[2024] JMCA Civ 11

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00076

BETWEEN	**VINAYAKA MANAGEMENT LIMITED**	**APPELLANT**
AND	**GENESIS DISTRIBUTION NETWORK LIMITED**	**1ST RESPONDENT**
AND	**NOHAUD AZAN**	**2ND RESPONDENT**
AND	**ASHNIK LAND HOLDINGS LIMITED**	**3RD RESPONDENT**

Ian Wilkinson KC and Lenroy Stewart instructed by Wilkinson Law for the appellant

John Graham KC and Josemar Belnavis instructed by John G Graham & Co for the 1st respondent

Dr Lloyd Barnett, Weiden Daley and Shaydia Sirjue instructed by Hart Muirhead & Fatta for the 2nd and 3rd respondents

16, 17 November, 8 December 2023 and 8 March 2024

Civil practice and procedure – Application for interlocutory injunction – Whether there is a serious issue to be tried – Where balance of convenience lies

Evidence - Whether unstamped agreement for sale of land is admissible - Stamp Duty Act, ss 36, 43, 44 and 45

STRAW JA

[1] This appeal arises from the decision of Staple J (Ag) (as he then was) ('the learned judge') made on 7 July 2022 in the Supreme Court, in which he refused the appellant's

(then claimant's) application for an interlocutory injunction. The learned judge made the following orders:

> "1. The [appellant]'s application for interlocutory injunction is refused.
>
> 2. The application by the Second and Third [respondents] for discharge of the interim injunction is granted.
>
> 3. Leave to appeal is granted to the [appellant].
>
> 4. The [appellant] is granted an interim injunction pending the outcome of an application by the [appellant] to the Court of Appeal for an injunction pending appeal, as follows:
>
> i. An interim injunction is granted restraining the first Respondent whether by itself, its agents, servants or otherwise howsoever, from transferring or in any other way dealing with the Certificate of Title for the property at Lot 12, Bogue Estate, in the parish of St. James registered at Volume 1439 Folio 71 of the Register Book of Titles and 1/15th share in the common properties comprised in Certificate of Title registered at Volume 1219 Folio 753 of the Register Book of Titles (hereafter called 'the said property'):
>
> ii. The First Respondent and the Registrar of Titles and/or the National Land Agency are prohibited from taking any steps, or any further steps, regarding Discharge Number 239234, Transfer Number 2392348 to Ashnik Land Holdings Limited and Mortgage Number 2392349 or any other dealing or accompanying instruments affecting the said Certificate(s) of Title;
>
> iii. The caveat numbered 2371025 lodged on behalf of the [appellant] against the said Certificate(s) of Title on the 11th day of January, 2022, shall remain in place;
>
> iv. The [appellant] gives its undertaking as to damages, and the said appeal and application in the Court of Appeal shall be filed no later than 11 July 2022 by 3:00 pm.
>
> 5. Costs to the [respondents].
>
> 6. The [appellant]'s Attorneys-at-Law are to prepare, file and serve this Order."

[2] Having read and heard submissions of counsel for all parties, this court took the view that the learned judge was well within his right in refusing to grant the appellant's application for an interlocutory injunction and as a result on 8 December 2023, it ordered that:

> 1. The appeal from the decision of Justice D Staple (Ag) made on 7 July 2022 is dismissed;
> 2. The counter notice of appeal of the 1st respondent is dismissed;
> 3. The counter notice of appeal of the 2nd and 3rd respondents is dismissed;
> 4. The parties shall within 14 days of obtaining the reasons for judgment, file and serve written submissions in relation to the costs of the appeal;
> 5. Orders number 4 and 6 made by the full court on 23 September 2022 are to continue in force pending the determination as to the costs of the appeal."

[3] At the time of giving the decision we promised to put our reasons in writing and we now fulfil that promise.

The background

[4] Mr Sunil Vangani ('Mr Vangani') was at the material time the managing director of the appellant company, Vinayaka Management Limited, a limited liability company incorporated in Jamaica on 5 October 2021 ('the appellant'). The appellant and the 1st respondent, Genesis Distribution Network Limited ('1st respondent') entered into an agreement for sale dated 10 November 2021 ('AFS'). By virtue of this AFS, the appellant was the purchaser and the 1st respondent was the vendor in relation to property located at 12 Bogue Estate in the parish of Saint James and registered at Volume 1439 Folio 71 of the Register Book of Titles and a 1/15th share in common properties comprised in certificate of title registered at Volume 1219 Folio 753 ('the property'). Two draft agreements for sale had preceded the execution of the AFS. The first draft was prepared with the 1st respondent as the vendor and a company called Blue Lagoon Inc. as the purchaser. This remained unexecuted. The second had the 1st respondent as the vendor and a company called Royal Palm Limited as the purchaser. The second of the two was

executed. (It appears that this agreement was treated by the parties as having no further relevance). Mr Vangani was connected as a principal of the respective purchasing companies in all these agreements for sale. The second draft agreement as well as the AFS contained identical terms and included a special condition 21 which gave the vendor, in both these agreements, the right to terminate simpliciter.

[5] On 23 December 2021, the appellant learned through his attorney at law, Mr Clayton Morgan, that the 1st respondent had opted to cancel the AFS as it had found a new purchaser, Mr Nohaud Azan ('2nd respondent'), who was prepared to purchase the property at a significantly higher price. Consequently, on 11 January 2022, Mr Vangani lodged a caveat against the registration of any change in proprietorship or any dealing with the property.

[6] The 1st respondent, in furtherance of the agreement for sale with the 2nd respondent, lodged a registrable instrument of transfer to Ashnik Land Holdings Limited ('the 3rd respondent') on 7 April 2022. The 2nd respondent is the 3rd respondent's principal.

[7] The appellant, thereafter, sought a number of reliefs from the Supreme Court including specific performance of the AFS as well as a declaration that the AFS constituted a valid agreement between the parties and that the 1st respondent's cancellation of the AFS was null and void. The appellant filed a claim form and particulars of claim on 22 April 2022 claiming these reliefs sought.

[8] Furthermore, by way of notice of application for court orders, filed on 26 April 2022, the appellant sought injunctive relief against the 1st respondent, seeking to prevent it from transferring or dealing with the property until after the determination of the claim in the Supreme Court. This application also sought to prevent the Registrar of Titles/National Land Agency from treating with the property until after the determination of the claim. It also sought that the caveat lodged by Mr Vangani, on behalf of the appellant, with respect to the property, remain in force until after the determination of the claim. The application was heard on 26 April 2022 before Pettigrew Collins J. The

interim injunctive relief was granted in terms of the orders sought by the appellant and the *inter partes* hearing of the matter was set for 26 May 2022. The matter was ultimately heard by the learned judge on 7 July 2022.

[9] As stated above, the learned judge on 7 July 2022 refused the appellant's application for an interlocutory injunction and consequently on 8 July 2022, the appellant filed its notice and grounds of appeal against the orders of the learned judge. Thereafter, the appellant, on 25 July 2022, filed an amended notice of appeal which sought the following:

> "1. The [appellant's] appeal against the decisions or Order of the learned Judge, the Honourable Mr. Justice Dale Staple J (Ag), be allowed;
>
> 2. The above-mentioned decisions or Order of the learned Judge, the Honourable Mr. Justice Dale Staple J (Ag), be set aside.
>
> 3. An interlocutory injunction be granted to the [appellant]against the First Respondent preventing it from selling or transferring its interest in the Certificate(s) of Title for the property to any third party including, in particular, the Second and Third Respondents herein, and otherwise dealing with the Certificate of Title for the property, until the trial of the substantive claim in the Supreme Court or until further Order.
>
> 4. The costs of the instant Appeal and the costs of the applications in the Supreme Court be awarded to the [appellant]to be taxed if not agreed.
>
> 5. Such further orders and/or relief that this Honourable Court deems just."

Grounds of appeal

[10] The appellant's amended grounds of appeal were as follows:

> i. The learned Judge erred in law in refusing to grant the Appellant's application for an interlocutory injunction restraining the First Respondent from transferring to

the Third Respondent its interest in the Certificate of Title for the real property at Lot 12 Bogue Estate in the parish of St. James registered at Volume 1439 Folio 71 of the Register Book of Titles and 1/15th share in common properties comprised in Certificate of Title registered at Volume 1219 Folio 753 of the Register Book of Titles (hereafter "the property").

ii. The learned Judge erred in law in ruling that the Appellant's application for an interlocutory injunction did not disclose that there was a serious issue to be tried.

iii. The learned Judged erred in law in ruling that damages would be an adequate remedy for the Appellant.

iv. The learned Judge erred in concluding that the Appellant intended on `…***using the land for investment purposes only'***, when there was absolutely no evidence to this effect.

v. The learned Judge erred in ruling that the balance of convenience lay in refusing the interlocutory injunction sought by the Appellant.

vi. The learned Judge erred in ruling that the Appellant's application for an interlocutory injunction could not succeed as the Appellant had failed to produce the stamped version of the agreement for sale between the Appellant and the First Respondent as required by section 36 of the Stamp Duty Act.

vii. The learned Judge erred in failing to interpret properly the provisions of the Stamp Duty Act, in particular sections 36, and 43 to 45, respectively.

viii. The learned Judge erred or alternatively, contradicted himself in ruling that the agreement for sale between the First Respondent and the Appellant could not be relied on or enforced as it was not stamped but, nonetheless, relied on the provisions of the unstamped exhibited copy of the agreement between the First Respondent and the Second Respondent to decide that their agreement should be given precedence over the Appellant's.

ix. The learned Judge erred in failing to appreciate that neither the Second Respondent nor the Third Respondent could have been a bona fide purchaser for value without notice having regard to the date (January 11, 2022) the Appellant lodged a caveat against the Certificate of Title for the property vis-à-vis the date of the Agreement for Sale (March 7, 2022) signed by the First Respondent which was submitted to Tax Administration Jamaica.

x. The learned Judge erred in concluding that the Appellant had no equitable interest in the property as a result of the First Respondent and the Appellant signing the agreement dated November 10, 2021 and the payment of the relevant deposit.

xi. The learned Judge misunderstood his role and erred in law in ruling on the effect or meaning of special condition 21 of the agreement for sale between the Appellant and the First Respondent thereby usurping the function of the judge who is to preside over the trial of the substantive matter in the Supreme Court.

xii. The learned judge erred in failing to appreciate that the Appellant did not deny signing the agreement for sale with the First Respondent containing special condition 21, but that the Appellant was contending that special condition 21 did not have the meaning ascribed to it by the Respondents.

xiii. The learned Judge erred when he concluded that the caveat lodged on the 11th January, 2022 was not lodged on behalf [sic] the Appellant but was, instead, lodged for the Appellant's principal, Mr. Vangani.

xiv. The learned Judge erred when he concluded that the caveat was lodged to protect an interest in money only.

xv. The learned Judge erred when he concluded that the Respondents would suffer greater hardship if the injunction relief sought by the Appellant were granted.

xvi. The learned Judge erred in finding that the Appellant could not satisfy any undertakings as to damages.

xvii. The learned Judge erred in concluding that the sum of US$220,000.00 was not available to the Appellant to satisfy any undertaking as to damages; and

xviii. The learned Judge misunderstood the evidence and erred when considering the issue of where the balance of convenience lay, as he failed to appreciate that the financing (US$3.74M) approved by JMMB was for the Appellant to complete the purchase of the property from the First Respondent."

Counter notices of appeal of 1st, 2nd and 3rd respondents

[11] The 1st respondent, as well as the 2nd and 3rd respondents jointly, filed counter notices of appeal on 15 July 2022 and 13 July 2022 respectively, contending that the decision of the learned judge should be affirmed.

[12] The 1st respondent contended that the decision should be affirmed on the following bases:

"1. The Appellant knew from the 23rd December, 2021 that the 1st Respondent had terminated the Agreement for Sale between the Appellant and the 1st Respondent. The caveat lodged by Mr. Vangani on the 11th January, 2022 was warned by the Registrar of Titles by notice dated the 8th April, 2022. The [appellant] acted improperly and inequitably in making an application for interim injunctions on the 26th April 2022 and giving the 1st Respondent less than three (3) hours' notice within which to secure legal representation and to instruct an attorney-at-law to act on its behalf. Given the almost four months between the termination of the Agreement for Sale and the application for interim injunction, the three (3) hours' notice was grossly inequitable and unjust.

2. The Appellant was guilty of laches in applying for the interim injunction granted on 26th April 2022.

3. In making the *ex parte* application for the said interim injunctions, the Appellant failed to make full and frank disclosure of all material facts that ought to have been disclosed to the Court, in particular the Appellant did not bring to the Court's attention the letter dated the 7th April, 2022 from the 1st Respondent's previous attorney-at-law and

addressed to the Appellant's previous attorney-at-law which was exhibited to the Affidavit of Sunil Vangani sworn to on the 25th April, 2022 as 'SV-8'.

4. The Agreement for Sale dated the 10th November, 2021 was not stamped in accordance with section 35 of the Stamp Duty Act and the Appellant did not provide the Court with any evidence of an attempt to stamp either the Agreement for Sale in its possession or a copy of the Agreement for Sale.

5. There is no serious issue to be tried as the primary issue was whether the 1st Respondent could terminate the Agreement for Sale dated 10th November, 2021 pursuant to the clear words set out [sic] special condition 21. There was no basis for the Court to imply terms/words into the Agreement for Sale.

6. The Appellant provided no evidence as to its ability to satisfy its undertaking as to damages."

[13] The 2nd and 3rd respondents provided the following reasons as to why the decision of the learned judge should be affirmed:

1. Despite the Appellant knowing, from not less than 14 days before the Appellant made the ex parte 'Without Notice' Application for Court Orders (Injunction) on 26th April 2022, of at least the Third Respondent's interest in the lands the subject matter of these proceedings as intended transferee, the Appellant irregularly and improperly failed to include the Third Respondent as a party to the proceedings.

2. The [appellant] acted improperly, inequitably, and contrary to CPR 17.3(2) and CPR 17.4(4), in making on 26th April 2022 the without notice application for interim injunctions which injunctions were specifically aimed at striking at the root of the Second Respondent's and/or the Third Respondent's rights and interests, in circumstances where there was no good reason for not giving notice.

3. The Appellant's duty to make full and frank disclosure was not fulfilled by the short informal notice the Appellant gave to the 1st Respondent.

4. In making the *ex parte* application for the said interim injunctions, the Appellant failed to make full and frank disclosure of all material facts that ought to have been disclosed to the Court.

5. There is no serious issue to be tried in relation to the right of the First Respondent to invoke Special Condition 21 of the Agreement with the Appellant for the purpose of terminating it even if there has been no breach by the Appellant.

6. At the time when the Second Respondent/Respondent entered into the Agreement for Sale as well as when he nominated the Third Respondent/Respondent to take the transfer of the subject property there was no caveat in protection of any interest in the property as being claimed by the Appellant.

7. By virtue of section 71 of the Registration of Titles Act, the Second and Third Respondents are not affected any by notice of any interest which was being claimed by or on behalf of the Appellant.

8. The Appellant was guilty of laches in applying for interim injunctions granted on 26th April 2022.

9. The said interim injunctions are disproportionately injurious to the rights and interests of the Second and Third Respondents.

10. The Appellant failed to make a full note of what happened at the *ex parte* hearing and on what basis the relief was granted on 26th April 2022, and to provide it to the Second and Third Respondents (whether or not asked for) as soon as possible or at all.

11. In breach of CPR 11.16(3), the said ex parte interim injunctions did not contain a statement telling the Respondents of the right to make an application under rule 11.16."

Application to adduce fresh evidence

[14] At the hearing of this appeal, the 2nd and 3rd respondents by way of notice of application for court orders, filed on 11 October 2023, sought permission to adduce an exhibit for this court's consideration. They sought specifically that:

> "Permission be granted for the [2nd and 3rd respondents] to adduce additional evidence, namely:
>
> i. Certified copy of the Certificate of Title registered at Volume 1439 Folio 71 of the Register Book of Titles, so certified as at 10th October 2023; and
>
> ii. Certified copy of Mortgage No. 2442519."

[15] Dr Lloyd Barnett appeared as counsel for the 2nd and 3rd respondents. In support of this application, he submitted that this court must be aware of the fact that a mortgage was granted to the 3rd respondent by the Bank of Nova Scotia which had now been registered on the relevant title. He stated that the existence of the mortgage would be a barrier to any transfer of title to a fourth party. He also posited that the issue of the mortgage would be pertinent to any pending trial of the claim in the Supreme Court. Also, he submitted that the learned judge would not have had the fact of the existence of the mortgage before him in July of 2022 when he gave his decision. Dr Barnett stated that its consideration by this court would be important to the determination of the appeal, as the court should not act in vain in granting any interlocutory injunction as requested pending the trial.

[16] Mr Ian Wilkinson KC, for the appellant, contended that the requirements of **Ladd v Marshall** [1954] 3 All ER 745, were not satisfied, in particular, the first requirement, that the evidence could have been obtained by reasonable diligence before being heard by the learned judge.

[17] The application before the learned judge was a request for an interlocutory injunction. We were guided by the authorities which dealt with applications to adduce fresh evidence as it relates to interlocutory matters. In **Russell Holdings Limited v**

L&W Enterprises Inc & ADS Global Limited [2016] JMCA Civ 39, Edwards JA reviewed relevant authorities and, at para. [45] of her judgment, determined that concerning interlocutory matters where there has been no trial, it is not necessary to strictly apply all the requirements in **Ladd v Marshall**. In any event, the court now routinely makes orders in fresh evidence applications based on not only on the criteria set down in **Ladd v Marshall** but also against the background of the overriding objective of the Civil Procedure Rules (see para. [40] of **Russell Holdings**).

[18] We granted permission for the exhibits to be entered into evidence in the interests of justice.

Preliminary considerations

[19] Mr John Graham KC, for the 1st respondent, in his written submissions opposing the appeal, made the preliminary point that the court should not hear the appellant's appeal as equity does not act in vain. He noted that the substance of the appeal could no longer be achieved in that, even if the court were to find that the learned judge exercised his discretion wrongly, the transfer of the property from the 1st respondent to the 3rd respondent had already been effected.

[20] Similarly, Dr Barnett, in his oral submissions, posited that the property was transferred to the 3rd respondent and considering that a mortgage (no 2442519 registered on the title) was granted by the Bank of Nova Scotia, the existence of the mortgage would be a barrier to any reversal of sale or transfer to a fourth party.

[21] Mr Wilkinson countered by advancing that the issue of the mortgage would be more pertinent to the trial of the claim in the Supreme Court. He advanced that if this court were to find in favour of the appellant, that the issuance of this mortgage should not have occurred, then this court would have the power to reverse these matters. He stated further that the learned judge did not have the issue of the mortgage before him in July 2022 and the principle of "acting in vain" would not apply to these proceedings.

[22] In our consideration of this issue, the chronology of events is important and will be set out here for convenience:

a) In August 2021 – a draft agreement for sale was prepared between Blue Lagoon Inc (purchaser) and 1st respondent (Vendor).

b) On 17 September 2021 - Agreement for Sale between Royal Palm Limited (purchaser) and 1st respondent (Vendor).

c) On 10 November 2021 –The AFS was executed.

d) On 23 December 2021 - Mr Vangani was advised by his attorney that the 1st respondent had decided to cancel the AFS on the basis that a different purchaser was willing to pay significantly more.

e) On 28 December 2021 - Mr Vangani was advised by his attorney that the 1st respondent's attorney had returned the deposit paid.

f) 7 January 2022 - purported by the respondents to be the date for agreement of sale between the 1st respondent and the 2nd and 3rd respondents.

g) On 11 January, 2022 - Mr Vangani lodged a caveat numbered 2371025 against the title for the property.

h) On 25 February 2022 – 3rd respondent was incorporated.

i) 7 March 2022 - purported by appellant to be the date for agreement of sale between the 1st respondent and the 2nd and 3rd respondents (this date seen on document sent to Stamp office)

j) On 8 April 2022 - warning of caveat given to Mr Vangani.

k) 22 April 2022 - appellant filed Claim Form and Particulars of Claim in the Supreme Court.

l) 26 April 2022 - caveat numbered 2371025 filed by Mr Vangani lapsed.

m) 26 April 2022 – appellant filed notice of application for court orders for injunctive relief in the Supreme Court.

n) 26 April 2022 - The Hon. Miss Justice A. Pettigrew-Collins granted the appellant the interim injunction sought.

o) 18 May 2022 – 2nd respondent lodged caveat against the property.

p) 26 May 2022 – the learned judge extended the interim order made on 26 April 2022 and 2nd and 3rd respondents were joined to the claim.

q) 6 and 7 July 2022 - *inter partes* hearing of appellant's application for interlocutory injunction was heard and the application for interlocutory injunction was refused. The learned judge granted an interim injunction pending an application for an injunction in the court of appeal.

r) 8 July 2022 – the appellant filed notice and grounds of appeal in the Court of Appeal against the orders of the learned judge refusing the application for an interlocutory injunction and granting the application of the 2nd and 3rd respondents discharging the interim injunction.

s) 11 July 2022 – the appellant filed a notice of application for a stay of execution of the orders of the learned judge and, on 3 August 2022, it filed a re-listed stay application. This application was heard on 16 and 17 August 2022 by Dunbar Green JA.

t) 25 July 2022 – appellant's notice and grounds of appeal were amended and filed to replace those filed on 8 July 2022.

u) 17 August 2022- the application for injunction pending appeal was refused by Dunbar Green JA.

v) 25 August 2022 – transfer #2392348 registered on 7 April 2022 effected transferring the interest in property at Volume 1439 Folio 71 to the 3rd respondent.

w) 23 September 2022 – appellant's application to discharge or vary the order of Dunbar Green JA was refused by the Full Court.

x) On 22nd March 2023 Mortgage #2442519 dated 30 September 2022 to the Bank of Nova Scotia registered on Certificate of Title.

[23] Having examined the chronology and the documentary exhibits, as of 17 August 2022, there would have been no legal impediment to the effecting of the transfer of the 3rd respondent's interest on the title. Although the learned judge had ordered that caveat numbered 2371025 (lodged by Mr Vangani) should remain in place pending the appeal, this was overtaken subsequently by the decision of the single judge of this court refusing to grant the interlocutory injunction pending the hearing of the appeal. Effectually, there was no further legal bar to restrain the transfer of the title to the 3rd respondent. This transfer was effected on 25 August 2022. In that event, unless fraud were to be alleged and proved during the course of the trial in the court below, the title of the 3rd respondent, at this stage of the proceedings (the hearing of the appeal), would appear to be indefeasible (see section 71 of the Registration of Titles Act 'ROTA').

[24] Realistically, this court would have no footing on which to grant the orders requested by the appellant. This is so, since the substratum of the appeal is for an interlocutory injunction to restrain any transfer of interest in the relevant property to the 3rd respondent (pending the trial of the claim in the Supreme Court). The question would therefore be, what is this court to restrain in the proceedings presently before us.

[25] In **Winston Brown and Annette Maud-Marie Brown v Carlton Daye** [2021] JMCA Civ 22, the property in dispute had been sold and a new certificate of title had been issued in the name of new owners at the time of the filing of the notice of appeal. V Harris JA, at para. [27], referred to the decision of **the Attorney General of Jamaica v The Commissioner of Police and Machel Smith** [2020] JMCA Civ 67, where Edwards JA opined that the court ought to bear in mind that it was no part of its function to make academic orders. At para. [30], V Harris JA stated that while the court retained a discretion to hear an appeal where there was no longer an issue joined between the parties, this should be done sparingly, "and only in circumstances where there was a good reason, in the wider public interest to do so (see **R v Secretary of State for the Home Dept, ex parte Salem** [1999] 2 All ER 42 at page 47)".

[26] In the case at bar, the counter-notices of appeal remained before us for consideration, and since an issue as to costs of the appeal may require a resolution, it is prudent that a determination be made as to whether the learned judge erred in his assessment of the factual and legal issues before him and/or whether his decision could be affirmed on the grounds set out in the counter notices of appeal.

Grounds of appeal and counter notices of appeal

[27] At the start of oral submissions, King's Counsel Mr Graham indicated that the 1st respondent would not pursue grounds 1, 2 and 3 of its counter notice of appeal. These grounds were, therefore, not considered.

[28] The court identified four main issues in the grounds of appeal and counter-notices of appeal that needed to be resolved: (1) whether the learned judge erred in concluding that there was no serious issue to be tried; (2) whether the learned judge erred in concluding that the balance of convenience was in favour of the respondents; (3) whether the determination by the learned judge that the application for interlocutory injunction should be refused ought to be affirmed based on material non/disclosure and laches during the hearing of the *ex parte* application; and (4) whether there was any other basis on which the learned judge's decision could be affirmed. The submissions of counsel in

the grounds of appeal and counter-notices of appeal will be dealt with under these four headings.

Court of Appeal's discretion to review judge's exercise of discretion

[29] It is well established that the Court of Appeal, as a court of review, should be slow to disturb a judge's finding of fact at the first instance and that the Court will only meddle with the first instance judge's exercise of discretion if it is shown that the judge at first instance was palpably wrong (see **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046; **Rohan Sudine v Shay Newman and Dwayne Chambers** [2023] JMCA Civ 49 para. [66]; **Massander Reid v Bentley Rose and Cynthia Rose** [2011] JMCA Civ 48 para. [44]. In the case of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, speaking specifically to interlocutory applications, Morrison JA (as he then was) at para. [20] stated the following:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[30] In considering the application for the interlocutory injunction, the learned judge found that there was no serious issue to be tried; and that, even if he were wrong on the above, the balance of convenience lay with the respondents and that damages would be an adequate remedy for the appellant as the respondents had the means to satisfy the appellant's claim in damages. He found also that damages would not be an adequate remedy for the respondents. The above issues are the principles as set out in **American Cynamid Co v Ethicon Limited** [1975] 1 ALL ER 504 that must be determined by a judge hearing the application.

Submissions

[31] Submissions from counsel are, therefore, set out as relevant to the learned judge's treatment of the above principles.

Issue 1: whether the learned judge erred in concluding that there was no serious issue to be tried (Grounds of appeal # i, ii, vi, vii, viii, ix, x, xi, xii, xiii and xiv; 1st respondent counter notice # 4 and 5; 2nd and 3rd respondent's counter-notice # 5 and 6)

Special Condition 21

Appellant's Submissions

[32] Mr Ian Wilkinson KC made several submissions on behalf of the appellant regarding perceived errors of the learned judge in his findings. Special Condition 21 provides as follows:

> "21. This agreement may be terminated by the vendor and in such event all monies paid by the purchase must be refunded to the purchaser's Attorney-at-Law SAVE AND EXCEPT the half agreement for sale. Further, the agreement shall be marked cancelled, and the transfer tax certificate and receipt should also be sent to the purchaser's attorney so that they may apply for a refund."

[33] In relation to special condition 21 of the AFS, King's Counsel contended that the intention of the appellant and its attorney at law would be to protect the purchaser's interests during the sale, a position which would not have been intended to give the 1st respondent unfettered discretion to terminate the agreement for sale without there being any breach by the appellant. Special condition 21 would have been with the understanding that the common practices in conveyancing matters would apply to the AFS and would necessarily mean that the 1st respondent could only terminate if the appellant breached a term of the AFS.

[34] King's Counsel invited this court to find that special condition 21 is an innominate term and should be read within the usual meaning of sale agreements in Jamaica and that the interpretation that flouts "business common sense" should be rejected.

[35] King's Counsel submitted that the judgment in **Winston Newell v Tastey Newell** [2020] JMCA Civ 44 was instructive in this regard. He advanced that the parties intended that special condition 21 was to operate only in the event of a breach committed by the appellant and was to be considered a serious issue triable before a trial judge in the Supreme Court. The learned judge attempted to rule on the meaning of special condition 21 without the rigors of a trial, thereby usurping the function of the ultimate trial judge. In support of his position concerning the intention of the parties, counsel relied on the case of **Epsilon Global Equities Ltd v Hoo & Ors** [2017] JMCA Civ 12 where Phillips JA considered the parties' intention in ascribing meaning to a document.

1st respondent's submissions

[36] Mr John Graham KC, in relying on the case of **Aedan Earle v Water Commission** 2014 JMSC Civ 69, submitted that care was taken by experienced attorneys at law representing the appellant and the 1st respondent in having special condition 21 included in the AFS. He posited that the words contained in that clause were unambiguous and that there were no linguistic mistakes and, as such, the words should be given their natural and ordinary meaning. King's Counsel also advanced that the fact that a clause appeared more favourable to one party was not sufficient reason for the court to conclude that the clear and unambiguous words of the contract were not what was stated. He referred the court to para. [113] of **Epsilon Global Equities Ltd v Hoo & Ors**, where Phillips JA referenced Lord Hoffman in **Chartbrook Ltd v Persimmon Homes Ltd** [2009] UKHL 38. The learned judge was therefore entitled to examine and construe those words as he did.

2nd and 3rd respondents' submissions

[37] Dr Lloyd Barnett also advanced that the learned judge was correct in finding that there was no serious issue to be tried since the 1st respondent had a clear right to terminate the AFS. Counsel argued that the appellant and the 1st respondent signed the AFS after they had been afforded a considerable period for review and consideration of its terms and also argued that the AFS was signed on behalf of the appellant on the

advice of its attorney. Counsel maintained that the language for the AFS is clear and plain and that there is no ambiguity or suggestion that there was any omission. He contended that the AFS, having been prepared and reviewed by attorneys at law, and, expressed in careful detailed language, meant that there could be no reasonable basis for concluding that it did not reflect the agreed terms and intentions of the parties. In relying on the case of **Ricardo McDonald v Island Networks Limited** [2019] JMSC Civ 125, counsel submitted that the appellant's attempt to modify or alter the effect of special condition 21 had no chance of succeeding.

[38] Counsel also cited Cheshire, Fifoot & Furmston's Law of Contract (15th ed) at page 700, in highlighting the principle of freedom of contract which permits a person to agree to a condition that the opposite party can terminate without there being a breach. He also advanced that there was no caveat lodged by the appellant against the title of the property at the time that the 2nd respondent entered into the agreement to purchase the property.

The learned judge's findings

[39] The learned judge found that there was no serious issue to be tried relevant to the interpretation of special clause 21. He noted that there was no assertion by the appellant that the agreement was not terminated pursuant to special condition 21, neither did he plead any factual basis for avoiding the clause such as fraud, *non est factum*, misrepresentation or any other reason. He also noted that there was no cross-referencing between special condition 21 and any other clause in the AFS. He considered the reference to Cheshire, Fifoot and Furmston's Law of Contract 15th edn (paras. [51] to [56] of his judgment) where the learned authors said the following at page 700:

> "It is not unusual for contracts to contain provisions entitling one party to terminate without the other party having done anything wrong. At first sight this seems strange, but there are many situations where it makes excellent sense."

[40] The learned judge concluded that special condition 21 was plain in its meaning and that language should not be imported into an agreement, "especially where it was drafted and agreed by counsel on both sides" in order to avoid the harsh consequences of the same. In particular, at para. [57], the learned judge set out the basis for his conclusion:

> "[57] Is the clause unfair? An argument could be reasonably made for that position. But it would not have much prospect of success if any at all. I agree with the assertions of the [respondents] on this issue from their submissions. The negotiations were [at] arms' length; the parties both had legal advice (in fact, one might argue that the [appellant] was in the stronger position given that it had on its side a prominent senior attorney-at-law in western Jamaica with tremendous experience); the agreement off which the impugned agreement was based was reviewed by Mr. Vangani and his lawyer and there was no issue raised; there is no evidence that this clause posed a problem for either party at the time of signing. So the argument of the clause's unfairness may not hold much, if any, weight at trial."

Analysis

[41] As it relates to the appellant's submissions, I am unable to discern what error the learned judge committed in coming to the conclusion that the argument of the clause's unfairness "may not hold much, if any, weight at the trial". The affidavit evidence reveals that both parties, (the appellant and the 1st respondent) entered into an arm's length agreement. They were both represented by counsel when the AFS was signed which included special condition 21. The affidavit of Mr Vangani, filed on 26 April 2022, at paras. 5 and 6, states that, on 21 September 2021, an agreement for sale (which contained special condition 21), was reviewed by himself and his attorney, Mr Clayton Morgan and was then signed by him on behalf of the appellant and witnessed by Mr Morgan. He states that the agreement was also signed by Mr Derrick Feare on behalf of the 1st respondent and witnessed by Mr Maurice McCurdy. He then refers to the exhibited copy of the AFS as being later dated 10 November 2021 by the 1st respondent. The learned judge did point out at para. [45] of his judgment that these assertions were not totally accurate as

Mr Morgan did not sign the AFS, but that it was only witnessed by Mr McCurdy. The AFS carries the date of 10 November 2021. The learned judge also stated that Mr Vangani would, in effect, be referring to the 2nd draft agreement (between Royal Palm Limited and the 1st respondent which was executed on 21 September 2021). However, there is no dispute between the parties that both the 2nd draft agreement and the AFS contained the impugned clause.

[42] Special condition 21 is, as noted by the learned judge, advantageous to the 1st respondent. However, Mr Vangani does not speak to the intention of the parties in including special condition 21. He merely states at paragraph 20 of the said affidavit, that he was advised by Mr Morgan after the contract was terminated that special condition 21 appeared to be incomplete and did not give the 1st respondent the absolute right to terminate the contract unilaterally especially where there was no breach. This, however, is only reflective of an afterthought and does not speak specifically to the intention of the parties at the time that the agreement was negotiated and signed.

[43] On the other hand, Mr Feare who signed the AFS on behalf of the 1st respondent stated in his affidavit filed on 24 May 2022 at paras. 13, 14 and 15 that:

> "13. Because this clause is not usually included in agreements for sale, Mr. Vangani and I decided to have a meeting to discuss this clause and the draft agreement generally.
>
> 14. A meeting was convened at my then residence at 1003 Gill Drive Ironshore Montego Bay. Present at that meeting was Mr. Sunil Vangani, Mr Maurice McCurdy, Ms Jhenelle Clarke, and I. It was made clear to Mr Vangani the reason for including special condition 21.
>
> 15. The reasons I gave Mr. Vangani for including special condition 21 which gave me the right to terminate the agreement were that:-
>
> (a) The property was not on the market for sale, and I had not fully made up my mind about selling the property by itself or selling both the property and the business as a 'package' deal;

(b) A standard deposit of ten percent (10%) was requested from Mr Vangani but he stated that he could only offer five percent (5%); and

(c) The offer I received from Mr. Vangani was below what I thought the property was worth."

[44] In **Epsilon Global Equities Limited v Hoo & Ors**, Phillips JA, in adopting the five principles of contractual interpretation laid down in the dictum of Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society**, stated thus in para. [109] of her judgment:

> "[109] In summary, Lord Hoffmann was of the clear opinion, with which the House of Lords agreed (save for Lord Lloyd of Berwick dissenting), that the interpretation of any document was to be given the meaning that a reasonable person would give to it having all the background knowledge, reasonably available to the parties at the time of the contract. As indicated, these background facts had become known as the matrix of facts, being such facts which would affect the interpretation to be given to the document by the reasonable man. Previous negotiations which may be indicative of the parties' subjective intent remain inadmissible, save in certain exceptional circumstances. So the document bears the meaning the parties intended it to have, which would have been conveyed to the reasonable man, given the relevant background that the parties would have had available to them. Generally, unless it was clear that the parties could not have had that intention, the words would be given their "natural and ordinary meaning."

[45] Phillips JA also went on, at para. [121] of her judgment, to cite Lord Hoffmann's opinion on behalf of the Board in **Attorney General of Belize and others v Belize Telecom Ltd and another** [2009] UKPC 10, [2009] 2 All ER 1127, in relation to how the court ought to construe a document in order to avoid an absurdity. She quoted para. [16], where Lord Hoffmann opined:

> "...The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms

> to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see **Investors' Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98 at 114-115, [1998] 1 WLR 896 at 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument."

[46] The appellant would be hard-pressed to advance any other interpretation of special condition 21 within the matrix of facts as they exist. Neither is it to be yoked to the principle of "time being of the essence" as a contractual term in the AFS, as urged by Mr Wilkinson. According to the learned authors of Halsbury's Laws of England, 5th edn, "The expression 'time is of the essence' means that a breach of the condition as to time for performance will entitle the innocent party to treat the breach as a repudiation of the contract, without regard to the magnitude of the breach, and normally, to claim damages for loss of bargain" (see Halsbury's Laws of England, Volume 6 at para. 363). Time being of the essence did not arise at all in the dealings between the appellant and the 1st respondent when the AFS was terminated. In all the circumstances, it is difficult to conclude that the learned judge erred in his assessment of this issue.

Stamp duty point

Appellant's submissions

[47] King's Counsel maintained throughout his written submissions that the learned judge had misinterpreted and misapplied section 36 of the Stamp Duty Act and had erred when he concluded that there was no enforceable agreement for sale as it was not stamped and not properly before him. King's Counsel posited that this posture by the learned judge led him to conclude that there was no serious issue before him to be tried.

King's Counsel advanced that on the contrary, the AFS was an exhibit to an affidavit and was properly before the court in interlocutory proceedings.

[48] In relying on the cases of **Leon Courtney Robinson v Michelle Chen and Others** [2014] JMSC Civ 146, **Wilfred Emmanuel Forbes and Cowell Anthony Forbes v Miller's Liquor Store (Dist) Limited** (unreported) Supreme Court, Jamaica, Suit No E 478 of 2001 delivered on 18 October 2002 and **Harry Abrikian et al v Arthur Wright et al** (unreported) Supreme Court, Jamaica Suit No CL A 083 of 1944, judgment delivered 16 June 2005, King's Counsel urged that this court not adopt a narrow restrictive approach in construing section 36 of the Stamp Duty Act in interlocutory matters. Our understanding of King's Counsel's further submissions is that section 36 of the Stamp Duty Act should not benefit a party who failed to stamp the agreement. Nor was it intended to prevent an innocent litigant from proving a breach of the agreement in question. The section was designed to prevent a defrauding of the revenue. In coming to this view, counsel cited the case of **Anthony Jonathon Nunns v Howard Mark Rotherham** (unreported) High Court (Montserrat) CASEMNIHCV2020/0041 delivered on 16 July 2021.

[49] Furthermore, King's Counsel again commended the case of **Leon Courtney Robinson v Michelle Chen and Others** in noting that in certain circumstances, there is a discretion by the court to allow parties to stamp the document prior to an award being made in their favour, or, in the alternative, to not require the document to be stamped.

1st respondent's submissions

[50] King's Counsel for the 1st respondent countered the appellant's submissions by contending that according to section 36 of the Stamp Duty Act, the AFS was not properly before the court when an interim injunction was granted. He cited the case of **Lookahead Investors Limited v Mid Island Feeds (2008) Limited & Ors** [2012] JMCA App 11 in submitting that until the appellant submits to the court an agreement for

sale that was properly stamped, then the court should not consider nor grant the appellant's application.

2nd and 3rd respondents' submissions

[51] Likewise, counsel for the 2nd and 3rd respondents was of the view that the appellant was not in a position to ask the learned judge to enforce the AFS nor was the appellant in a position to rely on the unstamped agreement for the grant of an interlocutory injunction.

Analysis

[52] Sections 36, 43 and 45 of the Stamp Duty Act ('the Act') provide as follows:

> "36. No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof....
>
> 43. Upon the tender in evidence of any instrument, other than inland and foreign bills of exchange and promissory notes, coastwise receipts, and bills of lading, it shall be the duty of the officer of the court, before reading such instrument, to call the attention of the Judge to any omission or insufficiency of the stamp; and the instrument if unstamped, or insufficiently stamped, shall not be received in evidence until the whole, or (as the case may be) the deficiency of the stamp duty, to be determined by the Judge, and the penalty required by this Act, together with an additional penalty of five hundred dollars, shall have been paid...
>
> 45. The Commissioner shall, upon production of the document with such memorandum thereon, perforate such production of such instrument with or, as the case may require, impress thereon, the proper stamp or stamps, in conformity with such receipt."

[53] The Act is quite clear as to the effect of the unstamped agreement. Brooks JA (as he then was) reiterated in **Lookahead** that it was correct to refuse to consider the agreement until it was stamped. At para. [13] of the judgment, he expressed thus:

> "When the claim came before Sinclair-Haynes J, the learned judge quite correctly refused to consider the agreement for sale until the document had been stamped."

[54] The learned judge considered the authorities of **Wilfred** and **Harry Abrikian** which were relied on by the appellant, however, he distinguished the factual circumstances in the case at bar as there was no evidence that there was a deliberate attempt by the 1st respondent not to stamp the AFS. The learned judge would, therefore, have been correct that the unstamped agreement should not be received into evidence for the purpose of enforcement. It does appear, based on sections 43 and 45 of the Act that the unstamped document could be rectified by the payment of the required duty. In any event, it cannot be said, that the learned judge had no regard to the contents of the unstamped AFS in arriving at a determination. Both the appellant and the 1st respondent relied on the contents, in particular, special condition 21 which would have been the critical issue affecting the outcome of the application.

[55] Similarly, the learned judge considered the agreement for sale between the 1st respondent and the 2nd respondent and took note that the specific clause was not included in this new agreement. Mr Wilkinson's contention that the learned judge gave preference to and relied on the unstamped agreement for sale between the 1st and 2nd/ 3rd respondents but failed to do so concerning the AFS, would not be an accurate assessment of the learned judge's review. In any event, the 1st and 3rd respondents were not relying on their agreement in order to give effect to it.

[56] Further, the learned judge did not rest his decision merely on the absence of a stamped agreement. He indicated at para. [44] that if he were wrong on this point (whether or not the fact that there was no enforceable agreement meant there could be no injunction), then the "the other point of weakness" would be the issue of whether the appellant did not agree to special condition 21.

[57] There were other issues considered by the learned judge as he weighed whether the appellant had established that there was a serious issue to be tried. He did opine that

the appellant had no equitable interest in the property as the caveat was lodged by Mr Vangani to protect a monetary interest. Also, he stated that there was no evidence that the deposit of US$220,000.00 (paid on behalf of Royal Palm Limited) could be properly taken to be the deposit for the AFS as the AFS was not an assignment of the second draft agreement; and that this fact was not disclosed to the Registrar of Titles (at the time of the application for the caveat). However, as the learned judge indicated, that may ultimately prove to be a legal nicety as "it was not raised by the [respondents] in their defence nor did it seem to appear to them" (see para. [63] of the judgment). The learned judge then commented that, "at this stage, taken together with the other weaknesses highlighted, it does severely undermine the seriousness of the [appellant's] case at this stage where the Court is considering whether to extend the injunction". While this issue, as the learned judge conceded, may not have provided any cogent reason for concluding that there is no serious issue to be tried, it was not the main plank of the learned judge's decision. Neither were the other issues highlighted above. Considering all the circumstances, his ultimate determination cannot be faulted.

[58] As to ground ix specifically, the learned judge made no determination as to the status of the 2nd and 3rd respondents as *bona fide* purchasers for value without notice.

[59] Grounds of appeal i, ii, vi, vii, viii, ix, x, xi, xii, xiii, xiv, therefore, are not sustainable in any determination that the learned judge erred in his assessment.

[60] In addition, grounds 4, 5 and 6 of the counter-notice of appeal of the 1st respondent as well as ground 5 of the 2nd and 3rd respondents' counter-notice of appeal are also not sustainable. This is so for the simple reason that they are not relevant to the decision of the learned judge being affirmed on other grounds. When these grounds are examined, it is pellucid that these are issues that were considered by the learned judge in coming to his ultimate decision. As such, these grounds are in breach of rule 2.3(3) of the Court of Appeal Rules which states that a counter notice of appeal wishing to affirm a judge's decision must be on grounds other than those relied on by the court below. These grounds ought, therefore, to have been struck out. Since the issue was not raised

with counsel during the hearing of the appeal, these grounds should be treated as dismissed.

Issue 2: whether the learned judge erred in concluding that the balance of convenience was in favour of the respondents (grounds of appeal iii, iv, v, xv, xvi, xvii, xviii; 1st respondent's ground 6; 2nd and 3rd respondents' ground of appeal #9)

Appellant's Submissions

[61] King's Counsel for the appellant submitted that the learned judge's assessment that the balance of convenience did not favour the granting of the interlocutory injunction in the appellant's favour was wrong. Although the learned judge appreciated that land is of a unique character and so ordinarily meant that damages are not an adequate remedy, he nevertheless found that in the instant case, the presumption that damages would not be adequate was rebutted. This finding, King's Counsel submitted, was an error by the learned judge. King's Counsel relied on the cases of **Tewani Ltd v Kes Development Co Ltd & ARC Systems Ltd.** (unreported) Supreme Court, Jamaica, Claim No 2008 HCV 02729 and **Lookahead**. He argued that the cases of **Tewani** and **Lookahead** supported his assertion that the usual presumption that damages would not be an adequate remedy for contracts involving the sale of property should apply in the instant case. King's Counsel also argued that even if damages were an adequate remedy, the learned judge was not in a proper position to determine the issue as there was no material before the court from the 1st respondent to substantiate whether the 1st respondent could pay or satisfy any award of damages to the appellant.

[62] King's Counsel went on to submit that the balance of convenience lay in the injunctive relief being granted to the appellant for the following reasons:

a. The evidence before the learned judge demonstrated that the appellant's interest in the property was first in time to that of the 2nd and 3rd respondents;

b. Arguably, at the very least, this was an issue which merited further consideration at a trial;

c. In all the circumstances, damages would be an adequate remedy for all the Respondents. Damages, however, would not be an adequate remedy for the appellant;

d. Until the issues to be tried are completely ventilated, the ownership of the property should have been preserved as any allowance or latitude for any of the Respondents to deal with the said property before trial could cause irremediable loss and harm to the Appellant;

e. There was no unreasonable prejudice or hardship to be suffered by the Respondents if the learned Judge had granted to the Appellant the relief being sought. This is particularly so, bearing in mind that the evidence disclosed that the 2nd Respondent proceeded with his agreement for sale after becoming aware of the Appellant's earlier interest. In other words, the 2nd and 3rd Respondents were the authors of their own misfortune;

f. The 2nd and 3rd Respondents with notice of the Appellant's prior interest, clearly incited the 1st Respondent to breach the first agreement; and

g. The conduct of the Respondents left a lot to be desired. Indeed, the 1st Respondent breached the [AFS] blatantly without any justifiable cause. Further, the 1st Respondent held two deposits simultaneously from two different purchasers that caused the 'Court's eyebrows' to be 'raised'."

[63] King's Counsel, in citing the case of **N W L Ltd v Wood** [1973] 3 ALL ER 614, asserted that the learned judge failed to consider the warning of Lord Diplock in dealing with the case in such a manner at the interlocutory stage that it would in effect, dispose of the action finally in favour of the party in whose favour the application was successful.

1st respondent's submissions

[64] King's Counsel for the 1st respondent submitted that there was no basis on which it could be said that the learned judge was wrong or that he misdirected himself as to

where the balance of convenience lay. The 1st respondent could not have adequately been compensated by the appellant's undertaking as to damages. He posited the following reasons:

> "a. The [appellant] was incorporated on the 5th October, 2021 with an authorised share capital of [$] 100,000.
>
> b. The [appellant] did not provide the court below or this court with any evidence of any other assets owned by it or their whereabouts and there is no evidential basis upon which this court can feel satisfied that the [appellant] can provide an undertaking as to damages which is of substance.
>
> c. If the injunction were to remain in place, at a minimum the direct loss to the First Respondent would be US$1.1 M.
>
> d. The First Respondent would also be exposed to liability to a third party for breach of contract."

2nd and 3rd respondents' submissions

[65] Counsel submitted that based on the evidence provided by the appellant, the learned judge was correct in concluding that damages would be an adequate remedy for the appellant if it were to succeed, as the appellant was clearly an investment company incorporated for the specific purpose of taking the transfer of the subject property.

[66] Further, counsel argued that the evidence advanced by the appellant indicates that if it were to fail at trial, it would not be able to compensate the respondents for the losses suffered by the delay resulting from the injunction. The appellant had not demonstrated that it had the financial standing to raise funds on its own or that it had any financial credibility or resources to compensate the respondents for the likely potential substantial losses. Counsel, however, stated that the 1st respondent is the owner of the property which has substantial value and the 2nd respondent has the ability to raise finances from reputable sources.

The learned judge's findings

[67] The learned judge found that the presumption that land is usually of a unique character and so damages would not be an adequate remedy had been rebutted. He stated that the land is commercial in nature and so the loss to both the appellant and respondents was capable of being assessed with reference to a monetary value. He also found that the appellant had not established that it had an interest in the land which needed to be protected. This was because it was Mr Vangani who had lodged the caveat in his own name and not, on the face of it, on behalf of the appellant. Also, the appellant must establish that it had an interest that needed to be protected through the coercive power of the injunction; that if it was intended to be on behalf of the appellant as the affidavits of Mr Vangani and the declaration of Mr Morgan (the lawyer) had suggested, it was a caveat to secure money, not an interest in the land. The learned judge compared this to the actions of the 2nd respondent, who had not only lodged a caveat but also an instrument of transfer. He stated that the 2nd respondent was seeking to protect an equitable interest in property, as well as the interest of the 3rd respondent, his nominee.

[68] The learned judge found that under these circumstances, where the interest to be protected for the appellant is purely a financial one, damages would be an adequate remedy for the appellant. He also found that the respondents had demonstrated that they were able to satisfy the appellant on their cross-undertaking as to damages. He stated that he was satisfied that the respondents would suffer serious financial losses should the injunction be maintained. Having scrutinized the affidavits of Mr Vangani, he found no evidence to demonstrate the capacity of the appellant to meet its undertaking and that the appellant merely spoke to raising funds to meet the debt. He stated also that the sum of US$220,000.00, (the deposit paid which was in an escrow account) was not, strictly speaking, the appellant's funds (as this deposit had been paid by Mr Vangani on behalf of Royal Palm Limited).

[69] In relation to who would bear the greater hardship, the learned judge concluded that it would be the respondents as there was evidence of a registrable mortgage granted

to the 3rd respondent registered on 7 April 2022 (which had been referred to in an exhibit to Mr Vangani's affidavit filed on 26 April 2022). Based on this, he was of the view that the 2nd and 3rd respondents' financing of the purchase of the property was on more secure footing. In contrast, the [appellant] had not yet reached the advanced stage of disbursement (concerning its requests for mortgage financing from JMMB) that the respondents had reached. Also, that there was no evidence put forward by Mr Vangani as to whom approval of financing was given by JMMB, whether to Mr Vangani himself or to the appellant.

Analysis

[70] The general principle of law is that damages will not usually be an adequate remedy in contracts for the sale of land, even if the land is part of a commercial venture. In **Lookahead**, at paras. [38] and [39], Brooks JA explained:

> "[38]…The reason behind that thinking is that each parcel of land is said to be 'unique' and to have 'a peculiar and special value' (see page 32 of Specific Performance 2nd Ed. by Gareth Jones and William Goodhart.) That reasoning may be found in the judgment of Hardwicke LC in **Buxton v Lister & Cooper** (1746) 3 Atkyns Reports 383…
>
> [39] The principle seems to apply even if the transaction in respect of the land is part of a commercial venture…"

[71] This presumption, however, can be rebutted depending on particular circumstances. In **Lookahead**, at para. [40] Brooks JA referred to two recent cases where it was determined damages would be adequate:

> "[40] …They are **Shades Ltd v Jamaica Redevelopment Foundation Inc.** SCCA No 55/2005 (delivered 20 December 2006) and **Global Trust Ltd and another v Jamaica Redevelopment Foundation Inc. and another** SCCA No 41/2004 (delivered 27 July 2007). In **Shades**, this court was of the view that such land, was "a mere asset of the company" despite the fact that it comprised a residence of one of the principals. In **Global Trust**, the property was an incomplete hotel and not a going concern. Both those cases, in my view,

> have different considerations which make them exceptions to the principle that the land and its location are unique. I do not consider the land in the instant case to be an exception to that principle."

[72] Mr Vangani, in para. 26 of his affidavit, sworn to on 25 April 2022 and filed on 26 April 2022, set out his reasons why damages would not be adequate. He stated that he had already made specific plans to deal with the property after the completion of the acquisition. Based on the plans he had, it would be difficult, if not impossible for the appellant to acquire another similar property in the same location. He also stated the extent to which he and the appellant's principals were emotionally invested in the project, as a reason for the inadequacies of damages.

[73] There is no evidence, however, as to what those specific plans were and how far they had been implemented, and this, bearing in mind that the agreement with the appellant was only signed in November 2022 and terminated in December 2022. At the most, it could be said that the negotiations were in train from 21 September 2021 when the 2nd draft agreement was executed with Royal Palm Limited and the deposit paid. In **Lookahead**, Brooks JA determined that damages would not be adequate as there was evidence as to the uniqueness of the property. This was set out at para. [41]:

> "[41] The location of the land and the feature it possesses of having a wharf on the Kingston Harbour make this piece of realty unique. The fact that it is in the vicinity of property where other companies, related to **Lookahead**, conduct business, enhances the value of the property to **Lookahead**…"

[74] Having regard to the totality of the evidence, the learned judge could not be said to have erred in concluding that the presumption had been rebutted and that damages would be an adequate remedy for the appellant.

[75] The appellant's grounds of appeal, therefore, failed.

Issue 3 - whether the determination by the learned judge that the application for interlocutory injunction should be refused ought to be affirmed on the basis

of material non/disclosure and laches during the hearing of the ex parte application (2nd and 3rd respondents' counter notice of appeal # 1, 2, 3, 4, 8, 9, 10 and 11).

[76] All these grounds relate to the circumstances under which the *ex parte* injunction was granted on 26 April 2022. I am not of the view that they are sustainable grounds in this appeal. They concern issues related to material nondisclosure and laches, that is, the timing at which the application for the interim injunction was made and facts not disclosed by the appellant. The authorities relied on by Dr Barnett are relevant when the court is considering an application to discharge an *ex parte* injunction (see **Lloyd's Bowmaker Ltd v Britannia Arrow Ltd** [1988] 1 W LR 1337; **Jamculture Ltd v. Black River Upper Morass Development Company Limited** (1989) 26 JLR 244; **Manor Electronics v Dickson** [1988] RFC 618).

[77] Where there is material nondisclosure at the time of the application for an *ex parte* injunction, the court considering the application to discharge may do so and refuse any further injunctive relief, although the jurisdiction exists to grant a fresh injunction. See **Lloyd's Bowmaker Ltd v Britannia Arrow Ltd** [1988] 1 W LR 1337 and **Jamculture Ltd v Black River Upper Morass Development Company Limited** (1989) 26 JLR 244 and 251 where this court considered the effect of non-disclosure on the grant of an injunction.

[78] The 2nd and 3rd respondents applied for the *ex parte* injunction to be discharged. The application for the discharge of the *ex parte* injunction was considered by the learned judge while considering the *inter partes* hearing for the interlocutory injunction (see para. [11] of his judgment.)

[79] The learned judge had material before him in the form of affidavit evidence from Mr Feare (on behalf of the 1st respondent) and Mr Azan (on behalf of the 2nd and 3rd respondents) in relation to the issues of material nondisclosure and laches. These included complaints made by Dr Barnett about the lack of disclosure in the application for *ex parte* injunction as to the actual date of the agreement between the appellant and

the 1st respondent; whether the deposit that was paid by Mr Vangani on behalf of Royal Palm Limited could be considered as a deposit paid by the appellant, as no such evidence was forthcoming and; whether the appellant, through Mr Vangani, could be said to have hidden information as to the reason advanced by the 1st respondent for the cancellation of the agreement between the 1st respondent and the appellant.

[80] The learned judge spoke to some of these issues in his judgment (see paras. [10] [11], [16], [18], [45], [47], [58] - [63]). The complaint by the respondents as to the non-disclosure of assets by the appellant also formed part of the factual matrix before the learned judge in coming to his determination as whether to discharge the *ex parte* injunction and whether a fresh injunction ought to be granted or refused. In the final analysis, he ordered that the *ex parte* injunction be discharged and subsequently refused the grant of the interlocutory injunction.

[81] The issues relevant to the *ex parte* application have, therefore, been overtaken by the learned judge's consideration as to whether the *inter partes* injunction ought to have been granted. It would be unnecessary for this court to determine whether the learned judge's decision ought to be affirmed on any of these bases. While he did not indicate any specific factors for his decision to discharge the *ex parte* injunction, it was clearly subsumed in his decision for refusing to grant any further injunctive relief.

[82] These grounds of appeal therefore failed.

Issue 4: whether there was any other basis on which the learned judge's decision could be affirmed. (Counter appeal #6 and 7 of the 2nd and 3rd respondents)

> "…6. At the time when the Second Respondent entered into the Agreement for Sale as well as when he nominated the Third Respondent to take the transfer of the subject property there was no caveat in protection of any interest in the property as being claimed by the Appellant.
>
> 7. By virtue of section 71 of the Registration of Titles Act, the Second and Third Respondents are not affected any by notice

> of any interest which was being claimed by or on behalf of the Appellant…"

Submissions

[83] Dr Barnett did not refer the court to any submissions relevant to these two grounds. Mr Vangani's caveat was lodged on 11 January 2022. Due to the various legal proceedings that were taking place, the transfer was not registered on the title until the ruling of the single judge of this court was handed down. However, upon this ruling, the transfer of property to the 3rd respondent was reflected on the title as at the date it was originally lodged with the Registrar of Titles on, namely, 7 April 2022. The absence of a caveat in protection of the appellant's interest in property, in these circumstances, could not properly be determinative of whether the learned judge could conclude that there was no serious issue to be tried. If, however, Dr Barnett is contending that the caveat was lodged in Mr Vangani's name and not on behalf of the appellant, this was an issue that the learned judge considered at paras. [29] and [69] of his judgment. These facts would have been subsumed in the learned judge's ultimate conclusion. Ground 6 therefore failed.

[84] In relation to ground 7, section 71 of the ROTA provides as follows:

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

[85] The learned judge was not involved with the trial of the claim of the appellant in order to determine whether there should be specific performance of the AFS. He was

determining whether the subject matter of the dispute was to be protected from any further dealings pending the trial of the claim. The issue of the relevance of section 71 of the ROTA to the determination by the learned judge at that stage of the proceedings could have been considered as an overreach, in particular, since the transfer to the 3rd respondent had not yet been registered on the title. This could only have been done after a ruling had been made by this court's refusing to set aside or vary the order of the single judge in relation any further injunctive relief pending the hearing of the appeal. Ground 7, therefore, failed.

Conclusion

[86] In all the above circumstances, the appellant's appeal against the orders of the learned judge was refused as there was no basis for interfering with the learned judge's exercise of his discretion in refusing to grant the interlocutory injunction. The substantial issue concerned the interpretation of special condition 21. The learned judge was correct in his determination that the interpretation of that condition revealed that there was no serious issue to be tried. He did not err in his interpretation of the Stamp Duty Act. We found that there was no error in his assessment of the balance of convenience, and in his assessment of where the greater hardship laid. Also, there was no error found in his determination as to whether damages were adequate for the appellant or the respondents. The appeal failed in its entirety. Similarly, we found no merit in the respective counter-notices of appeal of the 1st respondent and the 2nd and 3rd respondent.

FOSTER-PUSEY JA

[87] I have read in draft the comprehensive reasons for judgment of Straw JA. I agree with them and there is nothing that I could usefully add.

SIMMONS JA

[88] I also have read in draft the reasons for judgment of my sister, Straw JA. I agree with her reasoning.