JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 34 OF 1997

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (AG.)

BETWEEN:	**PETER HARGITAY**	**APPELLANT/DEFENDANT**
AND	**JOEL MAGAZINE**	**RESPONDENT/PLAINTIFF**

Ian Wilkinson and Miss Shawn Steadman for Defendant/Appellant

Miss Carol Davis and Simone Mayhew For Plaintiff/Respondent

March 13, 14, 15, 20, and July 17 2001

FORTE, P.

I have read the draft judgment of Smith, JA (Ag.) and I agree with the reasons and conclusion as well as the order proposed.

HARRISON, J.A.

I agree entirely. I have nothing to add.

SMITH, J.A. (AG.)

This is an appeal against the Order of Edwards, J., refusing the appellant's summons to dismiss the respondent's Action and for Removal of Caveat.

BACKGROUND FACTS

These are taken from the affidavits of the respondent/plaintiff sworn to on the 13th June 1994, of the appellant/defendant sworn to on the 5th August 1994, and of Mr. Patrick Bailey, attorney-at-law, sworn to on the 21st June 1994. The respondent/plaintiff Mr. Joel Magazine, is an American attorney-at-law. He is a practising member of the Florida Bar and served as the appellant's attorney-at-law in respect of various business transactions. The appellant/defendant, Mr. Peter Hargitay, is a Hungarian businessman who was a resident of Switzerland between the years 1957 and 1992. It is in dispute whether or not the appellant resided in this country for sometime. However in 1990, he purchased property situate at White River Road, Prospect, in the parish of St. Mary, comprised in Certificate of Title registered at Volume 1053 Folio 157 of the Register Book of Titles (the "property"). According to the appellant this property was to be used for vacation purposes.

On the 21st of August 1992, the respondent loaned to the appellant the sum of United States $800,000.00. This loan was secured by a Promissory Note executed by the appellant and was charged on the latter's property. The loan was to be repaid on or before August 20 1993, with interest thereon at the rate of 10% per annum. The loan or any part thereof was not repaid.

On the 26th October 1993, the respondent lodged caveat No. 787079 against the property to protect his interest. A Writ of Summons was filed on the 24th November 1993, by which the plaintiff/respondent sought the recovery of the money loaned or alternatively the realization of the security

described in the Promissory Note. Proceedings on this Writ of Summons were discontinued on the 9th June 1994.

On the 28th of January 1994, an Originating Summons for an Order for the sale of the property and affidavit in support were filed on behalf of the respondent - Suit No. E 64 of 1994. On the 3rd of May 1994, leave was granted by the Master to issue and serve Notice of Originating Summons and affidavit in support out of the jurisdiction. On the 15th June 1994, Mrs Harris J. on an ex parte Summons for interim injunction ordered that caveat numbered 787079 (the "caveat") remain in force until the 22nd day of June 1994.

On the 22nd day of June 1994, Chester Orr, J., granted an Order for substituted service of the Originating Summons on the appellant and ordered that the caveat remain in force indefinitely. A conditional appearance was entered on the 22nd July 1994. On the 5th September 1994, the attorney-at-law for the appellant filed a Summons to Dismiss Action and for Removal of Caveat. This Summons was dismissed by Edwards, J. on the 6th March 1997. An appeal against this order is the matter now before this Court.

THE ISSUES

Three original grounds of appeal were filed. At the hearing counsel for the appellant sought and obtained leave to argue ten supplementary grounds of appeal. The main issues raised on appeal are:

(1) Whether the respondent/plaintiff's case was brought in the right jurisdiction.

(2) Whether the respondent/plaintiff's case was properly brought by Originating Summons.

(3) Whether the learned judge erred in law in failing to discharge the order of Chester Orr, J. made on the 22nd June 1994.

(4) **(i)** Whether a caveat is analogous to injunction and if so, whether or not the judge erred in refusing to remove the caveat.

(ii) Whether a court could extend the expired caveat.

(5) Whether judicial cognizance should be taken of the Promissory Note which was:

(i) not mentioned in the originating summons.

(ii) unstamped pursuant to the Stamp Duty Act.

THE JURISDICTION ISSUE

The submissions of Mr. Wilkinson, attorney-at-law for the appellant may be summarized as follows:

(1) The proper jurisdiction is the lex loci contractus which is Switzerland where the contract i.e. the Promissory Note, was made – See ***Arnott*** v ***Redfern*** (1825) 2C and p. 88 172 E.R. 40; ***Keiner*** v ***Keiner*** (1952) 1 ALL E.R. 643 at 644 H. and 645 J. ***Jacob et al*** v ***Credit Tyonnais*** (1884) 12 Q.B. D. 589; Dicey and Morris on Conflict of Laws 11th Edition Vol. 2 p. 1162.

(2) The mere assertion of the respondent in his affidavit evidence that the parties had orally agreed that "Jamaica would have jurisdiction" is not enough in light of the fact that the Promissory Note is silent as to an agreed jurisdiction.

(3) The fact that the Promissory Note referred to land situate in Jamaica is irrelevant in this case because the land is not the subject matter of the contract – it is the loan that is at the heart of the contract and the land is just one means of securing the loan.

(4) The appellant had not submitted to the jurisdiction. See Halsbury's Laws of England 4th Edition Re-issue Vol. 8 (1) para. 630.

Ms Carol Davis' submissions on behalf of the respondent, may be summarized as follows:

(1) The matter relates to land within Jamaica and/or a charge and/or equitable mortgage over land in Jamaica. A mortgage over land is an immovable. Generally where the matter relates to immovable property the Courts of the country in which the land is situate have exclusive jurisdiction. See Dicey and Morris on Conflict of Laws 12th Edition Vol. 2 pp. 113, 941 and 960-1 and **In Re Hayles** (1911) 1 Ch. 179.

(2) A court has jurisdiction where the defendant submits to the jurisdiction. The appellant/defendant submitted to the jurisdiction by virtue of the following:

(a) he made an application for security for costs;

(b) he filed affidavits on the merits of the case – See Dicey and Morris on Conflict of Laws Vol. 1 Rule 25 ***Boyle*** v ***Sacker*** (1888) 39 Ch. 249. ***Lloneux Limon and Co***. v **Hong Kong *and Shaugai Banking Corp.*** (1886) 33 Ch. 446.

(3) Forum Non Conveniens – The defendant must show that there is another more "appropriate" forum. See ***Spiliada Maritime Corporation*** v ***Consulex Ltd.*** (1987) 1 AC 460.

In determining the question of whether or not the Supreme Court has jurisdiction to entertain this matter, a good starting point is to set out the contents of the Promissory Note upon which the matter is based:

"United States $800,000.00
Zolikon, August 21, 1992.

Address: 9190 SW 92 Avenue
Miami, Florida.

Mr. Joel R. Magazine

> In CONSIDERATION of the sum of U.S. $800,000.00 (eight hundred thousand) this day lent and advanced to me by you, I promise to repay said sum on/by August 20 1993, with interest at the rate of 10% (ten percent) per annum, and I hereby give you a charge over my property with building thereon and chattels therein located in the Part of Prospect Parish of Saint Mary, Lot numbered 8 on Plan DP 1564 registered at Volume 1053 Folio 157 of the Register Book of Titles by a deposit with you of a copy of the said Certificate of Title and UNDERTAKE to execute a MORTGAGE over said premises whenever called upon so to do by you.
>
> Signed by:
> Peter Hargitay
> In the presence of
> Helmith Beb".

The respondent asserted that a letter dated the 21st day of August 1992, was sent to him at his Miami Florida address by the appellant. It acknowledged the appellant's indebtedness and was signed by him. The Promissory Note was delivered by cover of the said letter. See affidavit of Joel Magazine sworn to on the 13th day of June 1994. In the same affidavit at paragraph 10, Mr. Magazine stated:

> "The Defendant and I specifically agreed that Jamaica would have jurisdiction over our transaction herein particularly having regard to the fact that the land charged under the Promissory Note aforesaid was the only real security given by the Defendant to me and further that the said land was situate in Jamaica that should it become necessary to enforce the security Jamaica Law and jurisdiction would prevail."

The appellant/defendant has denied any such agreement. Clearly, the mere allegation of an oral agreement as to jurisdiction cannot give the court jurisdiction. In any event, at common law, the mere agreement of the

parties that a court shall have jurisdiction to determine disputes arising out of a contract between them is insufficient by itself to give the court jurisdiction. See Dicey and Morris on Conflict of Laws Vol. 1 pp. 312-313.

However, the question arises as to whether or not the appellant by the contents of his affidavit, has submitted to the local jurisdiction. His affidavit sworn to on the 5th August 1994, bears the following caption:

> "Affidavit of Peter J. Hargitay in Reply to Affidavit in Support of Originating Summons AND IN SUPPORT OF SUMMONS TO DISMISS ACTION AND FOR REMOVAL OF CAVEAT".

The caption of the other affidavit dated the 2nd September 1994, is similar to the one above save that it starts with the word "Further". In paragraphs 13 and 15 of the first affidavit and paragraphs 5, 6, 8, 10, 12, 14, of the other affidavit he joins issue with the plaintiff/respondent in respect of the Originating Summons. He states his defence to the plaintiff/respondent's claim and challenges the validity of the Promissory Note by alleging forgery. The second affidavit especially goes to the merits of the case. Before Edwards, J., counsel for the appellant did not only contest the jurisdiction of the court but also sought to have the summons dismissed on various grounds.

In this regard the learned judge's ruling and reasons are instructive. They are as follows:

> "**(1)** Sections 35 and 38 of the Stamp Duty Act are not relevant. There is a stamped document before the Court and the Court is not obligated to look behind the stamped document as to antecedent.

> **(2)** The document is a hybrid of a Promissory Note and a charge. The failure or non-existence of the Promissory Note is not fatal to the plaintiff's claim as the Court could properly sever the separate elements of the grant of a charge and the promise to pay money.
>
> **(3)** Damages would not be an adequate remedy in this case. In any event in the instant case it cannot be argued that the caveat is the same as an injunction as the caveat is not an absolute as to dealings in land.
>
> **(4)** The proceedings were properly commenced by Originating Summons pursuant to section 535 of the Judicature (Civil Procedure Code) Act.
>
> **(5)** The Summons To Dismiss Action and for Removal of Caveat dated 5th September 1994, is refused.
>
> **(6)** The plaintiff is to give security for costs to the defendant of not less than Four Hundred Thousand Dollars ($400, 000.00) within forty-five (45) days from the date hereof."

Now submission to the jurisdiction of a court has been inferred when a defendant files affidavits and appears through counsel to argue the merits – see ***Boyle*** v ***Sacker*** (1888) 39 Ch. D. 249.

Submission has been inferred where a defendant applied to strike out part of a claim endorsed on a writ - **The Messiniaki Tolmi** (1984) 1 Lloyd's Rep. 266. It will be inferred where he has taken "steps which were only necessary or only useful if the objection had been waived or never had been entertained at all" - see ***Rein*** v ***Stein*** (1892) 66 L.J. 469 at 471 approved in ***Williams and Glyn's Bank*** v ***Astro Dinamico*** (1984) 1 WLR 438, 444 H.L.

Even a cursory look at the judge's ruling and reasons therefor will impel one to the conclusion that the defendant\appellant submitted to the

jurisdiction of the court. He challenged the admissibility of the Promissory Note on the ground that it was not properly stamped pursuant to sections 35 and 38 of the Stamp Duty Act. He challenged the validity of the document. He sought to have the summons struck out on the ground that the proceedings were not properly commenced by Originating Summons. I therefore cannot accept the argument of counsel for the appellant that having entered a conditional appearance the appellant was entitled to take these points in limine and not to be regarded as having submitted. I am driven to the view that the appellant, by his conduct, has submitted to the jurisdiction of the Court.

Another reason why the Supreme Court, in my view, has jurisdiction, is because the land described in the Promissory Note is situate in Jamaica.

As a general rule all questions that arise concerning rights over immovables (land) are governed by the lex situs, that is, the law of the place where the immovable is situate.

The learned author of Dicey and Morris on Conflict of Laws 12th Edition Vol. 2 at p. 960 in referring to this general rule has this to say:

> "The general principle is beyond dispute and applies to rights of every description. It is based upon obvious considerations of convenience and expediency. Any other rule would be ineffective because in the last resort land can only be dealt with in a manner which the lex situs allows." (Emphasis supplied)

Obviously any decision by a foreign court which runs counter to the law of the place where the land is situate would be, in most cases, a brutum fulmen (ibidem).

Mr. Wilkinson, as I understand his submission, is not challenging this view of the law. However, he contends that 'land' is not at the heart of this matter. Rather, the alleged loan is what the contract is all about and the land mentioned in the Promissory Note was, in essence, ancillary or collateral to the contract.

The Originating Summons filed on behalf of the respondent seeks an order for the sale of the land described in the Promissory Note with a view to satisfying the appellant's indebtedness to him. There can be no doubt that on the face of the Promissory Note the respondent has a charge on land owned by the appellant. Edwards, J. described the document as a "hybrid of a promissory note and a charge."

On the face of the document the respondent is entitled to have the appellant execute a mortgage over the said property. In England, a claim on property given as a security for a loan is classified for the purposes of the conflict of laws as an interest in immovable. See **In re Hayles** (1911) 1 Ch 179 at p. 183 where Cozens – Hardy M.R. said:

> " ... I think a mortgage debt secured by land is to be regarded not as a movable, but as an immovable."

Therefore, I think I can safely say that for the purposes of the conflict of laws in Jamaica, a charge on land to secure a loan is an immovable. The Originating Summons in question concerns a claim by the respondent to a charge on the land of the appellant situate in this country. It is my view therefore that the local courts will have jurisdiction to adjudicate on such claim. The respondent's application for an order for the sale of the said

property must be governed by the lex situs (the law of Jamaica where the land is situate.) However, the lex situs does not necessarily mean the domestic law of Jamaica, but any law which the Jamaican courts would apply to the particular case which might under certain circumstances be the domestic law of Switzerland i.e. the lex loci contractus. In other words "the lex situs means not the domestic law of the situs but the conflict of laws rule of the situs which may refer to some other system of domestic law" – see Dicey and Morris on Conflict of Laws (supra) at p. 960.

PROPRIETY OF ORIGINATING SUMMONS

The arguments of Mr. Wilkinson, briefly stated, are as follows:

(i) The plaintiff/respondent should have gone by Writ of Summons. Section 535 of the C.P.C.which provides for the commencement of proceedings by Originating Summons contemplates proceedings where the mortgage or charge is not disputed or which has been proved.

(ii) The plaintiff/respondent's claim is, in essence one for a debt or liquidated demand and the proceedings should have been begun by Writ of Summons not otherwise.

(iii) The Originating Summons did not mention the Promissory Note and did not in effect disclose a proper cause of action. Because of the history of this case, this Court should not now allow an amendment or order that the proceedings continue as if begun by Writ. He referred the Court to ***Melville*** v ***Melville*** SCCA No. 41/95 and ***Eldemire*** v ***Eldemire*** (1990) 27 JLR 316 P.C.

Accordingly, he is asking the Court to hold that Edwards, J. erred in failing to dismiss the Originating Summons. On the other hand, Miss Carol Davis contends that:

(i) Section 535 of the C.P.C. specifically gives authority to a mortgagee or mortgagor or any person entitled to an equitable charge to proceed by Originating Summons for the reliefs set out in the section which include payment of moneys secured by mortgage or charge and the sale of the property subject to the mortgage or charge.

(ii) The Originating Summons is properly brought since on the face of the document the plaintiff/respondent is entitled to an equitable charge.

(iii) Section 535 of the C.P.C. provides a special procedure by Originating Summons for mortgage actions. It is not necessary to set out the Promissory Note in the Originating Summons since the evidence on which the plaintiff will rely will be by way of affidavit.

Section 535 of C.P.C. reads:

> "**535.** Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons returnable in chambers for such relief of the nature or kind following as may by the summons be specified and as the circumstances of the case may require, that is to say –
>
> > Payment of monies secured by the mortgage or charge;
> >
> > Sale;
> >
> > Foreclose;
> >
> > Delivery of possession (whether before or after foreclose) to the mortgagee or person entitled to the charge, by the mortgagor or person having the property subject to the charge or by any other person in or alleged to be in possession of the property; ..."

It is clear that section 535 of the C.P.C. permits a person entitled to a charge on property to apply to the Court by Originating Summons for an Order for the sale of the property charged. However, as a general rule, an Originating Summons is not appropriate in the following circumstances:

(i) For the resolution of disputed facts – see ***Eldemire*** v ***Eldemire*** 27 J.L.R. 316 and ***Melville et al*** v ***Melville*** S.C.C.A. 41/95; and

(ii) When an issue of fraud is involved see Order 88/1/3 Supreme Court Practice.

In the instant case the affidavits filed by the parties disclose serious disputes and indeed the appellant is alleging fraud on the part of the plaintiff/respondent.

In this regard their Lordships in ***Eldemire*** v ***Eldemire*** said:

> "As a general rule, an Originating Summons is not an appropriate machinery for the resolution of disputed facts. The modern practice varies. Sometimes when disputed facts appear in an originating summons proceedings, the court will direct the deponents who have given conflicting evidence by affidavit to be examined and cross-examined orally and will then decide the disputed facts. Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim. Sometimes in order to ensure that the issues are properly deployed, the court will dismiss the originating summons proceedings and leave the applicant to bring fresh proceedings by writ."

During the course of his submissions Mr. Wilkinson sought and obtained the leave of this Court to place before it several documents including the minutes of orders of the judges of the Supreme Court.

The documents disclose that the plaintiff/respondent filed a Writ of Summons on the 24th November 1993. By this Writ he sought to recover the debt allegedly secured by the Promissory Note. The defendant/appellant on the 12th May 1994, filed a motion to dismiss the writ. In the affidavit in support of this motion the appellant denied borrowing the stated sum of money or any sum at all and claimed that the signature affixed to the Promissory Note was a forgery. Proceedings on the Writ were discontinued on the 9th June 1994.

The history of this matter certainly supports the contention of Mr. Wilkinson that at the time when the proceedings on the Writ were discontinued the plaintiff/respondent was aware that the facts in relation to the Promissory Note were disputed and that the appellant was alleging fraud. Thus when the plaintiff/respondent sought and obtained an order for substituted service of the Originating Summons on the 22nd of June 1994, he would have known that the procedure adopted was not the appropriate one.

In light of the foregoing, counsel for the appellant is urging this Court to dismiss the Originating Summons. He contends that to direct that the proceedings by Originating Summons be treated as if begun by a Writ, would inflict great hardship on the appellant. This submission is in my view, weighty and momentous. In the ***Eldemire*** case (supra) their Lordships indicated that the Court may deal with such a situation in one of three ways. It may:

(i) direct the deponents who have given conflicting affidavit evidence to be examined and cross-examined orally; or

(ii) direct that the Originating Summons proceedings be treated as if begun by Writ etc; or

(iii) dismiss the Originating Summons proceedings and leave the applicant to bring fresh proceedings by Writ.

The cause of action arose in 1993, when according to the plaintiff/respondent, the loan should have been repaid. To employ the third method above would virtually drive the plaintiff from the seat of justice in view of the limitation period. The Court should be very slow to deny anyone access to itself. The procedural error made by the plaintiff/respondent would not, in my view, warrant the Court taking such a drastic measure. The interests of justice would dictate that **(i)** or **(ii)** above should be followed. Because fraud is alleged, I think that **(ii)** is more appropriate.

I do not accept Mr. Wilkinson's argument that the Originating Summons does not disclose any cause of action. It is true that the nature and extent of the defendant\appellant's indebtedness to the plaintiff is not stated therein. It is also true that there is no specific mention of the Promissory Note or the charge in the Originating Summons.

However these defects may be remedied by the service of a statement of claim - see ***Hill*** v ***Luton Corporation*** (1951) 2 K.B. 387 and ***Grounsell*** v ***Cuthell*** (1952) 2 Q.B. 673. Of course the plaintiff may not introduce in his statement of claim a fresh cause of action distinct from anything mentioned in the "Originating Summons" (being treated as a Writ) - see ***Sterman*** v ***E.W. & W.J. Moore*** (1970) 2 W.L.R. 386.

Accordingly, I would direct that the Originating Summons proceedings be treated as if begun by a Writ and that the plaintiff's affidavit sworn to on

28th January 1994, in support of the summons be treated as the statement of claim.

CHESTER ORR, J's ORDER OF THE 22ND JUNE 1994

On the 22nd June 1994, Chester Orr, J., made an order that the caveat numbered 787079 lodged against the appellant's property should remain in force indefinitely. By summons dated 5th September 1994, the appellant sought to have the caveat removed. The summons was dismissed by Edwards, J.

The caveat was lodged on the 26th October 1993, and was warned on the 26th May 1994. Mr. Wilkinson submitted that, by virtue of section 140 of the Registration of Titles Act, when a caveat has been warned the caveator has fourteen days to apply to the Court for an Order that the caveat should remain in force for a specified further period.

The time, he submitted, expired on the 9th of June 1994, thus Orr, J. had no jurisdiction to make the order of the 22nd June 1994. Consequently, he is asking the court to hold that Edwards, J. erred when he refused to remove the caveat.

Further, Mr. Wilkinson is contending that the order made by Orr, J. extending the caveat indefinitely was in effect a renewal of the caveat and runs foul of section 140 which prohibits the renewal of a caveat.

Miss Davis on the other hand is contending that the relevant date is the date when the notice was served and not the date of the warning. Section 140 of the Registration of Titles Act provides that the caveat shall lapse upon the expiration of 14 days after the notice to the caveator. There

is no evidence as to when the notice was served on the caveator, i.e. the plaintiff/respondent.

The relevant part of section 140 reads:

> "Except in the case of a caveat lodged by or on behalf of a beneficiary under disability claiming under any will or settlement or by the Registrar every caveat lodged against a proprietor shall be deemed to have lapsed as to the land affected by the transfer or other dealing upon the expiration of fourteen days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing unless in the meantime such application has been withdrawn.
>
> A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest, but if before the expiration of the said period of fourteen days or such further period as is specified in any order made under this section the caveator or his agent appears before a Judge, and gives such undertaking or security, or lodges such sum in court, as such Judge may consider sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, then and in such case such Judge may direct the Registrar to delay registering any dealing with the land, lease, mortgage or charge, for a further period to be specified in such order, or may make such other order as may be just, and such order as to costs as may be just."

Mr. Patrick Bailey, the then attorney-at-law for the plaintiff/respondent said in his affidavit that the caveat was warned by notice from the Registrar dated 26th May 1994. There is no evidence as to when this notice was served. Miss Davis concedes that it was served "within days" of the date of the notice. An application for interim injunction and for an order that the caveat do remain in force was filed on the 9th June 1994.

On the 15th June 1994, Mrs. Harris, J., made an order keeping the caveat in force until the 22nd June 1994. On the 22nd June 1994, Orr, J., made an order keeping the caveat in force indefinitely.

I agree with Miss Davis that the appellant has failed to show that when Orr, J., made the order the caveat was not then in force. Edwards, J. was therefore right in dismissing the application for the removal of the caveat on this ground.

I am unable to accept the further submission of Mr. Wilkinson that the order of Orr, J. was null and void because a period for the extension of the caveat was not specified therein. The order can be varied at anytime to conform with the section. It is also important to note that section 140 empowers the court to "make such other order as may be just." It has not been shown that the learned judge wrongly exercised his discretion by making an order extending the caveat indefinitely.

The significance of this order, of course, is that unless otherwise directed, the Registrar of Titles will delay registering any dealing with the land until the dispute between the parties is disposed of.

THE CAVEAT

Mr Wilkinson contends that the renewal of the caveat is analogous to the granting of an injunction in that the principles germane to the granting of an interlocutory injunction are also those applicable to whether or not the caveat should be removed pending the resolution of the matter.

He further contends that there is no serious issue to be tried. Even if there was a serious issue to be tried, the balance of convenience would lie in

removing the caveat from the Certificate of Title. He relies on ***Burman*** v ***AGC (Advances) Ltd***. (1993) Australian Current Law Reporter p. 1671, Hogg's "Australian Torrens Systems" pp. 1035-1036 and ***American Cyanamid*** v ***Ethicon Ltd*** (1975) 1 All ER 504; (1975) AC. 396 HL.

Miss Davis submitted that the summary removal of a caveat is only proper where there was no ground for the lodging of the caveat in the first place - see In **re Peychens Caveat** (1954) NZLR. 285 and ***Plimmer Bros*** v ***St. Maur*** (1906) NZLR 294.

In ***Burman*** v ***AGC (Advances Ltd)*** (supra) the Court of Appeal, Queensland, held that a caveator's position should be considered as equivalent to that of an applicant for an interlocutory injunction to restrain a sale. The report of the decision is very brief and the relevant legislation is not referred to. Without this I cannot say that this decision is helpful.

To decide whether or not a caveat is in essence akin to an injunction it is necessary, I think, to examine the relevant legislative provisions. Section 139 of the Registration of Titles Act (the "Act") provides in part that:

> "Any beneficiary or other person claiming any estate or interest in land under the operation of this Act, or in any lease mortgage or charge under any unregistered instruments or by devolution in law or otherwise, may lodge a caveat with the Registrar in the Form in the Thirteenth Schedule, or as near thereto as the circumstances will permit, forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting such estate or interest either absolutely or until after notice of the intended registration or dealing be given to the intended caveator, or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat."

Thus prima facie, the plaintiff/respondent has a right to lodge a caveat against the registered Title of the defendant\appellant to protect the interest he is claiming. Section 140 of the Act gives the proprietor against whose title such caveat has been lodged a right to:

> "... summon the caveator to attend before the Supreme Court or a Judge in Chambers to show cause why such caveat should not be removed, and such Court or Judge may, upon proof that such caveator has been summoned, make such order in the premise either ex parte or otherwise, and as to costs as to such Court or Judge may seem fit ... "

Section 143 of the Act reads:

> "Any person lodging any caveat with the Registrar either against bringing land under this Act or otherwise, without reasonable cause shall be liable to make to any person who may have sustained damage thereby such compensation as a Judge on a summons in Chambers shall deem just and order."

It would seem that the removal of a caveat under section 140 is only proper where the Judge is satisfied that it was lodged "without just cause." In ***Plimmer Bros*** v ***St Maur*** (supra) Stout CJ. at p. 296 said:

> "In my opinion the caveat cannot be set aside unless the claim to the estate appears to be without any validity. If there is reasonable question to argue the Court should not remove the caveat but permit the matter to be litigated."

He went on to say that:

> "The question is whether under these circumstances the caveat can really be deemed a bona fide caveat protecting an interest in land."

The right to caveat is a right given by statute and unlike an injunction, the caveator does not have to apply to the Court. Pursuant to section 140 the intervention of the Court is necessary when:

(i) the proprietor desires to have the caveat removed; or

(ii) the caveator desires to have the caveat extended after it has been warned.

The application by the caveator, the plaintiff/respondent, to have the caveat extended was heard by Orr, J. who extended it indefinitely.

In dismissing the proprietor's i.e. the defendant/appellant's application to remove the caveat Edwards, J. held that:

> "Damages would not be an adequate remedy in this case. In any event, in the instant case it cannot be argued that the caveat is the same as an injunction as the caveat is not an absolute bar to dealings in the land."

I am of the view that the decision of Edwards, J. is right. The principles enunciated in the ***American Cyanamid*** case relate specifically to injunctions and not to caveats. In considering whether or not to remove a caveat the Court must have regard to the following:

(i) Whether the caveator has a beneficial interest sufficient to support a caveat.

(ii) Whether the interest requires protection.

(iii) Whether the caveat can be deemed to be a bona fide caveat protecting an interest in the land.

In the language of section 143 a judge should only remove a caveat where there was no "reasonable cause" to lodge it.

However, even if I am wrong and the decision of the Australian Court in ***Burman*** v ***AGC (Advanced) Ltd*** (supra) is relevant, it is still my view that the decision of Edwards, J. is right. I say this for the following reasons:

(i) There is a serious issue to be tried i.e. whether the document containing the Promissory Note and charge is valid and enforceable.

(ii) The balance of convenience favours preserving the right of the caveator because if the caveat is removed and the plaintiff/respondent succeeds, he might be without relief. The plaintiff's application for the sale of the land might be completely frustrated.

(iii) There is no evidence that the defendant would be in a position to pay damages if the plaintiff succeeds.

(iv) The plaintiff has given an undertaking as to damages pursuant to section 140 of the Act.

THE PROMISSORY NOTE

Mr Wilkinson argued that the Court should not take judicial cognizance of the Promissory Note because -

(i) It was not mentioned in the Originating Summons and

(ii) It was not stamped pursuant to the Stamp Duty Act.

I have already mentioned the first point. It is enough to dispose of this point by referring to ***Grounsell*** v ***Cuthell and Lumley*** (1952) 2 QB 673. The facts as they appear in the headnote are that on 12th February 1951, the husband of the plaintiff died as a result of an accident. On 22nd January 1952, the plaintiff issued a Writ the endorsement of which stated that her claim was for damages under the Law Reform (Miscellaneous

Provisions) Act, 1934, and the Fatal Accidents Acts 1846 to 1908. The claim arose out of the death of her husband due to the negligence of the defendants. The Writ, though issued within the time required by law, was not served on the defendant until after the time for service had expired.

The second defendant entered a conditional appearance and issued a summons to have the service of the Writ set aside on the ground that the indorsement was defective for insufficient particularity of the claim. After the issue of the summons but before it was heard, the plaintiff delivered a statement of claim which supplied the necessary particulars.

The Master refused to set aside the service of the Writ on the ground that the defective indorsement had been cured by the statement of claim. On appeal from the decision of the Master to the Judge in Chambers it was held that the circumstances to be considered on the application were those existing not when the summons was issued but when it was heard. At that time, the defective indorsement had been rectified and the service of the Writ should stand. In his reasons for judgment Ormerod, J. said at p. 675:

> "The matter was considered by Devlin, J. in ***Hill*** v ***Luton Corporation*** as recently as 1951 ... and Devlin, J. held that the delivery of the statement of claim cured any defect in the writ. The plaintiff had a right to deliver the statement of claim with the writ, in those circumstances the defendant knew within the prescribed time of limitation what he had to meet in the way of a charge of negligence and it was immaterial whether he knew it from one document the writ, or from two documents the writ and the statement of claim."

I have no hesitation in adopting the above reasoning. In the instant case the Originating Summons was accompanied by a supporting affidavit

which gives details of the Promissory Note and the charge on the appellant's property. The affidavit in support cures the defects complained of by counsel for the appellant.

The second point raised by Mr Wilkinson is that the document should not be received in evidence because it was not stamped in accordance with section 35 of the Stamp Duty Act and therefore not admissible by virtue of section 36.

Miss Mayhew in response to this submission argues that section 80 of the Stamp Duty Act is applicable. She also contends that the document could have been duly stamped under section 38.

Sections 34, 35, 36, 38 and 80, of the Stamp Duty Act are reproduced below:

> "**34.** Foreign bills of exchange and foreign promissory notes drawn in this Island, payable on demand, shall be exempt from stamp duty.
>
> **35.** The Stamp Commissioner shall not stamp any inland or foreign bill exchange, or promissory note, or foreign bill of lading, after the lapse of seven days from the execution thereof, or any coastwise receipt, or inland bill of lading after the execution thereof.
>
> **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.
>
> **38.** Any instrument made, executed, taken, or acknowledged out of this Island, and liable to duty shall not be received or admitted in any court, or be entered on record in any office within this Island, until the same shall have been first duly stamped.

> **80.** Notwithstanding the provisions of section 50 a bill of exchange which is presented for acceptance or accepted or a bill of exchange or a promissory note which is payable elsewhere than in Jamaica shall not be invalid by reason only that it is not stamped in accordance with the law for the time being in force relating to stamp duties, and any such bill of exchange or promissory note which is unstamped or not properly stamped, may be received in evidence on payment of the proper duty and penalty as provided by section 50."

The evidence of the plaintiff/respondent clearly indicates that the document in question contains in part a "foreign Promissory Note" and in part a charge on property situate in Jamaica. By virtue of section 35 a Promissory Note shall not be stamped after the lapse of seven days from its execution. This section however, does not apply to a "charge." A charge is not exempt from stamp duty. It is my view that this "hybrid document" is not caught by the provisions of section 35. There is no complaint that the document was insufficiently stamped. The Court cannot therefore assume that it was not duly stamped. The decision of Edwards, J. that sections 35, 36 and 38 of the Stamp Duty Act were not relevant and that the "Court is not obligated to look behind the stamped document as to the antecedent" is, as I see it, correct. It would follow that section 80 is also not relevant.

For the reasons that I have endeavoured to express, it follows that I would dismiss this appeal and affirm the order of the learned judge. The appellant must pay the respondent's costs as agreed or taxed.