JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2023CV00032

APPLICATION NO COA2023APP00092

BETWEEN	**STOCKS & SECURITIES LIMITED (IN MEMBERS' VOLUNTARY WINDING-UP)**	**1ST APPLICANT**
AND	**CAYDION CAMPBELL**	**2ND APPLICANT**
AND	**FINANCIAL SERVICES COMMISSION**	**RESPONDENT**

Mrs Caroline Hay KC, Mrs Kimberly McDowell, Mrs Tereece Campbell-Wong and Mr Zurie Johnson instructed by Caroline P Hay for the applicants

Ms Faith Hall and Ms Nicola Richards instructed by the Director of State Proceedings for the respondent

29 May and 9 June 2023

Application for extension of time to file notice and grounds of appeal – Whether there was a sufficient explanation for the delay – Whether there is an arguable appeal - Appeal against the grant of an injunction - Court of Appeal Rules, rule 1.11(1)

MCDONALD-BISHOP JA

[1] I have read, in draft, the reasons for judgment of Simmons JA. They accord with my reasons for concurring with the decision of the court, and there is nothing I could usefully add.

SIMMONS JA

[2] This was an application for an extension of time within which to appeal against the decision of Jackson-Haisley J ('the learned judge') granting an interim injunction in favour of the respondent, the Financial Services Commission ('FSC') on 20 April 2023 and that the notice and grounds of appeal filed 17 May 2023 be permitted to stand. The application is supported by the affidavits of the 2nd applicant, Caydion Campbell ('Mr Campbell').

[3] On 2 June 2023, after considering the submissions in this matter, we made the following orders:

> "(1) The application for the extension of time for the filing of the notice and grounds of appeal from the order of Jackson-Haisley J, made on 20 April 2023 and for the Notice and Grounds of Appeal filed on 18 May 2023 to stand, is refused.
>
> (2) Costs of the application to the respondent to be agreed or taxed."

[4] It was indicated to the parties on that date that the reasons for our decision would be provided in writing, and this is a fulfilment of that promise.

Background

[5] The 1st applicant, Stocks and Securities Limited ('SSL'), is a limited liability company incorporated under the laws of Jamaica, which provides the services of a brokerage firm offering wealth management, investment and advisory packages to its clientele. Mr Campbell is a chartered accountant, insolvency practitioner and licensed trustee under the Insolvency Act. The FSC is a statutory body created in accordance with the Financial Services Commission Act ('the FSCA') for the purpose of *inter alia* supervising and regulating financial institutions in Jamaica.

[6] On 10 January 2023, the FSC received a letter from SSL informing the FSC of an incident of fraud at SSL. On 12 January 2023, SSL and the FSC commenced discussions pertaining to the issue. On the same date, the FSC issued directions to SSL restraining

the company from conducting transactions on its own behalf or on behalf of clients without the FSC's approval. SSL was also to refrain from "disposing of or otherwise transferring or substituting any of its assets whether on or off-balance sheet or assets held in trust, without the prior written approval of the FSC". By letter dated 13 January 2023, SSL informed the FSC that it intended to appoint a receiver effective 16 January 2023. Mr Campbell was the proposed candidate.

[7] On or about 17 January 2023, SSL filed or caused to be filed at the Companies Office of Jamaica a special resolution that had been passed at an extraordinary general meeting on 16 January 2023 for its affairs to be reorganised and for a members' voluntary winding up. Mr Campbell was appointed as trustee "for the purpose of reorganisation".

[8] On 17 January 2023, the FSC, pursuant to its powers under section 8(5)(b) of the FSCA, assumed temporary management of SSL. Mr Kenneth Tomlinson was appointed as its temporary manager. The FSC also commenced proceedings in the Supreme Court in which it has alleged that SSL breached its statutory obligations under the FSCA by:

(1) Appointing Mr Campbell as the purported trustee.

(2) Convening the extraordinary general meeting, board meeting and directors' meeting on or about 16 January 2023.

(3) Passing and filing a special resolution with the Companies Office of Jamaica which:

  (a) appointed Mr Campbell as trustee; and

  (b) authorised a members' winding up of SSL.

[9] The FSC seeks the following declarations:

(1) That the appointment of Mr Campbell was null and void.

(2) That any purported action contrary to the directions of the FSC is null and void and of no effect.

The FSC has also sought injunctive relief against SSL, Mr Campbell and others.

[10] On 25 January 2023, the FSC filed an *ex-parte* notice of application for an interim injunction. The orders sought were as follows:

> "1. The Defendants be restrained whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise from disposing of and/or dealing with its assets and liabilities, or with assets and liabilities in its name, or its clients' name, wheresoever situate, or from withdrawing or transferring or otherwise dissipating any funds from its accounts or its clients' account or from accounts in its name wheresoever held for the entire portfolio of the company.
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> 2. The Defendants be retrained whether by themselves, their servants and/or agent including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell, and Sarah Meany or howsoever otherwise from interfering with the acts of the servants and/or agents of the [FSC] – Temporary Manager of [SSL] in accordance with the [FSCA].
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> 3. The Defendants be restrained whether by themselves, their servants and/or agent including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise from winding up or dissolving the company and liquidating [SSL's] assets and liabilities.
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> 4. The Defendants be restrained whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise from removing its name from the records and/or engaging with the Companies Office of Jamaica in any manner without the intervention and/or consent of the [FSC].
>
> 5. The Defendants be restrained whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise from reorganizing the company or its operations whether it be in any document form or organization of its members, or the assets and liabilities.
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> 6. The Defendants be compelled whether by themselves, their servants and/or agents including but not limited to Jeffrey

Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise to hand over the control of the company to the [FSC].

7. The Defendants be compelled whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise to grant full and unrestrained access to the FSC to (including but not limited to) all documentation, information, books, records, assets and liabilities, computers, software and hardware and reserves in the possession and/or control of [SSL] so the [FSC] can carry out its functions under the [FSCA].

8. The Defendants, be compelled whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise to comply or otherwise cooperate with the directions of the [FSC] and the Temporary Manager and any servant and/or agent of the Temporary Manager.

9. The Defendants be compelled whether by themselves, their servants and/or agents including but not limited to Jeffrey Cobham, Mark Croskery, Caydion Campbell and Sarah Meany or howsoever otherwise to comply with any cease and desist order of the Claimant issued pursuant to the [FSCA].

10. Costs of the application to be costs in the claim."

[11] The learned judge granted the interim injunction on 25 January 2023 on the *ex-parte* application and an *inter partes* hearing was scheduled. At the *inter partes* hearing on 20 April 2023, the learned judge granted the order for the injunction to remain in place until the determination of the proceedings.

[12] On 4 May 2023, SSL filed a notice of application for leave to appeal the decision of the learned judge. On 18 May 2023, SSL filed the application for an extension of time that is now before this court. In summary, the grounds on which the latter application is based are as follows:

1. The applicants mistakenly applied for permission to appeal when no permission was required.

2. The delay in filing the notice and grounds of appeal was not intentional.

3. The appeal has a real chance of success.

[13] The application is supported by the affidavits of Mr Campbell filed on 14 and 27 February 2023 in the Supreme Court. In essence, Mr Campbell deposed that the orders made by the learned judge have prevented him from performing his statutory duties under the Companies Act, and he has been unable to seek orders to stay proceedings that have been commenced against SSL by its "creditors or contributors".

Submissions

[14] Mrs Caroline Hay KC, for SSL, submitted that the delay was not inordinate and that the absence of affidavit evidence explaining the reasons for the delay was not fatal to the application as the reason for the delay was evident on the face of the application. The delay, she maintained, resulted from SSL's error in filing an application for permission to appeal.

[15] Mrs Hay submitted further that the application ought to be granted as the appeal has a real prospect of success. She argued that the learned judge erred in granting the injunction, as the FSC has no power akin to a private right to sue an institution that it manages for a breach of directions. In this regard, she stated firstly, that the text of the directions did not prohibit the SSL from appointing Mr Campbell or approving a members' voluntary winding up. Secondly, the alleged breach of the directions issued by the FSC would constitute a criminal offence, the penalties for which are prescribed in the FSCA.

[16] It was also submitted that the FSC's claim is not grounded in any cause of action as is required in order to obtain injunctive relief. Mrs Hay stated that the learned judge erred when she relied on the decision of the Privy Council in **Convoy Collateral Ltd v**

Broad Idea International Ltd & anor (British Virgin Islands) [2021] UKPC 24, to conclude that a cause of action was unnecessary to ground an application for an injunction. She maintained that the minority view in that case is to be preferred.

[17] Miss Hall, on behalf of the FSC, submitted that the proposed grounds of appeal do not reveal any instance of misapplication of the law by the learned judge. In such circumstances, the court cannot interfere with the exercise of the learned judge's discretion where it was properly exercised. She stated that the learned judge correctly found that there is a serious issue to be tried as the claim was not solely in relation to SSL's breach of the directions but also the failure of SSL to perform its mandatory statutory duties.

[18] It was submitted that the FSC's claim was grounded in a cause of action and that, even if there is no cause of action, the learned judge could still grant the injunction as the more flexible approach is preferred in the interests of justice. Moreover, the grant of the injunction was necessary to restrain the trustee from acting until the substantive issues are resolved.

Analysis

[19] The Court of Appeal Rules ('CAR') specify the time for filing and serving a notice of appeal as follows:

> "1.11 (1) Except for appeals under section 256 of the Judicature (Resident Magistrates) Act, the notice of appeal must be filed at the registry and must be served in accordance with rule 1.15-
>
> (a) in the case of an interlocutory appeal, where permission is not required, within 14 days of the date on which the decision appealed against was made;
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> (b) where permission is required, within 14 days of the date when such permission was granted; or

(c) in the case of any other appeal, within 42 days of the date on which the order or judgment appealed against was served on the appellant."

The rule also states that the court may extend the times set out above.

[20] The principles upon which this court will act in considering whether to grant an application to extend time to file an appeal are well known. The criteria to be satisfied were set out in **Leymon Strachan v The Gleaner Co. Ltd. and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered on 6 December 1999. At page 20 of the judgment, Panton JA (as he then was) stated:

> "The legal position may therefore be summarised thus:
>
> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
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> (3) In exercising its discretion, the Court will consider-
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> (i) the length of the delay;
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> (ii) the reasons for the delay;
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> (iii) whether there is an arguable case for an appeal and;
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> (iv) the degree of prejudice to the other parties if time is extended.
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> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

The length of the delay

[21] The learned judge's decision was delivered on 20 April 2023, and the notice and grounds of appeal filed on 17 May 2023 along with the application for permission to

appeal. The application for the extension of time was filed on 18 May 2023. As such, there was a delay of approximately 15 days for the making of the application under consideration. This period is by no means inordinate.

The reasons for the delay

[22] The affidavits supporting the application contain no information pertaining to this issue. However, in the grounds for the application for an extension of time to file an appeal, it is stated that the applicants had mistakenly filed an application for permission to appeal. This court was asked to note that that application was filed within 14 days of the order in its assessment of whether good reason had been provided. Having done so, it is clear on the face of the record that the applicants intended to approach this court for relief and as such the absence of the affidavit evidence in this regard was not fatal to the application. In any event, an application is not doomed to fail merely because the reason advanced for the delay is poor or unsatisfactory (see **Leymon Strachan v The Gleaner Co. Ltd. and Dudley Stokes**). In the circumstances, we formed the view that in keeping with the court's mandate to do justice between the parties, that omission by the applicants should not bar this court from giving due consideration to whether there was arguable case for an appeal.

[23]

Whether there is an arguable case for an appeal

[24] The proposed grounds of appeal have been identified as:

> "1. The learned trial judge fell into error when she awarded interim injunctive relief to the [FSC] on the basis of either existing cause of action, statutory right or neither for perceived breaches of Directions issued by the [FSC] to the Appellants under section 8(1)(b) of the [FSCA].
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> 2. The learned trial judge fell into error when she misapplied the reasoning in **Convoy Collateral Limited v Broad Idea International Limited**

[2022] 1 All ER 289 to the circumstances of the case in the Court below as the Appellants were not *"properly before the Court"* considering the provisions in Jamaican law of both the [FSCA] and the Companies Act read either together or independently of each other.

3. The learned trial judge failed to appreciate that in **Convoy Collateral Limited v Broad Idea International Limited [2022] 1 All ER 289** the power to award freezing injunction with no subsisting cause of action existed '*to facilitate the enforcement of a judgement or other order to pay a sum of money'* in circumstances where a party holds assets available to meet a possible money judgement. Those circumstances are not applicable to this case and as such, the learned trial judge fell into error when she sought to apply the reasoning in **Convoy**.

4. In erroneously finding the existence of either a cause of action, statutory right to sue or right to seek administrative reliefs against the Appellants, the learned trial judge fell into error when she held that the conduct of [SSL] to pass the special resolution on January 16, 2023 and appoint a trustee under the Companies Act amounted to a breach of the [FSC's] Directions under the [FSCA] or any breach(es) of the [FSCA].

5. In erroneously finding a serious issue to be tried the learned trial judge failed to have sufficient regard for the effect and import of the provisions of the Companies Act which deem all proceedings taken in members' voluntary winding-up to be valid in the absence of fraud or mistake - circumstances not pleaded in the [FSC's] claim or amended claim.

6. The learned trial judge also failed to appropriately address her mind to the effect and import of the provisions of the Companies Act that deem valid any act of the Trustee whether or not defects were subsequently discovered in his appointment. This would mean that whether the declaratory reliefs sought were granted or no, the Trustee's

appointment could not be challenged in the way pleaded for[sic] and has no real prospect of succeeding at trial.

7. The learned trial judge fell into error in finding [that there is] a serious issue to be tried as a civil matter [sic] an allegation of breach of Directions under the [FSCA] despite her recognition that the [FSCA] dictates that breach of Directions is a criminal offence for which the only outcome is criminal prosecution not civil action.

8. The learned trial Judge failed to appreciate that despite the fact that declaratory reliefs and compelling orders were sought alongside freezing orders, the entire claim was aimed at neutralizing [Mr Campbell] as Trustee and so the grant of injunctive relief was akin to the grant of the whole claim. The learned trial Judge failed or declined to closely examine the merits of the competing cases before her in order to determine where the balance of convenience lay, lending to a palpably wrong exercise of discretion.

9. The learned trial judge failed to appreciate the materiality of the several non-disclosures, omissions and misleading statements as to fact and law presented (or not) to the Court at the without notice phase and the effect they had on inducing the Court to act and issue the reliefs sought. The learned trial judge failed to apply the standard appropriate to uphold the due administration of justice and was wrong to grant the *inter partes* injunction in all the circumstances of the case.

10. The learned trial judge exercised her discretion in a manner palpably wrong when she found the balance of convenience favoured the grant of the injunction over permitting the Trustee to perform his statutory duties towards creditors, contributors and stakeholders as under the Companies Act.

11. The learned trial judge fell into error when she found that the events in the case were unfolding quickly and relied on that mistaken view of the

evidence to explain away the material non-disclosures and misleading statements complained of. The finding of insufficient time to disclose material was against the weight of the evidence before the Court.

12. The learned trial judge fell into error when she found that there was no material non-disclosure of the law or to appreciate the provisions of the Companies Act and the rights and duties it gives to the Appellants. Had the relevant provisions of the law been brought to her attention the Court below would have seen that there was no basis to bring the filed claim, the parties were not properly before the Court and the reliefs sought for could not likely be granted. For those reasons no injunctive relief ought to have been granted."

[25] Based on the grounds of appeal, the main issue is whether the learned judge erred in granting injunctive relief to the FSC. The grounds of appeal raise the following issues:

(1) Whether the learned judge erred when she found that, *prima facie*, the claim discloses a cause of action;

(2) Whether the learned judge erred when she found that there is a serious issue to be tried;

(3) Whether the learned judge erred when she found that there had been no material non-disclosure by the FSC; and

(4) Whether the learned judge erred when she found that the balance of convenience was in favour of the granting of the injunction.

[26] The granting of an interlocutory injunction is a discretionary remedy. Accordingly, this court will not set aside the decision of the learned judge unless "it was based on a misunderstanding by the judge of the law or of the evidence before [her], or on an

inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision is 'so aberrant that it must be set aside on the ground that no judge regardful of [her] duty to act judicially could have reached it'". See **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 at para. [20] in which Morrison JA (as he then was) adopted the principle enunciated by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042. The learned judge's treatment of the FSC's application was examined against that background.

[27] The learned judge began her deliberations by considering whether the FSC has a cause of action against SSL and Mr Campbell arising out of their alleged breach of the FSCA. She concluded at para. [41] that:

> "[The decision in **Convoy**] has revolutionized the former position. Even if it were to be found that there is no cause of action, that is no bar to the grant of an injunction. However, I do not agree with the Defendants' argument that there is no cause of action. On an examination of the Fixed Date Claim Form, [FSC] has alleged that the actions of the Defendants are in breach of the [FSCA]. They have clearly identified circumstances in which they are of the view that the actions of the Defendants are likely to frustrate the mandate of the FSC."

[28] The learned judge's findings are at para. [44], where she stated:

> "…(i) the Claimant has prima facie established that by statute they have the right to regulate and supervise the 1st Defendants and its agents; (ii) that the Defendants owe a duty to act in accordance with the law; (iii) that they are seized with information that the Defendants have acted in breach of their duty; (iv) that the Court has the power to declare rights in accordance with the provisions of the FSC Act and (v) if they prove their case the Court has the power to grant them relief/reliefs."

[29] The FSC, in its claim, has in addition to other remedies, sought a permanent injunction against SSL and Mr Campbell on the basis they have interfered with its

statutory duties and have breached certain provisions of the FSCA. The learned judge gave full consideration to the issue and found that the FSC has a cause of action against SSL and Mr Campbell. This was a finding that was open to her.

Whether there is a serious question to be tried

[30] The question of whether there was a serious issue to be tried was addressed in the context of an analysis of the statutory powers of the FSC. The learned judge at para. [57] identified some of the issues that, in her view, arose in the matter. She stated thus:

> "[57] It is not for me to attempt to resolve all the conflicts that have been raised. These conflicts would have to be addressed during the trial process and could not be decided here. What I have sought to do is to extract what seems to me to be some of the issues that would arise if the matter were to go to trial. Some of the issues a court would have to determine are as follows:
>
> 1. Whether the actions of [SSL] and [the] 3rd Defendant in appointing [Mr Campbell] as trustee was [sic] in breach of the [FSCA] and the directions of the [FSC] issued on January 12, 2023?
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> 2. Whether the actions of the 3rd Defendant and others in applying for a members' voluntary winding up of [SSL] was in contravention of the [FSCA]?
>
> 3. Whether the actions of [SSL] and [the] 3rd Defendant in facilitating the making and in making a declaration of insolvency when they knew or ought to have known that [SSL] was insolvent were reckless and contrary to the law?
>
> 4. Whether if [Mr Campbell] is allowed to carry out his functions as trustee, this would frustrate or defeat [FSC's] appointment as temporary manager?
>
> 5. Whether the actions of [Mr Campbell] are in direct contravention with an [sic] opposition to the role of the [FSC] as temporary manager?

6. Whether the Court in any of those circumstances can order the actions of the Defendants null and void?

7. Whether the office of Trustee 'trumps' that of a Temporary Manager

8. Whether the Trustee and the Temporary Manager can work in tandem with each other

9. Whether a collaborative approach would be contrary to the mandate of the FSCA.

10. Whether the actions taken by the Defendants are in accordance with the provisions of the Companies Act and therefore permissible?"

The 3rd defendant Hugh Croskery referred to above is not a party to these proceedings as the *ex parte* interim injunction against him was discharged.

[31] The learned judge found that the FSC's case is "neither spurious nor fanciful" and that there was a serious issue to be tried. Having regard to the principles to be applied for the grant of an interim injunction, she cannot be faulted in her conclusion that there are serious issues that would warrant investigation at a trial. Therefore, there would be no legal basis for this court to interfere with this aspect of her finding if the matter were to proceed on appeal.

Material non-disclosure by the FSC

[32] The learned judge dealt with this issue at para. [73], where she stated:

> "[73] The concerns raised by both Kings [sic] Counsel require thorough examination of both the facts presented and the law. Kings [sic] Counsel is correct in that a material non-disclosure in an ex parte application is a serious matter and ought to be treated with the serious consequence of a discharge of the injunction and in some cases without regranting it. When an ex parte application is made the applicant must make the fullest possible disclosure of all material facts and must act with a spirit of candour. I am of the view that the bar is even higher in the case of a government entity and where the law is concerned, in the

> case of counsel for the crown who is always a minister of justice."

[33] The learned judge, having conducted an analysis of the pleadings, the affidavit evidence and the authorities, concluded at para. [87] that, there was no "blatant misleading of facts found [sic] but rather omissions and some non-disclosure" which were not material to the issues. That was a conclusion that was open to her based on her assessment of the evidence at that interlocutory stage.

The balance of convenience

[34] The learned judge addressed this issue at paras. [105] – [107] where she stated thus:

> "[105] It is always the aim of the court to do justice between the parties and so as has been up [sic] expressed in the Olint case by Lord Hoffman the Court should take a course of action that results in least prejudice to the parties on either side and to consider the prejudice the [FSC] may suffer if no injunction is granted or [the possible prejudice to] the Defendant if it is in fact granted. If no injunction is granted it would mean that [Mr Campbell] could continue with his trusteeship and the process of winding up. If he completes that this may impact the nature of the assets the Company has. The Court would have to consider whether a reorganization under a trusteeship will better enable the investors to receive their investment. On the part of the Defendants, they would have to contend with the fact that potential capital injection may no longer be accessible in light of the restrictions and it may be that investors may withdraw their investments and so it may be prudent to stop the gap as soon as possible and try to save what's left from the damage.
>
> [106] This is a matter in which allegations have been made concerning what has been described as a "massive fraud". The interest of the public and investors is priority. Given the seriousness of the allegations of fraud which were revealed to the [FSC] and which led to the appointment as Temporary Manager of [SSL], it is necessary for the [FSC] to be provided with the full opportunity to determine whether the extent of any fraud had or will affect the financial viability of the company and its ability to pay creditors or investors. It would

> not be in the interest of any of the investors that the winding up of the company take place without a full investigation into all the affairs of the company nor is it in keeping with the spirit of the [FSCA].
>
> [107] If the injunction were granted this would restrict the Defendants from continuing during the life of the injunction but it does not mean that they would never be able to do this in the future. The law has stipulated that the FSC has a duty to provide a report to the Court within sixty days and so it is clear that the steps to be taken by the FSC would be subject to time limitations and not an indefinite exercise. This outweighs any prejudice the Defendants may suffer in having to await the determination of the matter. The balance of convenience weighs heavily in favour or the grant of the injunction. Based on the merits of the case it is prudent that the matter be ventilated at trial."

[35] Those paragraphs of the judgment demonstrate that due consideration was given to this issue within the context of the applicable law. The learned judge weighed the consequences associated with the granting as against the withholding of the injunction. This is in line with the principles set out by the Privy Council in **National Commercial Bank Jamaica Limited v Olint Corp. Limited** [2009] UKPC 16, in which Lord Hoffmann at paras. 16-18 stated:

> "16. …It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. **At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result**. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to

be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:

> 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases." (Emphasis supplied)

[36] The circumstances that gave rise to the intervention of the FSC and the appointment of a temporary manager for SSL involve the alleged misappropriation of funds belonging to its clients. This state of affairs has generated a great deal of public interest in the functioning and stability of the financial sector. The duties of the FSC are set out in section 6 of the FSCA, which provides:

"6.-1) **For the purpose of protecting customers of financial services, the Commission shall**-

(a) **supervise and regulate prescribed financial institutions**;

(b) promote the adoption of procedures designed to control and manage risk, for use by the management, boards of directors and trustees of such institutions;

(c) **promote stability and public confidence in the operations of such institutions**;

(d) promote public understanding of the operation of prescribed financial institutions;

(e) promote the modernization of financial services with a view to the adoption and maintenance of international standards of competence, efficiency and competitiveness." (Emphasis supplied)

[37] The learned judge, in her determination of where the balance of convenience lies, demonstrated that she was aware of the prevailing circumstances, the statutory duties of the FSC and the relevant principles applicable to her determination of whether the injunction should be granted. Her treatment of this issue was appropriate and also cannot be faulted.

Conclusion

[38] Having considered all the circumstances, the submissions of counsel and the applicable law, I formed the view that this court was unlikely to conclude on an appeal that the learned judge erred in granting the interim injunction in favour of the FSC. In short, I found no arguable case for an appeal.

[39] Additionally, in the absence of any express assertion that the respondent may be prejudiced by the granting of the application, the question of prejudice to the parties was nevertheless considered. I formed the view that in light of the particular circumstances of this case, and the absence of an arguable appeal, the respondent would be more likely to be prejudiced by the grant of the application than by its refusal.

[40] In conclusion, having had regard to the overriding principle that the court should seek to ensure that justice is done, I found that the interests of justice would be better served by a refusal to grant the extension of time sought by the applicants. Accordingly, I agreed that the court should make the orders detailed at para. [3] above.

DUNBAR-GREEN JA

[41] I too have read the draft reasons for judgment of Simmons JA which accord with my own reasons for concurring with the decision made by the court.