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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO 2006 HCV 03523

BETWEEN	CORRINE MINTO	CLAIMANT
AND	DAVID ADDISON	FIRST DEFENDANT
AND	OFFICE EQUIPMENT SALES AND SERVICE LTD	SECOND DEFENDANT
AND	WILTSHIRE FARMS LTD	THIRD DEFENDANT

IN CHAMBERS
Richard Paris for the claimant
H. Charles Johnson for all the defendants

NOVEMBER 15 AND DECEMBER 1, 2006

APPLICATION FOR EXTENSION OF INJUNCTION, MANDATORY INJUNCTION, SALE BY MORTGAGEE TO PURCHASER, MEANING OF FRAUD IN SECTIONS 70 AND 71 OF THE REGISTRATION OF TITLES ACT, APPLICABILITY OF THE DOCTRINE OF NOTICE TO REGISTRATION OF TITLES ACT, SECTIONS 70, 71, 105, 106, 108 AND 114 OF THE REGISTRATION OF TITLES ACT, SECTION 5 OF THE CONVEYANCING ACT, STRIKING OUT OF DEFENCE AND COUNTER CLAIM, WHETHER REAL PROSPECT OF SUCCESS

SYKES J

1. This is an application for the extension of an injunction first granted, ex parte, by Campbell J. on October 4, 2006 which was extended by Pusey J. on October 25, 2006 to November 15, 2006. The terms of the injunction are as follows:

a. That the first defendant whether acting by himself and/or his servants agents or workmen or through the second and third defendant or through anyone acting in his instruction or with his encouragement is hereby restrained from trespassing on the claimant's property situate at 35 Church Street, Montego Bay in the parish of St. James by occupying any part and/or remaining on any part thereof for any purpose whatsoever for the period of twenty one days from the date of this order.
b. The claimant undertakes to abide by any order as to damages that the court may make as a result of the granting of this order.
c. Personal service of the claim form, particulars of claim and attested copy of this order together with the documents filed in support of the ex parte application is to be effected up on the defendants.

2. This hearing is now inter partes. This injunction was granted in a claim initiated by way of a fixed date claim form dated October 2, 2006 in which Miss Minto is seeking the following remedies:

a. An injunction to restrain the first defendant whether acting by himself his servants/agents or workmen or through the second and third defendant companies or anyone working on his instructions or with his encouragement from trespassing on the claimant's property situate at 35 Church Street Montego Bay in the parish of St. James by occupying any part and/or remaining on any part thereof for any purpose whatsoever.
b. An order that the defendants do forthwith vacate that part of the ground floor of premises situate at 35 Church Street Montego Bay in the parish of St. James now occupied by them and previously vacated by the Bustamante Industrial Trade Union.
c. Damages for trespass to the claimant's said property
d. Interest pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act.
e. Costs and such further or other relief as this Honourable Court may deem just.

3. There is also an application by the defendants that this claim and Claim No. 2003 HCV 01791 (***WFL and OESS v Refin Trust Ltd, Dennis Joslin Jamaica Inc and Jamaica Re-development Foundation Inc***) be consolidated. I shall deal with both applications.

4. Other than the number of days there is not much difference between the terms of the first paragraph of the claim and the interim injunction. From the evidence before me, the building is occupied by the first and second defendants. This means that the injunction is a mandatory one even thought it is stated in prohibitory form. The injunction is not seeking to preserve the status quo until the rights of the parties have been determined. Compliance with this injunction would require the defendants to leave the building. It has been said that a mandatory interim injunction should only be granted "where the injury is immediate, pressing, irreparable, and clearly established and also the right sought to be protected is clear" (see Campbell J.A. in ***Esso Standard Oil v Lloyd Chan*** (1988) 25 J.L.R. 110, 112H). According to the Court of Appeal, a judge in these circumstances cannot stop his analysis at whether there is a serious issue to be tried. He must also go on to consider whether there is high degree of assurance that at trial it will appear that the injunction was rightly granted (page 113E).

The dispute

5. Mr. David Addison is the managing director of Office Equipment Sales and Service Ltd ("OESS") and Wiltshire Farms Ltd ("WFL"). Miss Minto purchased the property from Jamaica Redevelopment Foundation Incorporated which purported to exercise the power of sale vested in the mortgagee. She is now the registered proprietor. WFL was the registered proprietor and mortgagor. WFL is in the building and is claiming that it was not served with any notice to quit and consequently, the order of possession made against OESS does not apply to it. The defendants are alleging fraud in Miss Minto in order to impeach her title. She purchased the property for JA$10,000,000.00. She even had to pay a penalty of JA$164,000.00 for failure to complete on time. This fact is of great significance in this

case. She gave notice to all the tenants who were then in the building. She alleges that at the time she served notice, Mr. David Addison and WFL did not occupy the property.

6. Miss Corrine Minto, in her affidavit in support of the ex parte application, dated October 2, 2006, describes herself as an optician using the trading name of American Eyewear. She has been operating at 30 Union Street, Montego Bay, in the parish of St. James for the past five years. Her business has grown and flourished. It has outgrown its present location. Additionally, her landlord has served her notice to quit by the end of January 2007.

7. Her further evidence is that on April 21, 2006, His Honour Mr. Evan Brown, one of the Resident Magistrates for the parish of St. James heard, cases brought by her for recovery of possession from OESS and two remaining tenants who did not quit the premises when they were served with notices to quit. OESS was given until August 31, 2006, to vacate the property and was also ordered to pay JA$250,000 mesne profit. The other two tenants left by May 31, 2006. OESS filed an appeal against the learned Resident Magistrate's order and applied for a stay of execution. The application for the stay was heard by Her Honour Miss Carol Tie, also a Resident Magistrate for St. James, on August 31 and it was refused.

8. On July 27, 2006, fire of unknown origin destroyed a part of the building. About a week after the fire there were signs on the building stating that OESS had relocated to 39 Church Street, Montego Bay. Miss Minto wishes to repair her building and that cannot be done because WFL is in the building.

9. I should add to this that the notes of evidence of His Honour Mr. Brown were exhibited and he made three important findings of fact. First he found that the sale was under the power of sale exercised by the mortgagee. Second, there was no evidence that the sale price was not the true value of the property. Three, Miss Minto was not dishonest. In other words, Mr. Brown found that Miss Minto's title could not be impeached on the basis of fraud. It is true that those His Honour was adjudicating in an action for recovery between Miss Minto and OESS but it is a factor that I can take into account in the exercise of my discretion in this matter. The fact is that a judicial tribunal has examined the circumstances of Miss Minto's purchase and found them to be above board.

10. Mr. Addison has filed an affidavit, dated November 7, 2006, in response to Miss Minto's. He alleges that WFL has registered offices at 35 Church Street and was not served with a notice to quit. He claims that at all time WFL was in control of the building and OESS was a tenant of WFL. He says that OESS left the building soon after the stay of execution was refused.

11. He says that WFL is occupying part of the building and has nowhere else to go. He closes his affidavit with a reference to Claim No. 2003 HCV 01791 (***WFL and OESS v Refin Trust Ltd, Dennis Joslin Jamaica Inc and Jamaica Re-development Foundation Inc***). The pleading in that suit traces the history of a loan that was taken out with Royal Bank Jamaica

Ltd in the 1970s. After a series of transactions Jamaican Redevelopment Inc became the holder of the mortgage. The claim has allegations against the named defendants disputing the amount of the loan and various representations that were made to the claimants.

12. The defendants have also filed a defence and counter claim to this present action. In the defence they say that neither Mr. Addison nor OESS is occupying the building and the only occupant there is WFL. The vital paragraph of the defence is paragraph 7 which reads:

> 7. That the 3rd defendant Wiltshire Farm Ltd takes issues (sic) with the claimant that the claimant is a bona fide purchaser for value without notice of the property at 35 Church Street as the claimant at all material times was informed of the problems the company was having with Dennis Joslyn Jamaica Inc., Refin Trust Ltd. and Jamaican Redevelopment Foundation Inc. The claimant was informed of the contentious issues that were the subject of a Supreme Court Suit which is still unresolved notwithstanding the notices served by the claimant, the claimant fraudulently and maliciously acted causing the property at 35 Church Street to be transferred to her. The claimant when told of the various unresolved issues between the parties said the following words on a day in 2003 prior to the sale "I smelt something fishy because of the rush they were placing the transaction and they even offered to lend me money to complete the sale ..." "..my mother had a similar fight with Dennis Joslyn. I wish you luck ..."

13. In the counter claim the defendants state that the claimant as part of an illegal or fraudulent scheme joined in conspiracy to take possession of the property at 35 Church Street. The counter claim further alleges that WFL did not have notice of the sale or of the purchase by the claimant. The particulars state that a notice under section 26 (1) of the Rent Restriction Act ought to have been served. The specific acts of fraud alleged against the claimant are set out now:

> 9: The 1st, 2nd and 3rd Defendant (sic) intend at the hearing of this action to set up a counterclaim against the claimants demand the particulars of which are hereunto annexed: -
>
> **(a)** The 1st, 2nd and 3rd Defendants (sic) claim against the claimant that the claimant is part of an illegal or fraudulent scheme joined in conspiracy to take possession of the property at 32 Church Street.
>
> **(b)** That the 3rd Defendant which is the de facto registered owner of the property at 35 Church Street, had no notice of the sale or a purchase by the claimant of the said property, and that a notice ought to have been given under section 26 (1) of the Rent Restriction Act.
>
> **(c)** That the claim is Fraudulent (sic) in that prior to the sale transaction the claimant was told about the contentious issues that existed between the 1st, 2nd and 3rd Defendants and the vendors of the property Jamaican Redevelopment Foundation Inc., as also their agents Dennis Joslyn Jamaica Inc.
>
> **(d)** The claimant acted fraudulent and with malice in purchasing the property, in that the claimant when told of the contentious issues said the following words: "I smelt something fishy because of the rush they were placing on the

transaction and they even offered to lend me money to complete the sale" "My mother had a similar fight with Dennis Joslyn." "I wish you luck"

(e) That by virtue of such notice, and by virtue of the particulars of the comments made by the claimant, and the claimant having acted in the way she did, showed that she was motivated by malice, more so that even though the claimant had a signed agreement applying for institutional mortgage loan, later abandoned the idea of an institutional loan, but still was able to purchase the property.

(f) That the claimant should have enquired or ascertained the circumstances under or the consideration for which the 3rd Defendant or any previous proprietor thereof, was registered; and the claimant was duly affected by actual or constructive notice given the fact of what was told to her and the circumstances of the knowledge of the contentious issues.

(g) The 1st and 2nd Defendants claim that the recovery of the property under the circumstances it was recovered was unlawful and malicious and same has affected the operation of the business of the 1st and 2nd Defendants.

(h) That as a result of the malicious action of the claimant the 1st, 2nd and 3rd Defendants suffered loss and damages, and the 1st, 2nd and 3rd Defendants claim:

1. Damages, interest pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act;
2. Costs and such further or other relief as this Honourable Court may deem fit.

14. The particulars of the fraud are said to be the knowledge of the existence of the disputes between the defendants and Jamaican Redevelopment Foundation Inc. The claim pleads actual and constructive notice in the claimant, based on the allegation of paragraph 7 of the defence and that knowledge prevents her from being a bona fide purchaser for value without notice. The claimant is accused of being activated by malice, and proof of this malice is to be found in the fact that she signed the sale agreement in which she said that she was applying for a mortgage from some financial institution, and later abandoned the idea, but was still able to purchase the property.

Reasoning

15. It is too well established in Jamaica that when one is dealing with land under the Registration of Titles Act ("RTA"), the fraud referred to in section 71 of the Act is actual fraud, that is actual dishonesty on the part of the current registered proprietor whose title is sought to be impeached (see Court of Appeal of Jamaica in ***Enid Timoll-Uylett v George Timoll*** (1980) 17 J.L.R. 257, 261D where definition of fraud stated by the Judicial Committee of the Privy Council in ***Assets Company Limited v Mere Roihi*** [1905] A.C. 176, 210 was adopted). Fraud in other persons, generally, does not affected the registered proprietor unless it can be shown that the proprietor was part and parcel of the fraud, that is, acted dishonestly.

16. Mr. Johnson's reliance on the doctrines of actual and constructive notice are misplaced, because of sections 70 and 71 of the RTA. Section 70 provides:

> *Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or any estate or interest in land under the operation of this Act shall except in the case of fraud, hold the same as the same may be described ...*

17. Section 71 reads:

> *Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, from the proprietor or any registered land, ... shall be required or in any manner concerned to enquire ... or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.*

18. Section 70 confers on the registered proprietor an impregnability that can only be defeated by actual dishonesty on the part of the proprietor.

19. The intention of section 71, is to exclude the complications of the equitable doctrine of notice. The provision did not just say that the person shall not be affected by notice, but goes out of its way to say actual or constructive notice. As every equity lawyer knows, constructive notice includes imputed notice. Every equity lawyer is quite familiar with the problems that imputed notice has caused in land transactions.

20. The doctrine of notice had its origins in the early days of the development of the use, the ancestor of the modern trust, in order to protect the cestui que use (beneficiary) from the unscrupulous person to whom the legal estate was transferred for the benefit of the cestui que use. The holder of the legal estate was then placed in a position to transfer the property to a purchaser who might well argue that he had no notice of the beneficiary's interest. He could therefore refrain from getting actual notice by refraining from making prudent enquiries. The Chancellor, not to be outdone, developed the doctrine of constructive notice to supplement the doctrine of actual notice. The constructive notice doctrine had two prongs. One was those facts which the purchaser could discover had he made enquiries. The other was imputed notice, that is, notice of the agent employed by the purchaser would be attributed to the purchaser. This agent himself was affected by the first prong of constructive notice, which itself would be attributed to the purchaser. Thus we had notice being imputed even though neither the agent nor his principal had actual notice. The juridical basis of the doctrine of notice was fraud, equitable fraud, that is fraud where there was no conscious act of dishonesty. The unfortunate label fraud was attached to anyone who failed to rise to the demanding standards of equity even if the failure arose from ignorance. The Courts of Equity held the view that to purchase property with notice of a trust, was fraudulent conduct. This is the background to section 71 of the RTA. This is why it says *and the knowledge that any such trust or unregistered interest is in existence shall not of itself*

be imputed as fraud. Since fraud in equity did not necessarily require dishonesty, it was not entirely unforeseen that the Privy Council would have held in ***Asset Company*** that fraud there meant dishonesty. This was necessary to prevent the intrusion of the wider notions of equitable fraud that did not depend on dishonesty. This point was made by Stark J. of the High Court of Australia in ***Stuart v Kingston*** (1923) 32 C.L.R. 309, 359 (reversed by the Privy Council on another point):

> *The equitable doctrine of notice, actual and constructive, is founded upon the view that the taking of an estate after notice of a prior right is a species of fraud (Le Neve v. Le Neve(1)). Under the Act, taking property with actual or constructive notice of some trust is not of itself sufficient reason for imputing fraud. The imputation of fraud, therefore, based upon the application of the doctrines of the Court of Chancery as to notice, cannot any longer be sustained in the case of titles registered under the Act. "The difficulty lies," as Mr. Hogg points out (Registration of Title to Land throughout the Empire, p. 142), "in the demarcation of the line between knowledge or notice that is not to be treated as fraud, and notice that under particular circumstances must be treated as fraud." Cases must necessarily arise in which opinions will differ as to whether the conduct proved is or is not fraudulent.* ***No definition of fraud can be attempted, so various are its forms and methods. But we may say this: that fraud will no longer be imputed to a proprietor registered under the Act unless some consciously dishonest act can be brought home to him. The imputation of fraud based upon the refinements of the doctrine of notice has gone. But the title of a person who acquires it by dishonesty, by fraud (sec. 69), by acting fraudulently (sec. 187), or by being a "party to fraud" (sec. 187), in the plain ordinary and popular meaning of those words, is not protected by reason of registration under the Act. And to titles so acquired the equitable obligations imposed by the law of trusts are as applicable as formerly.*** (My emphasis)

21. When the preamble and first section of the RTA (Law 21 of 1888) enacted on May 23, 1888 are read, one sees the following:

> *Whereas it is expedient to give certainty to the Title of Estates in Land, and to facilitate the proof thereof, and also to render dealings with Land more simple and less expensive:-*
>
> *Be it enacted by the Governor and Legislative Council of Jamaica, as follows:-*
>
> *Preliminary*
>
> *1. All Laws, Statutes, Acts and practice whatsoever, relating to freehold and other interests in Land, so far as is inconsistent with the Provisions of this Law, are hereby repealed, as far as regards their application to Land under the Provisions of this Law, or the bringing of Land under the operation of this Law.*

22. In light of the stated purpose of the statute which has been developed in the various sections, it is difficult to accede to Mr. Johnson's submission based on the doctrine of notice and all of its implications. I would be turning back the legal clock to the mid nineteenth century which we have left far behind.

23. To put the matter beyond doubt, I shall refer to the Conveyancing Act of 1889 (Jam) (Law 40 of 1889) enacted November 30, 1889, a year after the RTA. Section 1 (2) at the time of enactment (now section 2) stated that it does not apply to land brought under the operation of the RTA. The Conveyancing Act deals with unregistered land. This is why section 4 (1) and (3) of Law 40 (now section 5 (1) and (3)) embodies the doctrine of notice. These provisions have been held to state the law on the doctrine of notice as it existed at the time of the passing of similar legislation in England (see ***Hunt v Luck*** [1902] 1 Ch. 428 where the Court of Appeal of England and Wales so held when interpreting section 3 (1) and (3) of the Conveyancing Act 1882 (45 & 46 Vict. c 49) (UK) which was produced in section 4 (1) and (3) of Law 40 (now section 5 (1) and (3)). There can now be no question of the doctrine of notice simpliciter being used as a basis for the imputation of fraud - a word which we now know means, under the RTA, actual dishonesty and mere want of prudence.

24. Sections 70 and 71 have to be read closely with sections 105, 106, 108 and 114 of the RTA. Under section 105 when the mortgage is registered it operates just as a security of the land and does not operate as a transfer of the legal estate to the mortgagee, as under the common law system of mortgages. However, notwithstanding that the legal estate remains in the mortgagor section 114 confers on the mortgagee, not only the rights of a mortgagee qua mortgagee but also the same right and remedies at law and equity as he would have had or been entitled to *if the legal estate in the land or term mortgaged had actually vested in him with a right in the mortgagor of quiet enjoyment of the mortgaged land until default in payment of principal and interest money secured or some part thereof respectively.*

25. Section 106 gives the mortgagee a power of sale, and importantly the section goes a far way to facilitate the passing of a good title by relieving the purchaser of any duty to find out whether the power was lawfully exercised and/or properly exercisable and exercised. Section 108 provides that the registration of any transfer signed by the mortgagee shall pass and vest in the purchaser the property freed and discharged from all liability on account of such mortgage except a lease to which the mortgagee has consented in writing.

26. It is true that section 71 states that a person dealing with a registered proprietor shall have the protections in that section. It is also true that a mortgagee exercising the power of sale is not a registered proprietor by reason of the fact that the mortgage does not transfer the legal estate to the mortgagee. However, the sections to which I have referred have the combined effect of treating the mortgagee as if he were in fact the registered proprietor when he is exercising the power of sale.

27. What the defendants needed to show is that the claimant was dishonest in her purchase. I am quite prepared to accept there can be no closed list of what amounts to actual fraud. The ***Asset Company*** case made no such attempt, and neither has any subsequent case. The High Court of Australia in ***Bahr v Nicolay*** (No. 2) (1988) 164 C.L.R. 604, approved and accepted dictum from Kitto J. in ***Latec Investments Limited and Others v Hotel Terrigal Pty Limited (In Liquidation)*** 134 C.L.R. 265, that a collusive and

colourable sale by the mortgagee to a purchaser, may amount to actual fraud. The facts as recounted by Kitto J., leave one in no doubt that the sale was not genuine, but was a device to take the mortgagor's property. This is not what is alleged by the defendants. Even though paragraph (a) of the counterclaim opens with an allegation of a fraudulent scheme at the end of the day the particulars did not support such a broad allegation. The defendants in the instant case say that the fraud of Miss Minto lies in knowing of the contentious issues between the mortgagee and the defendants, commiserating with them and then proceeding to purchase the property. The defendants need to go further. This is a long way from dishonesty. To take advantage of another person's misfortune may be said to be unkind, uncaring or worse, but that has never been held to amount to an act of dishonesty. There is no allegation that there was a conspiracy between the mortgagee and Miss Minto to engage in a sham sale. Miss Minto had to pay a penalty to the mortgagees for failure to complete on time. This is powerful evidence against any inference of a collusive sale.

28. If there is no sustainable case of fraud in Miss Minto, the current registered proprietor, I do not see how her title can be successfully impeached. There is absolutely no equity, mere or personal, in WFL, that could possibly affect Miss Minto. Mr. Addison's affidavit does not assert that WFL was a tenant of anyone. What he said was that WFL had OESS as a tenant. WFL was the mortgagor and registered proprietor of the property in question. Once the power of sale is exercised and there is no dishonesty in the purchaser, the previous registered proprietor is eliminated from the picture. On registration of the instrument of transfer the previous registered proprietor unless given permission to be there by the new registered proprietor becomes, in law, a trespasser. WFL has no legal basis to be in the building. WFL is now a trespasser and not a tenant under the Rent Restriction Act. Any remedy it has is against the mortgagee and that remedy is in damages, not in revoking the sale.

29. The counterclaim alleges that WFL had no notice of the sale. Assuming that to be true the remedy under section 106 of the RTA is only in damages. It is interesting to note the history of this provision which I shall show reinforces the conclusion that an improper exercise of the power of sale, generally, restricts the mortgagor to a claim for damages and the purchaser under such a sale, is not affected by any misdeeds of the mortgagee, unless such a purchaser was dishonest. The earliest available enacted version of the RTA. indicates that what is now section 106 was section 81. At the time of the passing of the RTA in 1888, the followings words which are now a part of section 106, were not in section 81:

and any persons damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.

30. Time did not permit an exhaustive enquiry into why the text was added to the statute. What the research shows, is that while the text is substantially the same as to the words found in section 23 (2) of the Conveyancing Act as passed in 1889 (now section 24 (2)) of the Conveyancing Act (Jam), there is at least one difference, which is a difference that reinforces the point that damages are the only remedy. That significant difference is this: in the RTA the word *only* is inserted between *remedy* and the prepositional phrase *in*

damages. The word *only* as used in this context signifies that all other remedies that might have been previously open to the mortgagor are prohibited except damages and such a remedy (damages) is available *against the person exercising the power*, that is, the mortgagee and no one else. The purchaser, provided he is not dishonest, is ring fenced and takes title free of the encumbrance and crucially, free from any taint of collusion in any *unauthorised or improper or irregular exercise of the power* by the mortgagee. This is consistent with the stated objective of giving certainty to the title of estates in land, facilitating proof of title and rendering dealings with land simpler and less expensive. The legislation has confined disputes over to the exercise of the power of sale, to the mortgagee and mortgagor. The honest purchaser is, as it were hoisted out of and above the fisticuff between the mortgagor and the mortgagee. It follows from this, that a challenger to the registered proprietor who purchased from a mortgagee, must have a case of fraud that has a reasonable prospect of success.

31. This leads me to the next proposition. I have concluded that neither the defendants' defence nor counterclaim has a reasonable prospect of success. They are mirror images. They rest on substantially the same allegations. The defence and counterclaim are struck out and judgment entered for the claimant with damages to be assessed. What is the test that ought to be applied? Lord Hope in the case of ***Three Rivers District Council v Governor and Company of the Bank of England (No 3)*** [2003] 2 AC 1, provides assistance. I agree with his formulation. He said at pages 260 - 261:

> *For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is--what is to be the scope of that inquiry?*
>
> *I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with*

cases that are not fit for trial at all.

32. The allegations in the defence and counter claim do not amount to fraud under the RTA and so have absolutely no prospect of success. There is no point in delaying the inevitable. It follows from this that there is nothing to consolidate with the other claim. The application for consolidation is dismissed.

33. The approach to mandatory injunctions as outlined earlier is predicated on the uncertainty of the outcome of any trial. Here, I have no such problem. The allegations against Miss Minto are not going to improve. This is the best case of the defendants.

34. There is one other point to be addressed. Mr. Johnson urged on me that His Honour Mr. Brown acted in excess of jurisdiction and that is one of the issues he proposes to argue before the Court of Appeal. He said I should take into account his proposed appellate submissions, and extend the injunction. It would not be prudent for me to comment on this either way, because it is a matter that is now before the Court of Appeal. Assuming that he is correct, that does not affect the case before me because the pleading as it stands does not amount to dishonesty.

35. Finally Mr. Johnson submitted that I should take into account the possibility of ruin. By this he said that damages would not be an adequate remedy because of the irreparable harm that would be done to the business of WFL. I respond in this way. Mr. Johnson would need to demonstrate the legal basis on which a court can restrain a property owner from getting rid of a trespasser. That has not been done.

Conclusion

36. The defence and counter claim do not amount to dishonesty and therefore do not allege fraud within the meaning of sections 70 and 71 of the Registration of Titles Act. There is therefore no basis to challenge the legal title of Miss Minto. There is no equity in WFL that can adversely affect Miss Minto. WFL is a trespasser and not entitled to notice under the Rent Restriction Act. Since it is common ground that WFL is conducting some business at the property I would give the company some time to leave. I make the following orders:

- **a**. The defendants whether acting by themselves their servants/agents or workmen or anyone working on their instructions or with their encouragement are restrained from trespassing on the claimant's property situate at 35 Church Street Montego Bay in the parish of St. James by occupying any part and/or remaining on any part thereof for any purpose whatsoever.
- **b**. The defendants not later than December 31, 2006, are to vacate premises situate at 35 Church Street Montego Bay in the parish of St. James now occupied by them.
- **c**. The defence and counter claim are struck out and judgment entered for the claimant.
- **d**. Damages for trespass to be assessed.
- **e**. Costs of this application to the claimant summarily assessed at $30,000.