IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 H.C.V. 00380

BETWEEN	**REAL ESTATE BOARD**	**CLAIMANT**
AND	**VICTOR MACCAULEY SPENCE**	**1ST DEFENDANT**
AND	**KES DEVELOPMENT COMPANY LIMITED (In Liquidation)**	**2ND DEFENDANT**
AND	**CAPITAL AND CREDIT MERCHANT BANK LIMITED**	**3RD DEFENDANT**
AND	**JENNIFER MESSADO & CO.,**	**4TH DEFENDANT**

Dr. Lloyd Barnett and Miss Gillian Burgess for the Claimant
Miss Khara East instructed by John G. Graham & Company for the First Defendant
Mrs. M. Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the Third Defendant

Application for interlocutory injunction; statutory mortgagee seeks to restrain institutional mortgagee; whether exercise of power of sale should be postponed to the grant of approval by statutory mortgagee; adequacy of damages; delay and acquiescence.

The ranking among mortgagees is nothing but the mechanism by which the several debts are liquidated when the security is realized. This ranking is not a fiat bestowed upon a prior mortgagee to dictate when the sale of mortgaged property should take place. The requisite of consent as a condition precedent, emanating from one mortgagee to another before the exercise of the power of sale is a creature of the law yet to be conceived. Therefore, whether the claimant's charge ranks prior or pari passu, this only determines the order in which the claimant

can insists on a share of the proceeds. Ergo, the claimant is manifestly disentitled to injunctive relief.

IN CHAMBERS

Heard : 9th and 14th April, 2010

CORAM: E.J. BROWN, J.(AG)

1. By Fixed Date Claim Form filed on the 28th January, 2010, the claimant seeks the following orders:

(a) A declaration that the charge registered in September 2006 on the Certificate of Title, Volume 962, Folio 209 in favour of the Claimant in respect of all monies received under prepayment contracts with respect to the Jacks Hill Development Scheme, pursuant to the provisions of section 31 of the Act, ranks in priority to the mortgage registered on February 1, 2007 in the favour of the Third Defendant.

(b) An order that the Defendants pay to the Claimant a sum equivalent to all amounts received by them under prepayment contracts with respect to the Jacks Hill Development scheme carried out on the property registered at Volume 962, Folio209 of the Register Book of Titles, together with interest at such rates as are provided for in section 26 (2) of the Act.

(c) An order that the Third and Fourth Defendants furnish an account of all monies received by them in the purported exercise of powers of sale under a mortgage or otherwise with interest at such rates as are provided for in section 26 (2) of the Act.

(d) Further or alternatively, an order that an account be taken of all monies received by the Defendants under or in respect of all necessary enquiries and directions to be taken and made that provision be made for the costs of such accounts and inquiries and for an order that the Defendants do pay the Claimant such monies as may be found to be due upon the taking of such accounts and the making of such inquiries including in relation to interest as aforesaid.

(e) An injunction to prevent the Third Defendant from proceeding with the sale of the property, the development scheme or any of the units without the prior approval of the Claimant.

(f) All such further or other accounts, inquiries, directions or relief as shall be just.

2. The grounds relied on are as appear below:

(i) The First Defendant entered into Agreements for Sale of four Lots in the development scheme known as No.33 Jacks Hill Road, St. Andrew being part of the land comprised in Certificate of Title registered at Volume 962, Folio 209 of the Register Book of Titles with the intent that the purchasers would enter into Construction Agreements with the Second Defendant for the building of townhouse units on the said lots for the purchasers.

(ii) The purchasers paid over various sums of money in respect of the Agreements for Sale and Construction Agreements to the Fourth Defendant who collected the said sums on behalf of the First and/or Second Defendant.

(iii) The Act provides that all amounts received on prepayment contracts in development schemes must be held on trust for the benefit of the purchasers from whom the amounts are received and by virtue of the Act, the First Defendant as owner of the land on which the buildings or works are being constructed must lodge a charge on the said land in favour of the Claimant charging the land with the repayment of all amounts received under such pre-payment contracts.

(iv) The Fourth Defendant acting on behalf of the First and Second Defendants collected over US$ 475,000.0 and J$ 16,584,902.00 under prepayment Contracts in respect of the said development scheme at Jacks Hill in the parish of St. Andrew and has not repaid these amounts to the purchasers or paid them over to the Claimant; but entered into arrangements to pay them over to various persons, including the First, Second and Third Defendants.

(v) The Third Defendant has been engaged in the sale of the housing units in the said development in purported exercise of its power of sale under its said mortgage.

(vi) The Claimant's charge ranks in priority to the Third Defendant's mortgage.

(vii) The housing units in respect of which the amounts were paid under the prepayment contracts have not been delivered or transferred to purchasers who paid moneys under prepayment contracts and the development has failed.

3. Pursuant to that originating document, a Notice of Application for Court Orders was filed on the 16th February, 2010 seeking an interim injunction in substantially the same terms. The only difference between the two documents is that the latter states "without the prior written consent." An order in the terms sought was granted on the 16th March, 2010, in the presence of the parties but without a hearing. The grounds anchoring the application are identical with those enumerated in the fixed date claim form. This is the inter-parties hearing of that application.

4. The Real Estate Board is established under section 4 of **The Real Estate (Dealers And Developers) Act** (herein after, **The Act**). On behalf of the claimant, learned counsel Dr. Lloyd Barnett submitted that under **The Act** the claimant has a statutory duty to act on behalf of purchasers and in particular, to register a charge. That charge is in point of fact registered by the owner of the land on which the building or works is being constructed, in favour of the Board.

5. Counsel next referred the court to the definition of prepayment contract at section 2 of the Act. Learned counsel then submitted that if a developer undertakes to carry out works and collects any down payment or deposits in respect of that development for its purchasers, then that is a prepayment contract. The argument continued, once a prepayment contract has been entered, then a copy has to be sent to the Board under section 28. Any money received has to be paid into a trust account under section 29; and

held on trust: section 30. Dealings with the monies paid into that account is subject to restrictions: section 31.

6. That statutory trusteeship is reinforced by the statutory mortgage granted by **The Act**. In this regard, the court's attention was directed to the affidavit of Sandra Watson, filed on 28th January, 2010. At paragraph 7 Ms Watson said that on September 20, 2006, a charge was registered on the Certificate of Title at Volume 962, Folio 209 for the said land in favour of the claimant in respect of all monies received under prepayment contracts pursuant to the provision of section 31 of **The Act** (at paragraph 12 she said a mortgage was registered in favour of the third defendant on the 1st February, 2007 to cover $146,000,000.00 with interest). In the succeeding paragraph she said between the 8th and 14th December, 2007, the second defendant was engaged in carrying out at least twelve development schemes at various locations.

7. The second defendant provided the Board with a signed Joint Venture Agreement, executed between itself and the first defendant on the 8th September, 2004. That indicated, according to the affiant, that both defendants were acting together in procuring prepayment contracts for the development. On the 13th September, 2006, the second defendant provided the claimant with copies of four prepayment contracts concerning the said development scheme. The fourth defendant was named as the attorney having carriage of sale.

8. The affiant swore that information provided by the purchasers in the development scheme shows that US$445,000.00 and

J$26,584,902.50 had been collected by or on behalf of the first, second and, or fourth defendants. Additionally, from about May, 2007, reports began reaching the Board that the development scheme was not progressing in harmony with the construction contracts entered into with the purchasers and the second defendant. Neither had the lots been transferred to the purchasers by the first defendant. The deponent charged that the third defendant had been selling housing units in the development scheme "in purported exercise of its power of sale under its said mortgage."

9. Dr. Barnett continued, the Board contends that, in respect of the exercise of the power of sale, it has priority over all other mortgagees unless the other mortgagees can establish that they come within the statutory exemption, that is, the amounts securing were amounts advanced and appropriately certified. Secondly, even if that is so, then the mortgage of such a person ranks *pari passu* with the Real Estate Board's statutory mortgage, to the extent so advanced and certified.

10. At this juncture learned counsel referred to the affidavit of Curtis Martin, filed on the 16th March, 2010. At paragraph 5, Mr. Watson said that by a loan agreement dated 8th August, 2005, the third defendant agreed to advance money to the second defendant up to $146,000,000.00. That was for the purpose of constructing residential units on the land in question. The ensuing paragraph declared that, as between the parties to the loan agreement, it was undisputed that the money was advanced.

11. That loan was particularized in article 1 of the agreement so called. Learned counsel argued that those particulars demonstrate that the loan was for purposes not all covered by the statutory exemption. The substratum of that submission was the articulated disaggregation of the principal sum: a term loan of $120,000,000.00 to provide construction loan financing for the projects; an annuity loan of $6,000,000.00 to complete the purchase of the Cambridge Hill Farm; lease financing of up to $20,000,000.00 with respect to certain commercial motor vehicle and equipment.

12. It was further argued that article IV (viii) which deals with the establishment of an escrow account for the payment in of money received from the purchase of the lots, does not provide for certification for work done but for cash flow disbursements. Therefore that does not satisfy the strict requirements of the statute. Counsel also argued that article 1V (ix) provides for the use of part of the fund in the escrow account for the payment of the commitment fee, which also falls outside the statutory exemption. In consequence of the forgoing, learned counsel submitted that it is clear that the mortgage of the third defendant does not fall within the statutory exemption which permits them to rank *pari passu* with the Real Estate Board's statutory charge.

13. *Ergo*, the submission went, the Real Estate Board is saying the sale should not proceed without its consent. As a responsible statutory trustee, the Board should be provided with copies of the agreement and offers so that in the exercise of its statutory

responsibilities it would be in a position to determine whether or not the interests of the statutory beneficiaries are being jeopardized.

14. With earnest it was argued that if the Board's mortgage has priority, or if it ranks equally with the third defendant's mortgage, then it is all the more necessary and reasonable that the consent of the Board be obtained prior to any sale. Counsel developed the point thus, if a sale is effected, in order to obtain the best terms purchasers should not have to contend with an existing charge, which the Board would have and consequently would have to agree to remove to facilitate the transfer.

15. After adverting to sections 105 and 107 of the **Registration of Titles Act (RTA)**, it was urged, with perspicacity, that the statute does not contemplate the exercise of a power of sale when there is a prior mortgage or a mortgage which ranks *pari passu* and therefore cannot be treated as a subsequent mortgage. Under the **RTA** it will not be possible to obtain a transfer without dealing with prior charges. Hence, there is no power of sale to subsequent mortgagees. Section 108 of the **RTA** only permits mortgagees who exercise the power of sale to transfer the land so that it is transferred free of subsequent mortgage.

16. Learned counsel contended that for these reasons the third defendant should not be permitted to sell without the approval of the Real Estate Board. His further argument was that it is only equitable and reasonable that they should provide to the Board all details of negotiations and offers of the proposed sale so that the Board can carry out its statutory fiduciary responsibility. Learned

counsel ended with the prayer that the application should be granted pending the hearing of the fixed date claim form or until further orders.

17. In opposing the application, Mrs. M. Georgia Gibson-Henlin for the third defendant submitted that the principles governing the grant of an interlocutory injunction were laid down in **American Cyanamid Co. v Ethicon [1975] 1 All ER 504** and reiterated in **National Commercial Bank of Jamaica v Olint Corp Limited [2009] 1 W.L.R. 1405**. Learned counsel mounted her assault on three fronts: no serious issue to be tried, adequacy of damages, balance of convenience and delay.

18. Under the first head it was submitted that there is no evidence that the third defendant received any money under the prepayment contracts. Indeed, so the submission ran, the claimant has not even so averred. Importantly, there is no evidence that prepayment contracts exist as, though Ms Watson refers to them, none were attached. In any event, section 31 (5) of The Act in not linked to prepayment contracts but advances. In the same vein, it was argued, there is no dispute that the monies were advanced for the construction of the development. Additionally, she submitted, although it was suggested, there is no averment of fact to support the claim that the third defendant is liable to account for amounts due under the prepayment contracts.

19. Learned counsel argued that the third defendant will be prejudiced if the sale is not allowed to proceed. Mrs. Gibson-Henlin articulated that what the third defendant is in fact doing is exercising

its statutory power of sale under the mortgage. If in fact the third defendant's mortgage ranks second to the claimant's charge, that would not *ipso facto* give the claimant a right of consent as a condition precedent to the sale. The issue of which mortgage ranks prior to the other is not one to prevent the exercise of the power of sale. Counsel pressed, the claimant merely has an interest in the proceeds of the sale: **Halsbury's Laws of England 4th edition volume 32 paragraphs 954 and 663; Kaolim Private Limited v United Overseas Land Ltd. [1983] WLR 472, 476.** Learned counsel concluded that the claim for an injunction on the basis of an entitlement to prior consent is unsustainable and as such, there is no serious issue to be tried.

20. Moving the question of damages, it was Mrs. Gibson-Henlin's submission that the claim sounds in damages. For that proposition counsel relied on **Cabot Paul v Victoria Mutual Building Society Claim # 2007 HCV 05120 (unreported) 29th February, 2007; Registration of Titles Act, section106.** Counsel posited that this case is about money and there is no suggestion that the third defendant lacks the ability to pay. Adopting Lord Hoffman's words in **NCB v Olint**, *supra*, learned counsel urged that the claimant should be "left to its remedy in damages." That position counsel sought to fortify by submitting that the remedy provided under section 31(7) of The Act is damages. The latter section, it was submitted, incorporates sections 106 and 107 of the **Registration of Titles Act** where the remedy is also damages.

21. Lastly, learned counsel argued that the claimant was guilty of delay. Delay is a serious matter to be weighed in the balance when

considering an application of this nature, according to the submission. As authority for that position counsel cited **Gee on Commercial Injunctions 5th edition, paragraph 2.019; Shepherd Homes Ltd v Sandham [1970] 3 All ER 402.** In the latter the dictum of Megarry, J. was prayed in aid. The learned judge said, "in the absence of any explanation, I do not think it unfair to treat this tardiness as some measure as the company's need for an injunction." This submission was further grounded in the judgment of Harrison J. (as he then was) in **Osmond Hemans and Thelma Hemans v St. Andrew Developers (1993) 30 JLR 290.**

22. Learned counsel articulated the factual foundations of this submission as appears hereunder. The claimant knew that the third defendant intended to exercise its power of sale since October, 2008. Not only did the claimant know that, the claimant requested and received an update. Neither did the claimant seek to restrain the sale by auction but rather requested the reserve price. The claimant was sent the valuation reports and kept abreast of the matter. The submission charged that the claimant led the third defendant to believe that it was not objecting to the sale.

23. It was the further contention of learned counsel for the third defendant, that the latter has had a long and difficult time in achieving the sale of the properties. And that in the face of the claimant's own inertia in exercising its power of sale. Finally, counsel submitted that it was a matter of record that several like applications and injunctions initially granted were refused and discharged, respectively. In fact, an injunction in the same terms, granted on the

18th March, 2010, was discharged on the 30th day of the same month. The formal order was produced to the court.

24. This application reveals the unusual contest between two mortgagees over the exercise of the power of sale. The claimant wishes to circumscribe the third defendant's use of its statutory power of sale under the mortgage instrument by making the exercise thereof subject to the claimant's prior written approval. The claimant's arguments do not stand on any judicial precedent distilled at the bar of incisive advocacy and anxious judicial consideration, *curia advisari vult*. These arguments rest on a construction of the claimant's enabling statute and the loan agreement.

25. As strenuously as they were articulated, and equally opposed, they demonstrate that their resolution must abide a full ventilation of the facts. A trial court will have to pronounce on the statutory factual outline of The Act before going on to establish the judicial factual outline and thereafter pronounce upon the correctness, or otherwise of the positions so manfully contended for. On the material before this court, it is palpable that there is a serious question to be tried.

26. So then, would damages be an adequate remedy at the close of the hearing on the fixed date claim form? The dictum of Lord Hoffman in **NCB v Olint**, *supra*, is most apposite:

> The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed in **American**

> **Cyanamid Co v Ethicon [1975] AC 396**, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction.

The freedom of action that the claimant seeks to injunctively interfere with is the third defendant's exercise of its statutory power of sale. As between mortgagee and mortgagor, the court is very slow to restrain the former. Even an allegation of fraud on the part of the mortgagee is insufficient to provoke a restraint without requiring the mortgagor to pay into court the disputed sum: **SSI (Cayman Limited) and Others v International Marbella Club S.A.** SCCA #57/86, unreported, delivered 6th February, 1987.

27. That is the general rule. And as is well known, all general rules are subject to exceptions. The position is best encapsulated by Rattray, P. in **Flowers, Foliage and Plants of Jamaica Limited and Jennifer Wright and Douglas Wright v Jamaica Citizens Bank Limited (1997) 34 J.L.R. 447, 452,** "courts of equity do not shackle themselves with unbreakable fetters if the justice of the particular case demands a more flexible approach." In that case is was held that:

> The general rule that the Court will not interfere to deprive the mortgagee of the benefit of his security, except where the sum stated to be due is paid into court, is distinguishable in the case as there are triable issues of fact and of law concerning the validity of the guarantee and the legality of the upstamping of the mortgage.

28. That was also the position in **MacLeod v Jones (1883) 24 Ch. 289**. The head note reads:

> The ordinary rule that the Court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of of

> sale except on the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the Court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee.

In **MacLeod v Jones**, the decision to interfere turned on the peculiar fact of Jones being MacLeod's solicitor and mortgagee simultaneously. According to Brett, M.R. at page 296:

> So far as I understand the practice of the Court he could not be stopped from selling the estate without the mortgagor paying into Court or otherwise securing to him, not what the Court might think *prima facie* was due to him as far as they could ascertain, but without paying into Court that which he demanded, subject to a subsequent inquiry. But that is on the theory that he is nothing more than a mortgagee.

29. It appears that the court is prepared to restrain a mortgagee's exercise of the power of sale when either of two things is in issue. First, when there are issues germane to the validity of the instrument creating the mortgage. Secondly, when the integrity of the mortgagee is impugned. It is to be noted that a mere allegation of fraud was insufficient to inaugurate the restraint: **SSI (Cayman) Limited**, *supra*. It would seem that the want of integrity would have to sound in the vein of undue influence exerted by the mortgagee over the mortgagor.

30. In the instant case, there is not even a whisper that the validity of the mortgage instrument has been or may be compromised in any way. Neither is it being contended that the mortgagee exerted any undue influence over the mortgagor. The claimant wishes to create a third category under which a mortgagee's exercise of its

power of sale may be restrained viz. where the mortgage of an authorized financial institution ranks *pari passu* or subsequent to that of the Real Estate Board, the exercise of the power of sale by that mortgagee must be postponed to the procurement of the written consent of the Real Estate Board.

31. The claimant may yet obtain judicial approbation of that position and a third category of restraint on the exercise of the power of sale by a mortgagee may become known to the law. The dust has settled on the position as it stands at common law. Paragraph 663 of **Halsbury's Laws of England**, cited by counsel for the third defendant lays it down as follows:

> Where there are successive mortgages, the first mortgagee may exercise his power of sale without the concurrence of the subsequent mortgagees, but must account to them for the surplus sale money. A first mortgagee may buy a subsequent incumbrance at a reduced price without communicating to the subsequent incumbrancer an anticipated advantageous sale; and the sale, if afterwards effected, will be valid. If the second mortgagee exercises his power of sale, he can sell subject to the first mortgage; or he can sell free from it, either with the consent of the first mortgagee, who will be paid off out of the purchase money and will concur in the conveyance to the purchaser, or under the statutory power. In the latter case application should be made to the court to allow payment into court of an amount sufficient to meet the mortgage debt and any interest due on it, and of such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments.... If the sum paid in proves deficient, the mortgagee can follow the remainder of the proceeds of sale..... Thereupon the court may, if it thinks fit, with or without notice to the incumbrancer,... declare the land to be freed from the mortgage, and make any order for conveyance, or vesting order, proper for giving effect to the sale or exchange.

32. The United Kingdom Privy Council considered the question in **Kaolim Private Ltd. v United Overseas Land Ltd. [1983] WLR 472.** At page 476 this is what Lord Brightman said:

> At the time of the offer for sale by the bank, there was in existence a prior charge to secure the arrears of property tax. Therefore, when the bank came to sell, it was in substance selling as a second mortgagee. The right of a second mortgagee is to sell the mortgage property, which subject to the encumbrance is the mortgagor's property, at the best price reasonably obtainable. The second mortgagee so selling has a choice. He can sell the mortgaged property free from the first charge. In this case the purchase price will reflect the full value of the unencumbered land. When therefore the purchaser pays the purchase money to the second mortgagee, the second mortgagee must discharge the first charge so that the purchaser is granted what the vendor has contracted to convey, namely an unencumbered estate. Alternatively, the second mortgagee can sell the property subject to the first mortgage.

Although this was an appeal from a decision of the Court of Appeal in Singapore, Their Lordships were clearly applying general common law principle as is evident by a comparison with the extract from **Halsbury's.**

33. The pronouncement of Their Lordships and the statement of the authors of **Halsbury's** appear to be premised on the assumption that each mortgagee is autonomous and consequently exercise its power of sale without reference to a prior or *pari passu* mortgagee. Of what import then is the order of priorities? The learned authors of **Fisher and Lightwood's Law of Mortgage** 11th edition provide an answer.

34. At paragraph 24.1 the law is stated as appears hereunder:

> If successive advances have been made on the security of the same property by different mortgages it may, for one reason or another, be necessary to discover the order in which the mortgages rank. A mortgagor may have contrived to borrow sums

> in excess of the value of the security; or the mortgaged property, though at first sufficient to support the debts of all the mortgagees, may have depreciated in value. Of course, the mortgagees have their remedy by way of the personal covenant for payment made by the mortgagor, but the sale of the mortgaged property may be the only satisfactory method of recovering the sum lent, since the property of the mortgagor may be of little value. Each mortgagee is then entitled to be satisfied out of the proceeds of sale in full in the order of the priority of the mortgages.

So, the ranking among mortgagees is nothing but the mechanism by which the several debts are liquidated when the security is realized. This ranking is not a fiat bestowed upon a prior mortgagee to dictate when the sale of mortgaged property should take place. The requisite of consent as a condition precedent, emanating from one mortgagee to another before the exercise of the power of sale is a creature of the law yet to be conceived. Therefore, whether the claimant's charge ranks prior or *pari passu*, this only determines the order in which the claimant can insist on a share of the proceeds. Ergo, the claimant is manifestly disentitled to injunctive relief.

35. It is painfully clear that whatever the decision at the trial, the claimant's remedy will sound in damages. The court is therefore constrained to agree with learned counsel for the third defendant that this case is all about money. That should be sufficient to dispose of this application, on the authority of **NCB v Olint**, *supra*, but a word needs to be said on the question of delay.

36. The charge of learned counsel for the third defendant that there was culpable delay on the part of the claimant is factually impregnable. Learned counsel did not speak to delay's corollary,

acquiescence, but its imprint is stamped all over the claimant's conduct. According to Thesiger L.J. in **De Bussche (1878) 8 Ch. D. 286, 314:**

> If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This ... is the proper sense of the term 'acquiescence'.

From the evidence, this claimant didn't just stand by, it locked arms at the elbows with the third defendant and together they strolled down the garden path.

37. In the words of the learned author of **Injunctions** 10th edition at paragraph 2.22 "a claimant who has acquiesced is only debarred from relief altogether where it would be dishonest and unconscionable for him, after the delay, to seek to enforce his rights." Even if the claimant's conduct does not approximate this standard, "the court still has a discretion to refuse an injunction and award damages in lieu," *ibid*.

38. The claimant knew from October, 2008, that the third defendant intended to exercise its power of sale. In fact, it is the claimant's evidence that the third defendant has been selling the housing units in the development scheme. That notwithstanding, the fixed date claim form was not filed until 28th January, 2010. This notice of application was not filed until 16th February, 2010.

39. This makes the claimant guilty of laches: the unreasonable delay in pursuing a right or claim – almost always an equitable one –

in a way that prejudices the party against whom relief is sought (**Black's Law Dictionary** 8th edition). While the claimant was sleeping on its rights, such as they may be, the third was demonstrating industry in realizing the security. In this regard, the third defendant's counsel's submission that the third defendant has had a long and difficult time in achieving the sale of the properties, resonates with the court. It is as notorious a fact as is the claim that 25th December is Christmas day,that the local real estate market has been depressed, in sync with the global recession. Consequently, the court holds that even on this score it would have been oppressive to grant the injunction because of the prejudice of the delay.

40. The application for the injunction is accordingly refused. The interim injunction granted on 18th March and extended on the 9th April, 2010, until 14th April, 2010, stands discharged. Costs to the third defendant, to be agreed or taxed.