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**NOTICE TO PARTIES OF THE COURT'S  
MEMORANDUM OF REASONS FOR DECISION**

**SUPREME COURT CIVIL APPEAL NO COA2021CV00045**

**APPLICATION NO COA2023APP0008**

<b>BETWEEN</b>	<b>EXCLUSIVE HOLIDAYS OF ELEGANCE LIMITED</b>	<b>APPLICANT</b>
<b>AND</b>	<b>ARC SYSTEMS LIMITED</b>	<b>RESPONDENT</b>

**TAKE NOTICE** that this matter was heard by the Hon Miss Justice P Williams, the Hon Mr Justice D Fraser and the Hon Mr Justice Brown JJA, on the 5, 6 and 9 June 2023, with Gordon Robinson instructed by Winsome Marsh for the applicant and Ian Wilkinson KC, Lenroy Stewart and Daniel Beckford instructed by Debbie-Ann Gordon & Associates for the respondent.

**TAKE FURTHER NOTICE** that the court's memorandum of reasons, as delivered orally in open court by the Hon Miss Justice P Williams JA, is as follows:

[1] This is an application seeking the following orders:

- "1. This appeal be struck out;
2. Alternatively, time for the filing of skeleton arguments by [Exclusive Holidays of Elegance Limited] be extended to twenty-one (21) days from the date of this order;

3. Costs of this Application be [Exclusive Holidays of Elegance Limited] [sic] to be Paid forthwith;
4. Such further or other relief as this Honourable Court deems just.”

[2] On 7 May 2021 Batts J, sitting in the Insolvency Division of the Supreme Court, made a receiving order against Arc Systems Limited ('Arc'). At the time, Batts J also ordered that, subject to the provision of security, Mr Kenneth Tomlinson “was appointed the Receiver and Trustee of the property and estate of the Arc Systems Limited (in Bankruptcy)”. Batts J gave leave to appeal. The formal order indicates that the parties before the court were Exclusive Holidays of Elegance Limited ('Exclusive Holidays'), as the applicant, and Arc, as the respondent.

[3] On 27 May 2021, Arc filed a notice of appeal in which the decision of Batts J is being challenged on several grounds. On 3 June 2021, Arc filed an application for a stay of execution of the judgment and on 28 June 2021, it was considered on paper by Brooks P. The application was refused. Exclusive Holidays subsequently applied for security for costs in the sum of \$3,795,000.00, and, on 6 October 2021, the matter was heard by Simmons JA, who made the following orders:

- “1. [Arc] shall give security for [Exclusive Holidays'] costs of defending the appeal in the amount of \$3,795,000.00 within 30 days of the date of this order, such sum to be paid into an interest bearing account in a commercial bank in the joint names of the respective attorneys-at-law for the parties pending the hearing and determination of this appeal.
2. Costs of the Application to be costs in the Appeal.”

[4] Exclusive Holidays, in this application, seeks an order striking out the appeal on the grounds that Arc has failed, neglected or refused to obey the order for the provision of security for costs and has not provided any proof of consent by the receiver for the proceedings.

[5] It was noted that the order for the provision of security for costs did not include an 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 as required by rule 2.11(4) of the Jamaica Court of Appeal Rules 2002 ('the CAR'). Further, there is no indication that there was a prior written request for such security by the applicant before the application for security for costs was made as required by rule 2.11(2) of the CAR. A prior application, that was not pursued, and which may be regarded as notice, cannot amount to the written request required by the rule.

[6] We have considered the helpful submissions of counsel along with the material provided. We recognise that section 283 of the Insolvency Act, 2014, provides that orders made in insolvency matters shall, at the instance of any person aggrieved, be subject to appeal in the same manner as other orders made by the court. Batts J made an order appointing a receiver and granted leave to appeal that order. Arc, the only party to the proceedings before Batts J, which could have been aggrieved by that order, launched the appeal challenging the appointment of the receiver. It seems somewhat impractical for Arc to be required to seek the consent of the receiver to pursue an appeal against the appointment of the said receiver in circumstances where the court had already granted leave to appeal.

[7] It has been held that there are limited circumstances where the directors of a company have the power to bring proceedings, even after the appointment of a receiver having the power to conduct proceedings on the company's behalf. The significant consideration will be that of the funding for the litigation and, where the receiver is not called upon to provide such funding from the assets of the company, there will be no need for the receiver's consent (see **Newhart Developments Ltd v Co-operative Commercial Bank Ltd** [1978] QB 814; **Sands v Layne and another** [2017] 1 WLR 1782; and **Duke Holness and Another v Palmyra Resort & Spa Ltd (in Receivership) and Another** [2014] JMSC Civ 123]). Accordingly, the absence of the

consent of the receiver in the circumstances of this case ought not to be fatal to Arc pursuing the appeal.

[8] Simmons JA, in her consideration of the application for security for costs, noted that Mr Lackie Horne, company director of Arc, in an affidavit filed on 3 June 2021 in support of the application to stay the execution of the orders of Batts J, had indicated that he was prepared to source and pay into court \$25,825,040.00 as a condition of the stay. Simmons JA was satisfied, from this indication, that Arc would be able to provide security for Exclusive Holiday's costs and proceeded to make the order. We are satisfied that the order for security for costs was made against Arc, in its own right, as the respondent (appellant in the appeal), independent of the receivership.

[9] The deficiencies in the orders for security for costs are acknowledged. However, there is no application before us to set it aside. The order made by Simmons JA could have been varied or discharged on an application made within 14 days of that order pursuant to rule 2.10(3) of the CAR. Therefore, no such application could be credibly mounted at this time, given the almost two years that have passed since the order was made. The requirement for an order stating the consequence for failure to comply with the order for security for costs was mandatory, especially given the draconian nature of the consequence. It is inconceivable, however, that one could disregard the orders of the court and not expect there to be some consequences. The processes of the court must still be protected even where there is non-compliance and no stated consequences for the breach of a court order.

[10] In the circumstances, we are minded to exercise our power to make orders for the purposes of managing the appeal and furthering the overriding objective pursuant to rule 1.7(2)(n) of the CAR. The security for costs order should remain, and, for the avoidance of any doubt, it is against Arc as the appellant in the appeal. The consequence of failing to comply with the order within 30 days will be that the appeal be dismissed with costs.

[11] Executive Holidays admits to being in breach of the rules in failing to have filed their skeleton submissions in the appeal in the time stipulated. The explanation that it was awaiting the result of this application to do so, whilst not entirely acceptable, is not unreasonable given the circumstances, and, as such, we are minded to grant an extension of time to file those submissions. Arc failed to file skeleton submissions relating to this application to strike out the appeal within the time specified. Accordingly, given the lack of compliance by both parties, no order as to costs of this application is considered most appropriate.

[12] Accordingly, the orders of the court are as follows:

1. The application to strike out the appeal is refused.
2. The application for an extension of time in which to file and serve skeleton submissions is granted.
3. Exclusive Holidays is to file and serve skeleton submissions within 21 days of the date hereof.
4. Arc shall give security for Exclusive Holiday's costs of defending the appeal, in the amount of \$3,795,000.00, within 30 days of the date of this order, such sum to be paid into an interest bearing account, in a commercial bank, in the joint names of the respective attorneys-at-law for the parties pending the hearing and the determination of the appeal.
5. If the security for costs is not provided in the amount, in the manner and by the time stated at order no 4 herein, the appeal is dismissed with costs to Exclusive Holidays to be taxed if not agreed.
6. No order as to costs of this application.