JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No.57/86

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

BETWEEN - SSI (CAYMAN) LIMITED
DR. STEVE LAUFER
FSI FINANCIAL SERVICES U.S. INC. - DEFENDANTS/APPELLANTS

AND - INTERNATIONAL MARBELLA CLUB S.A. - PLAINTIFF/RESPONDENT (CROSS-APPELLANT)

Emile George, Q.C., and Dennis Morrison instructed by Clinton Hart & Co. for Defendants/Appellants.

David Muirhead, Q.C., Hugh Small, Q.C., and Mrs. Hudson-Phillips instructed by Myers Fletcher and Gordon, Manton and Hart for Plaintiff/Respondent.

January 19-21 & February 6, 1987

ROWE, P.:

The trial of suit C.L. 1033/86 came on for hearing before Harrison J. in the Supreme Court on November 7, 1986, and on November 29, 1986, the trial judge upon the invitation of counsel for the defendants made an order for the preservation of certain property referred to as the Dragon Bay property. The occasion for the making of an order arose upon the intimation to the court by counsel for the plaintiff that the plaintiff felt free to exercise whatever power it possessed

under the mortgage and security documents with reference to the Dragon Bay property.

Before us there were no notes of what was said in court nor were affidavits filed in that regard. In argument we were told that defence counsel's invitation to the court was on the basis that the court had the inherent power to preserve property the subject-matter of the litigation once the trial had commenced and that it was unnecessary for the defendants to apply for or to obtain an injunction from the court. Harrison J. had in mind sections 459 and 461 of the Civil Procedure Code of Jamaica and he made the order which is appealed from in these terms:

> "(i) The Plaintiff shall refrain from exercising any power of sale or other disposition of the Dragon Bay property on condition that:
>
> (a) The sum of U.S. $23,000 per month be paid by the Defendants to the Plaintiffs as from the 1st December, 1986, and thereafter on the first day of each succeeding month or such amount as the parties mutually agree for the maintenance of the Dragon Bay property;
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> (b) the parties shall on the first working day of each month beginning from the second day of January, 1987, take an account of the costs of maintenance for the said property for the previous month in order to ascertain the amounts due and payable for the said property. Any difference occurring shall be off-set or added to the payment for the next succeeding month PROVIDED that the payment for the month of December, 1986 shall be made on the 8th day of December, 1986;
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> (c) there shall be liberty to apply;
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> (d) the costs of the application to be Plaintiff's costs for two Queen's Counsel awarded;
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> (e) leave to appeal to the Court of Appeal be granted;
>
> (f) there shall be no stay of execution pending the appeal."

Nobody was satisfied with this order, and both parties appealed. In the appeal by the defendants they indignantly claimed that conditions (a) and (b) which related to the payment by the defendants to the plaintiff of U.S. $23,000 per month, or such other sum as is actually paid, for maintenance, should be removed and prayed that the restraint upon the exercise of any power of sale or other dispositions of the Dragon Bay property should be unconditional. The cross-appeal was direct. It asked that the entire order be set aside, or alternatively that the condition to be imposed ought to be the payment into court, or otherwise the provision of security, for the amount in dispute in the statement of claim.

The pleadings are very full. They began with a statement of claim of a modest 12 paragraphs. This was met by a defence and counter-claim which ran to 8 pages and 24 paragraphs. The plaintiff came back with an amended reply and defence to counter-claim of 12 pages and 39 paragraphs. A rejoinder was filed. Further and better particulars on both sides ran to another 23 pages.

In its first thrust the plaintiff claimed the sum of U.S. $5,850,984.58 as moneys advanced to the defendants under various headings, interest thereon and in particular -

> "Sale of the said lands after all necessary directions, enquiries and orders."

Paragraph 14 of the defence recited that:

> "On the 28th February, 1985 the Plaintiff called in the loan which it estimated at $4,713,596.26 U.S. plus interest, and on the 6th March, 1985, the Plaintiff unilaterally appointed a receiver for Dragon Bay with a view to enforcing the provisions of the aforesaid Debenture given by the First Defendant."

During the course of arguments before us there was no denial of the loan or of its current magnitude. Paragraph 11 of the defence had admitted the principal sum loaned as $3.2 million dollars and had set out, inter alia, the interest terms. What the defendants contend in their defence and counter-claim is that they were induced by the fraudulent misrepresentations of the plaintiff, which the defendants believed to be true, to enter into a series of inter-connected and inter-dependent agreements with the plaintiff dated March 30, 1983, namely:

> "A Loan Agreement, a Management Agreement, an Option Agreement, a Guarantee and a Debenture."

The defendants charged the plaintiff with gross mis-management of the hotel, and in their counter-claim alleged fraudulent mis-representation and negligence and claimed relief as under:

> "(a) A declaration that all the Agreements hereinbefore referred to, namely the Loan Agreement, the Management Agreement, the Option Agreement, the Guarantee and the Debenture are void and unenforceable by reason of the Plaintiff's fraudulent misrepresentation.
>
> (b) Recision of the said Agreements on the ground of fraud.
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> (c) Alternatively, a Declaration that the Loan Agreement is unenforceable by reasons of its failure to satisfy the requirements of section 8 of the Moneylending Act.
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> (d) Cancellation and delivery-up of the Debenture and Guarantee.
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> (e) An account from the Plaintiff to determine the finances of the entire Dragon Bay Hotel during the period of its management.
>
> (f) An injunction to restrain the Plaintiff from exercising or attempting to exercise any powers of sale or foreclosure that it may have under the Debenture or from calling in the Loan Agreement.

"(g) An injunction to restrain the Plaintiff from continuing to manage the Dragon Bay Hotel under the Management Agreement or at all.

(h) An order for the delivery-up of possession of the said Dragon Bay Hotel to the First Defendant.

(i) In the alternative damages for breach of contract, alternatively, for negligence.

(j) Such orders for the preservation and/or management of the said hotel as the Court may deem fit.

(k) Such enquiries, accounts or other orders as the Court may deem just."

Further research proved that the provisions of the Moneylending Act had in fact been complied with and therefore the claim at (c) above was abandoned.

The process of seeking an injunction to restrain the plaintiff from exercising or attempting to exercise any powers of sale or foreclosure or from calling in the loan was halted after three days of hearing but the status quo was preserved by a consensual agreement, not involving a formal undertaking, between the attorneys for the parties. This agreement lapsed on November 3, 1986 and was not renewed. Harrison J. purported to act under sections 459 and 461 of the Civil Procedure Code to grant a preservation order such as was sought in claim (j) of the counter-claim. It does not appear to me that either of these sections actually deal with real property or with interests in land. Their designs seems to cover physical moveables and Mr. George did not seek to fortify his arguments on the basis of those sections of the Code. This is not to say that Harrison J. had no power to grant a preservation order in a case of this nature as under the provisions of section 48 (g) of the Judicature (Supreme Court) Act, the court has a wide power to grant conditionally or unconditionally all such remedies as the parties appear to be entitled to.

Before us Mr. George submitted that on the basis of the Management Agreement which was still in force, and upon the conduct of the plaintiff in refusing to let the defendants into possession of the property or to permit the defendants to lease the property to third persons, the conditions attached to the preservation order were unfair and unreasonable. A term of the Management Agreement is that if the plaintiff as manager should expend any sums of money on the maintenance of the hotel, such sums could be added to and to become part of the loan made by the plaintiff to the defendants. So, said Mr. George, if the plaintiff wishes to remain in possession of the Dragon Bay property, he has a duty to maintain it out of his own pocket. He argued further that the plaintiff had sought an order from the court for the sale of the property and it would be incongruous and indeed a contempt of court for the plaintiff to have resort to self-help under the contract documents when the court is fully seized of the matter and actually in the process of trying the issues. This argument led Mr. Muirhead to intimate to the court that the plaintiff was no longer seeking from the court the remedy of the sale of the land. After some discussion the Court ruled that the abandonment of a claim or the amendment of the pleadings was a matter for the trial court and in any event the claim for the preservation order did not arise simply as a consequence of the statement of claim but could properly rest upon the claim of the defendants in the counter-claim.

However, the main contention of the defence was that their claim was based on the fraudulent mis-representation of the plaintiff which would entitle them to the remedy of rescission. If then, the argument ran, the court permitted the Dragon Bay property to be sold, and at the end of the day it was found that the contracts and the securities were invalid,

as being void ab initio, the court would have precluded itself from giving the remedy of rescission and would thereby be acting in vain, something which a Court of Equity would not do.

To all these submissions, Mr. Muirhead made a direct reply. He said that the rights which the plaintiff has under the Management Agreement are quite distinct and separate from those which it possesses as mortgagee and the managerial rights do not in any way detract from the rights of the mortgagee. He referred the court to several passages from the 4th Edition of Halsbury's Laws of England, Vol. 31, commencing at paragraph 1082, and submitted that in the instant case the contract and the security documents were prima facie valid and will continue in that state of validity until a court, if that day ever comes, declare them to be void. Said he, the law on the matter is all one way. If the defendants/appellants wish the remedy of rescission they must restore the status quo, which means, they must pay into court the amount which was lent by the plaintiff and the accrued interest. If on the other hand, they wish to affirm the contract and to claim damages, there would be no basis on which they could apply to the court for an injunction or a preservation order. In my view, the statement of the law in Halsbury's Laws, 4th Edition, at paragraphs 1082 to 1088, paragraphs 1114 and 1115, support Mr. Muirhead's submissions.

What are the special and peculiar rights which a mortgagee may exercise over the secured property? For this one must look at the mortgage instrument and in the instant case the power of sale is conferred upon the mortgagee in the event of certain defaults, all of which have occurred. It was submitted on behalf of the plaintiff/cross-appellant, that the only basis upon which a mortgagee may be restrained

from exercising his power of sale is upon payment of the sum claimed by the mortgagee into court. For this proposition Mr. Muirhead relied on extracts from Halsbury's Laws of England, 4th Edition, Vol. 7, at paragraph 877 and Vol. 32 at paragraphs 724 and 725, as also on a passage from Fisher and Lightwood on Mortgages, 3rd Edition at page 310. A typical statement of the law is taken from Fisher and Lightwood:

> "The mortgagee will not be restrained from exercising his powers of sale because the mortgagor has commenced a redemption action (f), or because he objects to the arrangements for the sale (g), or because the amount due is in dispute (h). But he will be restrained if, before there is a contract for the sale of the mortgaged property (i), the mortgagor pays into court the amount claimed to be due (k); that is, the amount which the mortgagee swears to be due to him for principal, interest and costs (l), unless on the face of the mortgage, the claim is excessive (m), or where notice is required, if due notice has not been given (n), unless, as is the case under statutory power (o), the mortgage provides that the only remedy in case of irregularity shall be damages (p)."

I will briefly refer to four cases which were cited and relied upon by Mr. Muirhead. Gill v. Newton [1866] Weekly Reporter Vol. 14 p. 90 concerned the construction of documents referred to by Knight Bruce L.J., as of -

> "very peculiar character ..... the validity and consequences of which deserve great consideration and are open to much argument"

and the court held that it being unclear whether a proper notice for the exercise of the power of sale had been given, an injunction should issue. Turner L.J. in concurring that the injunction should issue, indicated that he too was affected by the peculiar circumstances of that case and that he was acting against the general rule. He said:

> "With great respect to the Master of the Rolls, I also think that the injunction is due. In saying this I wish it to be clearly understood that I do not at all proceed upon the ground that the amount due upon the mortgage is in dispute. If that were so, a mortgagor would have but to raise a dispute about the sum due, in order to deprive his mortgagee of his remedies under the mortgage deed."

Mr. Muirhead submitted that this attitude of Turner L.J. is apposite to the present case and that a mortgagee should not be deprived of his remedies by defendants even though they allege fraudulent mis-representation.

Inglis and Another v. Commonwealth Trading Bank of Australia [1971-72] Vol. 126, C.L.R. 161 was decided by the High Court of Australia. The plaintiff sought damages for breaches of contract, defamation, fraud and conspiracy in connection with certain real property and presented arguments to the effect that if the plaintiffs' claim was found to exceed the amount due to the defendants, the plaintiffs would be in a position to say that they held the property free from the mortgage. Walsh J. at trial rejected this argument and refused the injunction. He said at pp.164-165 of the Report:

> "In my opinion, the authorities which I have been able to examine establish that for the purpose of the application of the general rule to which I have referred, nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. If the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due.

> "The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of those claims had been completed."

In dismissing the appeal from the decision of Walsh J. the Chief Justice, Barwick C.J. said:

> "The case falls fairly, in my opinion, within the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into court the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage."

With this opinion Menzies and Gibbs JJ. agreed.

I think, in agreement with Mr. Muirhead, that this case is in all respects similar to the instant case and I would adopt the reasoning of Walsh J.

In Samuel Keller (Holdings) Ltd. and Another v. Martins Bank Ltd. and Another [1970] 3 All E.R. 950 the Court of Appeal affirmed the decision of Megarry J. at first instance that a third mortgagee was entitled to the remainder of the proceeds of sale after the first and second mortgages had been satisfied notwithstanding a claim by the mortgagor to be entitled to unliquidated damages from the third mortgagee. In affirming the decision the Court of Appeal approved the reasoning of Megarry J. when he said:

> "Unless and until the mortgage in this case is discharged in the appropriate way on actual payment and acceptance of the sum due, I think that the mortgage remains a mortgage, and that the mortgagee is entitled to any surplus proceeds of sale in the hands of the bank up to the amount properly due under the mortgage. A doctrine

> "of the discharge of a mortgage debt by the existence of unilateral appropriation of an unliquidated claim is one to which I gave no countenance; I regard it as neither convenient nor just. Even where there is a claim which is both liquidated and admitted, and it exceeds the mortgage debt in amount, it may be to the interest of one party or the other, or both, that the mortgage and the mortgage debt should continue in existence. The rate of interest may be attractively high or seductively low; there may be fiscal advantages in keeping the mortgage alive; there may be new projects to be financed which make liquid cash preferable to the satisfaction of mortgage debts; and so on. Nor have I heard any reason why it should be the mortgagor who is to have a unilateral power to discharge the mortgage debt by appropriation without payment."

This passage from Megarry J. was also quoted with approval by Walsh J. in Inglis and Another v. Commonwealth Trading Bank of Australia, supra.

A solicitor, without affording his client independent advice, bought up certain of her securities, partly to save the client from embarrassment and partly to secure his legal fees. The solicitor refused to give information to another solicitor, then acting for the client, concerning the securities, unless what was due to him was guaranteed and he threatened to proceed to a sale of the securities. On an action against the solicitor on the ground of fraud and undue influence an injunction was granted to restrain him because of the peculiar relationship which existed between the solicitor and client but the court even in those circumstances imposed terms. In doing justice to the claim by the solicitor of actually having made payments out of his own pocket to obtain the securities, the court ordered that he be secured to that extent. See Macleod v. Jones [1883] Ch. 289.

Mr. George courageously argued that the defendants/appellants have a substantial claim against the plaintiff/respondent for the fraud which it practised upon them that the cases relied on by Mr. Muirhead were not in effect based upon fraud and therefore they ought to be ignored by the court. As I said earlier, one look at the case of Inglis, supra, shows that the issues there are identical with those in the instant case and the allegation of fraud did not deter the court from refusing to make a restraining order.

There is the allegation that the defendants expended some U.S. $3 million on the Dragon Bay property and that if for no other reason they have a substantial equity in that property. That led me to conclude that if Harrison J. had had before him the authorities cited by Mr. Muirhead to this court and if he had been minded to give a conditional restraint, he would have imposed the only restraint permissible in law in these circumstances and that would have been the payment into court of the sum claimed by the mortgagee which was calculated to be U.S. $6,338,566.00. I, therefore, concurred in the order of Harrison J. by substituting for his conditions (a) and (b) the condition that the defendants/appellants do pay the sum of $6,338,566 into Court on or before 31st January, 1987.

It is ordered that the costs of the appeal should be the plaintiff/respondent's to be agreed or taxed.

CAREY, J.A.:

This appeal brings into question the validity of certain conditions imposed in an order of Harrison, J., in the course of the trial of this action on 29th November, 1984 when he was persuaded by the appellants' counsel to make an order to restrain the respondent from exercising his power of sale conferred by a mortgage in respect of the world famous, Dragon Bay Hotel in Portland, owned by the 1st appellants. We understood that the threat of such a course of action had been made on behalf of the respondent by its counsel. The order as stated in the Notice of Appeal, reads:

> "(1) The Plaintiff shall refrain from exercising any power of sale or other disposition of the Dragon Bay property on condition that:
>
> (a) the sum of U.S.$23,000 per month be paid by the Defendants to the Plaintiff as from the 1st December, 1986, and thereafter on the first day of each succeeding month or such amount as the parties mutually agree for the maintenance of the Dragon Bay property.
>
> (b) the parties shall on the first working day of each month beginning from the second day of January, 1987, take an account of the costs of maintenance for the said property for the previous month in order to ascertain the amounts due and payable for the said property. Any difference occurring shall be offset or added to the payment for the next succeeding month PROVIDED that the payment for the month of December, 1986 shall be made on the 8th day of December, 1986."

The respondent who cross-appealed sought (a) that the order be set aside (b) alternatively the Defendants/ Appellants or one or more of them do pay into Court or otherwise secure the amount in dispute in the statement of claim.

There is no question but that the Court has an undoubted power to restrain a mortgagee from exercising his powers of sale, but if it is so orders, the term invariably imposed is that the amount claimed must be brought into Court. The idea of the mortgagee paying sums to maintain his property while the restraining order is effective, is altogether novel, and in my judgment, has no warrant in point of law. The clearest statement of the law is to be seen in MacLeod v. Jones [1884] 24 Ch.D 289 at page 299 where Cotton, L.J., in an application to restrain a mortgagee from exercising his power of sale said this:

> "Now under ordinary circumstances the Court never interferes unless there is something very strong; it does not interfere on any suggested case without requiring the Plaintiff applying to pay into Court not what the Judge of the Court on hearing the evidence is satisfied will probably be the amount due, but what the mortgagee, the accounts not having been yet taken, swears is due to him on his security. And that is perfectly right, because we ought not to prevent mortgagees from exercising the powers given to them by their security without seeing that they are perfectly safe."

Bowen, L.J., was to the same effect at page 302:

> "Now if it was an ordinary case as between mortgagor and mortgagee, the relief which the Appellant asks would not in the ordinary course be granted, except on the terms of bringing into Court such sums as the mortgagee swore were due to him under his mortgage."

Another case to which reference might be made is Inglis & anor. v. Commonwealth Trading Bank of Australia 126 C.L.R. 161 where Barwick, C.J., tersely observed at page 169:

> "Failing payment into Court of the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage."

The learned Chief Justice was approving a decision of Walsh, J., in the Court below refusing an application to restrain a mortgagee from exercising his power of sale. None of the judges who have spoken on the matter have given any ground for supposing that any condition other than the payment in of the mortgage debt or that claimed where there is a dispute, can possibly be imposed. A mortgage debt can only be extinguished by actual payment. Megarry, J., (as he then was) in Samuel Keller Ltd. v. Martins Bank Ltd. [1970] 3 All E.R. 950 observed at page 953:

> "Unless and until the mortgage in this case is discharged in the appropriate way on actual payment and acceptance of the sum due, I think that the mortgage remains a mortgage, and that the mortgagee is entitled to any surplus proceeds of sale in the hands of the bank up to the amount properly due under the mortgage. A doctrine of the discharge of a mortgage debt by the existence of unilateral appropriation of an unliquidated claim is one to which I gave no countenance; I regard it as neither convenient nor just. Even where there is a claim which is both liquidated and admitted, and it exceeds the mortgage debt in amount, it may be to the interest of one party or the other, or both, that the mortgage and the mortgage debt should continue in existence."

The rule is therefore well settled and indeed, despite Mr. George's valid efforts, nothing has been said, which in any way permits a Court of Equity to order restraint without providing an equivalent safeguard, which is, the payment into Court of the amount due or claimed in dispute. It is plain that the learned judge fell into error when he imposed conditions (a) and (b) which were recited earlier in this judgment.

There are two other matters to which I must refer. The first relates to the cross-appeal in which it was argued that the order should not have been made, but in any event, the conditions imposed, amounted to wrong exercise of the judge's discretion. Accordingly, the respondent in his prayer, desired either the setting aside of the entire order or in the alternative, the removal of the conditions (a) and (b) and the substitution in, of payment of the amount claimed. For my part, I would have been inclined to quash the order but that would have resulted from my understanding of what the appellants' counsel had stated in the Court below after the order had been made by Harrison, J., viz., that his clients could not pay the monthly amount of $23,000. That would not be a proper basis for interfering with the substantive order, viz., ordering that the respondent be restrained from exercising their rights under the mortgage. I cannot say that in making that restraining order the judge was plainly wrong. Having regard to the complex nature of the case before him, it could be said this was not an ordinary case between mortgagor and mortgagee.

The second comment I wish to make, is in reference to the procedure adopted below in obtaining the order. Although the hearing of an application for injunction had begun, in the event, it was not completed nor renewed before the trial judge. Instead, having regard to some statement made by counsel leading for the respondent, in the course of the trial the appellants' counsel prevailed upon the Court to act, as I understood it, "on its own motion." No affidavits were placed before the judge nor

was the order sought drafted and submitted to him, no notice was served on the other side.

We were told that the judge purported to act under Section 459 Civil Procedure Code, but that provision, it is plain, is not relevant to this situation, it is concerned with chattels. Neither counsel who argued before us thought it apt. It reads -

> "459. When by any contract a prima facie case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured."

This concatenation of irregularities strikingly demonstrates the danger of departing from the rules. It leads invariably to confusion, to wasted time, effort and costs, all factors which should be sufficient, I would hope, to discourage a recurrence.

Finally, there was some suggestion on the part of Mr. George that the judge had an inherent power to preserve property even if he purported to rely on Section 459. It is not necessary in the circumstances of this case to consider this point, for what the appellants sought, was an order in restraint of the respondent's power of sale, the terms of which, as appears, are well settled.

It was for these reasons that I concurred with my Lords in affirming the order of restraint but varying the terms of the condition imposed by Harrison, J., in the Court below.

DOWNER J.A. (AG.)

THE ISSUES

The principal issue of law to be decided in this case is whether Harrison J. was correct in restraining the plaintiff International Marbella Club S.A. from exercising a power of sale pursuant to a mortgage where the defendants have alleged fraudulent misrepresentation in a Counter-Claim. A trial has commenced to resolve that and other issues and this is an unusual feature in this case. The order which was in substance an interim injunction had conditions attached to it and it is helpful to set it out so that the restraint and the conditions attached can be examined, to ascertain their full force and effect. The relevant part of the order reads:

> "That the Plaintiff do refrain from exercising any power of sale or other disposition of the Dragon Bay property on condition that the First Defendant pays the amount of U.S. $23,000.00 per month to the Plaintiff or its Attorneys-at-law, Myers, Fletcher & Gordon, Manton & Hart, for maintenance of the said property as from the 1st day of December, 1986 and thereafter on the 1st day of each succeeding month, or such amount as the parties mutually agree to be required for the maintenance of the said property, provided however that payment for the month of December, 1986 shall be made on the 8th day of December 1986;
>
> 2. On the first working day of each month, beginning from the 2nd day of January 1987 the parties shall take account of the maintenance cost of the previous month in order to ascertain the amount due and payable for the maintenance of the said property. Any difference occurring should be offset from or added to the payment for the next succeeding month, as the case may be."

The defendants Dr. Steve Laufer and his two companies sought and welcomed the restraint but have challenged the conditions imposed, while the plaintiff by way of cross-appeal has attacked the order in its entirety and in the alternative has contended that if the order is allowed to stand the conditions

are to be varied so as to make them conform to the settled law on these matters.

To appreciate the significance of the issues it is necessary to advert briefly to the course of the trial and the circumstances which gave rise to the order. By a loan agreement Dr. Laufer and his two companies borrowed $3,200,000.00 for two years from the Plaintiff, International Marbella Club S.A. a company incorporated in Linchtenstein. The security was a personal guarantee by Dr. Laufer, the well known Dragon Bay Hotel in the parish of Portland and there is a mortgage deed and debenture whose terms are of great importance. There is also a Management Agreement whereby the plaintiff was to manage the hotel on behalf of the defendants. In accordance with the terms of these agreements the plaintiff made a demand for repayment of the debt owed together with the interest which amounts to $6,338,566 and on 13th March, 1986 filed a Statement of Claim in the Supreme Court to which the defendants have replied by way of defence and counter-claim. They admitted that the loan was made but alleged that they were induced to enter the agreements by fraudulent misrepresentations. They have sought a number of reliefs and among them are recission of the contract, or in the alternative damages.

THE INTEREST OF THE PARTIES AND HOW THEY SOUGHT TO PROTECT THEM

For Dr. Laufer and his companies it is vital that Dragon Bay be not disposed of until the complex issues in the case have been determined by the Court. To the plaintiff, International Marbella Club S.A., what is important for them is to realise their security with promptitude so that they can recoup their principal and interest. It is because of these conflicting claims and the amount involved that the issues were contested with tenacity and skill on both sides. The defendants sought an Interlocutory injunction before Patterson J. but after three days hearing the submissions were incomplete and the case was

adjourned sine die. The parties agreed that the status quo would be maintained and an early trial date was ordered for 3rd November, 1986. On that day Harrison J. who was assigned to preside over the trial was engaged in another trial and the matter was set for 7th November, 1986. It is important to reiterate that the defendant sought an interlocutory injunction as this is the classic remedy in such circumstances, even if it is labelled a restraining order. Moreover, part of the appropriateness of this equitable remedy is that it is frequently given on terms so as to accord in a case such as this with the maxim that he who comes to equity must do equity.

The matter which caused great discomfiture to the defendants during the course of the trial was that counsel for the plaintiff announced that the agreement not to disturb the status quo was at an end and that they then considered themselves free in those circumstances to exercise such rights as they possessed under their security agreements. It was then that Mr. George for the defendants sought an order from the court to prohibit the plaintiffs from disposing of the property as such action would gravely prejudice the defendants. It does not appear that much assistance was given by counsel on how to provide this relief and the judge by his own research made the order pursuant to Sections 459 and 461 of the Civil Procedure Code. These sections read as follows:

> "459. When by any contract a prima facie case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.

> "461. It shall be lawful for the Court or a Judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation or inspection, of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid, to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all and any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

When section 459 is examined it does not appear to be dealing with realty the subject of this dispute. It seems to be dealing with chattels which it is desired to be preserved or for which an interim custody order can be made or in the case of money can be lodged into Court. Section 461 also envisages detention, preservation or inspection of chattels and authorises the servants or agents of the court to enter land or buildings for the purposes outlined previously and to take samples, make observations, and conduct experiments so as to obtain information or evidence. However, if Harrison J. had the power to award injunctive relief the fact that he relied on the wrong statutory provision would not be enough to vitiate the order. As was adverted to earlier the defendants were dissatisfied with the conditions imposed and they have appealed to this Court to set aside the conditions attached to the order, while the plaintiff sought by way of cross-appeal to have the restraint on sale of the property removed or in the alternative pleaded that if the restraint were to stand, then the conditions ought to conform to law. In further protection of their interests the defendants sought and secured a stay of execution in the Court of Appeal in respect of the conditions.

ON APPEAL

A prominent prayer in the Statement of Claim of the plaintiff was for a sale of the lands after all necessary directions, enquiries and orders, and Mr. George for the defendants contended that as this was one of the reliefs sought it would be inequitable to permit the plaintiff to dispose of the Dragon Bay Hotel when that was an issue to be determined. There must be some power in the Court he added to restrain the proposed sale and the conditions imposed could have the effect of pre-judging the issues. He felt that the power to impose a restraint on sale must be part of the inherent power of a court and that such a power should be exercised when there was an averment of fraud as in this case. The power to award an injunction is to be found in section 49 (h) of the Judicature (Supreme Court) Act and the relevant part reads as follows:

> "(h) A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks fit, ..."

The question for the court below was whether the circumstances warranted interim injunctive relief and whether the order should be made unconditional or upon terms and conditions. It should be noted that through no fault of the defendants that the hearing for an interlocutory injunction was adjourned sine die. The next matter to be considered is whether the circumstances were such that the judge should have considered and granted the order to restrain the sale of Dragon Bay. That the legislature contemplated an application such as this being made during the course of the trial is evidenced by the provision of 48 (g) of the Judicature (Supreme Court) Act which states that:

> "48 (g) The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided."

The pertinent question to ask therefore was whether there was material before Harrison J. which enabled him to exercise his discretion to make the restraining order. There were the elaborate defence and counter-claim admitting the agreement for the loan and reference to the debenture and mortgage. Of importance to the defendants were the allegations to the fraudulent misrepresentation which they averred induced them to enter the agreements. These circumstances were enough to enable Harrison J. to consider the law applicable to the issue of an injunction in such circumstances.

The principal authority on which Mr. Muirhead for the plaintiff relied to secure the type of order he cross-appealed for was McLeod v. Jones (1883) 24 Ch. 289. The headnote summarises the principle of law involved and with the necessary modifications he contended that the principle governed the circumstances of this case. The headnote states that:

> "The ordinary rule that the Court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due for principal, interest and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the Court

> "will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee. The Plaintiff was a lady who was entitled to a life interest in lease-hold property which she had mortgaged to various persons. The Defendant acted as her solicitor, and with her sanction in order to release her from embarrassment bought up several of the incumbrances with his own money and took a transfer of them to himself; having previously taken a mortgage of the life interest to secure his past costs and the costs which he might incur in paying off the incumbrances. Afterwards the Plaintiff discharged the Defendant, and employed another solicitor, who applied to the Defendant for information respecting the securities transferred. The Defendant refused to give this information unless the payment of what was due to him was guaranteed, and threatened to proceed to a sale of the property. The plaintiff then brought an action to impeach the securities and to restrain the sale of the property, and moved for an injunction till the hearing.
> Held, that considering all the circumstances, an injunction ought to be granted, on the Plaintiff paying into Court such a sum as the Court considered would cover the amount actually advanced by the Defendant, and amending the writ so as to make it a simple action for redemption and injunction."

The significant aspect to note is that there was a claim by the plaintiff against the defendant that the mortgage in issue be declared void on the ground of constructive fraud as there was a solicitor client relationship when the mortgage was made. One of the prayers in the instant case is for the agreement entered into to be declared void on the ground of fraudulent misrepresentation and the relief sought is rescission of the agreement. The important aspect of the law is that where there is an allegation of fraud equity tends to qualify the right of the martgagee to enforce his remedy of sale but the terms and conditions which are imposed is that the mortgagor pays the amount claimed or such other amount as the Court considers

just into court. It was contended that such an order favours the Goliaths of this world but as Turner L.J. puts it in Gill v. Newton (1866) 14 W.R. 191 the party who has entered into such contract cannot complain of its consequences. This is particularly so when the consequencies are implied by statute see Sections 105 and 106 of the Registration of Titles Act and Sections 22 and 23 of the Conveyancing Act which gives the mortgagee the power of sale apart from any term in the deed.

Mr. Muirhead cited two other useful cases namely Samuel Keller (Holdings) Ltd and Another v. Martins Bank Ltd & Another (1970) 3 All E.R. 950 and Inglis and Another v. Commonwealth Trading Bank of Australia (1971-72) 126 C.L.R. 161. As to the first of these cases Russell L.J. at 952 (h) summarises counsel for the mortgagor as contending as follows:

> "Put as a matter of equity in terms of fairness it was explicitly, or implicitly perhaps argued that when the mortgage was part of the purchase price which would not have been paid at all had the matters of complaints (if established) been known at the time of the contract some checks should be put on the full exercise of the mortgagee's rights until the issue is determined."

The contention was similar to that made on behalf of Dr. Laufer and his co-defendants that because of the allegation of fraud some restraint should be put on the plaintiff's power of sale. Russell L.J. at 953 (a) and (b) answered the contention thus:

> "However speaking for myself it seems clear to me where the parties use a system of payment under a contract which involves in fact notional payment in full and a lending on mortgage of a sum, it could lead to abuse if the mortgagee was to be kept out his undoubted rights, expressly provided for, by allegations of some connected cross-claim which might prove without foundation."

I find that these principles are applicable to the instant case for if they were not, where there is an allegation for fraud by the mortgagor, then the mortgagee would be deprived of his rights under the mortgage if a restraint is imposed without the appropriate conditions attached.

As for the case Inglis & Another the facts were that there was a claim for damages for fraud and conspiracy and an interlocutory injunction was sought to prohibit dealing with the property in issue which was mortgaged to the bank. Samuel Keller (Holdings) Ltd was expressly followed and the prayer for an injunction to issue without conditions until the issues were finally determined was refused. There are two passages from the judgment of Walsh J. which it is appropraite to quote as they are applicable to the facts of this case. At page 164 he said:

> "If the debt has not been actually paid, the court will not at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except on terms that an equivalent safeguard is provided to him by means of the plaintiff bringing in an amount sufficient to what is claimed by the mortgagee to be due.
>
> The benefit of having a security for a debt would be greatly diminished if the fact that a debtor has raised claims for damages against the mortgagee were allowed to prevent any enforcement of the security until after the litigation of these claim had been completed."

The other passage recognized that between the competing claims of the owner and that of the mortgagee the mortgagee must have priority. At page 166 Walsh J. said:

> "But the proprietary rights as owners which the plaintiffs have are rights which are subject to and qualified by the rights over the property given to the defendant by the mortgagee. If the defendant exercises the latter rights or threatens to do so that is not, as such an act or threatened act in contravention or infringement of the plaintiffs propeietary rights."

CONCLUSION

What then is the duty of this court as regards an interlocutory injunction where the offending conditions were not in accordance with settled law and prejudicial to the mortgagee. In Gordon Cottage Foods v. Milk Marketing Board (1983) 2 All E.R. 770 at 772 Lord Diplock said:

> "The function of an appellate court is initially that of review only. It is entitled to exercise an original discretion of its own only when it has come to the conclusion that the judges exercise of his discretion was based on some misunderstanding of the law. ....."

On review therefore I find that the restraining order was permitted, but that the conditions imposed did not follow the precedents of compelling the defendant to pay the amount claimed into court. Such a condition is essential to be just to the mortgagee. It was in those circumstances that in the exercise of its discretion, this court imposed the condition that the amount of $6,338,556.00 be paid into court on or before January 31, 1987 if the restraint sought by the defendant is to be continued until all the issues are determined. The appeal was therefore dismissed and the cross-appeal was allowed.