JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 119/2005

APPLICATION NO 218/2009

BETWEEN **JAMAICA INVESTMENT ASSOCIATES LIMITED** **APPLICANT**

AND **KES DEVELOPMENT COMPANY LIMITED** **RESPONDENT**

Dr Randolph Williams for the applicant

Abraham Dabdoub instructed by Chancellor and Co for the respondent

21 September 2010, and 18 October 2012

IN CHAMBERS

HARRIS JA

[1] This is an application by the applicant for an extension of time within which to file skeleton arguments and record of appeal.

[2] By a petition dated 28 October 2004, KES Development Company Limited (KES) made an application for the winding up of Jamaica Investment Associates Limited (JIA). Paragraphs 3 - 6 of the petition state:

"3. The Respondent Company is indebted to the Petitioner in the sum of $4,572,413.63 being monies paid by the Petitioner to First Caribbean International Bank Ltd. on behalf of the Respondent and director to the Respondent on account of mining operations expenses carried out by the Respondent.

4. That by letter dated July 26, 2004 the Petitioner caused to be delivered to the Respondent at the Respondent Company's registered office at 114 King Street in the parish of Kingston, a demand for the said sum of $4,572,413.63, requiring the Respondent to pay the said sum.

5. That more than twenty one (21) days have now elapsed since the Petitioner served the aforementioned demand but the Respondent has neglected to pay or satisfy the said sum or any part thereof or to secure or compound the same to the reasonable satisfaction of the Petitioner.

6. The company is unable to pay its debts."

An affidavit of Mr Hugh Scott, the managing director of JIA, verified the contents of the petition.

[3] On 6 October 2005 Anderson J ordered that JIA be wound up and the Trustee in Bankruptcy be appointed provisional liquidator. The learned judge granted a stay of execution for four weeks from the date of the order provided that JIA furnished a bond or guarantee in the sum of $3,000,000.00 within 14 days of the order.

[4] On 9 November 2005, a notice of appeal was filed by JIA. On 14 January 2006, on an application by JIA, an order was made staying the execution of the

order that JIA be wound up as well as the provisional liquidator's appointment. The conditional order was discharged.

[5] At the hearing of the application for the extension of time, Mr Dabdoub raised an objection that the order of Anderson J was an interlocutory order requiring leave to appeal. Dr Williams disagreed. Following this, the parties were requested to submit written submissions and authorities in the matter. Dr Williams complied but Mr Dabdoub has failed to do so despite numerous reminders being sent to him by the registrar. This matter has been long outstanding, accordingly, I feel compelled to proceed without having the requisite submissions from Mr Dabdoub.

[6] In his submissions, Dr Williams stated that in an interlocutory judgment or order made by a judge, leave of the judge or the court of appeal is required by section 11 (1) (f) of the Judicature (Appellate Jurisdiction) Act. Although an interlocutory judgment is not defined by the Act, the tests applied by the courts is "whether the application is of such a nature that whatever order is made thereon it must finally dispose of the matter in dispute", or, "whether the order made finally disposes of the rights of the parties". It was further stated by him that the order of the learned judge to wind up the applicant was final and not interlocutory. Citing Topham's Company Law 12th edition 1955 at 288, he stated that the object of the petition is that the company should cease to exist. The winding up order effectively discharges the company's employees, terminates its agencies, dismisses its directors, putting an end to the director's powers of

management of the company. The company, however, may nevertheless appeal in the company's name, he submitted. He cited Halsbury's Laws of England 4th Edition Vol 7 (3) page 2250, in support of this submission. It was his further submission that there is such finality about the winding up order that it reverts back to the date of the presentation of the petition.

[7] The question which arises is, what is the nature of Anderson J's order? Is it interlocutory requiring leave to appeal by virtue of section 11(1) (f) of the Judicature (Appellate Jurisdiction) Act, or, is it a final order not requiring leave? If it is interlocutory leave is required. An appeal therefrom must be filed within 14 days from the date on which permission is granted as mandated by rule 1.11 (1) of the Court of Appeal Rules (CAR). If it is final, as prescribed by rule 1.11 (2) of the CAR, the appeal should be filed within 42 days of the date of service, on the applicant, of the order appealed against.

[8] For sometime there had been mixed views as to the applicable test in deciding whether an order is interlocutory or final. The diversity in views surrounded the issue as to whether the order in question was in "the nature of the application to the court and not the nature of the order which the court eventually made". In **White v Brunton** [1984] 2 All ER 606, Sir John Donaldson MR putting an end to the controversy, stated that, as a general rule, the court is not "committed to the application approach". He said at page 608:

> "In determining whether an order or judgment is interlocutory or final regard must be had to the nature of the application or proceedings giving rise to the

> order or judgment and not to the nature of the order itself. Accordingly, whether an order made or judgment given on an application would finally determine the matters in litigation, the order or judgment is final, thereby giving rise to an unfettered right of appeal."

[9] Happily, Sir Raymond Evershed MR, in **Re Reliance Properties Ltd Waygood, Otis and Co Ltd v Reliance Properties Ltd** [1951] 2 All ER 327 in placing a winding up order in its proper perspective, said at 327:

> "It would be difficult to think of any order made by the court which in substance or character was more final than a winding up order".

[10] The learned authors, of Halsbury's Laws of England 3rd edition Vol (6) at page 712, places the effect of a winding up order in the following context:

> "an appeal from a winding up order maybe brought without leave of the court, it being a final and not an interlocutory order."

[11] Flowing from the foregoing pronouncements, it is without doubt that the appeal emanates from a final order. The appeal, having had its genesis in a final order, had been filed within the prescribed time and is validly before the court.

[12] I now turn my attention to the application for extension of time. This court by virtue of rule 1.7(2) (b) of the CAR, is empowered to enlarge the time for complying with any rule. However, the court, as enunciated by Panton JA (as he then was) in **Strachan v The Gleaner Company** Motion No 12/1999, delivered on 6 December 1999, in the exercise of its discretionary powers, will take into account 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."

[13] Dr Williams made reference to the application and stated that the record was ready for filing. It was at this juncture, Mr Dabdoub opposed the application, not only arguing that the order appealed from was interlocutory but also that there was considerable delay on the part of the applicant in pursuing the appeal and that the applicant, having deliberately ignored the rules, some sanction ought to be imposed. The applicant, he contended, was wound up for its inability to pay its debts and the evidence discloses that there is no likelihood of the success of the appeal. He further submitted that the applicant had failed to comply with the order for "payment into court".

[14] The length of the delay and the reasons for the applicant's tardiness in prosecuting the appeal will first be addressed. As prescribed by rule 2.6 (1) of the CAR, an applicant is required to file skeleton arguments within 21 days of the receipt of notice from the registry of the court that the record of the proceedings in the court below is available. Under rule 2.7 (3) of the CAR, an applicant is obliged to file the record of appeal within 28 days of the receipt of notice of the availability of the proceedings of the court below. It follows that JIA would have been bound to have filed the skeleton arguments on or before the expiration of the prescribed time, after receiving the requisite notification from the Registry. On

7 August 2009, the applicant was notified that the record of the proceedings was obtainable. On 17 December 2009, the application for extension of time was filed. This was approximately 72 days outside the permissible period for filing the record of appeal and 79 days beyond the time for the filing of the skeleton arguments.

[15] In my opinion, the delay of 72 and 79 days for filing the respective documents is not inordinate. In **CVM Television Limited v Tewarie** SCCA No 46/2003 delivered 11 May 2005, the time was extended to file and serve skeleton arguments despite the applicant's delay of one year and two months and the applicant advancing a reason for the delay which was not considered "altogether adequate" but was treated as not "entirely nugatory".

[16] A reason must be proffered for the delay in complying with the rules. In **Haddad v Silvera** SCCA No 31/2003 delivered on 31 July 2007, Smith JA said some reason must be given even if it is not a good one. Significantly, as pronounced by Panton JA in **Strachan**, the court will not necessarily disregard an application for an extension of time despite the absence of a good reason. In this case, Mr Aubrey Smith, managing director of the applicant, in explaining the delay, attributed it to a breakdown in the relationship between himself and the attorney-at-law whom he had retained to prosecute the appeal. Following which, he made new arrangements for the JIA to be represented. This, I would say, is not entirely a plausible excuse but can be accepted as some reason for JIA's failure to obey the rules.

[17] I now turn to the merits of the appeal. JIA owns lands at Temple Hall in the parish of Saint Andrew. In 1997, JIA obtained a quarry licence. In an affidavit of Mr Smith, sworn on 26 June 2005, he denied that JIA was indebted to KES in the sum of $4,572,413. 63 or that money was paid, on behalf of JIA or to JIA's account, by KES. He averred that mining operations were carried out on the land belonging to JIA by Temple Hall Aggregate Company Limited, a company equally owned by Mr Scott and himself. He also stated that prior to the incorporation of that company, the mining operations were carried out by him personally. It was his further averment that payments amounting to $2,000,000.00 were made to JIA's account at First Caribbean International Bank by KES on Mr Scott's behalf and that such payments were made at his request. Save and except acknowledging the receipt of a letter dated 26 July 2004 from KES, he made no admission to paragraphs 4 and 5 of the petition. He further averred, in paragraph 10, as follows:

> "If which is not admitted the respondent's servants or agents acknowledged any indebtedness of the Respondent to the Petitioner such acknowledgement was based on a mistaken view of the facts which are well known by the Petitioner and its servants or agents."

[18] In his affidavit in response, Mr Scott averred that the monies paid by KES was paid on behalf of JIA and its director. These payments, he stated, were made to JIA or to the First Caribbean International Bank Limited and this was done prior to the incorporation of Temple Hall Aggregates. He went on to say at paragraph 5:

> "... that prior to incorporation of Temple Hall Aggregate Company Limited, the said mining operations were being carried on by Mr. Aubrey Smith and that the said company was formed after I had discussions with Mr Aubrey Smith in respect of the mining operations that were already being carried out by him. It was always my position that a lease of the mining area was to be granted to Temple Hall Aggregate Company Limited. The proposal of Mr. Aubrey Smith was for Temple Hall Aggregate to purchase products from the Respondent and act only as a distributor. It was this difference in our positions which led to the breakdown in discussions."

[19] In a further affidavit of Mr Scott, sworn on 21 September 2005, he exhibited a letter dated 16 December 2003 with a schedule of expenses for Temple Hall Aggregates and cheques drawn on RBTT and First Global Bank amounting to $3,250,000.00. He further stated that KES and Trafalgar Construction Company are owned by his wife and himself and debts and advances as well as other payments are made by these companies on behalf of each other.

[20] In the letter of 16 December 2003, KES wrote to Mr Smith seeking to recover $4,572,412.63, as capital expenditure and $1,322,412.63 as operating expenses.

[21] On 15 June 2004, JIA sent the following letter to KES:

> "This is to confirm that we are indebted to you in the sum of Two Million Dollars ($2m) which sum you paid directly to First Caribbean International Bank Limited by way of investment in the sand mining operations at Temple Hall St. Andrew. We are in the final phase of a refinancing our operations and will pay you the above sum as soon as we get our first disbursement.

> So far as your direct investments in the actual sand mining operations are concerned, we further confirm that we take responsibility to settle with you as soon as the current plans to restart the operations begin to generate income.
>
> We thank you for your interest and patience."

[22] In arriving at his conclusion, the learned judge said:-

> "I was satisfied based on the affidavit evidence before me that the Respondent was indebted to the petitioner in a sum greater than fifty pounds, that the appropriate notice was served on the Respondent by the Petitioner and for a period in excess of three weeks after the demand was made, the Respondent has neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the Petitioner. The Respondent is therefore deemed "unable to pay its debts" pursuant to section 203 (e). I was also satisfied based upon the affidavit evidence before me that the Respondent had been properly served; the appropriate notices had been placed in the newspapers and notice of the petition to wind up had also been published in the Jamaica Gazette, and the Supreme Court Registrar had certified that the proceedings were in order.
>
> I ruled that the Petition should succeed and so ordered."

[23] The critical issue in this matter is whether JIA was indebted to KES. A quarry licence was granted to JIA. Mr Smith stated that he, in his personal capacity, entered into a contractual relationship with Mr Scott to carry out sand mining and quarry operations. JIA was the owner of the lands on which the operations were conducted. Mr Smith declared that the agreement was between Mr Scott and himself. However, it is to be noted the quarry licence was not granted to Mr Smith. Arguably, any agreement would have been entered into by him as agent for JIA and not as a principal in his personal capacity. There is evidence that the company Temple Hall Aggregates was incorporated in which Mr

Smith and Mr Scott were the shareholders and directors. This would have been subsequent to the negotiations. Mr Scott stated that prior to the formation of the company the operations were carried out by Mr Smith. The question now arising is whether at the time the payments were made to KES, an agreement was brokered between JIA and Mr Scott in contemplation of the incorporation of Temple Hall Aggregates which, in fact, had been incorporated.

[24] The sums demanded by the letter of 16 December 2003 were paid by cheques drawn in favour of JIA on the accounts at RBTT operated by KES and Trafalgar Construction Company Limited, and a cheque from First Global Bank which appears to be Mr Scott's personal cheque. Notably, one of these cheques for $300,000.00 was drawn on 9 April 2003, the very day of the incorporation of Temple Hall Aggregates. Arguably, these payments, in themselves, do not show the existence of a contract between JIA and KES. It is true that by its letter of 15 June 2004, JIA acknowledged indebtedness to KES. However, Mr Smith averred that it was a mistake. It may well be that the letter may have been a mistake. The real question, however, is whether an agreement existed between KES and JIA which would have accorded KES the right to have sought and obtained a winding up order against JIA. In my view, such a question is one which would require resolution by this court.

[25] I now move to the matter of prejudice. There is in place an order staying the execution of the winding up order. Consequently, there is no necessity to give consideration to the question of prejudice.

[26] At the time of the hearing of the application for the extension of time, the applicant had not been under any obligation to make payment into court, as submitted by Mr Dabdoub. Presumably, he was making reference to the conditional order, imposed by the learned judge, for the applicant to provide a bond or guarantee in the sum of $3,000,000.00. Obviously, Mr Dabdoub was unaware that the order had been set aside by this court.

[27] In all the circumstances, it would be just and fair to permit JIA to file and serve the record of appeal and skeleton arguments out of time. Accordingly, it is ordered that the record of appeal and skeleton arguments be filed and served within 7 days of the date hereof.