JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00099

APPLICATION NO COA2019APP00250

BETWEEN	**BRILLIANT INVESTMENTS LIMITED**	**APPLICANT**
AND	**RORY CHINN**	**RESPONDENT**

Ms Keisha Spence and Ms Zara Lewis instructed by Zara Lewis & Co for the applicant

Michael Hylton QC and Ms Shanique Scott instructed by Hylton Powell for the respondent

28 January and 12 February 2020

IN CHAMBERS

FOSTER-PUSEY JA

[1] On 26 September 2019 Laing J handed down judgment for the respondent in a claim which had been brought against the respondent, Mrs Jennifer Messado and Miss Jennifer Braham by the applicant. The applicant appealed that order by notice of appeal filed 29 October 2019. An amended notice of appeal was filed 7 November 2019 and thereafter, a further amended notice of appeal was filed 17 December 2019. The matter now for determination is an application for an injunction against the respondent to prevent the sale of two properties pending the determination of the appeal. The relevant properties, for the purposes of this application, are comprised in Certificates of Title

registered at Volume 1296 Folio 973 (hereinafter referred to as "the Grove Park property") and that registered at Volume 1401 Folio 931 (hereinafter referred to as "the Leas Flat property").

The proceedings below

[2] To put the matter simply, the applicant's case was that, by the respondent's dealings with Mrs Jennifer Messado, attorney-at-law and Miss Jennifer Braham, one of her employees who was the sole legal shareholder and a director of the applicant, he fraudulently transferred or caused the relevant properties to be transferred to himself.

[3] The evidence at the trial established that Mrs Messado had entered into transactions with the respondent in the course of which signed transfers of the relevant properties belonging to the applicant were delivered to the respondent. The respondent ultimately lodged the transfers and the properties were transferred to him. Mrs Messado confirmed at the trial of the matter that she did not have any authority to enter into the transactions involving the applicant's properties. Summary judgment was entered against her in favour of the applicant for damages to be assessed. The learned trial judge also entered judgment in favour of the applicant against Miss Jennifer Braham on the claim for breach of trust.

[4] The nature of the transactions which led to the transfers was in great dispute before Laing J. As Laing J indicated at paragraph [77] of his judgment:

> "A significant portion of the trial was consumed with the issue of whether the transaction was a loan as asserted by Mrs. Messado or a sale with an option to purchase as [the

> respondent] had asserted. It is [the applicant's] case, that the agreements for sale, options to purchase and signed blank instruments of transfer were merely structured to mask the true nature of the transaction which was a loan to Mrs. Messado. It was also submitted that [the respondent] knew that there was no intention by [the applicant] or anyone on its behalf to divest itself of its interest in the Relevant Properties. The nature of the transaction is therefore an important element on which [the applicant] relies to prove this knowledge on the part of [the respondent] …."

[5] The applicant, in the court below, argued that a number of matters, when taken together, showed that the transaction was a loan. These included the following:

a. There was no resolution or other document authorising a loan;

b. The properties were not advertised for sale, they were tenanted or otherwise occupied;

c. The agreements for sale were prepared by Ms Long, who was the respondent's attorney at law, and not the vendor's attorney at law; additionally, the registered titles for the properties were sent to her before the agreements for sale were signed;

d. The respondent did not register his interest in the properties by lodging the transfers with the Registrar of Titles for over four years and five months;

e. The respondent did not take possession of the properties or did not even visit the properties;

f. The respondent did not take over the payment of the taxes or maintenance payments which continued to be made for and on behalf of the applicant;

g. The respondent did not give the tenant notice nor did he adopt the tenant or collect rent from the tenant; and

h. The respondent initially said he paid for the properties and later admitted that a portion of that alleged payment was a prior debt obligation of Mrs Messado to him arising from another obligation.

[6] Laing J however opined, at paragraph [93] of the judgment:

> "Therefore, resolving the nature of the transaction, by itself does not resolve the issue as to whether [the respondent] knew that Mrs. Messado was not authorised to deal with the Relevant Properties as she did."

[7] In spite of the issues outlined above, in the final analysis, the important question for determination was whether the respondent knew that Mrs Messado was not authorised to deal with the relevant properties as she did.

[8] Laing J considered all the evidence and the various issues raised in the trial including:

i. Whether the respondent knew of or participated in the fraud of Mrs Messado, including whether the respondent knew that Mrs Messado was not authorised to deal with the applicant's properties;

ii. Mrs Messado's evidence;

iii. The respondent's evidence;

iv. Whether the transaction was a loan to Mrs Messado with the relevant properties held as security or a sale by the applicant to the respondent with an option for Mrs Messado to purchase;

v. Whether the payments made by Mrs Messado were payments of the cost of the option agreements;

vi. The letters referring to a loan;

vii. Statements of account sent to the respondent by Mrs Messado;

viii. Third party correspondence which included mention of a loan;

ix. The allegation that the transaction which the respondent said was a sale was a sham;

x. The absence of evidence as to the terms of the alleged loan;

xi. The advice provided to the respondent by his attorney-at-law, Ms Long,

xii. Whether the applicant held out Mrs Messado as its agent; and

xiii. Ms Long's evidence.

[9] Laing J then concluded at paragraph [130] of the judgment:

> "Having analysed the evidence of the witnesses in this case, and for the reasons indicated previously in this judgment, I have preferred the evidence of [the respondent] and Ms Long on a balance of probabilities as it relates to the question of whether the transaction was a loan or sale with an option to purchase. I accept the submissions of Mr Hylton that in any event even if the transaction was a loan, that without more, would not amount to fraud unless [the respondent] knew Mr. Morrison was the beneficial owner of [the applicant] and that Mrs Messado was not authorised to deal with the Properties. I keenly observed the demeanour of [the respondent] as he gave his evidence and I accept his evidence that Mrs Messado said that she was the beneficial owner of [the applicant] and that he believed her when she said so. I also find that this governed his decisions and his conduct thereafter. I accept his evidence that he did not know of Mr. Morrison's involvement with [the applicant]. I concluded that he was a shrewd businessman but that he was also cautious. This was evidenced by the fact that he prudently involved Ms Long and

> obtained her legal advice. [The respondent] clearly had an interest in making money, (like most entrepreneurs), to borrow his phrase- the '*sugar for the baby'*. However, the oral and documentary evidence, viewed in its totality, does not convince me, on a balance of probabilities, that he was a knowing participant in Mrs. Messado's fraud or any other fraud, which would affect his registered interest pursuant to the Registration of Titles Act."

The appeal

[10] The applicant has outlined approximately 19 grounds of appeal, 18 of which relate to the issue of fraud and one which concerns the question as to whether the applicant was entitled to damages on the basis of conversion. Counsel appearing in the matter are agreed that the main issue for determination on the appeal is whether the learned judge ought to have found that the respondent knew of and participated in the fraud being carried out by Mrs Messado.

[11] The orders sought in the further amended notice of appeal filed on 17 December 2019 are:

> "a. The order of the Honourable Mr. Justice K. Laing made on the 26th July 2019 be set aside.
>
> b. A Declaration that the [respondent] is not a bona fide purchase[sic] for value without notice that there are equitable owners of the property comprised in Certificate of Title registered at **Volume 1401 Folio 931** of the Register Book of Titles and the property comprised in Certificate of Title registered at **Volume 1296 Folio 973** of the Register Book of Titles.
>
> c. A Declaration that Transfer No. 2125304 registered on the 16th day of May, 2018 on the Duplicate Certificate of Titles registered at Volume 1401 Folio 931 from the [applicant] to the [respondent] is null and void on the basis that it was obtained by means of fraud or other unlawful conduct

and the [respondent] is **not** a bona fide purchaser for value without notice.

d. A Declaration that Transfer No. 2125309 registered on the 16th day of May, 2018 on the Duplicate Certificate of Titles registered at Volume 1296 Folio 973 from the [applicant] to the [respondent] is null and void on the basis that it was obtained by means of fraud or other unlawful conduct and the [respondent] is **not** a bona fide purchaser for value without notice.

e. An Order pursuant to section 158 153 and 154 of the Registration of Titles Act directing that the Registrar of Title cancel the said Certificates of Title issued to the [respondent] on the grounds that it has been fraudulently or wrongfully obtained and reissue new titles in the name of the [applicant].

f. An Order preventing the [respondent], his servants, and/or agents from selling, offering by sale by way of auction or otherwise, transferring or otherwise disposing of the [applicant's] interest in **ALL THAT** parcel of land part of FOREST HILLS in the parish of Saint Andrew being the Strata Lot numbered Eight on the Strata Plan numbered Two Thousand Three Hundred and Twenty-nine and Twenty-five undivided 1/609th share in the common property therein comprised in the Certificate of Title registered at **Volume 1401 Folio 931** while Caveat Number **2128232** remains in effect.

g. An Order preventing the [respondent], his servants, and/or agents from selling, offering by sale by way of auction or otherwise, transferring or otherwise disposing of the [applicant's] interest in ALL THAT PARCEL of land part of NUMBER ONE HUNDRED AND THIRTY-SEVEN CONSTANT SPRING ROAD now known as NUMBER FIVE GROVE PARK AVENUE in the parish of Saint Andrew comprised in the Certificate of Title registered at **Volume 1296 Folio 973** while Caveat Number **2128234** remains in effect.

h. Alternatively, damages to be assessed awarded to the [applicant] against the Respondent…"

The application and related affidavits

[12] By the notice of application filed 5 December 2019 the applicant seeks interim orders in the following terms pending the determination of the appeal:

> "i. An injunction be granted restraining the Respondent by himself or his servants, employees, agents or otherwise howsoever from taking any steps whatsoever to sell, deal, dispose or part with the possession of **ALL THAT PARCEL** of land part of NUMBER **ONE HUNDRED AND THIRTY-SEVEN CONSTANT SPRING ROAD** now known as **NUMBER FIVE GROVE PARK AVENUE** in the parish of Saint Andrew comprised in the Certificate of Title registered at **Volume 1296 Folio 973** while Caveat Number **2128232** including advertising the property for sale pending the determination of the Appeal herein;
>
> ii. An Injunction be granted restraining the Respondent by himself or his servants, employees, agents or otherwise howsoever from taking any steps whatsoever to sell, deal, dispose or part with the possession of **ALL THAT PARCEL** of land part of **ALL THAT PARCEL** of land part of FOREST HILLS in the parish of Saint Andrew being the Strata Lot numbered Eight on the Strata Plan numbered Two Thousand Three Hundred and Twenty-nine and Twenty-five undivided 1/609th share in the common property therein comprised in the Certificate of Title registered at **Volume 1401 Folio 931** including advertising the property for sale pending the determination of the Appeal herein;
>
> iii. An injunction restraining the Respondent by himself or his servants, employees, agents, or otherwise howsoever from entering upon the relevant parcels of land or taking any steps to dispossess the Respondent or its servants and/or agents pending the determination of the Appeal herein.
>
> iv. An Order that Caveats numbered **2128232 and 2128234** remain in effect until an Order from this Honourable Court is made ordering its removal or pending the determination [sic] the Appeal herein.

v. Further and/or other relief which this Honourable Court may deem just and appropriate in the circumstances.

vi. Costs of this Application be costs in the cause."

[13] The applicant relied on the following grounds in support of the application:

"i. It would be just, equitable and in keeping with the overriding objective.

ii. The Applicant will rely on the Affidavit in Support of this Application in further reliance of the grounds for the Orders sought.

iii. The Additional grounds on which the Appellant/Applicant is seeking the Orders are set out in the Affidavit of Paul Morrison accompanying this Application."

[14] On 7 January 2020 Edwards JA made the following orders:

"i. An injunction be granted restraining the Respondent by himself or his servants, employees, agents or otherwise howsoever from taking any steps whatsoever to sell, deal, dispose or part with the possession of **ALL THAT PARCEL** of land part of **NUMBER ONE HUNDRED AND THIRTY-SEVEN CONSTANT SPRING ROAD** now known as **NUMBER FIVE GROVE PARK AVENUE** in the parish of Saint Andrew comprised in the Certificate of Title registered at **Volume 1296 Folio 973** while Caveat Number **2128232** including advertising the property for sale pending the inter partes hearing set for the 28th January 2020;

ii. An Injunction be granted restraining the Respondent by himself or his servants, employees, agents or otherwise howsoever from taking any steps whatsoever to sell, deal, dispose or part with the possession of **ALL THAT PARCEL** of land part of **ALL THAT PARCEL** of land part of FOREST HILLS in the parish of Saint Andrew being the Strata Lot numbered Eight on the Strata Plan numbered Two Thousand Three Hundred and Twenty-nine and Twenty-five undivided 1/609th share in the common property therein comprised in the Certificate of Title

registered at **Volume 1401 Folio 931** including advertising the property for sale pending the inter partes hearing set for the 28th January 2020; and

iii. An injunction restraining the Respondent by himself or his servants, employees, agents, or otherwise howsoever from entering upon the relevant parcels of land or taking any steps to dispossess the Respondent or its servants and/or agents pending the inter partes hearing set for the 28th January 2020.

iv. Matter set for the inter partes hearing on 28 January 2020…."

[15] On 28 January 2020 the matter therefore came on for hearing before me.

[16] Mr Paul Morrison, managing director of the applicant company and its beneficial owner, on 5 December 2019, filed an affidavit in support of the application. He gave an undertaking as to damages and also undertook to pay the reasonable costs incurred by any person in the event that the orders sought are granted. A further affidavit was filed on 20 January 2020 attaching copies of documents to which reference had been made in the first affidavit, but which, in error, had been omitted.

[17] Much of Mr Morrison's affidavit related the applicant's case as it was pursued in the court below. In addition, he complained that the purported considerations for the sale of the relevant properties were a gross undervaluation. He indicated that the respondent has commenced collecting rent from the tenant at the Grove Park property. He stated that it was urgent that the matter be considered as quickly as possible to prevent a risk of injustice, as the respondent may proceed to sell property registered at Volume 1058

Folio 209[1]. He feared that the respondent may evict not only his tenant but also himself. Mr Morrison stated that if evicted, both he and his tenant would be rendered homeless in Jamaica, in addition he would face substantial ruin and irreparable harm.

[18] On 20 January 2020 Ms Tracey Long, attorney-at-law, swore to an affidavit on the respondent's behalf. Ms Long exhibited a copy of an agreement dated 8 November 2019 whereby the respondent is selling the property at Grove Park Avenue to two purchasers, who have paid the required deposit. Transfer tax and stamp duty have been paid and the sale is expected to be completed on or before 7 March 2020.

The applicant's submissions

[19] Counsel for the applicant, Ms Keisha Spence, referred to the case of **American Cyanamid Co (No 1) v Ethicon Ltd** [No 21] [1975] RPC in which the factors to be considered upon an application for an interlocutory injunction are outlined. Reference was also made to the case of **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd (Jamaica)** [2009] UKPC 16 to emphasize that an injunction is a remedy sought from the court to improve the chance of the court being able to do justice after a determination of the merits at trial.

[20] Ms Spence argued that the totality of the evidence admitted at the trial "made out" fraud on the part of the respondent, which would defeat the title of the respondent in

[1] It is not clear why reference has been made to a property at this volume and folio number as it was not included in the notice of application.

the relevant properties (see **Assets Co Ltd v Mere Roihi** [1905] AC 176). The learned trial judge therefore erred in law and in fact in failing to find actual fraud on the part of the respondent. Counsel acknowledged the well-known principles which apply to the appellate court in its examination of findings of fact made at first instance. Nevertheless, counsel stated that the learned trial judge was incorrect and "blatantly so" in his application and assessment of the evidence before him and the weight he attached to evidence including the correspondence between Mrs Messado and a third party, the fact that the respondent did not take any steps to take over the relevant properties and the fact that, even if it was a loan, there was evidence sufficient to show that the loan was paid off. Counsel submitted that the respondent, by having the properties transferred to himself on the same day that Mrs Messado was to be released on bail from the Parish Court on charges of inter alia fraud, after he had retained the transfers for approximately five years after they had been signed, "was properly aroused with suspicion that the actions of the [sic] Mrs Messado was in fact fraudulent in nature".

[21] Counsel emphasized that the court, in granting an injunction, would prevent the respondent from dissipating the relevant properties and frustrate the enforcement of a prospective judgment. Note was made of the agreement for sale already entered in respect of the Grove Park property. Counsel acknowledged that, in light of the agreement with a third party, it would be difficult to obtain an injunction to prevent the sale of that property. In so far as that property is concerned, she agreed that damages would be adequate compensation were the appeal to succeed.

[22] On the other hand, the applicant was fearful that steps would be taken to sell the Leas Flat property which is the home of Mr Paul Morrison. In light of this fact, damages would be inadequate to compensate for Mr Morrison's loss of his home.

[23] Furthermore, not only would Mr Morrison lose his interest in the property if it is sold, but the applicant would have a real difficulty in enforcing any judgment against the respondent.

[24] In contrast with the position of the applicant and its managing director, counsel argued that the respondent would not be adversely impacted were the injunction to be granted, as he does not live in any of the properties and has only collected rent from one of them since August 2019. Counsel stated that the respondent has not said that he has or will suffer any prejudice if the injunction is granted and in the circumstances, "the least irremediable prejudice" would occur if the injunction is granted.

The respondent's submissions

[25] Mr Hylton QC made submissions for the respondent. Mr Hylton, in his written submissions, referred to the case of **Kingston Armature & Dynamo Works Limited v Jamaica Redevelopment Foundation Inc and Kenneth Tomlinson** (unreported) Court of Appeal, Jamaica, Application No 121/2012, judgment delivered 20 December 2010 in which it was stated that, on an application for an interlocutory injunction the court must ask itself whether the applicant has a good arguable appeal, or whether there are serious issues to be canvassed on appeal. He submitted that the applicant does not have a good arguable appeal and the respondent has already sold one of the properties.

[26] Queen's Counsel drew the attention of the court to the fact that, while judgment was handed down in July 2019, the sale of the Grove Park property only took place in November 2019, and the application for the injunction was filed in December 2019. Mr Hylton submitted that it would be difficult to prevent the sale of this property, as the applicant would need to show that the purchasers are parties to a fraud. There is no such suggestion. The purchasers are already beneficial owners of the property (see **Ken Sales and Marketing Limited v Earl Levy and Others** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 21/2008, judgment delivered 30 July 2009).

[27] Counsel argued that the applicant did not prove actual fraud on the part of the respondent. The learned trial judge made it clear that he preferred the evidence of the respondent and Ms Long, and found as a fact that the respondent had not committed fraud and had not known about Mrs Messado's fraud. In so far as the issue is concerned as to whether the alleged transaction was a loan or a sale, Mr Hylton submitted that, even if the transaction was a loan, this would not have meant that the respondent was a party to Mrs Messado's fraud.

[28] While counsel for the applicant raised the issue of an alleged undervalue of the properties, Mr Hylton drew the court's attention to the fact that this was not an issue included in the notice of appeal and there is no reference to it in the findings of the court.

[29] Counsel referred to the case of **D & LH Services Limited and others v The Attorney General and the Commissioner of the Jamaica Fire Brigade** [2015] JMCA Civ 65 in which it was highlighted that, in order for the findings of fact made by

Laing J to be disturbed, this court would have to be satisfied that the learned judge was plainly wrong in respect of these findings. Further, the judge at first instance has the benefit of assessing the witnesses as well as hearing and considering their evidence. This court would therefore look to see whether there was evidence to support the conclusions to which the judge arrived, whether he/she misunderstood the evidence or whether the judge arrived at a conclusion to which no reasonable judge could have come.

[30] In referring to the notice of appeal, Mr Hylton stated that the applicant had indicated that it was challenging 24 findings of fact and five findings of law, however upon a close examination, the alleged findings of law were findings of fact. He highlighted that the learned trial judge set out the basis of his finding including the demeanour of witnesses.

[31] In response to the applicant's submissions on the issue of the timing of the respondent's lodging of the transfers, Queen's Counsel argued that that question would not relate to or address the burden on the applicant to prove fraud on the part of the respondent. In addition, there was nothing unusual in the respondent not exercising any acts of ownership in respect of the properties, in light of the fact that the transaction allowed for the vendor to remain in possession.

[32] Queen's Counsel submitted that the applicant does not have a good arguable appeal, in fact the appeal was hopeless, as it would not be able to overcome the high bar required to be met for this court to overturn findings of fact made at first instance.

[33] In addressing another element of consideration on applications of this nature, Queen's Counsel submitted that damages would be adequate to compensate the applicant. If the properties were to be sold, and the appeal thereafter succeed, the court would also still be able to make the declarations sought. The applicant was investing in multiple properties which it bought by cash. The respondent also purchased the properties in question for cash on short notice. There was no evidence supporting the argument that there would be a difficulty in recovering a judgment from the respondent, in fact there was no evidence of impecuniosity on the part of either party.

[34] While the applicant has argued that hardship would be experienced by Mr Morrison, were the Leas Flat property to be sold, Queen's Counsel submitted that since the applicant is a company, any hardship to be taken into account, would have to relate to the company, not one of its directors.

[35] Importantly, while the applicant had treated this application as if it were a review of the interim order made by Edwards JA, Queen's Counsel stressed that this was an erroneous approach. This was in fact the first inter partes hearing where the court will consider whether to grant an injunction until the hearing of the appeal.

Analysis

The applicable law

[36] The parties are agreed on the applicable principles in respect of the grant or refusal of an interlocutory injunction. The **American Cyanamid** case highlights that consideration is to be given to whether there is a serious question to be tried. The

principles outlined in that case, must, however, be reviewed carefully when an injunction pending appeal is sought. This is because, unlike the situation in the **American Cyanamid** case, this is a matter in which the evidence has been ascertained and given in open court before the judge at first instance, the judge has seen and heard witnesses and has made findings of fact, and full arguments were made before the first instance judge, leading to a decision on the merits of the matter.

[37] The matter of **Kingston Armature & Dynamo** concerned an appeal against the refusal of an application for injunction at first instance, followed by a refusal of an injunction pending appeal by a single judge of this court. The decision emanated from a three panel review of the decision of the single judge. Although the circumstances differ in this matter, I nevertheless agree with the statement made by Phillips JA at paragraph [34] of the judgment that:

> "The questions one must ask at this stage are: Does the applicant have a good arguable appeal, or are there serious issues to be canvassed on appeal? Is the applicant entitled to an injunction and if so, on what terms, if any?"

[38] I note that while the test of "good arguable appeal" was adopted by Phillips JA in that matter, in the course of the judgment, reference was also made to the test as to whether the applicant has "reasonable grounds of appeal", the threshold test for which Morrison JA (as he then was) expressed a preference in the **Michael Levy v Jamaica Re-Development Inc. Fund and Kenneth Tomlinson** (unreported) Court of Appeal, Jamaica Supreme Court Civil Appeal No 26/2008, Application No 47/2008 , judgment

delivered 11 July 2008. For the purposes of this application I have taken the approach that both tests, though differently worded, require the application of the same principles.

[39] As correctly highlighted by Mr Hylton, the nature of the grounds of appeal is relevant to an assessment as to whether it is a good arguable appeal, or there are reasonable grounds of appeal. In the case of **D & LH Services Limited and others v The Attorney General and the Commissioner of the Jamaica Fire Brigade** [2015] JMCA Civ 65, McDonald-Bishop JA, at paragraphs [30]-[33] of the judgment, highlighted the applicable principles where this court is being asked to disturb findings of fact made by a first instance judge. These include the following:

a. The appeal court must be satisfied that the judge at first instance has gone "plainly wrong". This directs the court to consider whether it was permissible for the judge to make the relevant findings of fact in the face of the evidence as a whole.

b. The court must identify a mistake in the judge's evaluation of the evidence that is so material that it undermines his conclusions.

c. The court will consider whether the judge failed to properly analyse the entirety of the evidence.

d. It is understood that the trial judge has had the benefit of assessing witnesses and actually hearing and considering the evidence as it emerges. Consequently, where a judge has arrived at a conclusion on the primary facts, only in rare cases will the appellate tribunal interfere with it. Such rare cases would include instances where there was no evidence to support a finding, there was a misunderstanding of the evidence or no reasonable judge could have arrived at that conclusion on the evidence before him.

[40] At paragraph [34] of the judgment McDonald-Bishop JA stated:

> "The burden on the appellants in this case is, therefore, to persuade this court to the view that the findings of fact of the learned trial judge, on which she has based her decision to grant judgment in favour of the respondents, are such as to warrant the interference of this court."

[41] It stands to reason that these principles must be taken into account in an assessment as to whether the applicant has a good arguable appeal or reasonable grounds of appeal. In my view, if there is no reasonable ground of appeal, then no injunction should be granted pending the hearing of the appeal.

[42] At times, even when a determination is made that there are no reasonable grounds of appeal, the court nevertheless proceeds to consider the question as to whether damages would be adequate to compensate either side. At this level, the issue of the

balance of convenience is also relevant. There is some dispute in the authorities concerning whether the question as to the adequacy of damages is a part of the assessment of the balance of convenience or precedes the consideration of the balance of convenience. See for example paragraphs [34]-[35] of the Supreme Court of the United Kingdom case, **Merck Sharp & Dohme Corp v Clonmel Healthcare Ltd** [2019] IESC 65 (Transcript) delivered 31 July 2019. O'Donnell J, who delivered the judgment of the court, stated:

> "In my view, the preferable approach is to consider adequacy of damages as part of the balance of convenience, or the balance of justice, as it is sometimes called. That approach tends to reinforce the essential flexibility of the remedy."

[43] In this matter I will consider the adequacy of damages as the first element in the consideration of the balance of justice.

Reasonable grounds of appeal

[44] As Mr Hylton highlighted, almost all the grounds of appeal, challenge findings of fact made by Laing J. The grounds of appeal are lengthy and many, however I will attempt to highlight some of the matters challenged. These include:

a. The learned judge's finding that in light of the relationship between Mrs Messado and the respondent there was nothing unusual about the sale of the properties without an advertisement;

b. The alleged failure of the learned judge to draw inferences from the "joint actions of Messado and the Respondent" in light of their relationship. It is suggested that the learned judge did not place sufficient weight on the relationship as influencing the way in which the transactions were structured;

c. That the learned judge erred in finding that the respondent's non-registration of the transfer was more consistent with the respondent trying to facilitate the option agreements;

d. That the learned judge erred in failing to draw proper inferences from the respondent's concealment of the true nature of the transaction;

e. The learned judge erred in finding that the nature of the transaction was not determinative of the claim;

f. The learned judge erred in finding that the payments made by Mrs Messado were consistent with options;

g. The learned judge erred in his application of the case of **Snook v London and West Riding Investments Ltd** as the applicant was not a true party to and had no knowledge of the transactions;

h. The learned judge erred when he found "Mrs Messado's statement of the Respondent's knowledge and her correspondence as being minimal to the issue of the Respondent's knowledge of the fraud";

i. The learned judge erred in construing letter dated 19 November 2015 from Donovan Jackson;

j. The learned judge misunderstood the applicant's submissions as it related to the interaction and approach to Gordon Tewani as the applicant was demonstrating that the respondent knew that he was holding the relevant properties as security as part of a loan;

k. The learned judge erred in finding that the transaction was not a loan;

l. The learned judge erred in failing to properly apply the legal position in the cases of **James Miller and Partners v Whitworth Street Estates (Manchester) Ltd** and **Brian Royle Maggs t/a BM Builders (A Firm) v Guy Anthony Stayner Marsh, Marsh Jewellery Co. Ltd** as to the purpose of subsequent correspondence between the parties;

m. The learned judge erred when he found that one would have expected to see the terms of the alleged loan if that was the nature of the transaction;

n. The learned judge failed to appreciate, in his analysis on loan terms and interest, that the purpose of the transaction was to mask Mrs Messado's indebtedness to the respondent;

o. The learned judge erred when he found that it was reasonable for the respondent to assume that Mrs Messado was the beneficial owner of the applicant;

p. The learned judge erred on the question of consideration as the applicant did not receive any consideration from the respondent;

q. The learned judge erred in his "understanding, interpretation and characterisation" of the evidence of Ms. Long;

r. The learned judge erred by placing too much weight on whether Mrs Messado or "Mrs. Chinn [sic]" was the beneficial owner of the relevant properties as nothing turned on that fact; and

s. The learned judge erred in finding that the applicant was not entitled to damages on the basis of conversion.

[45] Upon a review of the judgment of Laing J and the proposed grounds of appeal, I do not believe that the applicant has reasonable grounds of appeal. All the grounds, except for ground s, are appealing findings of fact made by the learned trial judge.

[46] The learned judge considered all the various issues raised in these grounds of appeal against the background of the evidence that was led. Although a great portion of the trial was spent on the question as to whether the transaction between Mrs Messado and the respondent was a loan or a sale with an option to re-purchase properties, the learned judge found that the nature of the transaction did not determine whether the

respondent was a party to the fraud perpetrated by Mrs Messado. This was an entirely reasonable conclusion.

[47] In any event, after a thorough examination of all the various circumstances, the learned judge was not convinced that the transaction was a loan. The crux of the matter, whatever the type of transaction was, was whether the respondent knew that Mrs Messado did not have authority to deal with the applicant's properties. There was no evidence from Mrs Messado that the respondent knew that she did not have authority to deal with the applicant's properties. The respondent stated that Mrs Messado told him that she was the beneficial owner of the applicant and he believed her. The learned judge, at paragraph [130] of the judgment, indicated that he observed the demeanour of the witnesses and he preferred the evidence of Ms Long and the respondent on a balance of probabilities as to whether the transaction was a loan or sale with an option to purchase, as well as the respondent's evidence that Mrs Messado told him that she was the beneficial owner of the applicant and he believed her. Mr Hylton described the appeal as "hopeless". While I will not utilize that description, it seems to me that the applicant will find it extremely difficult to convince the court that the learned trial judge was plainly wrong in his findings of fact, had no evidence to support critical findings made or arrived at a conclusion to which no reasonable judge could have come.

[48] In so far as the claim for conversion against the respondent is concerned, the learned judge found that since the respondent had not committed a fraud, and had received documents which on their face were properly executed, a claim in conversion

was bound to fail. While the applicant has appealed that finding, no indication has been given as to why the learned judge was wrong to so find. It appears that the finding was reasonable in the circumstances.

[49] In any event, I agree with Mr Hylton's submissions that damages would clearly be an adequate remedy in this matter if the applicant were to succeed in its appeal after an injunction is refused pending appeal. Both the applicant and the respondent seem to buy and sell properties as investments. In addition, in the notice of appeal the applicant has sought damages as an alternative to the injunctive orders in the event the latter is not granted. This indicates that it is recognized that damages could be sufficient compensation in the circumstances.

[50] I also agree with Mr Hylton's submissions that any inconvenience or prejudice to be taken into account on the part of the applicant, would, since the applicant is a company, need to relate to the company itself. In the event that the property is sold, any inconvenience which would be suffered by Mr Morrison, who lives in the Leas Flat property, could not be seen as hardship to the applicant.

[51] Although counsel for the applicant argued that the applicant will have a real difficulty in enforcing any judgment against the respondent, I also agree with Mr Hylton's submissions that there is no evidence led in that regard.

[52] Counsel for the applicant, Ms Spence, acknowledged that it would be challenging to secure the grant of an injunction in respect of the Grove Park Property which has been sold to two persons. These persons are presumed to be bona fide purchasers for value

without notice, and so I agree that it would not be proper to grant an injunction halting the sale of that property to them.

[53] Neither party made submissions concerning the orders that the applicant sought in respect of Caveats 2128232 and 2128234. The applicant requested an order from this court that the caveats it had lodged to prevent dealings with the relevant properties remain in effect until this court orders their removal or pending the determination of the appeal. In light of my conclusion that the appeal does not appear to reflect reasonable grounds of appeal, such an application would not be successful. Moreover, the Registration of Titles Act provides its own procedure, which ought to be followed, in respect of the warning and lapse of caveats-see sections 139-143 of the Registration of Titles Act.

Conclusion

[54] In conclusion, the appeal does not appear to me to have reasonable grounds and on that basis alone, I would refuse the application for an injunction in this matter where the merits have been thoroughly examined and thereafter determined at first instance. Furthermore, even if there were reasonable grounds of appeal, damages would suffice to compensate the applicant in the event that the injunction is refused and it goes on to succeed at the hearing of the appeal.

[55] The application and orders sought are therefore refused. Costs to the respondent to be agreed or taxed.