J A M A I C A

IN THE COURT OF APPEAL

APPLICATION NO. 133/09

BETWEEN	LEICESTER GREEN	APPLICANT/CLAIMANT
AND	JAMAICA REDEVELOPMENT FOUNDATION INCORPORATED	RESPONDENT/DEFENDANT

Miss Melissa Cunningham instructed by **Raphael Codlin & Co.** for the Applicant and **Mrs. Alexis Robinson** instructed by **Myers, Fletcher & Gordon** for the Respondent.

IN CHAMBERS

September 8, 10, 2009

PHILLIPS, J.A.

1. On the 10th September, 2009 I granted this application and made the following orders:

    1. Leave granted to the Applicant Leicester Green to file within five (5) days of the date hereof an appeal against the order made by the Hon. Mr. Justice Pusey on April 1, 2009 and May 8, 2009.

    2. That a date should be fixed as soon as practicable for the Case Management Conference with regard to the conduct of the appeal.

    3. It is recommended that the appeal be heard if possible in the Michaelmas Term.

4. No order as to costs in the appeal.

These are my reasons for granting the application.

2. The application before the Court filed on the 6th July, 2009, by the applicant Leicester Green, was for an order that leave be granted to him to file within five (5) days of the order an appeal against the Order made by Pusey, J. on April 1, 2009 and May 8, 2009 refusing the applicant's application for an injunction to restrain the respondent either by itself or through its agents from selling, mortgaging or in any other way, disposing of property belonging to him until the trial of the action filed in the Supreme Court between the parties. The application for the injunction was based on several grounds set out in the Notice thereof.

3. An interim injunction had been granted *ex parte* by Williams J. (Ag.) on the 12th December, 2008 on terms inter alia that the Claim Form and Particulars of Claim be filed within seven (7) days. This was done. Thereafter the *inter partes* application for the injunction was heard by Pusey J.

4. There were no written reasons for judgment submitted by Pusey J. but both counsel agreed that in refusing the injunction Pusey J. relied on the dicta by Morrison J.A. in the Court of Appeal case of ***Michael Levy v. Jamaica Redevelopment Foundation Inc. and Kenneth Tomlinson***, SCCA No. 26/2008 delivered on the 11th July, 2008.

5. The issues before me on this application are whether the applicant has shown good reasons for failing to file a Notice and Grounds of Appeal in time and whether there were any arguable grounds of appeal.

The Proceedings in the Court below

6. In the Statements of Case before the Court, the Applicant pleaded that he is the owner of property registered at Volume 1198 Folio 352 of the Register Book of Titles and that he was at all material times Managing Director of Gold Star Motors & Rental Limited ("the Company") and guarantor of a loan made to the Company by Workers Savings & Loan Bank ("WSLB") for $2.2m initially and later a further $2m. The loan was in time acquired by FINSAC and in due course by the Respondent. The interest rates on these loans were initially 10% and were increased from time to time and, despite having paid back some $10m to WSLB and a further US$33,251.12 and $1.2m to FINSAC, the Applicant stated that he was advised by a representative of the Respondent that there was a balance owing of $7m of principal and $3m of interest. This notwithstanding, the Applicant received a Registered Notice of Sale from the Respondent claiming a balance due of $31,032,910.32. The Applicant's property was thereafter advertised for sale giving rise to the filing of the application for injunction and then this action. The Applicant challenged the balances claimed to be owing by the Respondent and the interest rates charged, which he said were in excess of the originally agreed rates and which were in any event "oppressive, unreasonable and unlawful". In addition the Applicant maintained that the exemptions from the Moneylending Act relied on by the Respondent were void.

7. The Respondent in its Defence relies, as assignee of the original WSLB debt, on an Agreement to Restructure Existing Debt ("the Agreement") entered into between the Applicant, the Company and the Respondent, and the Respondent claims that as at the date of the Agreement the amount owing by the Company was US$402,412.00. Despite various discussions between the parties the debt remains outstanding and as at the date of the Statutory Notice for Sale the total amount owing was $31,032,910.23. The Respondent maintained that the interest rates charged were applied by virtue of the Agreement and were not oppressive. The Respondent relied on the Registration of Titles Act, and the Moneylending (Exemption) (Jamaica Redevelopment Foundation Incorporation) Orders for the years 2002-2008.

8. Pusey J. had before him three (3) Affidavits filed by the applicant, Mr. Leicester Green, and one by Miss Janet Farrow on behalf of the respondent. I will refer to portions of these affidavits later in treating with the submissions of counsel in respect of the application before me.

9. In the interest of brevity I have not set out counsels' submissions in their entirety, but have tried to capture the essential elements and hope that I have done justice to the industry of counsel.

Applicant's Submissions

10. Counsel for the applicant submitted that there were good reasons to explain why the Notice of Appeal was not filed in time. The judgment of Pusey J.

was delivered on the 8th May, 2009. The Notice of Appeal ought to have been filed 42 days thereafter, on the 22nd June, 2009. The application for extension of time was filed on the 6th July, 2009, 14 days after expiry of the time for appealing. On the face of it, that would not appear to be unreasonably late but that is not the end of the matter and counsel for the respondent submitted to the contrary.

11. The applicant in his affidavit in support of the application, stated in paragraphs 5 and 6 thereof, that he was desirous of appealing the matter and had so informed his attorneys, who instructed him to attend upon their chambers. The applicant stated that on the last day for the appeal to be filed he did not attend on his attorneys' chambers but "*instead was trying to ensure that my attorneys were properly instructed to carry out the appeal.*" He also stated that he was unable to attend upon his attorneys as he "*was desperately looking about matters to obtain funding to pay a portion of the amount that the Defendant is claiming that is owed so as to prevent them from selling my family home.*" Counsel submitted that what is set out above is a reasonable explanation as to why the appeal was not filed in time.

12. I would wish to comment here that the applicant has not stated why he did not attend on his attorneys throughout the 42 days allotted for the filing of the appeal. In his affidavit he only addresses not attending on his attorneys on the final day. He also depones to trying to find money to pay the defendant but does not explain why in the process of so doing he was not able to instruct his attorneys to appeal the order made by Pusey J. the effect of which was that there

was no restraint on the defendant with regard to its exercise of the statutory powers of sale over the subject premises.

13. Counsel for the applicant submitted further that the applicant was likely to succeed on appeal. She submitted that the Learned Judge erred when he relied on the dicta of Morrison J.A. in the ***Michael Levy*** case (supra), when dismissing the application to extend the injunction pending appeal in that case. Counsel insisted and maintained that in the instant case there are different facts.

14. Counsel relied inter alia on paragraphs 8-9 in the affidavit of urgency of the applicant sworn to on the 10th day of December, 2008 and paragraph 19 of the Particulars of Claim. In essence the applicant maintained that the amounts being claimed as owed by the respondent were inaccurate, so too the interest rates being charged. The applicant claimed that he had been told by a representative of the respondent that $7M principal was outstanding and $3M interest yet in excess of $31M was being claimed. The applicant claims that the applicable interest rate was 12% as can be seen from items 7 and 8 in the schedule to the Agreement between the parties, yet the respondent was claiming 31%.

15. The applicant also claimed that the respondent was requiring that the sum be paid in United States currency. Also the respondent was relying on the said Agreement, particularly clause 13 thereof, which the applicant claims should be rejected in its entirety since it was never brought to the attention of the applicant and he was not given an opportunity to obtain legal advice. But in any event,

even if the agreement was applicable the interest to be charged should be only 20% and not 30% being claimed by the respondent. The applicant submitted further that he was not the primary debtor, only the guarantor and as his premises, used as collateral for the mortgage was the family home, the learned trial judge should have considered this when exercising his discretion whether to grant the injunction, particularly since the respondent is a foreign company which appears not to be in good standing and which may not be in existence at the end of the trial. He also claimed that the exemptions to the Moneylenders Act on which the respondent relied were void.

On the basis of these submissions, the applicant said there was more that an arguable case, there were serious issues to be tried and the court ought to grant the extension of time to file the Notice of Appeal.

Respondent's Submissions

16. With regard to the issue of delay, needless to say counsel for the respondent challenged the explanation of the applicant and submitted that although the application was filed 14 days late, it was nonetheless evidence of unreasonable delay in the circumstances of this case. Counsel submitted that the applicant was present when the judgment of Pusey, J. was delivered and he has given no evidence of any extenuating circumstances as to why he could not attend on his attorneys so that the appeal could have been filed on time.

17. With regard to the issue of whether there is an arguable case on appeal, counsel submitted that there was an outstanding debt due to the respondent; and

there had been no allegation of fraud or wrongdoing on the part of the respondent. The respondent has a registered mortgage over the applicant's property; further the Agreement is the document which governs the relationship between the parties now. The restructuring permitted a compromise of the original debt which was in excess of US$400,000 loan to US$150,000.00.

18. Counsel relied on several clauses in the Agreement, inter alia, clause 3, which permitted claims to be made in Jamaican currency, clause 17 which indicated that any variations to the Agreement must be in writing and clause 13 which indicated how the respondent was to proceed once a party was in default in respect of the debt. The respondent claimed that if the Agreement was not applicable, the earlier documentation in respect of the loan, which would be applicable, specifies interest ranging from 19.5% to 45%. The respondent submitted further that there was no pleading with regard to the failure to obtain independent legal advice which is a belated and insincere claim without any basis and without merit.

19. The respondent indicated that the dicta in the ***Michael Levy*** case was applicable and also relied on the fact that the Court had already dealt with the efficacy of the exemptions granted to the respondent under the Moneylenders Act. The respondent indicated there was ample information before Pusey J. in respect of the amount outstanding and the applicable interest rates, the fact that the company was in good standing and that the balance of convenience favoured the respondent. Counsel submitted further that the fact that the applicant had

used the family home as collateral for the loan did not prevent the judge from concluding that damages were an adequate remedy.

Counsel therefore submitted that the balance of convenience must lie with the respondent as:

1) Moneys are outstanding;
2) There is no reasonable ground of appeal;
3) The Notice and Grounds of Appeal are out of time; and
4) The Court's interest is in seeing that cases are dealt with justly and ensuring that there is good use of the Court's resources.

Counsel asked that the application be refused.

20. The matter was adjourned at this stage of the proceedings for my ruling. However, the bundle comprising the documents was only submitted to me on the morning of September 8, 2009 during the hearing and on perusal I discovered that Mr. Codlin, counsel on behalf of the applicant, had made a submission before Pusey J that the Agreement was a curious document bearing two different dates. The signatures of the applicant and the company, after referring to items 7 & 8 in the schedule, bore the date of the 7th May, 2003 and the Agreement which contains clause 13, bore the date of 20 May, 2003, fourteen (14) days later. I refer now to the further submissions from counsel as requested by me.

Additional Submissions

21. Counsel for the applicant reiterated her earlier submissions and indicated that the applicant had stated that the document signed was not as bulky as that

attached to Miss Farrow's affidavit as the Agreement. Counsel further submitted that the instant case falls under the principles enunciated in ***Flowers, Foliage & Plants of Jamaica Ltd. v Jennifer Wright and others*** (1977) 34 JLR 447 and relied on the dicta of Rattray P "*the Courts of equity do not shackle themselves with unbreakable fetters if the justice of the particular case demands a more flexible approach*". Counsel submitted that the instant case was one in which the court was willing to make an exception where the document from which the respondent derives its power and authority to act is challenged. ***Rupert Brady v. Jamaica Redevelopment Foundation Inc. and others*** SCCA No. 29/2007, judgment delivered 12 June, 2008).

22. Counsel for the respondent responded to say that each page of the Agreement was initialed and so at some point between the 7th and 20th May, 2003 the applicant became privy to its terms. Counsel reiterated that this challenge to the Agreement was not in the pleadings or the earlier Affidavit. Counsel submitted that in the case, ***SSI (Cayman) Limited v. International Marbella Club SA*** (1987) 34 JLR 33, there was a claim for fraud and a challenge to the debt itself, yet the injunction was refused. Counsel challenged the efficacy of the ruling in ***Flowers, Foliage and Plants*** (supra). However, Counsel submitted that even if the ruling was correct there was no challenge in the instant case to the documents creating the debt, or to the guarantee, or the mortgage, or the applicant's obligation to pay the debt. Further, the primary debtor was not a party to the proceedings and in spite of the fact that the applicant was the managing director of the company, the primary debtor, there was no challenge

before the court from the primary debtor in respect of the indebtedness to the defendant.

23. Additionally, counsel submitted that the Agreement does not challenge the indebtedness and the guarantee signed by the applicant was unlimited and therefore the applicant undertook to pay whatever sums were found to be due in respect of the debt. Counsel reminded the court that the respondent is a mortgagee of a registered mortgage under the Registration of Titles Act and since there is no challenge to the validity of the debt which underpins the mortgage, there could be no serious issue to be tried and the Learned Judge was correct in ruling as he did in keeping with the principles enunciated in the ***Michael Levy*** case (supra) and the application for extension of time should therefore be dismissed.

24. It is also important to note that the documents referred to by counsel, to wit, the Agreement, the documents of good standing, the Certificate of Title and the mortgage instrument were all annexed to the Affidavit of Janet Farrow filed in respect of the application for the injunction before Pusey J. The issues relating to the amount outstanding and the applicable interest rate would therefore also have been before him by way of documentation.

ANALYSIS AND CONCLUSION

25. The powers of the single judge of the Court of Appeal are contained in Rule 2.11 of the Court of Appeal Rules under the Powers of a Single Judge, in

particular Rule 2.11(1) which states that: "A single judge may make orders.... (e) on any other procedural application."

26. The judge has a wide discretion as to whether to grant an extension of time for the filing of an appeal. The judge, however, must be guided by the fact that the applicant has been tardy in his conduct but mindful of the merits of the applicant's case as it would be futile to allow the appeal to proceed if it lacks merit and it would only consume more of the court's time and resources to no avail. The judge must also address whether, and to what extent, any prejudice will be suffered by either party.

27. As a consequence of the above the applicant must give reasons for the delay which are sufficient and satisfactory or the court is unlikely to exercise its discretion in his favour. (See P. *Harrison, J.A.* – ***Leyman Strachan v. The Gleaner Co. Ltd. & Others***, Motion 12/99 in the Court of Appeal).

28. Over three (3) decades ago Lord Guest observed in the decision of the Judicial Committee Privy Council that in the case of ***Ratnam v. Cumarasamy*** [1964] 3 All E.R. 933:

> "the rules of Court must, prima facie, be obeyed, and, in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

29. Indeed as stated by Panton J.A. (as he then was) in the ***Strachan*** case (supra), accepting the analysis of Griffiths L.J. in the Court of Appeal case of ***C M Van Stillevoldt BV v. El Carriers*** [1983] 1 All E.R. 699 the relevant matters for consideration in deciding whether to extend time are the following:

(1) length of the delay
(2) reasons for the delay
(3) whether there was an arguable case on the appeal; and
(4) the degree of prejudice to the Defendant if time was extended

Panton J.A. went on to refer to the Court of Appeal case of ***Palata Investments Ltd. & others v. Burt & Sinfield Ltd. and others*** [1985] 2 All E.R. 517 in which the Court held: "that when considering an application for an extension of time for appealing beyond the time limit specified, the discretion of the Court of Appeal is unfettered and will be exercised flexibly and with regard to the facts of the particular case. It said that where the delay is very short and there is an acceptable excuse, the Court will not as a general rule deprive the applicant of his right to appeal and in such a case it will not be necessary to consider the merits of the appeal." (pp.18 -19).

30. In ***Norwich & Petersburgh Building Society v. Steel*** [1991] 2 All E.R. 880, however, the Court of Appeal made it clear that it would take into account the length of delay and the reasons given but it would also consider the merits of the case and any prejudice to the Respondent, even though the reasons for delay may be acceptable. In ***Finegan v. Parkside Health Authority*** [1998] 1 All E.R. 595, which dealt with an application to extend time to file a notice of appeal

against an order of the Master who had struck out a claim for want of prosecution, the court allowed an appeal as the Judge had made his decision on the basis that in the absence of any explanation for the delay there was no material on which he could exercise his discretion in the applicant's favour. His judgment was overturned on appeal and the headnote of the case reads:

> "When considering an application for an extension of time for complying with procedural requirements, the court had, under Order 3, r 5, the widest measure of discretion. Accordingly, the absence of a good reason for any delay was not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension, but the court was required to look at all the circumstances of the case and to recognize the overriding principle that justice had to be done. Since prejudice formed part of the overall assessment and was a factor that needed to be taken into account in deciding how justice was to be done, it followed that the judge had erred in entirely disregarding it".

31. The court ultimately held that the most important consideration in matters of this nature is the overriding principle that justice must be done.

Whether the delay was unreasonable

32. As stated earlier, 14 days late does not appear unreasonable, on the face of it. In fact one can say that the delay is very short, but in my view there are no good reasons proffered for the delay in filing the Notice and Grounds of Appeal. The rules are there to be obeyed, and if as happens the party is tardy and falls short, then it is incumbent on the party to provide material on which the court can exercise its discretion in its favour. If the absence of good reason was sufficient I may not have granted this application. But as set out (supra) the authorities are clear, when considering an application to extend time the judge must look at all

the circumstances of the case, the merits, any prejudice to any party and make an overall assessment so that justice can be done.

Whether there is any arguable ground of appeal in order to exercise a discretion in the applicant's favour.

33. It is important that I indicate that I realize that my role at this stage is not to try the appeal; that is to ascertain whether Pusey J. was plainly wrong. My role is only to ascertain whether in all the circumstances, I should exercise my discretion and extend the time for the filing of the appeal.

34. I will deal with the grounds set out in the re-listed notice of application although they were not specifically argued in that way by counsel for the Applicant.

Serious Issues to be Tried (and the status quo to be preserved)

35. The essence of the first issue on behalf of the applicant appears to be one relating to what is the sum due and what is the applicable interest rate. The question as to whether the court ought to grant an injunction restraining the mortgagee from exercising its powers of sale in these circumstances, appears to have been somewhat settled by the Court of Appeal in the recent cases of ***Global Investment Limited & David Glanville v. Jamaica Redevelopment Foundation Inc. & Dennis Joslyn Jamaica Inc.*** (SCCA No. 41/2004, judgment delivered 22 July, 2007) and ***Rupert Brady v. Jamaica Redevelopment Foundation Inc. & others*** (supra) and the earlier decisions of ***Marbella*** and ***Flowers Foliage and Plants*** (supra) all of which were referred to by Morrison

J.A. in the ***Michael Levy*** case (supra). As I understand it, and I do not intend to rehearse the tension between the facts in those cases and how the law was applied as it has been set out with clarity in all five cases, the principles to be derived therefrom are "that it would be proper to grant an injunction to restrain the mortgagees' power of sale if there are triable issues as to the validity of the mortgage document upon which the mortgagee seeks to exercise his powers of sale."(Cooke J.A. Page 11 ***Global***) However, "as a general rule, a mortgagee will not be restrained from exercising its powers of sale on the ground that the amount due is disputed. He, however, may be restrained if the mortgagor pays into Court the sum which is claimed to be due." (Harris J.A. ***Global)***

36. In the instant case, the monies claimed to be outstanding have not been paid into court or otherwise, and there has been no indication of any intention or ability to do so. In light of the above the mere issue of a dispute as to the amount owed and the applicable interest rate may have persuaded Pusey J. to refuse the injunction and there may not seem to be reasonable grounds of appeal on this basis. However, if there was a challenge to the validity of the documentation on which the defendant relied, that could raise an issue as to whether there was a serious issue to be tried and which could affect the discretion as to whether to grant or refuse an injunction restraining the mortgagee from exercising its powers of sale, and if the learned trial judge did not take that issue into account when exercising his discretion, that could raise an arguable ground of appeal.

37. With regard to ground 4, I agree that S. 106 of the Registration of Titles Act would have no applicability to the circumstances of the instant case for as stated by Cooke J. A. in the ***Global*** case (supra) that portion of the section which refers to the remedy for the mortgagor being in damages, is not relevant in the consideration as to whether or not an injunction should be granted to restrain a mortgagee from exercising the power of sale. "*It is relevant after the power of sale has been exercised*" and concerns the remedy of a mortgagor when the mortgagee has embarked on an 'unauthorized or improper or irregular exercise' of the power of sale.

38. In any event both counsel indicated to me that Pusey J. relied on the ***Michael Levy*** case and on perusal of the decision of Morrison, J.A. the interpretation of this section did not feature in his judgment; and counsel for the applicant did not put forward any submissions in this regard before me.

39. That would therefore dispose of the grounds.

40. As indicated this is not a case where the reasons for the delay are good and sufficient but the Applicant has put forward some explanation for the delay and the delay is short. I therefore, on the authorities cited, ought to go on to consider whether there is any arguable case on appeal, and look at the prejudice to either of the parties and generally the justice of the case.

41. This is not an application on which a single judge could make any comment as to whether the ruling in ***Flowers Foliage and Plant*** was correctly

decided. The manner in which the interest was calculated and the basis for the amount stated in the registered notice was done pursuant to clause 13 of the Agreement which document is challenged by the Applicant. The transfer of the mortgage to the defendant was registered on the 9th December, 2003, subsequent to the execution of the Agreement. This issue therefore calls for a determination by the Court of Appeal as to whether the exercise of the discretion of Pusey J was correct.

42. If the Court of Appeal were to find that the learned trial judge was plainly wrong and the property had already been sold, the loss to the applicant could be substantial as it was the family home and the applicant could suffer prejudice. On the contrary, if the ruling of Pusey J is found to be correct, the registered mortgage would continue to protect the interest of the mortgagee.

43. In the interest of justice at this stage, I find that the applicant ought to be permitted to file his appeal and to have the Court of Appeal make its determination on whether the order made by Pusey J. refusing the injunction was correct. However, I was of the view that the matter should be determined with some dispatch, and as a consequence I made the orders as previously set out in paragraph 1 herein.