to evidence of equitable fraud.

It is a first principle of the law relating to injunctions that the court will not grant an injunction for an actionable wrong for which damages are the proper and/or adequate remedy.

London and Blackwell Railway Co. v. Cross (1886) 31 CL. D. 369. Lord Diplock said in the Cynnamid case at p. 323:

> " As to that the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants' continuing to do what was sought to be enjoined between the times of the application and the time of the trial. If damages in the measure recoverable at common law, would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however, strong the plaintiffs' claim appeared to be at that stage."

That case concerned the alleged infringement of a patent and consequently the period between the application and trial was of utmost relevance. In the instant case if the proposed sale is perfected title would be transferred to the purchaser thereby putting it beyond the power of the mortgagor to redeem. Lord Diplock, however, underscores the principle that where by a money payment there can be full and complete reparation to the plaintiff and the defendant is in a position to pay, no interlocutory injunction will be granted.

The plaintiffs say that if their contentions as to the true market value of the land and shares are upheld, then their damages could be quantified at about $10,000,000. Further that the effect of the threatened sale would be to cause irreparable damage to the plaintiffs in that:

(a) the assets of the company will be sold at a price which is not only under its market value but which will disregard the established development potential of the land;

(b) the plaintiff companies will be converted into shells after its assets are transferred, and will eventually have to go out of business;

(c) the plaintiff companies are indebted locally to the extent of $750,000 and the proceeds of sale on the proposed terms would be insufficient to pay those debts.

Dr. Barnett summarised the position of the plaintiffs when he said that the evidence indicates that the effect of the threatened sale will be to destroy the corporate entity in which the first plaintiff is interested and the development

schemes in respect to the land. He highlighted the fact that the plaintiffs will not be able to repurchase the shares in the open market.

The attorneys for the defendants sunbitted that damages would be the only appropriate remedy and in the circumstances of this case would be adequate relief for the reasons that:

(a) the plaintiffs always intended to sell the assets to repay the loan;

(b) there was no prospect for sale of either the shares of the land to anyone other than the government;

(c) the first defendant and any of its other creditors can liquidate the plaintiff companies at any time which liquidation would be to the detriment of the first defendant.

The evidence before me discloses that at all material times the plaintiffs were endeavouring to sell and unconditionally dispose of all the land comprised in the 3000 acres parcel mortgaged to the first defendant. The Loan Agreement provided for the first defendant to accept in part repayment of the loan assignments of completed contracts of sale for portions of the land. When the plaintiffs found it inpossible to consumate any of their numerous attenpts to sell portions of the land, the plaintiffs turned their thoughts to an outright sale of the hotel. The principal and over-riding reason for the sale of the hotel was to repay the first defendant.

In the matters at issue between the plaintiffs and the defendants I am clearly of the view that damages would be an adequate remedy.

The evidence is that the first defendant's assets in Jamaica total approximately J$10,000,000. Its revenue deficit of $23,400 in 1975 was due mainly to the fact that it was not receiving interest at the rate of $20,000 per month from the plaintiffs on due dates. Quite apart from its own investment the first defendant acts as agent for its New York parent company in respect of that bank's direct investments in Jamaica. The first defendant stated that it proposes to continue in business in Jamaica. In the circumstances I am of the view that the first defendant is in a position to pay whatever damages might be awarded to the plaintiffs in this action.

It is unnecessary for me to consider the balance of convenience or as to whether the plaintiffs should be ordered to pay into court the anount of the debt as a condition to the grant of the injunction.

For these reasons I dismissed the application of the plaintiffs for the interlocutory injunction.