[2022] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE D FRASER JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00032

AND

APPLICATION NO COA2020APP00040

BETWEEN	**ASSOCIATED GOSPEL ASSEMBLIES (by Power of Attorney from Jeremy Karram, Executor for the Estate of Albert Teimer Karram, deceased)**	**APPELLANT**
AND	**JAMAICA CO-OPERATIVE CREDIT UNION LEAGUE LIMITED**	**RESPONDENT**
AND	**REGISTRAR OF TITLES**	**INTERESTED PARTY**

Miss Tamiko Smith and Sheldon Robinson instructed by RamsaySmith for the appellant

Mrs Daniella Gentles-Silvera and Miss Monique Hunter instructed by Livingston, Alexander & Levy for the respondent

Mrs Kamau Ruddock instructed by the Director of State Proceedings watching proceedings on behalf of the interested party

21, 22 September 2020 and 11 November 2022

MCDONALD-BISHOP JA

[1] These proceedings concern an appeal, a counter-appeal, and an application for fresh evidence to be adduced on appeal. The appeal and counter-appeal emanated from the decision and order of K Anderson J ('the learned judge') made in the Supreme Court

on 22 March 2019 where he discharged an interim injunction that was entered on 13 December 2018 in favour of Associated Gospel Assemblies ('the appellant'), a duly incorporated religious organization, against Jamaica Co-operative Credit Union League Ltd ('the respondent').

[2] Aggrieved by that decision, the appellant on 5 April 2019 filed an appeal in this court challenging the learned judge's decision on several grounds. The respondent counter-appealed contending that the learned judge was correct and that his decision should be affirmed on other bases not stated by the learned judge.

[3] While the appeal and counter-appeal were pending for hearing, the appellant sought the permission of this court to adduce fresh evidence in the form of a surveyor's report concerning the identification of the property in dispute between the parties. The respondent strongly opposed the application contending that the appellant did not satisfy any of the criteria for permission to adduce fresh evidence to be granted.

[4] On 21 September 2020, after hearing the submissions of counsel for the parties with respect to the fresh evidence application, we agreed with the position of the respondent. Accordingly, we refused the application and awarded costs to the respondent.

[5] On 22 September 2020, the court considered the substantive appeal and the counter-appeal and made the following orders:

> "1. The appeal is dismissed.
>
> 2. The counter-appeal is allowed.
>
> 3. The order of K. Anderson J made on 22 March 2019 discharging the interim injunction is affirmed.
>
> 4. Costs of the appeal and counter-appeal to the respondent to be agreed or taxed."

[6] We promised to furnish the written reasons for our decisions at a later date. With apologies for the delay, this is in fulfilment of that promise.

The background

[7] The appellant is an incorporated religious organisation in Jamaica. It claims to be the beneficiary of the estate of Mr Albert Teimer Karram, now deceased, in respect of 169 acres of unregistered lands situate at Breadnut Hill, Cross Keys, in the parish of Clarendon and identified by valuation number 18706009002 ('the disputed land'). Messrs Jeremy Karram and his father, Stanley Karram, were appointed executors of the estate of Mr Albert Teimer Karram under his will. Mr Stanley Karram was the brother of Mr Albert Teimer Karram. Mr Stanley Karram died in December 2017, leaving Jeremy Karram the sole surviving executor of the estate of Mr Albert Teimer Karram. Mr Jeremy Karram granted a power of attorney to the appellant to pursue the action in the Supreme Court against the respondent.

[8] The appellant's case is that adjoining its land is land registered at Volume 827 Folio 74 of the Register Book of Titles. This land was owned by Mr Stanley Karram and was then sold by him to the respondent in 1995 ('the respondent's land').

[9] In or around July 2011, the respondent entered into an agreement for sale of its land to the Government of Jamaica through the instrumentality of the Ministry of Water and Housing (as it then was). The respondent sought to obtain subdivision approval for the land in furtherance of the agreement for sale. The certificate of title, however, showed that the respondent's land was described by estimation as comprising 123 acres "more or less". It was described in the certificate of title to be:

> "ALL THAT parcel of land known as CROSS PEN in the parish of CLARENDON containing by estimation One Hundred and Twenty-Three acres more or less and butting Northerly on Sevens Plantation belonging to Sevens Limited, Southerly on the Main Road from Hazard to Old Harbour, Easterly on lands belonging to N. Knott, W. Hylton, E. Allen, R. Ranger, J. Ranger, E. Thomas, A. Armstrong, V. Knott, Ethel Black and V. Anderson and Westerly partly on lands belonging to H. McHardy, H. Barnaby and J. Simmonds and partly on Chateau Estate belonging to John Herbert Miller et al." (Underlining as in the original)

[10] For subdivision approval to be obtained, the Registrar of Titles required the respondent to re-register its land by reference to a plan as description by estimation was no longer acceptable. In fulfilment of that requirement, a Commissioned Land Surveyor, Mr Richard Haddad, was engaged by the respondent to survey its land and provide a survey plan indicating its true boundaries. In 2018, the survey was done and a diagram was provided by Mr Haddad. Mr Haddad reportedly prepared his diagram based on the pegs on the grounds which indicated the physical boundaries with the neighbouring landholdings as described in the respondent's certificate of title. Mr Haddad concluded that the land contained in the certificate of title for the respondent's land amounts to 284.171 acres. He opined that the estimation of the size of the respondent's land in the certificate of title as 123 acres more or less was "understated, which is understandable as that figure is but an estimate, which by nature is imprecise". This survey plan was submitted to the Survey and Mapping Division of the National Land Agency ('NLA') and was subsequently approved in 2018.

[11] The appellant became aware of the respondent's attempt to re-register its land by plan upon reliance on the survey plan of Mr Haddad. The appellant's contention is that the survey plan prepared by Mr Haddad had wrongly incorporated its land as part of the certificate of title of the respondent. Despite discussions between the parties through their legal representatives, the respondent refused to accept that its survey plan incorporates land belonging to the appellant. Discontented with the survey plan of Mr Haddad and the reluctance of the respondent to accept that the survey plan is incorrect, the appellant initiated proceedings in the Supreme Court against the respondent for redress.

[12] By way of a fixed date claim form filed on 28 November 2018, the appellant sought these orders:

> "1. An injunction restraining the [respondent] from registering lands contained in Pre-checked Plan numbered **400909** comprising 169 acres and identified by land Valuation Number **18706009002** with lands

comprised in Certificate of Title registered at **Volume 827 Folio 74**.

2. An injunction restraining the [respondent] whether by themselves or their servant and/or their agent from transferring or otherwise dealing with the said property in any way prejudicial to the interest of the [appellant].

3. An Order that the Registrar of Titles be empowered to cancel Surveyor's Pre-Examination Plan #397408 produced by Mr. Richard Haddad and direct that a new Pre-Examination Plan be produced.

4. A Declaration and/or Order that the [respondent] is to indemnify the [appellant] against any third-party claim for obstructing or interfering with the [appellant's] ability to administer the Estate of Albert Teimer Karram with respect to lands contained in Pre-checked Plan numbered **400909** comprising 169 acres and identified by land Valuation Number **18706009002**.

5. Costs.

6. Such further or other relief as the Honourable Court deems just." (Emphasis as in the original)

[13] Additionally, on 28 November 2018, the appellant filed an *ex parte* application for an interim injunction to restrain the respondent from registering the disputed land and from transferring it or otherwise dealing with it to the prejudice of the appellant.

[14] On 12 December 2018, the application for interim injunction was listed before the learned judge as an *ex parte* application. On that date, he ordered that the respondent be served for hearing on 13 December 2018. He also ordered that the Registrar of Titles be joined as an interested third party and be served with all the documents pertaining to the claim.

[15] Neither the respondent nor its legal representatives attended the hearing on 13 December 2018, and the interim injunction was granted. However, shortly after the interim injunction was granted, the respondent filed a notice of application for it to be discharged.

[16] On 22 March 2019, after considering the respondent's application and the submissions of counsel for the parties, the learned judge discharged the interim injunction.

[17] In summary, the learned judge's decision was based on these primary findings as pronounced in his written judgment cited as **Associated Gospel Assemblies (by Power of Attorney from Jeremy Karram, Executor for the Estate of Albert Teimer Karram, deceased) v Jamaica Co-operative Credit Union League Limited** [2019] JMSC Civ 42 ('the judgment'):

(i) There was a failure by the appellant to place before the court certain documents material to the claim as such documents were not within the appellant's possession. One such document was Mr Haddad's report, which was material evidence of considerable significance as it reveals the true size of the respondent's land and that the respondent's land also includes the disputed land (paras. [17] and [21] of the judgment).

(ii) The survey report serves to make certain the extent of the respondent's land, which is already registered in the name of the respondent and, therefore, carries with it all the attendant benefits a registered owner of land is entitled to pursuant to the Registration of Titles Act ('the RTA'), including indefeasibility of title pursuant to sections 68, 70 and 71. The law on those sections is settled (paras. [22] and [23] of the judgment).

(iii) The current position of the appellant would be no different if the process of re-registration is completed because the true size of the respondent's land is already illustrated by Mr Haddad's report. This means that currently, the respondent's title already extends to include the disputed land. Therefore, the weight of the evidence required of the appellant to prove its right to ownership of the disputed land will be the same as that required of it after the re-registration is complete (para. [24] of the judgment).

(iv) As it relates to the appellant's contention that it would suffer irremediable losses upon completion of the re-registration, there is redress under section 162 of the RTA for persons so aggrieved like the appellant. Accordingly, it seems likely that the appellant's recourse in an action such as this would be to recover damages pursuant to that statutory provision (para. [25] of the judgment).

(v) There is sufficient material that justifies the discharge of the interim injunction restraining the respondent in its dealing with its property. There was no reasonable justification for the continuation of the interim injunction and the interests of justice would be best served by the discharge of it where documentation material to the claim was not before the court (para. [26] of the judgment).

[18] The reasons for concurring in the court's decisions with respect to the fresh evidence application, the appeal and the counter-appeal will now be outlined.

The fresh evidence application

[19] In or about May 2019, the Registrar of Titles provided the parties with what is termed an "Independent Investigative Survey Report" dated 7 May 2019, prepared by Mr Christopher Williams, Commissioned Land Surveyor from the Surveys and Mapping Division ('the investigative report'). The investigative report was to assist the parties in a joint meeting facilitated by the Registrar of Titles to resolve the land dispute between them.

[20] During his investigations, Mr Christopher Williams assessed the competing pre-checked survey diagrams numbered 405951 and 400909 of commissioned land surveyors, Mr Haddad (for the respondent) and Mr Benjamin Bloomfield (for the appellant), respectively; the boundaries of the respondent's land; and the certificate of title for the respondent's land. Mr Williams concluded in the investigative report that:

(1) the certificate of title registered at Volume 827 Folio 74, which contains the respondent's lands, is in error as the boundary descriptions are irreconcilable with the estimated area of the land stated in it;

(2) the pre-checked survey diagram of Mr Haddad (405951) has circumscribed unregistered lands belonging to Mr Albert Teimer Karram; and

(3) the lands contained in the pre-checked diagram of Mr Bloomfield (400909) form all or part of the unregistered lands belonging to Albert Teimer Karram.

[21] The appellant filed its application to adduce fresh evidence contending that the investigative report was crucial to its claim in the Supreme Court as well as the appeal pending before this court and for that reason it ought to be permitted to adduce it as fresh evidence. The appellant relied on the affidavit of Reverend Dr Peter Garth, its First Vice President, in which was exhibited the investigative report.

[22] The respondent, however, did not agree with that contention. In a nutshell, it contended, contrariwise, that the investigative report should not be adduced as fresh evidence because it was interim in nature and did not conclusively determine the boundary dispute. It relied on the affidavit evidence of its Chief Executive Officer, Mr Robin Levy.

[23] In considering the fresh evidence application, the parties' evidence and the opposing arguments, the narrow question for this court was whether, in all the circumstances of the case and the applicable law, the appellant should be permitted to adduce the investigative report as fresh evidence at the hearing of the appeal. We concluded that the law, facts and circumstances of the case and the reasons for the decision of the learned judge appealed against, did not support the grant of the application for the fresh evidence to be received. I shared that viewpoint for reasons that will now be summarised.

The law

[24] There is no express provision in the Judicature (Appellate) Jurisdiction Act or the Jamaica Court of Appeal Rules ('the CAR'), which grants the court power to admit fresh evidence on appeal in civil proceedings, whether after a final decision or a decision made in interlocutory proceedings.

[25] This court, however, has permitted fresh evidence to be adduced on an appeal in civil proceedings – be it in substantive or interlocutory matters – by reliance on common law principles. Most notably, the principles laid down in the well-known case of **Ladd v Marshall** [1954] 1 WLR 1489 have been endorsed and adopted by this court as the general principles to be applied in treating with applications to adduce fresh evidence on appeal in civil cases. It should be noted, within this context, that although the Supreme Court of Jamaica Civil Procedure Rules, 2002 ('the CPR') do not make express provision for fresh evidence applications, it is accepted that the **Ladd v Marshall** principles are not in conflict with the overriding objective of the CPR, which is embodied in the CAR.

[26] In **Darrion Brown v The Attorney General of Jamaica and others** [2013] JMCA App 17 ('**Darrion Brown v AG**'), Phillips JA referenced the case of **Mostyn Neil Hamilton v Mohamed Al Fayed** [2000] EWCA Civ 3012 in which Lord Phillips MR, in delivering the judgment of the court, made this statement in relation to the amended rule in the UK CPR:

> "…**We consider that under the new, as under the old, procedure special grounds must be shown to justify the introduction of fresh evidence on appeal**. **In a case such as this, which is governed by the transitional provisions, we do not consider that we are placed in the straightjacket of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in the light of the overriding objective of the new CPR. The old cases will, nonetheless remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of**

> **disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective**. In adopting this approach we are following the guidance to be found in the judgment of May L.J in **Hickey v Marks** (6 July 2000), of Morritt V-C in **Banks v Cox** (17 July 2000) and of Hale L.J. in **Hertfordshire Investments Ltd v Bubb** [2000] 1 WLR 2318." (Emphasis added)

[27] At para. 13 of his judgment, Lord Phillips MR continued to helpfully opine:

> "**These principles have been followed by the Court of Appeal for nearly half a century and are in no way in conflict with the overriding objective**. In particular, it will not normally be in the interests of justice to reopen a concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result." (Emphasis added)

[28] Therefore, the **Ladd v Marshall** principles are consonant with the interests of justice as well as the overriding objective of the CPR in the consideration of fresh evidence applications in civil cases. Consequently, the applicability of **Ladd v Marshall** to this jurisdiction still subsists. This is why, despite the passage of the CPR (and by parity of reasoning, the CAR), a consideration of the **Ladd v Marshall** principles is always treated by this court as the starting point in considering fresh evidence application in civil proceedings.

[29] **Ladd v Marshall** has established that the court will exercise its discretion to receive fresh evidence only if the following conditions are satisfied:

(1) the evidence the applicant seeks to adduce was not available and could not have been obtained with reasonable due diligence at the trial;

(2) the evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive; and

(3) although the evidence itself need not be incontrovertible, it must be such as is presumably to be believed or apparently credible.

[30] Although fresh evidence is admissible at common law and not by virtue of the CAR, there is authority from this court which suggests that the court is not bound in a straightjacket to apply the **Ladd v Marshall** principles, and particularly so, in interlocutory proceedings. For instance, in **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26, the court opined that the inclusion of new evidence is a matter for the discretion of the court. The primary consideration, according to the court, is that justice is done.

[31] In **Russell Holdings Limited v L&W Enterprises Inc and another** [2016] JMCA Civ 39, a distinction was made between an application to admit fresh evidence following a trial or a hearing on the merits and an application to adduce fresh evidence in interlocutory proceedings. It is stated that the **Ladd v Marshall** principles are strictly applied to the former but not the latter. The court opined that it is unnecessary to strictly apply the **Ladd v Marshall** principles to decisions in interlocutory proceedings. The court also cited the case of **Canada Trust Company and another v Stolzenberg and others (no 4)** [1998] 1 All ER 318 and noted that in considering the application to adduce fresh evidence, these factors should be considered:

a. the nature of the interlocutory application;

b. the reason why the evidence was not adduced in the court below;

c. the opportunity provided for putting in the evidence in the court below; and

d. the nature of the evidence sought to be put in.

[32] Having considered the various authorities, it may be said that there is no real conflict among them with respect to the considerations of the court in permitting fresh evidence to be adduced in civil proceedings. **Ladd v Marshall** is still applicable to fresh

evidence applications to this court and is invariably treated as the starting point in fresh evidence applications in civil cases. As the authorities have established, the principles are still aimed at satisfying the interests of justice. Therefore, consistent with the long-established practice of this court and the grounds relied on by the appellant in its application, the **Ladd v Marshall** principles were considered an apt starting point in treating with the application before us.

[33] The appellant stated that its application for permission to adduce fresh evidence was based on the following grounds:

> "1. The evidence sought to be adduced herein is evidence which could not have been obtained with reasonable diligence for use at the hearing of the application to discharge the interim injunction as the report was requested, completed and produced under the remit and completely at the election of the Survey and Mapping Division of the National Land Agency after the learned Judge's decision to discharge the interim injunction was handed down.
>
> 2. The evidence sought to be adduced is such that had it been given at the time of the hearing of the Notice of Application for Court Orders to Discharge the Interim Injunction, it would likely have had an important influence on the result of same. The Investigative Survey Report concludes that Certificate of Title registered at Volume 827 Folio 74 which contains the [respondent's] lands is in error, as the boundaries endorsed thereon are irreconcilable with the area of the land given. There is an error on the endorsements.
>
> 3. The evidence sought to be adduced is credible. It is an independent and objective assessment of the boundaries of the lands in dispute by a Commissioned Land Surveyor of the Survey and Mapping Department of the National Land Agency.
>
> 4. It is just in all circumstances to grant the orders sought herein.

5. The overriding objective favours the grant of the orders herein."

[34] Grounds 1 to 3, on which the application was brought, reflect the criteria to be satisfied in accordance with **Ladd v Marshall**. Accordingly, the enquiry as to whether permission should be granted was conducted by reference to those grounds, which were examined in turn.

(i) Whether the evidence could not have been obtained with reasonable diligence for use at the hearing of the application to discharge the interim injunction

[35] The investigative report was not completed until May 2019, which would have been after the learned judge's decision. Therefore, it was not available at the time of the hearing in the Supreme Court. The appellant maintained that it could not have been obtained with reasonable diligence as it was procured completely at the election of the NLA without consultation with either party to the proceedings.

[36] The respondent countered that while the investigative report was not available, the appellant could have obtained it with reasonable diligence. It contended that the appellant was aware of the competing survey reports since 2018 but waited until after the hearing of the application to discharge the interim injunction to seek clarification. It was the request for clarification that precipitated the preparation of the report by the NLA. The respondent argued that having taken issue with Mr Haddad's survey report from 2018, and having been aware of the competing reports from then, the appellant could have sought clarification prior to the hearing of the application to discharge the interim injunction. Therefore, it failed to satisfy the first limb of **Ladd v Marshall**.

[37] The submissions of the respondent were accepted in some respects. It is accepted that the appellant had been aware of the discrepancies between the respondent's certificate of title and the survey reports obtained by the parties before the claim was initiated and the injunction sought. It had ample opportunity to seek clarification from the Registrar of Titles or the NLA before seeking the injunction. Therefore, with

reasonable diligence, this investigative report or any other in similar terms could have been obtained.

[38] However, even if it may be fair to say, in acceptance of the appellant's arguments, that this specific investigative report (as distinct from any other) could not have been obtained with reasonable diligence because it emanated from the direct request of the Registrar of Titles, this would not be enough for the application to succeed. The preconditions for the grant of permission to adduce fresh evidence are cumulative, and so the appellant must satisfy each of them. Therefore, the court was obliged to consider the second **Ladd v Marshall** criterion, that is, whether the investigative report, if adduced at the hearing, would probably have influenced the outcome of the application for discharge of the interim injunction, even if not decisive.

(ii) Whether the evidence is such that, if given, it would probably have had an important influence on the outcome of the application for discharge of the interim injunction

[39] It is in respect of this criterion that the court found that the appellant faced an insurmountable hurdle. The investigative report noted that the certificate of title for the respondent's land described the land by reference to its boundaries as well as by an estimated size. At para. 7 of the report, headed, "Conclusion", it is stated that:

> "…The description of the boundaries therein and the area given are NOT describing the same property. It is either the described boundaries that are in error or the area given that is in error. The source of error at this time could not be determined."

[40] Counsel for the appellant, Miss Smith, submitted that the investigative report would have had an important influence on the result of the decision of the lower court. According to counsel, the report had concluded that the certificate of title for the respondent's land is erroneous, as the boundaries endorsed thereon are irreconcilable with the size of the land stated. Therefore, "as an independent finding of qualified personnel, acting on the mandate of the executive agency for national land records, the

report would undoubtedly have changed the way" the learned judge viewed the evidence and position of the respective parties.

[41] Those submissions were not accepted. Instead, we found as being more persuasive the submissions of counsel for the respondent, Mrs Gentles-Silvera, that the report would have had no influence on the decision of the learned judge in the light of the issues raised for determination and the learned judge's treatment of them.

[42] The investigative report was considered against the background of the learned judge's treatment of the application to discharge the interim injunction within the context of the applicable law. The first point of departure in considering the appropriateness of granting injunctive relief is the Judicature (Supreme Court) Act, section 48(h), which empowers the Supreme Court to grant an injunction by an interlocutory order "in all cases in which it appears to the Court to be just or convenient that such order should be made". The applicable law also includes the well-settled principles that govern the grant of an interlocutory injunction as laid down in the well-known cases of **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504 ('**American Cyanamid**') and **National Commercial Bank Jamaica Limited v Olint Corp. Limited** [2009] UKPC 16 ('**NCB v Olint**').

[43] There is no question that the investigative report was inconclusive and could not have been used to ultimately determine the question in issue between the parties. The learned judge had the survey diagram of Messrs Bloomfield and Haddad and the evidence adduced by the parties. Mr Robert Levy at para. 5 of his affidavit in support of the application to discharge the interim injunction, established that although the respondent's certificate of title described the size of the respondent's land to be 123 acres more or less, the 1995 sale agreement for the land showed that Mr Stanley Karram sold 276 acres of land to the respondent at a price of $23,340.00 per acre and that "the said purchase price [would have been] adjusted proportionately if the acreage [exceeded] or [did] not amount to 276 acres".

[44] The sale agreement itself shows that there was a discrepancy regarding the size of the land stated in the certificate of title and that stated by the parties in the sale agreement, but the description by boundaries was apparently accepted by the parties as being consistent. Mr Haddad's report established that the size of the respondent's land was not as stated in its certificate of title but that the description of the land accorded with the old iron pegs on the ground delineating the boundaries with the neighbouring lands. Mr Haddad was led to opine that "the description of the boundary of Volume 827 Folio 74 agreed with the adjoining neighbours as set out in our plan". He concluded that it was the described size of the land that was erroneous. There was also evidence before the learned judge that Mr Haddad's diagram was consistent with the earlier survey diagram of Mr Earle Cooke that was prepared as far back as 1951.

[45] The learned judge found that Mr Haddad's report was material to the application for the interim injunction but that the appellant had not disclosed it to the court at the time he granted the interim injunction in the absence of the respondent. Furthermore, the evidence of the respondent before the Supreme Court and this court was that the investigative report did not take into account the earlier survey of Mr Earle Cooke which showed the size of the respondent's land to be more than what is stated in the certificate of title, having regard to the established physical boundaries.

[46] Additionally, as indicated by Mr Robert Levy at paras. 6 and 7 of his affidavit in response to the application to adduce fresh evidence:

> "Mr. Calvin Thompson admitted that all relevant documentation on which [the respondent] relies to assert its interest in and ownership of the subject lands, such as the prechecked survey plan of Earl Cooke, had not been reviewed or considered in the preparation of the Report as the NLA did not have copies of those documents. At the meeting, the clear position was that the Report was inconclusive as it could not identify the source of the alleged error, nor could a determination be reached as to which of the descriptions given in the title, that is by boundaries or acreage, should be accepted, without more. Accordingly, it was suggested that a further meeting be held with the respective land surveyors

> and a representative of the Survey and Mapping Department of the NLA where all the pertinent documents could be reviewed, and an update provided by NLA."

[47] As is seen, the investigative report did not have regard to all documentation relevant to the respondent's land and was inconclusive in its findings. Therefore, if the investigative report were available to the learned judge at the hearing, it could not have served to destroy the conclusions drawn by Mr Haddad in his report. It was not likely to have affected or influenced the learned judge's conclusion that the appellant had failed to disclose material evidence at the time the interim injunction was granted, which was a significant reason for his decision to discharge the interim injunction.

[48] Furthermore, the learned judge discharged the interim injunction on an additional basis, which was the indefeasibility principle embodied in the RTA. He concluded that the indefeasibility principle availed the respondent as the registered proprietor of the disputed land, rendering it just for the interim injunction to be discharged. Given the terms and effect of the investigative report, we concluded that if it were adduced at the hearing before the learned judge, it was not likely to have had any influence on this particular conclusion.

[49] It is observed even further that although the learned judge considered the indefeasibility of the respondent's title, he was silent as to whether he found a serious issue to be tried following his analysis of the law. But even assuming that he had found a serious issue to be tried (to the benefit of the appellant), he was still entitled to consider whether, if the appellant succeeded on its claim at trial, damages would have been an adequate remedy for the appellant if it were to suffer any losses as a result of the discharge of the interim injunction. Within this context, the learned judge took account of section 162 of the RTA, which states:

> "162. **Any person deprived of land, or of any estate or interest in land**, in consequence of fraud, or through the bringing of such land under the operation of this Act, or by the registration of any other person as proprietor of such land, estate or interest, or **in consequence of any error or**

> **misdescription in any certificate of title**, or in any entry or memorandum in the Register Book, **may bring and prosecute an action for the recovery of damages against the person on whose application such land was brought under the operation of this Act, or such erroneous registration was made, or who acquired title to the estate or interest through such fraud, error or misdescription**:
>
> Provided always that, except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription, in the application of such person to bring such land under the operation of this Act, or to be registered as proprietor of such land, estate or interest, or in any instrument signed by him, such person shall upon a transfer of such land *bona fide* for valuable consideration, cease to be liable for the payment of any damage beyond the value of the consideration actually received, which damage but for such transfer might have been recovered from him under the provisions herein contained; and in such last mentioned case, and also in case the person against whom such action for damages is directed to be brought as aforesaid shall be dead, or shall have been adjudged bankrupt, or cannot be found within the jurisdiction of the Supreme Court, then and in any such case, such damages, with costs of action, may be recovered out of the Assurance Fund by action against the Registrar as nominal defendant:
>
> Provided that in estimating such damages, the value of all buildings and other improvements erected or made subsequent to the making of a contract of sale binding on the parties thereto, or subsequent to the deprivation shall be excluded." (Emphasis added)

[50] It follows from this statutory provision and the evidence before the learned judge, that was presented by the respondent (who was then given an opportunity to be heard), that the position of the learned judge on the appropriateness and availability of damages as a remedy was not likely to change. The inconclusive investigative report would have had no bearing on the question of adequacy of damages. Accordingly, it was the view of the court that this aspect of the learned judge's decision, regarding the applicability of

section 162 of the RTA, was not likely to have been influenced or affected by the investigative report in any way beneficial to the appellant.

[51] Finally, the learned judge also concluded that "the current position" of the appellant would have been no different if the process of re-registration had been completed. As he put it:

> "[24] …currently, the [respondent's] title already extends to include the disputed land and, therefore, the weight of the evidence required of the [appellant] to prove its right to ownership of the disputed land, will be the same as that required of it, after the re-registration is completed."

[52] In our view, this conclusion was not likely to have been different even if the learned judge had the benefit of the investigative report given all the evidence before him and the relevant law to which he had regard. The investigative report, at best for the appellant's case, would have shown that the respondent's certificate of title had already included the disputed property by virtue of the registered boundary description even if not by the reference to the estimated size. Obviously, what the appellant wanted the learned judge to do was to accept, as a fact at the interlocutory stage, that the size stated in the certificate of title to be 123 acres 'more or less' is correct but the boundaries, which would point to a larger parcel of land, are incorrect. This the learned judge could not properly do. Therefore, the learned judge's conclusion that the weight of the evidence required to prove the right to ownership of the disputed property would be the same as that required of it after the re-registration is complete would, in all likelihood, have remained even with the availability of the investigative report at the hearing. Again, the investigative report would have had no influence on this aspect of the learned judge's reasoning which led to his decision to discharge the interim injunction.

[53] In the end, the learned judge opined that the interests of justice favoured the discharge of the interim injunction rather than its continuation. The investigative report would have had no bearing on this conclusion of the learned judge and the outcome of the matter in the court below.

[54] Accordingly, from all indications, the learned judge's decision would not have been different had he received the investigative report at the time of the hearing for the discharge of the interim injunction.

[55] The appellant, therefore, failed to satisfy the second pre-condition stipulated by **Ladd v Marshall** for the investigative report to be accepted as fresh evidence at the hearing of the appeal.

(iii) Whether the evidence was presumably to be believed or apparently credible

[56] In light of the conclusion regarding the second **Ladd v Marshall** criterion, it was not necessary for the court to consider whether the proposed evidence was presumably to be believed or apparently credible. Not only was the proposed evidence inconclusive, but it can safely be said that even if it were found to be credible, that could not have assisted the appellant upon an application of the **Ladd v Marshall** principles because all the pre-conditions must be satisfied and it had fallen at the second hurdle.

The applicability of the overriding objective

[57] The appellant had prayed in aid the overriding objective of the CPR but, strictly speaking, this is inapplicable to a consideration of fresh evidence applications on appeal. It is well established that the CPR (and by extension the CAR) have not conferred power on the court to receive fresh evidence on appeal. Therefore, the overriding objective with all it entails in Part 1 of the CPR (applicable to this court by virtue of rule 1.1(10)(a) of the CAR) would not apply to the exercise of the court's discretion in treating with a fresh evidence application. As is well known, the court is to give effect to the overriding objective only when the court is interpreting or exercising any power under the rules themselves (rule 1.2 of the CPR). The admissibility of fresh evidence in this court does not engage the CAR.

[58] As was observed by Phillips JA in **Darrion Brown v AG** within the context of the consideration of fresh evidence applications:

> "[37] The approach with regard to the exercise of the discretion of the court utilizing the overriding objective has arisen subsequent to the amendment of the [UK] Civil Procedure Rules (introduced by the Civil Procedure (Amendment) Rules 2000)…"

There is no such amendment to our CPR that would render the court's reception of fresh evidence in civil proceedings subject to the rules of court.

[59] This court in **Louis Campbell v Ambiance Resort Properties Inc** [2022] JMCA Civ 4 had affirmed and applied these same principles in treating with similar submissions regarding the applicability of the overriding objective in cases dealing with applications to adduce fresh evidence on appeal. In that case, the argument that the court could permit fresh evidence to be adduced merely on the basis of the overriding objective was rejected.

[60] Accordingly, we concluded in this case that the appellant, having failed to satisfy the **Ladd v Marshall** prescriptions, could not pray in aid the overriding objective of the CPR for the investigative report to be received on appeal as fresh evidence.

Conclusion

[61] In the end, the appellant failed to establish that the investigative report was admissible as fresh evidence on appeal, primarily, because it was not likely to have influenced or affected the learned judge's decision and the outcome of the application to discharge the interim injunction in the Supreme Court. It was also not in keeping with the interests of justice to permit evidence to be adduced in this court that would have had no bearing on the issues to be resolved on the substantive appeal.

[62] It was for the foregoing reasons that I agreed that the application to adduce fresh evidence should be dismissed with the attendant costs of the application awarded to the respondent.

The appeal

[63] I now turn to outline the court's reasons for dismissing the appeal.

[64] The appellant's appeal against the learned judge's decision was on the following grounds:

> "a) …
>
> b) The Learned Judge erred in fact in determining conclusively that the surveyor's diagram of Richard Haddad revealed the true size of the [respondent's] land.
>
> c) The Learned Judge erred in fact and law when he failed to take into consideration the Pre-Checked diagram #400909 of Benjamin Bloomfield together with the valuation roll #18706009002 for the unregistered lands in finding conclusively that the said disputed lands belonged to the [respondent].
>
> d) The learned Judge erred in law in embarking on a full determination of the substantive claim in making his decision.
>
> e) The Learned Judge erred in law in handing down a final decision on an application for interim injunction.
>
> f) The Learned Judge erred in law in finding that in the circumstances of this case, and the undisclosed stage of the [respondent's] re-registration application, that the injunction obtained by the [appellant] ought to be discharged.
>
> g) The Learned judge erred in law in determining that the only recourse available to the [appellant] was an action to recover damages.
>
> h) The Learned Judge erred in law in providing the [respondent] a secondary opportunity to adduce evidence regarding damages when the time to adduce such evidence would properly be during the determination of the interim relief.
>
> i) …"

[65] At the hearing, the appellant was granted permission to abandon ground h). In written submissions, counsel for the appellant briefly restated the appellant's basis for the appeal in the following terms:

> "(i) the Learned Judge erroneously interpreted and/or applied the principal considerations laid down in [**American Cyanamid**] in discharging the interim injunction and (ii) he conclusively and erroneously determined the substantive issue in the Claim."

[66] The core issue for the court's determination was whether the learned judge erred in discharging the interim injunction. Counsel for the parties both agreed that this question must be examined against the background of the principles governing the grant of interim injunctions as enunciated in **American Cyanamid** and affirmed by the Judicial Committee of the Privy Council in **NCB v Olint**. These principles may be reduced to three key considerations:

(i) whether there is a serious question to be tried;

(ii) if there is a serious issue to be tried, whether damages would be an adequate remedy; and

(iii) if damages would not be an adequate remedy or there is doubt as to the adequacy of damages as a remedy, whether the balance of convenience favoured the grant or refusal of the interim injunction.

[67] Before addressing the question as to whether the learned judge erred in his decision, it is considered necessary to explicitly note the standard of review applied by the court in considering the learned judge's decision that emanated from the exercise of his discretion. In this regard, the court was guided by its long-standing endorsement of the principles articulated by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor Productions Ltd v Hamilton**'), regarding the function of an appellate court in reviewing the exercise of the discretion of a judge at first instance in interlocutory proceedings.

[68] In **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, Morrison JA (as he then was), in referring to the "well-known caution" of Lord Diplock in **Hadmor Productions Ltd v Hamilton**, stated that:

> "[20] 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'."

[69] Therefore, this court could only have properly interfered with the decision of the learned judge if the exercise of his decision had fallen within the ambit of the principles stated above. It was against that background that the learned judge's treatment of the respondent's application to discharge the interim injunction was examined.

(i) Whether there was a serious issue to be tried

[70] The first consideration for the grant of an interim injunction is that there is a serious issue to be tried. Concerning this criterion, Lord Diplock in **American Cyanamid**, at page 510, stated that:

> "…**The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried**.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial… **So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of**

convenience lies in favour of granting or refusing the interlocutory relief that is sought." (Emphasis added)

[71] Accordingly, to find that there was a serious question to be tried, the learned judge would have had to be satisfied that the matters raised in the appellant's fixed date claim form were not frivolous or vexatious and that the appellant's application for an interim injunction disclosed that it had a real prospect of succeeding in its claim for a permanent injunction at the trial.

[72] Counsel for the appellant, Miss Smith, submitted that there were serious issues to be tried in the claim, as regards ownership of the disputed land. She argued that error and misdescription of title were exceptions to the indefeasibility principle and those were in issue and should be determined before the re-registration process was completed by the respondent. The appellant, she said, should not be required to mount a claim under section 162 of the RTA for relief in the aftermath of the re-registration.

[73] In response, counsel for the respondent, Mrs Gentles-Silvera, argued that the learned judge did not make a final decision that an injunction should never be granted as that decision would ultimately be for the trial judge. She submitted that the appellant had not demonstrated that the disputed land is part of the lands owned by it such that the learned judge would have been convinced that there is a serious issue to be tried. Relying on para. 20 of the case of **Pottinger v Raffone** [2007] UKPC 22, and section 161 of the RTA, counsel submitted that the respondent's title, having been registered by estimation since 1952, is indefeasible. Therefore, the appellant's submission that the respondent will only enjoy indefeasibility of title upon re-registration of its title was without merit.

[74] On this premise, counsel submitted that the learned judge was correct in discharging the interim injunction as the test laid down in **American Cyanamid** had not been satisfied.

[75] At para. [18] of his judgment, the learned judge highlighted that:

> "The thrust of the [respondent's] submission is that the injunctive relief obtained by the [appellant], ought not to have been granted as there was no serious issue to be tried, as the defendant possesses an indefeasible title to their property which also includes the disputed land."

However, as noted earlier in this judgment, it is observed that although the learned judge considered and evidently accepted the indefeasibility of the respondent's title and explicitly stated that he did not agree with the contention of the appellant's counsel that indefeasibility of title did not apply to the disputed land (para. [22] of the judgment), he remained silent on the question of whether there was a serious issue to be tried. Also, he went on at para. [25] of his judgment to indicate the provisions of section 162 that provide a remedy for persons aggrieved like the appellant. He concluded that:

> "[25] … Accordingly, it seems likely that the claimant's proper recourse in an action such as this, would be an action to recover damages pursuant to section 162 of the RTA. I wish, however, to make it clear that at this stage, I am making no final or conclusive pronouncement in that respect, since the claim, as filed, still subsists."

[76] Having examined the applicable law and the submissions of counsel, it was observed that the resolution of whether there was a serious issue to be tried would not be particularly relevant to the resolution of the appeal because the decision to discharge the interim injunction was not based on that criterion. As seen above, the learned judge having considered section 162 of the RTA concluded that the likely remedy lies in the statutory remedy which provides for damages.

[77] It seems then, following on the lead of the **American Cyanamid** guidelines, that even if the learned judge had not found a serious issue to be tried, his decision would not have been wrong on that basis because he had examined the issue regarding the availability (which is taken to extend to the adequacy) of a statutory remedy in damages. But, even if he had found a serious issue to be tried (in the appellant's favour), he, nevertheless, would have had to proceed to consider the adequacy of a remedy in damages. Therefore, the appellant would not have been prejudiced by the learned judge's

failure to expressly declare whether or not there was a serious issue to be tried. The appellant's complaint regarding the failure on the part of the judge to determine whether there was a serious issue to be tried is not enough to impeach his decision.

(ii) Whether damages were adequate

[78] The second key consideration for the grant (and by extension the discharge) of an interim injunction pertains to the question regarding the adequacy of damages. As already demonstrated above, it is indisputable that the learned judge formed the view that a remedy in damages was available to the appellant and, therefore, would have been adequate, albeit that he qualified his observation by stating that he was not making a "final or conclusive pronouncement" in that respect, "since the claim, as filed, still subsisted".

[79] In the determination of the question whether damages would be an adequate remedy, Lord Diplock in **American Cyanamid**, at page 510, stated that:

> "…the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. **If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained** by being prevented from doing so between the time of the application and the time of

> the trial. **If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction**." (Emphasis added)

[80] Therefore, the first consideration on the question of the availability of damages as a remedy was whether damages would be an adequate remedy for the appellant. The second consideration would be whether the respondent was in a financial position to pay. If the answers to both questions were in the affirmative, then the learned judge would have been correct in discharging the interim injunction no matter how strong the appellant's claim appeared to be.

[81] Counsel for the appellant argued that during the hearing of the application to discharge the interim injunction, the learned judge failed to sufficiently apply his mind to the conduct of an exercise regarding the adequacy of damages. She contended that none of the affidavits filed on behalf of the respondent provided any evidence to indicate that the respondent had suffered loss or damage as a result of the grant of the interim injunction.

[82] Counsel further submitted that the learned judge failed to correctly assess the circumstances of the case, particularly, the consequences of discharging the interim injunction. She argued that without the interim injunction, there was very little to prevent the respondent from proceeding with its re-registration application and, should this occur, and the trial court subsequently determines that the disputed land forms part of the estate of Mr Albert Teimer Karram, damages would be insufficient to compensate the appellant for the loss.

[83] In response, counsel for the respondent submitted that, in the circumstances of this case, the withholding of the interim injunction would not result in irreparable damage to the appellant as an award of damages would provide an adequate remedy for any loss caused if the appellant succeeded in establishing its claim at the trial. Counsel contended that pursuant to section 162 of the RTA, even where a person has been deprived of land,

save in certain circumstances, the title stands but damages are recoverable. Counsel submitted that had the interim injunction been retained, the respondent would have been deprived of the use of its property and the rights attendant on ownership. She argued that in the circumstances, the appellant would not suffer greater harm, particularly, as any loss suffered could be compensated by damages.

[84] In **The Registrar of Titles v Melfitz Limited and Keith Donald Reid** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 9/2003, judgment delivered 29 July 2005, Smith JA outlined, on page 8, that:

> "Section 162 provides for an action for damages by any person wrongfully deprived of land in certain defined circumstances. This section…provides a remedy for persons who suffer from the effects of the indefeasibility of title under the Torrens system.
>
> …
>
> This section has been described as being 'confused and ill-drafted.' Its format is Victorian and lacks clarity. What seems tolerably clear, though, is that the section creates a statutory cause of action. It sets out the circumstances under which a person deprived of land may bring an action for damages and identifies the person to be made a defendant."

[85] Accordingly, if at trial the appellant is successful in its contention that it is deprived of its interest in the disputed land due to an error or misdescription in the respondent's certificate of title, then the appellant has a remedy in damages that it may pursue under section 162 of the RTA. It follows then that any loss occasioned by the deprivation of its property between the time the interim injunction was discharged and the trial of the claim could be compensated in damages.

[86] Although it is correct that there was no evidence that the respondent had the ability to pay, this is not fatal to the decision to discharge the interim injunction. The evidence shows that the respondent has significant landholding, of at least 123 acres (which is not in dispute), that it was seeking to sell. This would suggest it was not without

the means to satisfy an award of damages for losses flowing from the discharge of the interim injunction. Furthermore, at no time during its submissions to this court did the appellant raise as an issue, the inability of the respondent to pay damages. Therefore, there is nothing to suggest that the respondent was not in a financial position to compensate the appellant for any loss resulting from the discharge of the interim injunction. Additionally, the statutory remedy provided by section 162 of the RTA is not dependent on proof of the registered proprietor's ability to pay.

[87] We, therefore, agreed with the submissions of counsel for the respondent that in the circumstances of this case, even if there was a serious issue to be tried, an award of damages would provide an adequate remedy for any loss caused as a result of the discharge of the interim injunction, if the appellant were to succeed in establishing its claim at the trial. It would have been open to the learned judge to also reasonably conclude that the respondent was in position to pay such damages.

[88] Consequently, on this basis, the learned judge would have been correct in discharging the interim injunction.

(iii) Whether the balance of convenience favoured the retention or discharge of the interim injunction

[89] Counsel for both parties made submissions on this question, each arguing that the balance of convenience lay in favour of their client. However, it was made clear by Lord Diplock in **American Cyanamid**, at page 511, that:

> "It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises."

Therefore, having already concluded that a finding that damages would be an adequate remedy for the appellant would have been unassailable, I formed the view that it was unnecessary to embark on the question of where the balance of convenience lay.

[90] However, it appears from the judgment that the learned judge's determination of whether to discharge the interim injunction was primarily based on a consideration of (a) "whether there was any material change in the circumstances that would cause the re-consideration of the [interim injunction]" and; (b) which decision was more likely to "produce a just result" (see para. [20] of the judgment). In so far as his determination goes regarding which decision would have produced a just result, the learned judge must have conducted a balancing exercise taking into account some relevant factors that would inform where the balance of convenience lay. The extent to which a party may be compensated by an award of damages or prejudiced by the grant or refusal of an injunction are material factors in determining where the balance of convenience lies. The learned judge clearly had regard to these two considerations, even if he had not expressly stated them to be part of his consideration of the balance of convenience.

[91] I would note within this context, the dicta of Lord Hoffmann in **NCB v Olint** who, in delivering the judgment of the Board, stated:

> "[16] …It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial… The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. **At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result**…
>
> **[17] …The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other**…
>
> **[18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is**; the likelihood of such prejudice actually occurring; **the extent to which it may be compensated by an award of damages** or enforcement of the cross-undertaking; **the likelihood of either party being able to satisfy such an award;** and the likelihood that the injunction will turn out to have been wrongly granted or

> withheld, that is to say, the court's opinion of the relative strength of the parties' cases." (Emphasis added)

[92] With this guidance in mind, this court could not, in the circumstances, fault the learned judge in his finding at para. [26] of the judgment that:

> "There is no reasonable justification for the continuation of the [interim] injunction, and, the interests of justice would be best served in the discharge of the said injunction obtained by the [appellant], in circumstances where documentation material to the present claim were not before this court…"

He clearly formed the view on the material before him and the provisions of the RTA that the least irremediable prejudice would be caused by discharging the interim injunction. He cannot be faulted.

[93] The appellant's complaint that the learned judge decided the substantive claim is without merit. He had a right to examine the issues within the context of the applicable law to determine whether a viable issue exists to warrant the grant or retention of the interim injunction. It was permissible for him to form a provisional view of the likely outcome of the claim at trial regarding, in particular, the grant of a permanent injunction.

Conclusion

[94] There was no basis to impeach the decision of the learned judge on the legitimate observations and findings he made in determining whether the grant or discharge of the interim injunction would have been just and convenient as required by law.

[95] Having regard to the standard of review established in **Hadmor Productions v Hamilton**, there was no justifiable basis for this court to interfere with the exercise of the learned judge's discretion and allow the appeal.

[96] The appeal was, therefore, dismissed.

The counter-appeal

[97] The respondent's counter-notice of appeal sought to affirm the decision of the learned judge on the following grounds:

> "1. The learned Judge was correct in discharging the injunction as the Appellant failed to disclose material facts and documents and also misrepresented facts at the hearing of the application for injunction on the 13th December, 2018.
>
> 2. The [respondent] was deprived of an opportunity to bring forward evidence and make submissions on the hearing of the Application for Injunction. The application was served on the Respondent on the 13th December, 2018 at 8:50 a.m. for a hearing fixed for 13th December, 2018 at 11:00 a.m. which was too short a time for the Respondent to appear and/or get legal representation. The matter was in effect heard exparte although the Respondent was given notice.
>
> 3. The registration of the Certificate of Title to the said property is conclusive evidence of the Respondent's entitlement to the land and the Appellant failed to show that it fell within any of the exceptions recognised under the Registration of Titles Act.
>
> 4. The injunction ought to be discharged as there were no serious issues to be tried."

[98] The counter-appeal was allowed on the three substantive grounds: 1, 3 and 4. There was no need to consider ground 2, which did not touch the substance of the decision appealed against.

Ground 1 – failure to disclose material facts

[99] The respondent asserted that the appellant had failed to disclose material facts and documents and also misrepresented facts at the hearing of the application for the interim injunction. The learned judge had concluded at para. [17] of the judgment that as a result of the respondent's absence from the hearing for the grant of the interim injunction, "certain documents, material to the consideration of the granting of the

[interim] injunction, were not placed before the court…". He did not make specific reference to the documents that were omitted from the application for the interim injunction but had singled out Mr Haddad's survey report as "one such piece of documentary evidence that would have been material" to his decision whether or not to grant injunctive relief.

[100] One crucial bit of information that was not disclosed, according to the respondent and which was not denied by the appellant, related to the size of the respondent's land. The appellant is contending that the size of the respondent's land is that which is stated in the title to be 123 acres "more or less" and so Mr Haddad's finding that the size is over 284 acres must be rejected. The respondent noted, however, that in the agreement of sale of the land by Mr Stanley Karram to the respondent, the land was described as comprising 276 acres, more or less, and the purchase price was agreed and paid by the respondent on the basis of the size stated in the agreement. It was also stated in the agreement for sale that there would be an adjustment to the price if the size was found to be different from what was paid for. This information, the respondent contended, was known by instructing counsel, who represented the estate of Mr Albert Teimer Karram in relation to this case, and also acted as the attorney-at-law for Mr Stanley Karram in the sale of the land to the respondent. She also prepared the sale agreement.

[101] The respondent, therefore, contended that a figure in excess of 123 acres, in describing the size of the land, was not raised for the first time in Mr Haddad's prechecked plan but had been raised from the time Mr Stanley Karram sold the land to the respondent in 1994/1995. The appellant's instructing attorney, it maintained, was well aware of that material fact but it was not disclosed to the learned judge on the application for the interim injunction. This information was brought to the learned judge's attention by the respondent on the application to discharge the interim injunction.

[102] The fact that there was documentation that existed prior to Mr Haddad's survey report, which had indicated that the size of the land was significantly more than what is stated in the certificate of title, coupled with the fact that the respondent actually paid

for significantly more land than that stated in the certificate of title, was additional material that the learned judge could have properly considered in deciding whether to discharge the interim injunction.

[103] Accordingly, in the face of that material fact that was not disclosed by the appellant at the time the interim injunction was granted, the decision of the learned judge to discharge the interim injunction would have been justified. The respondent's position that the learned judge's decision could be affirmed on this additional ground was accepted.

Grounds 3 and 4 – indefeasibility of the respondent's title/no serious issue to be tried

[104] In these two grounds, the respondent maintained its argument in response to the appeal that there was no serious issue to be tried as the respondent possessed an indefeasible title to its property which also included the disputed land. Counsel maintained that the appellant had not shown ownership of the disputed land and so there was no triable issue.

[105] It does appear from the learned judge's reasoning that he must have formed the provisional view (which he was entitled to do) that the appellant was not likely to be successful in procuring the grant of a permanent injunction at the trial. The fact that he explicitly accepted the indefeasibility of the respondent's title and raised the remedy under section 162, which he believed could be pursued by the appellant, would tend to suggest that he found no serious issue to be tried that could have led to the grant of a permanent injunction at trial. Accordingly, there is every reason to believe that the respondent would have been entitled to rely on such a finding for discharge of the interim injunction.

[106] Additionally, the provisions of the RTA were strongly in favour of the respondent for the discharge of the interim injunction on additional bases not demonstrably established on the reasoning of the learned judge. These relate to the circumstances of the respondent's ownership of the registered land as the third owner since the 1950s and, especially, its position as a *bona fide* purchaser for value. In this regard, the

respondent had asserted in ground 3 of the counter- notice of appeal that the appellant failed to show that it fell within any of the exceptions recognised by the RTA to justify the retention of the interim injunction against the respondent as the registered proprietor and *bona fide* purchaser for value.

[107] This was, indeed, a correct assessment of the appellant's case given the protection the RTA accords to the registered proprietor who is a *bona fide* purchaser for value, including where there is misdescription or error in his certificate of title. See, particularly, in this regard sections 161, 162 and 163 of the RTA. The learned judge did not expressly have regard to sections 161 and 163. In section 161(e), for instance, it is provided, among other things, that no action or proceedings for ejectment or recovery of possession of land can be brought against a registered proprietor, who is a *bona fide* purchaser for value, in respect of lands included in his certificate of title due to misdescription of his land or boundaries. Section 163 gives similar protection to the *bona fide* purchaser for valuable consideration of registered land against certain specified actions, including recovery of possession which is brought on the ground "that the proprietor through or under whom he claims may have been registered as proprietor through fraud or error…and this is whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land…".

[108] *Prima facie*, the respondent would be protected by the foregoing provisions of the RTA (along with those expressly noted by the learned judge) based on the documentary evidence disclosed at the hearing for the discharge of the interim injunction. Also, the appellant would have, *prima facie*, fallen within no known statutory exception to defeat the inviolability of the respondent's title afforded by these statutory provisions. In those circumstances, it would not have been just and convenient for the interim injunction to remain.

[109] Accordingly, the discharge of the interim injunction would have been justified on additional bases not expressly indicated by the learned judge.

Conclusion

[110] There were sufficient bases to hold that the counter-appeal was not misguided and should be allowed on the substantive matters raised in grounds 1, 3 and 4. Therefore, there was no further benefit to be derived in considering ground 2 especially given that ground 2 did not touch the substance of the decision appealed against.

[111] It was for the foregoing reasons that I agreed that the orders detailed at para. [5] of this judgment be made in respect of the appeal and counter-appeal.

D FRASER JA

[112] I have read the draft reasons for judgment of McDonald-Bishop JA and agree with her reasoning. There is nothing that I wish to add.

SIMMONS JA

[113] I, too, have read the draft reasons for judgment of McDonald-Bishop JA. I agree with her reasoning and there is nothing that I could usefully add.