JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 91/09

APPLICATION NO. 203/09

BETWEEN	**CABLEMAX LIMITED**	**1st CLAIMANT/APPELLANT**
AND	**J.T. CABLE NETWORK LIMITED**	**2ndCLAIMANT/APPELLANT**
AND	**STONY HILL CABLE SERVICES LIMITED**	**3rd CLAIMANT/APPELLANT**
AND	**LOGIC ONE LIMITED**	**DEFENDANT/RESPONDENT**

IN CHAMBERS

Christopher Kelman, instructed by Myers, Fletcher & Gordon, for the applicant/respondent

B.E. Frankson, instructed by B.E. Frankson & Company for the respondents/appellants

12 & 21 January 2010

MORRISON, J.A.

[1] Before me is an application (see amended notice of application filed on 15 January 2010) by Logic One Ltd, the respondent to this appeal, for the following orders:

> (i) That the appeals of Cable Max Ltd and JT Cable Network Ltd be struck out;
>
> (ii) That the appellants Stony Hill Cable Services Ltd and alternatively Cable Max Ltd and JT Cable Network Ltd give security for costs of the appeal in sum of $1,265,333.33.

[2] In relation to the first order sought, the basis of the application is that the appellants Cable Max Ltd and JT Cable Network Ltd have been removed from the Register of Companies. In relation to the second order, the grounds are (a) that the appellants are unlikely to be able to pay the costs of the appeal in the event that they are unsuccessful and (b) that the appeals have no merit and are unlikely to be successful.

[3] The primary question for determination at the trial of this action before Brooks J in the court below was the true nature of the agreement between the appellants and the respondent, all of whom were independent providers in the cable television business when that industry came under government established regulations in the early 1990s. I cannot improve on the learned trial judge's summary of the dispute between the parties, which is as follows (pages 2–3 of judgment delivered 1 June 2009):

> "Cablemax Limited, J.T. Cable Network Limited, Stony Hill Cable Limited and Logic One Limited were four of the entities operating in the industry prior to the advent of the regulations. Each had established its own niche in the market; a geographical area where it supplied cable service to its customers. They nonetheless discussed pooling their resources for the purposes of compliance with the requirements of the newly regulated regime and in particular, the securing of a licence. In 1998, an application for a licence in Logic One's name was successful, but shortly thereafter the parties had serious differences which have eventually led to this claim.

> In the first of two consolidated claims, Cablemax, J.T. Cable and Stony Hill Cable (the trio) allege that Logic One has reneged on the oral agreement between the four, that the successful licensee would be the common vehicle for their continued existence in the industry. They seek declarations that they are each entitled, pursuant to the agreement, to 25% of the shareholding of Logic One and to damages for breach of contract.
>
> Logic One denies that there was any such arrangement concerning its licence application. It asserts that its application was independent of any discussions between the parties and that the other three companies are not entitled to become members of Logic One by virtue of those discussions."

[4] The judge's conclusion after hearing the evidence on both sides was that, while there was an agreement between the parties that they would pool resources for the purposes of the application for a licence, there was no agreement that there would thereafter be participation by the other parties in the shareholding and business of the successful licencee. On appeal, the appellants naturally challenge this second conclusion, but not the first.

[5] Mr Kelman on behalf of the respondent has referred me to his written submissions and to the evidence of the striking off of Cable Max Ltd (on 16 January 2004) and JT Cable Network Ltd (on 26 January 2008). As to the effect of removal from the register, I was referred by Mr Kelman

to section 337(5) of the Companies Act, which provides that upon the striking off of the name of a company from the register "the company shall be dissolved".

[6] However, since the filing of this application, affidavit evidence has been produced by Mr Frankson on behalf of Cable Max Ltd evidencing its restoration to the register as of 6 January 2010, so this ground of the strike out application against that company has therefore fallen away. However, the application as against JT Cable Network Ltd remains.

[7] Mr Kelman referred me to rule 2.12 of the Court of Appeal Rules ("the CAR") on the question of security for costs and to the fact that an (unanswered) written request had been made of the appellants to provide security, as required by the rules. He submitted that this was a case in which it would be appropriate for me to order security, as the evidence suggests that it is unlikely that the appellants will be able to pay costs if they are unsuccessful in the appeal. He very helpfully referred me to a number of decisions indicating the nature of and the manner in which I should exercise my undoubted discretion on an application such as this.

[8] Mr Frankson for the appellants referred me to the notes of evidence of the proceedings before Brooks J in the court below (page 11), to show that Cable Max Ltd had "substantial assets" and could therefore meet

any award of costs made against it. He also directed me to evidence that the respondent was in fact in possession of equipment belonging to Cable Max Ltd.

[9] Mr Kelman in reply acknowledged that the respondent was in possession of some equipment belonging to Cable Max Ltd, but submitted that there was no evidence as to its value. He also submitted that the appellants were neither trading nor earning and so would not be able to not pay costs, prompting Mr Frankson to urge upon me the distinction between "earnings" and "assets".

The jurisdiction to strike out

[10] Mr Kelman referred me to rule 1.13 of the CAR, which reads as follows:

> "The court may –
>
> (a) strike out the whole or part of a notice of appeal or counter-notice;
>
> (b) set aside permission to appeal in whole or part ; and
>
> (c) impose conditions upon which an appeal may be brought."

[11] In my view, the power to strike out is a power given to the court itself and not to a single judge (whose powers are listed in rule 2.11). I will therefore make no order with regard to JT Cable Network Ltd and in the

circumstances Mr Kelman will be free to make such further application as he may think fit.

Security for costs

[12] The power to make an order for the giving of security for costs occasioned by an appeal is specifically given to a single judge by rule 2.11(1)(a). Rule 2.12 sets out the basis upon which such an order may be made, as follows:

> "(1) The court may order –
> (a) an appellant; or
> (b) a respondent who files a counter-notice asking the court to vary or set aside an order of a lower court, to give security for the costs of the appeal.
>
> (2) No application for security may be made unless the applicant has made a prior written request for such security.
>
> (3) In deciding whether to order a party to give security for the costs of the appeal, the court must consider –
>
> (a) the likely ability of that party to pay the costs of the appeal if ordered to do so; and
>
> (b) whether in all the circumstances it is just to make the order.
>
> (4) On making an order for security for costs the court must order that the appeal be dismissed with costs if the security is not provided in the amount, in the manner and by the time ordered."

[13] I observe in passing that in relation to companies registered under the Companies Act, a similar power is given by section 388 of that Act, whenever it is made to appear to a judge that the plaintiff in any action or other legal proceeding will be unable to pay the defendant's costs, in the event that the action is unsuccessful.

[14] In ***Keary Developments Ltd and Tarmac Construction Ltd and another*** [1995] 3 ALL ER 534, the principles governing the exercise of the jurisdiction to order security for costs against a plaintiff company under the equivalent provision of the UK Companies Act 1985 were reviewed and restated by Peter Gibson LJ (at pages 539 – 542). These principles, which are in my view equally applicable to an application made under rule 2.12 of the CAR, may be summarised as follows:

> (i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.
>
> (ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security.
>
> (iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the

> costs which have been incurred by him in resisting the appeal.
>
> (iv) In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.
>
> (v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.
>
> (vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount.
>
> (vii) The lateness of the application for security is a factor to be taken into account, but what weight is to be given to this factor will depend upon all the circumstances of the case.

[15] Mr Kelman submitted that the judgment of the trial judge in this matter was largely based on questions of fact and that in those circumstances it was unlikely that the Court of Appeal would differ from his findings, the judge having had the opportunity to hear and to assess the witnesses, their demeanour and the like (indeed, the judge observed that the witnesses on both sides "were less than forthright and honest in their evidence" – see page 17 of the judgment). True though this may be, I have nevertheless to bear in mind that an appeal is by way of rehearing

and, having considered the evidence on both sides as it appears from the notes of evidence, I find myself unable to conclude that appeal has no prospect of success. The learned judge appears to have accepted in part the case advanced by the appellants that it was agreed between the parties that they would operate under a single "umbrella" for the purposes of the application for a licence to provide cable television services, but rejected the further contention that there was also an agreement that, the licence having been obtained, the appellants were thereafter to be issued shares in the respondent and that both the appellants and the respondent would thereafter operate as a single entity. In these circumstances I cannot at this very preliminary stage rule out the possibility that the appellants might be able to persuade the panel hearing the appeal that there may be an inconsistency between these two findings.

[16] So I go on to consider whether in my discretion, taking into account all the circumstances, this is a fit case in which to make an order for security.

[17] In my view, it is not. In coming to this conclusion, I have been primarily influenced by fact that, despite Mr Kelman's submission that without a licence enabling them to provide cable television services the appellants are without any means of earning, the force of which I can

readily appreciate, no real evidence has been provided to enable me to form a judgment as to the "likely ability" of the appellants to pay the costs of the appeal if ordered to do so, which is the test set out in rule 2.12(3)(a).

[18] On the other side of the coin, it is common ground that the respondent is in possession of assets in the form of various items of equipment belonging to appellants which, according to the managing director of Cable Max Ltd, "have been and still continue to be used by the Respondent in its business and for which the Appellants have received no compensation which has resulted in the unjust enrichment of the Respondent". While it is true, as Mr Kelman submitted, that there is no evidence whether those assets would be of sufficient value to meet the costs of the appeal, if awarded against the appellants, there is equally no evidence that they would not be.

[19] In these circumstances, the application must accordingly be dismissed. The costs of this application will be costs in the appeal.