SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2009/011

BETWEEN:

JADA CONSTRUCTION CARIBBEAN LIMITED

Appellant

and

THE LANDING LIMITED

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal

Appearances:

Mr. Peter I. Foster, with him Ms. Diana Thomas for the Appellant
Mr. Mark D. Maragh for the Respondent

2010: March 23;
2011: March 8.

Undertaking guaranteeing damages which may arise from arbitration or court order – undertaking secured by judicial hypothec on 9 parcels of condominium development – order varied to secure the undertaking on 3 alternative parcels – allegation that counsel represented from the bar that the 3 alternative parcels were good for securing the guarantee – conditional support in letter from a valuer – whether the varied order should be set aside

The respondent, the Landing Limited ("the Landing") engaged the appellant, Jada Construction Caribbean Ltd. ("Jada") to manage certain construction works in a hotel and condominium development. Their agreement was terminated and their ensuing dispute was referred to arbitration under the arbitration clause therein. In court proceedings, Jada obtained orders by which the court eventually ordered the Landing to enter into a guarantee in the sum of US$2 million secured on their property for any damages which Jada might be awarded in the arbitration or court proceedings. In an order of 1st April 2009, a high court Judge directed the registrar of lands to enter an inhibition on the Land Register against 3 parcels in the condominium development which the Landing offered as security for the guarantee. These were Block 1257B parcels 182/v/63, parcel 182/v/66

and parcel 182/v/67 (parcels 63, 66 and 67"). The judge ordered the removal of the restriction that was earlier placed on 9 other parcels in the said development.

Jada appealed on the ground that in making the order, the judge relied upon evidence which then legal counsel for the Landing gave from the bar, without oath, and a valuation report concerning the value and encumbrance status of those parcels. Jada's objection to any reliance on the valuation report was particularly because the authors of the report specifically stated that they could not vouch for its accuracy. Fresh evidence which Jada was permitted to adduce in the appeal showed that at the time when the order of 1st April 2009, was made, parcels 63, 66 and 67 were encumbered for a sum well in excess of the US$2 million which was to be guaranteed.

A single judge of the Court of Appeal made an order on 16th April 2009, which directed the Development Control Authority to provide the registrar of lands with a status report regarding the state of completion of the units on parcels 63, 66 and 67. The order also reflected that by consent, counsel for the parties agreed that restrictions be placed on 3 alternative parcels of land, to wit, Block 1257B parcels 182/v/15, 182/v32 and 182/v42 ("parcels 15, 32 and 42") in the meantime. In a subsequent order of 5th August 2009, the single judge noted that parcels 63, 66 and 67 were so heavily encumbered that the court did not consider that they sufficed for the purpose of securing the guarantee, which the order of 1st April 2009, sought to have identified for that purpose. Accordingly, the single judge confirmed the removal of the inhibition against parcels 63, 66 and 67; directed the retention of the restriction against parcels 15 and 42, and the removal of the restriction that was placed upon parcel 32.

Held: allowing the appeal, setting aside paragraphs 2, 3 and 5 of the order of 1st April 2009, with the Landing to pay costs to Jada in the High Court and in this appeal to be assessed pursuant to rules 65.12 and 65.13 of CPR 2000, if not agreed:

1. The order of 1st April 2009, is vitiated, first, because no cogent reasons were given for the decision to secure the guarantee on parcels 63, 66 and 67, and, second, because it is obvious that the judge made it on a conditional valuation and in the absence of disclosure of the exact encumbered status of the parcels 63, 66 and 67. In effect, the reason for decision is unsatisfactory and was made without all of the relevant facts to permit the court to make a dispassionate decision in violation of the *Benmax principles*.

   Dictum in **Michel Defour et al v Helenair et al** (1996) 52 WIR 194 and in **Golfview Development Limited v St. Kitts Development Corporation and Another**, Saint Christopher and Nevis Civil Appeal No. 17 of 2004 (20th June 2007), at paragraphs 23 and 24, applied.

2. This court is not seized of all of the facts to permit it to determine which parcels the Landing should retain for securing the guarantee, but notes that a single judge of this court made an order on 9th August 2009, upon receiving information as to the status of parcels 63, 66 and 67 and the value of parcels 15, 32 and 42 of the Landing development. The order of 9th August 2009,

retained a restriction on parcels 15 and 42 and this court would maintain this restriction and give liberty to Jada to apply to the High Court for any other order that Jada think is necessary to secure the guarantee.

JUDGMENT

[1] **RAWLINS, C.J.:** This appeal raises the question whether a High Court Judge erred when he made an order in which he purported to correct a prior order, removed restrictions which he had placed on 9 parcels of property of a condominium development and instead entered inhibitions on 3 alternative parcels in the said development.

Factual and procedural background

[2] The appellant, Jada Construction Caribbean Ltd. ("Jada"), was engaged by the respondent, the Landing Limited ("the Landing") to manage certain construction works. The Landing is involved in a hotel and condominium development in the Quarter of Gros Islet. The agreement was terminated. The parties embarked on proceedings under the arbitration clause and as the matter came to court, Jada sought to obtain security for any damages which may be awarded in the arbitration or court proceedings.

[3] On 16th October 2006, a High Court Judge ordered the Landing to execute an undertaking guaranteeing the payment of damages up to US$4 million for any damages that may be awarded to Jada in the arbitration proceedings. At Jada's request, the Registrar of Lands entered a judicial hypothec against the Landing's properties, namely, Block 1257B Parcels 182/v/17, 18 and 44 ("parcels 17, 18 and 44"). The Landing's applied to the Registrar to remove the hypothec on the ground that it was wrongfully registered. The Registrar refused to remove them. The Landing appealed the registrar's order to the High Court by way of application filed on 27th June 2008.

[4] On 29th July 2008, Jada applied for an order to require the Landing to comply with the order of 16th October 2006. The application also sought an order placing

inhibitions on parcels 17, 18 and 44. These were to restrain the Landing from disposing of or encumbering its properties registered at the Registry of Lands, including parcels 17, 18 and 44, until such time as the Landing executed the guarantee in a form satisfactory to Jada. The application sought, alternatively, to order the Landing to execute a guarantee in a form satisfactory to Jada within 7 days, failing which Mr. John Lucas, the corporate secretary of the Landing, be considered in contempt of court with liberty to Jada to file committal proceedings.

[5] The Landing responded by filing an application on 29th August 2008, seeking an order for security for costs against Jada.

[6] On 5th November 2008, the Landing appeal against the registrar's refusal to remove the judicial hypothecs from parcels 17, 18 and 44 and their application for security for costs, as well as Jada's application of 29th July 2008, were heard by a High Court Judge. On 5th November 2008, the judge ordered[1] the removal of the judicial hypothec against parcels, 17, 18 and 44 but ordered the Landing to execute a guarantee in a form satisfactory to Jada to ensure that the Landing retained identified property to a value of at least US$2 million as security pending the determination of the claim. The order specifically gave no direction for security for costs on the Landing's application of 29th August 2008.

[7] Jada has asserted that the removal of the hypothec in exchange for the order for the execution of the guarantees was occasioned on an undertaking which the then counsel for the Landing gave orally to the court at 9th November 2008, hearing to provide Jada with a list of properties which could be retained to secure US$2 millions.[2] Jada asserted that it was in reliance on that undertaking that the order to remove the hypothec was made.[3]

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[1] As corrected by order dated 1st April, 2009.
[2] Affidavit of Cornelius Daniel dated 3rd April, 2009, para. 9; Tab 8 of the Record of Appeal.
[3] Affidavit of Cornelius Daniel dated 3rd April, 2009, para. 9; Tab 8 of the Record of Appeal.

[8] In any event, no list of properties was provided to Jada by then counsel for the Landing. It however became apparent that the order of 5th November 2008, was not filed with the Land Registry so that the hypothec was not removed.

[9] By letter of 5th December 2008, to the Registrar of Lands, Jada requested that restrictions be placed against parcels, 17, 18 and 44 until the Landing complied with the order of 5th November 2008. At the hearing before the Registrar, former counsel for the Landing denied giving an undertaking to provide a list.[4] The Registrar removed the judicial hypothec against parcels 17, 18 and 44 and invited Jada to identify alternative parcels against which restrictions could have been placed to secure the US$2 million. After a search of the Land Registry, Solicitors for Jada became aware of 9 parcels of the Landing's development which were apparently unencumbered. The Registrar obliged and entered a restriction against the 9 parcels. The restriction was placed against that many parcels because Jada was unaware of the exact value of those parcels at the time.

[10] By application dated 7th January 2009, Jada applied to the court for an order to correct omissions and errors in the order of 5th November 2008, under the slip rule (rule 42.10 of **CPR 2000**). Jada also applied for an order compelling the Landing to comply with the said order of 5th November 2008, and asked the court to forthwith direct the Registrar of Lands to enter an inhibition on the land register against Block 1257B 182/v/17 and Block 1257B 182/v/18 ("parcels 17 and 18") of the Landing's hotel and condominium development in favour of Jada until the order of 5th November 2008, was complied with or until further order.

[11] By letter dated 25th January 2009, the Landing offered Block 1257B parcels 182/v/63, 182/v/66 and 182/v/67 ("parcels 63, 66 and 67") of the said development to Jada as security for the undertaking. The Landing promised to provide a valuation of these parcels to Jada shortly thereafter for that purpose. Upon being advised of the offer, the Registrar indicated that she was minded to vary the restrictions on the 9 parcels because the restrictions were hindering the

[4] Affidavit of Cornelius Daniel dated 3rd April, 2009, para. 15; Tab 8 of the Record of Appeal.

registration of a deed of sale and there was also a mortgage which the Landing wished to register against one of those properties. Jada however advised the Registrar that parcels 63, 66 and 67 were service buildings and a pavilion which were incapable of being detached from the condominium development and sold because all of the unit holders would have an interest in those properties. In Jada's view, they were therefore not satisfactory to secure the guarantee as they were not in the absolute ownership of the Landing and they were encumbered.[5] Jada also advised the Registrar that should the Landing provide a full and proper valuation they would then consider accepting parcels 63, 66 and 67 to secure the guarantee.

[12] In the meantime, the Landing presented Jada with a letter dated 18th March 2009, signed by Bradley Paul on behalf of a company of surveyors known as CHIEVAL. It purported to provide valuations for parcels 63, 66 and 67. The letter however stated that "the opinions stated herein are based on limited research and should not be construed as a full valuation report, which would require more extensive research and evaluation". It was apparently for this reason that Jada advised the Registrar that they were not prepared to accept parcels 63, 66 and 67 as security. The Registrar reserved her decision.

[13] Jada's application of 7th January 2009, for an order to correct the order of 5th November 2008; to require the Landing to comply with this latter order and for an inhibition to be entered against parcels 17 and 18 until compliance was heard on 1st April 2009. Jada has insisted that at that hearing, the then counsel for the Landing made the following oral representations to the court:

(i) Parcels 63, 66 and 67 were capable of securing the sum of US$2 million and were therefore capable of securing the guarantee.

(ii) The said 3 parcels were capable of being resold independently of the condominium development to satisfy a payment of US$2 million to the Applicant;

[5] Affidavit of Cornelius Daniel dated 3rd April, 2009, paras. 19 - 20; Tab 8 of the Record of Appeal.

(iii) The said parcels were unencumbered.[6]

[14] The judge made an order in the following terms after the hearing on 1st April 2009:

1. The application for correction of the Court Order is granted as prayed.
2. That the Registrar of Lands is directed to enter an inhibition on the Land Register with respect to:-

    Block 1257 B 182/v/66

    Block 1257 B 182/v/67; and

    Block 1257 B 182/v/63.
3. The restriction placed on the following parcels be removed.

    Block 1257 B 182/v/3;

    Block 1257 B 182/v/12;

    Block 1257 B 182/v/15;

    Block 1257 B 182/v/20;

    Block 1257 B 182/v/23;

    Block 1257 B 182/v/32;

    Block 1257 B 182/v/42;

    Block 1257 B 182/v/46; and

    Block 1257 B 182/v/62.
4. Leave is granted to appeal. Application for stay refused.
5. Costs of the application to the applicant in the sum of $500.00.

[15] Jada appealed by Notice of Appeal dated 3rd April 2009. By application of even date, Jada also sought a stay of the order of 1st April 2009, as well as permission to adduce fresh evidence of facts and materials discovered on 2nd April 2009, which were not before the court at the hearing on 1st April 2009.

[16] The application for stay of execution was heard and determined by George-Creque JA, as a single judge of the Court of Appeal, on 16th April 2009. She made the following order:

[6] Affidavit of Cornelius Daniel dated 3rd April, 2009, para. 23; Tab 8 of the Record.

(1) Paragraph 1 of the order of 1st April 2009, is stayed for a period of 14 days from 16th April 2009;

(2) The Development Control Authority shall provide the Registrar of Lands with a status report regarding the state of completion of the units on parcels 63, 66 and 67 within seven days; and

(3) By consent of counsel for the parties:

(a) the restrictions placed on Block 1257B parcels 182/v/15, 182/v32 and 182/v42 be retained;

(b) the restrictions placed on Block 1257 B Parcels 182/v/3, 182/v/12, 182/v/20, 182/v/23, 182/v/46 and 182/v/62 be removed.

[17] George-Creque JA made a further order on 5th August 2009, as follows:

"1. Based on the fact that, Block 1257B Parcel 182/V/67; 182/V/66 and 182/V/63 are encumbered by a Hypothec in excess of EC$60 Million, the court does not consider that the properties suffice for according to them a value of US$2million taking into account that the said properties are said to be valued at US$3 Million. This would not be in keeping with the Order of Cottle J for the identification and retention of property to the value of at least US$2 Million, in respect of the guarantee to be given by the Landings in respect of their undertaking. Accordingly the inhibitions, ordered as against, the said properties shall be removed.

2. It is ordered that the restrictions placed upon Block 1257B, Parcels 182/V/15 and 182/V/42 shall remain in place, and the restrictions placed upon Parcel 182/V/32 shall be removed."

This order was made on an application filed on 10th June 2009, in which the Landing applied for an order to the effect that an inhibition in favour of Jada were to be placed on parcels 63, 66 and 67 and the restrictions on parcels 15, 32 and 42 were to be removed. In that application, the Landing's Sales Office Administrative Manager, Jane Benfield, provided information that the value of parcels 15 and 42 could adequately satisfy the US$2 million guarantee.[7]

[7] See page 205 of the Record of Appeal.

[18] Jada's application to adduce fresh evidence was heard and granted by the full court on 19th October 2009. That new evidence is in the form of a report prepared by Engineering Construction and Management Consulting Limited (ECMC) on 13th April 2009. It provides information on the valuation and status of the property encompassed in parcels 63, 66 and 67.[8]

The Appeal

[19] On 3rd April 2009, Jada appealed the order of 1st April 2009. They insisted that the judge should not have removed the restrictions placed on the 9 parcels and should not have entered an inhibition against parcels 63, 66 and 67. Jada further insisted that the judge erred when he entered the inhibition on parcels 63, 66 and 67 because of information from counsel for the Landing at the hearing that these parcels were unencumbered and could be resold. Jada also insisted that the judge further erred when he thought that Jada's refusal to accept the Landing's offer of these parcels as security to satisfy the guarantee, in the letter of 18th March 2009, from Bradley Paul of CHIEVAL, was unreasonable.

[20] Jada challenged the order of 1st April 2009, on the ground that the judge took into consideration irrelevant matters in arriving at his decision to remove the restrictions from the 9 parcels and placing an inhibition on parcels 63, 66 and 67. Jada contended that the judge considered the contents of the letter from CHIEVAL although the writer expressly did not vouch for its accuracy, and the judge also accepted statements which then counsel for the Landing made from the bar concerning parcels 63, 66 and 67. Jada asserted that the judge could not have thought that those parcels were unencumbered when the letter from CHIEVAL stated that the specific areas within the buildings on those parcels are leased to the Landings Body Corporate by the Landings Limited. Jada further asserted that, in the foregoing premises, the judge made the order of 1st April 2009, by mistake, on inadequate information, or, alternatively, the decision was made prematurely.

[8] See from page 256 of the Record of Appeal.

Jada also asserted that in making the order of 1st April 2009, the judge did not properly consider the costs that should have been awarded on the application.

[21] This appeal is therefore concerned primarily with issues that revolve around the factual bases of the order of 1st April 2009, and the exercise of the learned judge's discretion in removing the restriction on the 9 parcels; not placing inhibition against parcels 17 and 18 as Jada's application of 7th January 2009, requested, and entering the inhibition on parcels 63, 66 and 67, as well as the issue of costs.

[22] The basic principle which guides our courts in appeals against findings of fact is trite. They have been stated, for example, by Sir Vincent Floissac, CJ, in the landmark case **Michel Defour et al v Helenair et al**[9] and by this court in **Golfview Development Limited v St. Kitts Development Corporation and Another**.[10] An appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. An appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself or herself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Where therefore there is an appeal against the finding of facts, the burden upon the appellant is a very heavy one. An appellate court will only interfere if it finds that the court of first instance was clearly and blatantly wrong, or, as it is sometimes more elegantly stated, exceeded the generous ambit within which reasonable disagreement is possible. These statements of principle on appeals from the fact-finding of a trial court are often referred to as the *Benmax principles*, from the *locus classicus*, **Benmax v Austin Motors Co. Ltd**.[11]

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[9] (1996) 52 WIR 194
[10] Saint Christopher and Nevis Civil Appeal No. 17 of 2004 (20th June 2007), at paragraphs 23 and 24.
[11] [1955] A.C. 370; [1955] 1 All E.R. 326.

Submissions by counsel for Jada

[23] Mr. Foster observed that the Landing did not deny Jada's reported account of the representations made by their former counsel at the hearing of 1st April 2009. He submitted, therefore, that it must be taken that the learned judge relied on the statements of fact made by the Landing's former counsel pronounced from the bar table in the absence of duly sworn evidence and on the opinion of CHIEVAL. Mr. Foster noted that there is support for the view that the unsworn evidence of counsel may be relied upon, but this was limited to evidence required to explain a case.[12] He contended that the disputed representations of fact did not fall within the category of cases in which unsworn evidence could be given.

[24] Mr. Foster further submitted that CHIEVAL's letter constituted opinion evidence on the value of the property, which evidence is admissible only if given by a competent expert witness. He insisted that CHIEVAL's letter was therefore inadmissible because it did not comply with the legal requirements for expert testimony to be submitted into evidence. He agreed that the learned judge had the discretion to determine whether reliance should be placed on such expert evidence, and, if so, the weight which should be attached to it.[13] He contended, however, that no reliance should have been placed on the letter because it did not address the issue before the court, that is: whether it was unreasonable for Jada to refuse to accept the property identified to be retained by the Landing in the affidavit of John Lucas. Mr. Foster noted that the letter did not speak to the limitation of use of the opinions expressed neither did it speak to the issue of market value, or value as security for a guarantee, which were the pertinent issues before the court. He insisted that both that letter and the unsworn evidence of counsel were inadmissible and the judge should not have relied on them.

[25] Mr. Foster submitted, alternatively, that even if the evidence were admissible, it ought not to have been relied on as Jada was not given an opportunity to test it as

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[12] The Common Law Library, Phipson on Evidence, 16th Edition (2005); Hickman v Berens [1895] 2 Ch D 638
[13] Phipson on Evidence, *op cit*, para. 33-01

it was given without prior notice. The result, said counsel, was that the decision was made without the benefit of further investigation and testing and Jada thereby suffered injustice and prejudice.

[26] In relation to the inhibition, Mr. Foster observed that the evidence which was discovered after the hearing of 1st April 2009, was startling in 2 significant respects. The first, he said, was that there was no land register for the parcels 63, 64 and 67 upon which the order of 1st April 2009, sought to place an inhibition, and, therefore no title against which inhibitions could be placed. This, he contended, gave the Landing the benefit of disposing of the properties to which the restrictions were attached but Jada did not have the benefit of a fortified guarantee as the learned judge meant to afford it. Second, said counsel, the properties against which inhibition was placed were not of a value of at least US$2,000,000.00 because they were encumbered by a mortgage in excess of EC$60 million.[14] The properties accordingly had no equity unless and until the bank in whose favour the mortgage was made released its hypothecary obligation. Further, said Mr. foster, the service and pavilion buildings could not be sold as confirmed by the valuation of Engineering Construction and Management Consulting Limited.

[27] In summary, Mr. Foster stated that the properties were, and continued to be, valueless to secure the guarantees. Mr. Foster noted that the fact of the encumbrance formed the basis of the decision by the single judge of this court in her orders of 29th June 2009, and 5th August 2009, which eventually permitted restrictions to remain on 2 other parcels of land, to wit, parcels 15 and 42. He submitted, further, that the evidence[15] which came to light after the 1st April hearing revealed that former counsel for the Landing knew that the representations made as to the value of the properties were incorrect because the hypothecary obligations entered on them were executed before her. Counsel

[14] As sworn to by Ms. Renee St. Rose in the affidavit dated 26th June, 2009 and placed before the court on 29th June, 2009 and 5th August, 2009.
[15] See exhibits at RSR4 and RSR 5 of Tab 14 of the Record of Appeal.

contended that she accordingly knowingly misled the court, and, in all of the circumstances, the order of 1st April should be reversed.

Submissions by counsel for the Landing

[28] In response, Mr. Maragh said that it is important to understand the context within which the order of 1st April 2009, that is appealed was made. He noted that the order appealed and that of 5th November 2008, were made in proceedings brought by the Landing on appeal to the High Court from the decision of the Registrar of Lands for wrongfully imposing judicial hypothecs against parcels 17, 18 and 44. Jada then applied in the same proceedings, on 29th July 2008, for an order restraining the Landing from, inter alia, disposing or encumbering its properties, including parcels 17, 18 and 44, until the Landing complied with the order of 16th October 2006, and execute the guarantee in a form satisfactory to Jada as ordered. The Landing then applied for an order that Jada provide security for costs and satisfy costs awarded against Jada in favour of the Landing. These were all heard by the High Court Judge on 5th November 2008. The Landing succeeded on their claim to have the judicial hypothec placed by Jada against parcels 17, 18 and 44 removed, but failed on their application for security for costs. Jada succeeded in their application to have the Landing to execute the guarantee to ensure that the Landing retained identified property to a value of at least US$2 million pending the determination of the claim.

[29] Mr. Maragh insisted that while the present appeal emanates out of an application by Jada for enforcement of the order of 5th November 2008, and for the removal of the restrictions previously placed on certain parcels, Jada has not appealed the order of 5th November 2008. In any event, argued counsel, it is an appeal against findings of fact and the exercise of judicial discretion in the making of the order of 1st April 2009. Mr. Maragh submitted that this appeal could therefore only involve the review of the exercise of discretion by the trial judge of three issues arising from Jada's application of 7th January 2009, namely: the enforcement of the order of 5th November 2008; disputed findings of fact; the judge's refusal to direct the

Registrar of Lands to enter inhibitions on parcels 17 and 18 until the order of 5th November 2008, is complied with; and costs on the application.

[30] Mr. Maragh urged us to find that the judge did not err in the exercise of his discretion not to enforce the November order. In the first place, he submitted that the order sought to be enforced was being corrected in the same sitting, without the corrected order being duly served thereafter upon the Landing as rule 53.7(3) of **CPR 2000** requires. In the second place, he submitted that the order of 5th November 2008, does not comply with rules 53.3 and 53.4 of **CPR 2000**. Additionally, said counsel, rule 45.7 provides that judgments and orders requiring a Body Corporate, such as the Landing, to do or refrain from doing something, may be made under Part 53 of **CPR 2000** for committal or sequestration.

[31] In the third place, counsel submitted that, based on the evidence before the trial judge, the Landing had complied with the order of 5th November 2008. The terms, he said, of paragraph 3 of the order of 5th November 2008, are clear and unambiguous in their requirement that the Landing were to execute a guarantee in a form satisfactory to Jada to ensure that the Landing retain property to a specific value, and the Landing did that.

[32] Mr. Maragh further argued that Jada made no application for an order requiring the Landing to "fortify" the undertaking or guarantee imposed by the order of 16th October 2006, and 5th November 2008, respectively. Alternatively, learned counsel submitted that even if Jada's 7th January 2009, application were to be construed as an application to fortify, there was nothing before the judge to warrant fortification. The court, contended counsel, has a discretion whether or not to order fortification, and, in considering the question, must have regard to all the circumstances of the case. He cited as authority this statement by Foster J [Ag] in **eChina Cash Inc. v eChina Cash (BVI) Ltd et al**[16] and by Blenman J in **Geoffrey Croft v Joseph W. Horsford**.[17] Counsel further asserted, on these

[16] Virgin Islands High Court Claim No. BVIHCV2008/0330, at para. 44.
[17] Antigua and Barbuda High Court Claim No. ANHCV2008/0559, at paras. 48 to 52.

authorities, that before an application to fortify an undertaking can succeed, there must be a likelihood of significant loss arising as a result of the injunction and a sound basis for belief that the undertaking will be insufficient, must be shown. Finally, said counsel, in any event, Edwards J, as she then was, stated in her judgment of 16th October 2008, that she was satisfied that the Landing would be able to pay Jada adequate damages if it became necessary.

[33] Mr. Maragh disputed Mr. Foster's statement that the trial judge was misled by then counsel for the Landing's statements from the bar when he made the order of April 2009. First, Mr. Maragh argued that the transcript of the proceedings does not bear out the account of the alleged misleading statements. It is unfortunate, said Mr. Maragh, that counsel's notes, if any, were not exhibited to the affidavit in which the allegation was made. Mr. Maragh noted that the entire premise of Jada's appeal is that the judge erred in the exercise of his discretion because he was misled by then counsel for the Landing as to the value, saleability and encumbrance of parcels 63, 66 and 67 and that the judge also misplaced reliance on CHIEVAL's valuation. In any event, submitted counsel, the alleged disputed facts are irrelevant to review the decision that the judge made upon Jada's application of 7th January 2009, and were irrelevant before him then having regard to the November order and Jada's January application.

[34] Mr. Maragh said that, for the foregoing reasons, the judge did not err in refusing to enforce compliance with the order as sought by Jada and the only other remedy that Jada sought in their January 2009 application, was a directive to the Registrar of Lands to enter certain inhibitions. In his view, the affidavit supporting that application gave no cogent reason for granting the inhibition and did not allege any prejudice to Jada if the inhibitions are not allowed. The judge, Mr. Maragh submitted, could not have adjudicated beyond the limits of the application then before him regardless of whether the CHIEVAL report or the alleged misrepresentations of then counsel for the Landing were made.

[35] In conclusion, Mr. Maragh contended that in the absence of an application to fortify the undertaking and/or guarantee, Jada has no right thereto and the Landing no obligation to provide fortification and there could be no complaint against the order of 1st April 2009. The result, said counsel, is that the order "enjoys shelter in the haven of the generous ambit within which reasonable disagreement is possible."

Decision

[36] I do not think that it was open to counsel for the Landing to raise the absence of an application for fortification as an issue in this appeal. The first order of 16th October 2008, noted, in the pre-amble, that the Landing undertook to guarantee the payment of damages in the event of an award. The order itself then directed the Landing to execute the undertaking. It was the court that ordered the execution of a fortified guarantee. The order of 5th November 2008, as corrected by that of 1st April 2009, required the Landing to fortify the guarantee in a form satisfactory to Jada to ensure that the Landing retain property to the value of at least US$2 million. In effect, the court itself stipulated the manner in which the guarantee was to be secured. Accordingly, the matter had advanced beyond the stage of application and obviated the need for it. The Landing was always aware of the court's stipulation. The Landing took steps to assist in fortifying the guarantee, for example, by identifying parcels 63, 66 and 67 as properties to be retained to secure it.[18]

[37] Premised on the foregoing, it is my view that Mr. Maragh's insistence that the Landing satisfied the order to execute the guarantee because parcels 63, 66 and 67 are valued at more than US$2 million is overly technical and inaccurate. I have not seen any notes of the proceedings for 5th November 2008. The transcript for 1st April 2009, offers little guidance as to the reasons why the judge ordered the Registrar to enter the inhibition against parcels 63, 66 and 67. The transcript shows that then counsel for the Landing merely stated as follows: "We have offered as security property worth more than US$2 million". The note that follows

[18] See, for example, correspondence from then counsel for the Landing to Solicitors for Jada at page 185 of the Record of Appeal.

immediately states: "Court satisfied with security provided by the property offered as guarantee". The court gave no reasons to explain why it was satisfied. The order follows immediately and thereupon the court adjourned.[19]

[38] In the first place, I am minded to conclude that in the absence of reasons there was no good reason for the decision by the court to impose the restriction against parcels 63, 66 and 67. However, in addition to the statement by then counsel for the Landing that these parcels could secure the guarantee, CHIEVAL's conditional valuation report was before the court. It is seen that CHIEVAL could not vouch for the accuracy of its valuation.

[39] The new evidence which Jada adduced in this appeal shows that then counsel for the Landing should have been aware that the parcels were encumbered by an hypothec in excess of EC$60 million at the time when she made the statement as to their worth in court. Unfortunately there is no evidence that this was brought to the attention of the judge. In real terms parcels 63, 66 and 67 could not have been valued at US$2 million dollars for the purpose of securing the guarantee at the time. The information as to the hypothecary obligation to which these parcels were charged would have assisted the judge to address his mind to the question whether parcels 63, 66 and 67 were worthwhile or worthless for securing the guarantee. It was the duty of counsel for the Landing to put the judge into a position to make a dispassionate decision on all of the available facts.

[40] As it turned out, the decision by the judge to remove the restrictions on the 9 parcels and to place the inhibition on parcels 63, 66 and 67 was made on a conditional statement in the CHIEVAL valuation and in the absence of disclosure of the status of the properties. The value that CHIEVAL gave was repeated by then counsel for the Landing at the bar without disclosing the encumbrance status of parcels 63, 66 and 67. These are the circumstances in which the court expressed satisfaction with the retention of parcels 63, 66 and 67 as security for the guarantee. In effect, the decision contained in the order that is appealed was

[19] See transcript at page 34 of the Record of Appeal.

made without all of the relevant facts to permit the judge to make a dispassionate decision. The transcript does not reveal satisfactory reasons for the decision and order. In my view, that decision is thereby vitiated. Accordingly, I would allow the appeal and set aside paragraphs 2 and 3 of the order of 1st April 2009.

The Consequences of allowing the appeal

[41] At the hearing of the appeal, Mr. Foster reiterated the prayer contained in paragraph 4.1 of the Notice of Appeal when he urged us to reverse the order of 1st April 2009. By this it seems that he meant that we should restore the restriction on the 9 parcels from which it was removed by that order or to place the restriction on parcels 17, 18 and 44 in keeping with the prayer in Jada's application which was before the judge at the April hearing. It would be recalled that the restrictions were removed by a direction in the order of 5th November 2008. Mr. Maragh responded, in opposition, that this latter order was not appealed. Mr. Foster's reply was to the effect that notwithstanding this, it is open to us to direct the Registrar to restore the restriction on these 3 parcels since Jada's prayer for this was before the court. I do not think that this court is in a position to facilitate Jada in this regard. We do not know the present ownership or encumbrance status of these parcels. Indications are that their status changed prior to the hearing of the appeal and we do not know what it is.

[42] It is noteworthy that when the single judge of this court made the order of 16th April 2009, she required the Development Control Authority to provide the Registrar with a status report on the state of completion of parcels 63, 66 and 67 and retained restriction on parcels 15, 32 and 42 of the Landing development. In her subsequent order of 9th August 2009, which was informed by the report, the single judge then removed the restriction on parcel 32 and retained it on parcels 15 and 42 on information that these could adequately secure the guarantee. It seems to me that this court should maintain this and give liberty to Jada to apply to the High Court for any other order as to the security for the guarantee that the court may think necessary. In that event, the parties would bring in evidence to assist the court in making a decision.

Costs

[43] Jada appealed the costs awarded in the sum of $500.00 on the ground that the costs awarded on the application were not within the general ambit allowed for the exercise of such discretion. In this regard, Mr. Foster submitted that the application of 7th January 2009, was necessary having regard to the fact that the Landing did not provide the list of properties until 25th January 2009, after the application. In the circumstances, he said, and having regard to the time spent in preparing the application, Jada should have been awarded its proper costs in the High Court. Mr. Foster accordingly contended that costs in all the applications in the High Court should be assessed pursuant to rule 65.12 of **CPR 2000**.

[44] On the issue of costs, Mr. Maragh submitted that inasmuch as these are within the discretion of the court, his foregoing submissions indicate that the judge was generous to have awarded any costs at all to Jada on its application. Additionally, the error in the order was not the fault of the Landing and Jada's application showed no merit as regards enforcement or the requirement for the inhibition.

[45] I agree with Mr. Foster's submissions for the reasons that he advanced and would reverse the judge's costs order contained in paragraph 5 of the order of 1st April 2009. This is particularly because the judge gave no reasons why Jada was not entitled to their proper costs in the circumstances in all of the applications that were before the judge on 1st April 2009. That is, in all of the applications except that aspect of Jada's application for correction of the order of 5th November 2008. Those costs are to be assessed in accordance with rule 65.12 of **CPR 2000**. Jada is also entitled to costs in this appeal to be assessed in accordance with rule 65.13 of **CPR 2000**. It is open to the parties first to agree costs.

[46] Apologies are hereby expressed to all parties and counsel for the delay in the delivery of this judgment due to an overly weighty administrative burden and illness.

Summary of order

[47] The order in summary then is as follows:

1. The appeal against the order which the trial judge made in these proceedings on 1st April 2009 is allowed and paragraphs 2, 3 and 5 of that order are set aside.
2. The Registrar of Lands shall retain the restriction on parcels 15 and 42 of the Landing's hotel and condominium development until a determination of the dispute between the parties hereto by arbitration or by the court, or until further order.
3. Liberty to Jada to apply to vary the restriction on parcels 15 and 42, which may include removing the restriction or placing it on another or other parcels.
4. The parties may vary the restriction confirmed in paragraph 2 of this order by consent.
5. Unless the parties otherwise agree, the Landing shall bear Jada's costs in the applications that were before the court on 1st April 2009, with the exception of that aspect of Jada's application for correction of the order of 5th November 2008. Those costs are to be assessed in accordance with rule 65.12 of **CPR 2000**.
6. Unless the parties otherwise agree, the Landing shall also bear Jada's costs in this appeal to be assessed in accordance with rule 65.12 of **CPR 2000**.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal