[2012] JMCC Comm. 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 CD 00023

BETWEEN	**LOOKAHEAD INVESTORS LIMITED**	**CLAIMANT**
A N D	**MID ISLAND FEEDS (2008) LIMITED**	**1ST DEFENDANT**
A N D	**JAMAICA LIVESTOCK ASSOCIATION LTD**	**2ND DEFENDANT**
A N D	**NEWPORT-FERSAN (JAMAICA) LTD**	**3RD DEFENDANT**
A N D	**REGISTRAR OF TITLES**	**4TH DEFENDANT**
A N D	**ROYAL BANK OF CANADA**	**INTERVENER**

Mr Michael Hylton QC and Mr Duwayne Lawrence instructed by Michael Hylton and associates for the claimant.

Mr Ransford Braham instructed by Jacqueline Samuels–Brown for the 1st defendant.

Mr Jerome Spencer instructed by Patterson Mair Hamilton for the second defendant.

Mr. Stephen Shelton and Ms Maliaca Wong instructed by Myers Fletcher and for the 3rd defendant.

Miss Emile Lieba instructed by Dunn Cox for Intevener.

Heard: 16, 17, 18, May, 2012

APPLICATION FOR INTERLOCUTORY INJUNCTION – WHETHER CONTRACT FOR SALE OF PROPERTY BINDING AND ENFORCEABLE – EFFECT OF AGREEMENT HELD IN ESCROW – WHETHER PRE-EMPTION RIGHT VALID – MORTGAGEE'S RIGHTS-PRIORITY OF EQUITIES – WHETHER FEED MILL AND WHARF ARE FIXTURES – WHETHER NOMINEE BONA FIDE IS A TRUE NOMINEE

SINCLAIR-HAYNES J

[1] This is an application by Lookahead Investors Ltd. for an interlocutory injunction until the trial of the matter. Lookahead Investors Ltd., hereinafter called Lookahead (claimant) and Mid Island Feeds Ltd., hereinafter called Mid Island (first defendant)

were signatories to an agreement for the sale of property comprised in certificate of title registered at volume 1435 Folio 917 of the Register Book of Titles. In the course of the negotiations, Lookahead was informed that Jamaica Livestock Association Ltd (second defendant) (JLA) held a pre-emption right over the property.

[2] In recognition of JLA's pre-emption right, on the 30th November 2011, Lookahead's attorneys obtained an undertaking from Mid Island's attorney-at law, Gordon and Company, that the agreement (in triplicate) and the cheque for the deposit of $750,000 would be held in escrow until it was able to certify that JLA's pre-emption right was either extinguished by the effluxion of time or it was waived. The vendor affixed his signature to the agreement but did not date the agreement. Upon receipt of a copy of the signed agreement from the vendor, Lookahead's attorney inserted the date. The document was not stamped.

[3] On the 10th January 2012, JLA informed Mid Island of its intention to exercise its pre-emption right. Mid Island, on the 10th January 2012, notified Lookahead that JLA intended to exercise its pre-emption right. Its attorney returned the cheque for the sum of $750,000.00 and its copy of the signed but undated agreement which it marked cancelled. Lookahead was required to signify the discharge of the undertaking by signing and returning the copy, instead, it instituted proceedings against the defendants for specific performance, among other things.

[4] Lookahead also sought and obtained an interim injunction against the defendants for the following:

> *(1) "An injunction to restrain the 4th Defendant, whether by herself or by her servants or agent or otherwise howsoever from registering the transfer of the property comprised in Certificate of Title registered at Volume 1435 Folio 917 of the Register Book of Titles to the 3rd Defendant or otherwise than to the Claimant.*
>
> *(2) An injunction restraining the 1st, 2nd and 3rd Defendants whether by themselves or by their servants or agents or otherwise howsoever from using or dealing with the property comprised in certificate of Title*

registered at Volume 1435 Folio 917 *of the Register Book of Titles in any manner inconsistent with or prejudicial to the interest of the Claimant.*

THE DEFENCE

[5] The claimant's application is met with strident opposition from the defendants. The first defendant has advanced the following:

(a) That there is no serious question to be tried.

(b) This document demonstrates that the parties did not intend the agreement for sale to come into effect unless or until it was established that the JLA had declined to enforce its preemption rights that it had in relation to the property.

(c) The agreement which Lookahead relies on has failed to come into existence.

(d) Alternatively the Jamaica Livestock Association's preemption right has had the effect of automatically bringing the said agreement for sale to an end.

(e) In the circumstances Lookahead does not have an agreement which the court can specifically or otherwise enforce. Further, the agreement upon which Lookahead relies states at special condition 8 as follows:
The purchase of the property the subject of this Agreement is conditional upon the following:

(a) Receipt of such third party consents as may be required for the transaction(s) as contemplated by the parties hereto, including but not limited to, the receipt of executed consents/discharges/ memoranda of satisfaction (as the case may be) related to:

(i) The release of the vendor's secured indebtedness of RBC Royal Bank Jamaica Ltd of the property; and

(ii) The full and conditional release by an affiliate of the purchaser, Newport Mills Limited, of its claim in debt also described as the "NML Debt" (Claim No. 2010HCV-4304) against the Vendor's affiliate, Mid Island Poultry Limited and including the provision of evidence satisfactory to the vendor/Mid Island Poultry Ltd, that the Judgment entered in Judgment Binder No. 752 Folio 37 on the 5th May 2011 in the Supreme Court has been duly discharged.

[6] Mr. Ransford Braham QC, on behalf of the 1st defendant submits that on a proper construction of the clause, no sale or transfer of the property to Lookahead can occur without the consent of RBC or by the provision of a discharge of mortgage by the

said bank as it is a registered mortgagee on title for the property, subject of the suit. RBC, he submits, in consenting to the sale or purchase to JLA, and/or to its nominee and by providing a discharge of mortgage to facilitate the transfer of the property to the JLA or its nominee Newport Fersan Jamaica Ltd (NFJ), has indicated that it is not consenting to the sale to Lookahead. Lookahead and Mid Island, according to him, no longer have the consent of RBC. In the circumstances the agreement is unenforceable.

THE LAW

[7] The principles expressed by Lord Diplock in **American Cyanamid Co. v Ethicon** [1975] 1 Al ER 504 is the settled law regarding the circumstances in which injunctions ought to be granted. The three important considerations distilled from that case are:

(1) whether there is a serious issue to be tried;

(2) whether damages is an adequate remedy; and

(3) with whom the balance of convenience lies.

Lord Hoffman, in delivering the decision of the Board in the Privy Council case of **National Commercial Bank Jamaica Limited v Olint Corp. Limited** Privy Council Appeal No. 61 of 2008 delivered on the 28th April 2009, endorsed and applied the principles enunciated by Lord Diplock in **American Cyanamid**. On behalf of the Board, at page 5, he said:

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

THE FIRST ISSUE IS WHETHER 'THERE IS A SERIOUS ISSUE TO BE TRIED'

[8] Lookahead has instituted proceedings against Mid Island for specific performance. The pertinent issue is whether there is a serious issue to be tried. The defendants contend that there is no serious issue to be tried. Mr. Stephen Shelton, submits on behalf of NFJ that the mortgagee, RBC, whose approval was necessary for any sale of the property, had required the agreement to be signed and held in escrow pending JLA's right to exercise its pre-emption rights. The pre-emption provisions were

invoked therefore the executed agreement never came into existence. It was cancelled by the escrow agent.

[9] Michael Hylton QC however submits that there is a serious issue to be tried. It is his submission that the court should not embark on a trial at this stage in order to determine the strength of each party's case. The court is mindful of the following admonition of Lord Diplock in **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504, 510 that:

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims or 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."*

[10] The court must however, satisfy itself that the claim is 'not frivolous or vexatious, in other words there is a serious question to be tried'. Lord Hoffman in **National Commercial Bank Jamaica Limited v Olint Corp. Limited** enumerated some matters the court may consider in determining whether to grant an injunction and the relative strength of each case is a factor. It is useful to quote, at page 6 paragraph 18 where he said:

> "*Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."*

[11] Is there in existence, a binding and enforceable agreement for sale between Lookahead and Mid Island Feeds? Lookahead's substantive application is for specific performance. Andrew Burrows in his text, **Remedies for Torts and Breach of Contract** third edition at page 456 states:

> "*Strictly speaking, it is not an essential prerequisite of specific performance that the defendant is in breach of contract. Rather as Snell says: "…an*

action for specific performance is based on the mere existence of the contract, coupled with circumstances which make it equitable to grant a decree". But in practice, it is a breach of contract; actual or threatened that renders it 'equitable 'to grant the decree."

[12] At Lookahead's request, the agreement was held in escrow as stated above. This is evidenced by letter dated November 30, 2011 from Lookaheads attorney, Mr. Lance Hylton, to Mid Island's attorneys. The letter reads:

"Please find enclosed:

(1) *Agreement for Sale in triplicate duly signed by the Purchaser; and*

(2) *Cheque for the amount of US$750,000.00 being deposit and further payment on account and made payable to RBC Royal Bank (Jamaica) Ltd.*

On your instructions these monies and documents are being delivered to you on your undertaking

(a) …

(b) …

(c) To ensure that the documents and funds are held in escrow under your direction and to procure that same are not used in any manner prejudicial to the Purchaser's interest unless you first certify to us that any preemption rights held by the Jamaica Livestock Association over the property has been waived, has expired or no longer subsists;

(d) To acknowledge receipt of the enclosures and the conditions on which they are forwarded by signing and returning the attached copy letter by close of business on Thursday, December 1, 2011.

By way of letter dated 2nd December, 2011, Mid Island's attorney responded:

"We refer to the captioned matter and to previous correspondence ending with yours dated November 30, 2011 duly amended as agreed, per our discussions. In this regard, please find enclosed:

(1) Copy of your letter, duly acknowledged by us, confirming our acceptance of the terms under which the enclosures forwarded to us by you on November 30, 2011 were received. We also return herewith previous letter of that date along with the copy, for your action.

(2) Copy of the Agreement for Sale (undated) evidencing due execution by both parties for your records.

Please note that we are holding the original signed Agreement for Sale (in triplicate) in escrow based on the undertakings accepted by us.

(3) Copy of our letter dated November 30, 2012 addressed to RBC Royal Bank (Jamaica) Limited, enclosing Bank of Nova Scotia Jamaica Ltd. Cheque No. 001013 in the amount of US$750,000.00, receipt of which was duly acknowledged by the Bank.

We reiterate our undertaking to hold the said documents and funds in escrow under our direction, and to procure that same are not used in any manner prejudicial to your client's interest unless we first certify to you that any pre-emption rights held by the Jamaica Livestock Association over the property has been waived, has expired or no longer subsists.
Kindly confirm the safe receipt of the enclosures by signing and returning the attached copy of this letter.

[13] The definition of the word escrow is helpful in determining whether the agreement was intended at that point to be binding. **Black's Law Dictionary** sixth edition at page 545 defines escrow as:

> "*A legal document (such as a deed), money, stock, or other property delivered by the grantor, promisor or obligor into the hands of a third person, to be held by the latter until the happening of a contingency or performance of a condition, and then by him delivered to the grantee, promise or oblige. A system of document transfer in which a deed, bond, stock funds, or other property is delivered to a third person to hold until all conditions are fulfilled; e.g. deliverer of deed to escrow agent under installment land sale contract until full payment for land is made.*"

[14] It was the clear understanding between Lookahead and Mid Island that the sale could not be completed at that point. The agreement was therefore held in abeyance until JLA either waived its preemption right or the same was extinguished by the passage of time. The fact that the agreement for sale was undated and unstamped by Mid Island fortifies the defendants' contention that the parties never intended the contract to have been binding at that point. This is firmly buttressed by the averment of Mr. Lance Hylton in his affidavit dated 4 April 2012. At paragraph 9, he deponed:

> "*It was because I realized that we would end up with a binding agreement without knowing much about the status of the alleged pre-emption right that I inserted the condition subsequent in my letter to Ms. Gordon of November 30, 2011 requiring that she hold the documents and cheques until she confirmed that the pre-emption right had expired (which we all expected to happen on December 12). She would then be free to proceed to use the cheque to stamp the agreement.*"

[15] Of significance is Lookhead's increased offer to purchase the property upon its discovery that JLA wished to exercise its pre-emption right. It is illuminating to set out the terms of the offer from Lookahead's attorney Mrs. Judy Hylton. Her letter dated January 20, 2012 reads:

> *"…This serves to advise that **Caribbean Broilers (Jamaica) Ltd** hereby offers (subject to contract) to purchase from Mid Island Feeds (2008) Limited the property at caption for a Purchase Price of US$5,200,000.00. All other terms and conditions would be as previously negotiated.*
>
> *We believe Mid Island is entitled to treat with this offer and withdraw from the present arrangements with the Jamaica Livestock Association (if no agreement has been signed as yet). The JLA would then be entitled to match this new offer under its pre-emption agreement.*

By way of letter dated January 23, 2012 she further wrote:

> *"We advise that we act on behalf of Caribbean Broilers (Jamaica) Limited and are instructed that you represent Mid Island Feeds (2008) Limited.*
>
> ***Caribbean Broilers (Jamaica) Ltd** hereby offers (subject to contract) to purchase from Mid Island Feeds (2008) Limited the property at caption for a purchase Price of US$5,200,000.00. All other terms and conditions would be as previously negotiated between Mid Island Feeds (2008) Limited and Caribbean Broilers (Jamaica) Ltd, the details of which would have been conveyed to you by your clients.*
>
> *We believe Mid Island is entitled to treat with this offer and withdraw from the present arrangements with the Jamaica Livestock Association (if no agreement has been signed as yet). The JLA would be entitled to match this new offer under its pre-emption agreement."*

[16] In light of the foregoing, Lookahead faces the insuperable task of convincing a court that the signed agreement at that point was binding and enforceable and thus it is "equitable to grant the decree."

RBC'S RIGHTS

[17] There was yet another hurdle which Lookahead needed to surmount in order to have secured a binding agreement. By virtue of paragraph 8 of the agreement, the purchase of the property was conditional upon the receipt of RBC's consent, discharge and memoranda of satisfaction. Mr. Hylton submits that special condition 8 is not a

condition precedent. It is a condition subsequent therefore its fulfillment does not affect the enforceability of the Agreement for sale.

[18] This submission, in this court's view, lacks tenability. It was a clear term of the Agreement that the purchase of the property was conditional upon the bank's consent *inter alia*. It is necessary to set out the clause.

Clause 8 states:

> *The purchase of the property the subject of this agreement is conditional upon the following:*
>
> *"(a) Receipt of such third party consents as may be required for the transaction(s) as contemplated by the parties hereto, including but limited to, the receipt of executed consents/discharges memoranda of satisfaction (as the case may be) related to:*
>
> *(f) The release of the vendors secured indebtedness to RBC Royal Bank Jamaica Limited over the property."*

[19] Michael Hylton QC relies on the case of **Property and Bloodstock Ltd. v Emerton; Bush v Bloodstock Ltd** [1967] 2 All ER 839 for the proposition that special condition 8 is not a condition precedent, therefore its non-fulfillment does not affect the enforceability of the agreement. The circumstances of this case are distinguishable from that of **Property and Bloodstock Ltd. v Emerton**. In that case, the salient issue before that court was identified by Ungoed-Thomas J as, "…*whether the mortgagee's right of redemption by a provision under its special conditions of sale that "…the sale is subject to the vendor obtaining the consent of the …" to the assignment of the lease to the purchaser."*

[20] It was the finding of the court that on a proper interpretation of the contract for sale, and condition "(j)," *obtaining of the landlord's consent was not a condition precedent to the formation of a contract of sale and creation of the relation of vendor and purchaser between the mortgagee and the purchaser*." (Headnotes)

[21] In the instant case however, special condition 8 was predicated on Mid Island's indebtedness to RBC. The loan was partly secured by the said property. Mid Island was

unable to service its loan repayments. Consequently, Mid Island, in order to avoid being placed into receivership by RBC, was forced to sell the property. It (Mid Island) agreed to sell the property and pay the proceeds to RBC. It was a condition of the agreement that any deposit on the sale was to be held in escrow.

[22] RBC is therefore a mortgagee with the inviolable right to sell the property whenever and to whomever, provided the sale is genuine and it is to an independent purchaser at a price honestly arrived at (See **Cuckmere Brick Ltd. and Anor. v Mutual Finance Ltd.** (1917) 2 All ER page 633 at page 646). As observed by learned Queens Counsel, Mr. Braham, the granting of an injunction might well be a futile exercise since RBC is entitled to sell the property under its powers of sale and Lookahead has no legal basis to prevent its sale.

REGARDING THE ALLEGATION THAT THE PRE-EMPTION AGREEMENT IS INVALID AND OR ILLEGAL AND THEREFORE VOID AND UNENFORCEABLE

[23] Is there a valid and subsisting re-emption right? Mid Island had originally purchased the property in issue from JLA. It was a term of that agreement, that in the event Mid Island decided to sell the property, JLA would have a pre-emption right to re- purchase the whole or any of the Sale Assets (including the Feed Mill, the wharf, the Grain Off-Loading Facilities and the Real Property.) Consequently, by virtue of agreement dated 15 June 2009 between, JLA and Agro Industries Holdings (2008) Limited, JLA was given a pre-emption right which expired in December 2011.

[24] It is important at this juncture, to pause and define the term 'pre-emption right'. Harrison P, in the Court of Appeal case of **Dennis Woodbine v John Ebanks** SCCA147/2000 delivered 20 December 2004, adopted the definition of the learned authors of **Halsbury's Laws of England** 4th edition, volume 42, paragraph 26, to wit:

> "*A right of pre-emption or of first refusal over land is a contractual offer from the owner of the land that in the event that he decides to sell the land he will first offer it to the other contracting party in preference to any third party buyer. No obligation arises on the part of the owner to sell if he does not wish to sell, nor is the other party bound to accept when the offer is made."*

[25] Michael Hylton QC, places reliance on the above stated dicta for the proposition that Mid Island's only duty regarding the JLA's pre-emption right was to offer it to JLA, it being possessed of the first right of refusal. Schedule 4 of the 2009 Agreement, however, imposes specific terms/ conditions which bind Mid Island once the decision is taken to sell for example, clauses 4, 5, 6, 7and 8 which state as follows:

> *Clause (5)*
> 5. *The Grantor and the Grantee undertake to do all such things as may be necessary to ensure that the agreement for sale, pursuant to which the Property is sold to the Grantee, shall be signed and completed without undue delay.*
>
> *6. If the Grantee shall, from whatever cause, fail to exercise the Right of Pre-emption, the Grantor shall be at liberty at any time during the period of six (6) months from the date of the Grantor's Notice to sell the Property at a price which shall not be less than the price specified in the Grantor's Notice and on terms and conditions which are no more favourable than those offered to the Grantee.*
>
> *7. If the Grantor shall not sell the Property in accordance with the foregoing provisions of this Schedule, the terms and conditions of the Pre-emption Right shall continue in full force and effect in relation to:*
>
> *(a) any intention on the part of the Grantor during the said 6-month period to sell or otherwise dispose of the Property at a price less than that specified in the Grantor's Notice or on terms and conditions more favourably than those offered by the Grantee;*
>
> *(b) any intention on the part of the Grantor after the said 6-month period but during the Pre-emption Period to sell or otherwise dispose of the Property at a price less than that specified in the Grantor's Notice or on terms and conditions more favourably than those offered by the Grantee.*
>
> *8. A Grantee shall not register any caveat or other interest against a Certificate of Title with respect to the Property over which it has a Pre-emption Right.*

Assuming Lookahead's agreement with Mid Island is binding and enforceable, the issue is which equity prevails, Lookahead's or NFJ's?

[26] The oft cited maxim which was recited by Hercules JA in the Court of Appeal case of **Barclays Bank v Hamilton** (1973) 20 WIR, 344, "*Where equities are equal, the*

first in time shall prevail' (qui prior est tempore, potior est jure) was criticized by Lord Kindersley V-C in **George Rice and Lydia Rice v William Nail et al** 61 ER.646, (1853) 2 Drewry 73. He preferred the statement of the rule thus "As between persons having only equitable interests, if their equities are equal, qui prior est tempore potior est jure." At page 3 He expressed the following:

> "*This form of stating the rule is not so obviously incorrect as the former. And yet even this enunciation of the rule (when accurately considered) seems to me to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the term "equity?" For example, when we say that A has a better equity than B, what is meant by that? It means only that, according to those principles of right and justice which a Court of Equity recognizes and acts upon, it will prefer A to B, and will interfere to enforce the rights of A as against B and therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a Court of Equity would altogether refuse to lend its assistance to either party as against the other. If the court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the equities of the two are equal; that is, in other words, how can it be said that the one has no better right to call for the interference of a Court of Equity than the other? To lay down the rule therefore with perfect accuracy, I think it should be stated in some such form as this:-- "As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity; or, qui prior est tempore potior est jure."*

In the opinion of this court there is certainly merit in that view.

[27] It is Mr. Hylton's submission that Mid Island is expected to comply with the terms of the contract and transfer the property to Lookahead unless:

(a) There is a valid pre-emption agreement right in favour of JLA; and

(b) JLA has validly exercised that right.

According to him, neither of those conditions is fulfilled, therefore Mid Island is obliged to transfer the property to Lookahead.

[28] Learned Queen's Counsel, submits that at the relevant time, the pre-emption agreement between Mid Island and JLA was not valid and enforceable. Although JLA is first in time, he submits that the pre-emption agreement treated items, that is, the wharf

and the feed mills which formed part of the real estate and are therefore fixtures, as chattel. He alleges that this was to avoid paying the necessary ad valorem transfer tax and stamp duty.

[29] He further, alleges that of the total consideration of US $6 million, only US$500,000.00 of that sum was allocated to the real estate. The balance was purportedly for chattel. As a result, millions of dollars of stamp duty and transfer tax were not paid. He submits that the contract is illegal and hence the court should not allow the parties to enforce it. He relies on the cases of **Napier v National Business Agency Ltd** [1951] 2 All ER 264 in which the court refused to enforce an agreement in which the parties agreed to inflate the claimant's expenses.

[30] It is his submission that a court will likely conclude that even if JLA had a valid pre-emption right, it was improperly exercised. A court of equity should not exercise its discretion in favour of JLA and NFJ. Although JLA is first in time, it should not prevail because of the conduct of JLA/NFJ. He relies on the case of **Barclays Bank v Hamilton** (1973) 20 WIR, 344 and George **Rice and Lydia Rice v William Nail *et al*** 61 ER 646**.** Lookahead's agreement, in the circumstances, takes priority because JLA's agreement is invalid. He relies on the following statement made by Lord in **George Rice and Lydia Rice v William Nail et al**:

> *"I have made these observations, not of course for the purpose of a mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this: that, in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i.e., that a Court of Equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all other respects equal; and that, if the one has on other grounds a better equity than the other, priority of time is immaterial."*

[31] The question is whether Lookhead has displaced JLA's equity by providing cogent evidence of fraudulent conduct which impugns the validity of the (relevant) agreement (between Mid Island and JLA). Hans Muller, an engineer and process Technologist,

deponed on behalf of Lookahead. The crux of his evidence is that the feed mill is a complex structure and its foundation is an integral part. It is his evidence that "*A feed mill, by design, nature and purpose is affixed to the earth."* He disagreed with the opinion of Mr. Trevor Patterson given in his affidavit of March, 2012, that, "*The Wharf also refers to trade fixtures, such as the fenders, shore-side equipment and the like."* It is his opinion that:

> *"…a significant portion of the Mid Island Feeds Mill is comprised of concrete foundation which cannot be moved and is permanently affixed in the earth. In my opinion it would be very difficult and prohibitively costly for the Mid Island Feeds Mill to be dismantled and reassembled in another location. I have never heard of this being done for a facility of this kind.*
>
> *The Mid Island Feeds Wharf includes a fixed platform which I estimate to be sixty seven meters (201 feet) wide along the shore and extending twenty five meters (83 feet) into the sea to achieve deep water draft. This platform is supported by concrete piling and protected from wave-action by sheet-piling and sea walls. I estimate that the piling foundation reaches depths of 50-60 feet below the surface extending into the bedrock of the earth. This is capped by a concrete retainer wall. The piling and foundation construction tend to be the biggest contributor to the cost of a wharf."*

[32] Mr. Muller is neither an attorney nor a valuator. In the final analysis it is for the court to examine the evidence and arrive at a decision. While his observations of the structure might be useful in arriving at a decision, it is not a foregone conclusion that they will lead to the conclusion that they are fixtures in law. The learned authors of **Cheshire and Burn's Modern Law of Real Property** 17th edition at page 156 recognize the difficulty in determining whether structures that are affixed to land are fixtures. At page 156 it expressed:

> "*The question whether a chattel has been so affixed to land as to become part of it is sometimes difficult to answer. It is a question of law for the judge, but the decision in one case is no sure guide in another, for everything turns upon the circumstances and mainly, though not decisively, upon two particular circumstances, namely, the degree of annexation and the object of annexation."*

[33] **RH Maudsley and EH Burn** in their text **Land Law cases and Materials** third edition at page 81 stated that there are occasions in which some chattels may be

removed although they have become a part of the land. By virtue of statute, in England, a tenant for years is able to remove trade, ornamental, agricultural and domestic fixtures.

[34] The English Court of Appeal case of **Webb v Frank Bevis, Ltd** [1940] 1 All ER 247, is instructive. In that case the lessee was permitted to construct building of a temporary character. He was made responsible for removing, at his own expense, the building and erections. The land was to be restored to its 'original state and condition'. On this land the appellant in the matter constructed a large shed which stood on a concrete base. Farwell J, the judge at first instance held that the shed and the concrete floor, constituted a single unit which was affixed to the soil. It was his finding that the shed was affixed to the soil to the same extent as the floor itself and that the appellant company had lost its right to the shed as it was not a tenant's fixture. The court of appeal however held that the concrete foundation, which is a fixture, was a 'separate unit from the superstructure'.

[35] Scott LJ, who delivered the judgment of the Court of Appeal, stated the law and described the shed and its construction with such clarity that I unapologetically quote copiously from his judgment:

> *"On this land the appellant company erected a large shed for the purposes of housing their manufacturing machinery and of affording warehouse accommodation for plant and materials. They first leveled and consolidated the surface, and then laid on it a concrete floor 3 ins. Think for the full dimensions of the shed, 135 feet by 50 feet. The roof and sides were of corrugated iron, both carried by a timber construction, but removable. The sides were capable of being taken down in panels. The weight of the roof was carried by wide timber girders, resting on solid timber posts, which in turn rested on the concrete floor, thickened to some depth to afford adequate support. To prevent lateral movement under wind pressure, each post was tied to its concrete base by wrought iron straps on the opposite sides and the post and straps were held together by a bolt running horizontally through the post, while the straps were fastened tightly by a nut screwed on one end of the bolt. There was no other attachment to the soil. In the shed, there were three heavy pieces of machinery, which were similarly attached to the concrete floor.*

Once the roof and sides of the shed had been taken down, the posts could easily be removed by undoing the bolts, and, if need be, the upstanding straps left behind could be cut off level with the surface of the concrete floor. This shed seems to have been erected with the informal consent of the military authorities. At a later stage, the respondent obtained a written agreement authorizing the use of the site for 3 years for the purpose of manufacturing concrete and breeze products, and permitting the removal during the 3 years of the "temporary storage shed," so named in the document, subject to the site being restored. It is thus plain that the respondent recognized the temporary nature of the shed, and so informed the military authorities.

That the concrete floor was so affixed to the ground as to become part of the soil is obvious. It was completely and permanently attached to the ground, and, secondly, it could not be detached except by being broken up and ceasing to exist either as a concrete floor or as the cement and rubble out of which it had been made. Does that fact of itself prevent the superstructure from being a tenant's fixture? I do not think so. If it had been erected on concrete blocks, one under each posts, the top level with the surface of the ground, and the attachment of post to block had been plainly removable at ground level, "the object and purpose" of the attachment would have been obvious-namely, to erect a mere tenant's fixture. In my opinion, it was equally so in the actual construction adopted for holding the posts in position on their concrete supports. The photographs proved below, and shown to us, demonstrate the simplicity of this method of detachment, once the upper parts and walls had been taken down.

The judge held, and I think rightly held, that the superstructure was "to a very large extent" a "temporary" building, by which I understand him to mean that the object and purpose for which the company erected it was its use for such time as they might need it. That view goes a long way, if not all the way, towards the conclusion that, regarded apart from the floor, the shed was in law removable…"the purpose and object" of the erection, and, when the judge found as a fact, as he did, that "it could be taken away, no doubt piecemeal," and re-erected elsewhere, I think he consciously decided that, apart from the floor, it was a tenant's trade fixture, and removable by the tenant as such."

[36] That case was decided in 1940. Technology has evolved exponentially since. Hitherto, chattels which were affixed to the land could not be easily removed without damage to the item, the concrete base and in some cases, to the land. The valuators DC Tavares and Finson Realty Ltd, a reputable company, classified the Feed Mill, the wharf, silo tower and the other relevant structures as "*specialized structures …that are not considered permanent appurtenances but can easily be dismantled and as such are*

capable of being easily dismantled and as such are capable of being treated as assets for sale." It is not unreasonable to assume that the relevant revenue collecting authorities are aware of advancement in technology. The ability to prove that the structures are 'specialized structures' is not, in this court's opinion, insurmountable.

[37] The court is of the view that Lookahead will be confronted with the monumental task of attempting to prove that Mid Island willfully defrauded the relevant agencies of tax and duties in light of advancement in technology and the valuation report which was accepted by the relevant revenue agencies. Further, the fact that a lesser sum was allocated to the real estate is not *per se* evidence of fraud. The relevant revenue agencies accepted the valuator's description of the feed mill as capable of being dismantled and sold separately. The said agencies therefore classified the items as chattels and accepted the value placed on these items as being reasonable.

[38] It is also Mr. Hylton's submission that the 2009 agreement (pre-emption agreement) did not include the sale of realty as the words 'Real Property' were deleted from under two subheads of the agreement. It is his further submission that the fact that only $30.64 was paid as stamp duty on the 2009 Agreement supports the contention that the agreement only included the chattel, as the relevant tax and duty were not paid on an *ad valorem* basis.

[39] Clause 19.1 of the pre-emption agreement stated that JLA was entitled to re-purchase the whole sale asset including the 'Real Property'. Mr. Hylton's submission is, in the view of this court, tenuous in the face of that clause.

[40] Learned Queen's Counsel, Mr. Hylton submits that a pre-emption right is personal and not attached to the land. It is only exercisable by and against the parties to the agreement that created it. The agreement which created the pre-emption right was between JLA and Agro Industries, not Mid Island. It is therefore not enforceable against Mid Island in the absence of expressed assumption of liability by Mid Island.

[41] Mid Island, by way of the affidavit of Ms. Sherine Reddie depones that:

> "*Agro Industries Holdings (2008) Limited …is the shareholder of Mid Island Poultry Limited and Mid Island Feeds (2008) Limited… and thus Mid Island Feeds (2008) Limited is a wholly owned subsidiary of Agro Industries Holdings (2008) Limited based on the annual returns for 2009 filed at the Companies Office of Jamaica*."

[42] Mr. Lance Hylton, on behalf of Lookahead, has however sought to impugn the veracity of that statement. In his affidavit he avers that Ms. Sherine Reddie's averments are untrue. Mid Island was only incorporated on 11June 2009 and its only returns were filed in September 2010. Those returns indicate that Mid Island's sole shareholder is Agro Industries Holding Ltd., of Jamaican nationality. Mr. Lance Hylton further depones that the 2009 Asset Sale and Purchase Agreement describes the purchaser as a St. Lucian company called Agro Industries Holdings (2008) Limited. Mid Island Poultry Limited's Annual Returns as at December 31 2009 revealed that its two shares were owned by Donovan and Anneka Hunter.

[43] Michael Hylton QC argues that the contradictions raise serious triable issues of fact. He submits that even if JLA had a valid and enforceable pre-emption right against Mid Island/Agro Industries, it was not exercised against Agro Industries.

[44] A pre-emption right does not provide JLA, the holder, with an equitable interest. It is a contractual obligation to offer the property to JLA for sale. This right is personal to JLA. In the Welsh case of ***McKay v Wilson*** (1947)47 SR NSW 3I5 Street J adumbrated:

> *"Speaking generally, the giving of an option to purchase land prima facie implies that the giver of the option is to be taken as making a continuing offer to sell the land, which may at any moment, be converted into a contract by the optionee notifying his acceptance of that offer. The agreement to give the option imposes a positive obligation on the prospective vendor to keep the offer open during the agreed period so that it remains available for acceptance by the optionee at any moment within that period. It has more than a mere contractual operation and confers upon the optionee an equitable interest in the land, the subject of the agreement: see, for example, per Williams J in* ***Sharp v Union Trustee Co. of Australia Ltd.*** *(1944) 69 C.L.R. 539, 558."*

At trial, it is for Mid Island to provide evidence on a preponderance of possibilities that Agro Industries is indeed a shareholder. Lookahead's claim, though arguable, has not attained such degree of strength, to assure this court, that at trial, it will necessarily prevail and prove that the injunction was rightly granted.

WHETHER NEWPORT-FERSAN IS A TRUE NOMINEE

[45] Michael Hylton QC submits that the agreement makes it clear that NFJ is the true purchaser and not JLA's nominee. According to him, the documents have been drafted to give the impression that JLA is purchasing the property by exercising a pre-emption right. NFJ, he submits is an unconnected third party which has put up its own funds. He regards as noteworthy the following clauses:

(a) *Clause 2 which states that "…JLA shall procure that NFJ or its nominee shall acquire the Lands and the Wharf Assets and the Feed Mill Assets…"*

(b) *Clause 4 which states that:*
"NFL shall provide to JLA all monies payable by the purchaser under the Agreement for Sale in the manner and at the times required by the Agreement for Sale…"

(c) *Clause 6 under the heading NFJ to Control Purchase", which provides that:*
"…NFJ shall be entitled to engage Myers Fletcher & Gordon to act on behalf of JLA in connection with the entry into and completion of the Agreement for Sale and JLA shall co-operate with Myers Fletcher & Gordon to the fullest extent necessary to protect the interest of NFJ as the ultimate purchaser of the Lands, Wharf Assets and Feed Mill Assets."

[46] Learned Queen's Counsel concludes that the agreement between JLA and NFJ is not a bona fide binding commercially recognized transaction. A genuine nominee, he submits, is nominated by the purchaser, the person to whom the title is to be transferred but it is the purchaser who conducts the transaction. There is no separate transaction between the purchaser and the nominee. He submits that in the instant case, it is the purchaser that has negotiated a sale with an unconnected third party who puts up his own funds. He relies on the case of **Eastern Bay Builders Ltd v CIR** (1988) 12 TRNZ 669.

[47] NFJ contends that it is a true nominee. The agreement between JLA and NFJ is a bona fide binding commercially recognized transaction. It Is Mr. Shelton's submission that it is settled law that commercial parties recognize the ability of commercial parties to include a conveyance to a nominee. He relies on the statement made by the learned authors of **Halsbury's Laws of England** 4th edition volume 42 at para289 page 196.

[48] He submits that a sham agreement is defined as an agreement in which the parties' common intention is not to create any legally binding obligations. The agreement between JLA and NFJ is evidence that the parties intended to create legal and binding obligations. He relies on the court of appeal case of **Cigarette Company of Jamaica Ltd. (In Voluntary Liquidation) v Commissioner of Taxpayers Audit and Assessment** SCCA No 133 of 2007 delivered 12th February 2012 at paragraphs 63-65 and 67.

THE LAW

[49] Halsbury's Laws of England 4th edition volume 42 at para 289 states:

> "*As a rule the conveyance is made to the purchaser, but, provided the vendor is not prejudiced, the purchaser can direct it to be made to a nominee, for such estate and interest, not exceeding the interest purchased as he pleases. Where the grantee is to enter into covenants with the vendor, the purchaser cannot substitute a new covenantor for himself without the vendor's consent, and in such a case the nominee must not be a person under disability."*

[50] Mr., Shelton submits that Mid Island and RBC have consented to the conveyance to the nominee NFJ. NFJ is a registered entity. It is under no disability in law and it has accepted the nomination. The agreement between JLA and NFJ, under which NFJ was nominated as the transferee, is a bona fide binding commercially recognized transaction. The claimant has no basis on which to interfere with the nomination agreement which has been duly stamped. Mid Island has accepted NFJ as JLA's nominee he relies on **Halsbury's Laws of England** edition paragraph 291.

[51] In **Cigarette Company of Jamaica Ltd v Commissioner of Taxpayer Audit & Assessment,** Panton P, in defining 'sham transactions' cited with approval the dictum of Diplock LJ (as he then was) in **Snook v London and West Riding Investments Ltd.** [1967] 2 QB 786. At page 802 Lord Diplock said:

> *"As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham', it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see* ***Yorkshire Railway Wagon Co v Maclure and Stoneleigh Finance Ltd v Phillips****) that for acts of documents to be a 'sham' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived."*

[52] Panton P further clarifies the definition of 'sham transaction'. At paragraph 64 he said:

> *"And in* ***National Westminster Bank****, Neuberger J, as he then was, confirmed that "a degree of dishonesty is involved in a sham" (paragraph 40), the whole point of a sham transaction being "that the parties intend to give the impression that they are agreeing that which is stated in the provision or agreement, while in fact they have no intention of honouring… their respective obligations, or enjoying their respective rights under the provisions of the agreement…."*

[53] Learned Queen's Counsel Mr. Hylton, argues that the arrangement between NFJ and JLA ought to have been subject to the payment of Transfer tax and Stamp Duty. He submits that JLA and NFJ have deceived the revenue authorities into believing there is only one transaction when in fact there are two.

[54] Has Lookahead provided evidence which assures this court, that the agreement between JLA and NFJ is a sham transaction which is intended to create some other

relationship? This court is not convinced that Lookahead's arguments have the strength that it will necessarily prevail and justify the grant of the injunction. In fact, this court is not satisfied *'that the chances that it will turn out to have been wrongly granted are low;'* (per **National Commercial Bank Ltd. v Olint**). In light of this court's view of the claimant's chances of success, it is also necessary, in determining whether to grant or withhold the injunction, to consider whether the grant of the injunction '*is likely to cause irremediable prejudice to the defendant'*. **(Olint)**

WHETHER DAMAGES CAN BE AN ADEQUATE REMEDY

[55] Both Lookahead's and the defendants' contentions are arguable. In the event that Lookahead's arguments are valid, and succeed at trial, the crucial issue is whether damages can be an adequate remedy.

[56] The following statement of Lord Diplock **American Cyanamid** is regarded as the settled law. At page510-511, he said:

> *"The governing principle is that the court should first consider whether if the plaintiff were to succeed at 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 an 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 appear 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 trial, the court should consider whether, on the contrary hypothesis that the defendant were to succeed at 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."*

[57] Michael Hylton QC submits that the property in issue is unique and so damages will not be an adequate remedy. Lance Hylton, in his affidavit dated 19 March 2012, deponed that the relevant property has a wharf which both Lookahead and NFJ are competitors for. Lookahead is the owner of property in the vicinity of the subject

property. On that property (Lookahead's) is a wharf. In fact, Lookahead's property abuts property owned by NFJ. NFJ's property is sandwiched by property owned by Lookahead on one side and the property in issue on the other side which also has a wharf.

[58] It is the evidence of Mr. Lance Hylton on behalf of Lookahead, that there is a wharf attached to NJF's property, but there are restrictions and conditions on the use of wharf. It is Mr. Lance Hylton's evidence that NFJ has announced its intention to acquire its own wharf. It is significant to note that Lookahead has not complained about any such limitation attached to the use of its wharf. It is NFJ's property that such restrictions are attached. Indeed, examination of exhibit reveals that the wharf attached to Lookahead's property is considerably larger than that on NFJ's property. In light of the foregoing, it is NFJ that is more desperate for the land.

[59] Mr. Lance Hylton further depones that Lookahead is a part of the CB group which is the second largest producer of feed in Jamaica. Newport Mills Limited and Newport Wharf and Storage Limited which are Lookahead's affiliates, own significant feed importation, production and distribution facilities in the immediate vicinity. The property would allow the group to achieve a number of strategic objectives including facilitating the group' s expansion plans which include using the property as a pet food production facility and the introduction of by-products which are now not utilized.

[60] There is no cogent reason advanced by Lookahead that damages cannot be an adequate remedy. I am fortified in this view by the fact that Lookahead, upon discovering the existence of the preemption right, suggested that the deposit should be held in escrow. It was at that time, quite willing to have its money back should JLA enforce its right. This property does not fall in the special category of properties which if sold, results in irreparable harm, such as, land with a family burial plot, family home etcetera.

[61] Mid Island has submitted that it will suffer irreparable financial ruin if the injunction is not discharged and the sale between the 1st and 2nd defendant is allowed to proceed. Its business, he submits, will be ruined. The viability of Mid Island is dependent on the sale to JLA. If the sale is not completed and RBC paid, Mid Island would be placed in receivership. Damages would not be sufficient. Michael Hylton Q.C. argues that the terms of both agreements are similar, so Mid Island should not be financially affected.

[62] It is true that the purchase price is the same. However at this stage, the circumstances are that the bank has a mortgage over the property. Mid Island is unable to fulfill its obligations to the bank and is forced to sell the property. If the property is not conveyed with alacrity, the bank can, as it has threatened, force Mid Island into liquidation and/or sell the property itself. Further, any delay will result in Mid Island incurring further interest that would result in serious harm to its business.

[63] It is the submission of Ransford Braham QC that the evidence that RBC has the power to appoint a receiver for Mid Island is unchallenged. The viability of Mid Island is dependent on the sale JLA. If the sale is not completed and RBC paid, Mid Island will be placed in receivership. In those circumstances damages will not be an adequate remedy. He submits that Lookahead, on the other hand would only suffer the disappointment of its strategic objective.

[64] Noel Levy, NFJ's Attorney has deponed that delay in this matter will constitute a serious risk to both NFJ and JLA as he is advised that significant deterioration to the feed mill is likely to occur if it not regularly and consistently serviced and operated. Hans Muller has deponed that substantial deterioration has taken place to the feed mill long before the proceedings were instituted as a result of lack of proper service. His averment however supports Mid Island's contention regarding its plight if the property is not transferred speedily

BALANCE OF CONVENIENCE

[65] In determining where the balance of convenience lies, Lord Hoffman in **Olint** endorsed Lord Diplock's dicta**.** At page 5 of the decision he said:

> "*At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords in pointed out in* ***American Cyanamid Co v Ethicon Ltd*** *[1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."*
>
> *What is required in each case is to examine what on the particular facts of the case the consequences of granting or with-holding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, the court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, the court will feel, as Megarry J said in* ***Shepherd Homes Ltd v Sandham*** *[1971] Ch. 340, 351, "a high degree of assurance that at trial it will appear that the injunction was rightly granted."*

[66] Nothing has been advanced, which satisfies this court that the claimant is liable to suffer irremediable prejudice. It was at his request, in recognition of the pre-emption right, that the agreement was held in escrow. In my judgment, the balance of convenience lies in the defendant's favour.

[67] In light of the foregoing, the application for injunctive relief is refused.