IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Kwach & Muli, JJ.A)

CIVIL APPLICATION NO. NAI. 72 OF 1994

BETWEEN

1. EAST AFRICAN FINE SPINNERS LIMITED(IN RECEIVERSHIP).....1ST APPLICANT

2. GRAHAM J. SILCOCK .....2ND APPLICANT

3. KENYA COMMERCIAL BANK LIMITED .....3RD APPLICANT

4. KENYA COMMERCIAL FINANCE COMPANY LIMITED.....4TH APPLICANT

AND

BEDI INVESTMENTS LIMITED ..... RESPONDENT

(An application for stay of execution pending appeal from the ruling of the High Court of Kenya at Nairobi (The Hon Mr Justice A B Shah) dated 13th day of April, 1994

in

HCCC No 384 of 1994)

****

RULING

Gicheru JA. As long ago as 1865 Lord Westbury, LC in *Chinnock v The Marchioness of Ely* 4 DE G J&S 638 at 646, observed that:

"As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract.

But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

This observation prompted Jessel, MR in *Winn v Bull* [1877] 7 Ch D 29 at pages 31 and 32, to conclude

that:

“where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal

contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.”

In *Chillingworth v Esche* [1924] 1 Ch 97 at page 114, Sargant LJ had this to say in regard to the words “subject to contract” or “subject to formal contract”:

“..... To my mind the words “subject to contract” or subject to formal contract” have by this time acquired a definite ascertained legal meaning - not quite so definite a meaning perhaps as such expressions as FOB or CIF in mercantile transactions, but approaching that degree of definiteness. The phrase is a perfectly familiar one in the mouths of estate agents and other persons accustomed to deal with land; and I can quite understand a solicitor saying to a client about to negotiate the sale of his land: “Be sure that to protect yourself you introduce into any preliminary contract you may think of making the words `subject to contract.’ “I do not say that the phrase makes the contract containing it necessarily and whatever the context a conditional contract. But they are words appropriate for introducing a condition, and it would require a very strong and exceptional case for this clear *prima facie* meaning to be displaced.”

Evershed, J (as he then was) in *Brilliant v Michaels* [1945] 1 All ER 121 at page 123 letters D & E, observed that:

“The phrase that the law does not recognise a contract to enter into a contract must now be taken as subject to certain qualification. ... The principle is the same and may be expressed in the form of a question. Did the parties intend to make a final and exhaustive bargain, the terms of which should in due course, for convenience or otherwise, be recorded in a formal document; or did they merely reach the point of together saying that either immediately or on the happening of some event an agreement would be entered into between them incorporating not only matters on which they had already reached accord but other matters proper or essential to the relationship proposed between them but not so far discussed?”

And in *Bennett, Walden & Co v Wood* [1950] 2 All ER 134 at page 137 letters B & C, Sir Raymond Evershed, MR said this:

“Parties contracting in particular words must be assumed to intend the ordinary meaning of those words.

Applying the proper test of construction, *viz*, what is the ordinary, straightforward, meaning of the language, it seems to me reasonably clear that the answer here is that by “offer” is meant a firm offer. In the ordinary sense of the term in business matters an offer is something which by acceptance creates a bargain. An offer subject to contract lacks that essential characteristic, for its acceptance does not create a contract”.

On 3rd January, 1994 the second applicant was appointed receiver & manager of the first applicant by the third and fourth applicants. Prior to this appointment, the assets of the first applicant were the subject of a sale negotiation. Offers had been invited and submitted in respect thereof. On his appointment as receiver & manager of the first applicant, the second applicant sent to the respondent a fascimile transmission dated 3rd January, 1994 which read as follows:

“Price Waterhouse

Fax/telex transmission

To Mr K S Bedi, Bedi Investments Limited

From G J Silock

Date 3 January 1994

Re East African Fine Spinners Limited (in receivership)

No of pages

(Incl this) 2

Please advise as soon as possible if all pages are not received.

I was appointed receiver & manager on 3 January 1994 by KCB and KCFC. It is anticipated that other debenture holders will also make an appointment.

It is planned to negotiate a sale of assets. I note your offer dated 14 December 1993 addressed to Mr C Kiplagat.

I am contacting leading offerors with the proposal that

they re-offer on the basis of a guideline of Shs 290 million, taking into account the attached proposed terms and conditions. Please let me have your response not later than 7 January 1994.

I do not have a list precisely identifying the assets which you are interested in buying. We shall need to liaise on this matter.

Yours faithfully

(signed)

G J Silcock

Receiver & Manager

East African Fine Spinners Limited

(In Receivership)"

Attached to this transmission was a document the contents of which were as follows:

"East African Fine Spinners Limited (in receivership)

Some Proposed Terms and Conditions of Sale

Subject to Contract

1. A fixed offer price for land, buildings, plant machinery, furniture, fittings and fixtures. 10% to be paid on signing a sale agreement. 90% to be paid on completion.

2. A formula price for inventories comprising raw materials (suggested formula: cost) work in progress (suggested formula cost plus apportioned overheads and profit) and finished goods (suggested formula 90% of selling price). This will be paid not later than completion. (Note: Many inventories belong to third parties).

3. Completion of the sale to be not later than 60 days from the date of the sale agreement.

4. A bank guarantee will be required to support the payment of 90% of the purchase price; alternatively some other form of security acceptable to the debenture holders.

5. The purchasers will assume responsibility for hire purchase/lease hire obligations on company assets.

6. No warranties or indemnities from the vendor.

7. The vendor may rescind the sale contract if the purchaser does not complete on the completion date. The purchaser's deposit will then be forfeited.

8 If the vendor agrees to late completion the purchaser will pay interest at penalty rates on the balance of the purchase price.

9 The receiver contracts as agent of the company with no personal liability."

These then were the proposed terms and conditions referred to in the fascimile transmission set out above.

By another fascimile transmission sent to the respondent by the second applicant on 5th January, 1994, the time deadline of 7th January, 1994 as per the fax dated 3rd January, 1994 was extended to 11th January, 1994. On the latter date therefore, the respondent in answer to the second applicant's invitation to re-offer as per the facsimile transmission dated 3rd January, 1994 submitted a bid of KShs 310 million to purchase the total assets of the first applicant, that is to say, land, buildings, plant and machinery and so forth including the first applicant's liability on hire purchase/lease hire obligations as furnished to it. On 13th January, 1994, however, the second applicant informed the respondent that it was one of the four bidders who were being invited to re-offer as per the debenture holders' response to the offers received on 11th January, 1994. If the respondent did not re-offer in accordance with the said response, its offer of 11th January, 1994 was to be regarded as remaining valid. That response which was attached to the second applicant's facsimile transmission to the respondent on 13th January, 1994 was as follows:

"East African Fine Spinners Limited (in receivership)

Debenture Holders' Response to Offers Received 11 January 1994

1) It is evidently necessary to provide a further opportunity for some interested parties to re-offer. Nevertheless, the debenture holders do not wish to extend matters unduly and it is intended that there should be only one more opportunity for offers.

2) Accordingly, revised offers are invited on the basis of a guideline price of Shs 325 million. Offers should be sent to the Receiver & Manager, Mr G Silcock, not later than Tuesday 18 January 1994.

3) Each offer should be in writing in sealed envelope.

Offers should not be notified by fax or by any other means which may reduce confidentiality. It is intended that offers should be opened at a meeting of the debenture holders and the receiver to be held on Wednesday 19 January. Prior to the meeting offers will remain in sealed envelopes.

4) The four highest bidders who sent in their offers on 11 January will be invited to re-offer on 18 January.

5) Those who re-offer on 18 January are recommended to make it clear whether or not they will pay the East African Fine Spinners Ltd liability (estimated at Shs 3.3 million) to lease hire – hire purchase creditors in addition to the fixed sum offered for the company's assets.

6) The terms and conditions notified by the Receiver & Manager on 5 January 1994 will be assumed to

apply unless otherwise notified by offerors except with the amendment that the successful party will be required to make a 10% deposit within 7 days of being notified by the Receiver & Manager of the intention to proceed to contract. The 10% deposit will be placed with KCFC at market rates of interest.

7) It is intended to execute a sale agreement within 30 days. If the intended purchaser and his advocate is unable to keep to this time table the Receiver & Manager may discontinue negotiations and sell elsewhere.

8) The successful party will be required to provide the receiver & manager and the debenture holders with full details of his financing plan and source of finance. If these are not considered to be adequate the Receiver & Manager may proceed to sell elsewhere."

The terms and conditions referred to in paragraph 6 of this memorandum were the same as those notified by the Receiver & Manager to the respondent on 3rd January, 1994 and which latter I have set out above.

Responding to the revised invitation to re-offer by the second applicant, on 18th January, 1994 the respondent submitted a bid KShs 345 million for the purchase of the first applicant's total assets, that is to say land, buildings, plant, machinery, furniture, fittings and fixtures and so on. The respondent also confirmed that it would pay the first applicant's liability (estimated at KShs 3.3 million) to Lease Hire - Hire Purchase Creditors.

At the meeting of the debenture holders and the receiver & manager held on 19th January, 1994, the debenture holders intimated that they would accept the highest offer which was from Sunflag Textile & Knitwear Mills Limited. That offer which was dated 18th January, 1994 and addressed to the second applicant was in these terms:

"Dear Sir,

Re:

Offer for assets of East African Fine Spinners Limited (EAFS)

We refer to your fax of 13th January, 1994 inviting revised offers for the assets of the above named company.

Since we have not had sufficient time to value the assets of East African Fine Spinners Limited, we are facing some difficulty in fixing a firm price for the assets. However, we are sure that the price offered by the other bidders would reflect a fair value to attach to those assets. We are therefore willing to pay a premium over and above the fair value of the assets as ascertained by the value of the other bids.

We are now pleased to make the following offer:

1. For the entire land, buildings, plant & machinery, furniture, fixtures & fittings, motor vehicles, and any and all other assets excluding inventories: Ksh 1.5 million (Kenyan shillings one million five hundred thousand only) over and above the highest offer made by the other bidders.

2. For inventories comprising raw materials, work progress, and finished goods: Formula price as suggested by you in your fax.

3.Over and above the preceding, we are willing to undertake the hire purchase liability estimated by you at Ksh 3.3 million.

The terms and conditions of sale as proposed by you in your fax are acceptable to us. Our above offer is, however, subject to the following:

1. Only those inventories which are approved by us

shall be purchased at the agreed price.

2. Our offer is based on the list of assets as per the valuation report of M/s Milligan & Company dated 14th May, 1991 and any subsequent additions thereto, which is subject to a physical inspection, which can be carried out once our offer is accepted.

3. The assets will be purchased either by us, or our subsidiary, group, or associate company, local or overseas.

4. The above offer is subject to our confirmation.

5. The above offer stands valid till the 31st of January, 1994.

We hope that you will find our offer to be in the best interest of the debenture holders and other creditors of the company. As you may be aware the Sunflag Group has been operating in the textile sector in Kenya and in other countries for several decades, and we believe we have the necessary technical skills, administrative ability, and financial strength to support our bid.

We now await your favourable response to our above offer.

Sincerely,

for Sunflag Textile & Knitwear Mills Ltd.

(Signed)

Authorized Signatory"

The respondent received information that the debenture holders proposed to accept the offer by Sunflag Textile & Knitwear Mills Ltd. Consequent thereto, the respondent strongly protested to the second applicant complaining that the referential bid submitted by Sunflag Textile & Knitwear Mills Ltd was in breach of the proposed terms and conditions of sale together with the memorandum containing the debenture holders' response to the offers received on 11th January, 1994 and should therefore have been disregarded. Contending that it was the highest bidder and fully complied with these terms and conditions of sale together with the memorandum containing the debenture holders' response and that it should have been declared the successful bidder and therefore the purchaser of specified assets of the first applicant, by a plaint filed in the superior court on 28th January, 1994, the respondent *inter alia* sought the

following reliefs:

"a) Pending the hearing and determination of this suit the defendants ..... jointly and severally by themselves, their servants or agents or otherwise be restrained from:-

i) Disposing of, alienating, charging, pledging, leasing, transferring, wasting or in any manner whatsoever and howsoever interfering with all the assets of the 1st defendant, namely, East African Fine Spinners Limited (in receivership), or

ii) Entering into or concluding any contract with any party or parties for the sale by the defendants jointly and severally by themselves, their servants or agents or otherwise howsoever of any of the assets of the 1st defendant, namely, East African Fine Spinners Limited (in receivership), or

iii) Transferring to any party or parties by registration, possession or in any manner whatsoever and howsoever, any of the assets of the 1st defendant, namely, East African Fine Spinners Limited (in receivership).

b) A mandatory injunction do issue compelling the defendants to forthwith complete and specifically

perform the contract made between the plaintiff and the defendants for the purchase by the plaintiff of specified assets of the 1st defendant and in this regard to perform all such acts and execute all such documents as are necessary to complete the sale and transfer of the said assets to the plaintiff in accordance with the terms and conditions of the said contract."

Simultaneous with the filing of its plaint in the superior court, the respondent applied by a chamber summons in that Court for orders similar to the reliefs set out above. These orders were numbered 2 (a), (b), (c) and 3 in that application. In a ruling dated 13th April, 1994, Shah, J granted the said orders to the respondent after observing that he had come to the conclusion that the second applicant was seeking final bids to conclude the contract as opposed to an invitation to treat otherwise there would have been no point in putting up such elaborate conditions as are set out above, that is to say, the proposed terms and conditions of sale together with the memorandum containing the debenture holders' response to the offers received on 11th January, 1994.

On 14th April, 1994 the applicants lodged a notice of appeal against the ruling of the superior court and on 18th April, 1994 they filed the present application to this Court under a certificate of urgency pursuant to rule 47 of the Rules of this Court - the Rules. The application is made under rule 5 (2) (b) of the Rules and seeks a stay of execution of the orders granted to the respondent by Shah, J as are referred to above.

The primary submissions by Mr Oraro for the applicants at the hearing of this application were that the invitation to tender by the second applicant was subject to contract and the proposed terms and conditions of sale together with the memorandum containing the debenture holders' response to the offers received on 11th January, 1994 did not constitute an agreement between the highest bidder and the second applicant for the sale of the first applicant's assets. Indeed, according to him, nowhere in these terms and conditions of sale together with the memorandum containing the debenture holders' response did the second applicant bind himself to accept the highest bid. To him therefore, as between the respondent and the second applicant, there was no contract capable of attracting a mandatory injunction as was granted by the superior court. The grant of such an injunction, Mr Oraro submitted, amounted to a misapplication of the law relating to mandatory injunctions. In view of these matters, there were not only serious questions to be resolved in the intended appeal; but if a stay of execution of the orders of the superior court was not granted, that appeal, if successful, will be rendered nugatory, Mr Oraro concluded.

Mr Regeru for the respondent was, however, of the view that the second applicant was bound by the proposed terms and conditions of sale together with the memorandum containing the debenture holders' response to the offers received on 11th January, 1994. These terms and conditions of sale together with the memorandum containing the debenture holders' response did not, according to Mr Regeru, contemplate referential bids. Relying heavily on the case of *Harvela Investments Ltd v Royal Trust Company of Cananda (CI) Ltd and Others* [1986] 1 AC 207, he contended that the referential bid submitted by Sunflag Textile & Knitwear Mills Ltd was unlawful and the intimation by the debenture holders to accept it was equally illegal. That therefore left the respondent as the highest bidder and since the second applicant was by the terms and conditions of sale together with the memorandum containing the debenture holders' response referred to above bound to accept the highest bid, the respondent was entitled to a contract of sale and there was nothing standing on the way of its completion since the relevant documents exchanged between the respondent and the second applicant were sufficient to consummate the

same. To Mr Regeru therefore, the orders granted to the respondent by the superior court were good and valid and the applicants' intended appeal was not arguable. On that score alone, he concluded, the applicants' present application must fail.

The holding in the *Harvela case, supra*, that is relevant to this application was:

"that whether the first defendants had invited the plaintiffs and the second defendant to participate in a fixed bidding sale, only inviting fixed bids, or in an auction sale, enabling each bidder's bid to be adjusted by reference to the other bid, depended on the first defendants' presumed intention, which was to be deduced from the terms of the invitation read as a whole; that their undertaking to accept the highest

offer, showing that they were anxious to ensure a sale, their extension of the same invitation to both the plaintiffs and the second defendant, showing that they wished each to have the same opportunity of buying the shares, and their insistence that the offers were to remain confidential until the time limit for the submission of the offers had elapsed, showing that they wished to provoke offers of the best price that each party was prepared to pay, were only consistent with a presumed intention to create a fixed bidding sale; that the use of the word "offer" did not displace that presumed intention; and that, accordingly, the invitation on its true construction had created a fixed bidding sale and the second defendant had not been entitled to submit, and the first defendants had not been entitled to accept, a referential bid''

Whether or not this holding is applicable to the respondent's case against the applicants will probably be a subject of debate in the applicants' intended appeal.

Concerning mandatory injunctions, Megarry, J (as he then was) had this to say in *Shepherd Homes Ltd v Sandham* [1971] 1 Ch 340 at pages 348, 349 and 351:

"As it seems to me, there are important differences between prohibitory and mandatory injunctions. By granting a prohibitory injunction, the Court does no more than prevent for the future the continuance

or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may ..... require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection. As Kindersley VC said in *Gale v Abbot* [1862] 10 WR 748, 750, an interlocutory application for a mandatory injunction was one of the rarest cases that occurred, "for the Court would not compel a man to do so serious a thing as to undo what he had done except at the hearing." Even if today the degree of rarity of such applications is not quite so profound, the seriousness of such an order remains as an important factor. Another aspect of the point is that if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done, and the plaintiff has on motion obtained, once and for all, the demolition or destruction that he seeks. Where the injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or continued; except in relation to transient events, there will usually be no question of the plaintiff having obtained on motion all that he seeks. I may add that I do not think that any question arises of the Court refusing to grant an injunction on motion merely because that, in effect, constitutes the sole relief claimed, for there is no rule against making such a grant: see *Woodford v Smith* [1970] 1 WLR 806, 817, 818.

The subject is not one in which it is possible to draw firm lines or impose any rigid classification. Nevertheless, it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more

drastic in its effect than a prohibitory injunction. At the trial of the action, the Court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the plaintiff's attempts to stop him, then upon the plaintiff promptly resorting to the Court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff's promptitude is a badge of the seriousness of his complaint.

Charrington v Simons & Co Ltd [1970] 1 WLR 725 was a decision of Buckley J on the trial of the action, and not on motion. He said, at p 730:

"Different considerations may, I think, arise in a case where the Court has to consider whether a

defendant should be compelled by a mandatory order to remedy a breach of contract which he has committed from those which would arise if the question were whether the Court should restrain a threatened breach of contract. To the latter case the principle enunciated by Lord Cairns LC in *Doherty v Allman* 3 App Cas 709, 710, 720, may apply in its full vigour. Where a mandatory order is sought the Court must consider whether in the circumstances as they exist after the breach a mandatory order, and, if so, what kind of mandatory order, will produce a fair result. In this connection the Court must, in my judgment, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, of course, be deprived of relief to which he is entitled merely because it would be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant."

That passage is valuable, if I may say so, both in its statement of the concept of a "fair result" as the criterion, and also as necessarily indicating, I think, that the enforcement of a negative covenant at the trial by a mandatory injunction is far more a matter of judicial discretion and not of right than in the case of a prohibitory injunction.

I may summarise my conclusions as follows. First, Lord Cairns's statement of principle *prima facie* applies to mandatory injunctions; but it does not apply in its full width. The matter is tempered by a judicial discretion which will be exercised so as to withhold an injunction more readily if it is mandatory than if it is prohibitory. Even a blameless plaintiff cannot as of right claim at the trial to enforce a negative covenant by a mandatory injunction. Second, although it may not be possible to state in any comprehensive way the grounds upon which the Court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a "fair result," and this involves the exercise of a judicial discretion.

Third, on motion, as contrasted with the trial, the Court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

I have deliberately set out the foregoing passages *in extenso* as I think that they represent comprehensive statements on the application of the law relating to mandatory injunctions.

From what I have attempted to outline above, whether or not the second applicant was seeking final bids to conclude the contract of sale of the first

applicant's assets as opposed to an invitation to treat is primarily a question of construction of the proposed terms and conditions of sale together with the memorandum containing the debenture holders' response to the offers received on 11th January, 1994. This, together with the intertwining issues of law relevant thereto are plainly grave matters for submission to this Court at the hearing of the intended appeal. That appeal is clearly therefore not frivolous. Considering the order for a mandatory injunction granted to the respondent by the superior court as is set out above, it seems to me that if the applicants' present application is not granted in connection therewith, the subject-matter in controversy in the applicants' intended appeal will disappear with the result that that appeal will, if successful, be rendered nugatory. To preserve that subject-matter, I would grant the applicants' application to the extent that the execution of the order for a mandatory injunction granted to the respondent by the superior court in the terms set out in this ruling be stayed until the final disposal of the said appeal, but the order of that Court restraining the applicants jointly and severally by themselves, their servants or agents or otherwise howsoever from disposing of, alienating, charging, pledging, leasing, transferring, wasting or in any manner whatsoever interfering with all the assets of the first applicant; or entering into or concluding any contract with any party or parties for the sale of the assets of the first applicant; or transferring to any party or parties by registration, possession or in any manner whatsoever any of the assets of the first applicant, shall remain in place until then. The costs occasioned by this application shall be in the

intended appeal. As Kwach and Muli, JJ A agree, it is so ordered.

Kwach JA. I have had the advantage of reading in draft the ruling of my noble and learned brother Gicheru, JA and I agree with him entirely. In view of the importance of the matter, I cannot resist the temptation to add remarks of my own if for no other reason but to reinforce the views so articulately adumbrated by my brother.

By a plaint dated 28th January, 1994, Bedi Investments Ltd (BIL) sued East African Fine Spinners Ltd (the company), Graham James Silcock (the receiver), Kenya Commercial Bank Ltd (the bank) and Kenya Commercial Finance Company Ltd (KCFC) asking for judgment against the defendants jointly and severally for:-

"(a) Pending the hearing and determination of this suit the defendants jointly and severally by themselves their servants or agents or otherwise be restrained from:-

(i) Disposing of, alienating, charging, pledging, leasing, transferring, wasting or in any manner

whatsoever and howsoever interfering with all the assets of the 1st defendant namely, East African Fine Spinners Ltd (in receivership), or

(ii) Entering into or concluding any contract with any-party or parties for the sale by the defendants jointly and severally by themselves, their servants or agents or otherwise howsoever of any of the assets of the first defendant, namely East African Fine Spinners Ltd (in receivership).

(iii) Transferring to any party or parties by registration, possession or in any manner whatsoever and howsoever, any of the assets of the first defendant namely East African Fine Spinners Ltd (in receivership).

(b) A mandatory injunction do issue compelling the defendants to forthwith complete and specifically perform the contract made between the plaintiff and the defendants for the purchase by the plaintiff of specified assets of the first defendant and in this regard to perform all such acts and execute all such documents as are necessary to complete the sale and transfer of the said assets to the plaintiff in accordance with the terms and conditions of the said contract.

(c) General damages for breach of contract and failure to observe a duty of care and to act in good faith.

(d) Exemplary damages in accordance with paragraph 31 hereinabove.

(e) Costs of this suit

(f) Interest on (c), (d) and (e) above at court rates until payment in full".

The facts on which BIL's claim is based are not in dispute and may be summarized. The Industrial and Commercial Development Corporation (ICDC) is the majority shareholder in the company with 74.44% of the total issued and paid up capital. In December 1991, ICDC placed an advertisement in the press inviting offers for the purchase of its shares in the company. BIL responded to the advertisement and offered to buy at Kshs 60,000,000/-. As the offers received were considered to be far below the market value of the assets of the company, the sale was withdrawn.

In August 1993 a body called the Executive Secretariat and Technical Unit (ESTU) which was apparently set up by yet another outfit called Parastatal Reform Programme Committee (PRPC) extended a fresh invitation to

selected parties including BIL to make offers for the purchase of the assets of the company. By a letter dated 31st August 1993 addressed to ESTU, BIL offered to buy the total assets of the company, namely, land, building, plant, machinery, fittings and fixtures for Kshs 140,000,000/-. By a letter dated 30th

October, 1993, BIL raised its offer to Kshs 238,000,000/-. This offer was still found inadequate and bids above Kshs 250,000,000/- were invited by ESTU. BIL made a firm order of Kshs 270,000,000/- and also furnished a letter of comfort from Prime Bank Ltd. At the request of ESTU, BIL raised this offer to Kshs 282,000,000/- on 14th December, 1993.

The negotiations between ESTU and BIL were abandoned when on 3rd January, 1994, Graham James Silcock sent a fax to BIL informing BIL that on that date he had been appointed receiver and manager of the company by the bank and KCFC which were debenture-holders. The receiver told BIL that he was inviting leading offerors to make fresh bids on the basis of a guideline price of Kshs 290,000,000/-. The receiver also sent BIL the terms and conditions upon which the new offers were being invited and stipulated that such offers were to reach the receiver not later than 7th January, 1994, later extended to 11th January, 1994. I shall read in full these terms and conditions in a moment but for now, it will suffice to state that in response to the invitation from the receiver, BIL, by a letter dated 11th January, 1994 made a fixed offer of Kshs 310,000,000/- for the purchase of the assets of the company. On 12th January, 1994, a representative of BIL rang the receiver to inquire about BIL's offer and was told by the receiver that the highest bidder was a company called Sunflag Textile & Knitwear Mills Ltd (Sunflag) which had offered to buy at Kshs 311,000,000/-. This disclosure surprised the representative somewhat as Sunflag Knitwear Mills Ltd was not among the leading offerors according to the fax from the receiver of 3rd January, 1994 and ought not therefore to have been invited to submit a bid. BIL took the view that apart from itself, only Kenknit (K) Ltd, Nakuru Canners Ltd and Capet Management Services Ltd should have been called upon to bid for the sale.

Be that as it may, on 13th January, 1994, the receiver faxed BIL to say that BIL was one of four highest bidders who were being invited yet again to make fresh offers in accordance with a memorandum which was in the following terms:

"Debenture Holders' Response To Offers Received 11 January 1994

1. It is evidently necessary to provide a further opportunity for some interested parties to re-offer. Nevertheless, the debenture holders do not wish to extend matters unduly and it is intended that there

should be only one more opportunity for offers.

2. Accordingly, revised offers are invited on the basis of a guideline price of Shs 325 million. Offers should be sent to the Receiver & Manager, Mr G Silcock, not later than Tuesday 18 January 1994.

3. Each offer should be in writing in sealed envelope. Offers should not be notified by fax or by any other means which may reduce confidentiality. It is intended that offers should be opened at a meeting of the debenture holders and the receiver to be held on Wednesday 19 January. Prior to the meeting offers will remain in sealed envelopes.

4. The four highest bidders who sent in their offers on 11 January will be invited to re-offer on 18 January. No other parties will be invited to re-offer of 18 January.

5. Those who re-offer on 18 January are recommended to make it clear whether or not they will pay the East African Fine Spinners Ltd liability (estimated at Shs 3.3 million) to lease hire – hire purchase creditors in addition to the fixed sum offered for the company's assets.

6. The terms and conditions notified by the Receiver & Manager on 5th January 1994 will be assumed to apply unless otherwise notified by offerors except with the amendment that the successful party will be required to make a 10% deposit within 7 days of being notified by the Receiver & Manager of the intention to proceed to contract. The 10% deposit will be placed with KCFC at market rates of interest.

7. It is intended to execute a sale agreement within 30 days. If the intended purchaser and his advocate is unable to keep to this time table the Receiver & Manager may discontinue negotiations and sell elsewhere.

8. The successful party will be required to provide the Receiver & Manager and the debenture holders with full details of his financing plan and source of finance. If these are not considered to be adequate the Receiver & Manager may proceed to sell elsewhere."

The terms and conditions notified by the Receiver & Manager on 3rd January, 1994 were in the following form:

Some Proposed Terms and Conditions of Sale

Subject to Contract

1. A fixed offer price for land, buildings, plant machinery, furniture, fittings and fixtures. 10% to be paid on signing a sale agreement. 90% to be paid on completion.

2. A formula price for inventories comprising raw materials (suggested formula cost) work in progress (suggested formula cost plus apportioned overheads and profit) and finished goods (suggested formula 90% of selling price). This will be paid not later than completion. (Note: Many inventories belong to third parties).

3. Completion of the sale to be not later than 60 days from the date of the sale agreement.

4. A bank guarantee will be required to support the payment of 90% of the purchase price; alternatively some other form of security acceptable to the debenture holders.

5. The purchaser will assume responsibility for hire purchase/lease hire obligations on company assets.

6 No warranties or indemnities from the vendor.

7. The vendor may rescind the sale contract if the purchaser does not complete on the completion date. The purchaser's deposit will then be forfeited.

8. If the vendor agrees to late completion the purchaser will pay interest at penalty rates on the balance of the purchase price.

9. The receiver contracts as agent of the company with no personal liability."

In response to this final invitation from the receiver BIL, by a letter dated 18th January, 1994 addressed to the receiver made an offer in the following terms:

Dear Sir

East African Fine Spinners Ltd

(in receivership)

Further to your fax message dated 13th January 1994 in regards to the above we hereby re-offer our bid to Kshs 345 million (three hundred forty five million only)

for total assets ie land, buildings, plant, machinery, furniture, fittings and fixtures etc.

In addition we confirm to pay EAFS liability (estimated at Kshs 3.3 million) for lease-hire purchase creditors.

Thanking you in anticipation of your favourable response.

We remain,

Yours faithfully

KS Bedi

Managing Director."

As can be seen from this letter, BIL's total offer amounted to Kshs 348,300,000/-. At the same time Sunflag also submitted a bid to the receiver by a letter dated 18th January, 1994 in the following terms:

"Dear Sir,

Offer for assets of East African Fine

Spinners Limited (EAFS)

We refer to your fax of 13th January, 1994 inviting revised offers for the assets of the above named company.

Since we have not had sufficient time to value the assets of East African Fine Spinners Limited, we are facing some difficulty in fixing a firm price for the assets. However, we are sure that the price offered by the other bidders would reflect a fair value to attach to those assets. We are therefore willing to pay a premium over and above the fair value of the assets as ascertained by the value of the other bids.

We are now pleased to make the following offer:

1. For the entire land, buildings, plant & machinery, furniture, fixtures & fittings, motor vehicles, and any and all other assets excluding inventories: Ksh 1.5 million (Kenyan shillings one million five hundred

thousand only) over and above the highest offer made by the other bidders.

2. For inventories comprising raw materials, work in progress, and finished goods: Formula as suggested by you in your fax.

3. Over and above the preceding, we are willing to undertake the hire purchase liability estimated by you at Kshs 3.3 million.

The terms and conditions of sale as proposed by you in your fax are acceptable to us. Our above offer is, however, subject to the following:

1. Only those inventories which are approved by us shall be purchased at the agreed price.

2. Our offer is based on the list of assets as per the valuation report of M/S Milligan & Company dated 14th May, 1991 and any subsequent additions thereto, which is subject to a physical inspection, which can be carried out once our offer is accepted.

3. The assets will be purchased either by us, or our subsidiary, group, or associate company, local or overseas.

4. The above offer is subject to our confirmation.

5. The above offer stands valid till the 31st of January, 1994.

We hope that you will find our offer to be in the best interest of the debenture holders and other creditors of the company. As you may be aware the Sunflag Group has been operating in the textile sector in Kenya and in other countries for several decades, and we believe we have the necessary technical skills, administrative ability, and financial strength to support our bid.

We now await your favourable response to our above offer.

Sincerely,

for Sunflag Textile & Knitwear Mills Ltd.

Authorized Signatory".

Capet Management Services Ltd by their letter dated 18th January, 1984, addressed to the receiver made an offer of Kshs 312 million or alternatively Kshs 2 million over the highest bidder, subject to their confirmation of the price.

On 19th January, 1994, JS Bedi, Sales Director of BIL, telephoned the Receiver to inquire about the fate of their bid and was told by the Receiver, so he depones in his affidavit sworn on 28th January, 1994, that Sunflag had been declared the successful bidder to purchase the assets of the company. Bedi protested to the Receiver pointing out that Sunflag's fixed bid (Kshs 312 million) was lower than BIL's bid (Kshs 348.3 million) and that Sunflag's formula bid was illegal. Mr Bedi's protest was followed by a formal complaint from BIL addressed to the Receiver dated the same day. BIL repeated in substance what Bedi had told the Receiver earlier over the telephone and added that the formula bid by Sunflag had given the latter an unfair advantage over the other bidders and that in disclosing BIL's bid to Sunflag, the Receiver had committed a breach of confidentiality. BIL sought a reversal of the decision in favour of Sunflag. The receiver refused and BIL filed proceedings seeking the reliefs to which I alluded earlier in this ruling.

On 28th January, 1994 BIL took out a chamber summons under order 39 of the Civil Procedure Rules in which it sought the following among other orders:

"(1) That service of this application be dispensed with in the first instance as the defendants/respondents have already unlawfully breached the terms of a very substantial contract between themselves and the plaintiff/applicant to a value of Kshs 348,300,000/- for the purchase by the plaintiff/applicant of the assets of the first defendant/respondent and in further breach thereof the defendants/respondents have concluded or are about to conclude a contract for the sale of the said assets to a third party thereby exposing the plaintiff/applicant to irreparable loss and damage not compensable by any award of damages.

(2) Pending the hearing and determination of this suit the defendants/respondents jointly and severally by themselves, their servants or agents or otherwise howsoever be restrained from:-

(a) Disposing of, alienating, charging, pledging, leasing, transferring, wasting or in any manner

whatsoever and howsoever interfering with all the assets of the 1st defendant, namely, East African Fine Spinners Limited (in receivership), or

(b) Entering into or concluding any contract with any party or parties for the sale by the defendants/respondents jointly and severally by themselves, their servants or agents or otherwise howsoever of any of the assets of the 1st defendant, namely, East African Fine Spinners Limited (in receivership), or,

(c) Transferring to any party or parties by registration, possession or in any manner whatsoever and howsoever, any of the assets of the first defendant, namely, East African Fine Spinners Limited (in receivership).

(3) A mandatory injunction do issue compelling the defendants/respondents to forthwith complete and specifically perform the contract made between the plaintiff/applicant and the defendants/respondents for the purchase by the plaintiff/applicant of specified assets of the first defendant/respondent and in this regard to perform all such acts and execute all such documents as are necessary to complete the sale and transfer of the said assets to the plaintiff/applicant in accordance with the terms and conditions of the said contract."

The application was heard by AB Shah J who in a reserved ruling granted BIL both prohibitory and mandatory injunctions in terms of prayers 2(a), (b) and (c) and (3) in the application. The company, the Receiver, the bank and KCFC being dissatisfied with that ruling and having filed a notice of appeal under rule 74 of the Court of Appeal Rules, now apply to this Court under rule 5(2) (b) of the Court of Appeal Rules for a stay of execution of the ruling and order of the judge.

The judge gave what in effect amounted to final orders in the suit on affidavit evidence and before the statement of claim was served on the defendants. Needless to say they had not filed any defences. The judge identified the issues he had to decide on the application as follows:

1) Whether the offer by BIL constituted an offer as accepted or acceptable in terms of conditions laid down by the Receiver;

2) Whether the offer was an invitation to treat creating

no legal relationship between the parties; and

3) Whether it culminated into a contract capable of creating a contract which can be given efficacy by the Court.

The judge appreciated that the issues in the case were complex and also thought that this was the first case of its kind in Kenya. I entirely agree with him that this is indeed a complex case but it is certainly not the first one of its kind in Kenya. He held that BIL's bid of 18th January, 1994 had complied in full with all the terms and conditions set by the Receiver on 13th January, 1994 (revised terms). In paragraph 6, it was expressly stipulated that the terms and conditions notified by the Receiver on 5th January, 1994 (original terms) were to be assumed to apply unless otherwise notified by offerors with a minor amendment regarding the payment of a deposit of 10% after being notified by the Receiver of the intention to proceed to contract. As BIL did not disqualify itself from the application of the original terms, it was bound by them. Under the original terms, a fixed offer had to be made for land, buildings, plant, machinery, furniture, fittings and fixtures. A formula bid was to be made for inventories comprising raw materials, work in progress and finished goods. BIL's bid covered only land, buildings, plant, machinery, furniture, fittings and fixtures and a provision of Shs 3.3 million for lease-hire creditors. There was no formula bid for inventories as stipulated under the original terms. That being the case, I cannot see on what basis the judge's finding of full compliance by BIL can be sustained. It is erroneous on the evidence.

The judge also held that once the highest bid was received, the Receiver was bound to accept it. This cannot be correct because under the original terms the sale was made expressly subject to contract. It was also expressly provided in paragraph 7 of the revised terms that it was intended to execute a sale agreement within 30 days and that if the intended purchaser was unable to keep to the timetable set by the Receiver, the latter could discontinue negotiations and sell elsewhere. There can be no doubt at all that even without the express use of the words "subject to contract" in the revised terms, the sale was still subject to contract. This much is clear from paragraphs 6 and 7 by which it is expressly provided that the successful party will be required to make a 10% deposit within 7 days of being notified by the Receiver of the intention to proceed to contract and that a sale agreement was to be executed within 30 days. I can find no commitment by the Receiver under the original or revised terms to accept the highest bid. In the circumstances, the judge's finding that the Receiver was bound to accept the highest bid is also erroneous and unsustainable on a proper construction of the terms and conditions of the sale. The terms

as put out by the Receiver amounted to no more than an invitation to treat which could not give rise to an obligation on the part of the Receiver to sell to any bidder including BIL whether or not its bids was the highest.

In the course of his submissions, Mr Regeru, for the respondent, conceded that the only interest his client had acquired was an agreement to enter into a contract. It is a well established principle of law that an agreement to enter into a contract cannot be enforced by a decree for specific performance leave alone a mandatory injunction as was ordered by the judge in this case.

The central pillar of Mr Regeru's case before the judge and also before us was that the referential bid by Sunflag was illegal being one that was not allowed under the terms set by the Receiver. This submission prevailed before the judge who found authority for it in the case of *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd and Others* [1985] 2 All ER 966, a decision of the House of Lords in England. In that case the plaintiff and the second defendant were rival offerors for a parcel of shares which would give effective control of a company to the plaintiff or to the second defendant, whichever was the successful offeror. The parcel of shares was held by the first defendants, the vendors, who invited both parties to submit by sealed offer or confidential telex a single offer for the whole parcel by a stipulated date. The vendors stated in the invitation to bid that "we bind ourselves to accept (the highest) offer" received by them which complied with the terms of the invitation. The invitation to bid further stated that interest was payable by the successful purchaser in the event of delay in completing the purchase, unless completion was unable to take place by reason of any delay on our (the vendors') part. The plaintiff tendered a bid of $2,175,000. The second defendant tendered a bid of $2,100,000 or $101,000 in excess of any other offer expressed as a fixed monetary amount, whichever is the higher. The vendors accepted the second defendant's bid, as being a bid of $2,276,000, and entered into a contract with the second defendant for the sale of the parcel of shares. The vendors also informed the plaintiff of the terms of the second defendant's bid, whereupon the plaintiff commenced proceedings against the vendors and the second defendant, contending that the second defendant's bid was invalid.

The plaintiff obtained an interlocutory injunction preventing the vendors from accepting the second defendant's bid and in its action sought (i) a declaration that there was a binding contract between the vendors and the plaintiff for the sale of the shares for the sum of $2,175,000 and (ii) specific performance of the contract. The judge upheld the plaintiff's claim

on the ground that it was an implied term of the vendor's invitation to bid that referential bids (ie bids framed by reference to other bids) would be excluded.

On appeal by the second defendant the Court of Appeal held that the second defendant's bid was the highest and therefore the successful bid. The plaintiff appealed to the House of Lords. It was held, allowing the appeal, *inter alia*, that if a vendor of property chose to sell his property by calling for fixed bids from prospective purchasers a referential bid which depended on the other bids for its price to be ascertained, was invalid, since a referential bid was inconsistent with the purpose of a sale by fixed bidding, which was to provoke the best price which the prospective purchasers were prepared to pay regardless of what rival bidder were prepared to pay; that whether an invitation from a vendor to prospective purchasers was to be construed as an invitation to participate in a fixed bidding sale or in an auction sale depended on the presumed intention of the vendor as deduced from the express provisions of the invitation to bid. The facts that the vendors had undertaken to accept the highest offer, that they had extended the same invitation to both parties and that they had insisted that offers were to be confidential were only consistent with a presumed intention to create a sale by fixed bidding and were inconsistent with any presumed intention to create an auction sale by means of referential bids, since those facts showed that the vendors had been anxious to ensure that a sale resulted from their invitation, that they had been desirous that no one else should have the opportunity of purchasing the shares and that they had been desirous that each prospective purchaser should put forward, in ignorance of the other bid, the best price he was prepared to pay. Accordingly, the second defendant had not been entitled to submit and the vendors had not been entitled to accept a referential bid.

In the course of his speech, Lord Templeman said at page 973(j):

"A bidder can only choose to participate in the sale or abstain from the sale. The ascertainment of the choice of the vendors in the present case between a fixed bidding sale and an auction sale by means of referential bids depends on the presumed intention of the vendors. That presumed intention must be deduced from the terms of the invitation read as a whole. The invitation contains three provisions which are only consistent with the presumed intention to create a fixed bidding sale and which are inconsistent with any presumed intention to create an auction sale by means of referential bids.

By the first significant provision, the vendors undertook to accept the highest offer; this shows that the

vendors were anxious to ensure that a sale should result from the invitation. By the second provision, the vendors extended the same invitation to Harvela and Sir Leonard; this shows that the vendors were desirous that each of them, Harvela and Sir Leonard, and nobody else, should be given an equal opportunity to purchase the shares. By the third provision, the vendors insisted that offers must be confidential and must remain confidential until the time specified by the vendors for the submission of offers had elapsed; this shows that the vendors were desirous of provoking from Sir Leonard an offer of the best price he was prepared to pay in ignorance of the bid made by Harvela and equally provoking from Harvela the best price they were prepared to pay in ignorance of the bid made by Sir Leonard."

Again at page 975(g) Lord Templeman said:

"To constitute a fixed bidding sale all that was necessary was that the vendors should invite confidential offers and should undertake to accept the highest offer. Such was the form of the invitation. It follows that the invitation on its true construction created a fixed bidding sale and that Sir Leonard was not entitled to submit and the vendors were not entitled to accept a referential bid."

In this case the receiver invited only the 4 highest bidders to make an offer. The bids were to be made on a confidential basis and were to remain in sealed envelopes until 19th January, 1994, when they would be opened at a meeting specially called for that purpose. The only stipulation the receiver did not add which would have made this into a fully fledged fixed bidding was that he did not bind himself to accept the highest offer. So quite clearly this was not a fixed bidding sale.

On the other hand was it a sale by auction by referential bid? Quite clearly it was not and I have no hesitation in stating that Sunflag's referential bid was, in the circumstances, invalid. Under the terms of the sale it was not open to any bidder to submit a referential bid. The effect of this would be that BIL's bid was higher than Sunflag's bid and the Receiver would have been obliged to sell to BIL but for the fact that he had not bound himself to accept the highest offer and the fact that BIL's bid did not, as

I have already found, comply in material respects with the terms of sale set by the receiver.

The sale was by its express terms subject to contract and until that contract had been executed there was no contract between the parties which could be enforced by an order for specific performance or mandatory injunction. In the course of his judgment in the case of *Keppel v Wheeler & Another* [1927] 1 KB 577, Bankes LJ said at page 584:

"I pause here to state plainly what is now well established, that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged."

I am firmly of the opinion that the mandatory injunction issued by the judge had no basis in law and will almost certainly be set aside on appeal. But with regard to the prohibitory injunction the respondent had established a *prima facie* case with a probability of success and was in my view entitled to the order. That being the case, I would allow this application and grant a stay only as regards the mandatory injunction issued in favour of the respondent but I would maintain the order of prohibitory injunction pending the final determination of the appeal or further order. I would order the costs of the application to be in the appeal.

Muli JA. The genesis of the subject matter of the judgment intended to be appealed from is the press advertisement which appeared in the Kenya Times of 6th December, 1991 under the caption:

"Offers for Sale East African Fine Spinners Limited

(Subsidiary of ICDC)

ICDC offers for sale its shareholding in the above company which is the largest manufacturer of industrial yarn in Kenya and the only one producing sewing threat in the East African region.

The company has in recent years invested heavily in plant expansion involving installations of modern machinery and is well poised to meet the ever growing demand for its products both in the local and export markets.

Interested purchasers may contact ICDC on the address below."

As a result of the above advertisement interests of many would be purchasers including the respondent were aroused and active competition ensued. The respondent, Bedi Investments Limited, responded by offering to buy the total assets of the first appellant, East African Fine Spinners Ltd (Fine Spinners) for Kshs 60,000,000/- excluding the company itself. There were other interested parties who also offered to purchase Fine Spinners assets at varied prices. The sale was withdrawn on the 10th August, 1993 at the instance of the executive secretariat and technical unit of the Parastatal Reform Programme Committee (PRPC) because the offers were considered to be below the market valuation of the first applicant's assets. The parties who had registered their interest to purchase the assets of the Fine Spinners were invited to improve their financial offers subject to terms and conditions enumerated in the letter of 10th August, 1993. The respondent improved its financial offer to Kshs 140,000,000/- which was later improved to Kshs 238,000,000/-.

The sale was withdrawn again at the incidence of PRPC and the third and fourth applicants, the debenture holders of the Fine Spinners (The Fine Spinners). This time the invitation for the offers specified that the financial offers were to be improved to a figure above Kshs 250,000,000/- such offers to be received by noon on the 3rd December, 1993. The respondent (Bedi Investments) submitted its financial offer of Kshs 251,000,000/= as the first option and Kshs 270,000,000/- as the second option both subject to terms. On the 14th December, 1993 the respondent (Bedi Investments) improved its offer to Kshs 282,000,000/-.

On 3rd January, 1994, the third and fourth applicants (debenture holders) appointed the second applicant the Receiver and Manager of Fine Spinners. On the same day the second applicant (the Receiver and Manager) informed Bedi Investments that he would contact leading offerors with the proposal that they re-offer on the basis of a guideline price of Kshs 290,000,000/-. Bedi Investments made a fixed offer of Kshs 310,000,000/- on 11th January, 1994. On 13th January, 1994 the Receiver and Manager advised Bedi Investments that it was one of the four highest bidders to be invited once more to re-offer in accordance with a submitted memorandum entitled "debenture holders' response to offers received 11th January, 1994", as follows:

1. It is evidently necessary to provide a further opportunity for some interested parties to re-offer. Nevertheless, the debenture holders do not wish to extend matters unduly and it is intended that there should be only one more opportunity for offers.

2. Accordingly, revised offers are invited on the basis

of a guideline price of Shs 325 million. Offers should be sent to the Receiver & Manager, Mr G Silcock, not later than Tuesday 18 January 1994.

3. Each offer should be in writing in sealed envelope. Offers should not be notified by fax or by any other means which may reduce confidentiality. It is intended that offers should be opened at a meeting of the debenture holders and the Receiver to be held on Wednesday 19th January. Prior to the meeting offers will remain in sealed envelopes.

4. The four highest bidders who sent in their offers on 11th January will be invited to re-offer on 18th January.

5. Those who re-offer on 18th January are recommended to make it clear whether or not they will pay the East African Fine Spinners Ltd liability (estimated at Shs 3.3 million) to leasehire – hire purchase creditors in addition to the fixed sum offered for the company's assets.

6. The terms and conditions notified by the Receiver & Manager on 5th January 1994 will be assumed to

apply unless otherwise notified by offerors except with the amendment that the successful party will be required to make a 10% deposit within 7 days of being notified by the Receiver & Manager of the intention to proceed to contract. The 10% deposit will be placed with KCFC at market rates of interest.

7. It is intended to execute a sale agreement within 30 days. If the intended purchaser and his advocate is unable to keep to this time table the Receiver & Manager may discontinue negotiations and sell elsewhere.

8. The successful party will be required to provide the Receiver & Manager and the debenture holders with full details of his financing plan and sources of finance. If these are not considered to be adequate the Receiver & Manager may proceed to sell elsewhere."

On the 18th January, 1994 Bedi Investments made yet another fixed offer of Kshs 345,000,000/- and Kshs 3,300,000/- to meet Fine Spinners liabilities to Leasehire Creditors making a total of fixed offer of Kshs 348,300,000/-. On the 19th January, 1994 Bedi Investments learned from the Receiver & Manager that another party (not cited in these proceedings) which had also submitted a bid had been declared the successful bidder with only Kshs 312,000,000/- fixed offer bid and formula offer of Kshs 1,500,000/-. Bedi Investments termed these offers as lower fixed bid compared with its fixed

offer of Kshs 348,300,000/- and the formula offer of Kshs 1,500,000/- as unlawful because it was not a fixed offer within the terms and conditions of the memorandum (*supra*).

Being aggrieved by the applicants' manner in which they handled the sale transactions, Bedi Investments brought an action in the High Court citing Fine Spinners, the Receiver & Manager and the debenture holders alleging breach of the agreement for the sale of the Fine Spinners assets. They also took out a chamber summons against the cited parties jointly and severally praying for an interlocutory injunction to restrain them from dealing in any manner with the assets of Fine Spinners, mandatory injunctions to compel them to specifically perform the alleged contract and costs of the application.

The chamber summons came for hearing before the High Court (AB Shah, J) which granted the application. The applicants being aggrieved by the ruling of AB Shah J, have appealed to this Court and have also brought the present application by way of notice of motion under rule 5(2)(b) of the Rules of this Court praying for stay of execution of the orders granted by AB Shah J, in granting interlocutory injunction and mandatory injunction to compel all the applicants to specifically complete and perform the alleged contract pending the final determination of the appeal and costs to abide the result of the appeal.

I am mindful that this is an application for stay of execution of the orders of Shah J, under rule 5(2)(b) of the Rules of this Court and the principles which govern applications of this nature are now settled. These are that firstly there must be an appeal or intended appeal and secondly whether or not the appeal is frivolous, that is to say, whether or not there is an arguable point or points in the appeal and thirdly if stay of execution is not granted whether the appeal, if successful, will be rendered nugatory. The appeal has already been filed. It now remains for consideration whether or not the appeal is frivolous and has no arguable point or points or whether if stay is not granted the appeal, if successful, will be rendered nugatory.

The undisputed facts surrounding the sale of the Fine Spinners assets by invitation of offers culminated with the appointment of the receiver and manager by the debenture holders (3rd and 4th applicants) on the 3rd January, 1994. There existed revised or improved offer by Bedi Investments at the sum of Kshs 345,000,000/- and Kshs 3,300,000/- to meet Fine Spinners liabilities to creditors. There were also other offers and the appointed Receiver & Manager invited Bedi Investments and other leading offerors to re-offer on the basis of a guideline memorandum. Pausing here for a

moment it is pertinent to appreciate the legal relationship, if any, between the applicants and Bedi Investments and whether or not prior offers amounted to a binding contract of the sale or not of Fine Spinners and finally whether the conduct of the parties with regard to those prior offers may be read into the subsequent re-offer(s). Were terms and conditions of those prior offers of the nature of invitation to

treat or purely negotiations? Can it be said that the prior offers were made with a view to fixed or reserved offer or whether there was a suggestion that the transaction was inviting highest bidder and whether or not the applicants were bound to accept the highest offer or any offer at all?

Reverting now to the historical background, the extended deadline attracted re-offer of Kshs 310,000,000/- by the Bedi Investments. However on 13th January, 1993, the Receiver Manager intimated that Bedi Investments were among the highest bidders and that they would be invited to re-offer. Under the memorandum the re-offerors were to be guided by price of Kshs 325,000,000/- and the offers were to be received by 18th January, 1994. The memorandum also stated that the highest bidders of 11th January (four in number) were to be invited to re-offer. One of the conditions in the memorandum stated that "the terms and conditions notified by the Receiver and Manager on 5th January, 1994 would be assumed to apply unless otherwise notified by the offerors.

It becomes absolutely necessary to see the terms and conditions of the document dated 5th January, 1994:

"1. A fixed offer price for land, buildings, plant machinery, furniture, fittings and fixtures. 10% to be paid on signing a sale agreement. 90% to be paid on completion.

2 A formula price for inventories comprising raw materials (suggested formula: cost) work in progress (suggested formula cost plus apportioned overheads and profit) and finished goods (suggested formula 90% of selling price). This will be paid not later than completion. (Note: Many inventories belong to third parties).

3. Completion of the sale to be not later than 60 days from the date of the sale agreement.

4. A bank guarantee will be required to support the payment of 90% of the purchase price; alternatively some other form of security acceptable to the debenture holders.

5. The purchaser will assume responsibility for hire

purchase/lease hire obligations on company assets.

6. No warranties or indemnities from the vendor.

7. The vendor may rescind the sale contract if the purchaser does not complete on the completion date. The purchaser's deposit will then be forfeited.

8. If the vendor agrees to late completion the purchaser will pay interest at penalty rates on the balance of the purchase price.

9. The Receiver contracts as agent of the company with no personal liability."

Pausing here again I observe that paragraph (6) refers to terms and conditions notified by the Receiver & Manager on 5th January, 1994 to be assumed to "apply unless otherwise notified by the offerors" (underlining is mine). What was the effect of this phrase? With regard to Bedi Investment's offer, the forwarding letter of 13th January, 1994 makes it clear that "if you do not re-offer, your offer of 11th January, will be regarded as remaining valid". (Underlining is mine). Bedi Investments did re-offer on the 18th January, 1994. The other invited bidders, and possibly another did re-offer. Was it not that all previous offers, including those of Bedi Investments were superseded by the offer of 18th January, 1994 as invited by the Receiver and Manager under the terms and conditions of the memorandum (*supra*)?

Mr Oraro for the applicants advanced some five propositions, namely, (1) Was there an arguable appeal or not? (2) Was the invitation to tender subject to a binding contract being entered into between the applicants and Bedi Investments or not? (3) Was interlocutory mandatory injunction properly granted or not in the circumstances surrounding this appeal? (4) If stay is not granted, will the appeal, if successful, be rendered nugatory or not? (5) Was there a binding contract between Bedi Investments and the

applicants or not?

Mr Regeru on the other hand maintained that there was a binding contract between the applicants and Bedi Investments and that the orders made by the learned trial judge were fully supportable with the result that there are no arguable points in the appeal.

I have already set out the principles which govern applications for stay of execution pending the determination of appeals. The learned trial judge held that there was a binding contract capable of being specifically performed and granted, interlocutory injunction to restrain the applicants from alienating, disposing of, charging, pledging, leasing, transferring,

wasting or in any manner whatsoever and howsoever interfering with the assets of Fine Spinners and also interlocutory mandatory injunction to compel the applicants to complete the sale and transfer of the said assets to Bedi Investments and costs of the application.

The crux of the matter turns on the interpretation and the effect of the proposed terms and conditions of sale, subject to contract dated 5th January, 1994 (*supra*). The Receiver and Manager's terms and conditions and the debenture holders' response to offers of 11th January, 1994 (also *supra*). Clause 1, thereof gives reasons for the necessity for a further opportunity for re-offers. The terms and conditions of the Receiver and Managers' were assumed to apply unless otherwise notified by offerors (clause 6). There were two exceptions, namely additional amendment that the successful party would make a 10% was deposit within seven days of the Receiver and Manager notifying the party of the intention to proceed to contract (underlining is mine). The other additional amendment was that the 10% deposit was to be placed with Kenya Commercial Finance Co Ltd, the fourth applicant.

Clauses 2 and 3 of the debenture holder's response invited revised offers on the basis of a guideline price of Shs 325 million and were to be sent to the Receiver and Manager not later than 18th January, 1994. To avoid reduction of confidentiality the mode of sending the offers was provided and the date for opening of the offers was the 19th January, 1994. Clause 4 limited the number of offerors to four highest bidders of 11th January, 1994. Clause 5 recommended that the four offerors do make clear that they will pay Fine Spinners liability estimated at Kshs 3.3 million to Leasehire – Hire Purchase creditors in addition to the fixed sum offered. Clause 7 stipulated that it was intended to execute the sale agreement within 30 days and in default by intended purchaser or his advocate to keep the timetable, the Receiver and Manager may discontinue negotiations and sell elsewhere (underlining is mine). Clause 8 required the successful party to furnish the Receiver and Manager with details of his financing plan and sources of finance but if inadequate, the Receiver and Manager may proceed to sell elsewhere. A fax note accompanied the debenture holders response memorandum dated 13th January, 1994 addressed to Bedi Investments stated that:

"Your company is one of the four bidders who are being invited to re-offer as per attached memorandum.

If you do not re-offer, your offer of 11th January, will be regarded as remaining valid.

I shall be glad to discuss with you on the telephone."

On 18th January, 1994 Bedi Investments did make a fixed offer of Kshs 345,000,000/- and KShs 3,300,000/- to meet lease-hire creditors liabilities. The question is this, was the fixed offer of Kshs 345,000,000/- by Bedi Investments capable of creating a binding contract? The proposed terms and conditions of sale subject to contract dated 5th January, 1994 (*supra*) read together with the debenture holders response to offers received on 11th January, 1994 in their totality and content leave no room at all that something more had to be done within the spirit of those two documents to amount to a binding contract. Bedi Investments' fixed offer under terms and conditions as well as under the debenture holder's response, no matter how attractive it was, was not accepted by the Receiver and Manager. I am now able to hold, as I hereby do, that the nature and obligations arising from the fixed offer of Bedi Investments are clearly arguable points in the appeal to determine whether there was a binding contract or not. The answer to Mr Oraro's 4th proposition is also in the affirmative.

The learned trial judge fell into error when he held that:

"There is substantial material before Court to show that the highest bid (fixed) was to be accepted. The whole tenor of page 22 conditions is clear. I do not see how else a sale agreement was to be executed (clause 7 – page 22) within 30 days. Once the highest bid as invited was received Silcock became bound to accept it as I see it".

This was a fatal misdirection. On the contrary, it was clearly stipulated that if there was a default by intended purchaser or his advocate to keep the timetable, the Receiver and Manager may discontinue negotiations and sell elsewhere (underlining is mine).

It is not difficult to discover where the learned trial judge went wrong. He construed and interpreted the terms and conditions of sale subject to contract (*supra*) as completely superceded by the debenture holders response (*supra*). For instance he fell into error when he held:

"I revert to the use of word "disregard" ..... of factual conditions set forth by Silcock. I have held that having put forth elaborate conditions for bidders to comply with Silcock is bound by them. He cannot now simply come forward and say I was not bound by them.

Page 18 of exhibit talks of subject to contract: however

page 22 of the exhibit brings forth other very elaborate conditions and the use of words "subject to contract" is dropped. It is also clear from this page (22) that serious offers are invited as to eventually become binding."

The learned trial judge was construing "terms and conditions of sale, subject to contract (*supra*) and the debenture holders response memorandum (*supra*). He failed to appreciate that clause 6 of the latter had preserved the former as follows:

"6. The terms and conditions notified by the Receiver and Manager on 5th January, 1994 will be assumed to apply unless otherwise notified by the offerors ....."

This was a misdirection. The two documents were to be construed together because there was nothing on the record to indicate that the offerors or any of them had notified otherwise with the result that the tenor of both documents made the offers including that of Bedi Investments subject to the contract being entered into in accordance with the terms and conditions of the said documents. Clause 8 of the memorandum (*supra*) stipulated further conditions to be fulfilled before a contract could be executed. The successful part was required to provide the Receiver and Manager and debenture holders with full details of financing plan and sources of finance and if these were considered to be inadequate, the Receiver and Manager would proceed to sell elsewhere. Nowhere in evidence to establish compliance with this clause. Clearly, this was a condition subsequent to the formation of a binding contract. Clause 6 of the memorandum poses arguable legal points in the appeal.

From his own research the learned trial judge unearthed and applied the authority in *Havela Investments Ltd v Royal Trust Co of Canada (CI) Ltd & Others* [1985] 2 All ER 966 a House of Lords' decision. Counsel were not invited to comment on this authority but it is plainly clear that the facts of that authority are distinguishable from those in the instant case. In that case the vendors stated in the invitation to bid "that we bind ourselves to accept the highest offer received by them which complied with the terms of the invitation". (underlining

is mine). This demonstrated the intention of the parties that on submitting the highest fixed offer a binding unilateral contract would ensue.

I have considered the authorities cited by counsel on the issuance of interlocutory mandatory injunctions or any injunctions for that matter. As I have held that the question as to whether a binding contract was created on Bedi Investments submitting their offers was highly questionable. It follows that it is highly

questionable as to the issuance of interlocutory mandatory injunction or any injunction at all. The maxim "Equity follows the law" applies as the orders sought were in the nature of equitable remedies.

The learned trial judge's ruling, in my opinion, bristles with monumental misdirections and the orders made thereunder are highly prejudicial to some of the parties.

I would grant the stay of execution as prayed in regard to the order for a mandatory injunction only. Costs will be costs in the appeal.

Dated and Delivered at Nairobi this 16th day of September 1994.

J.E.GICHERU

.....

JUDGE OF APPEAL

R.O.KWACH

.....

JUDGE OF APPEAL

M.G.MULI

.....

JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR