Michaelmas Term
[2017] UKPC 34
Privy Council Appeals No 0032 of 2016 and 0062 of 2016

JUDGMENT

Deslauriers and another (Appellants) *v* Guardian Asset Management Limited (Respondent) (Trinidad and Tobago)

From the Court of Appeal of Trinidad and Tobago

before

Lord Mance
Lord Kerr
Lord Hughes
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

9 November 2017

Heard on 11 and 12 October 2017

Appellants	*Respondent*
Peter Knox QC Ian Benjamin (Instructed by Charles Russell Speechlys LLP)	Gavin Kealey QC Elizabeth Lindesay (Instructed by Clyde & Co)

THE JUDGMENT OF THE BOARD:

1. The appellant defendants Mr and Mrs Deslauriers are property developers whose projects have been sited in the past both in Trinidad and Tobago and in the United States of America. At the beginning of October 2007 they entered into a commercial loan under which they borrowed TT$18.6m from the respondent claimant ("GAM"), which is a company administering pension, insurance and investment funds. They gave promissory notes for repayment and the loan was secured by a demand mortgage of parcels of land belonging to them. The loan could be repaid at any time after the first anniversary (thus October 2008) and was repayable in any event on 2 April 2009. Interest was payable quarterly. It was paid up until January 2009, but neither further interest nor the principal was repaid. After several agreed extensions of time had passed, GAM sued for repayment and interest on 20 November 2009. The Deslauriers both denied liability and counterclaimed damages. After a trial in July 2011, Rahim J gave judgment for GAM on 25 October 2011. The Deslauriers' appeal against that judgment was dismissed by the Court of Appeal on 3 February 2016. In the meantime, there had been further dispute over GAM's efforts to enforce its judgment. The judge directed sale of property owned by the Deslauriers at 28-29 Victoria Square in Port of Spain ("the Victoria Square property"), and the Court of Appeal upheld his order on 24 July 2015. There are now before the Board two further appeals by the Deslauriers:

(A) against the liability judgment: [2016] JCPC 62; and

(B) against the enforcement judgment: [2016] JCPC 32.

(A) The liability appeal

2. The Deslauriers did not dispute the loan or its non-payment. The essence of their defence was a complaint that GAM had let them down by leaving them unable to access further borrowing to complete a development which was in train at the time of the loan, residential apartments called Hevron Heights at Champs Fleurs. Their case was, in summary:

3. (a) the loan was required to help fund Hevron Heights;

(b) until late 2007 the Deslauriers were borrowers from their longstanding bankers, the Republic Bank;

(c) GAM aggressively pursued the Deslauriers for their business, against their reluctance to leave the Republic Bank;

(d) the TT$18.6m borrowed was only the first tranche of funding needed for Hevron Heights, which was going to cost in the region of TT$60m in all;

(e) the Deslauriers made clear to GAM that they would need more funding later;

(f) although they enquired of GAM what differences there were between it and a conventional bank, GAM told them that the only difference was that the loan was not repayable before its first anniversary; GAM failed to tell them of any internal or external lending limits which might inhibit its ability to make further loans to finance the later stages of Hevron Heights;

(g) when they did ask for more money at the end of 2008, GAM refused their application and indicated that one (or the) reason was that there were lending limits which an additional loan would exceed;

(h) the result was that they took the loan from GAM, and stayed with it, when otherwise they would have borrowed elsewhere from a lender who would have been able to offer further finance;

(i) in consequence they had been unable to complete Hevron Heights and had suffered loss of profit put at some TT$24m.

4. This complaint found expression in a number of different ways in the Deslauriers' Defence and Counterclaim:

(a) further advances were a condition precedent to the obligation to repay;

(b) GAM was in breach of a contractual obligation to finance the whole of the Hevron Heights project, giving rise to a counterclaim in damages which should be set off against the claim under the promissory notes;

(c) the failure to disclose any lending limits to which GAM was subject made the answer to the question about the difference between it and banks a misleading one; this amounted to a misrepresentation for which the Deslauriers were entitled to damages;

(d) GAM was under a duty of care to advise the Deslauriers of any lending limit and liable in damages for negligent breach of it.

5. Argument (a) has not been pursued and no more need be said about it, except that it was advanced at the trial and some of the judge's findings of fact were located in the section of his judgment rejecting this argument. It was clearly unfounded since the promissory notes themselves generated an obligation to repay and were in no sense conditional in their terms.

6. Mrs Deslauriers, who had conducted the business with GAM, appeared in person at the trial and gave evidence. For GAM evidence was given by Mr Ramdeen, who had handled the other end of the negotiations. Mrs Deslauriers' evidence, and her conduct of the trial, concentrated entirely on argument (b), viz a contractual promise to fund the entire project, which she said GAM had broken.

7. Arguments (c) and (d) were at times confused in the Defence and Counterclaim, and (c) might be said to have been but elliptically pleaded. They are of course different. (c) was summarised in the prayer as a claim for damages "for misrepresentation". It is reasonably clear that that meant, in the present case, a claim under section 3(1) of the Misrepresentation Act (12 of 1983; Ch 82.35). Such a claim involves proving (i) a misrepresentation which (ii) induces the claimant to enter the contract and which (iii) GAM did not believe on reasonable grounds to be true. There was no reference to the Act, still less to section 3(1), and no allegation that GAM did not believe the alleged misrepresentation to be true. But the claim for damages for misrepresentation was distinctly made separately from the claim for damages for negligence (as to which see below), and inducement was alleged in the narrative of events pleaded. It was sufficiently clear that what was being alleged was a misstatement about GAM's own lending limits, whether internally or externally imposed, and that as such GAM must have known the true position. So the claim under section 3(1) was - just - sufficiently made.

8. A claim under section 3(1) of the Misrepresentation Act involves no tortious duty of care; its gist is simply that a contracting party misstates a material matter which induces the other party to enter the contract. Such a misrepresentation, if made, can only come before the contract, here the loan. Anything passing between the parties after the loan might be evidence from which a pre-contract misrepresentation could be inferred, but it cannot itself amount to a misrepresentation actionable under the Act. Part of the explanation for the course of the trial, and the consequent form of the judgment, may well be that there is no sign that this point was appreciated either in the Defence and Counterclaim (which was professionally drafted) or by Mrs Deslauriers at the hearing. There was, however, no issue about the point before the Board, where Mr Knox QC readily accepted it; the Board has been grateful to him and to Mr Benjamin for their professional help, the more so since it is understood that it was given *pro bono*.

9. By contrast, if there was a tortious duty of care to avoid negligent misstatement, under the principle first enunciated in *Hedley Byrne & Co Ltd v Heller* [1963] UKHL 4; [1964] AC 465, that duty might well continue after the contract of loan was made, so that subsequent breach is actionable in damages. Such a duty of care would, however, require an assumption of responsibility by GAM for giving professional advice to the Deslauriers, which requirement is absent from any claim under the Misrepresentation Act. Once again, it is not at all clear whether these differences between a claim under the Act and a claim for tortious misrepresentation were appreciated in the drafting of the Defence and Counterclaim, and they very plainly did not figure in argument at trial. Certainly the written pleading contained no express assertion of the basis on which it could be alleged that there was the necessary assumption of professional responsibility for the care of the borrower. However, it distinctly pleaded a prayer for damages for negligence, which thus constituted argument (d).

10. Because the whole trial centred upon the Deslauriers' complaint that they had been promised funding for the entire project, the judge (correctly) focussed his judgment principally upon that issue. That is not to say, however, that he did not address separately the various claims made. He did, albeit that he did not repeat findings of fact already made when he moved on to a different basis of claim. GAM's case, as pleaded by way of Reply and Defence to Counterclaim and as spoken to by Mr Ramdeen, had been that there had been no discussion about future funding at all, save that Mrs Deslauriers had indicated that she proposed to fund Hevron Heights from other sources, including the deposits taken from prospective purchasers of the apartments. It was also the fact that, although it was clear from the discussions prior to the loan that the money would be used for Hevron Heights, the loan was principally required to re-finance the existing indebtedness to Republic Bank. That in turn had not been principally for Hevron Heights but for a quite separate development which the Deslauriers were undertaking at the Victoria Square property.

11. Having heard the oral evidence of both Mrs Deslauriers and Mr Ramdeen, and examined the correspondence between them, conducted by email, the judge rejected the evidence of Mrs Deslauriers. He found that there was no sign of GAM having pursued the Deslauriers aggressively; rather, the latter were dissatisfied with their relationship with the Republic Bank (para 50(i)). He found that there was no agreement for further financing. Moreover, he accepted Mr Ramdeen's evidence that he had been told by Mrs Deslauriers that she intended to fund the project by other means (paras 39 and 54). There is in this context no significant difference between her saying that she intended to fund it elsewhere and saying that it was being funded elsewhere. He specifically disbelieved Mrs Deslauriers' evidence that Mr Ramdeen had said off the record that GAM would fund the entire project (para 63). He found that her assertion of a promise to fund the entire project was inconsistent with the correspondence, particularly since in 2008 she had asked whether GAM would lend a further sum, rather than claimed it as a facility previously agreed (para 50(iii)). He found that if Mrs Deslauriers was under the impression that a representation was made as to future financing, that was the product

of her own making, given what he described as her unconventional use of language (para 64).

12. In the face of these findings by the judge who heard the witnesses, it would be unrealistic to pursue the complaint that there was a promise to fund the whole project, and Mr Knox realistically did not do so. Nor did he do so before the Court of Appeal. His case before the Board is confined to arguments (c) and (d) as listed in para 4 above - the Misrepresentation Act and a common law duty of care. He founds his argument in three stages. Firstly, he says that even if there was no promise of future funding, the email correspondence makes clear that GAM was aware that future funding would be needed, and that a request for extra money might be made of it. Secondly, he points to the fact that it was common ground that there had been some conversation about the differences between GAM and a bank, and that whilst there was a dispute as to exactly what GAM had said, it was not asserted that it included prior to the contract (or at all) anything at all about whatever lending limits applied to it. Thirdly, he contends that the indicative refusal to make a further advance, which GAM issued in January 2009, is evidence that some kind of lending limit existed, whilst no positive evidence was given by GAM to set against it. Combining those factors, he contends that once GAM knew that there was at least the possibility that a request for further funding might be made of them, and once there was a conversation about any difference from a bank, the statement (whatever it was) as to a difference relating to repayment terms was partial and misleading, since it did not, on any view, say anything about lending limits which might inhibit future advances. He further contends that the judge did not, in concentrating on the failed allegation of a promise to fund the entire project, recognise this line of argument. His case is that the judge's view of the credibility of Mrs Deslauriers does not need to be challenged in order to mount this argument. The email correspondence establishes, he says, the first stage. The second does not depend on her evidence, and nor does the third.

13. It is convenient to take the third stage first. It is clear, and was common ground, that in late 2008, a year or so after the loan, Mrs Deslauriers sought at least some additional advance, not to the extent of the suggested total cost of the development, but at any rate for some TT$6m. Formal refusal did not come until April 2009, but on 8 January 2009 Mr Ramdeen had sent an indicative response by email which included the following:

> "I agree that your track record has been excellent to date, but we need to follow the guidelines set by our regulator for failure to do so would run the risk of our license being revoked. If our balance sheet was much larger then the additional TT$6M would not be an issue. As soon as I receive feedback I will call you."

14. The evidence at trial about what if any lending limits applied to GAM was uncertain. Mrs Deslauriers cross-examined Mr Ramdeen on statutory limits on overall lending under the Financial Institutions Act 1993. However, (a) these apply to all lenders, of any kind, and so cannot constitute a difference affecting GAM which makes its answer to the question about the differences false, and (b) it is in any event a matter of public record, as available to Mrs Deslauriers as to GAM. Mr Ramdeen in evidence confined himself to answering the questions put. He said nothing about what limits, internally or externally applied, affected GAM at the material time, and he did not explain the email of 8 January 2009 because he was not asked to. In those circumstances, the judge understandably made no finding about what if any lending limit applied. It is of course possible that the email of 8 January was simply letting a disappointed applicant down lightly, but no-one from GAM has ever said so. The Board is content to proceed on the basis that there was prima facie evidence, from this email of 8 January, that some kind of regulatory limit or other constraint, internal or external, inhibited further lending to the Deslauriers.

15. As to the second stage of Mr Knox's argument, it is common ground that nothing had been said to Mrs Deslauriers about a lending limit, if such existed. It does not matter for present purposes exactly what the answer had been to the question about differences between GAM and a bank, nor whether the question had been about a "large" bank, or any bank.

16. Without more, a failure to say something is not a misrepresentation. But it may become such if a partial statement is made, which, because it omits something material, is misleading. This is a separate principle from the proposition that if, pre-contract, a party says black, which either is true or which he believes on reasonable grounds to be true (and is thus not a misrepresentation), he is under a duty to correct his statement if he subsequently learns prior to the contract being made that the true position is white. The latter proposition, whilst correct, has no application to the present case, for it is not suggested that the position as to any lending limits altered between the time of the conversation about banks and GAM and the making of the loan at the beginning of October 2007. It follows that what matters in the present case is whether there is any basis for saying that the judge erred in failing to find a misrepresentation by way of a partial and misleading statement. That in turn depends crucially on whether the existence of any lending limit was material at the time of the conversation. It is not a misrepresentation to leave out of any discussion a matter which is of no materiality to the contract under negotiation.

17. On this crucial point, the judge's findings, on the contested evidence, accepting Mr Ramdeen's evidence that there was no discussion of future funding by GAM of the rest of the development project, are fatal to the claim in misrepresentation. If the possibility of application to GAM for additional loans for the rest of the development was not raised, then the lending limits which affected GAM were simply irrelevant, there was no occasion to disclose them and whatever it said in the conversation about

banks cannot amount to a materially partial or misleading statement. This would be so even if the judge had not addressed the legal argument based on the Misrepresentation Act at all, but in fact he did.

18. The emails relied on were all considered by the judge alongside the oral evidence, but on reconsideration of them they do not show that there was such a discussion. The principal one relied upon before the Board was from Mrs Deslauriers to GAM on 24 June 2007. It is true that it contains, in the course of several pages of text, the words "If I need further assistance later on the security as we discussed will be worth a lot more as the buildings actually take shape." This passage needs to be considered in context. This long email came a day or two after the initial indication from GAM of the offer which it was prepared to make for the single loan under discussion. It had been based on a 66% loan to security ratio and Mrs Deslauriers, who was an experienced developer, had queried the percentage. She wanted to be able to make this initial loan 75% of the security available, which was, she said to GAM, the industry standard. GAM promptly accepted this. In the long email relied upon, Mrs Deslauriers set out the figures. She wanted the loan to re-finance her existing borrowing from Republic Bank, which stood at TT$15.5m, made up of TT$12.4m advanced on the different property of Victoria Square, TT$1,700 interest on that sum, and TT$1.4m advanced on Hevron Heights. She contended that the available security was TT$21.8m, so that 75% of that would be TT$16.35m. GAM's initial indication of offer was not the TT$18.6 eventually advanced, but TT$15m. Accordingly, Mrs Deslauriers was making the point that there was ample headroom in the security she was offering to accommodate a loan of up to TT$16.35m. This drew the reply from Mr Ramdeen that GAM was willing to consider $16.35m, but would need to look carefully at the security, to which Mrs Deslauriers responded that she could stick to TT$15m if needed. Other passages in this email dealt with the value of the security being offered. The email was not about possible future financing of the entire project; it was about the amount of the single loan then under negotiation. Much the same applied a few days later when, on 26 June, Mrs Deslauriers said that the parties seemed near to agreement. It is true the she referred to having to build out the project, and that this may be a reference to Hevron Heights, rather than to the Victoria Square property development. But everyone knew that Hevron Heights had to be built. It does not follow from this that she was giving any indication that she expected GAM to be able to finance it beyond the single loan being discussed. What she was asking about in that email was principally whether she could draw down the single loan in instalments, as needed; plainly if she could, the interest would not run from the beginning on the whole sum. The answer in the end was that that was not how GAM lent their money. That was, one might observe, a simple difference between a single loan advanced by a pension or investment fund, and a running loan account held at a bank.

19. Discussions continued about the amount of the loan. On 13/14 September, in another email exchange relied on by Mr Knox, Mrs Deslauriers asked whether, given that the security offered was now, in her view, TT$24.8m (and rising in value as the building was progressed) that meant that she could borrow up to TT$18.6m. Mr

Ramdeen replied that it meant that if she needed up to TT$18.6m that should not be a problem from the point of view of loan to security ratio, although if the advance was up to that figure, it would have to be on the same basis of loan for at least a year from the final element, that is without earlier redemption. Mrs Deslauriers made it clear by her response on 16 September that this is how she understood the conversation, for she said "So then if we do the TT$18.6m I have to do it now, in order not to delay the payoff in one year; is that correct?". This exchange likewise does not begin to approach an understanding that GAM might be asked in the future to make further advances to enable the project to be completed, such as might generate in GAM an obligation to make disclosure of what its lending policies or limits might be in relation to such further advances. The TT$18.6m is the sum eventually advanced by way of the single loan sued upon.

20. These conclusions, based upon the concurrent findings of fact by the judge and the Court of Appeal, never mind the Board's own analysis of the emails relied upon, are sufficient to dispose of this appeal insofar as it depends on the claim under the Misrepresentation Act. Two additional reasons why it cannot succeed ought, however, to be added.

(i) Even assuming in favour of Mrs Deslauriers that GAM told her that the only difference between itself and banks was that its loans were for a fixed term of a year rather than on running account, and even assuming that there were some kind of lending limits applicable to GAM, there was no evidence whatever before the judge that those limits were different from those applicable to a bank. Without such evidence it is difficult to see how the representation relied upon can be said to be a misrepresentation.

(ii) If that obstacle were to be overcome, there was no evidence whatever before the judge that if the suggested misrepresentation by omission/partial statement had not been made, the Deslauriers would not have suffered the same loss that they did, through inability to complete Hevron Heights. They would have to show two things. First, that they would, if told of the existence of lending limits, have placed their initial borrowing elsewhere, and second that the substitute lender would have been in a position, in late 2008 and subsequently, to make sufficient further advances to enable Hevron Heights to be completed. Certainly, if a minimum of such evidence had been adduced, it might well have been open to the Deslauriers to argue their case on quantum of damages on the basis of loss of a chance. But there was no evidence at all, and that basis of claim was never mentioned. It may be true that until mid-January 2009 the climate of the market was not unfavourable to developers, and that it changed abruptly for the worse on the collapse of Clico at about that time. But that is mere guesswork; it required evidence. Moreover, on any view, after the collapse of Clico it seems to have been the Deslauriers' own case that lenders were not disposed to lend for developments of the kind which Hevron Heights was. If so, even if an alternative

lender had initially been well disposed to lend more, it is at least unproved that enough would have been forthcoming to enable the project to be completed and the loss suffered to be avoided.

21. If a proper basis for the alternative claim under *Hedley Byrne* were laid, then the duty of care thus arising would be capable of continuing after the loan contract was made. That would enable the Deslauriers to rely on correspondence after the contract, during 2008, when at least towards the end of the year it became apparent that they were looking for further finance from somewhere. They are able to say that they told GAM that they were in discussions with a new bank (RBBT). Before that, on 30 July 2008, Mrs Deslauriers renewed her question whether she could in effect treat the loan as a running account. She enquired whether she could pay off the existing loan at the beginning of October 2008, rather than in April 2009 when it was finally due, but meanwhile borrow different sums, still within the security presently held by GAM. The answer was that the suggestion was confusing, and that the loan was fixed for payment in April, with an option to repay earlier in October. There is nothing in this exchange to indicate any change in the basis of business, still less that Mrs Deslauriers was even asking GAM to lend enough to fund the whole project. A little later on 17 November Mrs Deslauriers did indicate that she was in conversation with RBBT who, she asserted, were keen to fund the project for what she described as "the last ten months". She suggested paying off GAM's existing loan early in January. She enquired whether GAM wanted to keep the business longer term, and she also asked meanwhile for an extra TT$1-2m, which she said was within GAM's existing security, to cover current expenditure. Mr Ramdeen did not respond to the question about future business except to reply very briefly that if an extra TT$1-2m were advanced, it would have to be for the full year January to January. It is certainly true that he did not at that point say that there was the obstacle to further borrowing which, when later she asked for an additional TT$6m, he referred to in his indicative refusal of 8 January 2009 (para 13 above). But she was not in November speaking of TT$6m, and whether there would have been the same obstacle to TT$1-2m is not known. In any event, his brief reply in November cannot bear the construction that GAM was put on notice that she was relying on it to fund the remainder of the project. There is no basis for drawing from either exchange an assumption of responsibility to advise the Deslauriers about GAM's lending policies.

22. The duty of care postulated depends on the relationship between the parties giving rise to an assumption of responsibility by GAM for giving professional advice to the Deslauriers. The relationship between these parties was between a commercial lender and its highly experienced commercial borrower. It was an arm's length relationship, in which each sought to further its own commercial interests. If business between them was mutually beneficial, that was no doubt to the advantage of both, but it is not a relationship of adviser and client. It would be a very unusual relationship of that kind which gave rise to a duty on the part of the lender to advise the borrower about its internal lending policies or approaches to applications for loans, still less to any external influences, regulatory or otherwise, which applied to it. It would be extremely difficult to envisage such a duty arising even if it had been the fact that the borrowers

indicated from the beginning that they hoped to borrow more in the future. In the face of a finding that no such discussions took place between the parties, it is quite impossible to construct the duty of care contended for. The judge was clearly right to reject it. Moreover, the absence of evidence that loss was incurred which would otherwise have been avoided is as damaging to this claim as it is to the claim under the Misrepresentation Act.

23. For all these reasons, the appeal against the finding of liability under the promissory notes, and dismissing the Deslauriers' counterclaim, must itself be dismissed.

(B) The enforcement appeal

24. This appeal concerns the enforcement of the judgment of Rahim J of 25 October 2011 in favour of GAM against Mr and Mrs Deslauriers. The judgment was in the amount of TT$20,676,295.69 plus interest. The total now outstanding exceeds TT$36m, with interest continuing to accrue.

25. On 30 August 2013, pursuant to the Remedies of Creditors Act Ch 8:09, GAM sought an order for the sale of Mrs Deslauriers' alleged beneficial interest in the Victoria Square property. Before Rahim J Mrs Deslauriers opposed the order for sale inter alia on the grounds that (i) pursuant to a Deed of Settlement dated 8 December 2009 Victoria Square was held on trust for her son and daughter and (ii) that the court should take into account the sum likely to be recovered from the sale of the development property, Hevron Heights, which was mortgaged to GAM and in respect of which GAM was granted vacant possession on 29 September 2014 and which Mrs Deslauriers claimed was worth TT$77m. GAM submitted that Mrs Deslauriers had not divested herself of the beneficial ownership of Victoria Square by the Deed of Settlement. It also disputed that its right over Hevron Heights affected its entitlement to an order for the sale of the Victoria Square property.

26. On 27 October 2014 Rahim J made an order for the sale of the Victoria Square property. He held that no valid trust of Victoria Square had been created and that both the legal and beneficial interest in the property remained vested in Mrs Deslauriers. He also held that he could have no regard to the unsold value of Hevron Heights.

27. Mr and Mrs Deslauriers appealed and on 24 July 2015, the Court of Appeal (Moosai and Narine JJA) dismissed the appeal. On 15 February 2016 the Court of Appeal granted final leave to appeal against the order for sale of Victoria Square to the Judicial Committee.

28. The following issues arise on the enforcement appeal.

i) Whether, on its true construction, the Deed of Settlement created a trust of Mrs Deslauriers' beneficial interest in Victoria Square in favour of her children.

ii) Whether, even if Victoria Square was held on trust, since the Deed of Settlement was unregistered it did not prevent GAM as judgment creditor from enforcing its judgment by way of an order for sale of Victoria Square;

iii) Whether the judge had no discretion to stay the sale of Victoria Square pending the sale of Hevron Heights under section 38 or section 54, Remedies of Creditors Act;

iv) Whether, if there was a discretion to stay the sale of Victoria Square pending the sale of Hevron Heights, the Court of Appeal was correct not to interfere with the order for sale made by Rahim J;

v) Whether the Court of Appeal was correct to uphold Rahim J's decision to set the reserved price for the sale of Victoria Square by reference to GAM's valuation report rather than by reference to Mrs Deslauriers' earlier valuation report and not to commission an up to date valuation.

Issue (i): The Deed of Settlement

29. On 8 December 2009 there was executed a document entitled "Deed of Settlement" between Mrs Deslauriers, described as "the Settlor" and her two children Daniel David Deslauriers and Lindsay Leah Deslauriers (described as "the Trustees"). The recital stated that the name of the Trust Settlement was "Victoria Square Trust". The Settlor was described as "the beneficial owner of all that property known as 28-29 Victoria Square … 'the Trust Property'". Recital 4 recorded that:

> "(4) The Settlor intends shortly to transfer the Trust Property into the names of the Trustees to be held by the Trustees upon the trusts hereinafter declared."

Recital 5 recorded that:

> "(5) The Settlor desires that the Settlement made by this Deed shall take effect immediately upon the execution of this Deed."

30. Clause 1 provided:

> "1. The Trustees shall hold the Trust Property upon trust to retain the same in its present state of investment and shall with the consent of the Settlor during her lifetime invest the income from same and any other moneys from time to time requiring to be invested under the provisions of this Deed (hereinafter collectively called 'the Trust Investments') in the name of the Trustees in manner authorised by this Deed and as to all such investments the Trustees with the consent of the Settlor during her life and afterwards at the discretion of the Trustees realise all or any of such investments and invest the proceeds in any investments authorised by this Deed and with the like consent and at the like discretion may transpose those investments into others."

31. Clause 2 provided:

> "2. The Trustees shall hold the Trust Property and the Trust Investments upon the following Trusts:
>
> (i) upon trust to pay the income from them to the Settlor during her life and thereafter;
>
> (ii) upon trust as to both capital, income and accumulated interest, income investments etc of the Trust Property and the Trust Investments for Daniel David Deslauriers and Lindsay Leah Deslauriers absolutely and equally."

32. Clause 6(i) provided:

> "6(i) The Settlor during her lifetime shall have the power to appoint a new trustee or trustees other than the Settlor in place of any or all of the Trustees or in addition to time."

33. It is common ground that Mrs Deslauriers has not transferred and has never taken any steps to transfer legal title to Victoria Square to her children to be held by them as

trustees upon the trusts declared in the Deed of Settlement. As a result, GAM's case is that the Deed of Settlement was not effective to create a valid trust of Victoria Square and the legal and beneficial interest in the property remained and remain vested in Mrs Deslauriers.

34. In his oral decision of 27 October 2012 Rahim J held that no valid trust of the property had been created. In his subsequent reasons for his decision he stated that the legal effect of the Deed was that of a declaration of intention to create a trust in the future, contingent upon the occurrence of an event which had apparently not yet occurred ie a conveyance. Accordingly no valid trust had been created. Referring to *Milroy v Lord* (1862) 4 De GF & J 264; 45 ER 1185, he considered this ample authority for the conclusion that, title to the Victoria Square property not having been transferred, a trust was never created. The alleged declaration of trust appeared not to be one whereby Mrs Deslauriers was declaring that she held on trust for her children. On the contrary it was one whereby she was saying that they would hold on trust for her when she transferred to them shortly after the date of the Deed of Settlement which had been executed in December 2009. Some five years later this had not been done. He concluded that it could therefore not have been her intention to create a trust as she herself had never fulfilled the condition that she had imposed in the Deed of Settlement and, even if she had, the intention was to retain the beneficial interest in the said property.

35. Rahim J also referred to the decision of Aboud J in *Bhawanie v Guppy* CV 2012-02649 where the judge had concluded that in order for a trust to be properly constituted "the settlor must either validly transfer the property to the trustee, or, if it remains in his hands, declare himself as the trustee of the property". If neither occurred, interests in the property remained unchanged. Rahim J considered that that was the state of affairs in the case before him. Mrs Deslauriers had neither validly transferred the property nor had she declared that she held on trust for beneficiaries. As a result, both the legal and beneficial interests in the Victoria Square property remain vested in Mrs Deslauriers.

36. On the appeal to the Court of Appeal, R Narine JA, with whose judgment P Moosai JA agreed, referred to *Warriner v Rogers* (1873) LR 16 Eq 340 and *Milroy v Lord*. None of the methods of transfer identified by Turner LJ in the latter case had been effected. There was no transfer of the property to the beneficiaries or the proposed trustees and there was no declaration by the settlor that she intended to hold the property on trust for the purposes of the settlement. He observed that that was hardly surprising since Mrs Deslauriers had expressly stated her intention to transfer the property to her trustees and it would have been odd if she were to declare that she was holding the property in trust for herself, since she was named as an intended beneficiary of the income during her lifetime.

37. The classic statement of the law relating to the voluntary settlement of property is to be found in the judgment of Turner LJ in *Milroy v Lord*.

> "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried" (pp 274-275).

38. On behalf of the Deslauriers it is accepted that no further document was executed transferring the trust property into the names of the trustees as envisaged by Recital (4) of the preamble. However it is submitted that this is not conclusive because Recital (5) of the preamble expressly provides that the settlor desires that the settlement "shall take effect immediately upon the execution of this Deed" and the terms of the trust itself in the body of the Deed operate immediately, not from some point in the future. Accordingly, it is submitted that the effect of Recital (5) of the preamble, in conjunction with the immediate operation of the terms of the trust, was to transfer the beneficial interest in the property immediately as (short of a transfer of the legal title) this was the only way in which the settlement could take effect immediately upon the execution of the Deed. This, it is submitted, left Mrs Deslauriers a bare trustee holding the property on trust for her two children pending transfer to them. It is submitted that the apparently conflicting provisions of Recitals (4) and (5) can, in this way, be resolved by construing the Deed as intending to create an immediate transfer of the beneficial interest followed by a transfer of the legal estate shortly afterwards.

39. In this regard the Deslauriers draw attention to the judgment of the Board in *T Choitram International SA v Pagarini* [2001] 1 WLR 1 where Lord Browne-Wilkinson observed (at paras 11-12):

> "Although equity will not aid a volunteer, it will not strive officiously to defeat a gift."

In addition they rely on *Pennington v Waine* [2002] 1 WLR 2075 where Arden LJ stated at para 61:

> "Accordingly, the principle that, where a gift is imperfectly constituted, the court will not hold it to operate as a declaration of trust does not prevent the court from construing it to be a trust if that interpretation is permissible as a matter of construction, which may be a benevolent construction."

40. In the present case Mrs Deslauriers' submission is essentially that her intention, as evidenced by Recital (5), was to constitute herself a trustee of the property until such time as it vested in the trustees in accordance with the Deed of Settlement. The question is whether this is a permissible interpretation and whether the words of the Deed of Settlement evidence such an intention.

41. In order to declare himself a trustee, a settlor need not employ the express language of a declaration of trust. As Sir George Jessel MR observed in *Richards v Delbridge* (1874) LR 18 Eq 11, 14:

> "It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning."

42. Nevertheless, a settlor's intention to deal with the property so as to deprive himself of its beneficial ownership must be clearly evinced. Moreover, it is to be noted that in the present case Recital (5) sits alongside Recital (4) which does employ suitable and obvious language making plain an intention that the property be held on trust by trustees.

43. On behalf of Mrs Deslauriers great emphasis is placed upon the statement in Recital (5) that the settlement should take effect immediately upon the execution of the Deed. However, this of itself cannot be sufficient. In *Richards v Delbridge* the donor had endorsed upon a lease words of gift which were expressed to be effective "from this time forth" and then delivered the lease. It was held, nevertheless, that there was no valid declaration of trust of the property in favour of the intended donee.

44. In any event, the language of Recital (5) is, in the Board's view, inconsistent with any intention on the part of Mrs Deslauriers to constitute herself a trustee of the property. First it expresses a "desire" that the settlement made by the Deed shall take effect immediately upon the execution of the Deed. This must be contrasted with Recital (4) where the language of intention is expressly used and the intention expressly stated. Secondly, and more fundamentally, Recital (5) records the settlor's desire that "the Settlement made by this Deed shall take effect immediately upon the execution of the Deed". The Settlement referred to is set out in the substantive clauses of the Deed of Settlement. The trustees are to hold on the trusts set out in clause 2 which are totally different from the terms of the bare trust for the children pending transfer to them, for which the Deslauriers contend. Recital (5) contemplates a settlement totally inconsistent with Mrs Deslauriers' submission. Mrs Deslaurier's contention as to the meaning of Recital (5) is therefore, in the Board's view, not a permissible interpretation.

45. The respondent submits that Recital (5) is intended to make clear Mrs Deslauriers' wish that her children were, by signing the Deed of Settlement, accepting the office of trustees on the terms of the Deed of Settlement. Thereafter, it is submitted, seamlessly upon the conveyance of Victoria Square to them, their duties as trustees would commence. Be that as it may, in the Board's view Recital (5) certainly does not evidence an intention on the part of the settlor that she should constitute herself a trustee until the property is vested in the trustees of the settlement. This settlement was intended to be effected by a transfer to trustees and, in the present circumstances, it is not open to the court to give it effect as a declaration of trust. Rahim J and the Court of Appeal were correct in their conclusion that this was an incompletely constituted trust. In so far as the enforcement appeal challenges the propriety of any enforcement order in respect of Victoria Square on the ground that that property was held on trust for the Deslauriers' son and daughter, the challenge fails for that reason alone. The Board will, nonetheless, consider issue (ii), relating to registration.

Issue (ii): Registration

46. Issue (ii) only arises on an assumption that (contrary to what the Board has held, above) the Deed of Settlement was effective to create a trust in relation to Victoria Square or otherwise to divest Mrs Deslauriers of her beneficial interest in the property. GAM submits that, even if this were so, the failure to register it meant that the rights which would have been created were ineffective as against GAM as a registered judgment creditor of Mrs Deslauriers. The Court of Appeal held that such rights would have been ineffective against those of GAM and Mrs Deslauriers challenges that conclusion.

47. This registration issue did not arise at first instance, and the point was first taken by GAM upon service of its written submissions to the Court of Appeal.

48. The facts relevant to this issue are not in dispute. The Deed of Settlement was executed on 8 December 2009, but was never registered. GAM obtained its judgment on 25 October 2011 and registered it on the same day.

49. The Deslauriers take the preliminary point that the Court of Appeal should not have entertained GAM's registration objection because it had been raised too late. Since it turns on a pure question of law, the Board's view is that the Court of Appeal was entitled to deal with the point, which therefore falls to be considered on its merits on Mrs Deslauriers' further appeal.

50. Section 16 of the Registration of Deeds Act (Chapter 19.06) provides as follows:

> "16.(1) Every Deed whereby any lands in Trinidad and Tobago may be in any way affected at law or in equity shall be registered under this Act, and every such Deed duly registered shall be good and effectual both at law and in equity, according to the priority of time of registering such Deed, according to the right, title and interest of the person conveying such lands against every other Deed, conveyance or disposition of the same lands or any part thereof, and against all creditors by judgment of the same person so conveying such land.
>
> (2) Every such Deed that is not duly registered shall be adjudged fraudulent and void as to the lands affected by such Deed against any subsequent purchaser for value or mortgagee without notice of the same lands or any part thereof, whose conveyance shall be first registered."

51. Section 16 needs to be read and understood side by side with sections 5 to 8 of the Remedies of Creditors Act (Chapter 8.09). Section 5 provides as follows:

> "5. Every judgment or decree to be entered up against any person in the Court shall operate as a charge upon all lands and rents of or to which that person shall at the time of entering up the judgment or decree, or at any time afterwards, be seized, possessed or entitled for any estate or interest whatever, whether in possession, reversion, remainder or expectancy, or over which that person shall at the time of entering up the judgment or decree, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom the judgment or decree shall be entered up, and against all persons

> claiming under him after the judgment or decree, and shall be also binding as against his next of kin, and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion or other interest in or out of any of the said lands and rents."

52. Section 6 makes similar provision in relation to decrees and orders of the Court, as if they were judgments. Section 7 provides that no judgment or decree of the Court shall affect lands until it has been registered. Section 8 provides as follows:

> "8. Every judgment to be registered in the manner directed by this Act shall entitle the creditor, by virtue of the judgment, decree, order or rule, to the same remedies in equity against the lands charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom the judgment, decree, order or rule has been so entered up had power to charge the same lands, and had by writing under his hand agreed to charge the same with the amount of the judgment debt, or the amount made payable by the decree, order or rule, and interest thereon."

In summary therefore, the effect of sections 5 to 8 of the Remedies of Creditors Act is, upon registration of his judgment, to confer upon the judgment creditor all the rights of an equitable chargee of any land owned by the judgment debtor at the time of the judgment.

53. It is common ground that, if effective to create a trust or disposition of a beneficial interest in relation to Victoria Square, the Deed of Settlement was required to be registered under section 16(1), because it was (or would have been) a "Deed whereby any lands in Trinidad and Tobago may be in any way affected … in equity". But Mr Ian Benjamin submitted for the Deslauriers that, since judgment creditors were not expressed by section 16(2) to be persons against whom an unregistered Deed was to be adjudged fraudulent and void (not being a purchaser for value or mortgagee without notice, with a first registered conveyance), the issue as to priority between the equitable rights created respectively by the Deed of Settlement and by the judgment fell to be determined not in accordance with the time of registration, but in accordance with the traditional rules of equity, by which (although he did not spell them out) a competition between equitable interests is resolved in favour of the first in time to be created.

54. In the Board's view, the priority as between the equitable interests purportedly created by the Deed of Settlement and those arising from GAM's registered judgment is determined by section 16(1), not section 16(2). Priority in accordance with the time

of registration governs equitable interests arising from registrable Deeds and the interests of judgment creditors, where the judgment debtor is the same person as the grantor (including for that purpose settlor) under the relevant Deed. The operative words of section 16(1) may be extracted as follows:

> "and every such Deed duly registered shall be good and effectual … in equity, according to the priority of time of registering such Deed, … against all creditors by judgment of the same person so conveying such land."

55. The question arose during argument before the Board as to what, if that is the correct interpretation of section 16(1), is added by section 16(2)? Mr Kealey submitted that, merely to provide for priority as between equitable interests according to the time of registration would not protect a sub-purchaser, from a purchaser enjoying priority by reason of prior registration, as against an equitable interest thereafter registered, but before the completion or registration of the sub-purchase Deed. The effect of section 16(2) was to render the unregistered interest void for all purposes, so that its later registration could not take effect in priority to the interest of a sub-purchaser from the original purchaser whose conveyance had been first registered. No such protection was needed for judgment creditors, who could exercise their rights as prior charge free from the subsequently registered interest.

56. The Board considers that this analysis is probably correct, but that it is unnecessary to decide the point. Even if section 16(2) amounted to little more than belt and braces, the Board is satisfied that 16(1) is sufficient by its clear terms to regulate any competition for priority as between the equitable interests arising under a Deed and those arising under a registered judgment (which are the same as those of an equitable chargee), in accordance with their respective dates of registration.

57. Accordingly, the appeal on issue (ii) also fails.

Issue (iii): Discretion

58. Under the heading "Enforcement of Judgments on Lands", sections 28 and following of the Remedies of Creditors Act enable a judgment creditor to apply to court by summons for an order for the sale of any beneficial interest of the judgment debtor in any lands within Trinidad and Tobago, whether legal or equitable, whether a co-ownership interest, and whether in possession, reversion or remainder (see sections 28 and 30).

59. Section 38 provides as follows:

> "If at the return of the summons for sale it is proved to the satisfaction of the Judge that the debtor was at the time of the registration of the judgment, or at any time after the registration and before the issue of the summons for sale, entitled to the sole immediate unconditional beneficial interest, legal or equitable, in the lands sought to be affected, or in any several and ascertained portion thereof, there shall be a declaration accordingly, and the same shall be ordered to be sold on such conditions as to advertisement, date, conditions of sale, description, reserved price, if any, and otherwise, as the Judge shall by his order direct, and the Registrar shall, after the sale has been confirmed as hereinafter provided, execute and deliver to the purchaser thereof, without further order, a conveyance thereof in fee, to be prepared by the purchaser and which shall (subject as to land under the Real Property Act to the provisions of that Act) have the same effect as if the execution debtor had conveyed the same to the purchaser for all his estate and interest therein."

60. Section 54 provides as follows:

> "If it does not appear desirable that the ascertained beneficial interest of the debtor should be sold, the Judge may, at the return of the summons, order further execution by sale of land to be stayed till further order, and may award equitable execution by the appointment of a receiver in respect of the beneficial interest of the execution debtor, or may appoint the creditor, or any person nominated by him, receiver thereof without remuneration, or may, on such terms as may be just, and at the cost of the creditor to be charged by him against the beneficial interest of the execution debtor, appoint a receiver of the entire rents and profits of the said land or of any part thereof, or may order any person in receipt of the rents of profits to pay into Court the whole or such proportion thereof as shall be directed to the credit of the cause or matter, for such time or to such amount as shall be just."

Pausing there, the phrase "at the return of the summons" in section 54 refers to the creditor's summons seeking an order for sale for which the procedure is prescribed by sections 30 and following.

61. GAM issued a summons for sale (by then called a Notice of Application) as judgment creditor on 30 August 2013. After various interim skirmishes it was heard by Rahim J on 27 October 2014 when the judge made an order for sale of Victoria Square. He did so notwithstanding a request by the Deslauriers for a stay based mainly on the

ground that the Hevron Heights property, over which GAM had a first mortgage, was amply sufficient to pay the judgment debt and interest in full, whereas Victoria Square would not be.

62. The judge's view, with which the Court of Appeal agreed, was that, once the judgment creditor satisfied the court of the matters required to be proved under section 38, it was entitled to a sale. The court's discretion was limited to giving directions as to advertisement, date, conditions of sale, description and reserve price, and did not extend to a discretion to refuse or stay an order for sale on the grounds that some other asset of the judgment debtor ought to be realised, by execution or otherwise, first.

63. It does not appear that any point was made by reference to section 54 at the hearing before the judge. In the Court of Appeal it was held that the judge's view about the absence of the requisite discretion had not been shown to have been plainly wrong, at least in relation to section 38, and that the failure of the Deslauriers to apply at first instance under section 54 was fatal to any appeal based upon a discretion exercisable under that section.

64. The Board is sympathetic with the view of the courts below that, read on its own, section 38 does not appear to confer a general discretion whether to make an order for sale, or whether to stay such an order because of the availability of some other assets of the judgment debtor, the realisation of which would be better suited as a means of payment of the debt. The language is, as the judge noted, mandatory, once the judgment creditor has satisfied the court as to the requisite matters under section 38.

65. Nonetheless the Board has concluded that, on an application for an order for sale by a judgment creditor, sections 38 and 54 have to be considered together, and that section 54 creates a wider discretion to stay a sale until further order, "if it does not appear desirable that the ascertained beneficial interest of the debtor should be sold". Mr Kealey submitted that, read as a whole, Section 54 conferred that discretion only if, at the same time, the court made an order by way of equitable execution for the appointment of a receiver. While this may be a typical adjunct to an order staying execution by sale, the Board does not consider that the discretion in section 54 can only be exercised by staying a sale and ordering equitable execution at the same time. There may be other reasons why it is not desirable that the beneficial interest should be sold. For example the judgment debtor may have a range of other substantial assets at an advanced stage of realisation, such that it reasonably appears to the court that the sale of the specific property the subject matter of the creditor's application is neither necessary or proportionate, for the purpose of achieving prompt payment of the judgment debt and interest in full.

66. Nor, in the Board's view, is the exercise of the discretion conferred by section 54 dependent upon the judgment debtor making his or her own application for that purpose. The discretion is expressed to arise "at the return of the summons" which is, as noted above, a reference to the judgment creditor's summons for an order for sale.

67. The question remains however, whether on the facts of this case, and if the matter were remitted to be determined at first instance, the judge could properly grant a stay whether or not accompanied by an order for equitable execution, on the grounds put forward by the Deslauriers.

68. There are some trenchant observations both in the judge's written reasons and in the judgment of the Court of Appeal why, even if such a discretion existed, it would have been wholly inappropriate to exercise it in the Deslauriers' favour. Nonetheless, since those were delivered in the shadow, as it were, of a view that there was not such discretion in any event, the Board prefers to give its own short reasons for the same conclusion.

69. The sheet-anchor of the Deslauriers' argument in favour of a stay was that Hevron Heights was available as a ready means for GAM to execute its judgment in full, since a sale would be bound to yield proceeds greatly in excess of the judgment debt and interest, whereas the sale of Victoria Square would not do so. It was submitted furthermore that recourse to Hevron Heights was the contractually agreed method of execution, for the purpose of which GAM had been granted a first mortgage. Reliance was placed upon a recent valuation of Hevron Heights in the sum of TT$77m, as against a judgment debt and interests currently standing at a little over TT$36m. It is not in dispute that the sale of Victoria Square would only produce proceeds sufficient to pay the judgment debt and interest in part.

70. The principal difficulty with the Deslauriers' case for a stay is that Hevron Heights is a part completed development site, on which work ceased several years ago, and about which there have since been widely differing views as to its value. Since being forced to discontinue development works, the Deslauriers had several years in which to attempt to achieve a sale, but without success. Indeed, it appears that the TT$77m valuation was produced for the Deslauriers in an effort by them to persuade a purchaser who had shown interest in buying Hevron Heights plus 45 acres of further land for TT$54m to increase their offer, but who thereafter withdrew.

71. The Deslauriers had while developing Hevron Heights taken very substantial sums by way of deposit from purchasers of individual units in the aggregate exceeding TT$30m. Neither the likelihood of having to repay those deposits nor the anticipated developers' profit were factored into the TT$77m valuation.

72. Taken together, this evidence demonstrates to the Board's satisfaction that, far from constituting an asset available for early realisation in an amount more than sufficient to pay the judgment debt and accruing interest, Hevron Heights represented an asset with a very uncertain timetable for sale, and with real doubts as to whether the net proceeds of realisation would in fact repay the judgment debt and accruing interest in full.

73. There is by contrast no similar uncertainty about the saleability of Victoria Square. The fact that it is largely tenanted is no reason why it should not be sold. Although it may be a matter of regret that the Deslauriers would thereby lose a property which has been in their family for a long time, it is to be borne in mind that the bulk of the loan made by GAM to the Deslauriers was to discharge their previous indebtedness incurred in the development or improvement of Victoria Square, rather than Hevron Heights.

74. The effect of sections 5 to 8 of the Remedies of Creditors Act is to give a judgment creditor the rights of an equitable chargee. As is fully reflected in the mandatory terms of section 38, this does confer a prima facie right to a sale for the purposes of payment or even part payment of the judgment debt, unless the judgment debtor can show that it is, by other means, in a position to redeem by making reasonably prompt payment. The Deslauriers come nowhere near being able to show that. Nor is the evidence deployed in opposition to an order for sale anywhere near sufficient to demonstrate that a sale is not desirable, within the meaning of section 54.

Issue (iv): Reserved Price

75. The final issue on this appeal is whether the judge's decision to set a reserve price for the sale of TT$16m should be interfered with by the Board. The setting of a reserve price was, of course, one of those matters entrusted to the judge's discretion by section 38.

76. The judge based his decision as to the reserve price upon a valuation which had been obtained by GAM in February 2012, notwithstanding an earlier, higher valuation proffered by the Deslauriers.

77. The Court of Appeal declined to interfere with the judge's discretion as to the reserve price. The Board's view is that it should not do so either. No error of law in the judge's approach to this issue is disclosed. In the light of the difference of opinion as to value between the parties' valuers, the judge was entitled to choose the more recent but lower valuation for the purpose of setting a reserve price. The Board's view is that this was a matter pre-eminently for the judge to be determined, as it was, in the local court,

and that no sufficient basis has been shown to support a conclusion that he was clearly wrong in choosing the figure which he did.

Conclusions

78. For the above reasons, the Board concludes that both the liability appeal and the enforcement appeal must be dismissed. The parties should make any submissions on costs in writing within 21 days of the handing down of this judgment.