[2022] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00057

BETWEEN	**BRIAN MORGAN (Executor of the Estate of Rose I Barrett)**	**APPELLANT**
AND	**KIRK HOLGATE**	**RESPONDENT**

Neco Pagon and Ms Samoi Campbell instructed by Peter Champagnie QC for the appellant

Mrs Tamara Francis Riley-Dunn instructed by Nelson-Brown Guy and Francis for the respondent

15 December 2021 and 4 February 2022

BROOKS P

[1] The dispute between Dr Brian Morgan (the executor of the estate of Rose Barrett) and Mr Kirk Holgate concerns an option to purchase contained in a lease agreement that they made in 2018. Dr Morgan leased premises to Mr Holgate for three years. The lease was to have expired on 28 February 2021 (a Sunday), and the litigation centres on whether or not Mr Holgate satisfied the conditions of the option.

[2] Mr Holgate contends that he properly exercised the option, but that Dr Morgan improperly sought to renege on the agreement. He sued Dr Morgan for specific performance of the agreement, and a judge of the Supreme Court granted his

application for an injunction to prevent Dr Morgan from selling or treating with the premises, or removing Mr Holgate from them until the trial of the claim.

[3] Dr Morgan has appealed from the learned judge's decision. He contends that the learned judge has, among other things, misconstrued the clause in the agreement which granted the option to purchase ('the option clause').

[4] According to Dr Morgan, the option clause imposed a condition that time would be of the essence, in terms of Mr Holgate's completion of the purchase, but Mr Holgate did not meet that deadline and therefore the option had lapsed. Moreover, Dr Morgan argues that, in addition to the purchase price, there were cash fees, transfer costs and other sums ('associated costs') that Mr Holgate should have paid, prior to the expiration of the lease, but did not. Mr Holgate's failure to pay these sums within the duration of the lease, Dr Morgan asserts, also indicates Mr Holgate's failure to exercise the option.

[5] Mr Holgate contends that he complied with the terms of the option clause. He argues that, but for late and incorrect banking information having been provided by Dr Morgan's attorneys-at-law, the payment of the purchase price would have been made before the expiry of the lease. He further asserts that the payment having been made on 1 March 2021, the learned judge was correct in finding that there was a triable issue. Accordingly, he argues, an injunction was the correct order in the circumstances.

[6] The resolution of the dispute will largely turn on the construction of the option clause.

The factual background

[7] The lease agreement is dated 1 March 2018. The option clause, which will be quoted later in this judgment, required Mr Holgate to exercise the option before the expiry of the lease.

[8] Mr Holgate entered into possession of the premises after the execution of the lease agreement. On 20 January 2021, his, then attorney-at-law, wrote to Dr Morgan's,

then attorney-at-law, indicating his wish to exercise the option to purchase and requested "the draft agreement for Sale so that the terms can be finalised for signing". The letter further indicated that Mr Holgate required "120 days for completion".

[9] On 1 February 2021, Dr Morgan's attorney-at-law sent a draft agreement for sale by email to Mr Holgate's attorney-at-law. The draft agreement emphasised the option clause in two respects. Firstly, the provision for completion referred to it, thus:

> "COMPLETION: As per Instrument of Lease made on the 1st day of March, 2018 in particular Clause 4 e of same and subject to Clause 2 of Special Conditions herein.
>
> The Vendor shall not be obliged to register the name of the Purchaser on the duplicate Certificate of Title unless and until the full sale price and cash fees and costs of Transfer and such other amounts payable by the Purchaser hereunder have been paid, or the Purchaser have delivered to the Vendors' Attorney-at-Law an acceptable undertaking for payment of the same."

Secondly, special condition 2 of the draft agreement repeated the option clause. The special condition stated:

> "It is understood and agreed that 'Time is of the Essence' of this Agreement and in keeping with Clause 4 (e) of Lease Agreement made on the 1st day of March 2018 and which expires on the 28th day of February 2021 – '[repeats the option clause]'."

[10] Despite protestations by Mr Holgate's attorney-at-law, the clauses were not withdrawn. On Thursday, 25 February 2021, after correspondence with a financial institution ('the bank'), Mr Holgate's attorney-at-law wrote to Dr Morgan's attorney-at-law, by email, stating that the financing had been approved and that she expected to "have the cheque in hand tomorrow and will forward same…along with the signed Agreement for Sale…".

[11] On the same date, the bank wrote to Dr Morgan's attorney-at-law indicating the approval of loan financing and that the loan proceeds "will be disbursed once clients [sic] signs the documents and all closing conditions have been met". That indication proved unsatisfactory to Dr Morgan's attorney-at-law, who informed Mr Holgate's attorney-at-law, that it was "totally unacceptable as this is just an indirect way of trying to extend the contract to the benefit of [Mr Holgate] when the Agreement expires on the 28th February 2021".

[12] The bank altered its position, and by letter dated 26 February 2021 undertook to "disburse the loan proceeds on or before Wednesday March 3, 2021". Both Mr Holgate's attorney-at-law and the bank requested Dr Morgan's attorney-at-law's bank account details in order to facilitate the transfer of the purchase price by the Real Time Gross Settlement protocol ('RTGS'). Mr Holgate's attorney-at-law's email requesting the information is time-stamped 1:01 pm on Friday, 26 February 2021. Mr Holgate's attorney-at-law also sent off, that day, to Dr Morgan's attorney-at-law, a letter containing two copies of the agreement for sale document, duly signed by Mr Holgate.

[13] Dr Morgan's attorney-at-law provided the information by email that is time-stamped 4:22 pm that day. In that email, his attorney-at-law also indicated that Mr Holgate knows that she does not work on Wednesdays and Fridays. The day ended and 28 February 2021 passed without any further communication between the parties.

[14] On 1 March 2021, the bank transmitted the purchase price to the account for which Dr Morgan's attorney-at-law had provided the information. It informed Dr Morgan's attorney-at-law of the transaction, by email that is time-stamped 2:18 pm on that day. The attorney-at-law responded by email at 7:59 pm and indicated that "the funds will have to be returned as transaction [sic] cannot be completed". Later that evening, the attorney-at-law sent another email to the bank indicating that the funds had not been credited to her account. She said she made further checks and found that she had provided an incorrect account number. She concluded her email by asking the

bank to "make arrangements to reverse the transaction to replace the funds from whence it [sic] came".

[15] Dr Morgan's attorney-at-law then wrote a letter, dated 1 March 2021, to Mr Holgate's attorney-at-law, recounting her exchange of correspondence with the bank, and indicated that Dr Morgan was not prepared to enter into an agreement to sell the property to Mr Holgate. She informed Mr Holgate's attorney-at-law that time was of the essence of the contract and that the option to purchase expired on 28 February 2021.

[16] Despite the indication that the payment was rejected, the bank later sent the funds to Dr Morgan's attorney-at-law's account. On 8 March 2021, Mr Holgate filed his application for an injunction. Dr Morgan's attorney-at-law returned the sum representing the purchase money to Mr Holgate's attorney-at-law on 9 March 2021.

The learned judge's decision

[17] The learned judge did not give written reasons for her decision. The parties have, nonetheless, agreed that she orally indicated that although Mr Holgate had no real prospect of success in his claim against Dr Morgan, there was, however, a serious issue to be tried "on the question of whether the RTGS was perhaps provided with the correct information and on a timely basis then the payments could have been made" (paragraph 2 A of the notice of appeal). The learned judge also commented that the "RTGS information was sent after 4:00 pm on a Friday when the bank could have closed" (paragraph 2 B of the notice of appeal). She found that these were issues for a trial judge to resolve.

[18] The learned judge's orders in respect of the injunction are:

> "1. [Dr Morgan] and/or his servants or agents is/are restrained from selling or disposing [the premises] until the trial of the matter.
>
> 2. [Dr Morgan] and/or his servants and/or his agents is/are restrained from ejecting [Mr Holgate] from the Premises until the trial of the matter.

3. The Registrar of Titles is restrained from registering any transfer in the Register Book of Titles relating to this [sic] Premises until the trial of the matter is concluded."

The learned judge, at order 12, as a consequence of granting the injunction, also required Mr Holgate to give the usual undertaking as to damages. Apart from granting the injunction, the learned judge made a number of case management orders.

The grounds of appeal

[19] Dr Morgan filed numerous grounds of appeal, several of which repeated the same issue a number of times. The grounds are set out below:

"A. The exercise of discretion to grant the application for injunctive relief was inconsistent and palpably wrong in light of the learned judge's acceptance of the authorities that an option to purchase must be strictly complied with and her finding that '*on the face of it, [Mr Holgate] does not have a real prospect of success*.'

B. The learned judge unreasonably and/or incorrectly concluded that there is a serious issue to be tried in circumstances where the evidence before the court was that [Mr Holgate] failed to pay by 28 February 2021 or at all, costs/fees payable by [him] to complete the sale namely, ½ vendor's attorney's fee for preparation of agreement for sale, ½ stamp duty, ½ registration fee, and ½ vendor's attorney's fee for preparation of letters of possession.

C. The learned judge unreasonably and/or incorrectly relied on facts or inferences of facts which did not exist to conclude that there is a serious issue to be tried, to wit that '*the RTGS information was sent after 4:00 pm on a Friday* ***when the bank could have closed*** when there is no evidence before the learned judge regarding the closure of the JMMB Bank either at the time when the information was sent or at all.

D. The learned judge gave no weight or failed to give any weight to the following fact or misunderstood the evidence before her, namely:

i. The conditions of the options were that (i) the purchase price was for the sum of $4,000,000.00; (ii) the option was to be exercised during the lifetime of the lease; and (iii) [Mr Holgate] was to complete the sale by or before the expiration of the lease which expired on 28 February 2021.

ii. The unchallenged evidence before the learned judge was that [Mr Holgate] failed to make payments for costs/fees payable by [him] to complete the sale namely, ½ vendor's attorney's fee for preparation of agreement for sale, ½ stamp duty, ½ registration fee, and ½ vendor's attorney's fee for preparation of letters of possession, all of which form part of the requirement for completion of the sale.

iii. The unchallenged evidence before the learned judge was that notwithstanding the RTGS information supplied by [Dr Morgan's] attorney-at-law, the JMMB Bank transaction showed that the purchase price of $4,000,000.00 (only) was first disbursed or processed for payment by the JMMB Bank on **1 March 2021** albeit to the incorrect account.

iv. The unchallenged evidence before the learned judge was that [Mr Holgate] failed to disclose that:

(a) all costs/fees payable by [Mr Holgate] to complete the sale was not paid by 28 February 2021 or at all;

(b) the JMMB Bank's RTGS proof of transaction reflected an entry date of **1 March 2021** for the processing and disbursement of the sum of $4,000,000.00;

(c) by email dated 25 February 2021 with time stamp 4:29 pm, [Mr Holgate's] attorney wrote to [Dr Morgan's] attorney-at-law to indicate that '*I expect to have the cheque in hand tomorrow and will forward same to you along with the signed Agreement for Sale*…' Thereafter the first request made by [Mr Holgate's] attorney-at-law for the bank details of [Dr Morgan's] attorney-at-law was by email dated 26 February 2021 with date stamp 1:01 PM;

(d) [Mr Holgate] had failed to complete the first sale of the property in 2016 because of his inability to obtain a mortgage from the National Housing Trust.

E. The learned judge was incorrect to give undue weight or any weight at all to facts which did not exist on the evidence before the learned judge, namely that the bank details of [Dr Morgan's] attorney-at-law was supplied 'when the bank could have closed".

F. The learned judge failed to appreciate that even if the correct account information was supplied by [Dr Morgan's] attorney-at-law to [Mr Holgate's] attorney-at-law, it did not change the fact that (i) [Mr Holgate] failed to pay all costs/fees payable by [Mr Holgate] to complete the sale was not paid by 28 February 2021 or at all [sic]; and (ii) the JMMB Bank's transaction for the payment of $4,000,000.00 was on 1 March 2021, after the expiration of the option to purchase.

G. The learned judge wholly failed to treat with:

a. [Mr Holgate's] failure to disclose information as set out at paragraph D iv of the grounds above; and

b. [Mr Holgate's] failure to pay or give an undertaking to pay all costs/fees payable by [Mr Holgate] to complete the sale by 28 February 2021 or at all.

H. The learned judge was wrong in her conclusion that there was a serious issue to be tried between the parties in granting [Mr Holgate] injunctive reliefs.

I. The learned judge was wrong in all the circumstances of the case to exercise her discretion to grant [Mr Holgate] the injunctive relief sought." (Italics and emphasis as in original)

[20] Mr Holgate filed a counter-notice of appeal, in which he supported the learned judge's decision but challenged her finding that his claim had no real prospect of success. He also argued that the associated costs would have been paid once the sale agreement was duly executed by both parties and sent to the Stamp Office to be assessed and stamped, however, Dr Morgan refused to execute the agreement.

[21] The appeal and counter-notice of appeal may be analysed by addressing five issues:

1. whether time was of the essence for the exercise of the option to purchase;
2. whether the option clause required the payment of the purchase price as well as the associated costs;
3. whether Mr Holgate satisfied the requirements of the option clause;
4. whether the provision of incorrect banking information affected the transaction; and
5. whether the learned judge erred in the exercise of her discretion.

Whether time was of the essence for the exercise of the option to purchase

[22] A reading of the option clause is necessary to aid the analysis of this issue. The option clause states:

"That at anytime [sic] during the term of this Lease and prior to its termination [Mr Holgate] shall exercise the option to purchase the said property for the sum agreed, failing which

> **if [Mr Holgate] shall be unable to complete the sale prior to or within the duration of the Lease** then [Mr Holgate] shall immediately remove all things from [the premises] leaving it free and clear and [Dr Morgan] and the beneficiaries [of the estate of Rose Barrett] shall be exempted and indemnified from all sums paid by [Mr Holgate] for removal and clearance of the said premises or for any improvements hereon [sic] or for any sums utilised or other [sic] owed by [Mr Holgate]." (Emphasis supplied)

[23] The relevant law in respect of the exercise of options to purchase was set out in the 3rd edition of Halsbury's Laws of England at volume 8, page 165:

> "An option for the renewal of a lease, or for the purchase or re-purchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse."

A number of authorities, including **Hare v Nicoll** [1966] 2 WLR 441, **Janet Robertson v Surbiton Property Developments Limited** (1982) 19 JLR 90 and **Annie Lopez v Dawkins Brown and Another** [2015] JMCA Civ 6 ('**Lopez v Brown**'), have approved that statement of the law. In **Lopez v Brown**, this court approved the explanation given in **Hare v Nicoll** of the basis for the requirement of strict compliance of an option, and also accepted the reasoning given in **Janet Robertson v Surbiton Property Developments Limited** that the principle of strict compliance with such options also applies to options to purchase land. Morrison JA (as he then was) concisely set out the relevant law at paragraph [52] of his judgment in **Lopez v Brown**:

> "It is therefore clear that at common law an option to purchase is a species of privilege (and it does not appear that there is any relevant distinction, as [counsel for the respondents] seemed minded to suggest, between an option to purchase shares and an option to purchase land). Accordingly, the party seeking to rely on the option must comply strictly with the conditions stipulated for its exercise, failing which the option will lapse."

Whereas **Hare v Nicoll** concerned an option to purchase shares in a company, **Lopez v Brown** involved an option that was contained in an agreement to lease land.

[24] Mrs Francis Riley-Dunn, appearing for Mr Holgate, did not oppose those principles of law. She sought to distinguish **Hare v Nicoll** on the basis that, unlike in this case, the purchase price was set out in the agreement in that case.

[25] She further submitted that it was the circumstances of this case that stipulated the time for the exercise of the option. She argued that the option clause only placed two obligations on Mr Holgate. Those obligations, learned counsel submitted, are to:

> "a) Notify [Dr Morgan] of his intention to purchase which can be done at ***any time*** prior to the termination of the lease; and
>
> b) Show an ability to complete the sale prior to the termination of the lease." (Italics and emphasis as in counsel's written submissions)

[26] As Mrs Francis Riley-Dunn has stated, the option clause stipulates a date by which the option was to be exercised. That date, as accepted by the parties, was 28 February 2021, and applying the principle accepted in **Lopez v Brown**, was to be strictly observed. Contrary to Mrs Francis Riley-Dunn's submissions, however, the option clause did not only require Mr Holgate to demonstrate, before 28 February 2021, an ability to complete the purchase; it required him to complete the purchase on or before that date. That conclusion not only arises from a fair reading of the relevant portion of the option clause, but is implied from the context. The consequence of an inability to complete the purchase on or before 28 February is that Mr Holgate is to immediately vacate the premises. The context indicates that the lease would have terminated and there would be no agreement for sale and purchase in place.

[27] Mrs Francis Riley-Dunn's further reasoning in support of her stance is that "if the intent of the lease was to require that a sale be concluded prior to the termination of the lease, the time for [Mr Holgate] to notify [Dr Morgan] of his election would have expired on a date which would allow for the completion of a sale prior to February 28, 2021". This reasoning cannot assist Mr Holgate. The option clause set the outer date for

completion of the purchase. It was for Mr Holgate to have so arranged his affairs that he completed the purchase by that date.

[28] Learned counsel also relied on **Mountford and Another v Scott** [1975] 1 Ch 258 in support of her submissions. That case does not assist Mr Holgate. It is entirely distinguishable, as it dealt with a situation where Mr Scott improperly sought to prematurely rescind an option to purchase that he had legally granted, and wrongly sought to reject the grantee's exercise of the option well within the option period. There was no issue of whether the option had been properly exercised.

[29] The next enquiry concerns the details of Mr Holgate's obligation to complete the purchase.

Whether the option clause required the payment of the purchase price as well as the associated costs

[30] There is no dispute between the parties that Mr Holgate was required to pay the purchase price as a part of his obligations in exercising the option to purchase. Mr Holgate's attorney-at-law was earnestly seeking to have that done, albeit at the eleventh hour, as her email of 25 and 26 February 2021, and letter dated 26 February 2021, indicate.

[31] In this appeal, however, counsel for the respective parties disagreed on the issue of whether Mr Holgate was also required to pay over the associated costs, as part of the exercise of the option to purchase. Counsel for Dr Morgan, Mr Pagon, submitted that the option was not exercised because Mr Holgate did not make any attempt to pay the associated costs before 28 February 2021. Accordingly, he submitted, the option had not been exercised and therefore lapsed.

[32] Mrs Francis Riley-Dunn submitted that this was a triable issue that arose on the contending statements of case. She argued that Mr Holgate, having demonstrated within the stipulated time, an ability to purchase the premises, it was for the resultant creation of a vendor and purchaser relationship to allow the parties, to then set the

timetable for completion of the sale and the calculation and payment of the associated costs. Learned counsel posited that the absence of a demand for the associated costs was one of the several triable issues between the parties.

[33] The discussion of the issue concerning the time for exercise of the option, would have also determined this issue. In order to satisfy the option clause, Mr Holgate was required to pay over, or provide an acceptable undertaking, on or before 28 February 2021, the full sale price and the associated costs, as provided for in the completion clause. It cannot properly be said that the figure had not been ascertained. He signed the draft agreement for sale and his attorney-at-law returned it to Dr Morgan's attorney-at-law on 26 February 2021. The legal costs were not quantified in that document but were easily ascertainable. The document stipulated that Mr Holgate was required to pay "one-half of the Stamp Duty and Registration Fees" associated with the transaction. Those sums are calculable by reference to the relevant legislation (the Stamp Duty Act and the Registration of Titles Act).

[34] Even if it were posited that the document did not have the force of an agreement, since Dr Morgan had not signed it, the amount of Mr Holgate's obligation for legal costs were, nonetheless, ascertainable by reference to legislation. Section 4 of the Conveyancing Act sets out the applicable provisions as to costs in the absence of an agreement between the parties. It states, in part:

> "Nothing in this Act contained shall be taken to alter the practice heretofore existing in this Island in conveyancing, by which where there is no agreement to the contrary the following conditions always attach-
>
> (a) The attorney-at-law of the vendor, lessor and mortgagee has the right to prepare and complete the conveyance, lease or mortgage.
>
> (b) **The purchaser or lessee pays to the vendor or lessor one-half of the vendor's or lessor's costs so incurred, including stamping the conveyance** or lease and, in the case of a lease, of recording it also.

(c) **The purchaser records his conveyance at his expense**.

…" (Emphasis supplied)

Whether Mr Holgate satisfied the requirements of the option clause

[35] The preceding discussions necessarily result in a finding against Mr Holgate on this issue.

[36] Mrs Francis Riley-Dunn submitted that Mr Holgate satisfied both obligations, which, she argued, the option clause had imposed on him. She argued that during the currency of the lease he gave the notice of his intention to exercise the option. Additionally, by providing the undertakings and indications from the bank, he demonstrated, prior to the expiry of the lease, his ability to complete the sale.

[37] It follows from those submissions, and Mrs Francis Riley-Dunn's further submissions concerning Mr Holgate's obligation in respect of the payment of the associated costs, that the contention is that Mr Holgate had properly satisfied the requirements of the option clause.

[38] The events outlined in the chronology set out above, show that Mr Holgate did not pay the purchase money on or before 28 February 2021. Although Mr Holgate, in his first affidavit, deposed that the bank attempted to make the payment of the purchase money on 26 February 2021, the documents that have been included in the record of appeal do not support that assertion. Those documents show that the bank first attempted to make the payment of that sum on 1 March 2021. It was then too late. The option had, by then, expired, and there was no indication by Dr Morgan or his attorney-at-law, that any forbearance would be given.

[39] There is also no doubt that Mr Holgate did not pay over any associated costs on or before 28 February 2021, or at all.

[40] Based on the reasoning set out above, Mr Holgate had not satisfied the obligations set out in the option clause.

[41] The fact that the lease expired on a Sunday did not affect the obligation placed on Mr Holgate to exercise the option. Time remained of the essence in respect of that exercise. Section 8(1) of the Interpretation Act, which states, in part:

> "In computing time for the purposes of any **Act**, unless the contrary intention appears–
>
> …
>
> (b) if the last day of the period is Sunday or a public holiday (which days are in this section referred to as excluded days) the period shall include the next following day, not being an excluded day;
>
> …" (Emphasis supplied)

does not affect this transaction, since the time is not referable to any legislation.

Whether the provision of incorrect banking information affected the transaction

[42] The learned judge granted the injunction on the basis that the banking information had possibly been provided after normal banking hours and, therefore, did not allow for an exercise of the option. Mrs Francis Riley-Dunn sought to support the learned judge's stance. Learned counsel submitted that the closing hours of banks are of general knowledge and therefore the learned judge cannot be faulted for her assertion. These bases cannot be accepted as sound.

[43] It must be stated that evidence of the bank's closing hours is required before the learned judge could properly rely on the scenario, which she posited. Secondly, apart from the speculative nature of the learned judge's reasoning, in light of Mr Holgate's failure to pay both the purchase price and the associated costs, it is plain that the provision of incorrect banking information by Dr Morgan's attorney-at-law does not affect the outcome of the case. Even if the information had been provided within

minutes of the 1:01 pm request for the information on 26 February, the fact remains that the legal costs were not paid on, or prior to, 28 February 2021. The letter sending the agreement for sale document, which Mr Holgate had signed, was not accompanied by the associated costs that were stipulated in that document.

[44] Additionally, even if the correct banking information had been provided, the fact remains that the documentation provided indicates that the bank did not attempt a transfer of funds until 1 March 2021. Had a transfer been executed on 26 February 2021, the error in the account number could have been discovered before 28 February 2021, but even if it were not discovered then, Dr Morgan could not rely on an error by his attorney-at-law, to assert that Mr Holgate failed to exercise the option.

[45] The learned judge acknowledged that Mr Holgate had waited until the last minute to try and exercise the option, but she did not seem to have considered that he could have adopted other means to effect payment of the monies due. It is noted that Mr Holgate's attorney-at-law suggested, in her email of 25 February 2021, that payment would have been made by cheque on 26 February 2021. It is also noted that Dr Morgan's attorney-at-law refunded the purchase price by way of several cheques. That evidence shows that other payment options were available to Mr Holgate.

Whether the learned judge erred in the exercise of her discretion

[46] This court will not disturb an exercise of a discretion by a judge at first instance, unless it finds that that judge has erred in principle or has misunderstood the law or the evidence that was presented before him or her, in a way that is demonstrably wrong. The accepted authority for that approach is set out in **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042.

[47] Unfortunately, it must be said that the learned judge erred in the manner outlined above. She not only speculated as to the status of affairs concerning the bank being open or closed at the time that the banking information was provided, but she failed to take into account that it was for Mr Holgate to have found a way to exercise

the option. She did not give any, or sufficient regard to the fact that a transfer by the bank was not the only option available to him.

[48] Additionally, the learned judge erred in having found that there was a serious issue to be tried although, on a final analysis, she was of the view that Mr Holgate had no real prospect of succeeding in his claim. The law set out by Slade J in **Re Lord Cable (deceased) Garratt and others v Walters and others** [1976] 3 All ER 417, at page 431, is respectfully accepted as being correct:

> "…Nevertheless, in my judgment it is still necessary for any plaintiff who is seeking interlocutory relief to adduce sufficiently precise factual evidence to satisfy the court that he has a real prospect of succeeding in his claim for a permanent injunction at the trial. If the facts adduced by him in support of his motion do not by themselves suffice to satisfy the court as to this, he cannot in my judgment expect it to assist him by inventing hypotheses of fact on which he might have a real prospect of success…."

[49] That reasoning was accepted by this court in **Reliance Group of Companies Limited v Ken's Sales and Marketing and another; Christopher Graham v Ken's Sales and Marketing and another** [2011] JMCA Civ 12, and is consistent with that of Lord Diplock in his seminal judgment in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396, where he stated in part at page 408, that a prerequisite for considering the grant of an interlocutory injunction is that the applicant for the injunction should show that he has a real prospect of succeeding in obtaining a permanent injunction at 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...."

[50] The learned judge having been found to be in error, it is open to this court to reconsider the order to be made. The reasoning set out above shows that Mr Holgate does not have a real prospect of success in his claim for an order for specific performance, since, in law, his option to purchase had lapsed, without him exercising it.

Conclusion and disposal

[51] Based on the evidence produced before her, the learned judge erred in principle in granting the injunction. Accordingly, her orders for an injunction must be set aside. The failure to establish that there is a real question to be tried means that Mr Holgate should be denied an injunction. An order should be made to that effect, in accordance with rule 2.14 (b) of the Court of Appeal Rules, which states, in part:

> "In relation to a civil appeal the court has the powers set out in rule 1.7 [the court's general powers of management] and in addition-
>
> (a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; and
>
> (b) power to-
>
> (a) affirm, set aside or vary any judgment made or given by the court below;
>
> (b) give any judgment or **make any order which, in its opinion, ought to have been made by the court below**..." (Emphasis supplied)

[52] The failure to establish a real question to be tried also obviates the need to discuss the issues of whether damages would be an adequate remedy and the balance of convenience. Mr Holgate's counter-notice of appeal should also be dismissed. His undertaking as to damages must, however, remain effective.

[53] Dr Morgan should be granted his costs of the appeal and of the counter-notice of appeal.

FOSTER-PUSEY JA

[54] I have read the draft judgment of Brooks P. I agree with his reasoning and conclusion and have nothing to add.

G FRASER JA (AG)

[55] I too have read, in draft, the judgment of Brooks P and agree with his reasoning and conclusion. I have nothing to add.

BROOKS P

ORDER

1. The appeal is allowed.
2. The counter-notice of appeal is dismissed.
3. Orders 1, 2 and 3 of the orders of the learned judge, made on 28 May 2021, are set aside. All other orders remain in force.
4. The application for an injunction pending trial of the claim is refused.
5. Costs of the appeal and of the counter-notice of appeal to the appellant to be agreed or taxed.