[2022] JMCA App 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 NO COA2022CV00076

APPLICATIONS NOS COA2022APP00179, COA2022APP00189, COA2022APP00190 & COA2022APP00196

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

Ian Wilkinson KC, Lenroy Stewart and Jhawn Graham instructed by Wilkinson Law for the applicant

John Graham KC and Ms Peta-Gaye Manderson instructed by John G Graham & Co for the first respondent

Dr Lloyd Barnett, Weiden Daley, and Mrs Deneice Beaumont-Walters instructed by Hart Muirhead Fatta for the second and third respondents

19, 23 September and 14 October 2022

BROOKS P

[1] I have read in draft the reasons for judgment of my brother Laing JA (Ag). I agree with his reasoning and have nothing further to add.

D FRASER JA

[2] I too have the draft reasons for judgment of my brother Laing JA (Ag) and agree with his reasoning. There is nothing that I wish to add.

LAING JA (AG)

[3] There were a number of applications before the court for consideration stemming from the orders made by a single judge of appeal ('the single judge') related to an appeal filed on behalf of Vinayaka Management Limited ('the applicant') challenging the decision of Staple J (Ag), made on 7 July 2022.

[4] On 23 September 2022 having heard the parties we made the following orders:

> "1. Application number COA2022APP00179 filed by the [applicant] on 18 August 2022, to vary or discharge the decision of the Honourable Mrs Justice Marcia Dunbar-Green JA, made on 17 August 2022 is refused.
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> 2. Application number COA2022APP00189 filed by the [applicant]on 26 August 2022, for the respondents to give an undertaking as to damages or make payment into court is refused.
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> 3. Application number COA2022APP00190 filed by the second and third respondents on 30 August 2022 for an order for the [applicant]to give security for the second and third respondent's costs of defending the appeal, is granted.
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> 4. The [applicant]is to pay the sum of $2,500,000.00 into an interest bearing account in the joint names of the firms/attorneys-at-law representing the [applicant]and the second and third respondents, at a financial institution to be agreed on by the parties, pending the hearing of the appeal, such payment to be made within 30 days of the date hereof.
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> 5. Application number COA2022APP00196 filed by the first respondent on 14 September 2022 for an order for the [applicant]to give security for the first respondent's costs of defending the appeal, is granted.

6. The [applicant]is to pay the sum of $2,500,000.00 into an interest bearing account in the joint names of the firms/attorneys-at-law representing the [applicant]and the first respondent, at a financial institution to be agreed on by the parties, pending the hearing of the appeal, such payment to be made within 30 days of the date hereof.

7. The [applicant's]appeal shall be dismissed with costs if the security is not provided in the amount, in the manner and by the time ordered.

8. The costs of Application Nos COA2022APP00179 and COA2022APP00189 are awarded to the respondents, to be taxed if not agreed.

9. The costs of Applications Nos COA2022APP00190 and COA2022APP00196 are to be costs in the appeal."

We promised to provide our reasons for the decision and this is in fulfilment of that promise.

Background

[5] On 17 September 2021, Mr Sunil Vangani on behalf of a company named Royal Palm Limited and Mr Derrick Feare on behalf of the first respondent, Genesis Distribution Network Limited, entered into an agreement for sale as the purchaser and vendor respectively, in respect of property situated at Lot 12 Bogue Estate in the parish of Saint James, registered at Volume 1439 Folio 71 of the Register Book of Titles and the 1/15th share in common properties comprised in certificate of title registered at Volume 1219 Folio 753 (hereinafter referred to as 'the property'). The agreed purchase price was USD$4,400,000.00 and a deposit of USD$220,000.00 was paid by Mr Vangani to the first respondent.

[6] The applicant was incorporated as a limited liability company under the laws of Jamaica on 5 October 2021. Mr Vagani is its Managing Director and majority shareholder of the applicant. The applicant was incorporated to complete an agreement for sale with the first respondent. They entered into an agreement for sale ('the AFS') which was dated

10 November 2021 and which was identical in all respects to the agreement for sale executed by Royal Palm Limited, save that the purchaser was now the applicant.

[7] On or about 23 December 2021 the attorney-at-Law for the first respondent advised the attorney-at-Law for the applicant that the first respondent had unilaterally decided to cancel the AFS because it had found another purchaser who was willing to pay a significantly higher figure for the property, namely US$6,500,000.00.

[8] Mr Vangani, on about 11 January 2022, lodged a caveat against the registration of any change in the proprietorship or any dealing in respect of the property. The first respondent lodged a registrable instrument of transfer to Ashnik Land Holdings Limited, the third respondent. The second respondent, Mr Nohaud Azan, is the principal of the third defendant. As a result of the instrument of transfer being lodged, the registrar of titles warned that the caveat would lapse on 26 April 3033, unless otherwise directed by a judge.

[9] On 22 April 2022, the applicant filed a claim form and particulars of claim against the first respondent (which was at that time, the sole defendant in the court below), seeking a number of reliefs including specific performance of the AFS, a declaration that the AFS constituted a valid agreement between the parties and that the first respondent's purported rescission was invalid. The applicant also sought an injunction preventing the first respondent from selling the property to the third respondent or any other party.

[10] The applicant filed a notice of application for court orders on 26 April 2022 seeking injunctive relief against the first respondent ('the application for injunctive relief'). The application was accompanied by an affidavit in support of the application filed on 26 April 2022 sworn to by Mr Vangani.

[11] By that application, the applicant sought to prevent the first respondent from transferring or in any way dealing with the property until after the determination of the claim and from dealing with or using the property in any manner which was prejudicial to the applicant. The applicant also sought an order to prevent the Registrar of

Titles/National Land Agency from dealing with the property until the determination of the claim and an order that the caveat lodged by the applicant remain in force until the determination of the claim.

[12] The applicant's application came up for hearing on 26 April 2022 before Pettigrew-Collins J. On that date, interim injunctive relief was granted by the learned judge, basically in terms of the orders sought by the applicant, and an *inter partes* hearing of the application was scheduled for 26 May 2022. The second and third respondents thereafter successfully applied to be added as parties to the claim.

[13] Following several adjournments, the *inter partes* hearing of the application for injunctive relief was heard by Staple J (Ag), who on 7 July 2022, made the following orders:

> "1. The Claimant's application for interlocutory injunction is refused.
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> 2. The application by the Second and Third Defendants for discharge of the interim injunction is granted.
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> 3. Leave to appeal is granted to the Claimant.
>
> 4. The Claimant is granted an interim injunction pending the outcome of an application by the Claimant to the Court of Appeal for an injunction n pending appeal, as follows:
>
> i. An interim injunction is granted restraining the first Defendant whether by itself, its agents, servants or otherwise howsoever, from transferring or in any other way dealing with the Certificate of Title for the property at Lot 12, Bogue Estate, in the parish of St. James registered at Volume 1439 Folio 71 of the Register Book of Titles and1/15th share in the common properties comprised in Certificate of Title registered at Volume 1219 Folio 753 of the Register Book of Titles (hereafter called 'the said property'):

ii. The First Defendant and the Registrar of Titles and/or the National Land Agency are prohibited from taking any steps, or any further steps, regarding Discharge Number 239234, Transfer Number 2392348 to Ashnik Land Holdings Limited and Mortgage Number 2392349 or any other dealing or accompanying instruments affecting the said Certificate(s) of Title;

iii. The caveat numbered 2371025 lodged on behalf of the Claimant against the said Certificate(s) of Title on the 11th day of January, 2022, shall remain in place;

iv. The Claimant gives its undertaking as to damages, and the said appeal and application in the Court of Appeal shall be filed no later than 11 July 2022 by 3:00 pm.

5. Costs to the Defendants.

6. The Claimant's Attorneys-at-Law are to prepare, file and serve this Order."

[14] Staple J (Ag) refused to grant the interim injunction that was being sought on two main bases. The first, was that the AFS had not been stamped, and accordingly, by virtue of section 36 of the stamp duty act it could not be entered into evidence for purposes of being enforced (this will be referred to herein for convenience as 'the stamp duty point'). In arriving at this conclusion, he relied on the case of **Lookahead Investors Limited v Mid-Island Feeds (2008) Limited et al** [2012] JMCA App 11 ('**Lookahead**'). The second, assuming he was wrong on the stamp duty point, was that the AFS was validly terminated by the applicant in accordance with special condition 21 of the AFS (referred to herein as 'the special condition 21 point').

Proceedings in this court

[15] On 8 July 2022, the applicant filed its notice and grounds of appeal seeking to appeal the orders of Staple J (Ag) refusing the application for an interlocutory injunction and granting the application of the second and third respondents discharging the interim

injunction. This was refined and replaced by the applicant's amended notice of appeal, filed 25 July 2022, by which the applicant seeks the following relief, that:

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

[16] On 11 July 2022, the applicant filed a notice of application for a stay of execution of the orders of Staple J (Ag) and, on 3 August 2022, it filed a re-listed stay application ('the relisted stay application'). This was heard on 16 and 17 August 2022 by Dunbar Green JA ('the single judge') who made the following orders:

> "1. The application for stay of execution of the orders of the Honourable Mr. Justice D. Staple (Ag) dated 7th July 2022 pending the determination of the appeal filed on 8th July 2022 by the [applicant] against the learned Judge's said orders, is refused.
>
> 2. The application for an injunction restraining the First Respondent from transferring to the third Respondent its interest in the Certificate of Title for the real

property at Lot 12 Bogue Estate in the parish of St. James registered at Volume 1439 Folio 71 of the Register Book of Titles and the 1/15th share in common properties comprised in Certificate of Title registered at Volume 1219 Folio 753 of the Register Book of Titles until the determination of the instant appeal or further order, is refused.

3. The application for an injunction restraining the first Respondent from taking any steps or any further steps, regarding Discharge Number 2392346, Transfer Number 2392348 to the third Respondent and Mortgage Number 2392349 or any other dealing or accompanying instruments affecting the said Certificate(s) of Title for the property until the determination of the instant appeal or further order, is refused.

4. The appeal is scheduled for hearing during the week commencing 22nd May 2023 at 9:30 am.

5. The Case Management Conference is scheduled for hearing on 15th November 2022 at 10 a.m.

6. Costs to the Respondents, to be taxed if not agreed.

7. First Respondent's Attorneys-at-Law to prepare, file and serve this order."

Application to discharge or vary the orders of the single judge

[17] On 18 August 2022, the applicantfiled a notice of application to discharge or vary these orders ('the Application to Discharge or Vary the Orders of the Single Judge'), namely that:

"1. The Orders of the Honourable Mrs. Justice Marcia Dunbar-Green JA (hereafter referred to as '***the Single Judge'***) made on August 17, 2022 be discharged for the many reasons listed in the [applicant's] supporting affidavit sworn to by Sunil Vangani and filed herein.

2. Alternatively, that the Orders of the said Single Judge made on August 17, 2022 to be varied as follows:

a. There shall be a stay of execution of the orders of The Honourable, Mr. Justice D. Staple (Ag) (hereafter referred to as '***the Learned Judge***' contained in Formal Order dated the 7th day of July, 2022, pending the determination of the appeal filed in the Court of Appeal of Jamaica on the 8th day of July, 2022 by the Applicant against the Learned Judge's said orders or further order;

b. An injunction is granted restraining the First Respondent from transferring to the Third Respondent its interest in the Certificate of Title for the real property at Lot 12 Bogue Estate in the parish of St. James registered at Volume 1439 Folio 71 of the Register Book of Titles and the 1/15th share in common properties comprised in Certificate of Title registered at Volume 1219 Folio 753 of the Register Book of Titles (hereafter referred to as '***the property***') until the determination of the instant application by this Honourable Court and the [applicant's] appeal hearing, or further order;

c. An injunction is granted restraining the first Respondent from taking any steps, or any further steps, regarding Discharge Number 2392346, Transfer Number 2392348 to the third Respondent and Mortgage Number 2392349 or any other dealing or accompanying instruments affecting the said Certificate(s) of Title for the property until the determination of the instant application by this Honourable Court and the [applicant's] appeal, or further order;

d. The [applicant] gives its undertaking as to damages is to pay into Court the sum of United States One Hundred and Fifty Thousand Dollars (US$150,000.00) within fourteen (14) days of this Order; and

e. The Costs of this application be costs in the appeal;

3. That there be a stay of execution of the Single Judge's orders or rulings made on August 17, 2022 thereby

allowing the injunction granted by Mr. Justice Staples [sic] (Ag.) on July 7, 2022 to remain in force as the [applicant's] application has not yet been determined by this Honourable Court;

4. Further, or alternatively, in exercise of its various powers under the Judicature (Appellate Jurisdiction) Act and the Court of Appeal Rules, the Court grants a preservatory Order to prevent the transfer of the Certificate of Title for the property by the First Respondent to the Second Respondent or to the Third Respondent and preserve the status quo, pending the determination of the instant application as well as the [applicant's] appeal, or on until further order;

5. If necessary, the time for the service, and/or hearing, of this application be abridged;

6. The Costs of this application be costs in the appeal;

7. There be liberty to apply, and

8. There be such further and other relief as this Honourable Court deems to be just."

The applicant's submissions

[18] Mr Wilkinson KC submitted that to the extent that the single judge upheld Staple J (Ag)'s decision as contained in his written judgment, the single judge found that:

a. there was no serious issue to be tried;

b. damages were an adequate remedy; and

c. the balance of convenience favoured the refusal of the injunction.

It was argued that Staple J (Ag) and the single judge were both wrong and that this court should discharge the decision of the single judge. It was submitted that the learned single judge erred in a number of respects which contributed to her finding that there was no serious issue to be tried and in reaching similar conclusions to Staple J (Ag) on the stamp duty point and the special condition 21 point.

The stamp duty point

[19] Mr Wilkinson referred to the 18 grounds on which the applicant was relying in the substantive appeal. He submitted that Staple J (Ag) took into account factors which were not even in dispute, for example, the stamp duty point. King's Counsel submitted that the AFS was lodged with the tax department for assessment and was assessed. In the interim the applicant had been pursuing mortgage financing but was thwarted because it could not receive documents from the first respondent's then attorneys. In that regard, he said Staple J (Ag) did not attach sufficient importance to the fact that the AFS was not stamped as a result of the first respondents conduct. Staple J (Ag) was therefore wrong to have concluded that he could not have recourse to the AFS because it was not stamped. He submitted that the authorities show that this is not correct if the party who had the responsibility to stamp the document did not do so. In support of this argument, King's Counsel relied on the decision of Sykes J (as he then was) in the case of **Harry Abrikian et al v Arthur Wright and another** (unreported), Supreme Court, Jamaica, Claim No 2010 CL A 083/1994, judgment delivered 16 June 2005 ('**Abrikian v Wright**').

[20] In the applicant's reply, Mr Wilkinson submitted that **Lookahead** is distinguishable on a number of bases. He argued that, in that case the matter had reached trial stage and more importantly the agreement for sale had not been marked cancelled. In this case it was marked cancelled so it would not be accepted. In **Lookahead** it was possible to stamp the document while in this case it could not have been stamped although admittedly the applicant did not present any evidence that it tried to have it stamped and was refused.

The special condition 21 point

[21] It was advanced by the applicant before Staple J (Ag), and before this court, that there is a serious issue to be tried regarding the proper interpretation of this special condition and whether it confers absolute right on the vendor to terminate the AFS without any reason. Alternatively, whether it only allows the vendor to terminate the AFS if there has been a breach of it by the purchaser. It was argued that it was notable that

the special condition does not include any words such as "at any time", "without cause" or "without giving any reason" and is silent as to the consequences of the purchaser's breach of any terms or conditions of the AFS.

Usurpation of the full court

[22] Mr Wilkinson posited that because specific performance and an injunction were sought as reliefs, the effect of what the single judge did was to remove from the appellant any possibility of obtaining these remedies. Having regard to her ruling the respondents are now placed in a position where they can argue that the appellant's application is academic or futile. In effect, the single judge had usurped the function of this full court. He submitted that **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9 ('**Clarke v BNS'**) decided that the single judge cannot determine an appeal. He argued that the single judge, in this case, has acted as the Court of Appeal.

[23] Mr Wilkinson stressed that he was not arguing that the single judge could not have heard the application. However, the learned judge was constrained in the orders that she could make. Based on the orders made the application to vary and discharge is now difficult and the appellant has been deprived of justice. King's Counsel sought to rely on **Miller and another v Cruickshank** (1986) 44 WIR 319 in which it was held that where there are triable issues between the parries but no claim for damages, an interlocutory injunction should not be granted if it would give the plaintiff all that was sought in the substantive action. It was further submitted that there are factual disputes that are best tested during a trial.

[24] Mr Wilkinson submitted that in any event, the application is not futile by virtue of the fact that the Registrar of Titles has registered the title to the property in the name of the third respondent and the title of the third respondent is not indefeasible. He urged the court to consider the exceptional circumstances of the case arising from the alleged error of the single judge and to find that the court could order specific performance and order that the transfer of title be cancelled even in the absence of fraud. He argued that the justice of the case requires an order in the appellant's favour. Furthermore, the

second and third respondents perhaps incited the breach and the claim can be amended. In such circumstances, the court should unravel the transfer to make the land available for transfer to the applicant.

Subsidiary points

[25] It was further argued that the first respondent did not go before the Supreme Court with clean hands contrary to the maxim he who seeks equity must do equity. The first respondent was sitting on two separate deposits although there was one agreement for sale. Accordingly, it could not, therefore, be correct that the balance of convenience favoured the refusal of the injunctions.

[26] Mr Wilkinson submitted that the issue of the form and effect of the caveat that was lodged is one which ought properly to be reserved for the trial of the claim and should not be determined by the single judge or the full panel of the Court of Appeal. He argued that section 139 of the Registration of Titles Act ('RTA') provides that the registration of a caveat is a discretionary matter for the registrar of titles; and she will not register a caveat unless the relevant information is before her. He further submitted that in this case it was clear that Mr Vangani was filing the caveat on behalf of the applicant, and the form of the caveat should not be an issue.

<u>The first respondent's submissions</u>

[27] In response to the applicant's submissions, the first respondent accepted that rule 2.10 of the Court of Appeal Rules ('CAR') provides that any order made by a single judge may be varied or discharged by the court in an application made within 14 days of that order. Mr Graham KC, on its behalf, submitted that in this case where the single judge refused to grant a stay of execution, this was an exercise of her discretion, and where this is the issue the court will consider:

a. Whether the approach of the learned judge of appeal on the application for stay of execution and injunction

pending appeal was incorrect in the application of any principle or her analysis of the facts; or

b. Whether there has been a change of circumstances since [the decision of the single judge] which dictates a different outcome: (per Fraser JA in **Estate of Owen Dean Smith v Nilza Smith** [2021] JMCA App 16.

[28] Mr Graham stated that in respect of the applicant's application for a stay of execution, the single judge had to consider whether Staple J (Ag) was clearly wrong or committed some other error, in deciding that he would refuse to grant the stay of execution and the injunction. The single judge clearly accepted the submissions of the respondent that the orders of Staple J (Ag) were not capable of being stayed. She accepted that there was no serious issue to be tried and concluded that the material upon which this issue could be resolved were contained within the four corners of the AFS considering the plain and ordinary meaning as well as the normal usage of the words therein.

[29] Furthermore, she concluded that there was no need for expert evidence. The negotiations were conducted by experienced businessmen who had the benefit of legal advice and there was no issue raised as to the meaning of the words in special condition 21. The single judge was therefore correct to confirm the position reached by Staple J (Ag) that there was no serious issue to be tried.

[30] The effect of the contention by the applicant is that words should be implied into special condition 21 to restrict the termination to circumstances where a good reason was shown. However, there was no evidence to support the implication of any words into the special condition considering the law governing the circumstances where this may be permissible. The first respondent submitted that the applicant has not advanced any reason for contending that there was any error in the single judge's application of any principle or analysis of the facts in arriving at her conclusion. Neither has it been advanced

that there has been a change of circumstances since the decision of the single judge which ought to dictate a different outcome.

[31] In relation to the stamp duty issue, Mr Graham submitted that the authorities upon which the appellant relies were reviewed by Staple J (Ag) who preferred the approach in **Lookahead**, that in circumstances such as these there needed to be a stamped document and in the absence of that the court should not consider it. He further submitted that the question of whose responsibility it is to stamp the document is immaterial and there is no such obligation in the Stamp Duty Act which waives the requirement for stamping because the person with the responsibility to do so did not stamp the document.

[32] In respect of the caveat, it was submitted that Mr Vangani lodged the caveat in his own name to protect a certain sum of money. Although he stated in the affidavit accompanying it that he was a director of the applicant he did not say he was filing it on behalf of the company. King's Counsel asserted that Staple J (Ag) looked at the form of a caveat for a company and that for an individual. The caveat is in the form to be used by an individual. In any event counsel submitted that the issue of the caveat is a side issue and that the main issue is the construction of special condition 21, and Staple J (Ag) was not in error in construing it as he did.

[33] In respect of the applicant's application for an injunction pending appeal, the first respondent submitted that the single judge reviewed the applicable law and the factors to be considered on such an application and in particular whether the appellant had a good arguable appeal. The single judge concluded that Staple J (Ag) did not exercise his discretion on an incorrect basis. The single judge went further and considered whether she would grant the injunction in exercise of her discretion but concluded that there was no serious issue to be tried based on the language in special condition 21 of the agreement for sale.

[34] In response to the submissions of Mr Wilkinson that this court may consider the reversal of the relevant transfer in the absence of any evidence of fraud, Mr Graham suggested that the applicant's position was novel and unsupported by legal authority.

The submissions of the second and third respondents

[35] On 13 July 2022, the second and third respondents filed a counter-notice of appeal and a notice of objection to the applicant's notice of application for stay of execution and injunction. The essence of their submissions is that the applicant has not satisfied the threshold for the setting aside of a decision of a single judge of appeal in that it has not shown that the single judge "misunderstood or misapplied the law or misconceived the facts and therefore can be shown to be demonstrably wrong" per Phillips JA in **Hartigay v Gartman** [2015] JMCA App 44, at para. [48].

[36] Dr Barnett, for the second and third respondents, further submitted that the applicant's application to set aside the single judge's decision and appeal are both now academic since the application seeks to impose restraints regarding Discharge Number 2392346, Transfer Number 2392348 to the third Respondent and Mortgage Number 2392349, all of which have already been registered.

[37] Dr Barnett highlighted the fact that the second and third respondents were not initially named as defendants in the claim but were joined as second and third defendants on 26 May 2022 on their application. It was submitted that the single judge had full jurisdiction to determine whether or not the interlocutory injunction granted by the first instance judge should be continued. It was argued that the jurisdiction of the single judge under rule 2.10 of the CAR included the power to make orders to prevent a party from disposing of property. Therefore, the single judge cannot be described as usurping the power of the court, and the fact that the single judge had the power to determine that issue also meant that the single judge had the power not to extend the interim injunction which had been granted by Staple J (Ag).

[38] Counsel also argued that the issue in **Clarke v BNS** was completely different from the case at bar as is demonstrated in para. 57 of that judgment, where it was made clear that the issue was whether section 16(3) of the Charter of Fundamental Rights and Freedoms of the Constitution, prohibits the hearing of proceedings on paper.

[39] Dr Barnett said that there was no dispute that the principles in **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504 ('**American Cyanamid**') principles applied and that both Staple J (Ag) and the single judge applied those principles. The central issue was whether the first respondent had the right under special condition 21 of the AFS to terminate the agreement. This was considered by Staple J (Ag) as well as the single judge and both concluded that the appellant had failed to satisfy the first requirement of the **American Cyanamid** test, that is, that there was a serious issue to be tried.

[40] As it relates to the caveat, Dr Barnett submitted that once the caveat expires, it ceases to be effective to prevent a transfer unless a court order is made which prevents a transfer. Section 59 of the RTA provides that instruments submitted for registration must be registered in the order and from the time it was presented for registration. Accordingly, the transfer to the third respondent was submitted for registration in April, and consequently, the registrar had a statutory duty to register it with the effective date being as at the date when it was lodged for registration, and not at a subsequent date.

[41] For that reason, the caveat could be of no effect in preventing the transfer to the third respondent, because, in the caveat lodged by Mr Vangani, the caveator is not described as the appellant. The caveat does not conform with section 39 of the RTA. It is stated to protect an interest in a sum of money. It was conceded that the caveat can state the value of the property which is to be secured and this is clear from section 39 of the RTA which sets out the requirements.

[42] Dr Barnett posited that, the transfer to the third respondent having been completed, even if the applicant is correct in the construction to be applied to the caveat

that is, that it was lodged by the applicant, the applicant must now pursue a claim in damages and, by virtue of sections 68, 70 and 71 of the RTA, cannot obtain a transfer of the title in its favour.

[43] Dr Barnett suggested that furthermore, even if there is a possibility of an allegation of fraud in respect of the transfer of the property to the third respondent, section 71 of the RTA states that even knowledge of a claim against the land would not be sufficient, because a purchaser can rely on the register as to who is the registered owner. Against that background the applicant is pursuing a claim which has no prospect of succeeding whether on the application for the injunction or the claim that the applicant's agreement is of greater validity than that of the respondents.

Analysis

[44] In order to determine whether or not the application to discharge or vary the order of the single judge of appeal should be granted, it is necessary to examine the power or jurisdiction of the single judge of appeal.

[45] Rule 2.10 of the CAR provides in part as follows:

> "2.10 (1) A single judge may make orders –
>
> (a) for the giving of security for any costs occasioned by an appeal;
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal;
>
> (c) for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal; …
>
> (3) Any order made by a single judge may be varied or discharged by the court on an application made within 14 days of that order."

[46] In **Cable and Wireless v Abrahams (Eric Jason)** [2021] JMCA App 19 ('**Abrahams**') the ambit of the power of the single judge and the supervisory capacity of the court was examined. The following observations made at para. [56] are relevant:

> "The deployment of single judges to exercise one aspect of the jurisdiction of the court, which is in relation to procedural matters, is part of the new dispensation to achieve efficiency, economy, and expedition in the dispensation of justice in civil proceedings. It will always be easier to deploy a single judge than three judges, especially in urgent matters (which interlocutory matters often are) and so there is wisdom in permitting the court's jurisdiction to be exercised through a single judge, rather than three or more, in procedural matters."

[47] We do not find any merit in Mr Wilkinson's submission that the single judge usurped the function of the full panel of this court or improperly and outside her jurisdiction decided an appeal. It is not in dispute that a single judge of the court has no power to hear and determine an appeal and that the single judge's jurisdiction can only arise in the context of a pending appeal. The court in **Abrahams** at para. [60] quoted with approval from the headnote of the British Virgin Islands case of **KMG International NV and DP Holding SA (a company incorporated under the laws of Switzerland)** (unreported), Court of Appeal, Territory of the Virgin Islands, No BVIHCMAP2017/0013, judgment delivered 18 April 2018, in which this was accepted as settled law.

[48] This court in its supervisory jurisdiction will not hesitate to vary or set aside the decision of the single judge if the decision constitutes the disposition of a substantive appeal. It is in acknowledgement of this safeguard that the specified powers have been conferred on the single judge. This is also recognised in **Abrahams** at para. [59]:

> "… In this regard, attention is directed to rule 2.10(3) of the CAR, which gives the court the power to vary or discharge any order made by a single judge in a procedural application. This is an important safeguard provided for in rule 2.10 for the court to have and maintain oversight responsibilities over the decisions of a single judge. The single judge's decision is always amenable to the review of the court. There is thus a viable procedural mechanism, within the court itself, to

> provide relief for litigants concerning the exercise of its jurisdiction by a single judge in interlocutory or procedural matters."

At para. [67] the point is reinforced in the following terms:

> "Any restriction on the authority of a single judge in dealing with interlocutory applications that is not expressly provided for by any law, cannot reasonably be required for the proper administration of justice, having regard to the overriding objective and the provision of the CAR, which empowers the court to vary or discharge any order made by a single judge (rule 2.10(3))."

[49] The starting point for assessing the decision of the single judge is the orders of Staple J (Ag) which included an interim injunction preventing the transfer of the property, the effecting of any changes to documentation in respect of the property at the Office of the Registrar of Titles and/or the National Land Agency including the caveat "pending the outcome of an application by the Claimant to the Court of Appeal for an injunction pending appeal".

[50] Implicit in the power conferred by rule 2.10(1)(c) of the CAR on the single judge to grant an application for an injunction is the concomitant power to refuse the grant of such an application. In determining whether an injunction ought to be granted pending appeal the central question is whether the appellant has a good arguable appeal, not whether it has a good arguable case (see cases **of Ketchum International plc v Group Public Relations Holdings Limited and others** [1996] 4 All ER 374 and **Erinford Properties Ltd v Cheshire CC** [1974] 2 All ER 448 referred to by K Harrison JA in **Olint Corp Limited v National Commercial Bank Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 40 of 2008, Application No 58/2008 judgment delivered 30 April 2008). The position being advanced by Mr Wilkinson is that a single judge hearing an application for an injunction should not refuse to grant the injunction if such refusal would create circumstances that could not be reversed if the court subsequently came to a conclusion that an injunction would be appropriate.

[51] The application of such a principle would be far-reaching. In disputes involving land transactions, this would mean that a single judge would always be required to grant an injunction restraining the disposition or dealing with the relevant property since there would always be a risk that if the property is transferred in the absence of fraud, the court might not be able to grant the injunction which is being sought. The practical effect of this would be to guarantee the granting of an injunction to the appellant in those cases, at least until the court hears and determines the application.

[52] Judges of this court when sitting by themselves are well aware of the cascading consequences of not granting an injunction restraining the transfer, or dealing with land which is the subject of a dispute. However, injunctions are refused where the appellant fails at the first hurdle and does not have a good arguable appeal. Where there is a good arguable appeal, in assessing the balance of convenience the single judge will consider the actual or perceived risk of injustice to each party by the grant or refusal of the injunction. In this case, the conclusion was reached by the single judge that there was no good arguable appeal because Staple J (Ag) had correctly found that there was no serious issue to be tried.

The test for setting aside a single judge's decision

[53] Phillips JA, in **Hartigay v Gartman** [2015] JMCA 44, acknowledged that whereas Rule 2.11(2) of CAR recognises that "any order made by a single judge may be varied or discharged by the court" the rules do not provide any guidance as to the factors to be considered when varying or discharging such an order. Nevertheless, there have been several decisions of this court from which the applicable principles may be extracted. The learned judge referred to the statement of Morrison JA (as he then was) in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, at para. [20] and she also cited **John Ledgister and another v Jamaica Redevelopment Foundation Inc** [2013] JMCA App 10, in which she said at para. [33] that:

> "... I recognise that generally when an application is made to this court to vary or discharge an order made by a single judge

> of appeal, the matter is not viewed as a new application, but instead as a review by the court, and the test to be applied ought to be one wherein the court assesses whether the single judge was wrong in law or in principle or had misconceived the facts..."

[54] The applicable principles have also been recently expounded in the case of **Debayo Adedipe v Kemisha Gregory** [2020] JMCA App 19 at paras. [22] – [24] as follows:

> "The next issue that this court must address is the role of the court when reviewing the exercise of the discretion of the single judge of appeal. We have been guided over the years by the powerful speech of Lord Diplock in Hadmor Productions Ltd and Others v Hamilton and Others [1982] 1 All ER 1042, dealing with the review by the appellate court of the exercise of discretion of a judge in the lower court relating to interlocutory matters, which has also been endorsed by several cases in this court. Lord Diplock stated at page 1046 that:
>
> > 'It [the Court of Appeal] may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is 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. It is only if and after the appellate court

> has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.'

Morrison JA (as he then was) has stated in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, at paragraph [20], 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'.'

> In my view, the approach by the court with regard to the exercise of the discretion of the single judge of appeal is similar. The issue is whether the order was so aberrant and or plainly wrong so that the court ought to vary or discharge it. As a consequence, as we are only reviewing the exercise of the discretion of the single judge, there is a very limited jurisdiction to do so. It is therefore important to remember that we are not deciding the appeal itself, and so we must be careful not to give any indication that we are attempting to do so …"

[55] It is common ground that the single judge concluded, as Staple J (Ag) did, that there was no serious issue to be tried. We are of course cognizant that there is an appeal pending in this matter. For this reason, we do not in these reasons assess the arguments advanced by counsel with the level of analysis which will be demonstrated on appeal. We have conducted our review to the extent necessary to determine whether the decision of the single judge should be set aside in accordance with the applicable principles as stated herein.

The test for granting an interlocutory injunction

[56] There is no dispute between counsel for the parties as to the law relating to the granting of an injunction as has been clearly identified in the House of Lords case of **American Cyanamid** and applied more recently in the case of **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] 1 WLR 1405. The primary issues for consideration can be conveniently summarised as follows:

(a) Whether there is a serious issue to be tried;

(b) Whether damages are an adequate remedy for either party; and

(c) Where does the balance of convenience lie.

As Lord Diplock established in **American Cyanamid**, what the claimant needs to do in order to show that there is a serious question to be tried, is to establish to the satisfaction of the court "that the claim is not frivolous or vexatious" (see page 510d).

[57] The primary complaint of the appellant is that Staple J (Ag) and the single judge both erroneously applied the law to the evidence in arriving at the conclusion that there was no serious issue to be tried, and were wrong in their analysis of the stamp duty point and the special condition 21 point.

The stamp duty point

[58] Section 36 of the Stamp Duty Act provides as follows:

> "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."

Section 43 is also relevant and is in the following terms:

> "Upon the tender in evidence of any instrument other than inland and foreign bills of exchange and promissory notes, coastwise receipts, and bills of lading, it shall be the duty of the officer of the court, before reading such instrument, to call the attention of the Judge to any omission or insufficiency

> of the stamp; and the instrument if unstamped, or insufficiently stamped, shall not be received in evidence until the whole, or (as the case may be) the deficiency of the stamp duty, to be determined by the Judge, and the penalty required by this Act, together with an additional penalty of five hundred dollars shall have been paid."

[59] We do not accept as legitimate the criticisms levied at Staple J (Ag) that in considering section 36 of the Stamp Duty Act he was considering an issue that was not in dispute. It was an issue the learned judge was required to consider once it was brought to his attention that the AFS was not stamped. Staple J (Ag) relied on the case of **Lookahead** as authority supporting the position that he should not look at the unstamped AFS. In that case, the learned judge at first instance adopted that approach. Brooks JA (as he then was), at para. [13] of the judgment, acknowledged that when the claimant came before the first instance judge, she quite correctly refused to consider the agreement for sale until the document had been stamped. In that case, although the original of the document had been cancelled by the attorneys at law for the vendor, a copy thereof was stamped which bore no evidence of the cancellation.

[60] The practice of judges at first instance adjourning matters to permit the stamping of documents by the party relying on it, in accordance with section 43 of the Stamp Act is not unusual. In fact, judges will occasionally proceed on the undertaking of counsel to have the offending document duly stamped. The position has not been advanced, that there was ever such an application for an adjournment by the applicant in order to stamp the AFS which was refused or an undertaking offered to have it stamped. This is perhaps explained by the argument of Mr Wilkinson, deployed before this court, that the document could not have been stamped because it had been cancelled. Mr Wilkinson admitted that there was no evidence before Staple J (Ag) or this court that an attempt had been made by the applicant to have the document stamped, but that it was not accepted by the registrar because it had been marked cancelled or for any other reason.

[61] In the case of **Abrikian v Wright**, there was an unstamped undated document headed agreement for sale in which the claimants agreed to purchase land from the

second defendant. In addressing the effect of section 36 of the Stamp Duty Act, Sykes J (as he then was) commented at paras. 35 – 36 as follows:

> "If section 36 makes the agreement inadmissible, I am prepared to hold and do hold that there was an oral agreement between the parties and there were sufficient acts of part performance by the claimants. I accept Miss Russell's evidence that the parties had concluded all the essential terms of the contract before the instrument was drawn up.
>
> Section 36 does not invalidate agreements. The section suppresses evidence - evidence captured in an instrument but not evidence captured by ear. It does not affect the equitable doctrine of part performance - a doctrine which I now examine."

[62] In the learned judge's conclusion at para. 53 he stated the following:

> "Section 36 of the Stamp Duty Act, in the circumstances of this case, does not make the instrument inadmissible for the purpose of relying on what is contained in it. It would be inequitable and wrong to allow the defendants to rely on their wrong doing. If I am wrong on this, I find that there was an oral contract. Section 36 does not prevent the application of the doctrine of part performance."

[63] It is our respectful view that **Abrikian v Wright** is not authority which suggests that there is an accepted legal principle that section 36 of the Stamp Act does not apply in circumstances as obtain in this case. It was not concluded in that case that where the contractual obligation to stamp the document rests on the party opposing its admission, the party who is desirous of having an unstamped document admitted into evidence is entitled to have it so admitted. The case must, therefore, be confined to its particular facts and the approach of the learned judge who utilised the doctrine of part performance to establish proof of the existence of a disputed contract.

[64] In the case of **Wilfred Emmanuel Forbes and Cowell Anthony Forbes v Millers Liquor Store (Dist) Ltd** (unreported), Supreme Court, Jamaica, Claim No E 478 of 2001, judgment delivered 18 October 2002, ('**Forbes**') counsel for the defendant

raised a number of preliminary objections including that the relevant mortgage was unstamped. The learned judge, Anderson J, was of the opinion that this objection could be easily disposed of peremptorily and made the following statement at page 6:

> "… In the first place, the defendant itself is purporting to resist this action on the basis that it exercised validly, a power of sale under the mortgage. It is, in my view, entirely inconsistent to assert that there is no valid mortgage. Such a conclusion could be quite damaging to the defendant's own case. I shall make a further comment on this proposition later.
>
> Further it is common ground that the plaintiffs paid their half cost of the stamping and registration of both the [sic] documents. The plaintiffs had done all that had been required of them and they are, surely, entitled to rely upon that [maxim] of Equity "*Omnia Praesumuntur rite et solemiter esse acta".* Equity regards as done that which ought properly to have been done.
>
> In any event, an appropriate undertaking to stamp the offending unstamped documents, is usually enough to cure this defect." (Underline and italics as in the original)"

[65] The case of **Forbes** is not authority for the admission of an unstamped document because of the equitable maxim to which the learned judge referred and applied. Furthermore, the fact that a party asserts, inconsistently, a reliance on an unstamped document and its inadmissibility on the basis of section 36 of the Stamp Duty Act, ought not to affect the applicability of this section. In the instant case, the respondents are similarly relying on special condition 21 and arguing that the AFS should not be admitted because it is unstamped. However, the reliance on special condition 21 ought not to affect the ruling on its admissibility.

[66] In any event as a matter of *stare decisis*, both cases of **Abrikian v Wright** and **Forbes**, were of persuasive authority only and Staple J (Ag) was entitled to follow the general rule, as approved by the dicta in **Lookahead**, that the AFS was inadmissible until it was stamped.

[67] We concluded that the decision of Staple J (Ag) in respect of the stamp duty point was not one for which there would have been any proper basis for the single judge to intervene.

The special condition 21 point

[68] Staple J (Ag) found that even if he were wrong on the stamp duty point, special condition 21 provided a valid method of terminating the AFS, and it was terminated pursuant to this provision. Special condition 21 states as follows:

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

[69] Mr Wilkinson relied on the principles applicable to the interpretation of contracts as distilled by Sykes J (as he then was) in the case of **Aedan Earle v National Water Commission** [2014] JMSC Civ 69 in which his Lordship made reference to, among other cases, **Static Control Components (Europe) v Egan** [2004] All ER (D) 04 April ('**Static Control**'). **Static Control** is regarded as reflecting a modern approach in interpreting contracts in light of the background facts and from the perspective of the business persons entering into them. Mr Justice Holman, in the United Kingdom Court of Appeal, opined that the principles described by Lord Hoffmann in **Investors' Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896 at 912 H - 913 F did not only apply to a case in which the words in dispute were "very strange and badly drafted" to use the words of Lord Hoffman. He adopted the words of Lord Hoffman at para. 14 as follows:

> "Lord Hoffmann said:
>
> 'The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact.' But this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification ....

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the: background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have

> had. Lord Diplock made this point more vigorously when he said ... "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

[70] In paras. 27 and 28 of **Static Control** Lady Justice Arden (as she then was) expressed the opinion that in any given situation there are not two interpretations: a purely linguistic construction and one based on the factual background. She concluded that it is only possible to have one true interpretation, because the object of interpretation is to discover the meaning of the provision in question in its context. For this reason, in principle at least, all contracts must be construed in the light of their factual background and "the fact that a document appears to have a clear meaning on the face of it does not prevent, or indeed excuse, the court from looking at the background". In para. 28 the learned judge stated the following:

> "Lord Hoffmann's principles (4) and (5) in the *ICS* case, set out in the judgment of Holman J, also make the point that the effect of construing a document in the light of the relevant factual background may be that it becomes clear, in the exceptional case, that the parties have made a mistake in the way in which they have expressed themselves. This is particularly understandable in the case of a commercial contract made under pressure of time by business people … When the court interprets a document, it is not bound to make the unreal assumption that the parties expressed themselves with accuracy or precision. The court looks to the parties' common aim or intention in reducing an agreement in writing and the evidence as to the background information may lead to the conclusion that the parties have failed to express themselves accurately."

[71] The essence of Mr Wilkinson's submissions was that special condition 21 is unusual in the context of real estate transactions and when the factual matrix is considered, the purely linguistic construction of special condition 21 will be found to not reflect the intention of the parties, which was that the first respondent could only terminate the AFS on a breach by the appellant. We have, however, noted the explanation of Mr Feare for

the inclusion of the special condition which would support the plain and ordinary meaning of the words used. We have also noted the fact that the AFS was drafted by counsel for the first respondent and there is no assertion that it was not reviewed by the legal representative of the appellant as would be expected in the ordinary course of events. There was accordingly a basis for the single judge to have concluded that the AFS was validly terminated by the first respondent in accordance with special condition 21. Consequently, the applicant has not produced sufficient evidence to support the submission of Mr Wilkinson that there was a realistic chance of success on appeal.

[72] Having considered the law in relation to the construction of contracts, in reviewing the exercise of the discretion by the single judge we did not find that her decision was so aberrant and or plainly wrong so that the court ought to have varied or discharged it.

The subsidiary issues

[73] We believe that the caveat issue is not central to the application before us and we do not find it necessary to consider it. Similarly, having regard to our findings in respect of the single judge's decision there is no need for us to address the question of whether this court is empowered to set aside a registered transfer in the absence of fraud despite the plethora of authorities to the contrary.

The appellant's application for security

[74] The application to discharge or vary the orders of the single judge contains a prayer for relief for the respondents to make a payment into court. However, there is an independent notice of application number COA2022APP00189, filed on 26 August 2022 by which the applicant seeks orders that:

> "1. The Respondents, jointly or severally, be ordered to:
>
> (a) give an appropriate, written undertaking as to damages to this Honourable Court so that there be the necessary protection for the [applicant]regarding the subject matter of the instant appeal;

(b) pay into court the sum of TWO MILLION SIX HUNDRED THOUSAND UNITED STATES DOLLARS (US$2,600,000.), or such other sum as this Honourable Court deems just, pursuant to the said appropriate, written undertaking as to damages pending the hearing of the [applicant's]Notice of Application for Court Orders (to discharge or vary Single Judge is Ruling) and the [applicant's]Appeal herein; …"

[75] The applicant submitted that whereas it had given an undertaking as to damages which the respondents could seek to enforce if it was ultimately found to have been wrongfully granted, the applicant had no corresponding protection if at the conclusion of the substantive appeal the court finds that Staple J (Ag) erred in failing to grant an interlocutory injunction until the determination of the trial.

[76] It was submitted that these orders are akin to an order for an interim payment and differs only to the extent that the payment sought is to be paid into court and not to the applicant. The applicant submitted that the court had the power to grant the orders sought by virtue of rule 36.6(1) of the Civil Procedure Rules ('CPR') and rule 1.7 of the CAR. The applicant also relies on this court's powers contained in rule 1.7(3)(a) and (b) and 1.7(4) of the CAR.

[77] It was further submitted that the court's discretion to impose a condition and whether it will do so, will depend on whether it is just in all the circumstances of the case, including the consideration that the condition imposed should not stifle a litigant from participating in the appeal. For this proposition, the applicant relies on paras. 12 and 16 of **Goldtrail Travel Ltd (in liquidation) v Onur Air Tasimacilik AS** [2017] UKSC 57 (2 August 2017).

[78] Mr Wilkinson posited that there are some special circumstances in this case which justified the imposition of the condition sought; one consideration being that the applicant's only remedy will be damages unless the court sets aside the transfer, and that there is a real risk of the applicant not being able to recover such damages and costs

from the respondents (particularly the first respondent), if it is successful on an appeal. It was argued that the applicant was purchasing the property for US$4,400,000.00 and the property was sold at US$5,500,000.00, therefore there would be a difference of US$1,100,000.00 which would be the minimum damages to which the applicant would be entitled. Furthermore, the property could be worth as much as US$7,000,000.00 which would amount to a difference of US$2,600,000.00 to which the applicant would potentially be entitled.

The respondents' submissions

[79] The first respondent submitted that the remedy being sought by the applicant is not one that is known to law. It submitted that neither the CAR nor the Judicature (Appellate Jurisdiction) Act nor any statute of which it is aware, permits the applicant to obtain the remedy which it seeks.

[80] Mr Graham argued that rule 36.6 of the CPR is not applicable because this was not a case where the court made an order permitting a defendant to defend or to continue to defend a claim on condition that he makes a payment into court, which is what that rule addresses.

[81] It was further submitted that the rule 1.7(4) of the CAR bears a heading "general powers of case management". Accordingly, in dealing with the application the single judge was not dealing with the case management issue. Furthermore, it was submitted that the applicant was before the court seeking a remedy which it had not sought before. This is because there was no request or submission before the single judge, to the effect that in the event she refused the application for the injunction she should make a condition for the payment of a sum as a form of security. Furthermore, there was no legal authority cited to support the position that where a court has refused an application for a stay the court should impose the obligation of a payment into court by the respondent. This was submitted to be without precedent and is not supported by the CAR and should accordingly be dismissed.

[82] It was also submitted that rule 2.11(1) of the CAR is inapplicable because this rule provides that the court or a single judge may order a respondent who files a counter notice asking the court to vary or set aside an order of the lower court to give security for the costs occasioned by the appeal. However, in this case, although the first respondent has filed a counter-notice it has stated that the decision of the judge in the law court should be affirmed for the reasons set out in the written judgment as well as the additional bases set out in their counter-notice.

[83] Dr Barnett's submissions were similar to those of Mr Graham but he emphasised an additional point, that, insofar as the second and third respondents are concerned, it was manifest that they cannot be required to give an undertaking or payment in circumstances where there can be no viable claim against them for damages. The claim for the declaration and the injunction no longer exists, and this means that there is no remedy or relief which can be obtained against the second or third respondents and consequently, no basis to demand an undertaking from them as to damages.

Conclusion

[84] Whereas there may be appropriate cases in which the court would make an order requiring the respondent to make a payment into court, these cases would arise from exceptional circumstances. We are not of the view that the facts of this case qualifies. This was at its core a fairly common claim by a party that had executed an AFS, asserting that it had been wrongly terminated and seeking specific performance. For that reason, the applicant's application for the respondents to provide security or an undertaking in damages is refused.

The respondents' application for security for costs

[85] Mr Graham submitted that the applicant is undercapitalized and has no known assets. He argued that this was conceded by the applicant. He highlighted the contents of the affidavit of Mr Vangani filed on 19 September 2022, in which he averred that the applicant has access to financing and to the sum of US$220,000.00 which represents the

deposit paid to the first respondent on behalf of the applicant regarding the AFS and which is now in an escrow account. King's Counsel submitted that the ownership of these funds paid as a deposit is unclear and it may not in fact belong to the applicant.

[86] It was submitted that an order for security for costs would be appropriate in this case since there is likely to be a real injustice if the first respondent is saddled with the expenses of the appeal without any recourse. It was further submitted that in light of the assertion by Mr Vangani that the applicant has access to financing, it should be required to "put its money where its mouth is" and demonstrate this capacity by the payment of the security for costs.

[87] On 30 August 2022, the second and third respondents filed a notice of application seeking, inter alia an order that the applicant gives security for costs in the appeal ('the Application for Vinayaka to pay Security for Costs'), as follows:.

> i. "That the [applicant] give security in the sum of $6,609,625 for the second and third respondents' costs in the appeal;
>
> ii. In the absence of security that the appeal be struck out and on evidence of default that the appeal shall stand dismissed; and
>
> iii. Alternatively, that the proceedings be stayed until security is given."

The grounds of the application included the assertion that the applicant has failed to satisfy the court below and the respondents, that it can satisfy an undertaking as to damages. Further, that the applicant will be unable to pay the costs of the second and third respondents if they are successful, as the applicant's capitalization is limited to JA$100,000.00.

[88] Dr Barnett's submissions repeated his theme that the second and third respondents are in a special position because there is no cause of action that can be maintained against them. He argued that for the applicant to continue against them,

there is an extremely strong case that the applicant should give an undertaking or provide security for costs. He noted that the applicant in response to the second and third respondents' application for security for costs has stated that it has funds available from two sources. Firstly, US$220,000.00 in escrow, and secondly, through its access to financing. It was submitted that there was no evidence of an escrow since an escrow is established as a trust for the party ultimately entitled, furthermore there was no joint trustee agent holding the funds.

[89] Dr Barnett further submitted that the funds should be paid into court to meet the costs already incurred or which will be incurred in the future if the applicant proceeds with the appeal which is hopeless. Although Mr Vangani said he has resources, he also said he had gone all over the world seeking funding, even from unknown persons and his funding includes a mortgage. It was submitted that the applicant has no financial resources of its own or the right to demand the resources provided by someone else. Therefore, the application for security for costs by the second and third respondents should be granted.

The principles governing security for costs on appeal

[90] In **Continental Baking Co Ltd v Super Plus Foods** [2014] JMCA App 30 Brooks JA (as he then was) at para. [11] considered the applicable principles governing security for costs as follows:

> "The issues in relation to a company's ability to meet an order for the payment of the costs of an appeal were specifically considered in **Cablemax Limited**, where Morrison JA set out certain principles that assist in this analysis. He said at paragraph [14] of his judgment:
>
> > 'In **Keary Developments Ltd and Tarmac Construction Ltd and another** [1995] 3 ALL ER 534, the principles governing the exercise of the jurisdiction to order security for costs against a plaintiff company under the equivalent provision of the UK Companies Act 1985 were reviewed and restated by Peter Gibson LJ (at pages 539 – 542).

These principles, which are in my view equally applicable to an application made under rule 2.12 of the CAR, may be summarised as follows:

(i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.

(ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security.

(iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal.

(iv) In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.

(v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.

(vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount. (vii) The lateness of the application for security is a factor to be taken into account, but what weight is to be given to this factor will depend upon all the circumstances of the case.'

I respectfully adopt those principles as being applicable to this case."

[91] Applying these principles, we found that, based on the evidence before the court, it is clear that the applicant does not have any significant assets of its own. In respect of the deposit of US$220,000.00, we accept the submission of Dr Barnett that there is insufficient evidence that it belongs to the appellant or it is a sum of money to which the appellant will have a legal or equitable claim. Accordingly, we concluded that there is a real risk that the respondents will face an injustice if the appeal fails since they may find themselves unable to recover from the appellant the costs which have been incurred by them in resisting the appeal. This is because there is no mechanism by which the respondents, by way of enforcement proceedings, could have access to the financing which the applicant claims is available to it.

[92] However, we found that if the applicant has access to the funds as it asserts, it ought to be able to utilise those funds in order to provide security for costs. In such circumstances, it is unlikely that an order for security for the respondents' costs will stifle the appeal.

[93] In having regard to the applicant's chances of success, we have considered that our refusal to set aside the decision of the single judge is an indication that we do not find that the applicant has a real chance of success on the appeal, but we hasten to repeat that in doing so we are not deciding the appeal itself, and our finding in this regard is for a specific and limited purpose.

[94] In considering the amount of security we have measured the amount sought by the first, second and third respondents respectively and decided that we would not order the full amount claimed. We have also factored in our deliberation the amount which the applicant sought on its unsuccessful application, and we concluded that the amount of $2,500,000.00 for the first respondent and a similar sum for the second and third respondents jointly, would provide adequate security for the respondents' costs but would not be unduly burdensome to the applicant or place it in a position in which it would not be able to pursue the appeal.

Conclusion and disposition

[95] For the reasons stated herein, we made the orders disclosed at para. [4] hereof.