REPORTABLE: **(97)**

EQUITY PROPERTIES (PRIVATE) LIMITED
v
(1) ALSHAMS GLOBAL BVI LIMITED (2) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
BHUNU JA, UCHENA JA & KUDYA AJA
HARARE, 16 JUNE 2020 & 27 SEPTEMBER, 2021

J Bhamu, for the appellant

L Uriri, for the first respondent

No appearance for the second respondent

KUDYA AJA: This is an appeal against part of the judgment of the High Court of Zimbabwe sitting at Harare on 20 November 2019 granting an interim interdict in favour of the first respondent.

Civil Appeal No. SC 673/19

THE FACTS

The appellant and the first respondent have been engaged in a flurry of litigation and at other times with Interfin Banking Corporation Ltd in liquidation (the bank) in both the High Court and in this Court. Some of the cases have been concluded while others are still pending. The facts relevant to this appeal are narrow.

On 16 March 2018, in HC 2463/18, the appellant brought motion proceedings against the first respondent seeking vindication of its original title deed No. 9068/2008, which pertains to Lot 3 of Bannockburn (the immovable property), within 10 days of the grant of the order failing which the second respondent was to issue a duplicate replacement deed within 90 days of that order. The order was granted purportedly in default of the first respondent on 6 June 2018.

On 18 July 2018, while the application for rescission of the default judgment was pending, the appellant obtained the duplicate replacement title deed from the second respondent. The first respondent filed three urgent chamber applications to stop the second respondent from issuing the replacement deed and one court application to prevent the appellant from using it. The three urgent applications were all removed from the roll for lack of urgency while the court application was withdrawn. The default judgment upon which the replacement deed was issued was rescinded *a quo*, in terms of r 449 of the High Court rules 1971, on 21 November 2018.

The appellant duly appealed against the rescission of the judgment of the court *a quo* to this Court. The appeal was dismissed with costs on the higher scale on 7 October 2019 in case number SC 924/18 for two reasons. The first was that the substituted service, upon which the rescinded judgment was based, had been effected on legal practitioners who did not have the mandate to represent the first respondent. The second was that the order for substituted service had, by consent of the parties, been rescinded by this Court in SC 733/18 on 25 March 2019.

It was common cause that the appellant used the duplicate title deed to subdivide an undisclosed number of stands on Lot 3 of Bannockburn. He also used it to conclude an

undisclosed number of agreements of sale with purchasers such as Conradie Tinofirei Mutumbuki, the third respondent in the application for rescission, on 11 October 2019 and to transfer title thereof to three purchasers, one of which was David Madyausiku who took transfer on 12 April 2019.

On 21 October 2019, the first respondent filed the urgent chamber application which has given rise to this appeal. It sought in the interim, the return of the replacement deed to the second respondent, its cancellation by second respondent and the setting aside of all transactions based on it. On the return date, it sought confirmation of the interim relief and costs *de bonis propis* on the higher scale against the appellant's legal practitioner of record, one Mr *Kwaramba.*

On 29 October 2019, the appellant opposed the application. It also filed a counter urgent chamber application in terms of r 229A of the High Court Rules, 1971. It raised five preliminary points. These were that one of the urgent chamber applications that had been removed from the roll was *lis pendens*, there was material non-disclosure of all the urgent applications that had been removed from the roll and the court application that had been withdrawn, the application was not urgent, there was non-joinder of third parties who had benefited from transactions based on the replacement title deed and lastly that the relief in the interim order was the same as the one in the final order. On the merits, it sought the dismissal of the application.

In the counter application, the appellant sought the retention of the replacement deed in the interim and determination of the lawfulness of the first respondent's possession of the

original title deed on the return date. It indicated its avowed intention to utilize the replacement deed to conduct further subdivisions, conclude more agreements of sale and transfer the subdivisions that had been sold. One such purchaser was Conrad Tinofirei Mutumbuki, who was joined in the proceedings on his own motion as the third respondent at the hearing on 29 October 2019 and made common cause with the appellant. The first respondent also raised the preliminary point of lack of urgency against the counterclaim and sought its dismissal on the merits.

THE FINDINGS *A QUO*

The court *a quo* dismissed all the preliminary points raised by the appellant. While it regarded one of the urgent chamber applications that had been removed from the roll to be pending at the instance of the first respondent, it found the cause of action and relief sought to be different from those before it. It found the non-disclosure of prior urgent chamber applications and court application irrelevant to the determination of whether the main application was urgent. It held that, as the appellant had only impugned the interim relief pertaining to the setting aside of all transactions based on the replacement deed and not the surrender and cancellation relief as final in effect, it could exercise its r 240 discretion to grant interim relief that was not final in effect. It proceeded to do so by suspending rather than cancelling all the transactions predicated upon the replacement deed.

The court *a quo* further determined that the relief sought did not seek to stop past events but "recent and ongoing events". It also relied on the provisions of r 87 to find that the non -joinder of the third parties who purchased or took transfer of the purchased subdivisions

was not inimical to their rights and interests as they were not involved in the procurement of the impugned replacement deed. Lastly it found that the first respondent had acted with speed after the decision of this Court of 7 October 2019 to launch the urgent chamber application after the subsequent ten-day negotiations for the voluntary surrender of the replacement deed failed. Under the consequence factor it held that the first respondent had established that the failure to intervene on an urgent basis would result in the attenuation and dissipation of the immovable property to the detriment of the first respondent's rights in the security pending litigation in HC 8113/16, the consolidated case under which the application for rescission had also been incorporated.

Regarding the counter-application, it upheld the preliminary point of lack of urgency that was raised by the first respondent and struck it off the roll with costs on the higher scale.

On the merits of the main application, the court *a quo* was cognisant of the fact that the issue before it concerned the legality of the possession of the duplicate title deed by the appellant and not the legality of the possession of the original title deed by the first respondent. It held that the appellant had fraudulently procured the duplicate title deed through a deliberate omission of the timeous opposition to its application in HC 2463/18 from the bundle of documents for default judgment and the improper appeal against the rescission of the default judgment. It reasoned that the appellant had done so for the twin purposes of obtaining and utilizing the duplicate deed to undertake the transactions it could not do without the original title deed such as the advertisements for the sale of stands, the conclusion of agreements of sale and the transfer of the stands.

It also determined that the rescission of the default judgment restored the status *quo ante*, thereby effectively maintaining and preserving the first respondent's possession of the original deed and preventing the appellant from utilizing the duplicate deed to attenuate and dissipate the security by subdividing, selling and transferring any subdivisions. Lastly, it held that the first respondent had established all the requirements for a *mandamus*. It therefore granted the provisional order for the return of the duplicate deed to the second respondent for cancellation and suspended all pending activities founded on the subdivisions, agreements of sale and transfers of title predicated upon the duplicate title deed. The appellant was accordingly estopped from effectuating all activities based on the duplicate title deed.

The court *a quo* reserved the nature and level of costs for the return day.

GROUNDS OF APPEAL

Aggrieved by the determination *a quo*, the appellant sought the setting aside of the order in the main application only and its substitution by a dismissal of the urgent chamber application with costs on the following four grounds of appeal.

"The court *a quo* erred in concluding that the 1st respondent's application was urgent when the 'time' and 'consequence' factors of urgency were not satisfied.

1. The court *a quo* erred in granting the relief of an interdict when all the requirements of an interdict were not met.
2. The court *a quo* grossly misdirected itself by granting a final interdict on an interim basis.
3. The court *a quo* grossly misdirected itself by purporting to interdict past events done pursuant to the replacement title deed."

It is noteworthy that the appellant did not appeal against the striking off order against its counter urgent chamber application.

THE ISSUES

It was common cause that the issues for determination that arise from the grounds of appeal are:

1. Whether the court *a quo* correctly determined that the matter was urgent.
2. Whether the requirements of an interim interdict were satisfied.
3. Whether or not the court *a quo* granted a final interdict when the first respondent had sought an interim order.

Mr *Bhamu*, for the appellant sought to have the appeal postponed *sine die* to enable the appellant to brief a counsel of choice after the previous counsel renounced agency on 15 June 2020. Mr *Uriri*, for the first respondent opposed the application for postponement on the basis that the reasons therefor had not been correctly articulated and were merely a delaying tactic intended to prolong the appellant's perverse use of the replacement title deed. Further, that the appellant lacked the genuine desire to provide adequate security for the first respondent's claim for the settlement of the bankers' acceptances (BAs) that were secured by the original title deed held by the first respondent.

At the request of the parties, we adjourned the matter to the end of the roll to enable them to discuss the prospects of settlement. The parties failed to find each other on the requisite bond of security in the amount and currency claimed, thereby confirming Mr *Uriri's* disquiet

over the genuineness of the appellant's tender of security for the first respondent's claim that is secured by the original title deed.

We adopted the position pronounced by this Court in *Midkwe Minerals (Pvt) Ltd v Kwekwe Consolidated Gold Mining (Pvt) Ltd & Ors* SC 54/13 at p 7 that "the grant or otherwise of a postponement is in the discretion of the court. A party seeking the grant of a postponement or other indulgence at the hearing must come prepared for a grant or refusal of its request. A legal practitioner must be prepared, in the event of a refusal by the court to grant a postponement, to proceed with the hearing if so ordered." This was because the erstwhile legal practitioners for the appellant had filed heads of argument as far back as 9 March 2020, which they further supplemented on 19 March 2020. It was our view that by purporting to appear before us whilst totally unprepared and totally ignorant of the merits of the case smacked of negligence on the part of Mr *Bhamu*, who ought to have come prepared to argue the matter in the event that his application for deferment was refused. We accordingly ordered the parties to motivate the appeal. In the result both counsel requested that the appeal be determined on the papers filed of record.

In his written heads of argument, Mr *Uriri* raised the preliminary issue that the notice of appeal was fatally defective for non-compliance with r 37 (1) (c) and (e) of the Supreme Court Rules 2018, in that it failed to identify the part of the judgment appealed against and the exact relief sought. He contended that the first respondent sought and was granted *a quo* a *mandamus* and costs on a legal practitioner and client scale yet the appellant's substituted order seeks a wholesale vacation of that provisional order without appealing the costs order. He clearly

misconstrued the provisional order granted in the first respondent's favour. That order reserved the question of costs to the return date. We are also satisfied that, as worded, the relief sought meets the peremptory requirements of both para (c) and (e) of r 37 (1) of the rules of this Court. The first preliminary point is dismissed for lack of merit.

The second preliminary point is that the failure by the appellant to motivate the fourth ground of appeal throws that ground out of court. Rule 52(2) and not 26(1) (b) as submitted by Mr *Uriri* requires an appellant to file heads of argument in the prescribed period together with the list of supporting authorities in respect of each ground of appeal. It is trite that a failure to motivate a ground of appeal is treated as an abandonment of that ground. The second preliminary point is upheld and ground number 4 is accordingly struck out from the notice of appeal.

On the merits the appellant contended that the court *a quo* erred in holding firstly that the time to act commenced soon after this Court's judgment of 7 October 2019 rather than 18 July 2018, when the replacement title deed was issued by the second respondent and secondly that the continued use of the replacement deed to subdivide, sell and transfer the subdivisions constituted an irreversible dissipation of the immovable property secured by the collateral held by the first respondent. It submitted that the previous attempts in HC 5466/19 and HC 7769/19 to stop the use of the replacement deed negated the "time and consequence" based urgency by the time the provisional order was sought on 21 October 2019, since the dissipation of the immovable property, which began in 2008, was known to the first respondent from March 2012, when it took possession of the original deed.

On the consequent aspect, the appellant argued that the failure *a quo* to determine whether the tender of security *in lieu* of the original deed negated any irremediable harm arising from the indebtedness claimed in HC 8113/16, which had been fully ventilated by the parties, constituted a fatal misdirection warranting interference with its discretion on appeal. The appellant further submitted that as the immovable property was not hypothecated, it could not constitute security for the bankers' acceptances. It strongly contended that the absence of irreparable harm therefore negated the finding *a quo* of urgency.

The appellant further impugned the finding that the first respondent had established a *prima facie* case for granting the provisional order. It assailed the existence of a *prima facie* entitlement, though open to some doubt, to possess the original title deed pending determination of HC 8113/16, on four grounds. Firstly, the absence of a debtor-creditor relationship, secondly, the absence of a cession between the two protagonists, thirdly, that the appellant had discharged its obligations in full to the bank and lastly that possession of the original title deed was contrary to the Security Trust Deed and Assignment Agreement between first respondent and the bank. The appellant also emphasized that as the title deed was not the subject of the claim in HC 8113/16 nor encumbered, the purported tender of the bond of security countervailed the existence of actual or reasonable apprehension of harm. It further argued that the balance of convenience favoured the appellant in that it had earned US$15 million from the sale of 300 stands on which third parties had invested a further US$18m, which in aggregate significantly eclipsed the claim of US$2.3m in HC 8113/16. It boasted of its ability to pay the claimed amount in the event liability was established. Lastly, the appellant contended that the court *a quo*

improperly granted final relief on an interim basis on a lower onus, which did not protect its rights pending HC 8113/16.

Per *contra,* the first respondent contended that the court *a quo* had correctly found that the first respondent established both the "time and consequence" factors of urgency and all the four requirements for the grant of an interim interdict. Mr *Uriri* further argued that the provisional order was not final in form or substance as it was premised on the determination of HC 8113/16, which was pending before the High Court.

THE LAW

The treatment of whether an application is urgent is a matter in the discretion of the court *a quo*. This Court has very limited grounds upon which it can interfere with the exercise of that discretion. It can do so where the lower court makes a mistake on the law or the facts, acts upon a wrong principle, allows extraneous considerations to influence its decision, fails to take into account relevant facts or more generally makes a decision that is irrational. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 669F-670D; *Barros & Anor v Chimpondah* 1999 (1) ZLR58 (S) at 62G-63A and *Econet Wireless (Pvt) Ltd v Trust Co Mobile (Pty) Ltd & Anor* SC 43/13.

The law on what constitutes urgency is settled. Urgency is manifested by either a time or consequence dimension. See *Kuvarega v Registrar-General & Anor* 1998 (1) 188 (H) at 193E; *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H); *Gwarada v Johnson & Ors* 2009 (2) ZLR 159 (H) and *Sitwell Gumbo v Porticullis (Pvt) Ltd t/a Financial Clearing Bureau* SC 28/14 at p 3. In addition, in *Econet Wireless (Pvt) Ltd v Trust Co Mobile*

(Pty) Ltd & Anor, supra, at p 16 GARWE JA, as he then was, further suggested that an urgent chamber application in which the interim relief is similar to or has the same effect as the final relief prayed for may justifiably be found to be not urgent. While he generally approved the position articulated in *Kuvarega, supra,* at 193A-C he underscored that such an application could not be regarded as a nullity and stated that:

> "Whilst no hard and fast rule can be laid down, there may well be cases where a court would be justified in holding, in such a situation, that the application is not therefore urgent and that it should be dealt with as an ordinary court application. There may also be cases where the court as it is empowered to do….may amend the relief sought in order to grant…interim protection (and) obviate a situation where final relief is granted by way of a provisional order."

It is apparent that the consequence dimension presupposes that the harm sought to be protected in an impending matter would be amorphously irremediable without the interim indulgence. In *Chiwenga v Mubaiwa* SC 86/2020 at p 10, this Court further highlighted the incongruence of noting an appeal against a finding of urgency for the basic reason that the finding of urgency is a mere procedural device used by an applicant to jump the queue of other pending matters for a consideration of the merits. This Court reasoned that:

> "Looked at differently, an order granting the urgent hearing of a matter is generally not appealable. This is for the simple reason that the order has no bearing on the merits of the application or judgment. This is akin to a bank customer who is rightly or wrongly allowed to jump the queue. His or her transaction cannot be impugned or rendered unlawful solely on the basis that he or she has jumped the queue. By the same token a correct judgment cannot be impugned or rendered incorrect by the mere fact that the matter was improperly heard as an urgent application."

In *Nyakutombwa Mugabe Legal Counsel v Mutasa & Ors* SC 28/18 at p 8 this Court held that a finding of urgency by a court on its own cannot constitute a substantive ground of appeal.

In our law a pledge vests real rights of security in the property pledged to the pledgee. This was pertinently pronounced by Mfalila J in *Hughes v Lotriet* 1985 (2) ZLR 179 (H) at 186A thus:

> "This valid pledge therefore had the effect of conferring on the applicant (the pledgee) a real right in the articles pledged and this right can only terminate when the pledge is extinguished. The pledge is extinguished only after the original or principal obligation is discharged… Until this is done, the respondent as pledgor has no right of action either for their return or damages for their loss."

The requirements and purpose of an interim interdict are also well settled in this jurisdiction. It seeks to protect an existing right from unlawful infringement that is either continuing or reasonably anticipated. See *Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority* CCZ 7/14, *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S). In the latter case this Court stated at 56B-D that:

> "An application for a mandamus or "mandatory interdict", as it is often termed, can only be granted if all the requisites of a prohibitory interdict are established. See *Lipschitz v Wattrus NO* 1980 (1) SA 662 (T) at 673C-D; *Kaputuaza & Anor v Executive Committee of the Administration for the Hereros & Ors* 1984 (4) SA 295 (SWA) at 317E. These are:
>
> 1. A clear or definite right - this is a matter of substantive law.
> 2. An injury actually committed or reasonably apprehended - an infringement of the right established and resultant prejudice.
> 3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection."

In respect of an interim interdict, where the right sought to be protected is not clear, "a right which, 'though *prima facie* established, is open to some doubt'", suffices. See *Eriksen Motors (Welkom) Ltd v Warrenton& Anor* 1973 (3) SA 685 (A) at 691D.

Where a clear right is established the applicant is precluded from establishing a well-grounded apprehension of irreparable harm but must do so where only a *prima facie* right open to some doubt is established. See *Pinkstone Mining (Pvt) Ltd & Ors v Lafarge Cement (Pvt) Ltd & Anor* HH 118/18 at p 3.

Bankers Acceptances (BAs) meet the definition of a bill of exchange espoused in the Bills of Exchange Act *[Chapter 14:02]*[1]. The Act also defines certain correlative terms to a bankers' acceptance such as "acceptance" "bearer" "delivery", "endorsement holder" and "payment in due course"[2]

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[1] S 3 (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer.

[2] "acceptance" means an acceptance completed by delivery or notification;

"bearer" means the person in possession of a bill or note which is payable to bearer;

"delivery" means transfer of possession, actual or constructive, from one person to another;
"endorsement" means an endorsement completed by delivery;

"holder" means the payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof;

"payment in due course" means payment made at or after the maturity of a bill to the holder thereof in good
faith and without notice that his title to the bill is defective;

APPLICATION OF THE LAW TO THE FACTS

The appellant submitted that the court *a quo* misapplied the time aspect and failed to consider the "consequence" factor. The *ratio* of the court *a quo* on these two aspects is delineated on p 13 of the appealed judgment in these words:

> "Notwithstanding that the order that enabled the first respondent to procure a duplicate title deed was effectively nullified by the Supreme Court on 7 October 2019, the first respondent (appellant) is still refusing to return the replacement copy of the title deed in terms of which it subsequently subdivided and sold parts of the property as evidenced by the agreement of sale in the third respondent's (Mutumbuki) notice of opposition, hence first respondent is effectively in the process of developing and dissipating stands to individual purchasers. From the papers applicant engaged the first respondent from 7th to 17th October 2019 but first respondent has made it clear that it wants to hold onto the replacement title deed at all costs to further its apparent unlawful activities of dissipating the immovable property before resolution of case HC 8113/18 (*sic*).
>
> It becomes prudent for this court to intervene on an urgent basis to force the first respondent to return the duplicate title deed and for the duplicate title deed to be cancelled if necessary to prevent first respondent from alienating the property or disposing of its title in the said immovable property pending litigation between the parties before MUSHORE J."

The above sentiments are unassailable. Before the order of this Court of 7 October 2019, all prior urgent applications to stop the issuance and use of the replacement deed by the second respondent were hamstrung by the extant default judgment that permitted the appellant to obtain the replacement deed. The patently erroneous default judgment had been given a lease of life by the improper appeal lodged by the appellant against the order of rescission. Notwithstanding that the service by substitution order upon which the default judgment was based was, by consent, rescinded by this Court on 25 March 2019, the appellant brazenly utilized the replacement deed to transfer a stand on the immovable property to Madyausiku on 12 April 2019. And despite the confirmation, again by this Court of the

rescission of the default judgment on 7 October 2019, which by operation of law rendered the replacement deed inefficacious, the appellant perverted the default judgment and the replacement deed by concluding an agreement of sale for a stand on the immovable property with, amongst others, Mutumbuki on 11 October 2019. In its opposing affidavit, the appellant persisted with its avowed intention to continue using the replacement deed to subdivide, sell and transfer stands on the immovable property.

We are satisfied that the court *a quo* properly applied both the time and consequent factors of urgency. The exercise of its discretion on the question of urgency is unassailable. Again, on the authority of this Court in the *Nyakutombwa* and *Chiwenga* cases, *supra*, the first ground of appeal is not only ill conceived and misplaced but also devoid of merit.

The tenor of the contentions made by the appellant in respect of the second ground of appeal disingenuously relates more to the counter application that was struck off and not appealed against rather than the provisional order that it sought to impugn. The provisional order protected the first respondent's right to legality, which constitutes a vital aspect of the rule of law. The consolidated matter in which, *inter alia*, the first respondent sought the discharge of dishonored bankers acceptances drawn by the appellant and secured by the title deed was pending as was the claim of vindication that was lodged by the appellant. The case was awaiting determination in accordance with the law. This Court had effectively disgorged the appellant of the ill-gotten duplicate deed and nullified its efficacy on 7 October 2019. The appellant's refusal to voluntarily surrender the duplicate deed was inimical to the first respondent's real rights in the security that are awaiting determination. The provisional order could not and did not determine

the issues pending in HC 8113/16. It was remiss of the appellant to motivate the second ground solely on the legality of the possession of the original deed by the first respondent while studiously ignoring the legality of its own stranglehold on the duplicate deed.

The failure to properly demonstrate how the court *a quo* misdirected itself in finding that the constituent elements of an interim interdict were established is fatal to the second ground of appeal. The second ground of appeal lacks merit and must, therefore, fail.

The appellant further contended that the court a *quo* erred in granting a final interdict on an interim basis. The order granted *a quo* was a provisional order, which restored the status *quo ante* pending the conclusion of the consolidated matter, HC 8113/16. Before the replacement deed was issued, the appellant could neither subdivide, sell nor transfer any stands on the immovable property. That is the position that was safeguarded by the provisional order.

The order sought to be confirmed or discharged is predicated on the pending consolidated matter HC 8113/16, which at the time the provisional order was sought and granted incorporated HC 2463/18. In addition, the court will determine the propriety of mulcting Mr *Kwaramba* with costs on the higher scale *de bonis propis* on the return date. The first respondent will also be obliged to show not only why the status *quo ante* should be confirmed pending the determination of the disputes raised by both parties in the consolidated matter, HC 8113/16, but also why Mr *Kwaramba*, should personally be mulcted with punitive costs. The provisional order did not stop the determination of HC 8113/16 nor did it preempt any of the issues raised therein.

The provisional order was therefore not the same as the final order sought nor did it have final effect. Accordingly, the third ground of appeal must fail.

COSTS

It is clear to us that the appeal was launched for the perverse purpose of prolonging the appellant's stranglehold on the replacement deed in order to render the security held by the first respondent redundant. This is a proper case for expressing our displeasure at the conduct of the appellant by mulcting it with costs on the scale of legal practitioner and client.

DISPOSITION

Accordingly, it is ordered that:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the first respondent's costs on the scale of legal practitioner and client.

BHUNU JA **I agree**

UCHENA JA **I agree**

Mbidzo, Muchadehama & Makoni, appellant's legal practitioner.

Atherstone & Cook, first respondent's legal practitioners.