JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 13/2002

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN:	**URBAN DEVELOPMENT CORPORATION**	**1ST APPELLANT**
	URBAN MAINTENANCE (1977) LTD.	**2ND APPELLANT**
AND:	**MONICA CASSERLY**	**1ST RESPONDENT**
	ELGIN SWAPP	**2ND RESPONDENT**
	GAVIN CLARKE	**3RD RESPONDENT**
	SHARON HEHOLT	**4TH RESPONDENT**

Pamela Benka-Coker Q.C. and Charles Piper instructed by Piper and Samuda for the appellants

Judith Clarke and Susan Richardson for the respondents

December 2, 3, 5, 6, 9, 2002,
February 19, 20,2003; and July 30,2004

DOWNER J.A.

Introduction

This is an important interlocutory appeal from the order of Hibbert J. in the Supreme Court. It is necessary to set out the Order of the learned judge so as to grasp the extent of the interlocutory injunction awarded. It reads as follows at page 140-141 of the Record:

"1. The Defendants by themselves, their servants and/or agents be restrained from preventing the Plaintiffs and/or the lawful occupiers of the Plaintiffs' properties, (all part of Proprietors Strata Plan Number 79) and/or the Plaintiffs' lawful visitors from parking their vehicles and/or any vehicles lawfully brought on to the said properties by any of the persons aforesaid on the roof (5th floor) of the multi storey car park being the strata Lot numbered 58 of Proprietors Strata Plan 79 and being the Strata Lot registered at Volume 1128 Folio 711 of the Register Book of Titles pending the outcome of the matter herein.

2. That the Defendants by themselves, their servants and/or agents be restrained from taking any steps to establish any physical or other barrier whatsoever or otherwise obstructing the free passage and parking of vehicles upon the 5th floor of the multi storey car park being the lot numbered 58 of Proprietors Strata Plan Number 79 pending the outcome of the matter herein.

3. That the existing status quo as regards parking within and on the roof of the said multi storey car park be preserved pending the outcome of the matter herein."

Further, there were also the following consequential orders:

"4. The Plaintiffs give the usual undertaking as to damages

5. Costs to be costs in the cause

6. Leave to appeal granted."

Although the appeal is interlocutory there is no requirement for leave to appeal. See section 11 (1) (f) (ii) of the Judicature (Appellate Jurisdiction) Act.

Is there a serious issue to be tried?

In his careful and economical reasons Hibbert J. posed the issue thus at page 138 of the Record:

> "The first question which has to be determined is whether or not there is a serious issue to be tried.
>
> The Plaintiffs say that there is, on the basis of an entitlement to park on the 5th floor. The Defendants say that there is no such entitlement but a permission given amounting to a licence.
>
> I have looked at the Affidavits filed in support with exhibits attached, including the Affidavit of Sonia Dowding, on behalf of the Defendants. What is noticeable in all of these is the use of the word "entitlement". It is used in exhibits to both Affidavits. Therefore, my view is that this presents a serious issue being, is there an entitlement or a licence."

The learned judge also added at page139 of the Record:

> "I rely on Authorities cited by Counsel Miss Clarke in support of my decision."

Presumably, one case cited below and certainly cited in this Court was **Plimmer v Mayor of Wellington** (1884) 9 App. Cas. 699 where the identical issue arose. The case was decided by the Privy Council on the basis of a special case stated by the Compensation Court to the Supreme Court, the Court of Appeal and thereafter to the Privy Council. The learned judge below grasped the essentials. Either at the interlocutory stage or at a trial on the merits, the decisive issue as to whether there is an entitlement or a licence will be one of law. This is so because the respondents are relying on the unchallenged documentary evidence emanating from the appellants to establish their case.

It is important to raise this issue at the outset because there ought to be a sharp distinction between a case where the evidence is in dispute, and a case where the evidence is not in dispute or where, as in this case, the respondents are relying on the documentary evidence coming from the appellants. Lord Diplock in the case of **American Cyanamid v. Ethicon Ltd.** [1975] A.C. 396 at page 406 stated it thus:

> "My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, both, is uncertain and will remain uncertain until final judgment is given in the action."

Then His Lordship continues thus on the same page:

> "In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent."

Continuing on this trend Lord Diplock further stated at page 407:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits 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."

Counsel for the appellants as well as for the respondents relied on **American Cyanamid** so it is useful to cite another passage from this important judgment. It runs thus at page 409:

> "I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases. The instant appeal affords one example of this."

In the later case of **N.W.L. Ltd. v. Woods** [1979] 3 All E.R. 614 at 625 (d), Lord Diplock said:

> **"American Cyanamid Co v Ethicon Ltd.** [1975] 1 All ER 504, [1975] AC 396, which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial."

That interlocutory proceedings may dispose of the issues is also illustrated in **Robert Honiball and George A. Brown v. Christian Alele** (1993) 30 J.L.R. 373 at 382 where Lord Oliver said:

> "Secondly, Mr. Mahfood has submitted that since there were no affidavits from the valuers verifying their respective reports, the respondent's evidence as to this was mere hearsay which did not call for

> answer. If that objection had been taken in Mr. Brown's affidavit, it might carry more weight. But it was not; and, in any event, the objection is misconceived. Whilst it is true that, in the end, the Court of Appeal treated the hearing as one which finally determined the rights of the parties, inasmuch as they directed the Registrar of Titles to issue a certificate in the name of the respondent, the proceedings in their inception and form were interlocutory proceedings aimed simply at setting aside an order which was alleged to have been wrongly obtained and restoring the parties to the position as it was in the action before the order was made. Affidavit evidence of information and belief, disclosing the source of the information was therefore, permissible. It was not, as their Lordships have already observed, an ideal method of supporting an allegation of fraud but, on any analysis, it required an answer and a full answer. To this day, Mr. Brown has never sought to verify the opinion to which he deposed, to justify his valuation or to tender any explanation at all of how his affidavit came to be sworn. Whatever the explanation for the other extraordinary and unsatisfactory features of the proceedings, the valuation of no more than $3,500 was so ludicrously low as to be evidence of fraud and the Court of Appeal drew, as regard this evidence, the only inference that could reasonably be drawn."

The circumstances of the instant case are such that when the relevant documentary evidence is construed and the doctrine of Proprietary Estoppel applied, then the merits of the case may well be decided in favour of the party who was granted the interlocutory injunction.

It is against this background that it is important to pose the important issue of law which this Court has to decide thus: **Where the respondents are relying on the unchallenged documentary evidence of the appellants to establish a claim for Proprietary Estoppel and the**

learned judge's interpretation of the law is correct on this issue, ought his discretion to grant an interlocutory injunction be disturbed?

The initial task is to examine the affidavits of the appellants and the minutes of General Meetings of the Strata Plan 79 to ascertain if they can give rise to the entitlement which the respondents claim. The entitlement arises, the respondents contend, as a result of a Proprietary Estoppel. The submission on this issue was deployed with considerable skill by Ms. Judith Clarke for the respondents.

The first assurance as to parking rights is stated thus at page 29 of the Record:

> "MINUTES OF THE FIRST GENERAL MEETING OF THE PROPRIETORS OF KINGSTON MALL CONDOMINIUM PLAN 79, SINCE ITS TAKE-OVER BY URBAN DEVELOPMENT CORPORATION HELD AT OCEAN TOWER, 8 OCEAN BOULEVARD, KINGSTON ON MONDAY, 15TH MAY 1978 AT 5 p.m.
>
> 5 MATTERS RELATING TO MANAGEMENT OF THE APARTMENTS PARTICULARLY THE COMMON AREAS:
>
> (a) Mr. Wreford pointed out that prior to the take-over by U.D.C., a charge of $275 per annum per car was being made for the use of apartment occupiers in the covered parking area of the Multi-storey Car Park. As there was strong resistance by the occupiers to this arrangement, he took up the matter with the U.D.C. who agreed to provide free parking on the roof for the occupiers; as there was still some amount of resistance to this arrangement, Mr. Wreford explained to the Meeting that they would be allowed to park in the covered area outside the

> hours from 7 a.m. to 7 p.m. on working days. Mr. Ferguson was somewhat fearful that such an arrangement could be changed at short notice and requested assurance from the U.D.C. that this would be a permanent provision. He argued that should the economic situation improve, then he foresees that the car park would likely be used 24 hours per day. Hon. Leacroft Robinson then pointed out that as meetings will be held annually, these proposals could not be changed easily as they would be recorded in each Minute hence no further assurance from U.D.C. would be necessary."

Even before this assurance at the General Meeting the following letter at page 118 to apartment owners is noteworthy:

> "15th December, 1977
>
> Dear
>
> I am pleased to advise you that a policy decision has been taken that an apartment owner/occupier shall be entitled to one car-park space in the open, that is on the roof of the car park or on the garden terrace at no additional cost. I am, therefore, enclosing a sticker for the windscreen of your car which you should display for the convenience of the car-park attendant.
>
> We shall be shortly marking car-park spaces with signs reserving them to particular organizations or individuals. Until such time as these reservations leave you no space, you can, of course, continue to park where you find it most convenient. Should you wish to reserve a covered space for yourself, this can be done at an annual cost of $275.
>
> We are in the process of tightening up the controls on the car park and with effect from the 1st January, 1978 guests visiting you will be given a ticket as they enter the car park which we would ask you to endorse with your apartment number and signature, in which case they will not be charged when they surrender the ticket on leaving.

I look forward to your kind cooperation.

Yours sincerely,
URBAN MAINTENANCE (1977) LIMITED
JOHN S. WREFORD,
General Manager"

The decision has been called a policy decision but such a decision was a legal obligation pursuant to the planning laws and forms a claim in the respondent's Statement of Claim.

Be it noted that the Minutes disclosed Mr. Wreford was representing the Urban Development Corporation ("U.D.C".) at the above meeting. It is important to note that those minutes were taken at a general meeting pursuant to section 42 of the First Schedule of the Registration (Strata Titles) Act. Then at a meeting of the Executive Committee of Strata Plan 79 there was the decision recorded at page 36 of the Record:

> "Miss Carmen Plummer (a member of the Executive Committee) asked whether owners would ever be charged for parking. Mr. Trevor Clarke replied in the negative."

This assurance that owners would never be charged for parking must be considered against the reassurances given over a period of fifteen years subsequently either by the first appellant directly or by the second appellant on behalf of the first appellant. The assurances were also in conformity with the obligations the original developers were bound to meet in conformity with the Planning laws.

It should be noted this Minute answering Miss Carmen Plummer's question was recorded pursuant to paragraph 22 of the First Schedule of the Registration (Strata Titles) Act. Mr. Trevor Clarke attended that meeting on 26th April, 1979 as one of the representatives of the U.D.C. the first appellant. Mr. Trevor Clarke took an active part in the meeting explaining among other matters that U.D.C. took over from Kingston Mall Ltd. on October 1, 1977. It should be noted that as explained in the brochure promoting sales at page 24 of the Record all the apartments were sold pursuant to the Strata Titles Act.

Again it must be stressed that the Executive Committee is a statutory body whose composition and duties are stated in sections 13-25 of the Second Schedule to the above Act.

Then on January 11, 1979 the following extract of a letter from the second appellant at page 38 of the Record to the occupier tells a story:

> "I would remind you that the strict entitlement for each apartment is one space on the fifth floor (roof) of the car park, but that as long as you do not infringe any of the reservation notices there is no objection to your parking in any other space you can find."

This letter was signed by John S. Wreford as General Manager, of the second appellant. On March 18th 1981 the following extract from Frank Duncanson the then General Manager of the second appellant at page 41 of the Record, is of importance:

> "As we are approaching the close of the Financial Year I should be grateful if you would settle this account before the 31st March 1981. I should advise

> that if you do not wish space to be reserved for you on this Floor, free parking is available for all Apartment Occupiers on the 5th Floor which, although uncovered, is provided with the necessary security."

Further, on 28th December, 1981 the second appellant forwarded a letter (at page 42 of the Record) of which the following extract is of importance:

> "I should remind you that persons who do not wish space to be reserved are free to utilize the free parking provided on the Fifth Floor which, although uncovered, is provided with the necessary security."

The letter from the second appellant of 14th September 1983, at page 43 of the Record is worth noting in full:

> "Mr. G. Clarke
> Apartment 20
> Ocean Tower Apartments.
>
> The Urban Development Corporation has advised that effective from the 1st January, 1983, space in the Multi-Storey Car Park will be rented at the rate of $420.00 per annum payable in advance.
>
> 2. Space on the Roof (Fifth Floor) of the Multi-Storey Car Park will continue to be rented at the rate of $180.00 per annum but will be free to Residents of the Ocean Tower Apartment who may also park free in the space indicated between the Apartment Building and the exit from the Third Level of the Multi-Storey Car Park.
>
> 3. Space in the Open car Parks will continue to be rented at the rate of $100.00 per annum or 50c per day.

> 4. All prospective tenants are asked to return the attached Agreement duly completed not later than the 15th December, 1983
>
> URBAN MAINTENANCE (1977) LIMITED
>
> Frank H. Duncanson
> General Manager."

This was the final paragraph of a letter dated 27th January, 1984, at page 44 of the Record from the second appellant to Ocean Towers Residents:

> "In the above connection I have to remind you that free parking is available on the Fifth Floor for Residents at the Ocean Tower Apartments who do not wish to rent space in the Multi-Storey Car Park."

The identical assurance was given on 15th November, 1984 at page 45 of the Record and on October 10, 1985 to apartment owners on page 46 of the Record. Also on November 5, 1986 at page 47 of the Record and on November 16, 1987 at page 48 of the Record. Then on April 22, 1993 there was the extract from a Notice dated April 22, 1993 at page 49 of the Record:

> "Apartment Residents are being reminded that free parking is available on the Roof of the Multi-Storey Car Park (Fifth Floor) and in the parking area on the Second Floor level of the Apartment."

All the above extracts were exhibited to the affidavit of Gavin Clarke, an owner and occupier of one of the apartments in the complex known as Ocean Towers. The assurances given over a period of fifteen years must be read in the light of the undertaking given to Miss Carmen Plummer at the Executive Meeting on 26th April 1979. The astute Miss Plummer would have been aware of the concerns of Mr. Ferguson who raised the issue at the first general

meeting on May 15, 1978. So those assurances were not indications that permission to park could be revoked but they were like the confirmations of Magna Carta by Medieval Kings, indicating permanence.

The initial developer was Town and Commercial Properties Jamaica Ltd. U.D.C. took over from Kingston Mall Ltd. on October 1, 1977. The role of Urban Maintenance (1977) Ltd. was stated thus in the Minutes of the first general meeting at page 31 of the Record:

> "MANAGING AGENTS
>
> It was unanimously agreed, that Urban Maintenance (1977) Limited to continue as Managing Agents for the Condominium Corporation, and the Executive Committee was authorised to make up an Agreement."

The Bye-laws of the Strata Corporation had this provision at page 101 at 10(f):

> "(f) Require that any Managing Agent appointed by the Corporation shall on the 10th day subsequent to each quarter's operation report of expenditure and operations conducted for the benefit of the proprietors."

The brochure promoting the apartments at page 24 of the Record states:

> "Multi-storey car park on the third level. Guards patrol the interior of the car park and are stationed in the main lobby to the apartments through which visitors must pass.
>
> 24 hour security control."

The principal issue is whether the correspondence between the parties and the minutes accorded the appellants a mere licence as the appellants argued or whether they raised an equity in favour of the respondents. At this stage it is appropriate to state the status of the second appellant. It is the agent of the first appellant: the first appellant being a statutory corporation.

The submission as developed by Ms. Clarke was that all she had to do was to demonstrate that she had an arguable case. If she did demonstrate that before Hibbert J. his order, she further contended, ought not to be disturbed.

She could have put her submissions on a higher plane. There are circumstances, as Lord Diplock stated in the later case of **NWL Ltd. v Woods** (supra) at page 621, where the grant of an interlocutory injunction has the effect of putting an end to the action. I will return to this case. It must be emphasized that the injunction issued relates to free parking on the roof of the fifth floor of the multi-storey car park for the respondents and their lawful visitors. Lot numbered 58 is specifically mentioned.

How does the issue to be tried arise on the Statement of Claim?

The essential feature raised on the pleadings is whether the respondents, and others who occupy their apartments and their successors in title, have an entitlement to park on the roof of the multi-storey car park which forms part of the building complex known as Ocean Towers. The determination of this issue requires a careful analysis of the cases which

demonstrate the concept of proprietary estoppel and the relevant statutory provisions relating to parking for strata title holders. To my mind, having regard to the evidence as outlined earlier, the issue to be determined is one of law.

This issue is governed by the rule in **Ramsden v. Dyson** (1866) L R. 1 H.L. 129. A convenient starting point is the case of **Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.** [1982] 1 Q.B. 133. Since the case was cited with approval in two cases (**A.G. Hong Kong v. Humphreys Estate** [1987] 1 A.C. 114 and **Lim Teng Huan v Ang Swee Chuan** [1992] 1 W.L.R. 113) before the Privy Council, it is helpful to show how it was treated by the Board. Lord Templeman at page 123 of the **Hong Kong** case said:

> "In **Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.** (Note) (1982) Q.B. 133, Oliver J. reviewed all the authorities and in language to which he adhered in the Court of Appeal in **Habib Bank Ltd. v. Habib Bank A.G. Zurich** [1981] W.L.R. 1265, 1285, concluded, at p. 151:
>
> > "the more recent cases indicate, in my judgment, that the application of the **Ramsden v. Dyson,** L.R. 1 H.L.129 principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every

> form of unconscionable behaviour." (Emphasis supplied).

In the **Lim Teng Huan** case (supra) Lord Browne-Wilkinson said at page 117:

> "On appeal, the Court of Appeal held that the judge had erred in law. The decision in **Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.** (Note) (1982) Q.B. 133 showed that, in order to found a proprietary estoppel, it is not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could act as he did: it is enough if, in all the circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the representee to make. The Court of Appeal therefore held that, upon payment of compensation, the defendant was entitled to a declaration of ownership of the plaintiff's share and to the injunction which he sought on the counterclaim."

Then at page 118 Lord Browne-Wilkinson stated the position thus:

> "As to the first question, their Lordships have no hesitation in agreeing with the conclusions and reasoning of the Court of Appeal. Sir Michael Ogden (for the plaintiff) accepted that the Court of Appeal were right in applying the law as laid down in **Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.** (Note) 1982) Q.B. 133 and that recitals (3) and (4) to the agreement could provide evidence as to the parties' intentions, even if the agreement was legally unenforceable for uncertainty. However, he submitted that there was no evidence that the defendant had relied on the agreement or the recitals in it when he proceeded with the construction of the house. As a result one of the necessary ingredients for an estoppel was missing. Their Lordships reject this submission. Although the defendant did not give direct evidence of such reliance, the sole purpose of the agreement was to regularize the position so that the defendant's house

> would be built on land to which he was solely entitled: the inference that thereafter the defendant proceeded in reliance on that agreed arrangement is inevitable and was the inference rightly drawn by the trial judge in the passage to which their Lordships have referred."

Applying these principles to the documentary evidence in this case it would be unconscionable for the appellants to go back on the representations which they made to the apartment owners. Those representations were made at the annual general meeting of the Strata Titles owners and the meeting of the executive body. Further the numerous confirmatory letters, sent to the strata title holders or occupiers over several years were capable of creating an equity in favour of the apartment owners or occupiers and their lawful visitors.

Mrs. Benka-Coker Q.C., in her able submissions for the appellants, stated that the respondents could not demonstrate that they had suffered a detriment. It must be presumed that the attorneys-at-law who prepared the transfer for the purchasers would have examined Strata Titles legislation and the minutes from the annual general meeting and the executive meetings which were made pursuant to the legislation. The purchasers would have bought their apartments on the strength of the representation made in the minutes. That is the presumption in their favour: see **Greasley v Cooke** (1980) 3 All E.R. 710 at 713 and 714. The statements in the minutes and correspondence were meant to put owners and prospective owners' minds at rest.

On the issue of detriment it should be noted that it is to be presumed that the apartment owners and prospective owners would continue to make investments in their apartments on the strength of the repeated assurances. **Greasley v. Cooke** (supra) and the cases cited therein, namely **Smith v Chadwick** [1882] 20 Ch.D 27 at 44, **Reynell v Sprye** (1852) **De G & SM.**660 at 708 or 42 E.R. 710 at 728 are authorities which support his proposition.

Here is how Oliver J. treats with **Wilmott v Barber** at p.146 of **Taylors Fashions Ltd:**

> "It has to be borne in mind, however, in reading the judgment, that this was a pure acquiescence case where what was relied on was a waiver of the landlord's rights by standing by without protest. It was a case of mere silence where what had to be established by the plaintiff was some duty in the landlord to speak. The passage from the judgment in **Wilmott v. Barber,** 15 Ch.D. 96 most frequently cited is where Fry J. says, at pp. 105-106:
>
> > 'A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements of requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's

> mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but in my judgment, nothing short of this will do'." (Emphasis supplied)

Then at page 148 Oliver J. states the modern approach thus:

> "In **Gregory v. Mighell,** 18 Ves.Jun 328, the case relied on by Lord Kingsdown in formulating his proposition, the defendant was estopped from claiming that the plaintiff's possession was non-consensual so as to render it unavailable as an act of part performance. Here again this does not seem to have been a unilateral misapprehension as to what the legal position was when possession was taken. Nor, in my judgment, is any such essential condition deducible from the cases following **RAMSDEN V. Dyson,** L.R. 1 H.L. 129 and particularly from the more modern authorities. The fact is that acquiescence or encouragement may take a variety of forms. It may take the form of standing by in silence whilst one party unwittingly infringes another's legal rights. It may take the form of passive or active encouragement of expenditure or alteration of legal position upon the footing of some unilateral or shared legal or factual supposition. Or it may, for example, take the form of stimulating, or not objecting to, some change of legal position on the faith of a unilateral or shared assumption as to the future conduct of one or other party. I am not at all convinced that it is desirable or possible to lay down hard and fast rules which seek to dictate, in every combination of circumstances, the considerations which will persuade the court that a departure by the acquiescing party from the previously supposed state of law or fact is so unconscionable that a court of equity will interfere. Nor, in my judgment, do the

> authorities support so inflexible an approach, and that is particularly so in cases in which the decision has been based on the principle stated by Lord Kingsdown. Thus in **Plimmer v. Mayor of Wellington** (1884) 9 App.Cas. 699, 700 the stated case makes it clear that the respondent, who sought to raise the estoppel, knew the state of the title at the date when he incurred the expenditure. There was simply a common supposition that he would not be summarily turned out." (Emphasis supplied)

Plimmer v Mayor of Wellington was a case where the issue to be determined was an entitlement or a licence. As was accurately stated in the headnote:

> "...that by virtue of the transactions of 1856 such licence ceased to be revocable at the will of the Government whereby the lessor acquired an indefinite, that is, practically a perpetual right to the jetty for purposes aforesaid."

The statutory context in which the proprietary estoppel was created is also of importance. There are three relevant statutes, The Registration (Strata Titles) Act, The Urban Development Corporation Act and the Town and Country Planning (Kingston) Development Order 1966 made pursuant to the Town and Country Planning Law 1957.

There is no dispute as to the authenticity of the minutes exhibited. The Urban Development Corporation is a creature of statute and it has created a subsidiary Urban Maintenance (1977) Ltd. which is the Managing Agent for the Strata Corporation. The first appellant took over the responsibility of the original developer and is the owner of some strata titles. They also own the multi-

storey car park which forms part of the Ocean Towers complex. The relevant section 4(3)(c) of the Urban Development Corporation Act reads:

> "(3) In particular and without prejudice to the generality of the provisions of subsections (1) and (2) the Corporation may –
>
> (a)...
>
> (b)...
>
> (c) provide and maintain car parks, piers, public parks, public gardens and other public amenities within any designated area."

To my mind the respondents made out a strong arguable case, that there is a serious issue to be tried. It is difficult to see how the appellants can avoid this.

That parking is acknowledged as a requirement is stated in the Town and Country Planning (Kingston) Development Order 1966 under the caption Kingston Development:

> "KINGSTON DEVELOPMENT AREA
>
> GENERAL DESCRIPTION
>
> The intention of this Order is to make provision for the orderly and progressive development of that portion in the Corporate Area of Kingston and St. Andrew as described in the First Schedule. It is also intended to obtain appropriate land use, car parking facilities, building lines and other improvements in layout in accordance with recognized principles of Town Planning."

Then under the heading Vehicle Parking is the following provision:

> "Public car park and street parking will be available in certain locations but developers will be required to provide parking facilities within the curtilage of the site to be developed or in such other place as the Planning Authority may agree. Appendix 2 will be used as a guide to determine the parking facilities

required provided that the following conditions are complied with:-

(1) For each vehicle a parking bay not less than 144 sq. ft. shall be allowed.

(2) Reasonable vehicular access shall be provided to the parking area and to each parking bay

(3) Where a building is divided by permanent construction into more than one Use and Occupancy, the number of parking bays required shall be calculated separately for each Use and Occupancy but the permissible excess factors given in Appendix 2 shall only be allowed for the major Use and Occupancy."

Then in Appendix 2 there is Vehicle Parking Requirements within Site Boundaries:

"2. Apartment Buildings	1 for each individual unit up to 20 units. 1 for each 2 units in excess of 20."

So there is no doubt that the original developers, are aware of the requirement to provide parking facilities. In the original brochures advertising the apartments at page 50 of the Record there is the following statement:

"Car parking is in the adjacent multi-storey car park and only a short walk to the elevators on the garden terrace."

Further, (on page 51 of the Record) under the heading "Parking" of the aforesaid brochure is the following statement:

"Parking, one of the city's most pressing problems, has been tackled by the developers of Kingston Mall on a scale which the problem deserves.

> A multi-storey car park in Number Three King Street (Block Six) adjoining the apartment building, provides 24-hour parking service for more than 500 vehicles. A further 500 on-ground parking spaces will be available until a second multi-storey car park is constructed."

The first appellant took over from Town and Commercial Properties (Jamaica) Ltd., a member of the Town and Commercial Properties Group of Companies. So when the first appellant gave the apartment owners free parking on the roof of the fifth floor and restricted parking elsewhere in the car park the first appellant was acting in conformity with the statutory obligations of the Planning Legislation. The second appellant confirmed the original assurance.

At page 408 of **American Cyanamid** (supra) on the issue of damages as an inadequate remedy Lord Diplock had this to say:

> "As to 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."

There are special circumstances envisaged in **American Cyanamid** which require special consideration. These circumstances I reiterate arise in the instant case. It was stated thus in Volume 24 Halsbury's Laws of England Fourth edition at page 857:

> "Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."

The following cases are cited:

> **"NWL Ltd. v Woods** [1979] 3 All ER 614 at 626, [1979 WLR 1294 at 1307, HL, per Lord Diplock. Cf **Cayne v Global Natural Resources plc** [1984] 1 All ER 225, CA; **Lansing Linde Ltd. v Kerr** [1991] 1 All ER 418, [1991] 1 WLR 251, CA; and cf **Fielden v Lancashire and Yorkshire Rly Co** (1848) 2 De G & Sm 531 at 536 per Knight Bruce V-C."

It is worth citing a passage from **Cayne** to demonstrate how the Court of Appeal applied the principle in **NWL. Ltd. v. Woods.** At page 232 Eveleigh L.J. said:

> "I now turn to the third ground, that in the Vice-Chancellor's alternative finding he wrongly concluded that this case fell within the spirit of **NWL Ltd v Woods.** The view that the Vice-Chancellor took on the facts was this. If an injunction was granted to the plaintiffs, that would be an end to the substance of the matter and the injunction would not in effect amount to a holding operation: it would be giving the plaintiffs all that they came to the court to seek, namely their injunction, and when the time came for trial there would be no point in a trial because the object of the plaintiffs would have been achieved seeing that the annual general meeting would have been held. He said:
>
> > 'In the present case, what really matters to the parties is whether or not the 3.25m shares in Global should be issued; and the possibility of proceeding to trial for damages is but a pale shadow of the real claim.'
>
> With that I agree. If the injunction is granted the general meeting will not succeed in mustering the support that they seek to remove the directors from the board. If an injunction is refused then the agreement will be implemented and there will be no point in seeking an injunction thereafter. It will not be possible to unscramble the situation, so that whichever way this decision goes it seems highly likely that it will finally determine the issue."

The similarity between the instant case and **Cayne** is striking. Once the injunction continues, then the respondents have received what they seek. That is the entitlement to park on the fifth floor of the multi-storey car park. The other parking rights do not seem to be very important. If the injunction were to be correctly refused then it is extremely unlikely that the respondents could ever succeed at a trial. If they cannot succeed in this Court on the

documentary evidence of the appellants, then the only realistic option is to invoke the jurisdiction of the Privy Council.

The case of **Fielden v The Lancashire and Yorkshire Railway Company** 64 E.R. where the headnote at p. 237 summarises the principle at issue in this case reads:

> "Held, that the motion involved substantially the whole matter in dispute in the cause; and (having regard to the balance of possible mischief arising from interfering or not interfering on an interlocutory application) must be refused."

There are two other issues to be addressed, namely, the undertaking for damages and the Statement of Claim where the remedy claimed is a declaration.

The Statement of Claim

The respondents sought declarations in the following terms:

> "18. The Plaintiffs claim against the Defendants for the following orders and/or declarations.
>
> 1. An order that the Defendants by themselves, their servants and/or agents be restrained from preventing the Plaintiff from parking on the strata lot number 33, 46 and 58, registered in the name of the first Defendant.
>
> 11. Further or in the alternative, an order that the Defendants by themselves their servants and/or agents be restrained from preventing the Plaintiffs from parking on property known as Strata Lot Number 58, registered in the name of the Defendant.
>
> 111. An order that the Plaintiffs are entitled as of right to park in the spaces hitherto provided by the

Defendants for owners or properties forming part of Proprietors Strata Number 79.

IV. A declaration that the Plaintiffs have an equitable interest in the strata lots comprising and forming the roof of the said multi-storey car park.

V. A declaration as to the rights and/or interests of the Plaintiffs in any and/or all of the strata lots numbered 7, 14, 33, 46 and 58.

VI. A declaration that any steps and/or attempts by the Defendants, their servants and/or agents to deprive the Plaintiffs of their rights to park their vehicles within and/or upon the roof of the multi-storey car park which comprises strata lots numbers 33, 46 and 58 constitute a breach of the Town and Country Planning Act and the relevant Development Order made pursuant thereto

VII. Such further or other relief

VIII. Costs."

I make no extensive comment on the declarations sought with respect to the Town and Country Planning Act and the relevant Development Order. The argument on that issue was not as comprehensive as that which was put for the other issues.

The core of the dispute between the appellants and the respondents centered around the parking rights claimed by the respondents. Here is how it is pleaded:

"7. In or about 1977 and for several years thereafter the 1st Defendant and/or his predecessors in title represented to and/or agreed with the

Plaintiffs and/or their predecessors in title that the Plaintiffs and/or their predecessors in title were entitled as of right to park their vehicles and/or vehicles operated by them within the multi-storey car park, that is to say upon the strata lots numbered 33 and 46.

8. Further, at all material times the 1st Defendant represented to and/or agreed with the Plaintiffs and/or their predecessors in title that they were entitled as of right and without more to park their vehicles and/or vehicles operated by them on the roof of the multi-storey car park, that is upon strata lot number 58.

9. In reliance on the said representations and/or pursuant to the said agreement the Plaintiffs purchased and invested in their said apartments.

10. The said multi-storey car park and the roof thereof is and was at all material times the only parking facility provided by the 1st Defendant and intended by the 1st Defendants for the use of owners, residents and occupiers (including the Plaintiffs) of residential strata lots in the proprietors strata plan numbered 79.

11. By reason of the said representations made by the 1st Defendant and/or its predecessors in title and/or by reason of the said agreements between the Plaintiffs and/or their predecessors in title on the one hand and the 1st Defendant and or its predecessor in title on the other hand and/or by reason of the user of the said multi-storey car park by the Plaintiffs and/or their predecessors in title and by reason of the premises, the Plaintiffs have an equitable interest in the strata lots comprising and forming the roof of the said multi-storey car park.

12. In or about 1994 the 1st Defendant acting in breach of its said representations/agreements unilaterally altered its position and decreed that all persons including the Plaintiffs and/or their predecessors in title, wishing to park within the said

> multi storey car park, that is, upon the strata lots numbered 33 and 46 would be obliged to pay an annual fee to the 2nd Defendant for the benefit of the 1st Defendant."

The response of the appellants was as follows at page 83 of the Record:

> "10. The Defendants say that by letter dated December 15, 1977 the Second Defendant advised the Proprietors of Strata Plan No. 79 of a policy decision which had been taken permitting the owners or occupiers of apartments within the said Strata Plan to use the car park space on the roof of the First Defendant's multi-storey car park namely, Strata Lot No. 58, to use one car park space "at no additional cost."
>
> 11. Further, by the said letter dated December 15, 1977 the Second Defendant advised the Proprietors of Strata Plan No. 79 as follows:
>
> > 'We shall shortly [be] marking car-park spaces with signs reserving them to particular organizations or individuals. Until such time as these reservations leave you no space, you can, of course, continue to park where you find it most convenient. Should you wish to reserve space for yourself, this can be done at an annual cost of $275'.
>
> 12. The Defendants say that the permission given by the letter mentioned and described in paragraphs 10 and 11 hereof and by subsequent letters to the owners of Strata Lots in Strata Plan No. 79 the Defendants or either of them created in favour of the Proprietors of Strata Plan No. 79 aforesaid a bare licence to park free of charge on the First Defendant's Strata Lot No. 58, which said licence was, by operation of law, subject to being revoked by the First or the Second Defendant or both of them, at any time. Further, with respect to covered parking in Strata Lots Nos. 7, 14 33 and 46, the Defendants, in accordance with the terms of contracts, have charged and recovered fees from members of the public

> including Strata Lot owners or occupiers, in respect of the use thereof and have accordingly created contractual licenses in favour of such persons as enter into the said contractual licenses, which said licenses are determinable in accordance with the terms of the said contracts.
>
> 13. Paragraph 9 of the Statement of Claim is denied and the Defendants repeat paragraphs 1 to 12 inclusive hereof.
>
> 14. As to paragraph 10 of the Statement of Claim the Defendant says that at all material times the said multi-storey car park including the roof thereof were and continue to be Strata Lots within the meaning of the Strata Titles Act and the By Laws governing the Corporation known as Strata Plan No 79 which were previously owned by the First Defendant's predecessor in title and are now owned by the First Defendant. The said multi-storey car park was constructed as part of the development known as the Kingston Mall development and were constructed for the purposes of providing parking facilities for the public, including the proprietors of Strata Plan No. 79.
>
> 15. The Defendants deny that they or the predecessor in the title of the First Defendant made the representations or entered into the agreements referred to in paragraphs 11 and 12 of the Statement of Claim and the Defendants repeat paragraphs 1 to 15 inclusive hereof." (Emphasis supplied)

Paragraph 12 of the Defence raises the real issue between the appellants and the respondents. Be it noted that the minutes and correspondence would be the proof at a trial for instances where the appellants entered a bare denial in their Defence.

The Defence and Counter Claim continues thus:

> "16. Further as to paragraph 11 of the Statement of Claim the Defendants deny that the Plaintiffs or any

> of them have or are entitled to the alleged or any interest in the said multi-storey car park or any part thereof whether by reason of the alleged or any user thereof or by reason of the alleged or any representations or agreements and the Defendants repeat paragraph 1 to 15 inclusive hereof.
>
> 17. Paragraphs 12 and 13 of the Statement of Claim are denied and the Defendants repeat paragraphs 1 to 16 inclusive hereof.
>
> 18. Further as to paragraphs 12 and 13 of the Statement of Claim the Defendants say that in accordance with the terms of the licenses mentioned and described in paragraph 12 hereof, they permitted Strata Lot owners of Strata Plan No.79, their tenants and visitors to park free of charge on Strata Lot No. 58 aforesaid until by letter dated October 12, 2000 the First Defendant gave to the Proprietors of Strata Plan No. 79 notice of revocation of the said license with effect from Tuesday November 14, 2000 from which date it required that the necessary contractual arrangements be made and the relevant fees for the use thereof be paid. The Defendants also permitted and continue to permit Strata Lot owners or occupiers of Strata Lot No. 79 who enter into contracts with them or either of them for the use of covered parking spaces, upon payment of the relevant fee, to use the said covered parking spaces in accordance with the terms of the said contracts."

The cited paragraphs from the Statement of Claim and the Defence and Counter Claim demonstrate that the serious issue is one of law. This concerns the status of the representations made to the respondents as to whether they amount to a revocable licence or a proprietary estoppel. To my mind the respondents herein made out a clear and compelling case that they have a serious argument concerning the interpretation of the minutes and correspondence adverted to in this judgment.

The respondents have sought declarations which are perhaps wider than the ambit of the interlocutory injunction issued and Miss Clarke counsel for the respondent cited the following passage in **Newport Association Football Club Ltd and others v Football Association of Wales Ltd.** [1995] 2 All E.R.87 at 94-95 to support the respondents who alleged that they were entitled to the grant of an interlocutory injunction in the Court below:

> "Once one recognizes that a claim for a declaration is a cause of action, then I see no reason to say that the injunction can only be granted once the court had determined the claim. Where there is a cause of action for invasion of a right the court does not need to wait until trial – to find out whether the claim is good- before it has power to grant an injunction. It can do so before trial simply on the basis that the claim may be good. So also, in my judgment, where the claim is for a declaration of rights. The injunction, whether at trial or interlocutory, is in support of a cause of action in its widest sense.
>
> Mr. Goodie submitted that if the court were to grant an interlocutory injunction this would be tantamount to the grant of an interim declaration, which cannot be done. I disagree. Even an interim injunction to restrain an invasion of a right is not tantamount to an interlocutory final decision – it is not a decision on the ultimate merits of the claim. Likewise the grant of an interim injunction in support of a claim for a declaration is not a decision on the merits of the claim.
>
> Accordingly, I hold that the court has power to grant an interlocutory injunction where the only cause of action is a claim for a declaration by a trader that an arrangement or contract is in unreasonable restraint of trade and that arrangement or contract is damaging his trade."

The relative poverty of the respondents

It was contended on behalf of the appellants that the respondents might not be able to honour the undertakings in damages if they are not successful at the trial. The following passage from the judgment of Lord Denning M.R. in **Allen v. Jambo Ltd.** [1980] 1 W.L.R. 1254 at 1256-1257 is as follows:

> "There is one other point that I must mention. It is said that whenever a Mareva injunction is granted the plaintiff has to give the cross undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw L.J. said in the course of the argument, a legally aided plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other plaintiff would be. I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it. One has to look at these matters broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft."

This principle is applicable to the circumstances of the present case.

It is necessary to say an additional word concerning he three corporate entities involved in this dispute. The original developer was Town and Country Properties (Ja.) Ltd. The title for the development was then transferred to the Urban Development Corporation. That is the evidence of Ms. Sonia Dowding at page 87 of the Record. The first appellant is itself a developer by virtue of the Urban Development Corporation Act. Urban Maintenance (1977) Ltd is a subsidiary company controlled by the first appellant. There is an interchange in personnel between the two entities. Ms Sonia Dowding is the property

manager of the first appellant and seconded to the second appellant as General Manager. Similarily, John Wreford and Trevor Clarke are sent to Annual General Meeting or Executive Committee Meetings of the Strata-Title Corporation and they also are employees of both appellants. The second appellant is also the Managing agent for the Strata Corporation. As U.D.C. is a dominant member of the Strata Corporation, it is bound by the assurances it gave in that forum.

Conclusion

The appellants Urban Development Corporation and Urban Maintenance (1977) Ltd. have failed to establish any basis to disturb the interlocutory injunction correctly granted by Hibbert J. in the Court below. The respondent apartment owners have a strong arguable case and they have raised an issue of general public importance with particular concern to every apartment owner for whom parking is essential. The balance of convenience favours them and they have given an undertaking in damages. Accordingly, the appeal is dismissed. The order of the Court below is affirmed and costs of the appeal must be paid by the appellants.

HARRISON, J.A:

This is an appeal from the judgment of Hibbert, J on January 29, 2002, granting an interlocutory injunction restraining the appellants from preventing the respondents or the occupiers of their apartments or lawful visitors from parking on the 5th floor strata lot No. 58 of the multi-storied car park on Proprietors Strata Plan 79 registered at Volume 1128 Folio 711 of the Register Book of Titles.

The order reads:

> "1 The defendants by themselves, their servants and/or agents be restrained from preventing the plaintiffs and/or the lawful occupiers of the plaintiff's properties, (all part of Proprietors Strata Plan Number 79) and/or the plaintiff's lawful visitors from parking their vehicles and/or any vehicles lawfully brought on to the said properties by any of the persons aforesaid on the roof (5th floor) of the multi-storey car park being the strata lot numbered 58 on Proprietors Strata Plan 79 and being the Strata Lot registered at Volume 1128 Folio 711 of the Register Book of Titles pending the outcome of the matter herein.
>
> 2. That the defendants by themselves, their servants and/or agents be restrained from taking any steps to establish any physical or other barrier whatsoever or otherwise obstructing the free passage and parking of vehicles upon the 5th floor of the multi-storey car park being the lot numbered 58 on Proprietors Strata Plan numbered 79 pending the outcome of the matter herein.
>
> 3. That the existing status quo as regards parking within and on the roof of the said

> multi-storey car park be preserved pending the outcome of the matter herein.
>
> 4. The plaintiffs give the usual undertaking as to damages."

The relevant facts are that the respondents are lot owners of apartments in Proprietors Strata Plan No. 79 ("PSP 79"), Ocean Towers, Ocean Boulevard, Kingston. The block of the said apartments is adjacent to a multi-storied car park consisting of four floors which are covered and a fifth floor which is without a roof. The multi-storied car park is represented as strata lots 7, 14, 33, 46 and 58 (the roof) and the said lots are owned by the first appellant, the Urban Development Corporation ("UDC"), as fee simple registered owner.

The block of apartments, rising "twelve floors above the garden terrace" and consisting of 134 apartments as well as the said car park were built and developed by the Town and Commercial Properties (Ja.) Ltd., a member of the Town and Commercial Properties Group of Companies, which also developed what is called the Kingston Mall.

An undated advertisement, at page 51 of the record, captioned

> "Kingston Mall, a development by Town & Commercial Properties (Ja.) Ltd."

advertised the "... over 130 condominiums apartments" offering "luxury accommodation" and emphasized:

> "PARKING
> Parking one of the city's most pressing problems, has been tackled by the developers of Kingston Mall on a scale which the problem deserves. A multi-storey car park in Number Three King Street (Block Six) adjoining the apartment building, provides 24 hour parking service for more than 500 vehicles. A further 500 on-ground parking spaces will be available until a second multi-storey car park is constructed."

Another undated advertising brochure, at page 24 of the record, captioned

"Ocean Tower apartments by the sea"

describing the apartments as "... truly beautiful and relaxing", detailed the numerous facilities offered and conveniences of the neighbourhood, and further read:

> "Multi-storey car park to the third level. Guards patrol the interior of the car park and are stationed in the main lobby to the apartments, through which all visitors must pass."

A promotional letter dated May 20, 1976, from C.D. Alexander International Ltd., Real Estate Brokers and Appraisers, to one of the respondents Gavin Clarke at page 26 read inter alia:

> "Re: Apartments – Kingston Mall
> Ocean Boulevard
>
> Further to your recent visit to our office and enquiry regarding the abovementioned apartments, we now take pleasure in

> forwarding you a brochure which speaks for itself.
>
> You will see from the brochure that the apartment block is part of the whole re-development of downtown Kingston Water Front. This complex 'the Kingston Mall' including the office building, supermarket, shops, parking garage and apartments will cost $32,000.00 when complete."

It refers to the amenities of the neighbourhood, the prospects of rental income, and continued:

> "A parking garage is adjacent to the apartment building and owners will have the use of the 3rd floor area which is on the same level as the efficiency apartments."

Various prices were quoted, and the letter, in conclusion read:

> "If you are at all interested in these apartments please act quickly as I believe that anyone purchasing now is likely to benefit from special conditions."

The respondent Gavin Clarke in his affidavit dated January 4, 2002, in support of the application for the interlocutory injunction, at paragraph 7, said:

> "That on about August 1976 I was induced into purchasing the property herein by oral representations and written advertisements by the 1st defendant's predecessor in title setting out clearly that the apartments offer ample parking facilities."

He exhibited the said two undated advertisements referred to above.

Clearly, the advertisements, promotions and sales of the said apartments were commenced by the said developers in 1976.

At a meeting of the Executive Committee of Strata Plan 79, on April 26, 1979, one Trevor Clarke explained that:

> "The Urban Development Corporation took over Ocean Towers from Kingston Mall Ltd on October 1, 1977 and ... that for the first six (6) months of 1977/78, (1st April-30th September, 1977) Kingston Mall Ltd. was responsible for the operations of Ocean Towers."

Previously, at the first general meeting of the Proprietors of Strata Plan 79, on May 15, 1978, several owners were present. The minutes inter alia read:

> "4 Mr Alvin Clarke presented Proxies in favour of the following owners:
>
> Dr A. Jacobs
> Urban Development Corporation
> Kingston Parish Church
> Mr S. St. A. Clarke."

and continuing read:

> "Matters relating to management of the apartments particularly the common areas:
>
> Mr Wreford pointed out that prior to the take-over by U.D.C. a charge of $275 per annum per car was being made for the use of apartment occupiers in the covered parking area of the multi-storey car park. As there was strong resistance by the occupiers to this arrangement, he took up the matter with the U.D.C. who agreed to provide free parking on the roof for the occupiers; as there was still some amount of resistance to this

> arrangement, Mr Wreford explained to the meeting that they would be allowed to park in the covered area outside the hours from 7 a.m. to 7.p.m. on working days. Mr Ferguson was somewhat fearful that such an arrangement could be changed at short notice and requested assurance from the U.D.C. that this would be a permanent provision. He argued that should the economic situation improve, then he foresees that the car park would likely be used 24 hours per day. Hon Leacroft Robinson then pointed out that as meetings will be held annually, these proposals would not be changed easily as they would be recorded in each minute hence no further assurance from U.D.C. would be necessary."
>
> (Emphasis added)

The UDC therefore, the registered fee simple owner of strata lots, 7, 14, 26, 33 and 58, the five floors comprising the multi-storied car park, on October 1, 1977 took over from Kingston Mall Ltd., the operations of Kingston Mall Ltd, through its UDC's subsidiary, Urban Maintenance (1977) Ltd. ("UM (1977) Ltd."). This "take-over" was merely in respect of the management and maintenance operations.

By circular letter dated December 15, 1977 two and one-half months after the "take over" of the maintenance operations by UM (1977) Ltd., the apartment occupiers were advised of the relevant parking facilities in the terms following:

> "Dear:
>
> I am pleased to advise you that <u>a policy decision has been taken that an apartment owner/occupier shall be entitled to one car park space in the open, that is on the roof of</u>

> the car park or on the garden terrace at no additional cost. I am, therefore, enclosing a sticker for the windscreen of your car which you should display for the convenience of the car park attendant.
>
> We shall be shortly marking car park spaces with signs reserving them to particular organizations or individuals. Until such time as these reservations leave you no space, you can, of course, continue to park where you find it most convenient. Should you wish to reserve a covered space for yourself, this can be done at an annual cost of $275.00. ...
>
> I look forward to your kind cooperation.
>
> Yours sincerely,
> Urban Maintenance (1977) Limited.
> John S.
> General Manager."
> (Emphasis added)

An extract from the minutes of the said meeting of April 26, 1979, at page 36 of the record, reads:

> "Miss Carmen Plummer asked whether owners would ever be charged for parking. Mr Trevor Clarke replied in the negative."

Previously, by circular letter dated January 11, 1979, from Urban Maintenance (1977) Ltd. addressed to "Dear Occupier" enclosing "your car park sticker for the calendar year of 1979," it read:

> "I would remind you that the strict entitlement for each apartment is one space on the fifth floor (roof) of the car park, but that as long as you do not infringe any of the reservation notices there is no objection to your parking in any other space you can find.

> In addition, while there are only a small number of apartments completed and occupied, we are able to provide additional stickers for owners as well as occupiers where these are different and second stickers for a second vehicle, although this will not always be the case." (Emphasis added)

By circular letter dated January 4, 1980, to the "occupier", UM (1977) Ltd. advised that:

> "... the strict entitlement for any apartment owner-occupier is a space on the 5th floor/roof, however so long as reservations indicated by the orange stickers are not violated, you may park in any space you find except that the spaces in the open on the garden terrace are reserved for the use of visitors to the ... apartments."

Thereafter, the correspondence exhibited circular letters issued to apartment occupiers, annually, indicating the parking space, number allocated and the rental payable, where applicable, but specifically advising that:

> "... free parking is available for all Apartment Occupiers on the 5th floor which, although uncovered, is provided with the necessary security."

These letters are dated:

(1) 18.03.1981 – for year 1981
(2) 28.12.1981 – for year 1982
(3) 14.09.1983 presumably for year 1983.
(4) 27.01.1984 – for year 1984
(5) 15.11.1984 – for year 1985
(6) 10.10.1985 – for year 1986
(7) 05.11.1986 – for year 1987
(8) 16.11.1987 – for year 1988 and

(9) 22.04.1993 – and the latter read inter alia:

> "Please be advised that parking spaces are available for rental in the multi-storey car park at the rate of $4,000.00 per annum.
>
> Apartment residents are being reminded that free parking is available on the roof of the multi-storey car park (fifth floor) and in the parking area on the second floor level of the apartment."

UM (1977) Ltd. issued a further letter dated January 1, 1988. It read:

> "Apartment Owners/Tenants
> Ocean Tower Apartments
>
> Please be advised that persons desirous of renting space in the Urban Development Corporation's Multi-Storey Car Park should pay for the space or spaces required not later than Monday January 18, 1988. after this date no one will be allowed to park in these spaces unless the rental is paid."

A letter dated October 12, 2001 from UDC to PSP 79, advised:

> "Re: Parking Facility – Strata Lot #58
>
> We write to inform you that effective Tuesday, November 14, 2000, no parking will be allowed on this lot unless the necessary contractual arrangements are made with Urban Maintenance Ltd., and the relevant fees paid. Occupants of the Ocean Towers Apartment complex who wish to use this facility should therefore contact Urban Maintenance Limited in this regard
>
> Yours faithfully,
> Urban Development Corporation."

Thereafter, the first appellant issued an annual notification of its charges for parking on the said car park, quoting the rate for "covered space" and "uncovered space", (Lot 58), accompanied by the relevant blank contract forms.

A letter dated May 5, 2000, from UM (1977) Ltd to PSP 79 read:

> "Further to discussion at the last Annual General Meeting we wish to enter a five year full maintenance lease with PSP #79 for the roof of the car park.
>
> The items are as follows:
>
> PSP #79 will be responsible for all repairs Consideration of $1,051,747.60 per annum 7% increase per annum. Effective date – April 1, 2000.
>
> We have asked our attorneys to prepare a contract."

This was followed by letter dated May 10, 2001, which read:

> "Re: Roof Orange Street Car Park-Strata Lot No 58
>
> Reference is made to our letter dated October 12, 2000, advising that parking will not be allowed on the captioned lot unless the necessary contractual arrangements are made and the relevant fees paid.
>
> Please be advised that since construction work is in progress, reducing the parking facilities available to occupants of the Ocean Towers Apartment Complex, a decision was taken by the UML board to extend the grace period for parking on the roof, until the construction work is completed.

It is understood that construction is scheduled to be completed by the end of August 2001. Persons interested in using the facility from that time should therefore make the necessary arrangements with the Urban Maintenance Limited.

Yours faithfully,
Urban Development Corporation."

By letter dated August 11, 2001, PSP 79, responded, inter alia:

"1. General Feeling of Persons who Park on Lot #58

a) Are of the opinion that parking should continue to be free based on the sales pitch by the original developers who indicated free parking.

b) Approval would not have been given to the developers to construct the condominium complex without adequate parking. UDC is acting as if parking is the full responsibility of PSP #79.

c) Currently UDC makes a profit from income from its commercial tenants who use floors 2, 3, and 4.

d) Some owners/tenants are of the opinion that the executive committee should request a legal response to the question of 'passage of time' theory since they have been parking free of charge for over twenty years without any objections from UDC.

e) At least 60% of those persons who use the 5th floor, floor facility indicate that we should 'do nothing until UDC takes 'threatened action then to go court'.

f) Response from the last AGM shows that owners are prepared for confrontation should UDC initiate charges for parking on Lot #58.

g) Some owners/tenants feel that UDC should accept a nominal fee of $6.00 per day.

2. Sub-Committee Recommendations

a. UDC needs to consider a new approach to parking facilities as it relates to apartment owners and find a unique method of fusing parking fees into maintenance – it is done in other Strata Lots.

Fees collected via maintenance can be paid back to UDC – it is not impossible.

b. UDC could consider pro-rating a basic monthly charge and deduct same from their fees paid each month.

c. Any changes implemented before A/B/E is fully explored will create serious administrative problems for PSP 79 as it relates to proper control of indiscipline persons, who even under the present situation refuse to co-operate.

d. A late response from an owner suggests that the executive committee should re-visit the proposal submitted by U.M.L. in May 2000. See copy attached.

I support the above with the following adjustments:

(i) Roof to be repaired by U.D.C. prior to ten (10) year lease.

(ii) Consideration should be $0.5M per annum.

(iii) 3% increase per annum following a three (3) year moratorium.

e. No action should be taken until U.D.C. reviews the whole situation and then meet with a delegation of owners/tenants with a view to resolving a potentially explosive situation."

By letter dated October 17, 2001, U.D.C. in response rejected the proposals of PSP 79:

On November 29, 2001, the respondents issued the writ of summons against the appellants. The endorsement read, inter alia:

"The plaintiffs claim against the defendants jointly and severally for the following reliefs:

1. An order that the defendants by themselves, their servants and/or agents be restrained from preventing the plaintiffs' and/or the plaintiffs' lawful visitors from parking on property known as Strata Lot #58, registered in the name of the defendant.

2. A declaration as to the rights and/or interests of the plaintiffs in the said property known as Strata Lot #58.

3. An order that the plaintiffs are entitled as of right (sic) to park in the spaces hitherto provided by the defendants for owners of properties forming part of Proprietors Strata Plan #79.

4. A declaration that any steps and/or attempts by the defendants, their servants and/or agents to prevent the plaintiffs from parking their vehicles within that portion of

> and/or upon the roof of the multi-storey car park which comprises strata lots numbers 33, 46 and 58 constitute a breach of the Town and Country Planning Act and the relevant Development Order made pursuant hereto."

On November 30, 2001, the respondents obtained against the appellants an interim injunction, ex parte, which ordered:

> "the defendants by themselves, their servants and/or agents be restrained from preventing the plaintiffs and/or the lawful occupiers of the plaintiffs' properties, (all part of Proprietors Strata Plan #79) and/or the plaintiffs' lawful visitors from parking their vehicles and/or any vehicles lawfully brought on the said properties by any of the persons aforesaid on the roof (5^{th} floor) of the multi-storey car park being the strata lot #58 on Proprietors Strata Plan 79 and being the strata lot registered at Volume 1128 Folio 711 of the Register Book of Titles for a period of 45 days from the date thereof."

An appearance was entered on December 11, 2001.

On January 29, 2002, Hibbert, J issued an interlocutory injunction in similar terms:

> "... pending the outcome of the matter herein."

This appeal arises from that order.

Mrs Benka-Coker, Q.C., for the appellants, summarised, argued that:

> (1) The learned trial judge erred in finding that there was a serious question to be tried on the principles of the case of the ***American Cyanamid v Ethicon Ltd*** [1975] 1 All E.R. 504 in that both the appellants and the respondents have equal rights as registered proprietors in Strata Plan #79 and on the

affidavit evidence the respondents have no equitable interest in nor easement over lot 58 of the appellants. The respondents were given permission to park free of charge on the said lot thereby negativing an alleged right or entitlement.

(2) Assuming that there was a serious question to be tried, the affidavit evidence revealed that damages, that is, the charges for parking would be an adequate remedy to compensate the respondents and the appellants would be able to pay if the injunction was refused.

(3) and (4) The learned trial judge erred in finding that the balance of convenience favoured the grant of the injunction in favour of the respondents, in that he wrongly concluded that the only damage to the appellants was the loss of parking charges payable by the respondents, ignoring the fact that higher charges could be made by renting to other persons, spaces on the said Lot 58 maintenance of which they the respondents were paying without obtaining maximum returns.

(5) That the learned judge was wrong to have granted the said injunction in favour of the servants and agents of the respondents who were not parties to the action, were making no claim to a right to park on the said lot and in any event, the permission granted by the letter dated December 15, 1977, specifically allotted one car park spoke to each apartment occupier.

(6) The learned trial judge on his interpretation of the facts and the law, was plainly wrong.

The development of land is governed by the Town and Country Planning Act ("the Act") and the Town and Country Authority ("the Authority") appointed under section 3 of the Act is invested with specific powers under section 5. It reads, inter alia:

> "5 – (1) The Authority may after consultation with any local authority concerned prepare so many or such provisional development orders as the Authority may consider necessary in relation to any land, in any urban or rural area, whether there are or are not buildings thereon, with the general object of controlling the development of the land comprised in the area to which the respective order applies, and with a view to securing proper sanitary conditions and conveniences and the coordination of roads and public services, protecting and extending the amenities, and conserving and developing the resources, of such area.
>
> (2) – In this Act, unless the context otherwise requires, the expression "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

Provisional development orders "may be subsequently confirmed by the Minister" (section 7).

The Town and Country Planning (Kingston) Development Order, 1966, ("the Development Order") was made and confirmed thereunder. Paragraph 5 thereof imposes a prohibition. It reads:

> "5. Subject to the provisions of this Order no development of land within the area to which this Order applies, shall take place except in accordance with the development plan and any planning permission granted in relation thereto.
>
> Provided that the planning authority may in such cases and subject to such conditions as may be specified by directions given by the Minister under this Order grant permission for

> development which does not appear to be provided for in this Order or the development plan, and is not in conflict therewith."

The specific procedure to be employed by a developer applying under the Development Order is described in paragraph 6, which reads, inter alia:

> "6. (1) An application to the local planning authority for planning permission shall be made in a form issued by the local planning authority and obtainable from that authority or from the Authority, and shall include the particulars required by such form to be supplied, and be accompanied by a plan sufficient to identify the land to which it relates and such other plans and drawings as are necessary to describe the development which is the subject of the application, together with such additional number of copies (not exceeding five) of the form ..."

Subdivision of land is subject to certain controls. Paragraph 13 reads:

> "13. (1) Where any land within the area to which this Order applies is subdivided into allotments for the purposes of sale or lease or letting or for building purposes, a scheme plan showing the proposed subdivision shall be prepared by a Commissioned Land Surveyor and submitted to the local planning authority for approval.
>
> (2) A person shall not sell, or offer or advertise for sale, or build upon, any allotment in any subdivision to which this paragraph applies, or form any proposed road in connection therewith, unless a scheme plan has been previously approved whether conditionally or unconditionally by the local planning authority."

The purpose of the Development Order is clearly stated in the First Appendix to the Order. It reads:

> "KINGSTON DEVELOPMENT AREA
> GENERAL DESCRIPTION
>
> The intention of this Order is to make provision for the orderly and progressive development of that portion of the Corporate Area of Kingston and St Andrew as described in the First Schedule. It is also intended to obtain appropriate land use, car parking facilities, building lines and other improvements in layout in accordance with recognized principles of Town Planning.
>
> No development will be permitted which would conflict with the proposals outlined in the Order ...."

Parking facilities for cars are specifically dealt with, and reads:

> "Vehicle Parking
>
> Public car park and street parking will be available in certain locations but developers will be required to provide parking facilities within the curtilage of the site to be developed or in such other place or manner as the Planning authority may agree. Appendix 2 will be used as a guide to determine the parking facilities required provided that the following conditions are complied with:
>
> (1) For each vehicle a parking bay not less than 144 sq. ft. shall be allowed.
>
> (2) Reasonable vehicular access shall be provided to the parking area and to each parking bay.
>
> (3) Where a building is divided by permanent construction into more than

> one Use and Occupancy, the number of parking bays required shall be calculated separately for each Use and Occupancy but the permissible excess factors given in Appendix 2 shall only be allowed for the major Use and Occupancy."
>
> (Emphasis added)

Appendix 2 reads:

"VEHICLE PARKING REQUIREMENTS WITHIN SITE BOUNDARIES

Type of Development	Number of Vehicles Parking Spaces Required
1. Private Residences	1 for each individual unit
2. Apartment Buildings	1 for each individual unit up to 20 units. 1 for each 2 units in excess of 20."

The Kingston and St Andrew Corporation ("the KSAC") is both the local authority and the local planning authority under the Act.

Applications to develop land are made to the local planning authority. Section 11 of the Act reads:

> "11. – (1) Subject to the provisions of this section and section 12, where application is made to a local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development order so far as material thereto, and to any other material considerations."

The Registration (Strata Titles) Act ("the Strata Act") governs the development of land into strata lots. Section 3 reads:

> "3 – (1) Land under the operation of the Registration of Titles Act may be subdivided into strata lots in accordance with strata plan registered by the Registrar of Titles in the manner provided by or under this Act.
>
> (2) When a strata plan has been so registered any strata lot included therein may devolve or be transferred, leased, mortgaged or otherwise dealt with in the same manner and form as land under the operation of the Registration of Titles Act."

The proprietors of all the said lots upon registration become a body corporate ("the Corporation") under the name "the Proprietors Strata Plan No. X" (Section 4).

Among the duties of the Corporation is the management and maintenance of the building and the property (Section 5(1)). However the specific activities are governed by by-laws. Section 9 - (1) reads:

> "9. - (1) Subject to the provisions of this Act the control, management, administration use and enjoyment of the strata lots and the common property contained in every registered strata plan shall be regulated by by-laws.
>
> (2) The by-laws shall include –
>
> (a) the by-laws set forth in the First Schedule, which shall not be amended or varied except by unanimous resolution;
>
> (b) the by-laws set forth in the Second Schedule, which may be amended or varied by the corporation."

PSP 79, by resolution dated September 16, 1976, adopted its particular by-law replacing the First Schedule. The resolution on page 93 of the record reads:

> "Resolved that the new By-laws hereunto annexed be adopted as the new By-laws of the Corporation in lieu of the By-laws presently in use contained in the First Schedule to the registration (Strata Titles) Act, 1968."

Each proprietor is fee simple owner of his lot in Strata 79. However he holds the common property as tenant in common with all other such proprietors " ... proportional to the unit entitlement of their respective strata lots ..." (section 10 of the Strata Act), is subject to the relevant by-laws and is entitled to statutory rights conferred under the Town and Country Planning Act and the Order made thereunder.

A strata owner may however acquire rights over the lot of another strata owner, by way of the doctrine of proprietary estoppel, or by other equitable principles or under the Prescription Act sufficient to establish a recognized right to be protected by law.

For example, a person seeking to raise an estoppel, must show that he mistakenly spent money on another man's property believing it to be his own and the rightful owner knowing of the spender's mistake, stood by, and refrained from advising him and correcting the error intending to benefit thereby. A court of equity will not permit such rightful owner to benefit from the mistake unless he compensates the

mistaken spender. That is the principle called equitable or proprietary estoppel. The principle was explained in the case of ***Ramsden v Dyson*** (1865) LR 1 HL 129; however their Lordships held that no estoppel arose on the facts of that case.

The principle was further explained in the case of ***Willmott v Barber*** [1880] 15 Ch. D.96, where Fry, J set out the test to be applied, called the five probanda, embracing in general terms both encouragement or mere acquiescence by the true owner of the legal right being infringed.

In ***Crabb v Arun District Council*** [1976] 1 Ch. D.179, the defendant land owner led the plaintiff, adjoining land owner, to believe that the plaintiff would be granted a right of way over the defendant's land and stood by while the plaintiff, relying on his belief, sold off a part of his land without reserving a right of way for the benefit of the remainder. The plaintiff's land was therefore landlocked. On a declaration seeking an injunction, the defendant was held to be estopped and compelled to grant the plaintiff a right of way. In ***Greasley v Cooke*** [1980] 3 All ER 710, assurances given by the plaintiff's predecessors that the defendant who performed services as an unpaid housekeeper, could remain in the house for as long as she wished raised an equity in the defendant's favour and a presumption, which had not been rebutted, that the defendant acted to her

detriment relying on the faith of the assurances. The plaintiffs were estopped from evicting the defendant.

The cases reveal that a representor of a state of affairs or of a statement of certain facts, will be estopped, in equity, from denying the existence of those facts, where the representee, relying on the representor's assertions, altered his position or acted to his detriment. (See also ***Taylor's Fashions Ltd v Liverpool Trustees Co***. [1982] 1 Q.B. 133).

The law respects a man's rights but will not countenance unconscionable behaviour. Fry, J in ***Willmott v Barber,*** (supra) at page 105 said:

> " A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights ..."

The resolution of this appeal lies in the examination of the well recognized principles laid down in the case of ***American Cyanamid v Ethicon Ltd.*** [1975] 1 All ER 504: the initial question being, is there a serious question to be tried? Hibbert, J answered this question in the affirmative and ordered that the interlocutory injunction be issued.

The respondents averred in paragraphs 7, 8, 9 and 11 of their statement of claim that:

> "7. In or about 1977 and for several years thereafter the 1st defendant and/or its predecessors in title represented to and/or

> agreed with the plaintiffs and/or their predecessors in title that the plaintiffs and/or their predecessors in title were entitled as of right to park their vehicles and/or vehicles operated by them within the multi-storey car park, that is to say upon the strata lots numbered 33 and 46.
>
> 8. Further, at all material times the 1st defendant represented to and/or agreed with the plaintiffs and/or their predecessors in title that they were entitled as of right and without more to park their vehicles and/or vehicles operated by them on the roof of the multi-storey car park, that is upon strata lot number 58.
>
> 9. In reliance on the said representations and/or pursuant to the said agreement plaintiffs purchased and invested in their said apartments.
>
> ...
>
> 11. By reason of the said representations made by the 1st defendant and/or its predecessors in title and/or by reason of the said agreements between the plaintiffs and/or their predecessors in title on the one hand and the 1st defendant and/or its predecessors in title on the other hand and/or by reason of the user of the said multi-storey car park by the plaintiffs and/or their predecessors in title and by reason of the premises, the plaintiffs have an equitable interest in the strata lots comprising and forming the roof of the said multi-storey car park."
>
> (Emphasis added)

The respondents are therefore relying on the representations of the appellants and/or their predecessors in title as developers, giving

rise to an equitable estoppel in favour of the respondents, creating a right to park their vehicles and those of their visitors on lot 58.

Miss Clarke for the respondents, in her written submissions mentioned the existence of:

> "... the 1st Appellant's (UDC's) obligation to provide parking facilities as developer of an apartment complex in keeping with the law ..."
> (Emphasis added)

and continuing said:

> "The UDC is a statutory body with obligations. If the UDC is right that it can suddenly decide to charge fees for the parking facility simply because it holds the registered title thereto, it may one day decide with impunity to put up a commercial building on the entire parking facility and leave none at all paid or unpaid. ..."

The affidavit evidence before Hibbert, J and before us, shows that the developer of Kingston Mall inclusive of the apartment complex, now Strata Corporation 79, was Town and Commercial Properties (Jamaica) Ltd., ("Town & Commercial") an independent corporate entity and not the UDC. Nor is there any evidence on the record, that Town and Commercial was in any way associated with UDC, the first appellant.

Town and Commercial in a brochure exhibited as part of exhibit GC 5-15, to the affidavit of respondent Gavin Clarke, is described as the developer of Kingston Mall, and as a "Member of the Town and Commercial Properties Group of Companies". The said brochure

specifically addressed the matter of parking. It reads, on page 51, of the record:

"PARKING

> Parking is one of the city's most pressing problems, has been tackled by the developers of Kingston Mall on a scale which the problem deserves.
>
> A multi-storey car park in Number Three King Street (Block six) adjoining the apartment building, provides 24-hour parking service for more than 500 vehicles. A further 500 on ground parking spaces will be available until a second multi-storey car park is constructed."
> (Emphasis added)

Nowhere on the advertising brochures is UDC represented as the developer.

The Development Order, 1966, made under the Town & Country Planning Act, which requires in the First Appendix that:

> "... developers will be required to provide parking facilities within the cartilage of the site to be developed or in such other place or manner as the Planning Authority may agree."
> (Emphasis added)

places the obligation on the developer of Strata Corporation 79, that is, Town and Commercial, to provide "... parking facilities ...". That obligation does not rest on the first appellant, UDC.

Town and Commercial, as the developer, would have had vested in itself, the legal estate, the fee simple, in each of the strata lots. Town and Commercial, as vendor would be required to transfer the

said legal estate to the respective purchaser, on sale of the relevant strata lot. Town and Commercial was therefore properly described as the predecessor in title of the first appellant, the UDC.

Town and Commercial was also the predecessor in title of all the purchasers in Strata Corporation No. 79, including the respondents.

The evidence therefore of Gavin Clarke, in his affidavit dated January 4, 2002, at paragraph 7:

> "That in or about August 1976, I was induced into purchasing the property herein by oral representations and written advertisements by the 1st defendant's predecessor in title setting out clearly that the apartments offer ample parking facilities. ..." (Emphasis added)

is a reference to advertisements and inducements by Town and Commercial, the developer, and not to the first appellant, UDC. The fact that the evidence shows that at the meeting of the Executive Committee of Strata Plan No. 79 on April 26, 1979 Trevor Clarke stated that:

> "The Urban Development Corporation took over Ocean Towers from Kingston Mall Ltd on October 1, 1977 ... the operations of Ocean Towers."

confirms that prior to October 1, 1977, the first appellant was in no respect concerned with, nor associated with any advertisements or inducements, in respect of the promotions and sales of the strata lots in the Strata Corporation No. 79.

It is a misconception to juxtapose the first appellant with the phrase "... and/or its predecessors in title ..." in order to link the first appellant, with the representations and inducement in respect of the sales of the strata lots in 1975 and 1976 and prior to October 1, 1977, for the purpose of imposing liability on the first appellant.

By logical sequence and as a matter of law, each respondent, as purchasers from their predecessor in title, Town and Commercial, would, by analogy, be equally liable as the first appellant, who purchased strata lot No. 58, as erroneously claimed by the respondents.

The premise " ... predecessor in title" was introduced as a base to mount an argument without any evidential or legal basis. The substratum does not exist.

Consequently, there is no evidence of any belief in the subsequent grant of a right, as in ***Crabb v Arun*** (supra) nor any assurances given, as in ***Greasley v Cooke*** (supra), by any action of the first appellant, to give rise to any equitable estoppel, creating a right in the respondents to park as of right without payment on the strata lot 58, owned by the first appellant. It is my view that liability under the claim is misplaced as it concerns the first appellant. The evidence discloses that, the first appellant, through its subsidiary UM (1977) Ltd. took over the "the operations" of Kingston Mall Ltd., on

October 1, 1977, and promptly thereafter by letter dated December 15, 1977, from the general manager of UM (1977) Ltd. to the proprietors of Strata Plan 79 advised:

> "...I am pleased to advise you that a policy decision has been taken that an apartment owner/occupier shall be entitled to one car park space in the open, that is one on the roof of the car park or on the garden terrace at no additional cost." (Emphasis added)

This letter dated December 15, 1977, is additional evidence that no user arose "as of right" and that "...the roof of the car park ..." Strata Lot 58, was by permission of UM (1977) Ltd., the maintenance management company of the strata properties of the first appellant, the UDC. I agree with Mrs. Benka-Coker, Q.C., that the existence of the said letter demonstrates that permission was granted to park on strata lot 58, and no easement existed, as of right. Additionally, the said letter bars any right that could have arisen – see Section 2 of the Prescription Act.

The said "policy decision " is on the face of it, a unilateral act of benevolence on the part of Urban Maintenance (1977) Ltd., permissive in nature, which negates the claim of the respondents to be entitled "as of right".

A court, in considering whether or not to exercise its discretion to grant an interlocutory injunction, should be guided by the words of

Lord Diplock in the ***American Cyanamid*** (supra). At page 510, he said:

> "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."

On the available affidavit evidence, it is my view that the claim is "frivolous and vexatious". There is no serious question to be tried. The application for an interlocutory injunction ought to have been refused. Ground 1 therefore succeeds.

Assuming however, that there was a serious question to be tried, which I maintain that there was none, the learned trial judge should have gone on to consider whether the respondents would be adequately compensated in damages for the loss they would have sustained, in the event that no injunction was granted and the first appellant was permitted to continue charging fees, for parking on lot 58, payable by the respondents.

The financial health of the first appellant is certified by Sonia Dowding in her affidavit dated January 24, 2002 in paragraph 30 at page 91 of the record. She said:

> "30 ... the second defendant is a wholly owned subsidiary of the first defendant and the first defendant owns considerable assets which, by the audited Financial Statements prepared by its auditors, DeLoitte & Touché for the year ended March 31, 2001 stood at a net book value of $1,215,617,000.00. That I do verily

> believe that the first defendant is in a financial position to satisfy any award of damages which this Honourable Court may award to the plaintiffs or any of them in the event that they should be able to successfully maintain their claim herein at the trial of this action."

The first appellant is a large reputable statutory corporation. On that basis, the interlocutory injunction should not have been granted. Lord Diplock, in the ***American Cyanamid*** case, at page 510, dealt with that circumstance. He said:

> "...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."

Conversely, assuming that damages would not be an adequate remedy for the respondents if successful at the trial, the court should consider whether if the first appellant succeeds, the respondents under their undertaking could compensate him adequately in damage, if the injunction was granted. Lord Diplock further addressed that circumstance. He continued, at page 510:

> "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 on this ground to refuse an interlocutory injunction."

Although the respondents gave an undertaking in damages, the first respondent, in her affidavit, confessed to her impecuniosity.

Again, I agree with counsel for the appellants, that further losses to the first appellant would be the loss of rental of the parking spaces on lot 58, that is, the sums payable by persons at a higher rental than the concessional charge of $6,000.00 per annum allowed to be paid by the respondents. That potential loss the learned trial judge did not appear to contemplate.

It would seem that on the evidence available, if the respondents were to succeed at the trial and the appellants had been permitted to operate lot 58 charging the respondents parking fees, thereby refusing the grant of the injunction, damages would be an adequate remedy and the appellants would be able to pay.

No balance of convenience arises favouring the grant of the interlocutory injunction sought.

Miss Clarke for the respondents, in her written submissions, posited the first appellant as a developer with "obligations to provide parking facilities in keeping with the Order (Development Order 1966)". She projected that one of the questions at the trial would be:

> "... whether the first (respondent), as owner can derogate from its statutory obligation which it had and complied with in its capacity as developer and deprive a resident of a benefit he has derived from the statute."

This argument is based on a premise that the first appellant "took over" from Town and Commercial, the developers of the apartment complex. This is erroneous in law and is nowhere supported on the evidence.

When the developer, Town and Commercial sold to the strata lot purchaser, it transferred its legal estate in the respective lot to the said purchaser. Each owner, including the appellants and the respondents took over their own strata lots. Each strata owner as proprietor, in Strata Plan 79, in addition, holds the common property "... as tenant in common with all such proprietor ...": (Section 10 of the Strata Act). The Strata Corporation 79 therefore "took over" the management of the common area in accordance with the by-laws

made under section 9 of the Strata Act and which by-laws were adopted by Strata 79 by resolution dated September 16, 1976.

There was therefore, as a matter of law, nothing left in the hands of the developers Town and Commercial, which the first appellant could "take over" except its own strata lots which it owned as registered proprietor.

Wider questions do arise, although only obliquely relevant to these procedures. Did the KSAC as the local and planning authority under the Town and Country Planning Act grant planning permission to Town and Commercial in breach of Appendix 2 of the Development Order? Did the said developer commit a breach of the said order by not providing the statutory parking spaces for the individual apartment owners?

The answers to these questions do not in law appear on the face of it to be the concern of the first appellant.

The claim is wholly frivolous and vexatious. The interlocutory injunction ought not to have been granted by Hibbert, J.

There is no merit in the grounds of appeal. The appeal should therefore succeed and the order of Hibbert, J set aside with costs to the appellant in this Court and below, to be agreed or taxed.

WALKER, J.A:

I agree that this appeal should be allowed for the reasons given in the judgment of Harrison, J.A., which I have had the advantage of reading in draft and to which I cannot usefully add.

ORDER:

DOWNER, J.A:

By a majority appeal allowed. Order of the court below set aside. Costs of the appeal and in the court below to the appellants to be taxed if not agreed.