[2014] JMCA Civ 50

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 91/2012

BEFORE: **THE HON MR JUSTICE PANTON P**
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

BETWEEN	**TPL LIMITED**	**APPELLANT**
AND	**THERMO-PLASTICS (JAMAICA) LIMITED**	**RESPONDENT**

Charles Piper and Wayne Piper instructed by Charles E Piper and Associates for the appellant.

Kayode Smith instructed by G Anthony Levy of G Anthony Levy & Co for the respondent.

20 June and 19 December 2014

PANTON P

[1] I agree with the order made on 20 June 2014 in this matter because, having considered the evidence, I formed the view that there were no serious issues to be tried. There is nothing that I wish to add to the reasons that have been written by my learned colleague Mangatal JA (Ag).

Dukharan JA

[2] I agree with the reasoning and conclusion of Mangatal JA (Ag) and there is nothing that I can add.

Mangatal JA (Ag)

[3] We heard submissions in respect of this appeal on 20 June 2014 and at that time gave our decision as follows:

(a) Appeal allowed.

(b) Order of Mr Justice McIntosh dated 11 June 2012 is set aside.

(c) Costs of the appeal and the appellant's costs in the claim below to the appellant to be agreed or taxed.

We at that time promised to give our written reasons as early as possible. These are my reasons for concurring in the decision of the court.

[4] On 11 June 2012 McIntosh J granted an interlocutory injunction in favour of the respondent against the appellant, the 2nd Defendant. He ordered the following:

> "a) Upon the [respondent] giving the usual undertaking as to damages, the Court grants an interlocutory injunction restraining the [appellant] whether by itself or its Directors, Officers, servants or agents howsoever from dealing with or disposing of the lands comprised in Certificate of Title registered at Volume 1178 Folio 870 of the Register Book of Titles until further order of the Court or the determination of this action.
>
> b) Costs to be costs in the claim."

[5] The notice of appeal against the order made by the learned judge states the following:

> "(A) Findings of Fact:
>
> The Learned Judge did not indicate whether or not there were any findings of fact. He gave no reasons for making the order.
>
> (B) Findings of law:
>
> In light of the fact that the Learned Judge gave no reasons for his decision, the Second Defendant is unable to state the findings of law on which the Learned Judge's decision was based which ought to be the subject of challenge."

[6] These are the stated grounds of appeal:

> "1) The Learned Judge erred in law or misdirected himself as to the law and the facts if it was his determination that there was a serious issue to be tried because there was no material before the Court to support the Respondent's claim that the Appellant, the registered proprietor of the lands in question, should be deprived of its title.
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> 2) The Learned Judge erred in law or misdirected himself as to the law and the facts if it was his determination that damages was not an adequate remedy having regard to the claim, because the claim as advanced and the Respondent's evidence demonstrates that damages is an adequate remedy.
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> 3) The Learned Judge erred in law or misdirected himself as to the law and the facts if it was his determination that the balance of convenience favoured the Respondent because there was no evidence before him to enable him to exercise his discretion in this regard, in favour of granting the injunction.

4) The Learned Judge erred in law or misdirected himself as to the law and the facts when he premised his order in terms that "Upon the Claimant giving the usual undertaking as to damages ..." when:

a)No undertaking as to damages had been given by the Claimant/Respondent whether orally or in writing;

b)There was no material before the Learned Judge to indicate a willingness on the part of the Respondent to give such an undertaking;

c)There was no material before the Learned Judge to enable him to assess whether or not the Respondent is in a position to satisfy the purported undertaking as to damages.

5) The Order of the Learned Judge is unreasonable having regard to the law and the clear facts of the case, and is unsustainable in law."

Background to the appeal

[7] The respondent is a limited liability company and became the registered owner of lots four and five on the plan of Twickenham Park, Saint Catherine registered at Volume 1178 Folio 870 on 18 October 1983. There were substantial factory and office buildings on that parcel of land ('the Plas-Pac Factory'). The respondent was also at the material time the registered owner of lots one, two and three on the plan of Twickenham Park, registered at Volume 1192 Folio 165 of the Register Book of Titles. There were substantial factory and office buildings on this property also ('the Thermo Factory').

[8] A number of mortgages registered in favour of banks, including those entered into with National Commercial Bank Jamaica Limited ('NCB'), were assigned to Refin Trust Limited ('Refin') on 27 July 2000, Refin being the 1st defendant in the court below.

[9] By instrument of transfer dated 17 July 2002 ('the Omni Transfer') Refin exercised its power of sale as mortgagee and transferred the Thermo Factory to Omni Industries Limited ('Omni') for a price of $35,324,804.00.

[10] By instrument of transfer dated 17 July 2002 ('the TPL Transfer') Refin exercised its powers of sale as mortgagee and transferred the Plas-Pak Factory to the appellant for a price of $9,419,944.00.

[11] In 2004 the respondent filed suit. In further amended particulars of claim filed 23 June 2008, and which were before the learned judge on the hearing of the application, the respondent alleged that the two sales were at the direction of National Investment Bank of Jamaica Limited ('NIBJ'). It was further stated, amongst other matters, that NIBJ is a limited liability company wholly owned by the Government of Jamaica and that the 2nd appellant is a wholly owned subsidiary of NIBJ and that NIBJ is an associated company of Refin.

[12] It was alleged in the particulars that the parent company of the 1st Defendant Finsac Limited ('Finsac'), NIBJ, Refin and the 2nd appellant, had some common directors, employees and officers. It was further the respondent's claim that the

statutory powers of sale given to mortgagees by sections 105 and 106 of the RTA, "as modified by the Mortgage, had not arisen at the time when the 1st Defendant exercised the power of sale and sold and transferred the Thermo Factory and the Plas-Pak Factory to NIBJ in that the 1st Defendant had not given to the Claimant *the demand for payment of the moneys secured by the Mortgage* required by the Act and by Clause 2(g) of the Mortgage" - parargraph 15A.

[13] It was further alleged that the Refin was in breach of its duties to the respondent as mortgagee in respect of the sale of the Thermo-Factory and the Plas-Pak Factory by private treaty in a manner particularized in paragraph 16 of the particulars of claim.

[14] The respondent claimed that it suffered loss and damage in the sum of $447,895,252.00, being the difference between the then market value of the two properties, i.e, $492,640,000.00 and the sale price of $44,744,748.00. The respondent sought as relief the following paragraph 16, pages 5-6 of the further amended particulars of claim:

> "(1) The Orders prayed in the Claim Form filed herein.
>
> (1A) Damages against the 1st Defendant for the unauthorised, improper and irregular exercise of the power of sale of the Claimant's properties.
>
> (2) Damages against the 1st Defendant for the breach of its duties as mortgagee to properly and adequately advertise the Claimant's properties for sale to the wider public or at public auction in order to ensure that the best prices were obtained for each of them but instead sold them at private treaty to a connected party at a gross undervalue.

(3) Further or in the alternative for damages suffered by the Claimant as a consequence of the negligence of the Defendant in failing to advertise or adequately advertise each of the Claimant's properties prior to the sale by private treaty of the Thermo Factory and the Plas-Pak Factory to NIBJ, a connected party, at a gross undervalue.

(4) That the transfer by the 1st Defendant of the Plas-Pak Factory to the 2nd Defendant be set aside and declared to be a nullity.

(5) An injunction to restrain the 2nd Defendant whether by itself or by its directors, officers, servants or agents or otherwise howsoever from dealing with or disposing of the land comprised in Certificate of Title registered at Volume 1198 Folio 870 of the Register Book of Titles until the final determination of this action.

(6) Interest at Commercial rates compounded monthly on the damages found to be due from the date of the sale of the properties until payment.

(7) ...."

[15] It is to be noted that the respondent did not sue either NIBJ or Development Bank of Jamaica Limited ('DBJ'). DBJ is wholly owned by the Government of Jamaica and was established with substantially the same objectives as NIBJ, that is, to facilitate economic growth and development by providing financing through the management and divestment of national assets and investments. DBJ acquired the operations, liabilities and assets of NIBJ and the operations of both entities were merged in September 2006. It is also important to note that although the particulars of claim sought, as relief, an order setting aside the transfer by Refin to the appellant, and sought an injunction (oddly, an interlocutory injunction and not a permanent one) against the appellant restraining it from dealing with or disposing of the Plas-Pak

Factory, there are no direct allegations against the appellant. There are no allegations specifically of fraud on the part of the appellant neither are there any such allegations, particularized, as they would have to be. Essentially, the only matters that arguably involve the appellant are in fact particularized in paragraph 16 and are merely particularized as breaches of Refin's duties to the respondent as mortagee, and not as breaches or allegations against the appellant, unless impliedly, or indirectly. Sub-paragraphs 16 (g) and (h), which are in fact a duplication of each other, allege:

> "(g)(h) It [Refin] sold the [respondent's] properties to the detriment of the [respondent] at prices which were substantially below their market value to connected and/or associated companies with common directors and officers and the sale was incestuous and tainted with collusion and conflicts of interest."

[16] In its amended defence filed 14 July 2008, the appellant stated that NIBJ owned 80% of its shares. It further stated that only NIBJ's chairman, and one director was a director of both the appellant and Finsac.

[17] The appellant pleaded that on 9 March 1998, NCB appointed Mr Richard Downer as receiver and manager of all the undertakings and assets of the appellant and Plas–Pak charged by debentures made by the respondent and Plas-Pak, in favour of NCB. The pleaded case continued, that after unsuccessful attempts were made by Mr Downer to sell the respondent's assets NIBJ, by agreement for sale of assets dated 16 July 2001 purchased in good faith, the respondent's assets as well as the assets of Plas Pak from the receiver, for the sum of $205,000,000.00.

[18] Further, the appellant indicated that by an agreement for sale of assets entered into between NIBJ as vendor and Omni Industries Limited ('Omni') as purchaser, in or about October 2001, NIBJ sold to Omni some of the respondent's assets acquired under the agreement for sale of assets dated 16 July 2001. The assets sold were the parcel of land registered at Volume 1191 Folio 165 and all the buildings thereon, fixtures, fittings and appurtenances. The consideration for the sale was $175,000,000.00 as to which $35,324,804.00 was apportioned as being the consideration for the purchase of the realty and $139,675,196.00 was apportioned as being in consideration of the remaining assets.

[19] The appellant admitted that by instrument of transfer under the Registration of Titles Act dated 17 July 2002, Refin exercised its powers of sale as mortgagee and transferred the Plas-Pak Factory to the appellant on the direction of NIBJ for the 'sale price' of $9,419,944.00.

[20] The appellant in addition pleaded that by a lease agreement dated 31 July 2003, the appellant leased the assets formerly owned by Plas-Pak to Omni for a term of five years commencing on 1 January 2003 with an option to purchase the premises registered at Volume 1178 Folio 870 of the Register Book of Titles at a price of US$640,000.00. Further, that by agreement for sale of machinery, equipment and furnishing dated 31 July 2003, NIBJ sold the machinery, equipment and furnishings

formerly owned by Plas-Pak to Omni Plas Limited for J$5,000,000,00, which sale was guaranteed by Omni.

[21] Still further, the appellant stated that the market value of premises registered at Volume 1178 Folio 870 was assessed by Allison Pitter & Co, a reputable firm of valuators, as being $28,000,000.00 to $30,000,000.00 as at 7 July 2004.

[22] The appellant asserted that NIBJ entered into the agreement for sale of assets dated 16 July 2001 well knowing that the receiver had made several attempts to sell the assets, the subject of the agreement without success. In particular, attempts to acquire the assets from the receiver were made by Ebenezer International Development Organization but that sale did not materialize. Additionally, Omni was in negotiations with the receiver to acquire the assets, but those negotiations did not come to fruition. These efforts on the part of the receiver, pleaded the appellant, and the availability of the assets for sale were widely reported in the press and were matters of public knowledge.

[23] Accordingly, the appellant averred, at the time of acquisition by NIBJ of the assets formerly owned by the respondent and Plas Pak, the price which was obtained by the receiver was the best price which was available on the open market and that NIBJ and the appellant acquired the real property which was formerly owned by Plas-Pak, at the true market price.

[24] It was also pleaded by the appellant that NIBJ was a bona fide purchaser for value of the Thermo and Plas-Pak Factories without notice of the alleged or any breach in the exercise of the power of sale.

The application before the judge

[25] The notice of application for court orders dated 5 April 2012 sought an injunction and was supported by an affidavit of Mr Jean-Marie Desulme, managing director of Thermo-Plastics (Jamaica) Limited. Amongst the stated grounds of the application were the following:

> (i) the respondents have failed to adequately defend the claim and, by their pleadings have admitted most of the claim and the appellant actively marketing the lands;
>
> (ii) the appellant was unlawfully registered as the proprietor of the lands through a tainted, fraudulent, collusive transaction between Refin, Finsac NIBJ (now Development Bank of Jamaica Limited ("DBJ") and the appellant;
>
> (iii) the transfer was made contrary to law and is a nullity; and
>
> (iv) the statutory power of sale, as modified by the mortgage, had not arisen because Refin had not given the respondent a demand as required clause 3(g) [sic] of the mortgage.

The evidence on the application

[26] In his affidavit in support, Mr Desulme substantially attested to the matters raised in the further amended particulars of claim. At paragraph 7 of the affidavit he also stated, that at all material times the appellant was a wholly owned subsidiary of

NIBJ. Further, that subsequent to the appellant taking title to the Plas-Pak Factory, Thermoco Limited was issued 20% of the shares in the appellant. At paragraph 16 he contended that DBJ is now the owner of 80% of the shares in the appellant and Thermoco is the owner of the remaining 20% of the shares.

[27] Mr Edison Galbraith, the General Manager, Loan Origination and Portfolio Management of DBJ, gave evidence on behalf of DBJ, NIBJ and TPL, opposing the application. At paragraph 5 he stated that the appellant was incorporated on 26 September 2001. Amongst its directors at the time of swearing the affidavit were Yvon Desulme and Cynthia Desulme. At paragraph 10 of his Affidavit, Mr Galbraith referred to the agreement for sale dated 16 July 2001 as including the property registered at Volume 1178 Folio 870, the subject of this application, and at paragraph 12 he stated that the assessment by the Commissioner of Stamp Duty was done for the purpose of transfer tax and stamp duty payable. At paragraphs 8 and 9, Mr Galbraith makes some observations as to what connection or association existed or did not exist between some of the relevant parties in this case. He states:

> "8. With respect to paragraphs 6 and 7 of Mr Desulme's Affidavit, TPL Limited was incorporated as a wholly owned subsidiary of NIBJ. In paragraph 6 of his Affidavit, Mr Desulme refers to NIBJ as being an associated company of Refin Trust Limited and/or Finsac Limited. I understand an associated company to be one in which an investor holds between 20-50% of the voting rights or one in which the investor has significant influence and/or over whose operating and financial policy it exercises a significant influence. In September, 2001, Thermoco Jamaica Limited was entitled to 20% of the shares in TPL Limited and was

issued those shares in December, 2004. The remaining 80% of the shares are owned by NIBJ.

9. NIBJ was never an investor in Finsac or Refin Trust Limited and neither were those companies investors in NIBJ. Also, there were no employees or officers who were common to NIBJ, Finsac, and Refin Trust Limited. Only NIBJ's then Chairman, Mr David Coore QC and the Honourable Mrs. Shirley Tyndall OJ, were Directors of NIBJ, Refin Trust Limited and Finsac Limited."

The appellant's arguments

Ground one

Is there a serious issue to be tried?

[28] The appellant in its written submissions filed 20 May 2013 submitted that both the undisputed facts and the respondent's contentions in the court below revealed that there was no serious issue to be tried for the following reasons:

(a) The claim does not reveal any cause of action or any reasonable ground for bringing or maintaining the action against the appellant. The claim as a whole (as opposed to parts of the relief being sought) is with respect to the alleged conduct of Refin in respect of its exercise of the powers contained in the mortgage, and not against NIBJ, DBJ or the appellant, NIBJ's nominee.

(b) Neither NIBJ nor DBJ (the appellant's principals) are parties to the proceedings.

(c) The only aspect of the claim that affects the appellant is in that part of the prayer in the claim form and further amended particulars of claim in which the respondent seeks relief that the transfer be set aside as being a nullity and an injunction restraining dealings with the land.

(d) Even if it is sought to argue that there is something in the nature of an allegation of fraud in the claim, there is nothing on the pleadings or in the evidence adduced on the application that amounts to any or any sustainable allegation or plea of fraud.

(e) There is no dispute that the appellant is registered as the proprietor of the lands and has been so registered since 29 August 2002.

(f) There is nothing on the evidence raising any proper basis on which it may be contended that the registration of the appellant as the proprietor of the lands ought properly to be set aside.

[29] Learned counsel Mr Piper, on behalf of the appellant submitted that against this background, the learned judge wrongfully exercised his discretion if he concluded that there was a serious issue to be tried.

Ground two

In the event of a finding that there is a serious issue to be tried, is an award of damages adequate?

[30] The appellant submitted that an award of damages is adequate for the following reasons:

(a) Apart from the unsubstantiated claim for relief that the transfer of the said land to the appellant is a nullity and should be set aside and declared a nullity, the claim is one for damages against Refin only. Further, that no claim has been brought or could reasonably have been made against the appellant and, even more so, because no claim has been brought or could reasonably have been made against NIBJ or DBJ.

(b) There is no pleading or evidence that shows that the appellant acquired title by fraud.

(c) Even where reliance is placed on section 106 of the RTA, the effect of that section is that, if the claim is proved, damages only may be awarded against Refin, whose conduct is allegedly being impugned.

(d) The claim for breach of duty reflected in paragraph 16 of the further amended particulars of claim is a claim for damages in negligence, in respect of the power of sale and is directed at Refin.

(e) Even despite the foregoing, the appellant, having been registered as the proprietor of the lands pursuant to powers contained in a mortgage, is protected by the provisions of section 106 of the RTA, in that, the alleged or any wrongful or irregular exercise of the power redounds only in damages against the person exercising the power.

[31] Accordingly, the appellant argued that the claim being one which is directed at Refin, is properly founded in damages as being the only available relief if the

respondent's allegations were proved. For this reason also, it was submitted that the injunction should not have been granted.

Ground three

> **In whose favour does the balance of convenience lie in the event of a finding that there is a serious issue to be tried and damages is not an adequate remedy?**

[32] It was submitted that the balance of convenience is in favour of the appellant and that the learned judge ought properly to have so found.

[33] Reference was made to the oft-cited case of ***American Cyanamid v Ethicon*** [1975] AC 396, where at page 406E Lord Diplock stated:

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial: **but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty was resolved in the defendant's favour at the trial.** The court must weigh one need against another and determine where 'the balance of convenience' lies." (Emphasis provided by the appellant)

Ground four

> **The effect of the failure of the respondent to give an undertaking as to damages. And the effect of the learned judge's order proclaiming that the injunction was being granted "Upon the Claimant giving the usual undertaking as to damages".**

[34] Counsel submitted that up until the time of the making of the order the subject of the appeal, the respondent's affidavit contained no undertaking as to damages. Neither did it contain any material to demonstrate that the respondent had the means to satisfy such an undertaking if called upon to do so after the trial of the action. Further, no undertaking was given orally by counsel on behalf of the respondent whether before or after the making of the order and, even if one was given, there is no evidence of the respondent's ability to satisfy the undertaking if called upon to do so. Counsel made the point that no written undertaking has ever been given. For these reasons also, it was submitted that the order of the learned judge should be set aside.

The law

[35] Mr Piper referred to sections 71 and 106 of the RTA and submitted that both [of these] sections protect NIBJ, which is not a party to the proceedings, as well as the appellant, who took title as nominee of NIBJ. Both sections demonstrate, the argument continued, that the respondent's claim, if capable of proof, is sustainable in damages only against Refin.

[36] Reference was made to numerous cases, including, ***Lloyd Sheckleford v Mount Atlas Estate Ltd*** SCCA No 148/2000, delivered 20 December 2001; ***International Trust and Merchant Bank Ltd v Gilbert Gardiner*** SCCA No 111/2000, delivered 30 March 2004; ***Global Trust Ltd and anor v Jamaica Redevelopment Foundation Inc and anor*** SCCA No 41/2004, delivered 27 July 2007; ***Paulette Hamilton v Gregory Hamilton and others*** SCCA No 77/2007, delivered 31 July 2008 and ***National Commercial Bank Ltd v Olint Corpn Ltd*** [2009] 1 WLR 1405, [2009] UKPC 16

The respondent's arguments

Ground one

Is there a serious issue to be tried?

[37] Counsel, Mr Smith submitted that there is an abundance of material to demonstrate that there is a serious issue to be tried. Indeed, he submitted that there are a number of serious issues involved in this case, including the following:

(a) Whether the power of sale arose at all?

(b) Whether the transfer can be set aside where there is power to sell?

(c) Whether the relationship among NIBJ, the appellant and Refin created a conflict of interest and placed a greater onus on Refin to show that in all respects it was a fair transaction?

(d) Whether the appellant was a *bona fide* purchaser without notice of irregularities?

(e) Whether the transaction was irregular because the property was sold significantly below its market value?

[38] It was posited that these issues among others are to be resolved at trial. Further, that difficult questions of law arise from the circumstances of this claim which will require detailed argument and examination as to the nexus of the relationship between Refin and the appellant and NIBJ, as well as the circumstances in which the transfer took place.

[39] Reference was made to the decision of the Judicial Committee of the Privy Council in ***Tse Kwong Lam v Wong Chit Sen and others*** [1983] 3 All ER 54, particularly pages 57 and 59, as being instructive in how courts should treat situations where there is a close nexus between a mortgagee/vendor and a purchaser. In that case, the mortgagee sold the property at a public auction to a company where he, along with other members of his family, were directors. Damages, counsel pointed out, were awarded as an alternative only because of the appellant's inexcusable delay in prosecuting his counterclaim for the setting aside of the sale.

[40] It was submitted that in the instant case the issue of whether the transfer from Refin to the appellant should be set aside is a matter for trial. The argument continues, that if it is that a sale can be set aside then logically, the property in dispute, which

would have been sold but for the imposition of an injunction, makes it necessary for the appellant to be a part of the original claim as well as the injunction. It was further submitted that this is a serious issue and one in respect of which the burden rests on Refin and the appellant to show that the transfer was effected fairly and *bona fide*.

[41] The respondent submitted that the power of sale never arose at the time when Refin transferred the property and that sections 105 and 106 of the RTA do not apply unless a power of sale has been validly created.

[42] It was the respondent's submission that in all the circumstances, the purchase of the property in question by the appellant was not an arm's length transaction, and that sections 105 and 106 provide no protection to a purchaser who has been given notice that the transaction engaged in is improper, tainted or in some other manner irregular. It was contended that it is not necessary to elevate the requirement for the deprivation of this protection to that of outright fraud. It was submitted that, read purposively, the provisions in the RTA were intended to provide protection to honest and fair purchasers of land who were unconnected with the vendor and who had no interest connected to a vendor acting under powers of sale. Further, that where this was not the case, it is unnecessary to prove actual fraud and it was argued that it is enough to show the conflict of interest and the overt participation in a transaction that was clearly irregular.

Ground two

In the event of a finding that there is a serious issue to be tried, is an award of damages adequate?

[43] It was also submitted that damages cannot be and are not an adequate remedy because the subject matter of the application was land. The written submissions posited that whilst a money value can be ascribed to the land, that cannot replace "the operative and opportunity value of the land".

Ground three

In whose favour does the balance of convenience lie in the event of a finding that there is a serious issue to be tried and damages is not an adequate remedy?

[44] The respondent states that the appellant's averment that there was no evidence before the court to enable the learned judge to rule on the balance of convenience is not the true rule. It was submitted that there is no requirement that evidence in relation to the balance of convenience *per se* be placed before the court. However, in any event, the respondent claims that there was an abundance of evidence favouring the grant of the injunction on the basis of the balance of convenience.

[45] It was posited that it was patent that the balance of convenience lay in favour of granting the injunction. Firstly, the close and incestuous relationship identified by the respondent placed the onus on Refin to prove that the sale to the appellant was not only fair and regular but above board. On this basis, it was submitted that the strength

of the respondent's case is visible and there is a high probability of success in the claim. Secondly, the property, the subject of the action is the sole major asset of the appellant. If the injunction is not granted, a resulting sale of the property would significantly prejudice the respondent since it would then be impossible to restore the property to its rightful owner. Thus, even if the respondent were to succeed against the appellant at trial, it would end up with a pyrrhic victory.

[46] Counsel also stated that the appellant, were it to dispose of the property which is its major asset, would not likely be in a position to pay those damages. Counsel submitted, that in any event, the court ought not to speculate that it would be in a position to pay such damages. Reference was made to the decision of Phillips JA in ***George Anthony Hylton v Georgia Pinnock and ors*** SCCA Nos 17 & 84/2010, delivered 1 April 2011.

Ground four

> **The effect of the failure of the respondent to give an undertaking as to damages. And the effect of the learned judge's order proclaiming that the injunction was being granted "Upon the Claimant giving the usual undertaking as to damages".**

[47] In relation to this ground, it seems to me that counsel exhibited their best, if I may be permitted to so describe it, efforts at ingenuity. Counsel made the submission that there is no binding rule or requirement that a cross-undertaking in damages must be given orally. Reference was made to rule 17.4(2) of the Civil Procedure Rules ('the CPR') which states as follows:

> "17.4 (2) Unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order."

[48] The submission continues that the effect of this rule is that absent a direction to the contrary from the court, any injunction granted on the usual undertaking as to damages, has created an obligation on the party in whose favour the injunction is granted to abide by the undertaking set out in the rule. Thus, the novel argument continues, there is no rule requiring evidence of either the willingness to abide by an undertaking or the assessment of a party's financial position before an injunction is granted. The undertaking is judicially imposed as a consequence of a CPR rule. If a party is not willing to abide by the undertaking, a simple statement to the court would suffice to have the judge refuse the injunction. The test, it was submitted, must be: can a party to whom an injunction is granted thereafter contend that they are not bound by the undertaking? It was argued that such a contention would fail because it is a simple question of an imposed condition without whose fulfilment, the injunction sought will not be granted. Further, by accepting the injunction, the undertaking in damages has been given.

[49] Thus, counsel submitted that there is no rule "writ in stone" requiring evidence as to assessing financial ability before the grant of an injunction, but rather, the court, in exercising that flexible jurisdiction of equity, may cause such an enquiry to be made.

[50] Finally on this ground, the respondent argues that no oral or written undertaking was given because none was sought by the appellant at or after the hearing of the application for an injunction. In any event, it was argued that this court has the power to vary the orders granted by the learned judge and impose the condition of an orally stated or written confirmation of the cross-undertaking in damages to maintain the injunction already granted. It was declared that the respondent stands ready to accept and comply with such a requirement if the court is so minded.

[51] It was therefore the respondent's position that the injunction granted should be allowed to remain until the conclusion of the trial in the action and the prayer was that the appeal be dismissed.

Discussion and analysis

Ground one

Is there a serious issue to be tried?

[52] In the instant case, regrettably, the learned trial judge gave neither oral nor written reasons for his decision. This application essentially constituted a rehearing of the application and this court had therefore to itself examine the issues and material that were before the learned judge in order to decide whether he acted exercised his discretion correctly.

[53] It seems to me that there are a number of clear distinctions that need to be made before discussing this ground. In the first place, a distinction must be made between the respondent's cause of action against Refin and its cause of action against the appellant. Further, unlike the purchaser in the ***Lloyd Sheckleford*** case, the transfer of the land to the appellant here has already been effected, and the appellant has been the registered owner of the land since August 2002.

[54] The relevant sections of the RTA that plainly offer the appellant protection are therefore, sections 70, 71, 106, 108 and 161.

[55] Section 70 offers the registered proprietor of the land, the appellant, protection from any preferential or prior rights, which are defeated upon registration of the appellant, except in the case of fraud. Section 161 further demonstrates the indefeasibility principles by providing that no action of ejectment or other action suit or proceeding for the recovery of land shall be brought against a registered proprietor, save for a number of exceptions, including subsection (d) being in the case of a person deprived of any land by fraud, against the person registered as proprietor of such land through fraud, or as against a person deriving land otherwise than as a transferee bona fide for value from or through a person so registered through fraud.

[56] It is trite law that fraud must be specifically pleaded and there is no such pleading against either Refin or the appellant. The decision of this court in ***Willocks v Wilson*** (1993) 30 JLR 297, is authority for the proposition that fraud means actual

fraud, and the fraud would have to be alleged on the part of the appellant, not only the mortgagee Refin. Section 108 of the RTA decrees that upon registration of the transfer signed by the mortgagee, the estate or interest of the mortgagor passes and vests in the purchaser.

[57] Importantly, the protection of a purchaser from a mortgagee commences even before the transfer to the purchaser is registered. This is by virtue of the wording of section 106 of the RTA-see ***Lloyd Sheckleford***. Section 106 reads as follows:

> "s.106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power." (emphasis mine)

[58] It is true that the respondent's counsel have argued that the protection afforded under section 106 only applies if the power of sale had arisen in the first place and the relevant statutory notice given. However, a plain reading of the section suggests that the purchaser is not bound to inquire into such matters. In addition, this point does not appear to be a substantive one capable of serious contest. If this were so, it is difficult to see why Thermoco Limited, the Desulme family's company, and the Desulmes agreed to participate in shareholding and directorship or management in the appellant after the transfer of the property to the appellant in purported exercise of the power of sale by Refin. The real issue, if there is one in contest, is not one between the respondent and the appellant, and is the issue of whether Refin sold the land at an undervalue and whether Refin was in breach of its duties to the respondent as mortgagee.

[59] Reference was made by the respondent to the Hong Kong case of ***Tse Kwong Lam*** in support of the submission that the sale could be set aside and therefore an injunction ought to be put in place to enable the pursuit of such relief and not to render that aspect of the claim futile. However, it does not appear that there was any relevant statutory provision such as section 106 of the RTA under consideration or applicable in that case. The comprehensive and lucid discussion in the ***Lloyd Sheckleford*** case, by a strong panel of Forte P, P Harrison and Walker JJA, makes it clear that much may turn upon whether there are statutory provisions under consideration, and the precise wording thereof.

[60] However, in my judgment, the case of ***Tse Kwong Lam*** also supports a distinction between an allegation of an improper exercise of the power of sale and allegations of fraud. The Judicial Committee of the Privy Council held that there was no inflexible rule that a mortgagee exercising its power of sale under a mortgage could not sell to a company in which he had an interest. However, the sale to the company could only be supported if the mortgagee proves that he took reasonable precautions to obtain the best price reasonably obtainable at the time of sale. The discussion of the mortgagee's duties in this case is completely different from a discussion regarding allegations of fraud. In Jamaica, the statutory regime of the RTA and the case law interpreting its provisions, do not support the respondent's contention that outright or actual fraud are not necessary in order to defeat the rights of the person purchasing from the mortgagee.

[61] In my judgment, viewed closely, and maintaining separately the issues concerning Refin's exercise of its power of sale, there are no serious issues to be tried against the appellant. Ground one therefore succeeds.

Ground two

In the event of a finding that there is a serious issue to be tried, is an award of damages adequate?

[62] In the event that I am wrong in the view which I have expressed, that is, that there are no serious issues to be tried in relation to the appellant, I have gone on to consider the question of whether damages are an adequate remedy. I have taken into

account a number of circumstances, including the fact that the respondent had given the mortgages many years ago, that it appears as if the factory, although constructed, had not for some time been operating for the purposes for which it was built, and the fact that 20% of the shares in the appellant are vested in Thermoco. It does appear as if damages would be an adequate remedy, and that the appellant, 80% of its shares being owned by NIBJ, which is itself a financial institution wholly owned by the Government of Jamaica, would be in a financial position to pay those damages. This deduction does not call for speculation, as argued by the respondent. In addition, if the meaning of section 106 of the RTA contended for by the appellant is correct, and I have held that it is, then damages would by that path also be an adequate, indeed, the statutorily prescribed remedy. This would therefore be another basis upon which the appeal succeeded.

Ground three

> **In whose favour does the balance of convenience lie in the event of a finding that there is a serious issue to be tried and damages is not an adequate remedy?**

[63] I agree with learned counsel Mr Piper that the balance of convenience favoured refusing the injunction. The transaction in respect of which the respondent complained occurred during the years 2001 and 2002. That was a very long time ago. In addition, it is difficult to see why the respondent did not in its application make any reference to the agreement for sale of assets in July 2001 from the receiver to NIBJ which the respondent must have known about. That information would have been directly

relevant in order to put some context to the assessments of value by the Commissioner of Stamp Duties referred to by the respondent. Further, these transactions involved other assets previously owned by the respondent and its subsidiaries and those are not the subject of any application for a restraining order or any other claim.

[64] It also appears that, as argued by Mr Piper, the owners and/or operators of the respondent are owners of 20% of the shares in the appellant and occupy certain positions on its board. The respondent has therefore participated in the present state of affairs where ownership of the land resides in the appellant and has had some say in the land's utilisation under the appellant's stewardship. None of these factors point in the direction of greater irremediable harm or prejudice being likely to be caused to the respondent rather than the appellant if the injunction is not granted until trial.

[65] In addition, this claim was filed originally in October 2004. This was over two years after the land became registered in the name of the appellant. It is true that in 2004 the claim did seek relief that the transfer be set aside. However, the application for an interlocutory injunction was not filed until April 2012. Whilst it is the respondent's claim that it is because of the appellant's taking steps in that time period in 2012 to sell the land, which prompted the application, that does not seem to suggest a real sense of urgency and genuineness in the claim to set aside the sale. In other words, if the respondent was seriously interested in having the sale in 2001, 2002 set aside, it ought not to be seeking an injunction to restrain the appellant from dealing with the land as late as April 2012. The respondent here had been just as guilty of

delay as had been the borrower in ***Tse Kwong Lam***. At pages 63-64 of the judgment, in discussing the borrower's dilatory approach, Lord Templeman stated:

> "The borrower has however been guilty of inexcusable delay in prosecuting his counterclaim..... The borrower by his delay achieved a favourable position; if the property decreased in value he could either abandon his action or seek damages in setting aside the sale. If the property increased in value he could persist with his claim to set aside the sale. In the circumstances, the Board consider that the borrower is not entitled to have the sale set aside but is entitled to the alternative remedy of damages."

[66] Additionally, it is my view that, in the event that there are serious issues to be tried, the relative strength of the parties' cases differs widely, with the appellant having by far the stronger case. In all of the circumstances, the balance of convenience is to my mind plainly weighted in favour of a refusal of the injunction.

Ground four

> **The effect of the failure of the respondent to give an undertaking as to damages. And the effect of the learned judge's order proclaiming that the injunction was being granted "Upon the Claimant giving the usual undertaking as to damages".**

[67] Counsel for the respondent is correct that there is no rule "writ in stone" that the court must require evidence as to a party's ability to give a cross-undertaking as to damages before an interlocutory injunction will be granted. However, that is as far as it goes. It is completely fallacious to suggest that rule 17.4(2) of the CPR, which deals with procedure, governs or has changed the substantive law in relation to interlocutory injunctions. The proper usual practice and law is, and has been, to require evidence

both of a willingness and an ability to provide a proper undertaking as to damages. It would be quite impossible to carry out the balancing exercise required by the court as referred to in ***American Cyanamid*** and more recently in ***NCB v Olint*** and to arrive at a proper assessment of which course is likely to cause the least irremediable prejudice without requiring some substantiation of an applicant's posture and capacity to pay damages in the event that they are required to do so. Indeed, the practice has been particularly so in relation to companies, and commercial matters. Some authorities even go so far as to suggest that where a company is concerned, financial statements, records or accounts should be placed before the court in order that the court can properly assess the adequacy of the remedy of damages to the defendant and the claimant's financial ability to pay them. It is trite that courts act on evidence and not bare assertions. Of course, in this case, the respondent did not even express a willingness to give an undertaking as to damages, much less assert or elucidate upon its financial ability to fulfil such a commitment.

[68] In any event, the wording of rule 17.4(2) of the CPR does not support the effect contended for by the respondent. This is so because it states that any party "applying" for an interim order, must undertake and not that any party granted an interim order must undertake or be taken thereafter to have agreed to abide.

[69] It was particularly important in this case for the learned trial judge to have required proof both as to the respondent's willingness to give an undertaking as to damages as well as its financial ability to satisfy one. Firstly, on the respondent's own

evidence the subject property was worth millions of dollars. But more importantly, the financial state and indeed, even the status of the respondent was by no means clear. The respondent was a company in respect of which both NCB and Refin had previously appointed a receiver. It is not readily clear what the current status of the receivership was at the time of the application. Indeed, there are rules concerning the bringing of law suits by company directors without the consent of a receiver, indemnities and other financial matters - see for example ***Tudor Grange Holdings Limited and others v Citibank NA and Anor*** [1991] 4 All ER 1 and ***Newhart Developments Limited v Coop Commercial Bank Ltd*** [1978] 2 All ER 896. Additionally, in its written submissions, the appellant at paragraph 7 indicated matters which have not been controverted by the respondent. It was stated that this action has not yet been tried as there have been pending issues in another action, claim no E 300/1998, as to whether the respondent is the subject of a winding up order and whether it has in fact been wound up. Thus, not only was there no offer of an undertaking or no favourable evidence as to the respondent's capacity to fulfil such an undertaking; there were circumstances that should have manifestly caused concern or raised a red flag with regard to this issue. In all of the circumstances, I agree with learned counsel for the appellant that, for the reasons adumbrated in ground four, the learned judge erred in law or misdirected himself as to the law and the facts when he premised his order in terms "Upon the Claimant giving the usual undertaking as to damages". Accordingly, ground four succeeds and the appeal is also allowed on this basis.

[70] It is for these reasons that we made the decision set out at paragraph [3] above and set aside the order of the learned judge.