[2014] JMCA App 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 47/2013

APPLICATION NO 93/2013

BETWEEN	**ARC SYSTEMS LTD**	**APPLICANT**
AND	**ATRADIUS CREDIT INSURANCE NV**	**RESPONDENT**

Miss Jacqueline Cummings instructed by Archer Cummings and Company for the applicant

Miss Stacey Mitchell and Courtney Smith instructed by Foga Daley for the respondent

3 December 2013 and 27 March 2014

IN CHAMBERS

HARRIS JA

[1] In this application, the applicant seeks a stay of execution of an order by the learned Master in which she struck out the applicant's defence and entered summary judgment for the respondent.

[2] The applicant is a company, duly incorporated under the laws of Jamaica, carrying on business as a manufacturer and distributor of building materials. The respondent is a Swedish company carrying on the business of trade credit insurance.

[3] On 25 January 2011, the respondent brought a claim against the applicant to recover a sum of US$5,634,829.95, being a debt of $3,425,000.00 with interest thereon, at the rate of 30% per annum from 8 December 2008 to 10 January 2011, as well as the sum of J$12,000.00 for attorney-at-law's costs and court fees. The respondent's claim relates to a contract between Elof Hansson AB ("Elof") and the applicant for the supply of deformed steel bars on terms of credit to the applicant. The steel bars were supplied. The respondent claims that the debt, which was assigned to it by Elof, is due and owing. The applicant contends that the despatching of the goods by Elof was as a result of a collateral agreement between the applicant and Elof, and that it is not indebted to the respondent.

[4] It will be useful to outline such paragraphs of the particulars of claim and the defence as are necessary for the purpose of this application. Paragraphs 3 to 10 of the particulars of claim are as follows:

> "3. On May 21, 2008 the Defendant ordered a quantity of Deformed Steel Bars on credit terms from Elof Hansson AB ('Elof Hansson') at a total cost of US$6,665,545.68. Elof Hansson, a company incorporated in the Kingdom of Sweden, accepted the Defendant's order and provided the requested credit facilities. Said credit facilities were insured by Elof Hannson [sic] under a Policy of Insurance with the Claimant.

4. The said goods were shipped to the Defendant CFR Incoterms 2000 Kingston Jamaica, with the effect that delivery was effected by Elof Hansson when the goods passed the ship's rail in the port of shipment. Upon said delivery, all risks in the goods were transferred to the Defendant as buyer.

5. On July 10, 2008, Elof Hansson issued Invoice numbered 486-7589/01 to the Defendant in relation to the shipped goods, supported by three (3) concomitant Bills of Exchange. The Invoice provided that the Defendant was to make the following payments: US$2,221,848.56 to be paid on October 8, 2008; US$2,221,848.56 to be paid on November 7, 2008; and US$2,221,848.56 to be paid on December 7, 2008. The invoice also provided for the payment of interest at a rate of 30% per annum if payment was delayed. The three Bills of Exchange issued to the Defendant on July 10, 2008 were for the total sum of US$6,665,545.68, with maturity dates of October 8, 2008, November 7, 2008 and December 7, 2008 respectively. All three Bills of Exchange were accepted by the Defendant.

6. Notwithstanding receipt of the goods and acceptance of the Bills of Exchange, the Defendant failed to make any payments to Elof Hansson in accordance with the agreed payment schedule. Accordingly, on October 9, 2008, November 10, 2008 and December 9, 2008 respectively, Elof Hansson protested each of the three Bills of Exchange.

7. The Defendant has to date made the following payments to Elof Hannsoп [sic]:

DATE	**AMOUNT (US$)**
March 9, 2009	1,403,511.24
March 11, 2009	600,000.00
June 4, 2009	220,000.00
July 2, 2009	220,185.88
September 10, 2009	221,848.56
December 1, 2009	200,000.00
February 5, 2010	100,000.00

March 10, 2010	100,000.00
May 3, 2010	100,000.00
September 2, 2010	75,000.00
TOTAL PAYMENTS	**3,240,545.68**

8. The Defendant has failed and/or neglected to make any further payments since September 2, 2010 and the sum of US$3,425,000.00 remains outstanding.

9. In October 2010 Elof Hansson claimed against its Policy of Insurance with the Claimant in relation to outstanding monies owed by the Defendant, and on October 22, 2010 assigned to the Claimant all of its rights and interests against the Defendant and granted an irrevocable Power of Attorney to the Claimant to act on its behalf in the recovery of outstanding sums owed by the Defendant.

10. The Claimant, pursuant to the Deed of Assignment and irrevocable Power of Attorney, claims against the Defendant the sums of **US$5,634,829.95** and **J$12,000.00** plus further interest and costs, being monies due and payable to the Claimant by the Defendant and particularised as follows:-

Amounts Claimed:-

	US$	**J$**
Principal	3,425,000.00	
Interest on Principal at a rate of 30% per annum and a daily rate of US$2,815.07 from December 8, 2008 to January 10, 2011	2,209,829.95	
Court Fees	-	2,000.00
Attorney's fixed costs on issue		10,000.00
Total	**5,634,829.95**	**12,000.00**

11. The Claimant, by registered letter dated October 29, 2010 sent from its Attorneys-at-Law to the Defendant, demanded payment of the sum of **US$3,425,000.00.** Notwithstanding this demand, the Defendant has failed, neglected and/or refused to pay the said sum to the Claimant."

[5] Paragraphs 1 to 15 of the defence read:

"1. The Defendant admits paragraph[s] 1 and 2 of the Particulars of claim.

2. Save that the Defendant ordered steel bars from Elof Hansson AB of the Kingdom of Sweden paragraph 3 of the Particulars of Claim is not admitted.

3. Save that the Defendant received goods from Elof Hansson AB aforesaid paragraph 4 of the Particulars of Claim is also not admitted.

4. Save that Elof Hansson AB issued invoice numbered 486-7589/01 to the Defendant paragraph 5 of the Particulars of Claim are [sic] not admitted as the Defendant and Elof Hansson AB merely had this for insurance purposes.

5. The Defendant denies that it failed to make any payments to Elof Hansson AB in accordance with their agreement and denies paragraph 6 of the Particulars of Claim.

6. The Defendant denies paragraphs 8, 9, 10 of the Particulars of Claim.

7. The Defendant says that in 2008 Elof Hansson AB was informed prior to any shipment of the steel bars of the losses being experienced in the Jamaican construction industry and the dramatic and drastic fall in the price, demand and sales of steel and also that

they were unable to accept any further shipment of steel.

8. Elof Hansson AB asked the Defendant to reconsider its position and accept a shipment and sell the product as the market dictated.

9. The Defendant agreed and accepted the shipment that was subsequently sent based on these terms from Elof Hansson AB. The Defendant eventually sold the said steel on the local market after being stuck with same for 12 months and remitted all funds collected thereon to Elof Hansson AB in accordance with their collateral agreement.

10. Elof Hansson AB accepted and received these payments in satisfaction and discharge of the Defendant [sic] obligation to them.

11. Hence the Defendant denies that there is any debt to Elof Hansson AB which was capable of being assigned to the Claimant herein.

12. The Defendant says that had there not been this collateral agreement between Elof Hansson AB and them, they would not have accepted any shipment from Elof Hansson AB in 2008.

13. Further the Defendant say [sic] that Elof Hansson AB has wrongfully made a claim on the Claimant or assigned any alleged debt to the Claimant herein.

14. Any alleged claim made by Elof Hansson AB on the Claimant herein would lapse or be barred by the passage of time of more than 12 months are [sic] required by any policy of insurance to make such a claim.

15. In the premise [sic] the Claimant is not entitled to recover the sum claimed or any at all from the Defendant as they are not liable to the Claimant with respect of [sic] the alleged debt."

[6] Mr Lackie Horne, a director of the applicant, in an affidavit sworn on 30 August 2013, in support of the application, stated in paragraphs 5, 8 and 9:

> "
> ...
> 5. That the Appellant has been advised by its Attorneys-at-Law and does verily believe that the Defence as put forward by the Appellant/Defendant herein does disclose reasonable prospects of success as subsequent to the agreement to purchase the deformed steel bars when the market price plummeted and we were about to cancel the proposed shipment when the representative of Elof Hannson [sic] asked us and we agreed to sell the product as the market dictated which is the essence of the collateral agreement that we referred to in our Defence herein.
> ...
> 8. That there is a serious risk of injustice to the Appellant/Defendant if the stay of execution is not granted as the Appellant/Defendant could face financial ruin as it would not be able to pay this sum and still operate the company and the devaluation of the Jamaica [sic] dollars [sic] has also made this sum out of reach of the company's capabilities.
> 9. That the Respondent/Claimant is a foreign company with no assets in Jamaica.
> ..."

[7] In an affidavit, sworn on 20 November 2013 by Mr Karl Olsson, the credit manager of the respondent, in opposition to the affidavit of the applicant, stated at paragraphs 3 to 7 and 11 to 14 as follows:

> "...

3. The Respondent/Claimant (hereinafter 'the Respondent') is a trade credit insurance company. It advanced to the Appellant/Defendant (hereinafter 'the Appellant') in 2008 credit facilities secured by Bills of Exchange.

4. The credit facilities offered to the Appellant was [sic] in relation to deformed steel bars sold to the Appellant by Elof Hansson AB, a company incorporated in the Kingdom of Sweden. These credit facilities were secured by three Bills of Exchange which were issued to the Appellant by Elof Hansson.

5. The Bills of Exchange were accepted by the Appellant by impressing its stamp thereon in the section on each Bill titled 'Accepted By'. A copy of each Bill was attached to the Particulars of Claim.

6. The Appellant failed to pay all the sums invoiced by Elof Hansson in relation to the sale to it of the steel bars and the Bills of Exchange were each protested by Elof Hansson.

7. The credit facilities were insured by Elof Hansson under a policy with the Respondent. Elof Hansson subsequently claimed against its Policy of insurance with the Respondent and pursuant to the said policy assigned to the Respondent all of its rights and interests in the debt of the Appellant and granted to the Respondent an irrevocable Power of Attorney to act on its behalf in recovering the debt.

...

11. The Appellant filed no Affidavit in response to the Application for Summary Judgment but argued, inter alia, that there is no debt owed to Elof Hanson [sic] that could have been assigned to the Claimant and hence there could have been no assignment as the original parties had a collateral agreement to the bills of exchange and Elof Hanson [sic] accepted all payments received in total satisfaction of its obligations.

12. While relying on a collateral agreement with Elof Hansson the Appellant had not in its Defence referred to either an agreement in writing or a series of correspondence from which one could deduce an agreement with Elof Hansson which could have served to displace the Bills of Exchange.

13. I am advised by my attorneys at law and do verily believe that averring that there was a collateral agreement without more does not satisfy the requirement that a Defendant set out all the facts on which it relies to dispute a claim.

14. Further the Appellant in response to an averment in the Particulars of Claim that it had accepted the Bills of Exchange set out in paragraph 4 of its Defence that it made no admission in relation thereto but did not state its reasons for so pleading nor did it set out its own version of the facts."

[8] Mr Horne, in an affidavit filed on 3 December 2013 in response to Mr Olsson's affidavit, stated at paragraphs 5 to 6, 9 to 14 and 16 to 17:

"5. That contrary to the assertion of Mr Olsson in paragraph 3 of his Affidavit the Appellant had no relationship with [the] Respondent and advanced no trade credit insurance to the Apppellant at any time.

6. That at all material times the Appellant had a relationship with Elof Hasson [sic] another Swedish company that it has being [sic] doing business with for over 12 years prior and they shared and [sic] mutual respect and regard for their business relationship.

...

9. That at the time of this transaction it was in the midst of [sic] world recession when the average price of steel on the world market dropped from US$1,400.00 per ton to US $480.00 per ton.

...

10. That as a consequence of this dramatic fall in the price we were not going to accept any further shipment of steel but in order to save this transaction from being [cancelled] by us, Elof Hansson asked us still [sic] accept the shipment of the steel and sell it as the market dictates and remit only the sums we collect [sic] to them.

11. That we did so and remitted all sums collected on these sales to Elof Hansson as agreed and they accept [sic] the payments in full and final settlement of our obligation to them.

12. That as a consequence Elof Hansson ought not to have further relied on the bills of exchange to require us to make any further payment to them and ought not to have assigned anything to the Respondent herein as they knew that they accepted all our payments in satisfaction of our obligation to them.

13. That these are the facts that we intend to rely on at the trial of this action and are sufficient to deny the Respondent's claim herein. We intended to subpoena the officers of Elof Hansson to come to Jamaica to give evidence on our behalf to prove this collateral agreement to the court.

14. That we have been instructed by our Attorneys-at-law law [sic] and do verily believe that these facts are sufficient to rebut the bills of exchange as the consideration for the bills of exchanges [sic] was the sale and purchase of the said steel.

...

16. That as a result of the world economic crises our business suffered significant financial loss that we are yet to recover from to date. We have not returned the company to profitability and if we are to pay the alleged debt herein which is now over Eight Hundred Million Jamaica[n] dollars ($800,000,000.00) then the

appellant could face financial ruin if the stay of execution is not granted as we may have to wind up the company.

17. That if any payments are made to the Respondent herein there would be no obligation on them to repay when we are successful as this court will not have any jurisdiction in Sweden nor will the Respondent have to submit to the jurisdiction of this Honourable Court."

[9] In the respondent's affidavit, in support of the application for summary judgment, sworn by Mr Olsson, it is stated at paragraphs 6 to 11:

"6. That the Defendant was issued three Bills of Exchange and all three Bills of Exchange were accepted by the Defendant and the Defendant's signature and stamp on each of the three Bills of Exchange are irrefutable evidence of the Defendant's acceptance of the said Bills of Exchange.

7. That the Applicant relied on the validity of the three Bills of Exchange.

8. That the Applicant has been advised by its Attorneys-at-Law and does verily believe that the Defendant, having not admitted in its Defence acceptance of the three Bills of Exchange, has failed to either set out the facts on which it relies on [sic] to dispute the said claim or to give a reason for resisting this specific averment as required by Civil Procedure Rule 10.5.

9. That the three Bills of Exchange, having been dishonoured for non-payment were duly protested for non-payment as averred in the Applicant's Statements of Case and no grounds have been put forward by the Defendant challenging either the validity of said Bills of Exchange or the protestation of the said Bills.

10. That the Applicant has been advised by its Attorneys-at-Law and does verily believe that according to the rules of evidence and the Bills of Exchange Act, the alleged oral agreement as averred in the Defendant's Defence cannot vary or discharge Bills of Exchange.

11. That the Defendant has not put forward any valid defence to the Applicant's claim on the Bills of Exchange and in the circumstances, has no reasonable prospect of successfully defending the Claim should the matter proceed to trial."

[10] The learned Master had this to say at paragraphs [14] to [19] of her judgment:

"[14] As a holder in due course as defined under the Bills of Exchange Act.[sic] The legal position would seem to be that the Claimant/Applicant became a party to the transaction of value and so creating [sic] a presumption of consideration in relation to this [sic] bills.

[15] The question then is, does the respondent have a real prospect of successfully defending the claim based on the collateral agreement raised in the defence. It must be noted as well that though raised it has not been disclosed and as such seems to be in direct contravention with [sic] Rule 10.5(4) and (5) as Mrs. Campbell Bascoe has emphasized.

[16] It must be that the defendant intends to introduce new evidence if a trial is to take place or the pleadings of necessity would require a substantial amount of supplementing. Even though the arguments here by the defence surround the original validity of the Bills of Exchange albeit having been varied by the illusive collateral agreement [sic]. The defendant at one point against the physical, factual evidence deny [sic] the original debt at points in the agreement and in the defence.

[17] The pleadings are closed and as such the defendant would be barred from adducing any facts at trial

which it should have outlined in its Defence - CPR 10.5.

[18] The issue of Summary Judgment then becomes a live one and one must also consider the timing of the application. I certainly adopt the reasoning of Lord Justice Peter Gibson in the English Court of Appeal case of Goodwill v British Pregnancy Advisory Service at page 88 paragraph 5 where he says [1996] 31 BMLR 83:

> *'Of course litigants should be encouraged, if they are minded to make an application to strike out, to do so earlier rather than later, but if the trial will be long and expensive and the claims are hopeless, it defies common sense to refuse to allow the saving of time and expense of the trial simply in order to punish the applicant party for failing to strike out earlier.'*

Trial is fixed for June 3-7, 2013 also five (5) days.[sic] The Court's over-riding objective in these circumstances would [sic] best served by balancing all the issues and not necessarily saying trial is imminent, let the matter proceed apace.

[19] It is the Assessment of this court that the claimant has met the burden of showing that the defendant has no real prospect of successfully defending the claim based on the defects identified under Rule 10.5 and the relevant case law guidance. As such Rule 26.3 is invoked and the defence is struck out as disclosing no reasonable grounds for defending the claim. The natural consequence then would be that Pursuant to Rule 15.2 (b) the defendant has no defence before the court and the claimant is entitled to Summary Judgment as prayed in its application."

[11] The amended grounds of appeal are as follows:

"(a) The Learned Master erred when she held that there was no proof of the collateral agreement between Elof Hansson and the Appellant/Defendant.

(b) The Learned Master erred when she held that there was no prospect of the Appellant/Defendant successfully defending the claim.

(c) The Learned Master erred when she held that although the Appellant/Defendant raised the collateral agreement it was not disclosed.

(d) The Learned Master erred when she struck out the Appellant/Defendant's Defence as disclosing no reasonable ground of Defence."

Submissions

[12] It was Miss Cummings' submission that although the applicant admitted ordering the steel bars and had accepted delivery of them, it is not indebted to the respondent, as the ordering and acceptance of the goods were subject to a collateral agreement between Elof and the applicant. There was a drastic fall in the sale of steel, she submitted, and Elof was so informed and as a result the applicant decided not to accept any further shipment of steel, following which, it was proposed by Elof that the applicant should sell the steel as the market dictated and send the proceeds of sale to Elof. To this proposal, the applicant agreed, she submitted. It was also her submission that the proceeds of sale were forwarded to Elof in full satisfaction of the debt and that the debt was therefore discharged by reason of accord and satisfaction. The learned Master erred by holding that the applicant failed to set out the terms of the collateral agreement and further erred as she failed to appreciate that the sale of the

steel was the consideration for the bills of exchange which had been discharged by the receipt of the payments from the applicant, counsel argued.

[13] Elof, she argued, erred in assigning the debt to the respondent as the goods were insured only for the purposes of the invoice. Elof abused the relationship between it and the applicant and in order to protect itself, it insured the bills of exchange with the respondent, counsel contended. Further, she argued, the learned Master failed to appreciate that on the facts in dispute, a triable issue arises.

[14] Mr Horne has shown in his affidavit that the applicant will suffer financial ruin if the stay is refused and further, the respondent does not disclose that it will suffer any irremediable harm if a stay is granted, she argued. The affidavit of Mr Olsson wrongly stated that the applicant was insured with the respondent, she submitted.

[15] The cases of ***Wilson v Church*** (No 2) (1879) 12 Ch D 454; ***Linotype-Hell Finance Ltd v Baker*** [1992] 4 All ER 887; ***Scotiabank Jamaica Trust and Merchant Bank Limited v National Commercial Bank Jamaica Limited and Jamaica Redevelopment Foundation Inc*** [2013] JMCA App 5; ***Watersports Enterprises Ltd v Jamaica Grande Limited, Grand Resort Limited and Urban Development Corporation,*** SCCA No 110/2008, application no 159/2008, delivered on 4 February 2009; ***Reliant Enterprise Communications Limited v Twomey Group Limited and Infochannnel,*** SCCA No 99/2009, application nos 144/2009 and 181/2009 delivered on 2 December 2009; ***Flowers Foliage and Plants et al v***

Jamaica Citizens Bank Limited (1997) 34 JLR 447; and ***Dalfel Weir v Beverly Tree*** [2011] JMCA App 17 were cited by the applicant in support of these submissions.

[16] Miss Mitchell argued that on an application for summary judgment the court looks at the pleadings and makes an assessment of each party's case and upon the inquiry, makes a decision whether on the face of it there is a case to be tried. She submitted that an appellate court decides on the prospects of the appeal.

[17] The thrust of this case, she argued, surrounds the bills of exchange which have been stamped and accepted by the applicant. A bill of exchange is an unconditional order in writing, as provided for by section 3 of the Bills of Exchange Act and under section 54 of the Act, she argued, a person who accepts a bill of exchange indicates that he will pay. The applicant has not raised any issue to rebut the unconditional order to pay the debt, counsel contended, and it is therefore insufficient to maintain that a collateral agreement exists. She went on to argue that any oral collateral agreement would not displace the respondent's right under the Bills of Exchange Act.

[18] Citing ***Huntley Manhertz and Yvonne P Manhertz v Island Life Insurance Company,*** SCCA No 24/2006, delivered 27 June 2008, counsel argued that there is nothing in the defence to show that paying a lesser sum amounts to accord and satisfaction of the debt. In that case, she submitted, the appellants owed money to the respondent but asserted that a lesser sum paid to the respondent amounted to accord and satisfaction and was in settlement of a debt, but this court found that the payment

did not amount to accord and satisfaction. Counsel further submitted that in ***Manhertz***, the rule in ***Foakes v Beer*** (1884) AC 605 that part payment of a debt is not satisfaction of the debt was applied. Counsel further submitted that there is nothing in the applicant's pleadings which negates the right of the holder of the bills of exchange to recover the amount due.

[19] It was also counsel's submission that there must be some evidence to satisfy the court of ruination and the applicant's simple assertion of financial ruin is not enough. She cited ***1st National Bank St Lucia Limited v Universal Fishing and Trading Company, Aloysius Hyacinth also known as Al Hyacinth and Philippe Zelie*** *SLU* 2007/0998 and ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA Civ 2065, to support this submission and argued that in ***Hammond***, although the applicant filed a balance sheet it was insufficient to shown ruination.

[20] Paragraph four of the defence, she argued, indicates that the applicant did not accept the bills of exchange but this averment is not in compliance with rule 10.5 of the Civil Procedure Rules (CPR), which requires a defendant who denies an averment to state the reason for the denial.

Analysis

[21] It is a well settled rule that a litigant ought not to be deprived of receiving the benefit of his judgment. This principle, nonetheless, is not impervious as the court is

accorded an unfettered discretion to stay the execution of a judgment if the circumstances of a particular case so warrant.

[22] The principle laid down in the old case of ***Wilson v Church***, cited by Miss Cummings, is that the court has a duty to stay execution of a judgment pending appeal to avoid the appeal being nugatory. It is true that a court, on an application for a stay of execution of a judgment, should ensure that an appeal is not stifled. Over the past 15 years, there have been in place modern authorities defining the test by which the court ought to be guided in giving consideration to the question of a stay of execution. In granting a stay of execution, in ***Linotype*** Lord Staughton propounded the test to be one in which the applicant must show that the appeal has some prospect of success and without a stay he would be ruined. In the continuing development of the law, the test as to the grant or refusal of a stay has been redefined in the more recent authorities of ***Hammond*** and ***Combi (Singapore) Pte Limited v Ramnath and Sun Limited*** [1997] EWCA 2164 (23 July 1997).

[23] In ***Hammond,*** Lord Clarke spoke to the test in this way:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is

> enforced in the meantime, what are the risks of the appellant being unable to recover any monies paid from the respondent?"

[24] In ***Combi,*** Phillips LJ defined the test as follows:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course, that the court concludes that there may be some merit in the appeal. If it does not, then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

[25] Rule 26.3 of the CPR permits the court to strike out a defence if it is shown that there are no reasonable grounds for defending the claim. In keeping with rule 15.2 (b), where the court is satisfied that there is no prospect of a defendant succeeding on his defence, the court is empowered to enter summary judgment.

[26] The applicant has disputed the claim. The first question arising is whether the applicant has a meritorious appeal. Has it been shown that it has a good prospect of succeeding on its defence if the matter proceeds to trial and accordingly, a real chance of success on appeal?

[27] In answering the foregoing question, it would be appropriate to first look to rule 10.5 of the CPR which outlines the procedure to be adopted by a defendant in disputing a claim. The rule states:

> "(1) The defence must set out all the facts on which the defendant relies to dispute the claim.
>
> (2) ...
>
> (3) ...
>
> (4) Where the defendant denies any of the allegations in the claim form or particulars of claim-
>
> (a) the defendant must state the reasons for doing so; and
>
> (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.
>
> 5. Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not -
>
> (a) admit it; or
>
> (b) deny it and put forward a different version of events the defendant must state the reasons for resisting the allegation.
>
> (6) ..."

[28] Miss Cummings submitted that the applicant was only required to plead facts and not the evidence which is to be proved and the learned Master erred by holding that the pleadings were inadequate. It is true that a litigant must plead facts and not the evidence on which he intends to rely. However, in pleading, a defendant must adhere

to the requirements of rule 10.5 of the CPR. In this case, the applicant, as defendant, is required to observe the rule and in particular, sub rules 10.5 (4) and 10.5 (5). In deciding whether the applicant had raised issues to be resolved at the trial, the learned Master was duty bound to have examined and assessed the claim and the defence.

[29] In the defence, it is admitted by the applicant that the shipment of deformed steel was ordered and received. The issuance of an invoice, bearing number 486-7589/01, has also been admitted. As shown in the particulars of claim, this invoice was supported by three bills of exchange which were accepted by the applicant. In its defence, the applicant has not admitted nor denied the bills of exchange and has not advanced a reason to defeat the respondent's averment regarding these bills of exchange.

[30] The invoice lists a schedule of the payments for the goods on prescribed dates in 2008. This, the applicant denied but the reason for the denial was not stated. Paragraph seven of the particulars of claim shows that several payments for the goods were made by the applicant between March 2009 and September 2010, over a period of approximately a year and six months. The applicant has neither admitted nor denied this aspect of the claim and has advanced no reason for resisting it.

[31] The averment in paragraph six of the particulars of claim speaks to the failure of the applicant to have made payments in keeping with the payment schedule outlined in the invoice. The applicant, in its defence, denies that it failed to make payments in

accordance with the agreement between Elof and itself. Although averring that, under a collateral contract between Elof and itself, Elof would be paid for such of the goods which were sold based on the prevailing market conditions and that it had repaid all sums due and owing, it failed to have specifically stated the amount which was repaid and the date or dates on which any repayments were made.

[32] A collateral contract has its genesis in an original contract. Mysteriously, although relying on this collateral agreement, the applicant's defence is silent as to an original agreement with Elof and the terms thereof. The applicant merely states that it was unable to take any further shipment of steel and as a result of the collateral agreement with Elof, it accepted the shipment. There is no averment in the defence with reference to a specific date on which this collateral contract had been made or the date on which it was intended to have commenced operation. The defence merely recites that the collateral agreement was made in 2008. It is to be noted that the maturity dates of the bills of exchange are listed as 8 October, 7 November and 7 December 2008 and interest of 30% was payable. As earlier indicated, the respondent pleaded that several payments were made in 2009 and 2010. Were the payments not made by the applicant? This question remains unanswered by the defence.

[33] Importantly, the applicant did not admit the existence of the bills of exchange but remarkably, proffered no reason in the defence for the denial. There is evidence that the applicant accepted and stamped the bills of exchange. The applicant is the holder of the bills of exchange and section 3 of the Bills of Exchange Act speaks to the

unconditional force of a bill of exchange requiring payment on demand by the person to whom it is addressed and section 54 imposes liability on the holder to honour the bill.

[34] Section 3 reads:

> "3. 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 certain sum in money to or to the order of a specified person, or to bearer.
>
> An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.
>
> An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with-
>
> (a) an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount; or
>
> (b) a statement of the transaction which gives rise to the bill –
>
> is unconditional.
>
> A bill is not invalid by reason-
>
> (c) ... (e)."

Section 54 provides:

> "54. The acceptor of a bill, by accepting it-
>
> (a) engages that he will pay it according to the tenor of his acceptance;

(b) is precluded from denying to a holder in due course --

(i) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

(ii) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;

(iii) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement."

[35] A debt is deemed valuable consideration under a bill of exchange. Elof protested the bills. This, the applicant has not answered in the defence. No averments were made in the defence to impugn the validity of the bills. Nor is there any statement in the defence, showing that Elof or the respondent had, at the time of the issuing of the bills or after the maturity of those bills, absolutely or unconditionally renounced their rights under those bills. There is nothing in the defence to demonstrate that the bills had not been given in good faith.

[36] The defence alleges that the debt was extinguished by reason of accord and satisfaction. There is no statement in the defence which demonstrates, on the face of it, that an original sum had been agreed on between Elof and the applicant for the steel which was varied by the collateral contract showing that the applicant should pay a lesser sum. Arguably, there is nothing to show that the doctrine of accord and satisfaction could be brought into operation in this case. It could be argued that the

applicant, in its defence, seeks to renege on its commitment to satisfy the debt by introducing a collateral agreement without specifically and adequately demonstrating in its pleadings substantial questions of fact or any question of law disclosing that the debt had been discharged.

[37] The respondent averred, in paragraph one of the particulars of claim that it carries on business as a trade credit insurance company, that the applicant ordered the goods on terms of credit and Elof provided credit facilities requested by the applicant, which facilities were insured by Elof, with the respondent. Its further averment in paragraph nine is that Elof's claim against its insurance policy is in respect of the applicant's debt and that Elof's entitlement under the policy was assigned to it (the respondent). This, the applicant has denied. It pleaded that the goods were insured with the respondent for the purpose of the invoice and that the respondent's claim has lapsed due to the effuxion of time. It could be argued that the applicant's statement that the insurance related to the coverage of the invoice is very weak and therefore insufficient to defeat the respondent's claim.

[38] Arguably, no circumstances have been outlined in the defence purporting to defeat the respondent's claim. The particulars of claim discloses the existence of a debt by the applicant to Elof which had been assigned to the respondent on 22 October 2010. It could be argued that the applicant has not put forward any arguable or any fairly arguable point in its defence to be resolved at a trial. Accordingly, it has not set

out a bona fide defence or raised any issue which ought to be tried. Clearly, it has not shown that it has a real chance of success on appeal.

[39] The applicant has stated that it could be ruined if the stay is refused. The statement in Mr Horne's affidavit of 30 August 2013 that if stay is not granted the applicant would be unable to satisfy the debt and continue to operate is not in itself sufficient to justify ruination. In his further affidavit of 3 December 2013, he stated that the applicant suffered significant financial loss, has not returned to profitability and if the stay is not granted it may have to be wound up. Notably, the applicant declares that it could be ruined and not that it would be ruined. It has not stated definitively that it would be wound up. It has merely asserted that it may be wound up.

[40] Further, as Miss Mitchell pointed out, like ***Hammond,*** the applicant failed to place enough evidence before the court to support its allegation that, in the absence of a stay, it would be ruined. In ***Hammond***, the appellant alluded to ruination if a stay was refused. However, it failed to put before the court adequate evidence as to its trading and financial position. In the present case, the applicant, has likewise, failed to submit documentary evidence, for example, audited statements of account, to persuade the court that it is in dire financial straits and that severe prejudice would be occasioned by the refusal of a stay. Accordingly, it cannot be said that the applicant has demonstrated that if the stay is not granted it would suffer irremediable harm.

[41] The cases of ***Wilson v Church; Linotype; Watersports Enterprises Ltd v Jamaica Grande Limited, Grand Resort Limited and Urban Development Corporation; Scotiabank Jamaica Trust and Merchant Bank Limited v National Commercial Bank Jamaica Limited and Jamaica Redevelopment Foundation Inc; Reliant Enterprise Communications Limited v Twomey Group Limited and Infochannel*** and ***Weir v Beverley Tree*** are clearly distinguishable from the present case. Those were cases in which the applicants had met the requisite criteria for the grant of a stay. It cannot be said that this is true in the instant case.

[42] It is necessary to state that the learned Master was incorrect in saying that the collateral agreement had not been disclosed. Arguably, this finding, in itself, would not have militated against her setting aside the defence and entering summary judgment in favour of the respondent.

[43] In my judgment, there is no significant risk that the applicant's appeal will be rendered nugatory if the application for the stay is refused. In balancing the scales, the pendulum undoubtedly swings in favour of the respondent. Accordingly, the justice of this case demands that the respondent be given the liberty of reaping the fruits of its judgment.

[44] The application for a stay of the execution of the judgment is refused. Costs are awarded to the respondent to be agreed or taxed.