[2011] JMCA App 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 28/2011

APPLICATION NO 80/2011

BETWEEN	**EPSILON GLOBAL EQUITIES LIMITED**	**APPLICANT**
A N D	**PAUL HOO**	**1ST RESPONDENT**
A N D	**IAN LEVY**	**2ND RESPONDENT**
A N D	**JANNETTE STEWART**	**3RD RESPONDENT**
A N D	**SUPREME VENTURES LIMITED**	**4TH RESPONDENT**
A N D	**MARTYN VEIRA**	**5TH RESPONDENT**

John Vassell, QC, Terri-Ann Lawson and Lisa Nance Elliott instructed by DunnCox for the applicant

John Graham and Dianne Edwards instructed by John Graham & Co for 1st, 2nd & 4th respondents

Walter Scott and Anna Gracie instructed by Rattray, Patterson & Rattray for the 3rd & 5th respondents

10 May and 18 November 2011

IN CHAMBERS

HARRIS JA

[1] Two applications were before me. The first was an application by the applicant seeking an injunction pending the hearing of an appeal filed by it against an order

made on 21 January 2011, by Jones J in favour of the respondents. The second was an application by the respondents for security of costs. I must at the outset state that the parties entered consent orders in respect of the application for security of costs. The relevant orders are as follows:

> "…**IT IS HEREBY ORDERED BY CONSENT THAT:**
>
> 1. Pursuant to section 388 of the Companies Act, Court of Appeal Rules 2002 (CAR) 2.11 (1)(a), the Appellant do pay the sum of $3,000,000.00 as security for the 1st Respondent's costs in this Appeal;
>
> 2. That the said sum be paid in a lump sum payment within thirty (30) days of the date of the order herein into an interest bearing account in the names of the Attorneys-at-law for the Appellant and the 1st Respondent to be held at the Cross Roads Branch of the Bank of Nova Scotia Jamaica Limited until the determination of this Appeal or until further order of this Honourable Court or in the alternative to be placed on fixed deposit in the name of Messrs. DunnCox on the undertaking of the said DunnCox to pay over the said sum within seven (7) days of the making of any order of the Court directing that the said sum should be paid to the 1st Respondent.
>
> 3. That in the event that the Appellant fails to pay such security within thirty (30) days of the date of the order herein that the said Appeal be struck out without any further order of this Honourable Court.
>
> 4. Costs of the Application to be costs in the Appeal; and
>
> 5. The 1st Respondent's Attorneys-at-law to prepare, file and serve Orders made herein."
>
> "…**IT IS HEREBY ORDERED BY CONSENT** as follows:
>
> I. That pursuant to section 388 of the Companies Act, Court of Appeal Rules 2002 CAR 2.11 (1)(a) and CAR 2.12 (1)(a), the Appellant do pay the sum of

$2,500,000.00 as security for the 3rd Respondent's costs in this Appeal;

II. That the said sum be paid in a lump sum payment within thirty (30) days of the date of the order herein into an interest bearing joint account in the names of the Attorneys-at-Law for the Appellant and the 3rd Respondent to be held at the Cross Roads Branch of the Bank of Nova Scotia Jamaica Limited until the determination of this Appeal or until further order of this Honourable Court *or in the alternative* to be placed on fixed deposit in the name of Messrs. DunnCox on the undertaking of the said DunnCox to pay over the said sum within seven (7) days of the making of any order of the Court directing that the said sum should be paid to the 3rd Respondent;

III. That in the event that the Appellant fails to pay such security within thirty (30) days of the date of the order herein that the said Appeal be struck out without further order of this Honourable Court;

IV. Costs of this Application to be costs in the Appeal; and

V. The 3rd Respondent's Attorney-at-Law to prepare, file and serve the Orders made herein."

"…**IT IS HEREBY ORDERED BY CONSENT THAT:**

1. Pursuant to section 388 of the Companies Act, Court of Appeal Rules 2002 (CAR) 2.11 (1)(a), the Appellant do pay the sum of $2,000,000.00 as security for the 4th Respondent's costs in this Appeal;

2. That the said sum be paid in a lump sum payment within thirty (30) days of the date of the order herein into an interest bearing account in the names of the Attorneys-at-law for the Appellant and the 4th Respondent to be held at the Cross Roads Branch of the Bank of Nova Scotia Jamaica Limited until the determination of this Appeal or until further order of this Honourable Court or in the alternative to be placed on fixed deposit in the name of Messrs. DunnCox on

the undertaking of the said DunnCox to pay over the said sum within seven (7) days of the making of any order of the Court directing that the said sum should be paid to the 4th Respondent.

3. That in the event that the Appellant fails to pay such security within thirty (30) days of the date of the order herein that the said Appeal be struck out without and further order of this Honourable court;

4. Costs of the Application to be costs in the Appeal; and

5. The 4th Respondent's Attorneys-at-law to prepare, file and serve Orders made herein."

"…I**T IS HEREBY ORDERED BY CONSENT** as follows:

I. That pursuant to section 388 of the Companies Act, Court of Appeal Rules 2002 CAR 2.11 (1)(a) and CAR 2.12 (1)(a), the Appellant do pay the sum of $2,000,000.00 as security for the 5th Respondent's costs in this Appeal;

II. That the said sum be paid in a lump sum payment within thirty (30) days of the date of the order herein into an interest bearing joint account in the names of the Attorneys-at-Law Law for the Appellant and the 5th Respondent to be held at the Cross Roads Branch of the Bank of Nova Scotia Jamaica Limited until the determination of this Appeal or until further order of this Honourable Court *or in the alternative* to be placed on fixed deposit in the name of Messrs. DunnCox on the undertaking of the said DunnCox to pay over the said sum within seven (7) days of the making of any order of the Court directing that the said sum should be paid to the 5th Respondent;

III. That in the event that the Appellant fails to pay such security within thirty (30) days of the date of the order herein that the said Appeal be struck out without further order of this Honourable Court;

IV. Costs of this Application to be costs in the Appeal; and

V. The 5th Respondent's Attorneys-at-Law to prepare, file and serve the Orders made herein."

[2] The applicant is a limited liability company, incorporated under the laws of the Virgin Islands, having its registered office in the British Virgin Islands. It is a part of a group of companies engaged in the business of sourcing, structuring, managing and monitoring investments funds. Its strategy is to make loans to high risk borrowers who fail to qualify for or secure loans from the banking sector. Messers Paul Hoo, Peter Stewart and Ian Levy were the founding shareholders of Supreme Ventures Limited (hereinafter referred to Supreme Ventures) which is a limited liability company incorporated under the laws of Jamaica. Mrs Janette Stewart is the widow of Mr Stewart and Mr Martyn Veira is the executor of Mr Stewart's estate.

[3] In 2002, the founding shareholders of Supremes Ventures engaged the applicant for the purpose of securing finance for that entity. Subsequent thereto, the Epsilon Group, through Paul "Gerry" Moulett, entered into negotiations with Messrs Hoo, Levy and Stewart. Following the negotiations, on 28 August 2002 an agreement was brokered between the founding shareholders and the applicant. The applicant was created to hold the Epsilon Group's interest in Supreme Ventures.

[4] A summary of the 2002 agreement as to the rights and obligations of the parties was accurately reproduced by the learned judge at para [7] of his judgment. It is as follows:

"7. The rights and obligations under the 2002 Agreement are as follows:

a) The Fourth Defendant would pass a resolution increasing its authorized share capital by the issue of an additional 204,820 ordinary shares at par value of J$1.00 to rank *pari passu* in all respects with its existing ordinary shares.

b) The shares, referred to in the 2002 Agreement as the "Subscription Shares", would be subscribed for and be issued to the Founding Shareholders as follows:-

(i)	Paul Hoo	84,350 shares
(ii)	Peter Stewart	84,329 shares
(iii)	Ian Levy	36,141 shares

c) The Founding Shareholders would transfer the said shares, representing 17% of the issued capital of the Fourth Defendant, to the Claimant at par upon the occurrence of the earliest of certain events referred to in the Agreement as the "Acquisition Date". The events are as follows:

'5.1 One month prior to the date of change of control of the Company (control shall have the same meaning as it set out in the definition for 'Affiliate')

One month prior to the date of an initial offering of the share capital of the Company or its Affiliates to the public in Jamaica or elsewhere.

One month prior to the date of completion of the sale of any portion of the shares which are held by the Founding Shareholders on the signing of this Agreement (i.e. any portion of 1,000,000 ordinary shares).

The Maturity Date of the Loan which is the earlier of (i) the repayment of all principal and accrued interest of the Loan or (ii) August 31, 2005. '

d) Pending the occurrence of the event constituting the Acquisition Date, each Founding Shareholder would execute and deliver to the Claimant undated Instruments of Transfer in prescribed form in respect of the Subscription Shares he agreed to sell together with Irrevocable Powers of Attorney entitling the Claimant to exercise voting rights in respect of the said shares, by itself or by proxy;

e) The Fourth Defendant would, upon the issue of the share certificates, deliver them to the Claimant.

f) Upon the occurrence of an event constituting the Acquisition Date, the Claimant would be entitled to date and deliver the previously executed Transfers to the Fourth Defendant for registration, which registration the Fourth Defendant would forthwith effect, in accordance with the Agreement and would pay the Founding Shareholders the price of J$1.00 per Subscription Share.

g) The Founding Shareholders would pay all stamp duty and transfer taxes in respect of the Agreement and in respect of the transfer and registration of the Subscription Shares in favour of the Claimant.

h) Pending registration of the Subscription Shares in favour of the Claimant, all dividends and distribution declared, paid, or made in respect of the shares would be paid by the Founding Shareholders to the Claimant for the Claimant's sole benefit.

i) The Claimant was entitled to appoint two persons to the Board of Directors of the Fourth Defendant upon the issue of the Subscription Shares.

j) The intent and effect of the Agreement was that the Claimant's 17% interest in the Fourth Defendant would be preserved and not diluted without the consent of the Claimant."

[5] Subsequent to the agreement, the Epsilon Group disbursed US$29,500,000.00 which was a loan to Atlantic Marketing Services Limited a company which had a service agreement with Supreme Ventures. A loan of US$500,000.00 was also made directly to Supreme Ventures. The receipt of the US$500,000.00 was admitted by Supreme Ventures. However, there is a dispute between two of the respondents in relation to the purpose of the loan of US$29,500.000.00, Mr Levy admitted receiving his share of that loan. However, Mr Hoo denied receipt of any of the loan as he contended that it was not intended to benefit any of the founding shareholders.

[6] In pursuance of the 2002 agreement, Supreme Ventures passed a resolution increasing its share capital by $204,820.00 divided into 204,820 ordinary shares of $1.00 each. The subscription shares, to which the founding shareholders were entitled, were issued to them by Supreme Ventures, upon their application. Subsequently, each shareholder executed and submitted to the applicant undated transfers of 17% of the shares, as also the relevant certificates and irrevocable powers of attorney in favour of the applicant.

[7] On 27 February 2004, Mr Hoo executed an agreement, forwardly selling to the applicant 15,510 shares, which were formerly issued to Supreme Ventures, by virtue of which he conveyed his interest in those shares to the applicant as also a right to vote at shareholders meetings in respect of these shares. Blank transfers of the shares executed by the founding shareholders as well as the relevant share certificates were sent to the applicant. This agreement in 2004 specified the

acquisition date of the applicant's 17% as well as the 15, 510 of the shares to be June 2005 and provided for the tender of $1.00 per share on that date.

[8] In May 2005, Supreme Ventures, by way of capital reorganization, did, among other things, the following:

> "a) converted into a public company;
>
> b) increased its authorized share capital from 2,000,000 ordinary shares of J$1.00 each to 100,000,000 ordinary shares of J$1.00 each to rank *pari passu* with existing ordinary shares.
>
> c) converted its shares into shares without par value;
>
> d) subdivided its issued shares into 3,000,000,000 ordinary shares;
>
> e) converted its ordinary shares into ordinary stock units and resolved that stock certificate of equivalent value be issued; and
>
> f) made a private placement of its shares of 500,715,405 ordinary shares which raised J$1,862,600,000."

[9] On the acquisition date in June 2005, Supreme Ventures repaid the loan of US$500,000.00. The applicant failed to surrender the requisite instruments of transfer for registration and it did not tender the $1.00 per share. Having not done so, the reason advanced by it for its failure to meet the acquisition date was that it had entered into an option agreement with a company called St George's Holdings Limited deferring the date. The option agreement was made on 7 July 2005, between St George's Holdings Limited, one of Mr Moulett's group of companies, and Supreme Venture.

It was executed by Mr Moulett on behalf of St George's Holdings Limited and by Mr Hoo and Mr Brian George on behalf of Supreme Ventures. This agreement was not exhibited in the record before me but paragraphs [67], [68] and [69] of the witness statement of Mr Amir Reza Emami, the applicant's witness, discloses the following:

> "67. The essence of the Option Agreement was that the shares acquired by the Claimant under the 2002 Agreement and the 2004 Agreement could be purchased by St. Georges by dates specified in the Option Agreement. The Option Agreement established a range of purchase prices for the shares, which purchase prices varied depending on when the option was exercised and which translated into an implied valuation for SVL between US$145 million to US$175 million.
>
> 68. The Option Agreement was set to expire on December 6th 2005, however it was extended multiple times and ultimately expired on March 31st, 2008.
>
> 69. As part of the negotiations leading up to the execution of the Option Agreement, SVL and Mr. Gerry Mouttet promised not only that the Epsilon Group's loans would be repaid, but also that the Epsilon Group's equity stake in SVL would be purchased at a pre-defined price. It was in return for that promise that the Epsilon Group agreed to enter the Option Agreement and further agreed that it would not exercise its rights to take title to the shares under the 2002 and 2004 Agreements until the Option Agreement expired."

[10] In October 2008, the applicant transmitted the transfers of the subdivided subscription shares duly stamped, which were sold by Messrs Hoo and Levy, demanding that it be registered as the proprietor of the shares. By letter of 27 October 2008 the applicant's attorney at law wrote to Supreme Venture signifying that it would pay the consideration for the shares and requested that it takes steps to effect the transfers

of them. On the same day, the applicant also wrote to Mrs Stewart informing her that its attorney-at-law was in possession of the funds payable on the receipt of the shares sold to it by her deceased husband and insisted that she prepare and remit to it new transfers of the shares. The applicant also demanded that all dividends declared by Supreme Ventures in June and October 2008 be remitted to it.

[11] The applicant's demands went unheeded. This being so, it initiated proceedings in which, in amended particulars of claim, it sought the following reliefs against the respondents:

> "1. Against the First and Second and Fourth Defendants, specific performance of the 2002 Agreement.
>
> 2. Against the First and Fourth Defendants, specific performance of the 2004 Agreement.
>
> 3. Against each of the First, Second, Third, Fourth and Fifth Defendants, a declaration that on a proper construction of the 2002 Agreement and against each of the First and Fourth Defendants, a declaration that on a proper construction of the 2004 Agreement, and in the events which have occurred, the First, Second, and Third Defendants are severally obliged to transfer the following shares to the Claimant and the Fourth Defendant is obliged to register the Claimant as proprietor of the said shares and issue to the Claimant share certificates in respect of them.
>
> | | |
> |---|---|
> | Paul Hoo | 175,313,560 |
> | Ian Levy | 63,448,904 |
> | Janet Stewart | 152,821,778 |
> | | 391,584,242 |
>
> 4. A Declaration against the Third Defendant that 152,821,778 shares of the Fourth Defendant registered in her name are subject to the full beneficial interest of

the Claimant therein and that, accordingly, she holds the said shares on trust for the Claimant and is, further, liable to account to the Claimant for all dividends paid in respect of the said shares.

5. An Order that the First Defendant transfer and procure the registration of 175,313,560 shares in the Fourth Defendant to the Claimant.

6. An Order that the Second Defendant transfer and procure the registration of 63,448,904 shares in the Fourth Defendant to the Claimant.

7. An Order that the Third Defendant transfer and procure the registration of 152,821,778 shares in the Fourth Defendant to the Claimant.

8. An Order that the Fourth Defendant register the Claimant as proprietor of the said shares.

9. An injunction restraining the First Defendant by himself, his brokers, agents, or otherwise from entering into any transaction or directly or indirectly, taking any steps and whether on the Jamaican or Trinidadian Stock Exchange or otherwise, which would result in a reduction of his shareholding in the Fourth Defendant below 175,313,560 shares, until he transfers shares in that number to the Claimant.

10. An injunction restraining the Second Defendant by himself, his brokers, agents, or otherwise from entering into any transaction or directly or indirectly, taking any steps and whether on the Jamaican or Trinidadian Stock Exchange or otherwise, which would result in a reduction of his shareholding in the Fourth Defendant below 63,448,904 shares, until he transfers shares in that number to the Claimant.

11. An injunction restraining the Third Defendant by herself, her brokers, agents, or otherwise from entering into any transaction or directly or indirectly, taking any steps and whether on the Jamaican or Trinidadian Stock Exchange or otherwise, which would result in a

reduction of her shareholding in the Fourth Defendant below 148,047,442 shares, until she transfers shares in that number to the Claimant.

12. An Order that the First, Second and Third Defendants pay to the Claimant forthwith the following sums being dividends received from the Fourth Defendant:

Paul Hoo	$26,297,034.00
Ian Levy	$ 9,517,335.00
Janet Stewart	$22,207,116.00

together with interest at commercial rates pursuant to the Law Reform (Miscellaneous Provisions) Act.

13. An Order that the First, Second and Third Defendants account to the Claimant for any other dividends or distribution or other payments received in respect of the Subscription Shares.

14. An Order that the Defendants take all necessary and effective steps to appoint Mr Geoffrey Tirman, or any other Claimant's nominee, to the Board of Directors of the Fourth Defendant.

15. A Declaration that the Claimant is entitled to a right of first refusal in respect of any shares which the Fourth Defendant proposes to issue to Intralot or any one else.

16. An injunction restraining the Defendant from passing or procuring the passing of any resolution or the taking of any steps for the issue of shares in the Fourth Defendant to Intralot without prior notice thereof to the Claimant and before the Claimant is given the opportunity to exercise its right of first refusal.

17. Damages for breach of contract."

[12] The following grounds of appeal were filed:

"a. The Judgment is against the weight of the evidence and ought to be set aside.

b. The learned Judge misapprehended the facts before him and the law applicable thereto and construed the 2002 and 2004 Forward Sale of Shares Agreements without having any or any proper or adequate regard to the commercial context in which the said Agreements were entered into and thereby reached the erroneous conclusion that time was of the essence of the obligations under the said Agreements to pay the sum of $1.00 per share and to submit the executed Transfers for registration.

c. The learned Judge's finding that the shares in the Fourth Defendant were not acquired by the Applicant in exchange for loans is erroneous, unsupported by the evidence, and inconsistent with other evidence accepted by the Judge including the evidence recited by him at paragraph 2 of his written Judgment that the 17% shareholding interest in the Fourth Respondent for which the Applicant bargained under the 2002 Forward Sale of Shares Agreement was in return for the loan of $29,500,000.00 to Atlantic Marketing Services Limited and the loan of US$500,000.00 to the Fourth Respondent.

d. The learned Judge failed to appreciate that, even if time was of essence of the said Agreements the said Agreements were not discharged prior to the tender of performance by the Applicant, since there was no evidence before him that the Respondents, or any of them, had acted to rescind the Agreements.

e. The learned Judge erred in reaching the conclusion that if time was of the essence of the Applicant's obligations under the said Agreements; same had not been waived by any of the Respondent parties to the Agreements.

Further, the learned Judge wrongly excluded admissible evidence that the Option Agreement was extended to March, 2008.

f. The learned Judge erred in reaching the conclusion that the beneficial interest in the shares, subject to the Forward Sale of Shares Agreements, did not pass to the

Applicant upon execution of the said Agreements. The reasoning which led the learned Judge to this conclusion, viz., that the 2002 Forward Sale of Shares Agreement was not an agreement to buy and sell shares but an agreement for the forward sale of shares under which the Applicant was to obtain the shares in the Fourth Respondent at a future date reflected a failure to appreciate the true nature and effect of the Forward Sale of Shares Agreement and is, additionally, based upon attributing to the words 'Forward Sale' which appear only in the title of the said Agreement, a meaning and weight not justified by the rules of construction of contracts.

g. Generally, the learned Judge failed to identify or appreciate all the material facts and issues in the case and reached a determination in the action without any proper adjudication upon the said issues whereby his said decision was erroneous and unsupportable."

[13] By Rule 2.11 (1) (c) of the Court of Appeal Rules a single judge is authorized to grant an injunction. However, an injunction is not a remedy to which an applicant is entitled as of right. It is discretionary. Although the power to grant an injunction is untrammelled, an applicant who seeks injunctive relief must show that his application is one which warrants a grant.

[14] The prerequisites for the grant of injunctive relief have been propounded by judicial authorities over the years, the first of which is that an applicant must satisfy the court that he has a good arguable appeal. This is a very arduous test to meet where a case turns upon factual circumstances as observed by Stuart-Smith LJ in ***Ketchum International plc v Group Public Relations Holdings Ltd and Others*** [1997] 1 WLR 4 when at page 10 he said:

> "… I cannot see any reason in principle why the considerations which are applicable when the court is considering the grant of a Mareva injunction should not be applied in favour of a plaintiff, even if he has lost in the court below, though the question will not be "Does he have a good arguable case?" But 'Does he have a good arguable appeal?" This is likely to be a more difficult test to satisfy, and, if the case turns upon questions of fact which the judge has resolved, against the plaintiff, may well be insuperable. This threshold must be at least as high as that which has to be satisfied when the court considers whether or not to grant leave to appeal where that is required."

[15] In ***National Commercial Bank Jamaica Ltd. v Olint Corporation Ltd.*** [2009] UKPC 16, [2009] 1 WLR 1405. Lord Hoffmann, in delivering the advice of the Board, at page 1409 paragraph [16], speaks to the purpose of an interlocutory injunction and the court's approach thereto in this way:

> "16. …It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in ***American Cyanamid Co v Ethicon Ltd*** [I975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not

have been restrained, then an injunction should ordinarily be granted."

[16] An applicant, in addition to demonstrating that he has a good arguable appeal, must also show that damages are not an adequate remedy, that if the injunction is refused it will suffer irremediable harm and that the balance of convenience favours a grant.

[17] It is clear therefore that, the court, in considering an application for an injunction, should, upon examination of the facts of the case, take into account the consequences of granting or refusing an injunction. If the court is of the opinion that the grant of an injunction would be prejudicial to the defendant, it may entertain some reluctance to make the grant on being satisfied that the risks that the injunction had been wrongly made are not minimal. See ***National Commercial Bank Limited v Olint Corporation Ltd***.

[18] Mr Vassell QC submitted that the learned trial judge was in error in finding that time was of the essence for the sale of the shares in respect of both agreements as he treated the forward sale agreement as if it were an ordinary contract for the sale and purchase of shares. He failed to appreciate that the forward sale agreement was an overall transaction in the making of the loan of US$30,000.00, he submitted. The obtaining of the shares, he argued, was also an overall term of the loan agreement but the learned judge treated the contract as one in which the applicant used to purchase shares at $1.00 per share, with completion on the date of acquisition. He contended that it was the intention of the parties that the applicant would make the loan of

$50,000.00 in return for, among other things, in Supreme Ventures, 17% of the equity. It was wrong for the learned judge, he submitted, to have taken the forward sale agreement out of its context and construed it as meaning that the failure of the applicant to pay the $1.00 per share at the time the payment was to be made, the 17% equity in Supreme Venture was lost and the contract discharged, as the construction of all the agreements is based on the overall transaction and what was the overall deal.

[19] Given the commercial context and the background of the forward sale agreement, he argued, the parties could not have intended that $1.00 was the sale price of each share as it was only a token sum to give efficacy to the agreements. The intention of the parties was that on the occurrence of the acquisition date, the applicant's right to be registered as owner of the forwardly purchased shares would become effective but the applicant's failure to exercise the right promptly cannot operate to deprive it of its entitlement under the contract, he further argued. The parties, he contended, agreed in advance that the applicant would acquire 17% of the shares mainly due to the loan and part of the transaction in making the loan. The parties, as commercial men, acknowledged the unchallenged evidence as to what was the value of the Supreme Ventures at the time of the 2002 agreement.

[20] It was Mr Scott's submissions that the applicant has not established that it has a good arguable appeal to justify the grant of an injunction and the refusal of the injunction would be the course least likely to cause irremediable prejudice to Mrs Stewart and to the parties generally. In support of this submission he cited among

others, ***Ketchum Plc v Group Public Relations Ltd*** and ***National Commercial Bank Ltd. v Olint Corporation Ltd***. The notice of appeal challenges the trial judge's findings of fact and the appeal against Mrs Stewart, he argued, is based primarily on the trial judge's findings of fact and where an appeal rests on a challenge to a trial judge's findings, the court will not disturb them unless it is shown that the judge was plainly wrong. He relied on the cases of ***Industrial Chemical v Ellis*** [1986] 35 WIR 303, and ***New Falmouth Resorts Limited v International Hotels Jamaica Limited*** [2011] JMCA Civ 10 delivered on 15 April, 2011.

[21] The learned judge, he argued, was correct in finding that the shares were not acquired for the loan. Although the consideration was stated as $1.00 per share, the applicant was making $1.00 as the real value and not a token and the acquisition date was ascertainable, he submitted. Mrs Stewart was not a party to the option agreement and there is nothing to show that she waived the issue as to time or acquiesced in the date being immaterial, he contended. Further, he argued, Mr Stewart died in 2004 and there is no evidence that either Mr Veira, his executor, or Mrs Stewart approved of Mr Moulett as his or her agent.

[22] Mr Graham adopted the submissions of Mr Scott. He further submitted that the applicant made no loans and gave nothing in exchange and consideration did not move from the applicant but from a third party and therefore the applicant could not have been a proper claimant in the loan transaction. The 17% shareholding was not in return for the loan which Epsilon made, he argued, and the 17% of the issued share capital could only have materialized in the future if it was intended that the title to the

shares in question would pass on execution of the transfer. The title, he contended, was due to pass in the future and the parties set out a formula as to the acquisition date and the 17% could only have become the applicant's property if and when it complied with the forward agreement.

[23] It was further submitted by him that in his affidavit, the contents of which are unchallenged, Mr Hoo had shown hardship. Additionally, the applicant is a special service vehicle which has no assets, he argued. It was also his submission that the affidavit of Mr Chung is speculative as it merely catalogues a review of the activity in the trading of shares over a number of years and there is no explanation as to what would have been the result if the applicant were to place an order to purchase the shares.

[24] I will first turn to the question as to whether the applicant has shown that it has a good arguable appeal. The brunt of Mr Vassell's assault against the learned judge's decision was centred around grounds (b) (c) and (d) of the grounds of appeal which, he contended, raise points of law as to whether the learned judge had applied the correct test in his construction of the 2002 and 2004 agreements and if time was of the essence whether the agreements were discharged notwithstanding that no steps were taken by any of the respondents to rescind them.

[25] It is perfectly true, as submitted by Mr Scott, that it is a settled rule that an appellate court is loathe to disturb a trial judge's findings of fact. It will only do so if

the trial judge is plainly wrong. However, I must add that the court will also interfere if the judge is shown to have misinterpreted the law or misdirected himself on the law.

[26] The learned judge identified three issues arising on the applicant's claim, namely:

(a) Whether the beneficial interest in the shares under the 2002 and 2004 agreements passed to the applicant at the time of signing of the transfers.

(b) Whether time was of the essence of the contracts with the result that the applicant's failure to pay $1.00 for each share and to return the transfer effectively discharged the agreements.

(c) Whether the respondents by way of the option agreement waived objection to the applicant's delay in taking steps, if any, to be registered as owner of the shares.

[27] The fundamental question on appeal would be whether the construction placed on the agreements by the learned judge is at variance with the law. Accordingly, the issues which the appellate court would have to consider are whether on a proper construction of the 2002 and 2004 agreements, the shares were acquired in exchange for the loans, or for the payment of a purchase price of $1.00 per share, whether time was of the essence and accordingly, whether the waiver under the option agreement had expired at the time of the applicant's presentation of the transfers for registration.

[28] The learned judge stated that the 2002 and 2004 agreements were similar in nature save and except that the purpose of the 2004 agreement was to secure a loan which Mr Moulett received from Westford Special Situations Fund, an Epsilon Group Fund, and in pursuance of the agreement the relevant documents were delivered to the applicant. He found that under both agreements the acquisition of the shares was not made subject to the loans.

[29] In deciding whether the applicant had acquired a beneficial interest in the shares, the learned judge said that the resolution to this issue was dependent upon the construction of the 2002 and 2004 agreements. He relied heavily upon the factors propounded by Lord Hoffmann in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 All ER 98 HL at 114, as to the manner in which documents are construed, in which he said that the construction of contracts necessitate an examination of the "matrix of facts", that is, looking at the background of the case. The learned judge went on to state that the question of time being of the essence could be imported into a contract by implication.

[30] He further made reference to the following extract from Halsbury's Laws of England fourth edition at paragraph 482 in which the learned authors state as follows:

> "Apart from express agreement or notice making time of the essence, the court will require precise compliance with stipulations as to time whenever the circumstances of the case indicate that this would fulfil the intention of the parties. Whilst the time of performance will not ordinarily be considered to be of the essence, it will readily be so construed in a 'mercantile contract'. For example, time will be considered of the essence in stipulations specifying a fixed

> date for performance in such a way as to show that the date was essential, such as in a sale of …of shares… Generally, time will be considered of the essence in other cases where the nature of the contract or of the subject matter or of the circumstances of the case require precise compliance…"

[31] The learned judge also referred to the cases of: ***Hare v Nicholls*** [1966] 1 Q.B 130, ***Re Schwabacher, Stern v Schwabacher, Koritschoner's Claim*** [1908] Law Times Report Chan Div 127 and ***British Commonwealth Holdings plc v Quadrex Holdings Inc*** [1989] 3 All ER 492 in which time was implied as being of the essence of contracts in respect of the sale of shares.

[32] There was evidence that at the time in which the parties entered into the 2002 agreement, Supreme Ventures was a private company, the value of its shares were uncertain and that it operated at a loss over the years. There was also evidence that the founding shareholders contemplated making a public offering of the shares and that the acquisition date would be "one month prior to the date of the initial offering of the share capital of the company or its affiliate to the public". In these circumstances, the learned judge stated that the applicant would have been under a duty to have paid the purchase price for the shares prior to the public offering.

[33] At paragraph [40] of his judgment, he made the following findings:

> "Three findings are important here. First, I find as a fact that the shares in the Fourth Defendant were not acquired by the Claimant in exchange for the loans. I find that the shares were to be acquired in exchange for "the consideration" of the payment of the purchase price. Second, the parties agreed that the purchase price would be paid at the Acquisition Date using a formula which

> provided various alternatives. Thirdly, the Claimant could not use the blank Instruments of Transfer executed by the Founding Shareholders until the Acquisition Date materialised, and it was then required to present them at that time duly completed and stamped for registration. This it seems to me would point to the importance that the parties to the agreement gave to the obligations regarding time."

[34] At paragraphs [41] and [42] he went on to say:

> "(41) I accept that the Claimant may well have decided in the long run not to pursue the purchase of the shares at all. From the evidence, in 2002, the value of the shares were uncertain. At the time of the Acquisition Date the outlook for the Fourth Defendant was not much better and so no one could predict the outcome of the public sale of shares. What is clear, however, is that the Claimant may well have decided not to pursue its right to purchase the shares. The 2002 Agreement provided that the sums loaned would be repaid with interest and the Claimant may well have chosen to accept that, without risking being a shareholder in an unsuccessful venture with the attendant problems that may be involved.
>
> (42) For all the above reasons, this court concluded that time was intended to be of the essence in both the 2002 and 2004 Agreements…"

[35] The learned judge's findings at paragraph [41] attracted a further complaint by Mr Vassell. He stated that this finding was based on the doctrine of mutuality which had not been pleaded. It appears that the learned judge was wrong in making such a finding. However, in the circumstances of this case, it could not be said that this finding would be sufficient to give rise to a good arguable appeal.

[36] In dealing with the option agreement, the learned judge acknowledged that that agreement would only be applicable in circumstances in which all parties to the 2002

and 2004 agreements were aware of that agreement. Mr Hoo, the learned judge said, admitted that the 2002 and 2004 agreements were binding on him and he was prepared to transfer his shares to St George's Holding's Limited up to the time stipulated in the option agreement. The learned judge then went on to find that the option agreement expired on 30 December 2005 and that the applicant fulfilled its obligations in October 2008. However, the evidence discloses that the applicant had not fulfilled its obligation in December 2005 or in October 2008.

[37] The learned judge, in dealing with the question as to whether Mr Hoo and Supreme Ventures would have been adversely affected by the option agreement, said at paragraph [48] of his judgment:

> "48**.** St. George's Holdings Limited would be required to exercise its option by December 30, 2005, the date for the Option Agreement to come to an end. Consequently, in so far as the Option Agreement is a waiver by the First Defendant and Fourth Defendant it would only have operated until December 30, 2005. After that date, it would be necessary for the Claimant to fulfil its obligations under the Forward Sale of Shares Agreements. The Claimant only fulfilled its obligations under the Agreements in October 2008. The result is that the Claimant cannot now rely on the First and Fourth Defendant's waiver of its obligations under the 2002 and 2004 Agreements by way of the Option Agreement as that had already expired."

[38] So far as Mr Levy is concerned the learned judge found that there was no evidence to show that he was aware of the option agreement. At the time of the option, Mr Stewart had died. He also found that there was no evidence that Mr Moulett was Mrs Stewart or Mr Veira's agent in respect of that agreement.

[39] Arguably, the learned judge applied the correct principles in construing the agreements. Grounds (b) (c) and (d) raise points of law. All other grounds relate to findings of fact which are anchored partly on his assessment of the evidence of the witnesses. Consequently, it cannot be said that the applicant has a good arguable appeal. If I am wrong and it is viewed that there is room for debate that the learned judge had in fact misinterpreted the 2002 and 2004 agreements, and that the applicant has a good arguable appeal, consideration will be given to other factors arising in this application.

[40] The first of these factors is whether the applicant could be adequately compensated in damages if the injunction is refused and it succeeds on appeal. In my opinion, if successful on appeal, it would be open to the applicant to pursue a claim for damages, as, any damages to which it may be entitled are ascertainable and quantifiable. The applicant would be at liberty to review the trading pattern of shares over the years and the declaration of dividends by Supreme Ventures to determine such amount to which it would be entitled. I must at this juncture state that Mr Dennis Chung, a chartered accountant had been requested, at the applicant's invitation, to give an opinion on the possibility of the applicant securing 14.85% or 6.65% of Supreme Ventures shares. This request was in response to an averment of Mr Hoo that Supreme Ventures shares were regularly and easily available on the Jamaican and the Trinidadian stock markets. Mr Chung presented a review of the activity in the trading of shares on both stock exchanges between 2007 and 2008, pointing out that Supreme Ventures shares were not widely traded. However, as rightly submitted by Mr Graham,

Mr. Chung's opinion is speculative and it failed to explain what would have been the result if the applicant were to place an order on the stock market to purchase the shares.

[41] A further matter for consideration is the question of prejudice. In ***Erinford Properties Ltd v Cheshire County Council*** [1974] 2 All ER 448 in speaking to the question of the grant of an injunction where such grant may evoke hardship than it would prevent, Megarry J at 454 said*:*

> "There will of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on."

[42] Mr Hoo, in an affidavit, stated in paragraphs [6], [7], [8] and [9] the following:

> "6. In November 2010, I became seriously ill which has resulted in my hospitalization both in Jamaica and in the United States of America on about four (4) different occasions. I have also incurred medical bills in excess of US$300,000.00. I am the sole income earner in my family as my wife is a housewife and over the past six (6) months, she has been fully occupied in caring for me.
>
> 7. My monthly expenses are substantial and I have also been responsible in assisting my three (3) children, one of whom is still in university full time in the USA and the other two are operating fledgling businesses which are not making a profit and they often need my financial support.
>
> 8. That I have only been able to survive by borrowing at a high rate of interest to meet my medical and other bills. My having to seek loans has caused me hardship and embarrassment.

9. I will be severely prejudiced if the injunction were to be re-imposed so as to prevent me from dealing with my shares in Supreme Ventures Limited, as I would like to be able to sell mortgage or pledge my shares in order to secure financing for medical bills and other financial obligations"

[43] No challenge had been advanced by the applicant to contradict Mr Hoo's assertions. Taking into account Mr Hoo's disclosure of the financial challenges which he faces, the grant of an injunction would surely operate to prejudice him severely. It cannot be said that this would be true in the case of the applicant. Any damages which it may suffer is recoverable, should the appeal be decided in its favour.

[44] If successful on appeal, the applicant has a remedy in damages. Refusing the injunction is the path least likely to result in irremediable harm to the respondents. Further, the applicant is a paper company having no assets. It lacks the capacity to satisfy an undertaking in damages if an injunction were to be granted. In all the circumstances, the balance weighs against the grant of an injunction. Accordingly, the application is refused. Costs are awarded to the respondents.