JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 55/2015

APPLICATION NO 15/2018

BETWEEN	**JAMAICA EDIBLE OILS & FATS CO. LTD**	**APPLICANT**
AND	**M.S.A. TIRE (JAMAICA) LIMITED**	**1ST RESPONDENT**
AND	**JEANE LAVAN**	**2ND RESPONDENT**

Kwame Gordon and Ramon Clayton instructed by Samuda and Johnson for the applicant

Christopher Dunkley and Miss Tiffany Sinclair instructed by Phillipson Partners for the respondents

3 and 23 April 2018

IN CHAMBERS

MORRISON P

[1] This is an application for security for costs of an appeal which was filed on 8 May 2015, and is now listed for hearing before the court on 16 July 2018. Having heard submissions from counsel on the application on 3 April 2018, I granted the application in the following terms on 23 April 2018:

> "1. The 1st appellant/respondent shall give security for the respondent/applicant's costs of defending the appeal in the amount of $3,000,000.00 within 30 days of the date hereof.

> 2. The 1st appellant/respondent shall pay the said sum of $3,000,000.00 into an interest bearing account in the name of Samuda & Johnson, attorneys-at-law, attorneys for and on behalf of the respondent/applicant, as security for the respondent/applicant's costs in defending this appeal, at a financial institution to be agreed on by the parties, such payment to be made within 30 days of the date hereof.
>
> 3. Costs to be costs in the appeal."

[2] These are my reasons for making these orders. For ease of reference, I will describe the respondent/applicant as 'the applicant' and the 1st appellant/respondent as 'the 1st respondent'.

[3] The background to the matter is as follows. By a lease made on 16 January 1998 ('the head lease'), the Factories Corporation of Jamaica ('FCJ') leased a factory building situated Lot # 7, Naggo Head Industrial Estate in the parish of Saint Catherine ('the premises') to the applicant for a term of 15 years.

[4] By clause 4(19) of the head lease, the applicant covenanted not to assign or underlet or part with possession of the premises without the previous written consent of FCJ (such consent not to be unreasonably withheld).

[5] By an underlease made on 18 May 2006, the applicant leased the premises to the 1st respondent. The term of the underlease was five years, commencing 15 June 2006 and expiring 30 September 2011, at a monthly rental of US$6,666.67, with provision for a 3% increase for each succeeding 12-month period commencing May 2008.

[6] There is no evidence that the applicant either sought or obtained FCJ's prior written consent to the underlease, as clause 4(19) required it to do.

[7] But, pursuant to the underlease, the 1st respondent duly entered into possession of the premises, paying rent as agreed to the applicant. However, the 1st respondent ceased making rental payments in March 2011.

[8] On 10 April 2012, the applicant issued a fixed date claim form against the 1st respondent claiming (i) an order for recovery of possession of the premises; (ii) outstanding rent from April 2011-September 2011, totalling US$52,642.16; and (iii) mesne profits at the agreed rental rate for the unlawful occupation of the premises for the months of October 2011-February 2012, totalling US$44,082.45. The applicant also sought orders for payment of mesne profits at the agreed rental rate until the respondent vacated the premises, plus interest.

[9] On 13 December 2012, McDonald-Bishop J (as she then was) ordered the 1st respondent to give up possession of the premises on or before 14 March 2013.

[10] Between 28 January 2013 and 25 February 2013, the applicant obtained a series of freezing orders against the respondent, the last such being an order made by King J after an *inter partes* hearing on 25 February 2013. The upshot of this order was that the 1st respondent was restrained from (i) dealing with funds in its accounts with the National Commercial Bank Portmore Branch; (ii) disposing of, transferring, charging or diminishing the value of, or in any way dealing with, assets in its name wheresoever they may be situate in the jurisdiction up to the value of US$176,000.00; and (iii) taking

out of the jurisdiction machinery and equipment used by it in the operation of its business until 11 June 2013, or until further order.

[11] The freezing order was subsequently extended more than once on the applicant's application and remained in force right up to the end of the trial.

[12] On 27 June 2013, the applicant amended the fixed date claim form to update the mesne profits claim to February 2013.

[13] The 1st respondent filed its defence to the claim on 5 August 2013, taking took two points. First, that the claim for rent in respect of the premises was unenforceable by virtue of the fact that the applicant was in breach of clause 4(19) of the head lease; and, second, that the applicant, having admitted that it was itself a lessee of the premises, was not entitled to claim against the 1st respondent for mesne profits in respect of those premises.

[14] In evidence at the trial of the fixed date claim form was a copy of a letter from FCJ to the applicant dated 12 June 2007. The letter confirmed that prior written approval had neither been sought nor obtained by the applicant in respect of the underlease to the respondent:

> "At the time of our visit, it was also observed that there was an illegal occupant in the building purporting to be a subtenant of your company, conducting tyre retreading operations on the property. We regard that occupant as being in unlawful possession of our property since you had not received written consent from FCJ to sublet the property, in breach of Clause 19 of the Lease Agreement. In addition, the occupant was seen conducting the tyre

> retreading operations in breach of Clause 25 of the Lease Agreement prohibiting the use of combustible and inflammable substances on the property.
>
> In view of the foregoing breaches of the lease in allowing an illegal occupant onto the property to conduct activities using prohibitive [sic] substances, you are **hereby given Notice** to take all necessary steps to correct the breaches and have the illegal occupant removed from the premises **within thirty (30) days** of the date hereof. Failure to do so will result in Notice being served on you to Quit and vacate the premises by August 31, 2007." (Emphasis as in the original)

[15] In a judgment given on 27 March 2015, Evan Brown J found for the applicant. He considered that although the underlease was entered into in breach of clause 4(19) of the head lease, it was nevertheless valid and effectual: "where such a breach occurs, it avails remedies to the landlord rather than invalidate [sic] the lease" (paragraph [26]). It therefore followed from this that the applicant was entitled to recover the unpaid rent for the duration of the underlease. As regards the claim for mesne profits, the judge said that "[w]hilst I am guided by the view that a landlord in such a tenancy cannot sue for mesne profits, the landlord may nonetheless take out an action against the tenant for 'the use and occupation of the premises'".

[16] The judge accordingly ordered the 1st respondent to pay to the applicant (i) outstanding rent in the sum of $4,572,225.76; and (ii) mesne profits in the sum of $3,791,090.70, plus interest at the commercial rate on the sums awarded. As regards the freezing order, which he had earlier extended to the determination of the substantive matter, the judge ordered that it should remain in effect for a period of 28 days from the date of his judgment.

[17] In its notice and grounds of appeal filed on 8 May 2015, the 1st respondent challenged the judge's decision on a total of 16 grounds covering a wide area of contention. The grounds of appeal are as follows:

> "16. The Learned Judge in Chambers erred in failing to hold or at all that the Claim as pleaded was one in contract, firstly for rental and subsequently, for mesne profits beyond the period of that contract.
>
> 17. The Learned Judge in Chambers erred in failing to consider or at all that as a Court of Pleadings, and there being no Part 20 CPR application to amend, the Claimant was bound by its pleadings and not the case of tenancy by estoppel it argued at trial.
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> 18. The Learned Judge in Chambers erred in failing to consider or at all that as a matter of contract, the Claimant was obliged to pay rent to its Lessor, Factories Corporation, without breaching the Lessor's prohibition to sublet, outside written prior permission per clause 4(19) of its lease.
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> 19. The Learned Judge in Chambers erred in finding that the Claimant's lease with Factories Corporation of Jamaica was a 'Head Lease' to an 'Underlease' where the lease at Clause 4.19 strictly prohibited any such agreement in the absence of prior written consent.
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> 20. The Learned Judge in Chambers erred in failing to consider or at all that the Claimant's claim required the finding that a valid underlease existed, which in turn required the suppression of Factories' Corporation notice of June 12, 2007 to this Honourable Court, eventually the subject of a Notice to Produce dated March 6, 2014.
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> 21. The Learned Judge in Chambers erred in failing to consider or at all that the suppression of the Lessor's notice of complaint to this Honourable Court further barred the Claimant from seeking relief of tenancy by estoppel.
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> 22. The Learned Judge in Chambers erred in failing to consider or at all the commercial intent of the Claimant,

calculated to turn a profit from the Defendant's occupation, negated any plea for relief by estoppel.

23. The Learned Judge in Chambers erred in failing to consider or at all that the Claimant suffered no loss whilst the Defendant was paying and thereby relieving the Claimant of the majority of its contractual obligation to the Factories Corporation.

24. The Learned Judge in Chambers erred in failing to consider or at all that by intentionally breaching its contract with its landlord for profit and entering into a agreement with the Defendant which was prohibited by contract, the Claimant was estopped from the protection of tenancy by estoppel.

25. The Learned Judge in Chambers erred in failing to appreciate or at all that whilst the agreement between the parties was not illegal, having regard to its prohibition by contract, it was unenforceable against the Defendant.

26. The Learned Judge in Chambers erred in holding that the Claimant was entitled to mesne profits to which only the lawful owner of the property, the Factories' Corporation was entitled.

27. The Learned Judge in Chambers erred in failing to consider or at all that as the value of the Defendant's equipment, its equity was three times the value of the amended claim, the defendant had all rights to seek to sell its property.

28. The Learned Judge in Chambers erred in failing to appreciate from the evidence that the prospective sale to the Suriname purchaser exceeded the claim by USD$230,000.00, the loss of which, the Claimant was accountable.

29. The Learned Judge in Chambers erred in failing to consider or at all that the Defendant's efforts to sell its equipment overseas arose from a scarcity of purchasers worldwide and not any attempt to evade.

30. The Learned Judge in Chambers erred in failing to appreciate from the evidence and the previous interlocutory

> applications, that the Defendant was entitled to mitigate by trying to sell its equipment overseas.
>
> 31. The Learned Judge in Chambers erred in failing to appreciate that on the facts, the Claimant's actions to defeat the Defendant's efforts at mitigation entitled it to an enquiry on assessment of damages."

[18] A case management conference was duly held on 28 November 2017 and, as I have indicated, the hearing of the appeal is now set for 16 July 2018, for one day.

[19] By letter dated 29 November 2017, the applicant's attorneys-at-law wrote to the 1st respondent's attorneys-at-law raising the issue of security for costs for the first time:

> "It has come to our client's attention that [the 1st respondent] has wound up its operations within the jurisdiction and in fact other than the assets which are already the subject of an Order by the Court below, has no assets within the jurisdiction. As such, should the appeal fail, our client would be unable to enforce an award of costs. In the circumstances we hereby write to ascertain whether your instructions permit you to agree security for costs in the amount of $5,000,000.00.
>
> Kindly note that if we fail to receive a favourable response to our request for security within five (5) days from the date of this letter then we will be making an application to the Court for security."

[20] No response having been received to this letter, the applicant filed its notice of application for security for costs on 19 January 2018. In stating the grounds of the application, the applicant referred to section 388 of the Companies Act and indicated that -

> "2. Despite appearing on the Companies Office Register as a duly incorporated company with active status, [the 1st respondent] no longer carries out business in the jurisdiction of Jamaica and therefore, the Applicant is unaware of any assets belonging to the [1st respondent] in Jamaica to satisfy any costs awarded to the Applicant.
>
> 3. The circumstances of the case make it just for the granting of this Order."

[21] The applicant relied on two affidavits. First, the affidavit of Roydene Graham sworn to on 23 January 2018 set out the basis of the applicant's estimate of its costs of responding to the appeal of $3,000,000.00 (at paragraph 10):

> "10. I verily believe that the Applicant's costs of these proceedings including the hearing of the Appeal will be approximately $3,000,000.00 arrived at as follows:
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> a) Receiving and perusing Notice of Appeal;
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> Taking instructions $500,000.00
>
> b) Taking instructions; Preparing for and attending Case Management Conference $70,000.00
>
> c) Taking instructions and preparing Application for Security for Costs $100,000.00
>
> d) Preparing Submissions for Security for Costs $300,000.00
>
> e) Reviewing Appellant's Submissions to include Authorities $450,000.00
>
> f) Preparing Appeal Submissions (Reviewing Notes of Evidence and Authorities) $800,000.00
>
> g) Preparing for and attendance at the

hearing of the Appeal for 3 days $780,000.00

TOTAL **$3,000.000.00**"

[22] And second, there is the affidavit of Damion Dodd, filed on 29 January 2018, in which he gave the following as justification for an order for security for costs (at paragraphs four and five):

> "4. That in or about November, 2017 I had reasons to believe that the 1st Appellant/Respondent may have wound up its operations in Jamaica and no longer had a presence in this jurisdiction. On or about December, 2017 a company search was conducted at the offices of the Registrar of Companies and this search revealed that the 1st Appellant/Respondent still appeared on the companies' registry and maintained as its address Lot 7 Naggo Head, Industrial Park Saint Catherine. Exhibited hereto and marked '**DD1'** is a copy of the company search.
>
> 5. That in or about December, 2017 I engaged the services of an investigator to ascertain whether the 1st Appellant/Respondent was conducting its operations from another location. The investigator made several checks and advised and I do verily believe that he was unable to locate the 1st Appellant/Respondent's operations in Jamaica. Additionally, the results of the investigations suggest that the 1st Appellant/Respondent does not have assets within the jurisdiction."

[23] For the 1st respondent, there was the affidavit of Tiffany Sinclair, filed on 1 March 2018, in which it was pointed out that the application for security for costs was brought "approximately five months before the substantive appeal". Then, in direct response to the applicant's position that the 1st respondent might not be able to pay the costs of the appeal, if unsuccessful, Ms Sinclair added this (at paragraphs five to nine):

> "5. Based on the material forming the Appeal, I can say that it is the actions of the Respondent in pursuing and obtaining a mareva injunction against the 1st Appellant which severely comprised the Appellant Company which in turn, resulted in severe loss, damage and created grave hardship and embarrassment to the 1st Appellant.
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> 6. I will say that the financial fallout to the 1st Appellant has left it with no recourse beyond this Appeal and the enforcement of the undertaking in damages, and were this Court to grant an order for Security for Costs, it would almost certainly fail to comply, which would result in the stifling or a Good Appeal with a high prospect of success.
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> 7. That the 1st Appellant, MSA Tire Jamaica Limited experienced financial difficulties after the fall out in the tire retreading business from which the Company's jobs were commissioned.
>
> 8. That the principal of the Company, Mr. Mike Shill Snr, identified a buyer for the very specialized equipment used by MSA Tire, the sale of which was intended to take care of the Company's obligation towards its employees and other payables.
>
> 9. That the Respondent's injunction over all the 1st Appellant's assets from February of 2013, prevented it from selling its equipment overseas at a significantly higher value that what currently obtains."

[24] Before turning to the rival submissions, it may be convenient to state the basis of a single judge's jurisdiction to order security for costs. As to this, there is no controversy between the parties.

[25] First, there is rule 2.11(1)(a) of the Court of Appeal Rules 2002 ('the CAR'), which empowers a single judge of appeal to make orders "for the giving of security for

any costs of occasioned by an appeal". Next, under the rubric, 'Security for costs of appeal", rule 2.12 provides as follows:

> "**Security for costs of appeal**
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> 2.12 (1) The court may order -
>
> (a) an appellant; or
>
> (b) a respondent who files a counter notice asking the court to vary or set aside an order of a lower court,
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> to give security for the costs of the appeal.
>
> (2) No application for security may be made unless the applicant has made a prior written request for such security.
>
> (3) In deciding whether to order a party to give security for the costs of the appeal, the court must consider -
>
> (a) the likely ability of that party to pay the costs of the appeal if ordered to do so; and
>
> (b) whether in all the circumstances it is just to make the order.
>
> (4) On making an order for security for costs the court must 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."

[26] A further basis for making an order for security for the costs of any proceedings is provided by section 388 of the Companies Act, upon which the applicant principally relies:

> "Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

[27] I was referred by counsel to **Continental Baking Co Ltd v Super Plus Stores Ltd and Tikal Ltd** [2014] JMCA App 30, paragraph [11], in which Brooks JA specifically adopted the following principles set out in the earlier decision of **Cablemax Limited and Others v Logic One Limited**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 91/2009, Application No 203/2009, judgment delivered 21 January 2010:

> "(i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.
>
> (ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security.
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> (iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal.

(iv) In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.

(v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.

(vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount.

(vii) The lateness of the application for security is a factor to be taken into account, but what weight is to be given to this factor will depend upon all the circumstances of the case."

[28] Against this background, Mr Gordon for the applicant made three principal points. First, that the applicant had produced credible testimony that the 1st respondent would be unable to pay the applicant's costs of the appeal should it lose the appeal. Of great significance in this regard, Mr Gordon pointed out, was the fact that Ms Sinclair in her affidavit did not offer any rebuttal of the essential assertions made in the evidence proffered in support of the application for security for costs. Second, Mr Gordon submitted that the 1st respondent's appeal lacks merit and has a high probability of failure, since the judge was clearly right in concluding that the applicant's failure to secure FCJ's consent to the underlease did not affect its validity. And, third, while conceding that the timing of the application for security for costs in this case was "not

ideal", Mr Gordon submitted that it was made as soon as possible after it appeared that the 1st respondent was no longer operating in Jamaica.

[29] In his submissions in opposition to the application, Mr Dunkley for the 1st respondent told me that the principal point which the 1st respondent intends to pursue in the appeal is that, in the absence of prior permission by FCJ to sub-let to the 1st respondent, the underlease was unenforceable. While Mr Dunkley did not question the fact that the 1st respondent is in, as he put it, "a parlous financial position", he submitted that this was largely the fault of the applicant and that in any event impecuniosity does not necessarily make an order for security for costs mandatory. He urged that this was an instance in which such an order could have the effect of stifling the appeal, particularly given the timing of the application. Finally, Mr Dunkley submitted that, the applicant having already been granted an injunction which ought not to have been granted, the applicant ought not to be able to put the 1st respondent to the further constraint of being ordered to provide security for costs of the appeal.

[30] I will first consider the 1st respondent's chances of success in the appeal. The judge concluded that the applicant's failure to obtain prior written approval from FCJ did not invalidate the underlease. As has been seen, despite the amplitude of the grounds of appeal, Mr Dunkley told me frankly that the 1st respondent's principal contention on the appeal will be that the judge erred in arriving at this conclusion.

[31] In discussing a tenant's general freedom to deal with the leasehold estate as an aspect of the common law's preference for "unfettered alienability of land", the learned

authors of Elements of Land Law, 5th edn, by Kevin and Susan Francis Gray, state the following (at paragraph 4.2.18):

> "Moreover, even if a tenant assigns or sublets in clear breach of an express covenant in his lease, the transaction vests a good title in the assignee or sublessee unless and until the wrongful dealing is invoked by the landlord as a ground for forfeiture of the lease. In effect, the dealing operates to transfer or create the relevant estate subject only to the possible exercise of the landlord's right of re-entry."

[32] In my view, the operation of this principle is likely to be a significant obstacle to the 1st respondent's chances of success in this appeal, since, although FCJ did threaten to invoke its rights under the head lease upon discovering the presence of the 1st respondent on the premises, there is no evidence that it did so in fact.

[33] I turn next to the timing of the application for security for costs. Coming over two and a half years after the appeal was filed, a month after case management and six months before the date fixed for hearing of the appeal, there can be no doubt that, as Mr Gordon readily recognised, the timing of the application for security for costs must be of particular relevance in this case. As Brooks JA explained in the **Continental Baking Co** case (at paragraph [12]), "[w]here an application has been filed very late, it may be viewed as reflecting insincerity on the part of the applicant". Brooks JA went on to refer to a passage from the judgment of Sir John Donaldson MR in **A Co v K Ltd** [1987] 3 All ER 377, in which it was noted that, in certain circumstances, the unexpected and consequently unplanned expenditure which an order for security for

costs made at a late stage of proceedings may entail could amount to "very real prejudice and, indeed, potential injustice".

[34] I am fully alive to this danger in this case, particularly keeping in mind what Mr Dunkley has frankly conceded to be the respondent's "parlous financial position" at this time. On the other hand, however, I am also satisfied from the unchallenged evidence put forward by the applicant that the filing of the application was a sincere reaction to the discovery that the 1st respondent may no longer have any physical presence in Jamaica and as a result may not have been able to pay any costs ordered against it at the conclusion of the appeal. In these circumstances, I considered that, on balance, the risk of injustice to the applicant arising from the 1st respondent's inability to meet any order for costs at the end of the day significantly outweighed the potential injustice to the respondent of a late order for security for costs.

[35] As regards the possibility that an order for security for costs might stifle the 1st respondent's appeal in this case, nothing was placed before me by way of evidence to support Mr Dunkley's assertion that such an order is likely to have this result. The amount of $3,000,000.00 asked for by the applicant was, in my view, taken in the context of the case as a whole, a relatively modest requirement in all the circumstances.

[36] And finally, while the 1st respondent – through Mr Dunkley – remained concerned about the freezing order to which it has been subject, I do not think that this can have any bearing on the applicant's entitlement to an order for security for costs in a proper

case, as I have found this to be. The purpose of such an order, where appropriate, is to protect the successful party to an appeal in respect of the costs expended by him to defend the appeal, in circumstances in which the unsuccessful party's inability to meet those costs could plainly have been foreseen beforehand.

[37] These are my reasons for making the orders set out at paragraph [1] above. However, for the avoidance of doubt I think that I should indicate that I declined to make an order striking out the appeal in the event of non-compliance with this order by the respondent, as I considered that, by the clear terms of rule 2.12(4) of the CAR, the power to strike out an appeal is one properly exercisable by the court itself. Nor, given the time remaining between the making of this order and the date fixed for hearing of the appeal, did I consider it appropriate to make an order staying the appeal pending compliance with the order. If, when the appeal does come on for hearing, the order has not yet been complied with, it will be a matter for the applicant and its legal advisers to determine which of the options open to them to take at that stage.