[2023] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR. JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NOS COA2021CV0007, 22 & 90

BETWEEN	**KEVIN SUDEALL**	**1ST APPELLANT**
AND	**JOYCE RAMDEEN-SUDEALL**	**2ND APPELLANT**
AND	**GARFIELD SINCLAIR**	**1ST RESPONDENT**
AND	**LYNSETTA SINCLAIR**	**2ND RESPONDENT**

Nicholas Chambers instructed by Legal Chambers for the appellants

Andre Earle KC and Ms Diandra McPherson instructed by Earle & Wilson for the respondents

19 April and 26 May 2023

Injunctions - Principles to be applied - Balance of convenience - Competing beneficial interests in real property

Contempt of Court - Principles to be applied - Whether *mens rea* requires finding that conduct was contumacious

BROOKS P

[1] I have read, in draft, the judgment of Laing JA (Ag). I agree with his reasoning and conclusions and have nothing to add.

D FRASER JA

[2] I, too, have read in draft, the judgment of Laing JA (Ag). I agree and have nothing to add.

LAING JA (AG)

The appeals

[3] The appellants Kevin Sudeall ('Mr Sudeall') and Joyce Ramdeen Sudeall, the defendants in the court below, filed three notices of appeal which were consolidated at the case management conference which was held in this court.

[4] By notice of appeal COA2021CV0007, filed on 25 January 2021 ('Appeal No 7'), the appellants (being the first and second defendants, respectively, in the court below) appealed against order number one of 12 orders which were made by T Carr J ('the learned judge') on 8 January 2021. The order that is being appealed, which will be referred to herein as the 'January Order', is as follows:

> "1. Interim injunction granted restraining the Defendants whether by themselves, their servants and/or agents from preventing or restricting the Claimants, and their servants and/or agents, access to the common areas of the lands comprised in Certificate of Title registered at Volume 1501 Folio 316 formerly Volume 33 Folio 78 of the Register Book of Titles, for the purpose of parking and delivery so as to be a nuisance to the claimants' use and enjoyment of the land comprised in the Certificate of Title registered at volume 1457 Folio 930 of the Register Book of Titles."

[5] By notice of appeal COA2021CV00022, filed on 3 March 2021 ('Appeal No 22'), the appellants appealed three of seven orders which were made by the learned judge on 19 February 2021. The orders being appealed, which are referred to herein collectively as the 'February Orders', are as follows:

> "1. Interim Injunction granted prohibiting the Registrar of Titles from registering any dealings, or transferring any interest in the lands comprised in the Certificate of Title registered at Volume 1051 Folio 316 formerly Volume 33 Folio 78 of the Register Book of Titles until the Claim is determined.

2. Interim Injunction granted prohibiting the Defendants' their servants and or agents from dealing, selling or transferring any interest in the lands comprised in the Certificate of Title registered at Volume 1051 Folio 316 formerly comprised in Volume 33 Folio 78 of the Register Book of Titles until the claim is determined.

3. Interim Declaration that caveat numbered 2266814 is not to be removed from Certificate of Title registered at Volume 1501 Folio 316 formerly Volume 33 Folio 78 of the Register Book of Titles, until the Claim is determined."

[6] By notice of appeal COA2012CV00090, filed on 14 October 2021 ('Appeal No 90'), the appellants appeal from the decision of Wint-Blair J, contained in the written decision which was delivered on 5 October 2021, in which she found, *inter alia*, the first appellant Kevin Sudeall guilty of criminal contempt, and ordered him to pay a fine of $1,000,000.00 and also a security of $3,000,000.00 against frustrating the administration of justice, or be committed to serve 30 days imprisonment ('the contempt orders').

The background

[7] The appellants and the respondents operate businesses along West Street in the town of Port Antonio in the parish of Portland. Between their respective properties is a parcel of land referred to as a common area (the 'common area'). Whether the common area can be used by delivery vehicles for the respondents' business is the subject of dispute and litigation between them.

[8] There is also a dispute between the parties as to the ownership of a small portion of the common area ('the omitted land'). The respondents are owners of land from which they operate a supermarket ('the supermarket land'). They are also the registered proprietors of a nearby parcel of land, also bordering on the common area, on which they have a storeroom (referred to herein as 'Lot 1'), which was purchased pursuant to an agreement for sale dated 4 December 2009. Both parcels of land were purchased from Johnston and Company Successors (Portland) 1957 Limited ('Johnston'). A memorandum

of understanding ('the MOU') was subsequently executed by the respondents and Johnston on 30 December 2011, which stipulated that a small portion of the common area, was in fact sold to the respondents, but was mistakenly not included in the sale and transfer of Lot 1. The common area includes the omitted land which is the subject of the ownership dispute and the respondents rely on the MOU in their claim of ownership of the omitted land.

[9] The appellants assert that they purchased the lands that they occupy from Johnston, pursuant to an agreement for sale dated 9 April 2020, (referred to herein as 'Lot 2') and that it includes the omitted land. Accordingly, on this basis they claim that they are the owners of the omitted land.

[10] A judge of the Supreme Court ordered the appellants not to prevent the respondents from accessing and using the common area and not to transfer or otherwise dispose of the omitted land. The appellants appealed against those orders (Appeals Nos 7 and 22). The respondents complained that Mr Sudeall breached the orders and asked for him to be held in contempt. Wint-Blair J found Mr Sudeall to be in contempt and fined him. The appellants have also appealed that decision (Appeal No 90).

The applicable law

[11] These three appeals must be considered in the context of the prescribed ambit within which this court must operate in conducting a review of the learned judge's decision. The test as laid down in the case of **Hadmor Productions Ltd and Others v Hamilton and Another** [1982] 1 All ER 1042 ('**Hadmor**') has been followed in numerous decisions of this court including **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, where at para. [20], Morrison JA (as he then was) stated that:

> "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'."

[12] In keeping with this guidance, in order to set aside the orders of the learned Judge we would have to find that she misunderstood the law or the evidence before her, or that the orders which are the subject of this appeal are "so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it".

[13] In my opinion the issues that might be identified for discussion and which are capable of disposing of Appeal No 7 and Appeal No 22 can conveniently be framed as follows:

(i) whether there was sufficient basis for the learned judge to have properly exercised her discretion in granting the injunction contained in the January Order;

(ii) whether there was sufficient basis for the learned judge to have properly exercised her discretion in granting the injunctions contained in the February Order; and

(iii) whether the January Order and/or the February Order should be set aside.

[14] Regarding Appeal Nos 7 and 22, the principles as to whether to grant an interlocutory injunction are clearly identified in the oft-cited House of Lords case of **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504 ('**American Cyanamid**') and requires the court to have regard to three primary criteria:

(a) Is there a serious issue to be tried?

(b) Are damages an adequate remedy?

(c) Where does the balance of convenience lie?

In **American Cyanamid**, at page 510(e), Lord Diplock made the following observation:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

[15] **American Cyanamid** has been followed in the case of **National Commercial Bank v Olint Corp Limited** [2009] 1 WLR 1405, ('**Olint**') in which the Board at para. 1 confirmed that the purpose underlying the granting of an interim injunction is to improve the chance of the court being able to do justice after a determination of the merits at trial. As such, the court must assess whether granting or withholding an injunction is more likely to produce a just result.

[16] In **Olint** the Privy Council reaffirmed the **American Cyanamid** principles and offered further useful guidance on the approach to interlocutory injunctions. At paras. 16, 17 and 18 of the judgment delivered by Lord Hoffman, it is stated as follows:

> "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 [1975] 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.
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> 17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:
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> > 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them'.
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> 18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases." (Italics as in original).

Appeal No 7 -The injunction against prohibiting deliveries

[17] The respondents, by a without notice application for court order filed on 23 November 2020, sought and obtained an injunction in the same terms as prayed for in their claim form. That injunction is in the form of the January Order, which is the subject of Appeal No 7.

[18] The grounds of appeal which are presently before this court are as follows:

> "1. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she ordered at this stage that the Respondents/Claimants are entitled to use the common area of lands registered at Volume 1501 Folio 316 of the Register Book of Titles as a delivery area in circumstances where the Parish Council made it clear what the common area should be used for;
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> 2. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she failed to have regard to the undisputed decision of the Portland Parish Council and the Registrar of Titles as regards the use of the common area and the access to Lot 1;
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> 3. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she failed to have regard to the lawful access way to the Respondents/Claimants' property which is wider than the access to the common area;
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> 4. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she concluded that there were serious issues to be tried;"

The appellants' submissions

[19] The appellants argued, through their attorney-at-law Mr Chambers, that the respondents have used the common area for purposes that are contrary to the designation by the Portland Parish Council and restrictive covenant 20. He invited the court to note that a subdivision plan was approved by the Portland Parish Council on 13 January 2011, which relates to the supermarket land, Lot 1 and Lot 2. By a resolution dated 8 March 2012, condition 32 of that approval now provides that "[t]he common area shall be used for parking for the development". Additionally, counsel highlighted restrictive covenant 20 which is present on the certificate of title for Lot 1, issued on 24 May 2012, and provides that the common area shall be used for parking for the development.

[20] It was also submitted that by letter dated 4 May 2018, which was addressed to the appellants' then attorneys-at-law, the Deputy Registrar of Titles indicated that:

> "5. Access to the lands comprised in [Lot 1] is gained via lands comprised in [the supermarket land]. These two parcels are held together as one parcel in accordance with one holding clause endorsed on Certificate of Title [for Lot 1]."

It was posited that, as a consequence of this letter, the question as to whether the respondents could use the common area for delivery was answered by the Deputy Registrar and there was no serious issue to be tried on this issue.

[21] Mr Chambers also took issue with the form of the January Order. He argued that it was irregular because it did not specifically state the end time of the interim injunction; that is, that it would end when the substantive trial occurred. However, it was indicated to counsel by the court that it was expressly stated that it was an interim injunction and implicit in this legal characterisation is an understanding that it would come to an end at the trial of the substantive matter unless otherwise ordered. Thereafter, counsel did not pursue this argument with any vigour. However, counsel submitted that the order was also unnecessarily wide in its scope especially having regard to the manner in which the respondents have been using the common area and causing severe inconvenience to the appellants.

[22] Counsel also questioned the effect of the fact that whereas three orders were contained in the January Order, orders 2 and 3 were repeated in the February Order but not order 1. However, following an exchange with the court, counsel conceded that the January Order was not discharged and was, therefore, an extant order of the court. Counsel accepted that a party, by making an amended application, does not thereby discharge an order previously made by the court.

[23] In conclusion, Mr Chambers argued that the balance of convenience was not in favour of granting the injunction especially when the inconvenience caused to the appellants as operators of a commercial entity is considered.

The respondents' submissions

[24] Mr Earle KC, for the respondents, submitted that the Deputy Registrar's letter dated 4 May 2018 was not determinative of whether the respondents could use the common area for deliveries. Counsel noted that there was no evidence that the Deputy Registrar conducted an investigation with the Parish Council or the surveyor, or that she appreciated that the restrictive covenant provided that parking was for the development. He submitted that having regard to the fact that the development is comprised of Lot 1 and Lot 2, then the respondents as the registered owners of Lot 1 were entitled to use the entryway from West Street to do deliveries using the common area. It was submitted that the Deputy Registrar made an error in arriving at her conclusion and it is not her responsibility to determine how access is to be obtained by the respondents as owners of Lot 1. Counsel submitted that in any event, and more importantly, the issue of the usage of the common area is an issue to be determined by the court at trial.

[25] In response to Mr Chambers' complaint that the order was too wide in its scope, Mr Earle noted that this does not form a part of the grounds of the appeal.

Discussion and analysis

[26] By claim form and particulars of claim, filed on 23 November 2020, the respondents seek declarations and injunctions based on their pleaded case, that on or about 14 November 2020, the first appellant and or his servants and or agents chained the gates of Lot 2, thereby preventing the respondents, their servants and/or agents, from using the common area for the purpose of parking "as provided in the respondents' certificate of title". Accordingly, the respondents seek, *inter alia*, a declaration that they are entitled to access the common area for the purposes of parking and delivery and an injunction preventing the appellants from interfering with their access to the common area for "the purposes of parking and delivery so as to be a nuisance to [their] use and enjoyment*".*

[27] In their defence and counterclaim, filed 8 December 2020, the appellants, deny that they have blocked the warehouse of the respondents. At para. 5, they accept that the respondents have "an easement of parking" but assert that the respondents have acted in breach of the restrictive covenant to use the common area for parking and have wrongfully used it as an access to their property.

[28] It should be noted that the claim for the injunction to restrain the appellants and/or their agents from preventing the respondents from using the common area for delivery is not dependent on the respondents' assertion of a beneficial interest in respect of the omitted Land. This is so because, even if the respondents are found to be the beneficial owners of the omitted land, they would still need to utilise a separate portion of the common area to give vehicles passage from West Street to their warehouse. The claim for the injunction which resulted in the January Order is based primarily on what the respondents argue is a right to use the common area to deliver goods to the respondents' warehouse. This they say arises by virtue of their legal ownership of Lot 1 and is not based on their asserted ownership of the omitted land.

[29] It seems clear to me, on a preliminary assessment, that there is a serious issue to be tried as to the scope of the restrictive covenant and the effect of any designation by the Portland Parish Council of the common area as an area to be used for parking. The primary issue which will fall for the trial court's determination will be whether the respondents have a right to use the common area for the purpose of delivering goods to their warehouse. If there is such a right, sub-issues will include the limits of such a right, and whether the actual use by the respondent has been in a manner that exceeds the reasonable exercise of that right.

[30] Neither counsel focussed their submissions on whether damages are an adequate remedy. It appears to us that there is at the very least a tacit concession by Mr Chambers that damages are not an adequate remedy. In assessing the adequacy of the respective remedies in damages available for either party, it is my opinion that a significant factor is that there would be considerable difficulty in quantifying the inconvenience to which the

respondents would be put if they are unable to use the common area for deliveries. This arises from the difficulty the court would have at trial in assessing the opportunity cost of any alternative arrangements when one factors in the time which may be lost and the inconvenience in moving the goods being delivered from another point.

[31] It appears to me that, in this case, the balance of convenience lies in favour of granting the injunction to prevent the appellants from restricting deliveries, and thus the learned judge did not err in granting the interim injunction. In arriving at this conclusion, this court has considered the uncontradicted evidence of the respondents that they have been using the common area for deliveries for over 20 years. At the trial, the limits of any right to use the common area will turn on the evidence of the historical and the intended future usage. For this reason, I am reluctant to express an opinion on the relative strengths of the parties' cases. Having considered the balance of convenience, I am satisfied that it is unlikely that the injunction will turn out to have been wrongly granted considering the commercial practicality of permitting the respondents to continue to use the common area for deliveries until the claim is resolved.

Conclusion - Appeal No 7

[32] In the premises, I have concluded that the grant of the injunction in the terms of the January Order was a proper exercise of the discretion of the learned judge and that there is no merit in Appeal No 7.

Appeal No 22-The restrictions against registration

[33] In challenging the February Orders, the appellants' grounds of appeal are as follows:

> "1. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she ordered at this stage that the Respondents/Claimants are entitled to the Injunction and Declaration or that the Appellants be restrained from having the property transferred to them in circumstances where it is not denied that the Appellants are Bonafide Purchasers for

value and the registered proprietors did effect a transfer of the subject property to the Appellants.

2. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she failed to have regard to the evidence before her or the entire available evidence including evidence provided to show the 1st Respondents (sic) failure to disclose his written offers to the Registered proprietor to purchase the subject property;

3. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she found that the Respondents had provided evidence that they had a real prospect for succeeding in their claim for an injunction.

4. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she concluded that there were serious issues to be tried;

5. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she failed to have regard to section 71, 162 and 163 of the Registration of Titles Act;

6. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she found that the Respondents had provided evidence that they had a real prospect for succeeding in their claim for an injunction and damages was not an adequate remedy.

7. That the Learned Judge erred in law and/or in fact and/or misdirected herself when she found that the Respondents had provided evidence that they had a real prospect for succeeding in their claim for an injunction and the balance of convenience lies in their favour."

The appellants' submissions

[34] The appellants submitted, through their counsel Mr Chambers, that they are purchasers for value without notice of Lot 2 and were put in possession of it by the registered owner, Johnston. Accordingly, in keeping with the principle of indefeasibility of title under the Registration of Titles Act ('the Act'), and, in particular, sections 70 and 71 thereof, the appellants' ownership of the omitted land is not capable of being disturbed or displaced by the respondents' claim of a prior right to the omitted land, in the absence

of fraud. They argued that, importantly, the respondents have not pleaded any allegation of fraud.

[35] They argued that they had no knowledge of the beneficial interest in the omitted land which is being asserted by the respondents. They further argued that they took prudent steps through their then attorneys-at-law, of inquiring of the Registrar of Titles, by letter dated 25 April 2015, as to whether the titles for Lot 1 "gave an interest in any common area allegedly adjoining the subject properties" and were comforted by the response that there was no such interest.

[36] It was submitted by the appellants that it is the caveat and the injunctions extending the validity of the caveat, that prevent the registration of their names in the register book of titles as proprietors of Lot 2, which would give them a superior legal title to the omitted land than that which is being asserted over it by the respondents, which is only a beneficial interest.

[37] It was further submitted by the appellants that the MOU signed by the respondents and Johnston is merely indicative of an understanding between the parties and is not binding. It was posited that, in any event, any claim that the respondents assert in relation to the omitted land is properly to be made against Johnston as a matter of privity of contract, it being the party with whom the respondents entered into the MOU. It was submitted, therefore, that it is of relevance that Johnston has not been joined by the respondents as a party to the claim.

[38] Mr Chambers also argued that the injunction in the terms granted was unnecessary because the registration of the appellants' legal interest in Lot 2 could be permitted subject to the respondents claim for a beneficial interest in the omitted land.

[39] In closing his presentation on this appeal, Mr Chambers submitted that the respondents' claim in respect of any right or interest in the omitted land is bound to fail and there is no serious issue to be tried in respect of this element of the respondents'

claim. Accordingly, the learned judge ought not to have made the February Orders which are the subject of Appeal No 22.

The respondents' submissions

[40] Mr Earle submitted that the respondents moved to protect their claim to the omitted lands by lodging a caveat on 10 August 2020. The appellants lodged the instrument of transfer 20 October 2020 which was approximately two months after the caveat was lodged. Reliance was placed by counsel on section 58 of the Act which speaks to what is considered to be the date when an instrument of transfer is lodged, which counsel submitted supports the respondents' position that their caveat was first in time. Mr Earle emphasized the chronology of the events and argued that whereas the respondents' equitable right arose in 2009 when the Agreement for Sale of Lot 1 was signed, the lodging of the caveat on 10 August 2020 constituted notice to the world of their interest.

[41] Mr Earle submitted that this was a case of competing equitable interests; of the respondents on the one hand, and the appellants on the other. However, the respondents' interest was also protected by special condition 13 which was inserted in the Agreement for Sale in respect of Lot 2 which provided that:

> "13. The purchasers hereby acknowledge that they are aware of and take the property subject to any and/or call conditions imposed by the relevant planning authorities and/or any rights whatsoever of any third parties and/or adjoining owner(s) over the subject property."

King's Counsel argued that it was incumbent on the appellants to enquire from the vendor as to what these conditions and rights may have been.

[42] Considering the respondents' claim to access to the common land for delivery, and the competing beneficial interests in respect of the omitted land, Mr Earle submitted that there was a serious issue to be tried.

Discussion and analysis

[43] In their defence and counterclaim, filed on 8 December 2020, the appellants, asserted that they are the beneficial owners of Lot 2 and deny that the respondents have any legal or beneficial interest in the omitted land. However, this assertion must be viewed in the context of section 58 of the Act, which provides as follows:

> "58. Every duplicate certificate of title shall be deemed and taken to be registered under this Act when the Registrar has marked thereon the volume and folium of the Register Book in which the certificate is entered; and every instrument purporting to affect land under the operation of this Act shall be deemed and taken to be registered at the time when produced for registration, if the Registrar shall subsequently enter a memorandum thereof as hereinafter described in the Register Book upon the folium constituted by the existing certificate of title and also upon the duplicate; and the person named in any certificate of title or instrument so registered as the proprietor of, or having any estate or interest in or power over, the land therein described or identified, shall be deemed and taken to be the duly registered proprietor thereof, or as duly registered in respect of such estate, interest or power:
>
> Provided that if, before entering the memorandum hereinbefore mentioned, the Registrar shall, for any reason, return the instrument to the person producing the same, the time of reproduction of the instrument for registration, after the requirements of the Registrar have been complied with, shall be the time of production for registration."

[44] It appears, on the evidence I have seen, that, at best, the appellants have a beneficial interest in Lot 2 and by extension in the common area, and there is a competing claim to a beneficial interest in a portion of the common area which is being asserted by the respondents arising from their purchase of Lot 1 and the acknowledgement in the MOU by Johnston that the omitted land was excluded in error. Considering the date on which the appellants lodged the instrument of transfer (20 October 2020 - which was after the caveat was lodged), the issue of which interest was first in time is a live one.

[45] Therefore, among the issues to be resolved at the trial will be the effect of the MOU and whether the respondents have an equitable interest in the omitted land. Their claim to the omitted land will be determined having regard to the competing equitable interest in those lands which is also being asserted by the appellants. Ultimately, the claim will turn on which party will prevail in the face of these competing interests. On these facts, I am of the view that there is a serious issue to be tried.

[46] The question of whether damages would provide an adequate remedy if the respondents are denied the interim injunction but succeed at trial is answered in the same way as in appeal No 7, which is that damages are not an adequate remedy because of, *inter alia*, the difficulty in assessing damages if the injunction is refused and the respondents succeed at trial. However, there is an additional basis for concluding that damages would not be an adequate remedy and that stems from the fact that the February Orders concern the respondent's claim to a beneficial interest in the omitted land. This interest would be trumped by the appellant's legal interest if the registration of Lot 2 is permitted and for that reason it is sensible to have the status quo remain until the issue of the competing interests is resolved by the court.

[47] The general principle is that where the subject matter of the dispute is real property there is a presumption that damages are not an adequate remedy because each parcel of land is said to be unique and to have a peculiar and special value. There is no evidence to refute that general principle in this case having regard to the proximity of the omitted land to Lot 1 and the commercial use to which the respondents say they have used it in the past. In the case of **Lookahead Investors Limited v Mid Island Feeds and Others (2008) Limited and Others** [2012] JMCA App 11, this court found that there are circumstances where the general rule may not apply depending on the special facts of a case. I do not find that there is any reason to depart from the general position that the omitted land and its location are unique.

[48] Rattray P in **Life of Jamaica Limited v Broadway Import & Export Limited and Others** (1997) 34 JLR 526, said at page 532 that:

> "In my view the purpose of the caveat in the Jamaican jurisdiction is the same as in the Australian jurisdiction under the torrens system common to both jurisdictions … the case of **J. & H. Just (Holdings) Pty Limited v Bank of New South Wales and Others.** Vol. 45 Australian Law Journal at page 625 in which Barwick CJ examined the nature and purpose, of the caveat at page 627 and stated as follows:
>
> > 'Its purpose is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealing for registration. The purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest though if noted on the certificate of title, it may operate to give such notice'."

Rattray P noted that in Jamaica caveats are not noted on the certificates of title.

[49] In this case, the respondents have adopted a "belt and braces" approach. They applied for, and have obtained by the February Orders, injunctions to restrain the appellants and the registrar from registering any dealings in relation to Lot 2 until the determination of the substantive claim. The injunctions also prevent the removal of the caveat.

[50] It is my view that the respondents are entitled to these separate, and mutually supporting, protective injunctive orders. I do not hold the view that the absence of Johnston (the vendor) as a party to the claim prevents the February Orders from being made, although I appreciate the argument that such a joinder may be beneficial for the most efficient use of judicial time.

[51] I do not accept the submission of Mr Chambers that the registration of the instrument of transfer on the title for Lot 2 ought to be permitted subject to the interest which is being claimed by the respondents in the omitted lands. Such a course would

unnecessarily introduce an additional element in the legal matrix of the claim and may itself create other administrative issues which would militate against the timely resolution of the matters.

[52] The uncontradicted evidence of the respondents is that they rented the omitted land prior to its sale to them. Then immediately, upon conclusion of the sale, the vendor ceased charging them and they ceased paying rent. Additionally, they assert that they occupied the omitted land at all material times and used it to store two permanent cold storage containers. When I considered this element of the claim in its proper context (a claim involving an interest in land) and the evidence surrounding the legal bases of the parties' respective beneficial interests, I concluded that it would be possible to take into account the relative strength of the parties' cases without the need to resolve conflicting evidence. My approach in this regard is different from that adopted in respect of Appeal No 7 because as it relates to the use of the common area, an issue to be resolved is the construction to be applied to the term "parking". There are also legal and factual issues which may have to be resolved as to relevance of the historical use of the common area by the respondents, since this is an element on which they rely.

[53] I have noted that, on the evidence before this court, the equitable interest claimed by the respondents appear to have arisen before the interest claimed by the appellants. In this regard, the law in relation to the long-established principle governing priority of interests as reflected in **Barclays Bank D C O v The Administrator General for Jamaica (Administrator of the Estate of Gifford Reid, deceased) and Ransford Hamilton** (1973) 20 WIR, 344 is apt. The principle, in essence, is that if the holder of a later equitable interest knows, at the time he acquires his interest, that an earlier interest exists, the interest of the prior holder will not be postponed. The situations in which the interest of a prior holder will be postponed to that of the holder of later equitable interest in registered land, such as where the prior holder filed no caveat in protection of his interest, does not apply in this case. Therefore, on balance it appears that the

respondents have a stronger case when their equitable interest is weighed against that of the appellants.

[54] For these reasons, I have concluded that the balance of convenience is distinctly in favour or granting the injunctions ordered by the learned judge.

Conclusion - Appeal No 22

[55] I have applied the law in respect of the granting of interlocutory injunctions as previously discussed and for the aforementioned reasons, I have concluded that the learned judge properly exercised her discretion in making the February Orders. I have found no merit in the complaints of the appellants and accordingly Appeal No 22 fails.

Appeal No 90 -The contempt order

The fresh evidence application

[56] By a notice of application, filed on 25 April 2022, the respondents sought orders permitting them to produce fresh evidence in the form of the police report dated 8 March 2022 and various photographs dated 11 January 2022, 10 February 2022, 14 February 2022, and 15 March 2022. Counsel for the respondents conceded that the items which were the subject of the application post-dated the 2021 February Orders of the learned judge in respect of which there was an appeal. Accordingly, these documents could not properly form the basis of a fresh evidence application in accordance with the law as reflected in the case of **Ladd v Marshall** [1954] 3 All ER 745, and that the more appropriate course would be to make a new complaint before the Supreme Court based on any allegation of new and/or continuing breaches of the January Order which is evidenced by these documents.

The appeal

[57] The grounds on which the February Orders is appealed are as follows:

"1. That [Wint-Blair J] erred in law and/or in fact and/or misdirected herself when she pronounced that the test for contempt proceedings is [sic] strict liability

2. That [Wint-Blair J] erred in law and/or in fact and/or misdirected herself when she failed to have regard to the fact that it is disputed whether the common area has always been used by the Respondents/Claimants as the access way to the warehouse;

3. [Wint-Blair J] erred in law and/or in fact and/or misdirected herself when she failed to have regard to the contradictory evidence of the Police and the Respondent/Claimant.

4. That [Wint-Blair J] erred in law and/or in fact and/or misdirected herself when she failed to have regard to the contradictory evidence from the drivers and the hearsay letters from Businesses;

5. That [Wint-Blair J] erred in law and/or in fact and/or misdirected herself when ordered the immediate incarceration of Kevin Sudeall;

6. That [Wint-Blair J] erred in law and/or in fact and/or misdirected herself when she found that the Respondent/Claimants had proved their case beyond a reasonable doubt and have failed to have regard to the total evidence of the Appellant/Defendant;

7. That [Wint-Blair J] erred in law and/or in fact and/or misdirected herself when she pronounced Costs order twice and gave no explanation for doing so."

[58] The issues that arise on these grounds can be conveniently reduced to the following issues:

(i) Whether Wint-Blair J erred in its application of the proper test for the mental element in civil contempt proceedings;

(ii) Whether there was sufficient evidence to support the finding of the court below that Mr Kevin Sudeall was guilty of contempt; and

(iii) Whether there was an impermissible duplication of the costs order.

[59] It is necessary to note that the numbering of the paragraphs in the copy of the judgment of Wint-Blair J, which was exhibited in the appeal, differs from that which is the final version of the judgment posted publicly on the website of the Supreme Court, and references to paragraph numbers of the judgment of Wint-Blair J herein are references to the version published on that website.

The submissions

[60] Mr Chambers submitted that Wint-Blair's J application of the incorrect test is evidenced at para. [36] of her written judgment where the following is stated:

> "I rely upon and restate the dictum of my learned brother, Laing, J in the case of **Stewart Brown Investments Limited v Alton Washington Brown et al** reported at [2020] JMCC COMM. 36 where he states that the test is one of strict liability. The absence of negligence or an intention to disobey will not amount to a defence. Court orders must be obeyed, any motive for disobedience is irrelevant for the purposes of establishing a case of contempt."

Counsel noted that the case relied on by Wint-Blair J was reversed by this court on appeal in **National Export Import Bank of Jamaica Limited v Stewart Brown Investments Limited** [2021] JMCA Civ 40.

[61] In his oral submissions, Mr Chambers highlighted the terms of the January Order which Mr Sudeall was found to have breached and argued that the requirement for the proof of the appropriate *mens rea* was critical. He submitted that it was not sufficient for Wint-Blair J to have found that Mr Sudeall by himself or his servants and/or agents prevented or restricted the respondents and their servants and/or agents access to the common area, but that it had to be proved that this was done specifically with the intent "to be a nuisance to the claimants' use and enjoyment of the land comprised in the Certificate of Title registered at Volume 1457 Folio 930 of the Register Book of Titles".

Counsel urged this court to note that there was no such finding by Wint-Blair J of that specific intention on the part of Mr Sudeall.

[62] Mr Chambers submitted that it was relevant that Mr Sudeall indicates, in his affidavit filed 9 August 2021, that a gate was erected to ensure that there is no chaos or damage to motor vehicles and for security purposes, as there are tenants who occupy Lot 2 and they have items thereon. Mr Sudeall also averred that the gate is closed at 7:00 pm and opens that 8:00 am and he tried his very best to ensure that the respondents and all persons have access to the common area. Counsel conceded that the appellants did not provide the respondents with a key to the gate.

[63] Mr Chambers also submitted that Wint-Blair J failed to consider that the common area was not the assigned access way to Lot 1, having regard to its restricted use for parking for the development as ordained by the Portland Parish Council and restrictive covenant numbered 20.

[64] In respect of the costs order, Mr Chambers posited that it was irregular because order four stated "Costs of this application are awarded to the applicants on an indemnity basis". However, after ordering the formal order to be prepared, Wint-Blair J again stated that "Costs of this application are to be taxed if not agreed".

[65] Mr Earle in response, submitted that notwithstanding Wint-Blair J's restatement of the dictum of Laing J in the case of **Stewart Brown Investments Limited v Washington Brown et al** that the test for contempt is one of strict liability, it was evident that Wint-Blair J considered the issue of *mens rea* when she found that Mr Sudeall disobeyed the clear order of the court. Counsel further submitted that the first respondent's affidavit in support of the notice of application for contempt orders filed on 7 July 2021, chronicles events of flagrant disregard of the injunctive January Order.

[66] In respect of the argument that the costs order was duplicated, Mr Earle argued that there was only one order by Wint-Blair J for Mr Sudeall to pay costs, followed by a

second order in terms which were not unusual, requiring such costs to be taxed if not agreed.

Discussion and analysis

[67] In **Stewart Brown Investments Limited v Alton Washington Brown et al** at para. [59], Laing J expressed the following view:

> "Nevertheless, although a defendant who fails to comply with an injunction is not necessarily absolutely liable, the weight of the authorities tip the scales considerably in favour of **a test of strict liability in the sense that the absence of negligence or intention to disobey will not amount to a defence**. Because orders are meant by the Court to be obeyed, the motive for disobedience is irrelevant for the purposes of establishing a case of contempt. **In Knight v Clifton and Others** [1971] Ch 700 at 721, Sachs LJ commented that:
>
> > '…when an injunction prohibits an act, that prohibition is absolute, and is not to be related to intent unless otherwise stated on the face of the order…'." (Emphasis mine)

[68] In **National Export Import Bank of Ja Ltd v Stewart Brown Investments Limited**, the appeal from the decision of Laing J, this court considered the cases on which Laing J relied in applying a strict liability approach, including, **Stancomb v Trowbridge UDC** [1910] 2 Ch 190, **Director General of Fair Trading v Pioneer Concrete (UK) Limited and another** [1995] 1 AC 456 ('**Fair Trading v Pioneer Concrete**'), and **Knight v Clifton and Others** [1971] Ch 700. This court concluded that all those cases involved alleged breaches of injunction orders which were clear. Those orders were distinguishable from the order considered by Laing J, which had issues regarding its construction, but which were clarified by a judge of this court. Accordingly, the approach adopted by Laing J to such a different circumstance was flawed.

[69] In para. [43] of the written judgment in the case of **National Export Import Bank of Ja Ltd v Stewart Brown Investments Limited**, this court confirmed the

legal position regarding the pre-requisite of a mental element in order to establish contempt as follows:

> "[43] For there to be contempt of court, the order should clearly specify the behaviour that must, or must not, be done. Any ambiguity in the order must be resolved in favour of the person charged with contempt. Contempt of court, at common law, requires not only an act or an omission (the *actus reus*), but it also requires a mental element (the *mens rea*). Lord Nicholls of Birkenhead, in the decision of the House of Lords case in **Her Majesty's Attorney General v Punch Limited and Another** [2002] UKHL 50 said, in part, at paragraph 20 of his judgment:
>
> > 'For the defendant company or Mr Steen to be guilty of contempt of court, the Attorney General must prove that they did the relevant act (actus reus) with the necessary intent (mens rea)'."

[70] The question arises whether, in satisfying the mental element or *mens rea*, it is also necessary to show that Mr Sudeall acted knowing that what he was doing was a breach of the January Order, and intending to breach that order.

[71] In my view, on the facts of this case, it is not disputed that Mr Sudeall was at all material times fully aware of the January Order. There is no assertion by him that the terms of the order are unclear. It is not being suggested by him that the conduct of which the complaint was made was casual, accidental, or unintentional. What he is saying is that he had an acceptable excuse for what he did because of the unreasonable constraints imposed upon the appellants by the narrow terms of the injunctive orders of Wint-Blair J.

[72] At para. 17 of his affidavit filed on 9 August 2021, in opposition to the respondent's notice of application for contempt filed on 9 August 2021, Mr Sudeall averred as follows:

> "17. I have not sought to obstruct the course of justice. In fact, since the Order was first granted in December, more than ever before the Claimants have increased deliveries daily to the extent that the tenants of Lot 2 have found it difficult

> to have their deliveries done. I intend to rely on their Affidavits filed herein. I have no other place to park the vehicle and the Claimants have clear unhindered access to the use of their delivery area…."

[73] What Mr Sudeall is asserting, as a defence, is that his conduct was not 'contumacious' in the sense that, in doing it, there was a direct intention to be wilfully disobedient to the court. In any event, such a defence if it exists, as suggested by the line of authority represented by cases such as **Irtelli v Squatrit** [1993] QB 83 (see pages 10-11), does not avail Mr Sudeall because Wint-Blair J found that his conduct was to "flout" the court's authority and thus was indeed contumacious. That is at para. [52] of her written judgment where she found that:

> "It is the view of this court, that the first respondent disregarded the injunction and did so in a high-handed manner intending to wilfully disobey its terms. It can be said that based on the evidence, the first respondent has chosen to flout and give scant regard to the orders of this court and in so doing has fallen into the hands of the court."

[74] I find considerable merit in the submissions of Mr Earle that, notwithstanding the reference of Wint-Blair J to strict liability, it is clear that the judge did not approach her assessment of the facts with the view that there is a contempt once the conduct of Mr Sudeall amounts to a breach of the court's order. At para. [19] of her judgment, Wint-Blair J noted a number of factors which fell to be considered, one of which was "(g) Has the mens rea been established".

[75] At para. [50] Wint-Blair J made the following findings:

> "[50] The evidence of actions of the first respondent has led this court to form the view that the administration of justice has been brought into disrepute. The first respondent has elected to conduct himself in a manner which lends itself to the view that the orders of the court are of no moment and that he can interpret the terms of the injunction as he sees fit. The police and applicants were incapable of preventing the first respondent from behaving in the contumacious manner

> that he did. The court order in place did not play a part in dissuading the first respondent from erecting a gate, locking out the applicants and, disregarding the presence of delivery trucks when the gate was locked among other factors. The nature and quality of the first respondent's actions were such as to tend to undermine the authority of the court and to diminish the orders of the court in the eyes of right-thinking members of the public."

It is clear from this paragraph that Wint-Blair J found the conduct of Mr Sudeall to be contumacious. Her conclusion in this regard is undergirded by paras. [51] and [52], under the subheading "g) Mens rea".

Conclusion – Appeal No 90

[76] It is my view, that Wint-Blair J came to the correct conclusion on the issues of fact and law which arose for her analysis in deciding whether Mr Sudeall was guilty of contempt. I am of the opinion that she has clearly set out her reasons for her finding and the bases of her conclusion cannot be faulted. Accordingly, I have concluded that there is no merit in Appeal No 90 and this appeal should also be dismissed.

BROOKS P

ORDER

1. The appeal against the decision and orders of T Carr J, in Supreme Court Civil Appeal No COA2021CV0007 is dismissed and the orders of the learned judge are affirmed.

2. The appeal against the decision and orders of T Carr J, in Supreme Court Civil Appeal No COA2021CV00022 is dismissed and the orders of the learned judge are affirmed.

3. The appeal against the decision of Wint-Blair J in Supreme Court Civil Appeal No COA2021CV00090 is dismissed and the orders of the learned judge are affirmed.

4. Costs of the three aforementioned appeals are awarded to the respondents to be taxed if not agreed.