[2015] JMCC COMM 9

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMERCIAL DIVISION

CLAIM NO. 2015 CD 00047

BETWEEN	**VENUS INVESTMENTS LIMITED**	**CLAIMANT**
AND	**WAYNE ANN HOLDINGS LIMITED**	**DEFENDANT**

IN CHAMBERS

Nigel Jones and Kashina Moore instructed by Nigel Jones and Co for the claimant

Vincent Chen and Nicola Ann Fullerton instructed by Chen Green and Co for the defendant

June 1 and 2, 2015

CIVIL PROCEDURE – INJUNCTION – GRANTED WITHOUT NOTICE – WHETHER THERE WAS MATERIAL NON-DISCLOSURE – WHETHER INUNCTION SHOULD BE DISCHARGED AND NOT RE-GRANTED

SYKES J

[1] Once again the never ending problem of whether an injunction granted without notice should be discharged (on the ground of material non-disclosure) and not re-granted has arisen. The court has decided that the injunction should be discharged and not re-granted. These are the reasons.

Facts

[2] Wayne Ann Holdings Ltd ('Wayne Ann') decided to convert a building into strata lots for sale to purchasers. In order to do this, Wayne Ann needed significant sums of money. This is where Venus Investments Limited ('Venus') comes in. It decided to lend money to Wayne Ann. At the time of the lending by Venus, the property was subject to a registered legal mortgage. In light of this, Venus decided not to register its mortgage which meant that it took an equitable mortgage. In the context of this case the immediate inference is that Venus took the risk that in the event that Wayne Ann could not meet its obligations to the registered mortgagee and there was an enforcement of the mortgage by the registered mortgagee then Venus would get what was left, if any, after the registered mortgagee took its portion of the proceeds of sale.

[3] Venus sought to protect its position by lodging a caveat under section 139 of the Registration of Titles Act ('RTA'). As the units were completed they needed to be sold. In order to do this Venus consented to a variation of the caveat which permitted the sale of the finished units with a registered title being given to the purchasers.

[4] Wayne Ann wanted to sell a particular unit which was covered by the caveat. Venus was told of this by the Registrar of Titles. Under the RTA once the person who lodged the caveat (known as the caveator) is told by the Registrar that the registered proprietor wishes to sell the property (this is known warning the caveator), the caveator has fourteen days to justify keeping the caveat. If he does not act in the stated time the caveat ceases to have any legal effect.

[5] In this case, Venus acted. When it received the notice of Wayne Ann's intention it decided to attend upon the Supreme Court to seek a without notice injunction restraining Wayne Ann from transferring of the property in question. The injunction was granted. Wayne Ann is challenging the injunction on the ground of material non-disclosure. Venus' response is four fold. First it says that under

section 139 and 140 of the RTA it had the right to do what it did in order to protect its equitable mortgage. Second, there was no material non-disclosure because the information not disclosed was not material. Third, the court should re-grant the injunction. Fourth, the RTA has constructed a statutory regime for protection of unregistered interests and therefore the pure injunction principles do not apply with full rigour.

Response

[6] This court need not decide on the effect of sections 139 and 140 of the RTA. The court is prepared to act on the basis that Venus had the right to do what it did under the RTA. However, whether or not Venus had the right to seek an injunction is not conclusive of the issue. The real issue is whether Venus met the high standard imposed on all who seek without notice orders against another.

[7] The court wishes to say that it profoundly disagrees with Mr Jones' primary submission that the usual injunction principles do not apply with full rigour. Secondly, even if that were the case, the rigour of full and frank disclosure would still apply to a without notice application.

[8] The legal basis for the court ignoring section 139 and 140 of the RTA is supported by this passage from the judgment of Viscount Reading CJ, sitting in the Divisional Court, in **R v Kensington Commissioners** [1971] KB 486, 495 – 496:

> *Before I proceed to deal with the facts I desire to say this:* ***Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to***

> ***the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits.*** *This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit.* (my emphasis)

[9] In other words, once an allegation of material non-disclosure has been made then the actual merits of the case recedes into the background. The task of the court then is to see whether the allegation has been made out and if made out what should be the response.

[10] Over one hundred years ago Isaacs J of the High Court of Australia in **Thomas Edison v Bullock** 15 CLR 679, 681 – 682 had this to say:

> *The law in such a case is well established. There is a primary precept governing the*

administration of justice, that no man is to be condemned unheard; and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence. But instances occur where justice could not be done unless the subject matter of the suit were preserved, and, if that is in danger of destruction by one party, or if irremediable or serious damage be imminent, the other may come to the Court, and ask for its interposition even in the absence of his opponent, on the ground that delay would involve greater injustice than instant action. But, when he does so, and the Court is asked to disregard the usual requirement of hearing the other side, the party moving incurs a most serious responsibility.

Dalglish v. Jarvie, a case of high authority, establishes that it is the duty of a party asking for an injunction ex parte to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say he was not aware of their importance. Uberrima fides is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would

> *presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fall. I add the word "almost" in deference to such an exceptional case as Holden v. Waterlow. The obligation is stated by Turner L.J. in that case to be to "state their case fully and fairly," and so by Sugden L.C. in Dease v. Plunkett, where he said:—"The plaintiff had not fully and fairly disclosed the entire facts of the case." Lord Cottenham L.C., in Brown v. Newall, observes that the power to grant such an injunction should exist is indispensable, but, from the liability to injustice, must be exercised with caution. Then he says :—"The Court can have no ground upon which it can proceed, in granting an ex parte injunction, but a faithful statement of the case." The learned Lord Chancellor distinguishes between mis-statement, or suppression likely to influence the Court in acceding to the application, and that which is immaterial.*

[11] In **Bullock** the claimant had sought an injunction '*restraining the defendant from selling or offering for sale Edison phonographs, records and blanks at prices less than those licensed by the plaintiffs without their consent, and from including in his offer for sale of Edison phonographs any horns or gramophones or other articles not listed to go with an Edison phonograph as a regular outfit, and from*

including in a sale or offer of Edison records or blanks other articles without giving the price of such phonograph records or blanks' (pages 679 – 680).

[12] In the context of a tax assessment, where the applicant for a rule nisi which was the foundation for seeking a writ of prohibition to prevent the commissioners from levying an assessment on her had made material omissions and misstated important facts the non-disclosure rule was applied with unrelenting vigour. In **Kensington Commissioners** it was held by Scrutton LJ at pages 513 – 514:

> *Now that rule giving a day to the Commissioners to show cause was obtained upon an ex parte application; and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it - the Court is supposed to know the law. But it knows nothing about the facts, and* ***the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement. This rule applies in various classes of procedure.*** (my emphasis)

[13] In the same case Lord Cozens Hardy MR stated at pages 504 – 505:

The authorities in the books are so strong and so numerous that I only propose to mention one which has been referred to here, a case of high authority, Dalglish v. Jarvie, which was decided by Lord Langdale and Rolfe B. The head-note, which I think states the rule quite accurately, is this: "It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward." Then there is an observation in the course of the argument by Lord Langdale: "It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved." That is to say he would not decide upon the merits, but said that if an applicant does not act with uberrima fides and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application. Then there is a passage in Lord Langdale's judgment which is referred to in the head-note. It is this: "There is, therefore, a question of law, whether having regard to the facts thus appearing, the plaintiffs are entitled to the protection they ask; and there is also a

question of practice, whether the facts stated in the answer being material to the determination of the question, and being within the knowledge of the plaintiffs by whom the case was brought forward, and who obtained an ex parte injunction upon their own statement, whether the omission of the statement of these facts in the bill does not constitute a reason why the ex parte injunction so obtained should be dissolved." They held that the injunction ought not to be granted although there might be materials apart from this question upon which the injunction might have been granted. Rolfe B. says this: "I have nothing to add to what Lord Langdale has said upon the general merits of the case; but upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, 'uberrima fides.' In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material it is a fraud; but, besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such

> *concealment entirely vitiates the policy. So here, if the party applying for a special injunction, abstains from stating facts which the Court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant. I think, therefore, that the injunction must fall to the ground." That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, that* ***on an ex parte application uberrima fides is required, and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say "We will not listen to your application because of what you have done."*** (my emphasis)

[14] In the same case a submission was made that the principle, if applicable, only applied to injunctions and not a rule nisi for a writ of prohibition. Lord Cozens Hardy rejected that submission at pages 505 – 506:

> *Then it is said that that rule may be true in cases of injunctions where there is an immediate order granted, which order can be discharged, but that it has no reference at all to a case like a rule nisi for a writ of prohibition, which is nothing more than a notice to the other side that they may attend and explain the matters to the Court. To so hold would, I think,*

> *be to narrow the general rule, which is certainly not limited to cases where an injunction has been granted. It has been applied by this Court, and certainly by the Courts below, to an application for leave to serve a writ out of the jurisdiction. If you make a statement which is false or conceal something which is relevant from the Court, the Court will discharge the order and say "You can come again if you like, but we will discharge this order, and we will apply the general rule of the Court to applications like this." There are many cases in which the same principle would apply. Then it is said "That is so unfair; you are depriving us of our right to a prohibition on the ground of concealment or misstatement in the affidavit." The answer is that the prerogative writ is not a matter of course. The applicant must come in the manner prescribed and must be perfectly frank and open with the Court.*

[15] Warrington LJ held at page 509:

> *It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible*

> *disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.*

[16] Where there is an application for a customer information order by a state agency Lord Hughes held in **Assets Recovery Agency (Ex Parte) (Jamaica)** [2015] UKPC 1 said at paragraph 21

> *These conclusions do not mean that these evidence-gathering orders, including a CIO, are available to the prosecution or Agency whenever they want them. The Act expressly makes them available only when the judge determines that they ought to be granted. The role of the judge is crucial. Moreover, the duty of the applicant to the court is of great importance. Applications of this kind will normally be made ex parte. All ex parte applications impose on the applicant the duty to disclose to the judge everything which might point against the grant of the order sought, as well as everything which is said to point towards grant. That is especially so when, as here, the financial institutions may well have little interest beyond ensuring that anything they are required to do is covered by the order of the court, whilst the persons whose affairs*

are under investigation may not find out about the order until long after the event. The duty of the applicant in such circumstances is, in effect, to put himself into the place of the bank, but also of the person whose affairs are under investigation, and to lay before the judge anything which either could properly advance as reasons against the grant of the order sought. The role of the judge is to ensure that the order is justified.

[17] The Court of Appeal of Jamaica in **Jamculture Ltd v Black River Upper Morass Development Co Ltd** (1989) 26 JLR 244 endorsed without qualification or equivocation the following from **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 1350:

In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.
(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton L.J.

(2) The material facts are those which it is material for the judge to know in dealing with

the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries Inc. v. Robinson [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of

inquiries: see per Slade L.J. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 92-93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in Bank Mellat v. Nikpour, at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioners'; case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be

afforded:" per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

"when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell L.J. in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc., ante, pp. 1343H-1344A.

[18] The court has made these reference to refute the proposition that somehow there is a watering down of the principles relating to without-notice applications. As the quotation from Isaacs J made clear a without-notice application is one where the affected party is being 'condemned' without being heard. Lord Hughes has emphasised that the applicant must put himself in the shoes of the affected party and ask, 'What arguments could have been made by the affected party had he been present?' The court is aware that the principle of full disclosure may be altered where the applicant is a state agency seeking to enforce the criminal law or some connected law. Later cases seem to draw a distinction between private law enforcement and public law enforcement (**Jennings v Crown Prosecution Service** [2006] 1 WLR 182).

[19] Also in **Jamculture**, the Court of Appeal emphasised that the duty of full disclosure is not met even though the material was placed before the judge but

was done in such a manner that its true import was not brought home to the judge.

[20] The court is fully aware that the injunction can be re-granted at the inter partes hearing but the circumstances where that happens are not very common. At the very least for that to happen the non-disclosure would need to be innocent. But the court should be careful to note that even if the non-disclosure was innocent that does not mean that there will be a re-grant of the injunction. Innocent non-disclosure is one of the factors to be taken into account.

[21] This court also takes guidance from Woolf LJ in **Behbehani v Salem** [1989] 1 WLR 723 on the question of a re-grant of the injunction. In that case his Lordship was not enthusiastic about first looking to see whether the non-disclosure was innocent or deliberate and then acting on that basis. His Lordship stated at page 728:

> *In practice in most cases it will be extremely difficult for a defendant who is applying to discharge injunctions which have been granted ex parte to show that the matters which were not disclosed, but which should have been disclosed, were the subject of any decision not to disclose which was made in circumstances where it was appreciated that there should have been disclosure. In the majority of cases the matter has to be approached on the basis of considering the quality of the material which was not disclosed without making any final decision as to whether or not there has in fact been bad faith. If, of course, it can be established that there has been bad faith, either on behalf of the parties or their legal*

> *advisers, that will be a most material matter in considering whether injunctions which have been granted should be discharged, and, if they are discharged, whether it is appropriate in the circumstances to re-grant injunctions either in the same terms or in similar terms.*

[22] His Lordship stated at page 729:

> *In deciding in a case where there has undoubtedly been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of fresh injunctions, it is most important that the court assesses the degree and extent of the culpability with regard to the non-disclosure, and the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court.*

[23] This court fully appreciates that counsel, in many instances, have to make quick decisions, often times on incomplete information. This court accepts the view of Woolf LJ at page 729:

> *I recognise the strain placed on legal advisers and the pressure under which they have to work, especially in large commercial actions, where prompt steps sometimes have to be taken in order to protect their clients' interests. However, if the court does not approach the question of the non-disclosure of material*

> *matters in the way that has been indicated in earlier decisions, there will be little hope of solicitors who are subjected to such pressures appreciating the importance of making full disclosure and, more important, bringing home to the clients the serious consequences of non-disclosure.*

[24] Thus the full and fair disclosure rule has to be insisted upon. The protection of the judicial process has to take priority over the risk to counsel that he may, unwittingly, pass on incorrect information to the court or fail to inform the court of information that should have been placed before the judge.

[25] All of what has been said is against the background that no litigant has a right to an injunction. It is not like a pure common law action where even a thief has pure legal rights that do not depend on his conduct. Once the legal standard is met for a common law remedy then the litigant must be granted the remedy. In equity, it is discretionary, meaning that even if the strict legal requirements are met, an injunction may be denied because of the applicant's delay, conduct or any other relevant factor whereas no such consideration arises in common law actions.

[26] When one examines the affidavit placed before the judge in this case against the background of the obligation of full and fair disclosure and that this obligation extends to making proper enquiries before the application it is safe to say that there was not full disclosure.

[27] The affidavit of Mr Rory Chin was not factually inaccurate but it did not convey the nuance necessary for the judge to appreciate the full commercial context. Mr Chin told the judge that Wayne Ann decided to convert a building to strata lots. He also told the judge that there was a prior registered mortgage on the property. He also said that he was notified by the Registrar of Titles that Wayne Ann

intended to sell a strata lot to a purchaser and it was this notice that precipitated the application for an injunction.

[28] The fuller picture which ought to have been conveyed to the judge should have included:

a. there had been previous transfers of strata lots to other purchasers and part of that sale price was in fact paid to the applicant;

b. Venus had consented to a variation of the caveat in order to facilitate the transfer of strata titles to purchasers;

c. the equitable mortgage on this property was also secured against another property

[29] Had Venus made enquiries about the transfer it would have been told the following:

a. Wayne Ann is seeking to sell the unit in order to pay off its debt to the legal mortgagee;

b. the legal mortgagee's attorneys at law are in control of the conveyancing process and not the attorneys at law for Wayne Ann and the purpose for arranging the conveyance in this way was to ensure that the legal mortgagee was paid first;

c. this was being done to ensure that the legal mortgagee was paid off fully and then if anything was left then Venus would be paid.

[30] The court should add that during submissions it was the case that Wayne Ann had paid back the principal sum borrowed as well as an additional $10m. From

the affidavit evidence it appears that this was not brought to the attention of the judge.

[31] When the total of all Venus definitely knew is added to what it could have found out had it made enquiries it is clear to this court that full disclosure and significance of facts were not brought home to the judge who granted the without notice injunction.

[32] The judge ought to have been told Wayne Ann had not only borrowed money from the registered mortgagee but also that the money was still owed and efforts were being made to pay off that debt. Had the enquiries been made Venus would have been able to tell the judge that Wayne Ann has stated that it intends to pay the legal mortgagee first. All this in a context where Venus had secured the loan against another property owned by Wayne Ann.

[33] It was not sufficient to make a bare bones application before the initial judge. The full commercial context should have been brought home to the judge. The full commercial context is that Wayne Ann decided to convert an existing building into separate units and issue separate titles for each unit. When the equitable mortgage was granted it was to be used to develop the separate units for sale. Before the separate titles were issued the caveat covered the entire property. However, when the separate titles were to be issued Venus consented to the variation of the caveat in order to facilitate the transfer of each unit to the respective purchasers. There was no evidence presented that Venus had not used the money to repay the legal mortgagee or the equitable mortgagee. Indeed, as has already been noted, Venus was paid out of this very arrangement. There was no evidence to suggest that the sale Wayne Ann wanted to make would have been treated any differently from what has occurred before. Bearing in mind the high obligation on the applicant to make all reasonable arguments that the defendant may have made had he been present, Venus was under an obligation to say to the judge that based on its (Venus')

certain knowledge of some past sales this particular sale may well be of the same nature as those that went before out of which Venus was paid. It was not sufficient to say to the judge as was done here, that Venus was an equitable mortgagee and has a right to caveat protection under section 139 and 140 of the RTA and since Wayne Ann did not communicate with Venus, Venus has absolutely no idea what Wayne Ann may be doing. Since this was the impression that undoubtedly was conveyed to the judge, this impression was not correct or, at the very least, was not complete in light of Venus' certain knowledge from previous dealings with Wayne Ann concerning sales of previous units. This is what full and fair disclosure looks like.

[34] Mr Jones kept asking, how was Venus to be protected? But that, respectfully, is a secondary question. As has been shown from the cases cited above, a without-notice applicant has a duty not only to state what he knows, but also to make reasonable enquiries before the application is made in order to uncover facts that may be material and also advance all reasonable arguments that the affected party may have advanced had he been present. This high duty has nothing to do with whether the applicant is seeking to steal a march on the affected party but rather with the public interest in seeing to it that applicants who are seeking orders adverse to another tell the court the truth, the whole truth and nothing but the truth inclusive of nuances that may tell in favour of the affected party what would not be known just from looking at the printed text. The issue is not how should Venus have been protected but rather whether Venus met its high and demanding obligations on the without notice obligations. It is not enough to be factually accurate. Fairness demands that the full implication of facts particularly those facts in favour of the affected party be brought home to the judge.

[35] The submission made by Mr Jones only differs in time and place from that made in the **Kensington Commissioners** case. In that case the submission was that there was a practice in the Crown Offices that once an injunction was discharged a second one could not be granted except in cases of formal defect.

Those cases apart, a second injunction could not be granted and to have such a rigid rule as that espoused by the court regarding the principle of full disclosure would wreak great hardship. In other words, the full rigour of the full disclosure principle may lead to hardship in this case for Venus. The hardship being that it might not have its caveat protection. The Master of the Rolls rejected that submission with these words at page 506:

> *Then it is said that it would be very hard upon the applicant to dismiss the application because, according to the settled practice, or what is believed to be the settled practice, of the Crown Office, there cannot be a second application for a writ of prohibition except in the case of a purely formal defect, such as a mistake in the jurat of the affidavit or something of that kind, and that in such a case only would the Court treat the first application as no obstacle in the way of the second. All I can say is that if that is the rule of the Crown Office it is a rule which is perfectly well settled, and anybody who goes to the Crown Office must take the consequences of that rule. We cannot, and we ought not, to refuse to give effect to what seems to me to be a most salutary rule of practice merely because it may prevent this lady from ever getting what she seeks; it may or may not. I do not say whether it will or will not.*

[36] Hardship is not a reason to dilute the rule despite the fact that it may lead to difficulties for the applicant. Upholding the rule is more important that hardship to the litigant.

[37] No one has suggested that Venus should not be protected but it must do so in a manner that conforms to the legal standard. There is nothing that has been put forward at this inter partes hearing that Venus could not have found out if it had made enquiries before making the application.

[38] The court declines to re-grant the injunction. Mr Rory Chin declined to disclose material facts which were fully within his knowledge at the time of the without-notice application. He declined to place the full meaning and context before the judge. What he stated was true but the picture was distorted. The court is not suggesting that he was dishonest. He may well have thought that what he said was all that needed to be said. Regrettably for him, the law demands more.

[39] There is nothing to suggest that Venus is not protected by other security which it decided to take. To say that squatters are on the other property cannot be relevant now when it was Venus that decided that it was in its best commercial interest to accept that other property, squatters and all, as security. Additionally, the equitable mortgagee is always secondary to the registered legal mortgagee. In this case the unchallenged evidence from Wayne Ann is that it wants to pay its lawful debt to the registered legal mortgagee. As Mr Chen submitted, in practical terms Wayne Ann is seeking to do what the legal mortgagee could do at least cost. The legal mortgagee is seeking to be paid first by voluntary conduct by the debtor rather and enforce the power of sale. It is simply a cheaper and more cost effective way of achieving the same objective. This court cannot think of one good reason why it should not be allowed to do so.

[40] Mr Jones sought to say that had it been the registered mortgagee exercising the power of sale Venus' interest would have been secondary but since it is the registered proprietor of the land exercising its undoubted right to sell property the

equitable mortgagee can restrain that sale until satisfactory arrangements are made with the equitable mortgagee. This court does not agree. If that were the case, as Mr Chen pointed out, that would be placing the equitable mortgagee on a pedestal he simply cannot have. In this court's view, the registered proprietor is entitled to sell his property to meet his lawful debts. The equitable mortgagee, in this case, knew of the commercial context, knew what Wayne Ann may be doing having regard to prior sales and with that knowledge decided to lend nonetheless. In these circumstances, there is no rational basis to re-grant the injunction.

Disposition

[41] The injunction is discharged. Certificate for two counsel granted. Costs to Wayne Ann to be agreed or taxed. Injunction granted until June 11, 2015 to enable Venus to appeal to the Court of Appeal and to apply for an injunction from that court.