[2015] JMCA App 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 69/2015

APPLICATION NO 109/2015

BETWEEN	**VENUS INVESTMENTS LIMITED**	**APPLICANT**
AND	**WAYNE ANN HOLDINGS LIMITED**	**RESPONDENT**

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones & Co for the applicant

Vincent Chen and Miss Nicole-Ann Fullerton instructed by Chen Green & Co for the respondent

11 and 18 June 2015

IN CHAMBERS

MORRISON JA

[1] This is an application for an injunction and other orders, pending an appeal to this court from a decision of Sykes J given on 2 June 2015. In the notice of application filed on 8 June 2015, the applicant seeks an interim injunction and interim declarations as follows. First, an order restraining the respondent, its servants and or agents from transferring strata lot no. 15 ("the property"), comprised in Certificate of Title registered at Volume 1480 Folio 64 of the Register Book of Titles ("the title"). Second, interim

declarations that (a) the Registrar of Titles ("the registrar") is not empowered to lodge and endorse transfer no. 1934317 in favour of Cruz Holdings (St Lucia) Limited on the title, (b) the registrar is not empowered to register any documents submitted by the respondent in relation to the property whilst caveat no. 1719695 ("the caveat") remains on the title, and (c) the caveat is not to be removed from the title.

[2] The background to this application can be shortly stated. By notice of application for interlocutory orders filed in the Supreme Court on 24 April 2015, the applicant sought without notice orders in terms generally similar to the orders which it now seeks pending appeal. The grounds of that application were set out in the notice as follows:

> "(1) The Claimant gave the Defendant a loan of J$33,000,000.00 which was secured by way of Mortgage dated April 19, 2011 over property known as ALL THAT PARCEL of land of STRUAN CASTLE situate at CHRISTIANA in the parish of MANCHESTER being Lot numbered fifteen and being the land comprised in Certificate of Title Registered at Volume 1280 Folio 7766 of the Register Book of Titles which has been cancelled and splintered into approximately 28 Certificates of Titles including Certificate of Title registered at Volume 1480 Folio 64 of the Register Book of Titles.
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> (2) The Claimant lodged a caveat to protect its interest in the property as the property was already encumbered.
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> (3) The Defendant is aware of Claimant's equitable mortgage and interest and is seeking to defeat same by transferring the property.
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> (4) The Defendant's indebtedness to the Claimant is presently J$334,843,984.55 inclusive of interest.

(5) The Caveat has been warned by the Registrar of Titles and the Claimant has been given Notice that the Defendant is seeking to transfer them.

(6) The Notice was sent to Claimant's conveyancing Attorneys-at-Law on April 14, 2015 and the Caveat will lapse on April 29, 2015 and therefore this application is urgent.

(7) The Claimant has a case with real prospect of success.

(8) Section 140 of the Registration of Titles Act gives the court the specific power to make an order for the purpose of protecting the Claimant's caveat.

(9) The Claimant gives its undertaking as to damages and has sufficient assets to meet its undertaking as to damages."

[3] The application was supported by a brief affidavit, sworn to on 24 April 2015, by Mr Rory Chin, the applicant's managing director, in which he confirmed the amount of the loan, the agreed repayment terms and the fact that the respondent was in arrears of payment. Mr Chin explained that the mortgage by which the loan was secured was stamped, but never registered, as the certificate of title to the property offered as security was already encumbered by three previous registered mortgages in favour of other mortgagees securing moneys to the tune of US$1,707,626.00. Accordingly, the applicant lodged a caveat to protect its interest. In due course, after the cancellation of the original certificate of title and another which was issued in its stead, certificates of title registered at Volume 1480 Folios 50 -78 were issued under the provisions of the Registration (Strata Titles) Act, with the applicant's caveat noted on each.

[4] Mr Chin's affidavit then continued as follows:

"9. The Claimant has been notified by the Registrar of Titles that the Defendant has lodged for registration a transfer being Transfer #1934317 to Cruz Holdings (St. Lucia) Limited in relation to property comprised in Certificate of Title registered at Volume 1480 Folio 64. A copy of the Notice to Caveator is exhibited hereto as "RC-7". That the Notice was sent to Claimant's Conveyancing the [sic] Attorneys-at-Law Hart Muirhead Fatta on April 14, 2015.

10. The Claimant objects to this transfer in circumstances where the Defendant's indebtedness remains outstanding. Further the Claimant did not consent to the sale and in fact was unaware of the sale until the Claimant's conveyancing Attorneys-at-Law received the Notice to Caveator on Attorneys April 14, 2015. The Claimant has therefore made this application to prevent the discharge of its caveat.

11. The application is urgent as the Caveat will lapse on April 29, 2015 and the property transferred.

12. That the Claimant is entitled to maintain its caveat based on its mortgage which remains unsatisfied. I give the Claimant's undertaking to pay damages in the event that this Court later determines that the orders sought ought not to have been granted. That the Claimant has assets and can [sic] its undertaking as to damages.

13. The Claimant owns real estate including 34 Dunrobin Avenue being property registered at Volume 1455 Folio 8 of the Register Book of Titles. That a copy of the Certificate of Title is exhibited hereto and marked as "RC-8" for identity. That I buy and sell real estate for myself and on behalf of several companies. That this Dunrobin Property is prime real estate and based on the improvements to the land and what the Claimant sold a portion of the land alone to the Commissioner of Lands for, I put the property value for this property at One Million United States Dollars and the title is free and clear.

14. That I note that the Commissioner of Lands has endorsed on the Certificate of Title that it has an interest in the property as a purchaser under a Sale Agreement. However this is not the case. The Claimant agreed to sell and did sell the Commissioner of Lands a portion of the Property to construct the highway at Dunrobin and there is no pending sale in relation to the remainder of the Property.

15. I humbly pray that [sic] Court will grant the orders sought in the Notice of Application for Court Orders filed herein so the Claimant can preserve its interest in the Property as an equitable mortgagee."

[5] Mr Chin exhibited a number of documents to his affidavit, including copies of the cancelled certificates of title, the caveat, the equitable mortgage and the notice to caveator which had prompted the application for the injunction. On this evidence, Batts J made an order granting an interim injunction and other orders for 14 days in the following terms:

"1. That the Defendant be restrained until May 12, 2015, whether by itself, its servants or agents, or howsoever otherwise from transferring the property known as ALL THAT parcel of land known as STRUAN CASTLE situate at CHRISTIANA in the parish of MANCHESTER being strata lot numbered Fifteen and being the land comprised in Certificate of Title Registered at Volume 1480 Folio 64 of the Register Book of Titles.

2. An interim declaration that Caveat numbered 1719695 is not to be removed from Certificate of Title registered at volume 1480 Folio 64 of the Register Book of Titles until May 12, 2015;[sic]

3. The Claimant through its Counsel gives the usual undertaking as to damages; [sic]

4. Costs to be Cost [sic] in the application; [sic]

5. Inter parties [sic] hearing fixed for the [sic] May 12, 2015 at 10:00a.m. or so soon as Counsel may be heard."

[6] It is against this background that the matter came on for further consideration before Sykes J, initially on 12 May 2015, when the interim injunction granted by Batts J was extended to 1 June 2015; and again on the latter date, when the learned judge made the order that is the subject of the appeal in these proceedings. But before the hearing on 1 June 2015, three additional affidavits were filed. The first and second were affidavits sworn to by the respondent's managing director, Mr Wayne Chen on 26 May 2015 and 28 May 2015 respectively; while the third was an affidavit in response, sworn to by Mr Chin on 29 May 2015.

[7] In his first affidavit, Mr Chen explained that, with the knowledge of the mortgagees, the property comprised in the previous certificates of title had been brought under the provisions of the Registration (Strata Titles) Act so as "to facilitate the sale of the individual units". On 18 May 2012, pursuant to these arrangements, the applicant had executed and delivered to the respondent its consent to the stratification of the property in the following terms:

"**CONSENT OF CAVEATOR**

IN THE MATTER of an Application to Surrender Certificates of Title registered at **Volume 1208 Folio 776** of the Register Book of Title [sic] and to obtain separate Certificates

of Title for each of the Lots shown on the said Subdivision Plan.

AND

IN THE MATTER of the Registration of Titles Act

TO: THE REGISTRAR OF TITLES

VENUS INVESTMENTS LIMITED, whose address for the purposes herein is care of Jennifer Messado & Co., Attorneys-at-Law of No. 10 Holborn Road 10 [sic] in the parish of Saint Andrew, being the ***CAVEATOR under Caveat Numbered 1719695*** registered on the 22nd day of August, 2011 against Certificate of Title registered at Volume 1208 Folio 776 of the Register Book of Titles **DO HEREBY CONSENT** to the issuance of the individual duplicate Certificates of Title for the lands comprised in the said Certificates of Title registered at Volume 1208 Folio 776 **PROVIDED THAT** the Caveat No. 1719695 remains on the individual duplicate Certificates of Title.

DATED the 18th day of May 2012."

[8] Mr Chen's first affidavit continued:

"8. The Claimant, through Rory Chin was aware that it was intended by the Defendant, and agreed by all parties, to the stratification of the building to enable the Defendant to repay the debt due to the 1st Mortgagees under mortgage number 1622271 which was registered against the certificates of title at Volume 1208 Folio 776 (later Volume 1476 Folio 875) and Volume 1364 Folio 348 on the 28th day of October, 2009 and which at all times ranked ahead of the charge of the Claimant in point of time and of security and payment. That I exhibit hereto a copy of the consent signed by the Claimant under seal, signed by Rory Chinn as a director and Heather Chinn as the secretary marked "**WC 1**" [sic]

9. In fulfillment of the intention to pay the 1st Mortgagee and procure the discharge of the 1st Mortgage, 29 of the strata lots have been sold to third parties and I exhibit hereto a bundle consisting of 72 pages copies of the existing contracts for the sale of strata lots with a summary attached marked "**WC 2**".

10. It is intended to apply and appropriate the balance due on these contracts first to payment of the amount due under the 1st Mortgage and secondly the amount, if anything, found due to the Claimant on the equitable mortgage protected by the caveat 1719695 lodged by the Claimant.

11. The amount due under the first mortgage is $1,846,103.45 with interest accruing at the rate of US$582.06 per diem. This is working hardship, not only on the Debtor but also on the Claimant/Creditor whose equity in the properties is being reduced on a daily basis by this amount as it is intended that once the first mortgage is repaid the Caveat will remain in place against the lands not included in the transfer and the charge protected by the Caveat will rank first in order of priority.

12. The warning to the caveator relates to the dealings contained in the transfer No. 1934317 which relates to only some of the strata lots and the caveat will not be removed in relation to strata lots not included in the transfer. There are 6 strata lots which are not affected by the transfer and which will remain subject to the caveat.

13. In addition to the Christiana Lands the caveat also extends to other lands and which will be available to the Claimant as it is not sought to have the caveat released against all the lands its affects but only [the] strata lots the subject of the transfer No. 1934317.

14. The same loan is protected by a charge on lands at Volume 1409 Folio 845. These comprise over ninety acres of residential land at Weston Park in the parish of Clarendon. I exhibit herewith is [sic] Certificate of

> Title registered at Volume 1409 Folio 845 and marked "**WC 3**"…"

[9] In his second affidavit, Mr Chen made the point that the transfer which had triggered the warning of the caveat related to lot no. 15 only and was lodged by the firm of DunnCox, who were the attorneys-at-law for the first mortgagee. Further, that the proceeds of all sales would go to the firm for the account of the first mortgagee until the first mortgage debt was settled.

[10] In the affidavit in response, Mr Chin confirmed that the applicant had consented to the conversion of the property into strata lots, as evidenced by the consent exhibited to Mr Chen's affidavit. However, Mr Chin denied that there was ever any agreement that the respondent would be selling the strata lots to enable it to pay off its debt to the first mortgagee, "without any regard and reference to the Claimant". Then Mr Chin added this (at para. 5):

> "…In fact where the Claimant has consented to the sale of properties it was clear that [the] Claimant would benefit from the sale but this is not the case in relation to this sale or any pending sale. Therefore in or around March 2012 when the Defendant entered into an agreement…to sell those Lots 1, 2 and 7 for J$55 million the Claimant received $19,500,000.00 from that sale. However the Claimant was never advised that there were purchasers for other units and neither was it advised of the sale price."

[11] At the hearing before Sykes J, the applicant sought an extension of the interim injunction granted by Batts J until the trial of the action. In so doing, it based its application on the provisions of section 140 of the Registration of Titles Act ('the Act'), which entitled it, it was submitted, to move the court without notice, as it had done, to

prevent a transfer of the property in which it had an interest as equitable mortgagee. For its part, the respondent's primary complaint was that the without notice order granted by Batts J was obtained by the applicant on the basis of an affidavit which did not make full disclosure of all material facts, as it ought to have done. However, in addition, the respondent made the points that (i) the applicant's claim is a money claim and not an appropriate one for the grant of an injunction; (ii) preventing it from completing the sale would prejudice both the applicant and the respondent, given the fact that interest on the first legal mortgage continued to accrue at the daily rate of US$582.06; and (iii) the grant of the injunction would have the effect of elevating the applicant's equitable mortgage to *pari passu* status with the first legal mortgagee.

[12] In a written ruling given on 2 June 2015, Sykes J considered (at para. [6]) that, even assuming that the applicant had the right under the Act to move the court as it did, the real issue was whether it had "met the high standard imposed on all who seek without notice orders against another". Citing the well-known decision in **R v Kensington Income Tax General Commissioners** [1917] 1 KB 486 and a long line of subsequent cases on the duty of complete candour on the part of applicants for *ex parte* relief, the learned judge concluded that the applicant had indeed been guilty of material non-disclosure in the application before Batts J. It had failed to disclose that (a) there had been previous transfers of strata lots to other purchasers and part of the sale price had in fact been paid to the applicant, (b) the applicant had consented to a variation of the caveat "in order to facilitate the transfer of strata titles to purchasers" and (c) the funds advanced on the strength of the equitable mortgage were also

secured against another property. Further, had the applicant made enquiries about the transfer, it would have discovered that the respondent was seeking to sell the strata unit in order to pay off its debt to the legal mortgagee, whose attorneys-at-law were in control of the conveyancing process, thus enabling payment to the applicant if anything was left over. In the result, the learned judge concluded (at para. [31]), "[w]hen the total of all [the applicant] definitely knew is added to what it could have found out had it made enquiries it is clear to this court that full disclosure and significance of facts were not brought home to the judge who granted the without notice injunction". On this basis, the learned judge ordered that the without notice injunction granted by Batts J should be discharged and not renewed. Sykes J also doubted (at para. [40]) whether a registered proprietor of land could be prevented by an equitable mortgagee from "exercising its undoubted right to sell property…until satisfactory arrangements are made with the equitable mortgagee".

[13] By notice of appeal filed on 8 June 2015, the applicant has given notice of its intention to challenge the learned judge's ruling on a number of grounds:

> "1. The Court erred in failing to recognize that the issue for him [sic] to determine was whether the [applicant] had a caveatable interest in [the] property registered at volume 1480 folio 64 and could maintain the caveat;
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> 2. The Court erred in accepting assertions made by the [respondent] even in the face of these assertions not being supported by documents provided by the [respondent];

3. The Court erred in finding that a Registered Proprietor who was selling its property with the consent of the first mortgagee an equitable mortgagee could not restrain the registered proprietor;

4. The Court erred in finding that the [applicant's] failure to disclose that it had another land as security for its loan, that there had been previous transfers of other strata lots and the [applicant] had received part of the proceeds of sale these other strata lots were material facts to be disclosed to the Court and the [applicant's] failure to disclose same disentitled it from having the injunction granted; and

5. The Court in finding that [applicant's] failure to make enquiries about the Respondent's reasons for seeking to sell the property and presenting same to the court disentitled it from having the injunction granted."

[14] At the outset of the hearing of this application, Mr Vincent Chen for the respondent took a preliminary point. He submitted that the appeal, and by extension the application, were not properly before the court, as section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act, provides that no appeal shall lie from any interlocutory judgment or order without the leave of the court below or of this court and no such leave has been sought or obtained in this case. Mr Nigel Jones for the applicant, on the other hand, directed my attention to section 11(1)(f)(ii), which excepts from the rule in the main body of the subsection cases "where an injunction or the appointment of a receiver is granted or refused". In the light of this provision, I agreed with Mr Jones that this was a case in which an injunction was refused by Sykes J and that the appeal was therefore competent without leave from either the judge or this court.

[15] The application for an injunction pending appeal comes before the court under the provisions of rule 2.11(1)(c) of the Court of Appeal Rules 2002, which empowers a single judge of this court to make orders "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". Both parties accept as applicable to this exercise Brooks JA's recent restatement (in **Rona Thompson v City of Kingston Sodality Co-Operative Credit Union Limited** [2015] JMCA App 12, para. [14]) of the basis upon which a single judge of appeal acts in considering an application for an injunction pending appeal:

> "A single judge of appeal is permitted, by rule 2.11(c) [sic] of the Court of Appeal Rules (CAR), to consider and grant applications for injunctions pending the determination of an appeal. In determining whether an injunction ought to be granted pending appeal, the single judge must find that the applicant has a good arguable appeal (see **Olint Corp Ltd v National Commercial Bank Jamaica Ltd** SCCA No 40/2008 Application No 58/2008 (delivered 30 April 2008)). As a part of that analysis, the single judge must bear in mind the fact that this court, when considering the appeal, will only disturb the decision of the learned judge below, if it finds that the judge exercised his or her discretion on an incorrect basis (see **The Attorney General v John Mackay** [2012] JMCA App 1)."

[16] In order to demonstrate that the applicant has a good arguable appeal, Mr Jones made submissions on each of the grounds of appeal in turn. On ground one, it was contended that Sykes J had misapprehended his task in determining the application: what was before him was an application made pursuant to section 140 of the Act and all that the learned judge was therefore required to do was to consider whether the

applicant had a caveatable interest in the property, which it plainly did as an equitable mortgagee to which funds were owed under its mortgage. On ground two, Mr Jones complained that the learned judge's acceptance of assertions made to him, by or on behalf of the respondent, had misled him into thinking that, for instance, the applicant had consented to the sale of the property in question, when the consent signed by the applicant was expressly subject to the proviso that the caveat should attach to the individual certificates of title. It was submitted that, at the interlocutory stage, the court need only to have considered whether the applicant had an arguable case and had established that it had a caveatable interest, instead of accepting one version of disputed facts over another. On ground three, it was pointed out that clause 2(h) of the mortgage given by the respondent prevents it from parting with possession or any part of the property without the mortgagee's written consent and that on that basis the applicant clearly had a right to restrain the respondent from selling the mortgaged property. On ground four, it was submitted that the facts which the learned judge found had not been disclosed were either incorrect or not material to the issue which was before him, which was whether the applicant had an interest in the property which it was entitled to protect by caveat. And on ground five, Mr Jones protested the judge's use of his finding that the applicant ought to have made enquiries as a factor disentitling it to an injunction, given that its rights over the property were such that they could only be defeated by a sale of the property by the first mortgagee.

[17] Mr Vincent Chen submitted that the applicant's reference to section 140 of the Act is misconceived, as all that the part relied on by Mr Jones does is to provide a

mechanism by which, once a caveat has been lodged, the registered proprietor or persons claiming under any transfer or other instrument signed by him may test the caveator's right to lodge and maintain the caveat before the Supreme Court. This is not what was done in the instant case, which was an ordinary case of an application for an interim injunction to which the usual principles governing the grant of such injunctions apply. Beyond this, Mr Chen was therefore content to submit that, in the light of the well-established learning on the effect of material non-disclosure on a without notice application, Sykes J had exercised his undoubted discretion in the matter correctly and his conclusion should therefore not be disturbed.

[18] Given its centrality to Mr Jones's submissions, I must first consider sections 139 and 140 of the Act. Important though it is, I can pass over quickly section 139, which is the section of the Act which gives a discretion to persons claiming an estate or interest in registered land to lodge a caveat forbidding the registration of any dealings with the land until after notice of the intended registration is given to the intended caveator, "or unless such instrument be expressed to be subject to the claim of the caveator". But Mr Jones places fundamental reliance on section 140, which it is necessary to set out in full:

> "140. Upon the receipt of any caveat under this Act, the Registrar shall notify the same to the person against whose application to be registered as proprietor, or as the case may be, to the proprietor against whose title to deal with the estate or interest such caveat has been lodged, and such applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he thinks

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

[19] Section 140 does three things. First, as Mr Chen submitted, it provides a mechanism by which the registered proprietor or persons claiming under him may summon the caveator to show cause why the caveat should not be removed. The court may, upon proof that the caveator has been summoned, make such order as it thinks

fit, whether *ex parte* or otherwise. Second, it provides that the caveat will lapse 14 days after notice to the caveator that the registered proprietor has applied for the transfer or other dealing with the land. It is a notice to the applicant, as caveator, under this part of the section which triggered these proceedings in the first place. Third, once such notice has been served, the caveat will not be renewed, unless within the same 14 day period the caveator or his agent appears before the court and gives an undertaking or security sufficient to indemnify every person against any damage that may be suffered by reason of the delay in the registration of any disposition of the property.

[20] It will immediately be seen that the first part of the section, which allows the registered proprietor to summon the caveator to show cause, etc, has absolutely no application to this case, in which it is the applicant, that is, the caveator, which has brought these proceedings against the respondent, the registered proprietor, to restrain it from transferring or dealing with the property. What was before Batts J was therefore, as Mr Chen also submitted, an application for an interim injunction made without notice to which the usual principles governing the grant of such injunctions apply. It accordingly seems to me that Sykes J was incontestably right to reject Mr Jones' contention that, in the application that was before him, "the usual injunction principles do not apply with full rigour" (see para. [7] of Sykes J's judgment).

[21] Which brings me then to the question that is really at the heart of this application: does the applicant has a good arguable case on appeal against Sykes J's determination that, by reason of material non-disclosure, the interim injunction granted

by Batts J fell to be discharged and not renewed. Despite the learned judge's copious citation of relevant authorities, I think that for present purposes it is only necessary to mention three.

[22] In **R v Kensington Income Tax General Commissioners**, Viscount Reading CJ said this (at pages 495 to 496):

> "…Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits..."

(Similar statements are to be found in the judgments of Lord Cozens-Hardy MR at pages 504 to 505, Warrington LJ at page 509 and Scrutton LJ, at pages 513 to 514.)

[23] In **Brink's Mat Ltd v Elcombe and Others** [1988] 3 All ER 188 (in a judgment cited with approval and applied by this court in **Jamculture Ltd v Black River Upper Morass Development Co Ltd and another** (1989) 26 JLR 244), Ralph Gibson LJ set out some of the factors relevant to a consideration of whether there has been material non-disclosure and what consequences should apply to a failure to make full and frank disclosure (at pages 192 to 193):

> "(i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *R v. Kensington Income Tax Comrs, ex p Princess Edmond de Polignac* [1917] 1 KB 486 at 514 per Scrutton L.J. (ii) The material facts are those which it is material for the judge to

know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the *Kensington Income Tax Comrs* case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing *Dalglish v Jarvie* (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and *Thermax Ltd v Schott Industrial Glass Ltd.* [1981] FSR 289 at 295 per Browne-Wilkinson J.(iii) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v Robinson* [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see in *Bank Mellat v. Nikpour* [1985] FSR 87 at 92–93 *per* Slade L.J. (v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains…an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty…': see in *Bank Mellat v Nikpour* (at 91) *per* Donaldson L.J, citing Warrington LJ in the *Kensington Income Tax Comrs* case. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see *Bank Mellat v. Nikpour* [1985] FSR 87 at 90 *per* Lord Denning MR. The court has a

> discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:…"

[24] And lastly, in the recent decision of the Privy Council on appeal from this court in **Assets Recovery Agency (Ex-parte) (Jamaica)** [2015] UKPC 1, para. 21, Lord Hughes restated the general rule in the context of an *ex parte* application by the agency for a customer information order:

> "…the duty of the applicant to the court is of great importance. Applications of this kind will normally be made ex parte. All ex parte applications impose on the applicant the duty to disclose to the judge everything which might point against the grant of the order sought, as well as everything which is said to point towards grant. That is especially so when, as here, the financial institutions may well have little interest beyond ensuring that anything they are required to do is covered by the order of the court, whilst the persons whose affairs are under investigation may not find out about the order until long after the event. The duty of the applicant in such circumstances is, in effect, to put himself into the place of the bank, but also of the person whose affairs are under investigation, and to lay before the judge anything which either could properly advance as reasons against the grant of the order sought..." (Emphases in the original)

[25] There is therefore an unbroken line of authority in support of the proposition that, on a without notice application, the applicant is obliged to act in good faith by disclosing all material facts to the court, including those prejudicial to its case, and that failure to do so may lead to an injunction being discharged. The duty of disclosure extends not only to material facts known to the applicant, but also to any additional facts which he would have known had he made proper enquiries. Material facts are

those which it is material for the judge hearing the without notice application to know and the issue of materiality is to be decided by the court, and not by the assessment of the applicant or his legal advisers. Nevertheless, there is a discretion reserved to the court to make a fresh order on terms, notwithstanding proof of material non-disclosure.

[26] In my view, it is patently clear from Sykes J's, as ever, comprehensive and highly articulate discussion of the law that he was fully alive to these principles and that this is the basis upon which he sought to approach the respondent's challenge to the grant of the without notice injunction on the ground of material non-disclosure. So the question is whether, on this basis, it was open to the learned judge to conclude (at para. [26]) that "it is safe to say that there was not full disclosure".

[27] There is no question that the material placed before Batts J by the applicant did not disclose the matters which weighed particularly in Sykes J's consideration - that is, (a) the previous transfers of strata lots to other purchasers which had resulted in part of the sale price being paid over to the applicant, (b) the applicant's consent to "a variation of the caveat in order to facilitate the transfer of strata titles to purchasers" and (c) the fact that the funds advanced on the strength of the equitable mortgage were also secured against another property.

[28] In his submissions before me, Mr Jones accepted that the learned judge had correctly stated (a) and (c) as not having been disclosed to Batts J, though he maintained that neither fact was material to the application that was before the learned judge. I respectfully disagree. As regards (a), it seems to me that it must plainly have

been material to Batts J's consideration of whether to grant an interim injunction without notice for him to have been told that the applicant had not only permitted previous transfers of strata lots, but had also benefitted from a portion of the sale price of those lots. At the very least, that information might have led the learned judge to consider whether it might not have been prudent in the circumstances to insist on hearing the other side before making any order at all. Similarly, as regards (c), the fact that the applicant had other security might also have prompted Batts J to make a wider enquiry into what Sykes J described (at para. [33]) as the "full commercial context" of the parties' dealings with each other. I therefore consider that both matters were highly relevant to Batts J's consideration of whether or not to grant what is a purely discretionary remedy without hearing the other side.

[29] In relation to (b), Mr Jones protested that Sykes J had overstated and, by so doing, misrepresented the effect of the applicant's consent to the stratification of the mortgaged property, as that consent was expressly given on condition that the caveat would remain on the individual certificates of title issued for each strata lot. I accept that the learned judge's statement that the applicant's consent had been given "to facilitate the transfer of strata titles to purchasers" appears to have gone further than what the so far uncontested evidence suggests to be the case. However, it certainly seems to me to be a reasonably clear inference from the whole exercise of splintering the title to the property, which was done with the applicant's consent, that it was within the contemplation of the parties that the strata lots would ultimately be sold individually. But be that as it may, it seems to me that it must surely have been

material for Batts J to have been told that the applicant had in fact consented to the splintering of the titles, albeit subject to the caveat remaining on the individual titles, since this fact would at the very least have explained how factor (a) had come about.

[30] For these reasons alone, I consider that Sykes J's conclusion that the applicant was guilty of material non-disclosure in the respects stated above is unassailable. When these are added to other factors mentioned by the learned judge, including the admitted failure to make enquiries about the transfer which triggered the application for the injunction, it appears to me that the manner of the learned judge's exercise of his discretion in this matter cannot be faulted. In my view, therefore, the applicant has no good arguable grounds of appeal against Sykes J's decision to discharge the interim injunction granted by Batts J and not to grant any further injunction. It follows from this that, it not having crossed the threshold for the grant of interlocutory relief in this court, this application must be refused.

[31] Mr Chen has asked for the costs of the application, certified fit for two counsel, and Miss Moore has indicated that she is unable to resist. The respondent must therefore have its costs accordingly, such costs to be taxed, if not sooner agreed.