IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT No: E – 505 of 2001

IN THE MATTER OF EQUIPMENT MAINTENANCE LIMITED

AND

IN THE MATTER OF SECTIONS 196 AND/OR 203 OF THE COMPANIES ACT

Heard on October 15, 2002

Appearances: Mr. David Batts and Ms. Daniella Gentles, instructed by Livingston, Alexander & Levy, for the Applicants; Dr. Lloyd Barnett and Mrs. Priya Levers instructed by Priya Levers & Co for the Respondents; Mrs. Janice Causwell (Interested Party, Present).

ANDERSON, J.

This is an application by way of Summons on behalf of the Petitioners in this suit' "under and by virtue of an Order of the Honourable Justice Roy Anderson, made on the 29th day of May 2002, granting Liberty to Apply, for an Order that:

1. The consent Order made on the 29th day of May 2002, be amended in the following terms:

    3. That the Respondents shall pay to the Petitioners or their legal representatives the purchase price as determined by the Valuer aforesaid on the following terms
        (a) A deposit of 22% of the purchase price to be paid to the Petitioner's attorneys-at-law *within thirty (30) days of the Respondents or their attorneys-at-law being notified that the valuation is ready. For the purpose of this order notice is sufficient if sent to the Respondents' Attorneys-at-Law last known place of business, or to the Respondents in care of the Company at 19 Arnold Road Kingston 5.*
        (b) The balance of the purchase price is to be paid within *sixty (60) days thereafter or within a further thirty (30) days* if the Respondents are unable to pay the purchase price within the sixty (60) days as stipulated.
        (c) Interest shall accrue on the balance purchase price at the Government of Jamaica Treasury Bill rates as published by the bank of Jamaica from the date the date the deposit

becomes payable until payment and such interest shall be computed monthly and (be) payable within five (5) days of the end of each month until the balance purchase price is paid.

4. If the Respondents fail to pay the deposit within the stipulated time or the entire purchase price and interest is not paid within *ninety (90) days after payment of the deposit* and upon the expiration of seven (7) days notice of default is served upon the Respondents or their legal representatives, it is hereby ordered that the company be wound up pursuant to the provisions of the Companies Act and Chartered Accountant to be agreed upon by the parties and if not agreed to be appointed by the Court under Liberty to Apply, be appointed Liquidator for the purpose of winding up the Company which shall take immediate effect.

2. The Respondents and the Company's auditor, J.B Causwell and Company deliver to KPMG Peat Marwick all information, accounts, letters and/or documents requested by KPMG Peat Marwick within five (5) days of the date hereof failing which the company be and is hereby would up pursuant to the provisions of the Companies Act and a Chartered Accountant to be agreed upon by the parties and if not agreed to be appointed by the Court to be appointed Liquidator for the purposes of winding up the Company which shall take immediate effect and that paragraph 4 of the Order of the 29th May 2002, do take immediate effect.
3. The balance of the cost of the valuation prepared by KPMG Peat Marwick is to be paid by the Company within seven (7) days of KPMG Peat Marwick notifying the Company that the valuation is ready failing which the Company shall be wound up as in paragraph 2 above.
4. Lynne Clacken is not to be excluded from any directors' or shareholders' meetings of Equipment Maintenance Limited.
5. Within seven (7) days of the date hereof, the Respondents do produce to the Petitioners, {Here follows a list of sixteen (16) items lettered (a) to (p)}
6. Costs of this application to the Petitioners' to be agreed or taxed.

The italicized and underlined words in 3(a), 3(b) and 4, above represent the significant time period changes sought from the original Order, by the instant application. The Summons is supported by an affidavit sworn by the applicants, Dwight and Lynne Clacken, running to some 94 pages including the exhibits.

This application arises out of the Consent Order made, as indicated in this application, by this court on the 29th day of May 2002. The terms of that Order are set out below in full

since it evidences the extensive nature of the discussions which informed the agreement to the Consent Order.

1. Michael Causwell and Richard Causwell (hereinafter referred to as "the First and Second Respondents") do purchase 6,666 ordinary shares in the capital of Equipment Maintenance Limited (hereinafter referred to as "the Company") presently registered in the name of the Petitioners (as to 3,33 each) at a price to be fixed by the accounting firm of Peat Marwick and Partners of 6 Duke Street, in the parish of Kingston (hereinafter referred to as "the Valuer").

2. The Valuer is directed to value the Petitioners' shares in the said Company within ninety (90) days of the date of this order, or such other period as may be approved by the Court from time to time, by reference to the market value of all the assets owned by the Company inclusive of fixed and personal property on a net assets value basis as a going concern and shares at market value in Windshield Centre Limited and Rodeo Holdings Limited, goodwill and receivables of the Company as at 31st day of December, 2001 without any discount for the fact that the Petitioners' shareholding is a minority shareholding. The Valuer shall take into account any assets or funds of the Company which have been diverted, utilized or paid by or to any of the shareholders and/or any of the following companies including but not limited to Ranchero Investments Limited, Startech Services Limited, Econocar Rentals Limited and Auto Auctions Limited and/or paid by the Company and/or its subsidiaries, and for this purpose the Valuer is authorized to make such enquires and examine such records, books and documentation including, but not limited to the Affidavits and documentation filed in these proceedings as are necessary to ascertain the value of the said assets or the amount of the said funds or any amount of which the Company is entitled to demand repayment from the shareholder concerned and that any such assets, funds and/or amounts shall be brought into account for purposes of the valuation aforesaid and shall attract interest being the Government of Jamaica treasury bill rates as published by the Bank of Jamaica. The valuer may use in house figures for the financial year ending the 31st day of December, 2001 in the absence of Audited Financial Statement for the said year. In the event of any dispute relative to the aforesaid valuation of the assets the valuer's decision in that regard shall be final.

3. The Respondent shall pay to the Petitioners or their legal representatives the purchase price of the said shares as determined by the Valuer aforesaid on the following terms:
   (a) A deposit of 22% of the purchase price to be paid to the Petitioner's attorneys-at-law within ninety (90) days after the valuation is delivered to the Respondents or their legal representatives whichever is earlier.
   (b) The balance purchase price is to be paid within One Hundred and Eighty (180) days thereafter or with a further Ninety (90) days if the Respondents are unable to pay the balance purchase price within the One Hundred and Eighty (180) days as stipulated.
   (c) Interest shall accrue on the balance purchase price at the Government of Jamaica treasury bill rates as published by the Bank of Jamaica treasury bill rates as published by the Bank of Jamaica from the date the deposit becomes payable until payment and such interest shall be computed monthly and payable within five (5) days of the end of each month until the balance purchase price is paid.

4. If the Respondent fails to pay the deposit within the stipulated time or the entire purchase price and interest is not paid within 270 days after the valuation is delivered and upon the expiration of seven (7) days notice serves on the Respondents or their legal representatives, it is hereby ordered that the Company be wound up pursuant to the provisions of the companies Act and a Chartered Accountant, to be agreed upon by the parties and if not agreed to be appointed by the Court under liberty to apply, be appointed liquidator for the purpose of winding-up the Company which shall take immediate effect.

5. On the signing of this consent Order, the Petitioners shall execute and deliver to their legal representatives, Instruments of Transfer of the said shares to be held by the said legal representatives on their undertaking to send it to the Respondent's Attorneys-at-Law on payment and receipt of the purchase price.

6. Pending completion of the said purchase in the aforesaid manner and time the Petitioners shall continue to exercise all rights and privileges as shareholders.

7. Pending completion of the said valuation and purchase of shares and/or winding up of the Company as the case may be the Respondents, Michael and Richard Causwell are hereby restrained whether by themselves, their servants and/or agents or otherwise howsoever from removing, dissipating and/or otherwise disposing

of the assets of the company except in the ordinary course of business and from excluding the Petitioners from Directors and/or shareholders meeting.

8. The Petitioners shall not for a period of Eighteen (18) months from the date hereof use any confidential information obtained in their capacity as Directors of the Company and shall not solicit clients of the Company for the said period of Eighteen (18) months.

9. Pending completion of the said valuation and purchase of shares and/or winding-up of the company as the case may be, the Respondents, Michael and Richard Causwell shall maintain the existing insurance as at the 31st day of December, 2001 on all the properties owned by the Company and its subsidiaries specifically, Windshield Centre Limited and Rodeo Holdings Limited except computer equipment and property at 1a Montrose Road such insurance to be based on the existing terms and conditions.

10. Each party is to bear their own legal costs of transfer of the shares.

11. Costs of the valuation to be borne by the Company.

12. Each party is to bear their own legal costs of the Petition.

13. There be Liberty to Apply to either party generally.

The applicants herein who are the Petitioners in the substantive action, have brought this summons under the "Liberty to Apply" provision of the May 29th Order and, pursuant thereto, now seek certain clarifications/alterations to that original Consent Order. From the text, it will be apparent that the changes sought are the adjustments of time frames in paragraphs 3(a), 3(b) and 4 of the May order. The application also seeks additional substantive relief as set out in the paragraphs 2,3,4, and 5, as well as an order for costs.

It should be noted that this is the second application by the Petitioners under "Liberty to Apply", the first having come before the court on August 22, 2002. At that time, an order "By Consent", was entered which varied paragraph 2 of my previous order, extending the time of ninety (90) days therein given for the completion of the share valuation, by a further period of thirty-one (31) days from the 22nd August 2002, being the date when the valuation of the shares ought to have been completed, to the 23rd September, 2002. The August 22nd Order, also gave the attorneys of the parties until September 17, 2002, to

agree on the adjustment of the other dates contained in my original order, failing which the matter of the adjustment of the dates and the issue of costs, were to be set down for hearing before me, in the week of the 23rd September, 2002. The text of my August 22nd Order is set out below.

> "By Consent, the Respondents, Michael Causwell and Richard Causwell do cause to be paid over to KPMG Peat Marwick a cheque drawn in favour of KPMG Peat Marwick in the amount of $425,000.00 plus General Consumption Tax of $63,750.00 by the 26th day of August 2002.
>
> Paragraph 2 of my Order of the 29th day of May 2002 be amended by extending the period of ninety (90) days by a further thirty-one (31) days from the 22nd day of August 2002, to the 23rd day of September 2002.
>
> The attorneys for the Petitioners and the Respondents advise the Court by the 17th day of September 2002, whether an agreement had been reached on the time periods in the Order of the 29th day of May, 2002, and if no agreement has been reached, the matter be set down for hearing in the week of the 23rd of September, 2002, at which time the question of the time periods and the question of costs will be dealt with".

Mr. Batts, in making his submissions, pointed out that the times allotted for certain occurrences in the original order had all been affected by delay in signing the letter of engagement for the valuation of the shares of the company had been signed late by the respondents. He referred to his firm's letter of October 4, 2002 (See Paragraph 5 and Exhibit "DC & LC 4", to the affidavit of the Clackens sworn on October 4, 2002, in support of the application) to the respondent's attorney-at-law, (Mrs. Levers), in which he had responded to one from her, dated September 19, 2002. In this letter, he states, with respect to the agreement to engage KPMG Peat Marwick: "It is clear that the agreement was in your possession since the 5th July, 2002 and the failure to sign was the cause of the delay, whether deliberate or otherwise".

Mr. Batts continued his submissions by referring to a letter, dated September 18, 2002, (Exhibit "DC & LC 5") from KPMG Peat Marwick, to Livingston Alexander & Levy the attorneys for the Petitioners. The letter is in the following terms.

"The purpose of this letter is to inform you that we have been experiencing considerable delays in obtaining all the relevant documents and information to complete this assignment. In particular, to date, we have not received the audited financial statements, or failing that, the unaudited management accounts for the following companies:

1. Equipment Maintenance Limited.
2. Windshield Centre Limited.
3. Rodeo Holdings Limited.

This delay is likely to cause an increase in the agreed cost of J$850,000 stated in our engagement letter, dated August 21, 2002.

We attach a letter from Mr. Basil Cunningham of J.B. Causwell & Co., auditors of Equipment Maintenance Limited; informing us of the reasons why he has been unable to provide us with the above-mentioned financial statements or unaudited management accounts.

On the basis of the above, its seems unlikely that the valuation of the shares will be complete within the additional time provided by the court."

Here was clear evidence, on his submission, that there would be further delays in the completion of the valuation, and by necessary implication, a further postponement of the petitioners' receipt of the amounts to be paid for their shares in the subject company, in the time contemplated by the original order. The petitioners are the ones who are being jeopardized by this delay, and not the respondents, and the delay was also occasioning increases in the cost of KPMG's engagement. Mr. Batts continued by referring to a letter of September 13, 2002 from JB Causwell & Company the auditors of Equipment Maintenance Limited. That letter indicated that "due to the changes in the management structure and also the accounting staff, information being requested takes a longer time to reach us, this eventually delays the completion of the financial statements. We are however doing our best to complete the same."

Mr. Batts referred in particular to two paragraphs of the affidavit of the Clackens. Paragraph 9 states: "That it is an honest belief that the respondent and/or the company's auditor are deliberately delaying giving KPMG Peat Marwick the information and the documents requested so that they can prepare the valuation as most of the company documents needed by KPMG Peat Marwick were supplied to Mr. Cunningham from January 2002 and any other information needed would be accessible by Richard Causwell and the new management of the company. Indeed, all monthly and end of year reports up to the 31st day of December 2001 are in a vault at the company's premises. By letter dated the 27th day of August 2002, a copy of which is attached as Exhibit "DC and LC 7" I Dwight Clacken wrote to Mr. Cunningham pointing out all of this". The affidavit continued at paragraph 10, "The effect of this delay means that it is going to take longer for the respondent to purchase our shares as the Consent Order of the 29th day of May 2002 provides that payment of the purchase price of our shares in the company is not payable until the valuation is prepared". This is in fact the purported foundation of the application.

Mr. Batts then referred to paragraphs 13 and 14 of the affidavit of the Clackens' in which they refer to requests made to the respondents for specific documents and information which requests had not been complied with. He also referred to paragraph 15 of the petitioners' affidavit discussing the issue of the failure to re-institute certain insurance coverage in relation to the property owned by Equipment Maintenance Limited. Mr. Batts in discussing the interval between the 5th of July when the draft engagement letter was sent to the respondent's attorney, and the ultimate date of signing, said that this delay was due entirely to the respondent. Mr. Batts also made the point that in paragraph 18 of the Clackens' affidavit and at Exhibit DC & LC 3, are a set of letters, one of which, (Mrs. Levers letter of September 19, 2002) states: "Mr. Cunningham did a previous valuation and he would therefore have to hand over all the material requested by KPMG." Mr. Batts suggested that in the circumstances he could see no reason why there was such a delay in providing the information necessary to conclude the valuation since Mr. Cunningham had already done one. He accordingly, could see no virtue in the suggestion

of respondents' counsel "to write a joint letter to Mr. Cunningham", who is an employee of J.B. Causwell and Company, the company's auditors.

In relation to the difficulty in supplying the information he suggested that it was strange that Mr. Cunningham had been invited to come to the office to look for the information needed by KPMG Peat Marwick, but not the Clackens who, he suggested, would be better able to find it. He submitted further that if the company is unable to provide the information in order to facilitate the valuation on the purchase of the petitioner's shares then it is probably just as well to order the winding-up of the company today.

Finally, Mr. Batts submitted that the relief in relation to Mrs. Clacken and her claim to be allowed to attend directors meetings, was one which could be supported based upon the articles of associations and the annual returns with particulars of directors of Equipment Maintenance Limited. These he submitted showed that Mrs. Clacken was indeed a member of the board of directors.

With respect to the request for numerous pieces of information and documents which had been made by the petitioners of the respondents, he submitted that company directors have a duty to oversee carefully the business of the company of which they are directors. In support of this proposition, he cited "The Law and Practice Relating to Company Directors" by Vincent Powell-Smith, and page 80 of that text. He adopted for purposes of this submission the propositions set out on that page in the text referred to. He also cited "The Company Director and the Law" by John A. France. In particular he referred to chapter 5 of that publication which dealt with the role of the company director as it relates to the annual report and the accounts of the company. Again he adopted the propositions set out in chapter 5 of this text. Finally, he cited the case ***"Conway and Others v Petroneous Clothing Company Limited and Others,"[1971] 1 All E.R. page 185.*** It was the burden of the submission, based on this authority, that at Common Law, a company Director had a right to inspect the books of accounts of his company, although this was not a right specifically conferred under the U.K. Companies Act 1948, section 147 (3). In further support of this he pointed out that the court would have a discretion,

according to that authority, to assist a Director in his efforts to secure appropriate information, unless there was evidence that such a course would be likely to be injurious to the company.

Based upon these submissions Mr. Batts urged the court to conclude that there was a real delay which would affect the petitioners in seeking to carry out the terms of the consent order of May 29 as it would delay payments for an indefinite period, and in any event much longer than the Order had contemplated at the time when it was made. He urged the court to come to the conclusion that the delay in finalizing the engagement letter was the fault of the respondents and that the consequential delays would impact negatively upon the applicant/petitioners. It was therefore necessary and just that the application be granted.

In his response, Dr. Barnett for the respondents submitted that what the petitioners were seeking to do was to vary the terms of a consent order. He submitted that this was not an attempt to find a better way to implement the court order. Rather, it was an attempt at altering the terms of the order. It was, in his submission, a basic principle, that a consent order could only be altered by consent. In the absence of consent, there was no power to alter.

In his view, the time limits between the conclusion of the valuation and the time for payment had been fixed by agreement of the parties. Those limits recognized the practical considerations relating to the securing of substantial sums of money. The valuation of the shares of the company involved a number of different things, mainly the revaluation of the company's assets which is contemplated by the original order. There was also the need to examine accounting records in order to establish true liabilities. He submitted that without that background, the raising of funds on the basis of the shareholding of the respondents would not be possible. The period contemplated by the order is of great importance and ought not to be changed.

With respect to the petitioners' complaint that the respondents had been the cause of the delay in the finalization of the letter, he submitted that this complaint was not well founded. The respondents, like the petitioners, had received the draft engagement letter from KPMG on July 5, 2002. Although the parties had jointly approached KPMG, the draft letter had not been settled in consultation with both of them. It was reasonable that the respondents should seek advice on the draft terms of engagement and there were good reasons why it took some time to be resolved. Indeed, there had been attempts to fix a time for a meeting to review the terms but this had proven difficult. The matter had nevertheless been settled eventually and the respondents had signed the letter and made the appropriate payment.

On this submission, he also raised a second point. This was to the effect that the audit for the year 2000 was now in hand. Both parties have been complaining about the delay in getting information. He reminded the court that the appointment and dismissal of auditors was a matter which was not necessarily one of easy resolution since there were statutory requirements in effecting this. He therefore submitted that the joint approach to the auditor which had been recommended by the attorney for the respondents ought to be considered.

Finally, with respect to the copious requests for information which was one aspect of this application, he submitted that this request must be carefully examined. The value of the assets had to be taken account of by the auditors and all information being requested would need to be supplied to the auditors. There was also a concern by the respondents that the petitioners would have access to sensitive information, such as the names of customers, in circumstances where such information could be used by the petitioners to the prejudice and disadvantage of the company.

He submitted that on a review of the authorities, there was no basis for the submission that the petitioners were entitled to the information which they were seeking to obtain. The court should take into account that a court appointed auditor would be examining the records and could take into account all relevant matters relating to the period in relation

to which information is sought. He accordingly submitted that the order sought by the petitioners, should be refused.

It is the view of the court that there are two essential questions which have to be considered. These may be stated thus:

> A. Does the Court have jurisdiction to grant the relief of the nature sought under Liberty to apply part of its earlier Order?
> B. If it does, what is the nature and extent of the relief that may be afforded to the applicants?

Before answering those questions however, I wish to comment upon Dr. Barnett's submission on the effect of the consent order of May 29, 2002. It is I believe, trite law, that a judgment entered into "By Consent" may not be set aside, or reversed without leave of the Court granting it. While it arises out of the consent of the parties, this order is nevertheless an order of the Court. It therefore is clearly within the purview of the court to make subsequent orders in explaining or clarifying a previous order, or in order to give effect to what the court intended. It is, after all, the *Order of the Court*. It seems to me that that must be the basis upon which the parties submit a draft consent, and upon which an order of the court is then to be made.

As part of the first of the two (2) questions posited above, I ask myself whether an application for relief such as is sought here, may properly be brought under "Liberty to Apply". I have found but two (2) authorities which deal directly with the subject. According to the 1999 Supreme Court Practice Vol. 2 page 17A-16

> "Liberty to apply" may be given in every order of the court to enable matters to be dealt with in the working out of an order but not when the order is final. (See per Chitty J. in ***Penrice v Williams 1883 23 Ch.D.*** page 353). In ***Abbott v Abbott [1931] 49 TLR page 207,*** it was held that after a consent order for alimony, *Pendente lite,* the words "Liberty to Apply" in the order gave the district judge power to review the order. In that case Langton, J. stated: "The expression "Liberty to apply" means what it says – namely that leave was reserved to both parties to make any application concerning any part of the order at any subsequent time. It was argued on behalf of the petitioner that a sufficient meaning could be given to the expression "Liberty to apply" by taking it as having reference only to the

> time at which a payment ordered should be paid. This would mean that the "Liberty to apply" did not cover the most serious part of the order and indeed the only matter which the parties were really likely to wish to review. I do not think that the words "liberty to apply" can or ought to be read in this restricted sense, and consequently I hold that the original order of the registrar is open to review."

The extent and breadth of this view of Langton, J. on "Liberty to Apply, though not the principle, were doubted in the subsequent case of ***Cristel v Cristel reported at 1951 2 K.B. page 725.*** In that case Somervell L.J. in giving the decision of the Court of Appeal stated:

> I think, with respect, that Langton, J., in his judgment below, in discussing these words "Liberty to apply", used language which goes beyond what was necessary for the decision of that case, having regard to the way in which it was dealt with by Lord Hanworth. Langton, J., said (5): "the expression 'Liberty to apply' means what is says, namely that leave was reserved to both parties to make any application concerning any part of the order at any subsequent time". I think that that is *too wide a statement*. (Emphasis Mine) As I have said, prima facie the words "Liberty to apply" refer, in my opinion, to the working out of the actual terms of the order".

In the same case Denning. L.J. (as he then was), added a few words of his own and for the purpose of the matter before me, I adopt these words:

> "If there were any unforeseen change of circumstances, for instance, if the wife were left by will another house, or if she took an adulterer to live with her in this house, I should have thought that the "Liberty to apply" would enable the court to remedy the position. ***Abbott v Abbott*** would appear to be sufficient authority for that. But when there is no change of circumstances, I do not think that the court can alter or vary the agreement of the parties under the "Liberty to apply". It can only do what is necessary to carry the agreement into effect".

It seems clear that where there are "changes in circumstance", the court may intervene under the provisions of "Liberty to apply". A brief review of the relevant terms as to timing in the instant case is appropriate here. The original order of the court contemplated that the valuation of the shares in the company would have been effected "within ninety (90) days of the date of this order, or such other period as may be approved by the Court from time to time". The second order of August 22nd, 2002, in paragraph 2 amended

paragraph 2 of the original order "by extending the period of ninety (90) days by a further thirty-one (31) days from the 22nd day of August 2002, to the 23rd day of September 2002". The original order also contemplated the first payment of a deposit of 22% of the purchase price was to be paid within a further ninety (90) days of the delivery of the valuation to the respondents or their attorneys-at-law. Thereafter, the balance of the purchase price was to be paid within a further period of 180 days or a further 90 days (a total of 270 days), if the respondents were unable to complete the payment by the earlier date.

The fact is that the extension granted by the August 22nd Order has now passed. All the other dates which are consequential upon that date are now moot. There are, without doubt, "significant changes in circumstances". What then is to be done? Is the court to sit idly by and await the conclusion of the valuation whenever this may be done, or ought the court to countenance an application for the re-configuration of the times it had in mind when it first made its order? I think that the answer is obvious. I say so, with respect, for a number of reasons.

At this point in time, I would venture to suggest there are no applicable periods, since the basic date for the completion of the valuation, by which all other periods are to be defined, has now passed. I make no finding as to responsibility for the delay, and indeed, it might be quite inappropriate for me so to do. However, it is not unreasonable to conclude that the longer the delay, the more likely it is that the petitioners would be at risk for their investment, since they are no longer intimately involved in the running of the company. I also should observe, that the original order of the court spoke of a valuation as at December 31, 2001. I am at a loss therefore to understand why a revaluation of assets exercise, mentioned by Dr. Barnett, to be carried out at this time would have any implication for such valuation of the company as at December 31, 2001.

Dr. Barnett also in opposing the application, suggested that time frames in the original order had been based upon practical considerations such as the need for the respondents to raise substantial sums of cash to pay for the shares. At the same time he submitted that

the respondents could not approach financing institutions without knowing what the valuation of the shares is. I do not accept this. In fact, the two propositions are to some extent inconsistent. The respondents cannot be heard to say, "the time is needed to raise the substantial sums of money to pay the petitioners", and then say: "We cannot approach financiers because we do not know what exactly will be needed". This court is sufficiently *au fait* with the workings of financial institutions, both locally and overseas, to know that preliminary discussions are set in motion long before final figures for investment are concretized. Nor am I persuaded that the parties who have together operated this business for several years, do not have, at least, some rough and ready ideas as to its worth as at December 31, 2001. In any event, none of these considerations being urged to resist the petitioners' application, was unknown to the respondents on May 29, 2002. Indeed, it has not been suggested otherwise by the respondents.

It will be apparent from the foregoing, that I am satisfied that the court has jurisdiction to grant the application either in terms of the summons, or otherwise upon such terms and conditions, as it may think fit. It therefore has the power to amend the time frames set out in its first order. A fortiori, now that the critical date for the completion of the valuation has passed, it must set new dates if the order is not to be meaningless.

I turn now to the second question that I raised above; that is, the nature and the extent of the relief that is appropriate in the circumstances. The first fact that has to be borne in mind is that there is no evidence before me as to whether the periods suggested in the application are reasonable in all the circumstances. The petitioners have not, for their part, indicated that these are reasonable periods to be imposed and given the Court's imprimatur. The court must be seen to act reasonably. While the respondents have given no indication as to when they foresee the valuation being done, and their being in a position to pay any monies due, this does not lead to a conclusion that they may not have ideas as to the reasonableness of any periods for effecting the valuation and payment, in the absence of which the company would be ordered to be wound up.

I am also satisfied that this court cannot stand idly by while time passes on a matter such as this, the resolution of which, has crucial implications for the livelihood of the petitioners, and maybe of the respondents. At the same time, the court cannot get ahead of itself, by assuming the nature of the evidence which may be available, to determine the reasonableness or otherwise of the periods sought in the application. In the circumstances, I have decided that the proper course is to grant the application partially.

I would accordingly order as follows:

1. Order in terms of paragraph 2 of my Order of May 29, 2002, save that instead of the period applicable being "within 90 days of the date" of that order, there shall be substituted the date, 31st January 2003, as being "such other date as the court thinks fit."

2. In order to ensure completion by that date, the respondents shall deliver and/or cause to be delivered by the Company's auditors, not later than January 15, 2003, all such information as shall be required by KPMG Peat Marwick in order to complete the exercise by the said date.

3. Failing the completion by January 31, 2003, the valuers shall be authorized to use the last available audited accounts of the company, being those for the period ending not earlier than December 31, 2000, in order to arrive at an approximate valuation for the purposes of the purchase of the shares of the petitioners by the respondents. (If there is any evidence that there is any willful obstruction or frustration of the efforts of the valuer to complete its job by the date herein, the Court will require such persons to show cause why they should not be cited for contempt).

4. A deposit of 22% of the value of the petitioners' shares, as determined by paragraph 1or 3 of this order, is to be paid to the petitioners or their attorneys-at-law, not later than 28th of February 2003.

5. Counsel for both the petitioners and the respondents are to make written submissions to be delivered no later than the 28th of February, 2003, supported by appropriate affidavits as to a reasonable time, in total not being more than 210 days, nor less than 120 days, after January 31, 2003, by which all monies are to be paid.

6. On a date to be agreed with the Registrar, not being later than 14 days after the date in 4 above, the matter is to be set down for a maximum of two (2) hours, for counsel to attend at my chambers to explain their affidavits and answer any questions the court may have in order to make its final decision as to the time to be fixed for payment of the outstanding balance.

7. Interest shall accrue on the balance purchase price at the Government of Jamaica treasury bill rates as published by the Bank of Jamaica from the date the deposit becomes payable, February 28, 2003, until payment and such interest shall be computed monthly and payable within five (5) days of the end of each month until the balance purchase price is paid.

8. The failure to meet any date in this order, shall, in and of itself, be a sufficient ground for an Order, that the Company be and is hereby would up pursuant to the provisions of the Companies Act and a Chartered Accountant to be agreed upon by the parties and if not agreed to be appointed by the Court, to be appointed Liquidator for the purposes of winding up the Company which shall take effect, immediately on the making of such Order.

9. With respect to the paragraph 4 of the Summons for an Order that Lynne Clacken is not to be excluded from directors' meetings, I make "No Order".

10. With respect to paragraph 5 of the Summons for various items of information, that application is denied. I do not believe that the authorities cited by Mr. Batts

supports my making such an Order. Nor do I see how it will assist in the early resolution of this impasse. Rather, it could only serve to delay it.

11. Paragraph 5,6,7, and 8 and paragraphs 10, and 11 of the Order of May 29, 2002, are specifically included in this order and made a part thereof, save that paragraph 8 is amended by deleting the period of eighteen months from the date of that order and inserting instead, the period of twelve (12) months from the date of this Order.

12. Costs of this Summons, to the Petitioners, to be agreed and if not, taxed.

13. Leave to appeal granted, if necessary.

14. Liberty to Apply.