JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 55/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE PUSEY JA (AG)

APPLICATION NO 112/2018

BETWEEN	**JAMAICA EDIBLE OILS & FATS COMPANY LIMITED**	**APPLICANT**
AND	**MSA TIRE (JAMAICA) LIMITED**	**1ST RESPONDENT**
AND	**JEANNE LAVAN**	**2ND RESPONDENT**

CONSOLIDATED WITH

APPLICATION NO 124/2018

BETWEEN	**MSA TIRE (JAMAICA) LIMITED**	**1ST APPLICANT**
AND	**JEANNE LAVAN**	**2ND APPLICANT**
AND	**JAMAICA EDIBLE OILS & FATS COMPANY LIMITED**	**RESPONDENT**

Kwame Gordon and Ramon Clayton instructed by Samuda and Johnson for Jamaica Edible Oils & Fats Company Limited

Christopher Dunkley and Miss Tiffany Sinclair instructed by Phillipson Partners for MSA Tire (Jamaica) Limited and Ms Jeanne Lavan

20, 21 June and 9 July 2018

PHILLIPS JA

[1] I agree with the reasoning, conclusion and orders made by McDonald-Bishop JA which constitues the decision of the court.

MCDONALD-BISHOP JA

[2] These proceedings concern two applications that have emanated from an appeal, brought by MSA Tire (Jamaica) Limited ("MSA Tire") and Jeanne Lavan ("Ms Lavan") (collectively referred to as "the appellants", where necessary), against the judgment of E Brown J, delivered in the Supreme Court on 27 March 2015, in favour of the respondent, Jamaica Edible Oils & Fats Company Limited ("JEO"). The substantive appeal is fixed for hearing during the week commencing 16 July 2018.

[3] The first application was brought by JEO (application no 112/2018) for an order striking out the appeal for non-compliance with an order made by Morrison P, sitting as a single judge in chambers, on 23 April 2018. Morrison P had ordered that MSA Tire provides security for costs of the appeal (see [2018] JMCA App 8).

[4] The second application is that of MSA Tire for: (i) relief from sanction; (ii) an extension of time to file an application to vary or discharge the order of Morrison P; and (iii) to vary and discharge the order of Morrison P. The hearing of both applications was consolidated. However, although the application of JEO was first in time, the application of MSA Tire was heard and considered first in

these proceedings. This is due to the fact that the outcome of MSA Tire's application will be determinative of whether JEO's application for striking out succeeds or fails.

The background

[5] The dispute between the parties, which resulted in the commencement of proceedings in the Supreme Court, emanated from a lease agreement entered into between them on 18 May 2006, in respect of premises at Lot No 7, Naggo Head Industrial Estate, Portmore in the parish of Saint Catherine ("the premises"). The premises were the subject of a lease agreement between JEO, as the lessee, and the Factories Corporation of Jamaica ("FCJ") as the lessor ("the head lease"). JEO purported to sub-let the premises to MSA Tire ("the under lease"), evidently, without first obtaining the consent of FCJ.

[6] Despite the absence of the prior consent of FCJ, MSA Tire was let into exclusive possession of the premises, pursuant to the terms of the under lease, with payment of rent to JEO. MSA Tire remained in possession until an order for recovery of possession was made by the Supreme Court in December 2012, on a claim brought by JEO. The claim was for, among other things, recovery of possession, outstanding rent in the sum of $4,572,225.76, mesne profits at the rental rate as set out in the under lease, and interest at a commercial rate. By an amended fixed date claim form filed on 27 June 2013, the claim was amended to include an updated claim for mesne profits in the sum of $14,563,272.36.

[7] MSA Tire filed its defence to the claim, on 5 August 2013, in which it averred that: (i) the claim for rent in respect of the premises was unenforceable by virtue of the fact that JEO was in breach of clause 4(19) of the head lease; and (ii) JEO, having admitted that it was itself a lessee, was not entitled to claim against MSA Tire for mesne profits in respect of the premises.

[8] Between January and February 2013, JEO also obtained a series of freezing orders against MSA Tire which restrained it from dealing with funds in bank accounts; disposing of, transferring, charging or diminishing the value of assets in the jurisdiction up to the value of US$176,000.00; and, taking out of the jurisdiction machinery and equipment used in the operation of its business. The freezing order was later extended and remained in place until the end of the trial.

[9] The trial proceeded before E Brown J in chambers. A letter from FCJ, addressed to JEO, confirming that prior written approval to sub-let the premises was neither sought nor obtained, was admiited into evidence. This letter was adduced at the instance of MSA Tire. The letter also revealed that FCJ had visited the premises and had become aware of MSA Tire's occupation of it. Despite stating that it regarded MSA Tire as being in unlawful possession of the premises and that it required JEO to correct the breach, FCJ did nothing to enforce the covenant or to re-enter.

[10] On 27 March 2015, E Brown J entered judgment in favour of JEO on the claim. He made an order for payment of the sum claimed for outstanding rent in the sum of $4,572,225.76 and mesne profits in the sum of $3,791,090.70, along with interest on those sums at the commercial rate. He also ordered that the freezing order that was ordered to be in place until the end of the trial be further extended for 28 days from the date of the judgment.

[11] E Brown J found that, notwithstanding the established breach of the covenant not to sub-let contained in the head lease, the under lease was, nevertheless, valid and effectual on the basis that the breach entitled the landlord (in this case FCJ) to obtain remedies against the tenant (JEO), rather than to invalidate the under lease (see paragraph [26] of his written reasons for judgment). Accordingly, he concluded that MSA Tire was liable to pay the outstanding rent and mesne profits for "use and "occupation of the premises". He relied on several authorities in arriving at his conclusion that JEO was entitled to the remedies sought.

The appeal

[12] MSA Tire, being aggrieved by the judgment of E Brown J, filed its notice and grounds of appeal on 8 May 2015. It raised 16 wide-ranging but substantially overlapping grounds of appeal, which now form part of the record of appeal. They have all been examined and taken into account by this court.

[13] After the case management conference concerning the appeal was held on 29 November 2017, JEO's attorneys-at-law wrote to MSA Tire's attorneys-at-law, requesting security for costs. They made the request on the ground that MSA Tire had wound up its operation within the jurisdiction and that it had no assets within the jurisdiction to satisfy an award of costs. There was no response to this letter.

[14] Upon the failure of MSA Tire's attorneys-at-law to respond to this request for security for costs, JEO, by way of notice of application, filed on 19 January 2018, sought an order for security for costs. JEO relied on: (i) section 388 of the Companies Act; (ii) the fact that MSA Tire no longer carried on business within the jurisdiction; (iii) the fact that JEO was unaware of assets belonging to it in the jurisdiction to satisfy a costs order; and (iv) the fact that the circumstances of the case made it just for the granting of the order.

[15] On 23 April 2018, Morrison P granted the order that MSA Tire should give security for costs of the appeal within 30 days of the order. He made no consequential orders in the event of the failure of MSA Tire to comply with the order for security for costs, despite the provisions of rule 2.12(4) of the Court of Appeal Rules, 2002 ("the CAR"). He opined that the power to strike out the appeal was one properly exercisable by the court itself. He, however, reasoned that in the light of the fact that the appeal was set for hearing within a short time of the granting of the order, it was not considered appropriate to make an

order staying the appeal pending compliance with the order (see paragraph [37] of Morrison P's reasons for judgment).

JEO's application for striking out of the appeal

[16] MSA Tire failed to comply with the order of Morrison P. This prompted JEO to file its notice of application for court orders for the striking out of the appeal (the subject matter of these proceedings) on 24 May 2018. The application was amended on 11 June 2018. These orders were being sought by JEO by virtue of that amended notice of application:

> "1. An Order that the Appeal herein is to stand struck out if [MSA Tire] fails to provide security for [JEO's] costs in the sum of $3,000,000 within 30 days from the 23rd day of April, 2018.
>
> 2. In the alternative an Order that the Appeal herein stands struck out in the light of the failure of [MSA Tire] to provide security for [JEO's] costs in the sum of $3,000,000 within 30 days from the 23rd day of April, 2018.
>
> 3. Further, or in the alternative, an Order striking out the Notice of Appeal filed herein.
>
> 4. Further, in the alternative, an Order requiring [MSA Tire] to give the said security within seven (7) days, failing which its Notice of Appeal shall stand as struck out.
>
> 5. Any such order [as] this Honourable Court deems fit in the circumstances.
>
> 6. Costs of this application to be awarded to [JEO]."

[17] In broad outline, the grounds on which the application to strike out were based are:

i. Rule 2.12 of the CAR;

ii. The failure of MSA Tire to comply with the order of Morrison P, requiring it to give security for costs;

iii. Rule 1.13(a) of the CAR;

iv. The inherent jurisdiction of the court to strike out;

v. That the appeal discloses no reasonable grounds for bringing the appeal; and

vi. The appeal is patently frivolous.

[18] The application was supported by the affidavit of Roydine Graham, filed on 24 May 2018, and the affidavit of urgency of Christopher Henry, filed on 25 May 2018. The essence of Ms Graham's evidence was that since the order was made for MSA Tire to give security for costs, it had not complied and that rule 2.12(4) of the CAR provides that the court, on making the order for security for costs, 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. Mr Henry referred to the affidavit of Ms Graham and further deposed that the security for costs should have been paid by the close of business on 24 May 2018 and that MSA Tire had failed to comply with the order within the time specified. The purpose of his affidavit was to ask this court to grant a speedy hearing of the application because JEO continued to incur costs as it prepared to defend the appeal in circumstances where MSA Tire had failed to comply with the order of the court.

MSA Tire's notice of application for relief from sanction, extension of time and to vary/discharge the decision of the single judge

[19] Obviously spurred into action by this application by JEO, MSA Tire, on 1 June 2018, filed a notice of application to vary or discharge the order of Morrison P for security of costs. This application was informed by rule 2.11(2)(a) of the CAR. This rule provides that any order made by a single judge may be varied or discharged by the court.

[20] On 19 June 2018, when the matter was listed for the first time before the court for hearing, MSA Tire, upon being advised by the registrar that the application was out of time, filed its amended notice of application for relief from sanction; extension of time to file the application to vary or discharge the order of the single judge and for an order varying or discharging the said order. This application is the subject of these proceedings.

[21] MSA Tire detailed 22 grounds as forming the basis of the substantive application for this court to disturb the decision of Morrison P.

[22] In seeking to provide the evidential base for its application, especially the aspect for extension of time, MSA Tire relied on the affidavit of Christopher Dunkley filed on 19 June 2018. In paragraphs four, five and six of this affidavit, Mr Dunkley set out the reason for MSA Tire's failure to file the application to vary or discharge Morrison P's order within time and indicated that there is good reason for the court to grant an extension of time. Mr Dunkley took full responsibility for failing to keep abreast with the amendment to the CAR, which

provides a 14 day time limit for applications to be filed to vary or discharge the order of a single judge. The non-compliance, he said, was an "unintentional oversight" as it was never his intention to not comply with the rules. He sought to impress upon the court that MSA Tire, generally, had complied with all the rules and directions of the court and that the appeal has merit.

[23] The substantive application was supported by the affidavit of Carissa J Bryan, filed on 1 June 2018. Ms Bryan deposed to matters, which laid the foundation for the substance of the submissions advanced by counsel on behalf of MSA Tires, and which reflect the essence of the 22 grounds on which the application was brought.

[24] These are the main planks of MSA Tire's complaint about the decision of Morrison P as garnered from the grounds of the application, the affidavit of Carrissa J Bryan and the core arguments advanced in support of the application by counsel on its behalf:

i. The mareva injunction was wrongly obtained as a result of JEO's failure to disclose that it did not have the consent of FCJ to sub-let the premises.

ii. Morrison P erred in failing to appreciate the impact of the unjustified mareva injunction, which is the subject of the appeal, in that, he failed to give sufficient regard to the evidence that:

a. as a direct consequence of this injunction was the financial distress on MSA Tire, as JEO had resisted every effort made by it, to obtain a practical variation of the injunction in its own mitigation.

b. the proposed purchase price for the equipment, which was the subject of the injunction, was approximately three times the value of the amended claim. This was why MSA Tire sought to have its very specialized equipment converted into cash which would then be available for escrow by the court.

iii. Morrison P failed to give sufficient regard to the additional fallout from the financial difficulties of MSA Tyre's employees being thrown out of work. This resulted in lost pay and non-compensation to them for unused vacation time, and the consequent filing of redundancy claims by them, as a direct result of the unjustified mareva injunction.

iv. Morrison P failed to appreciate the effect of the unjustified mareva injunction on third parties such as Ms

Lavan as a creditor of MSA Tire as well as the Lannaman & Morris (Shipping) Limited whose containers storing the equipment, the subject of the injunction, were caught up in the said injunction.

v. Morrison P also failed to appreciate that JEO's failure to disclose that it did not have the consent of FCJ to sub-let the premises ought to have been fatal to the extended freezing orders, triggering enforcement of its undertakings in damages, which may well exceed its judgment against MSA Tire.

vi. Morrison P failed to appreciate the extent of the negative impact of the order for security of costs on MSA Tire who has been rendered impecunious by the wrongly obtained injunction and the frustration of its effort to vary it.

vii. The apparent failure of Morrison P to consider all of the evidence before him, on which he was asked to exercise his discretion is a proper basis for a review to vary and/or discharge the order he made.

viii. The adverse consequences of the order on MSA Tire by the lateness of the application for security for costs is a factor to be taken into account. (see **Keary Developments Limited v Tarmac Construction**

Limited and another [1995] 3 ALL ER 534 and **A Co v K Ltd** [1987] 3 ALL ER 377).

ix. The effect of Morrison P's order, in granting security for costs, has resulted in the stifling of MSA Tire's appeal, because MSA Tire was unable to provide the requisite security within the time specified.

x. It is unjust to order security for costs against MSA Tire.

xi. The order made by Morrison P has prejudiced MSA Tire in the face of the overriding objective and in all the circumstances.

[25] In support of the contention that the appeal has merit and ought not to be stifled by the order for security for costs and not to be struck out on JEO's application, counsel for MSA Tire, in their written and oral submissions (as voiced by Mr Christopher Dunkley) further highlighted the following:

i. The prospect of success lies in the fact that the contract between MSA Tire and JEO for the sublease of the premises, entered into without the prior written consent of FCJ, was illegal and unenforceable and, so, Morrison P erred in finding that it was enforceable against MSA Tire so as to render outstanding rent and mesne profits recoverable in estoppel.

ii. JEO did not plead estoppel and furthermore, there was material non-disclosure on its part concerning the absence of consent from FCJ.

iii. E Brown J failed to appreciate the seriousness of this material non-disclosure and its consequential effect on the freezing order for which JEO gave its undertaking in damages.

iv. The financial circumstances of MSA Tire, which led to impecuniosity being raised by JEO as a ground for the order for security for costs, are a direct consequence of JEO's action in obtaining an unjustified injunction against MSA Tire and the subsequent resistance of JEO to the practical and necessary variation of that injunction to permit the liquidation of MSA Tire's very specialised equipment.

v. The freezing order has resulted in the diminution in value of the assets of MSA Tire which it had in the jurisdiction at the commencement of the litigation.

vi. E Brown J appeared to have misunderstood the application for an order for enquiry and assessment of damages by ruling, at paragraph [31] of his judgment,

that, having ruled in favour of JEO, the question of the discharge of the injunction remained. E Brown J fell into error of not appreciating, on the facts, that JEO's actions to defeat MSA Tire's efforts at mitigation entitled it to an enquiry on assessment of damages. The evidence shows that the several attempts made by MSA Tire to mitigate its circumstances (which involved two sale negotiations of equipments), were frustrated by JEO. The unreasonable resistance to vary the wrongly obtained freezing order has rendered necessary an enquiry as to damages.

vii. E Brown J failed to appreciate that, notwithstanding the victory of JEO in the "money claim", the question remained whether in all the circumstances, JEO was justly entitled to the freezing order or whether the appellants were entitled to enforcement of the undertaking in damages. This is at the heart of the appeal and is not frivolous.

[26] Counsel submitted that this court ought not to accede to the application to strike out. Rather the court should review Morrison P's order because he fell into error in allowing the application for security for costs, mainly in light of the freezing order, which ought not to have been granted and the persistent

opposition to the efforts of MSA Tire to mitigate. It is, therefore, in the interests of justice that MSA Tire be permitted to prosecute its appeal without fetter, he urged.

JEO's arguments in objection to MSA Tire's application and in support of its application to strike out the appeal

[27] MSA Tire's application was stridently opposed by JEO which insisted, through its lead counsel, Mr Kwame Gordon, that the appeal should be struck out on the several grounds cited in its application. Mr Gordon contended as follows:

i. While it cannot be said the application was "terribly" out of time, it was clear that the application to discharge or vary the order of the single judge was not made until the application to strike out was brought by JEO. It meant then, that had that not been done, MSA Tire would have done nothing about the order of Morrison P.

ii. MSA Tire had not satisfied the judgment of the Supreme Court and there is no order obtained for stay of execution of that judgment. It stands, therefore, in blatant and flagrant breach of the rules and orders of the court and, so, ought not to get leniency with such infractions.

iii. There was no good explanation for the delay in making the application. The relief being sought was not predicated on anything relating to the amount of money it was ordered to pay as security for costs or the time given for the payment to be made. There was nothing to indicate that it was still conducting business or had assets within the jurisdiction. All that is put forward as a basis is that the appeal will be stifled.

iv. Mr Dunkley had taken Morrison P through the impecuniosity of MSA Tire and that would have served to reinforce in Morrison P's mind, the need for MSA Tire to give security for costs.

v. MSA Tire's contention that its equipment valued far more than the judgment debt, cannot be accepted because the evidence of value of the equipment given by Major Young (JEO's affiant in the application for the freezing order), which had informed MSA Tire's contention of value, was based only on an estimate of the value. Furthermore, Major Young is not a valuator. Despite the contention that the equipment valued three times the judgment debt, the appellants have done nothing to

provide evidence of the value of the equipment. The freezing order was varied in a post judgment order and the opportunity was presented for the equipment to be sold or for MSA Tire to treat with the equipment in a way to preserve its value. MSA Tire, however, did not exploit that opportunity.

vi. Furthermore, MSA Tire was not trying to sell the equipment at the time the injunction was granted but rather had parked the equipment at Lannaman & Morris (Shipping) Limited, a warehouse for shipment outside of Jamaica, clearly for the purpose of moving the equipment from the jurisdiction. This information came to the attention of JEO and, so, aggressive steps were taken by it, as a matter of necessity, to restrain the movement of the equipment from the jurisdiction. The steps taken by JEO were, therefore, not draconian or oppressive as contended by Mr Dunkley.

vii. The appellants have not provided any evidence as to how the freezing order had caused financial distress. MSA Tire had stopped paying rent for almost a year for reasons unknown and had remained in possession of the premises,

even after expiration of the lease period. The first time that issue was taken with the lease agreement, on the basis of breach of the head lease, was after the claim was filed and it became aware of the letter from FCJ indicating that no consent was given for the under lease to be entered into. So, the argument now being raised about the invalidity of the lease agreement was not the reason MSA Tire had stopped paying rent. It is, therefore, not true for MSA Tire to state, as it has done in affidavit evidence, that had it not been for the conduct of JEO, it would have been prosperous.

viii. The appeal is patently frivolous and ought to be struck out not only pursuant to rule 2.12(4) of the CAR, but also pursuant to the inherent jurisdiction of the court and rule 26 of the Civil Procedure Rules, 2002 ("the CPR"), which by virtue of rule 2.15(a) of the CAR, applies to this court.

ix. The essence of the appeal is that MSA Tire had no liability to pay rent or mesne profits because JEO had not obtained the consent of FCJ to sublet the premises. The principle of law that settles that argument, as relied on by E Brown J and Morrison P in their judgments is, "solid as

the rock of Gibraltar" and, so, the appeal which seeks to undermine that principle is frivolous.

x. There is, therefore, no merit to the appeal, and even if there is some merit to the appeal, the conduct of MSA Tire in disobeying the order of the court, would warrant the appeal being struck out.

[28] For all the foregoing reasons, Mr Gordon submitted that there was no merit in the application to vary the order of Morrison P and no merit in the appeal. Accordingly, the application of the appellants should be refused and the appeal struck out either forthwith or within seven days of this order, if security for costs was not given.

Discussion

[29] The core application of MSA Tire was that the order of Morrison P, made under the powers conferred on him by rule 2.12 of the CAR, be varied or discharged, pursuant to rule 2.11(2). However, to get that desired order, an extension of time was required before the application could be heard.

[30] Rule 1.7(2)(b) of the CAR gives the court the power to extend the time for MSA Tire to comply with the order for security for costs. In addition, by virtue of rule 2.15(a) of the CAR, the court has all the powers and duties of the Supreme Court, including, and in particular, the powers of case management, as

set out in the CPR. The overriding objective in Part 1 of the CPR also applies to the treatment of appeals in this court (see rule 1.1(10)(a)).

[31] The principles governing the extension of time are now well settled and have been sufficiently summarized in several cases in this court. In **The Commissioner of Lands v Homeway Foods Limited and another** [2016] JMCA Civ 21, one of the more recent cases from this court, a comprehensive examination was undertaken within the context of a case which involved issues arising from an application for extension of time, which co-existed with a corresponding cross-application for striking out, as in the case at bar. At paragraph [44], the court summarized the applicable principles relative to an application for extension of time in these terms:

> "[44] Some of the relevant considerations that govern the question of whether an extension of time should be given to a party in default have been laid down in several cases from this court. These principles have been distilled and outlined as follows:
>
> (i) Rules of court providing a timetable for the conduct of litigation must, prima facie, be obeyed.
>
> (ii) Where there has been non-compliance with a timetable, the court has a discretion to extend time. The court enjoys a wide and unfettered discretion under CAR, rule 1.7(2)(b) of the CAR to do so.
>
> (iii) The court, when asked to exercise its discretion under CAR, rule 1.7(2)(b), must be provided with sufficient material to enable it to make a sensible assessment of the merits of the application.

(iv) If there is non-compliance (other than of a minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted.

(v) In exercising its discretion, the court will have regard to such matters as:

(a) the length of the period of delay;

(b) the reasons or explanation put forward by the applicant for the delay;

(c) the merits of the appeal, that is to say, whether there is an arguable case for an appeal; and

(d) the degree of prejudice to the other party if time is extended.

(vi) Notwithstanding the absence of a good reason for the delay, the court is not bound to reject an application for extension of time.

(vii) The overriding principle is that justice is done."

[32] The court has been guided by these relevant principles in making its determination of whether the application should be granted. The starting point, in treating with the issues in this case, is that the order of Morrison P must, prima facie, be obeyed and so the court, upon being asked to exercise its discretion to extend time must be provided with sufficient material to enable it to make a sensible assessment of the merits of the application. Consideration has been given to these core factors as directed by the authorities:

i. The length of the period of the delay;

ii. The reasons or explanation put forward by the MSA Tire for the delay;

iii. The merits of the application to vary or discharge the order of Morrison P;

iv. The merits of the appeal;

v. The degree of prejudice to the other party if time is extended;

vi. What is required in the interests of justice and the overriding objective.

The length of the delay

[33] The application ought to have been made within 14 days of the order made on 23 April 2018. It was filed on 1 June 2018, which made it out of time. While it cannot be said that that, in and of itself, was an inordinate delay, one has to look at what was required to be done by MSA Tire, in order to fairly and properly determine whether in all the circumstances, the length of the delay ought to be held against it.

[34] Morrison P gave MSA Tire 30 days within which to comply with the order for the giving of security for costs. It did nothing to comply with the order and no effort was made to approach the court to vary or discharge the order, given

the time limited for the security to be given. The time passed and yet nothing was done to deal with the order of Morrison P. It was not until the application to strike out was filed by JEO that MSA Tire was spurred into action, as pointed out by Mr Gordon. This tardiness was all within a context, where there had been no stay of execution of the judgment being appealed.

[35] It does seem in all the circumstances, given the nature and import of the order that was made, that the length of the delay, even if, speaking strictly in terms of time, is not inordinate. It seems inexcusable in all the circumstances but that, however, is not of such gravity to militate against the grant of the extension of time.

The reason for the delay

[36] The court must examine the reason for the delay, even though the authorities have established that the absence of a good explanation for the delay would not necessarily militate against the grant of an order extending time for compliance. MSA Tire has explained the reason for the delay in making the application, which, basically, is the ignorance of its counsel that the rules were amended to limit the period for the making of the application to review the order of the single judge of appeal to 14 days. It seems to me, however, that whether it was 14 days or more, MSA Tire had no intention to apply to the court because it only sought to do so when the application was made by JEO to enforce the order of Morrison P by striking out the appeal. The sincerety of the reason put forward for the delay is, therefore, rendered suspect.

[37] Despite the misgivings regarding the true intention or motives of MSA Tire, I have paid due regard to counsel's explanation and will say that ignorance of the law is known not to be an excuse. It is, therefore, not a good excuse, albeit that Mr Gordon himself had conceded that he, too, was not aware of the amendment. The absence of a good excuse, however, is not determinative of the matter. The ultimate question is what justice requires. The resolution of this question necessitates an investigation into the merits of the application to set aside or vary Morrison P's order, since that is the application in respect of which extension of time is being sought and not, so much at this stage, the merits of the appeal itself.

Is there merit in the application to vary or discharge the order of Morrison P

[38] The immediate question for this court in determining whether an extension of time should be granted is whether there is merit in the argument that Morrison P erred in coming to his decision so that the grant of an extension of time to make the application to vary or discharge his order would not be a waste of scarce judicial time and resources. So, the crucial question arises: if the extension of time is granted and the challenge to the decision developed, is there a real likelihood that MSA Tires would succeed in obtaining an order varying or discharging the order of Morrison P?

[39] In resolving this question, the judgment of Morrison, along with all the other relevant materials and authorities placed before us by both sides for

consideration, have been closely examined. Having considered all that had been urged on us on behalf of both sides, it is found that the answer to the question must be in the negative. In sum, the examination of the issues has revealed that there is no arguable case with a real prospect or chance of success that Morrison P erred in the exercise of the wide discretion he enjoyed, in making the order he did, for security for costs. There is no chance of MSA Tire being able to successfully persuade this court on the case presented, that the order of Morrison P should be disturbed.

[40] I have arrived at this position, having also borne in mind the approach that the court must apply, in treating with the application, if it were allowed to proceed. In this regard, the principles enunciated by Lord Diplock in **Hadmor Productions Ltd v Hamilton** [1983] 1 AC 191, stood at the forefront of our minds. Lord Diplock had set out the criteria that must be satisfied for an appellate court to justifiably interfere with the exercise of a judge at first instance. These principles have been endorsed by this court, time and time again, and have even been extended to apply to decisions of a single judge of this court (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 and **Royden Riettie v National Commercial Bank Jamaica Limited and others** [2014] JMCA App 36).

[41] The guiding principles may be condensed in these terms. The appellate court is loath to interfere with a judge's exercise of his discretion merely on the

basis that it would have exercised the discretion differently. The appellate court will, therefore, only set aside a judge's exercise of his discretion on an interlocutory application if it is found to be based on a misunderstanding by the judge of the law or of the evidence before him, 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 his duty to act judicially could have reached it".

[42] The reasons for concluding that there is no likelihood of MSA Tire succeeding in its substantive application to vary or discharge the order of Morrison P will now be outlined.

[43] It is observed that Morrison P had identified the main point of the appeal to be as stated by him in paragraph [29] of his judgment, that:

> "[29] In his submissions in opposition to the application, Mr Dunkley for the [MSA Tire] told me that the principal point which [MSA Tire] intends to pursue in the appeal is that, in the absence of prior permission by FCJ to sub-let to [MSA Tire], the underlease was unenforceable. "

[44] In examining the merit of the appeal, Morrison P dealt with that principal point at paragraphs [30] - [32] of the judgment. Having considered E Brown J's reasoning and findings on the issue, within the context of the applicable law, in particular the relevant principle of law treating with a tenant's general freedom

to deal with leasehold estate, he considered paragraph 4.2.18 from the text, Elements of Land Law 5th edition by Kevin Gray and Susan Francis Gray, and concluded:

> "[32] In my view, the operation of this principle is likely to be a significant obstacle to [MSA Tire'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 [MSA Tire] on the premises, there is no evidence that it did so in fact."

[45] It is highly improbable (if not nigh impossible) that the court would conclude that this finding by Morrison P is anything less than being unassailable. MSA Tire has no prospect of success in arguing that Morrison P erred in his conclusion on this issue. However, to be fair to Mr Dunkley, he did not seek to strongly argue this point in the course of his application before us as being the main basis for the application for the extension of time. The target of his challenge before us related more to the treatment by Morrison P of the issue regarding the grant of the freezing order in the court below, which include the evidence of material non-disclosure in obtaining the injunction; the impact of the injunction on MSA Tire's financial position and on third parties; as well as the adverse impact on MSA Tire's ability to mitigate.

[46] Mr Dunkley's strongest argument, in advancing that there is merit in the application as well as in the appeal, is that the matter should have proceeded to an assessment of damages on JEO's undertaking in damages. The basis of this

argument lay in the contention by MSA Tire that the injunction was wrongly or unjustly obtained (due to material non-disclosure) and that the value of the specialized equipment, which was the subject matter of the injunction, was three times the value of the claim. According to counsel, MSA Tire was deprived of the opportunity to have the equipment converted into cash for availability to the court. Both Morrison P and E Brown J, it was contended, failed to take those matters into account and, so, there is merit in the appeal (and by extension, in the application for variation or discharge), which would justify a discharge of the order for security for costs.

[47] An examination of the judgment of E Brown J, however, does not reveal these matters pertaining to the freezing order being the core issues resolved by him. At paragraph [14] of his judgment, he identified four issues for his determination which all related to the enforceability of the contract for the under lease. He found the principles applicable to the issues for resolution to be well settled, and after applying those principles, he concluded that the contract was enforceable and that MSA Tire was liable on the claim for the outstanding rent and mesne profits.

[48] E Brown J then proceeded to indicate, under the heading, "**Third Party Interest**", at paragraph [29] that, "[a]nother dimension of this matter was the grant of the freezing order over the assets of [MSA Tire]". However, before moving on to consider that matter of the freezing order, he had already

highlighted earlier in his judgment at paragraph [7], MSA Tire's contention concerning the freezing order. He had noted:

> "[7]...In respect to the injunction granted, [MSA Tire] submits that [JEO] ought not to have benefitted from its granting. In the circumstances, [MSA Tire's] prayer is that this court will so rule and in consequence discharge the injunction. The court should also order an enquiry as to damages which they have sustained from the granting of the injunction. Reliance was placed on **Dalton Yap v Union Bank of Jamaica Ltd** SCCA No 58/98 dated 22nd November 2001 (unreported) to ground their prayer for an enquiry as to damages." (Emphasis as in original)

[49] After considering the affidavit evidence before him from Ms Lavan and Mr Mike Shill Jr, which amounted to an application to discharge the freezing order, he opined:

> "[30] There was evidence before me that [MSA Tire] expressed a clear intention to remove its assets from the jurisdiction of the court. With that no issue was joined. Mr. Mike Shill Snr, also another director of [MSA Tire], told a representative of [JEO] that [MSA Tire] would have been relocating to Suriname. When pressed about the settlement of [MSA Tire's] debt to [JEO], Mr Shill Snr responded that the company had no money. Consequently, there was a real risk of [JEO] being left with an unsatisfied judgment in the event of success at the hearing. It was on that basis that I extended the freezing order until the determination of the substantive matter."

[50] At paragraph [31] of his judgment, he then went on to consider the question of the discharge of the freezing order, having already found in favour of JEO on the claim. He refused to discharge the freezing order until 28 days after

the judgment, as he put it, "until the fear of dissipation or removal of [MSA Tire's] assets has passed".

[51] There was no counterclaim before E Brown J for any claim for damages arising from the freezing order. In any event, he saw reasons to keep the order in place during the course of the proceedings and for a period after judgment was handed down. It is clear from the reasoning of the learned judge, that having found that MSA Tire was liable, he did not accept the argument that the injunction was wrongly obtained. He saw that the basis for granting it existed, in that there was evidence of the intention of MSA Tire to take the equipment outside of the jurisdiction and that it was impecunious. He retained the injunction, despite MSA Tire's argument of non-disclosure of material facts that was advanced before him.

[52] It cannot be said then that E Brown J failed to take those matters concerning the freezing order into account as argued by MSA Tire. Also, there is nothing to show from his decision that it is unlikely that an order for costs on the appeal would not be made against MSA Tire, thereby warranting a variation or discharge of the order for security for costs.

[53] With respect to the treatment of the issue of the freezing order by Morrison P, it can be seen that he took into account the evidence and arguments advanced by and on behalf of MSA Tire, in considering whether the order for security for costs should have been made. Apart from taking into account the

law applicable to the making of an order for security for costs, he took into account the following matters:

i. The letter written by JEO's attorneys-at-law to MSA Tire's attorneys-at-law for security for costs and that no response to that letter was received;

ii. The affidavits filed on behalf of JEO which set out the estimate of the costs of the appeal and the justification for an order for security of costs;

iii. The affidavit filed on behalf of MSA Tire pointing out: (a) the delay in bringing the application for security for costs, and (b) the financial fallout and consequent embarrassment suffered by MSA Tire as a result of the freezing order;

iv. The alleged conduct of JEO that prevented MSA Tire from selling its specialized equipment overseas and, so, the only recourse for MSA Tire as a result of the financial crisis would have been to enforce the undertaking in damages;

v. The assertion made on behalf of MSA Tire, by its affiant, that were the court to grant the order for security for costs, it would, "almost certainly fail to comply, which would result in the stifling [of] a good appeal with a high prospect of success."; and

vi. The submissions of counsel on both sides, and in particular that of Mr Dunkley that the injunction was wrongly granted.

[54] At paragraph [36] of his judgment, Morrison P cast his attention to the concerns of MSA Tire, through Mr Dunkley, about the freezing order. He concluded:

> "[36] ...I do not think that this can have any bearing on the [JEO'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."

[55] When one examines the treatment of both E Brown J and Morrison P of this issue pertaining to the freezing order, in all the circumstances of the case, and the principal contention of Mr Dunkley before this court, that MSA Tire has the legal right to enforce the undertaking as to damages, it is hard to find any argument of such potency that could erode the logic in the decision of Morrison P to grant the order for security for costs. The contention that he failed to have regard to all the evidence, and in particular, issues concerning the freezing order and the need for an assessment of damages, is totally devoid of merit.

[56] There is also no merit in MSA Tire's contention that Morrison P failed to have sufficient regard to the question of JEO's delay in making the application. Morrison P clearly also took into account, as a relevant consideration, the delay on the part of JEO in making the application, which was, and still remains, a complaint of MSA Tire. He concluded that he was satisfied on the unchallenged evidence, put forward by JEO, that the application was, "...a sincere reaction to the discovery that [MSA Tire] 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". He then continued:

> "[34]... In these circumstances, I considered that, on balance, the risk of injustice to [JEO] arising from [MSA Tire's] inability to meet any order for costs at the end of the day significantly outweighed the potential injustice to [MSA Tire] of a late order for security for costs."

[57] In relation to the complaint that the order for security for costs might stifle the appeal, Morrison P observed that no evidence was placed before him to support Mr Dunkley's assertion that such an order is likely to have that result. To date that situation exists and this court is placed in no different or better position to properly evaluate MSA Tire's true status.

[58] Morrison P carefully examined the material evidence in the case against the applicable law, which he found to be sufficiently embodied in rules 2.11(1)(a) and 2.12 of the CAR, section 388 of the Companies Act, on which JEO

principally relied, and **Continental Baking Co Ltd v Super Plus Food Stores Ltd and Tikal Ltd** [2014] JMCA App 30, paragraph [11]. There is no challenge to his application of the relevant law. He concluded, on the basis of his application of the law, that an order for security for costs was justified. One can discern no likelihood of success in any contention advanced by MSA Tire that he erred in law in coming to his decision.

Prejudice

[59] It has not escaped our attention too that despite Mr Dunkley's customarily spirited submissions challenging the decision of Morrison P, there was no evidence produced in support of the contention by MSA Tire that it is gravely and unjustly prejudiced by the order. There is, therefore, nothing pointing to a change in circumstances, since the grant of the order, that would entitle this court to interfere with the decision of Morrison P. To date, JEO has a judgment that remains unsatisfied. There is no stay of execution but there is no effort made to carry out the order of the court. There is no effort made by MSA Tire to give security for costs. The prejudice to JEO would far outweigh the prejudice to MSA Tire if the court were to extend time to MSA Tire to argue a futile application for variation or discharge of the order for security of costs. This finding favours the refusal of the application, as it would produce the most just outcome.

[60] Mr Gordon's helpful submissions have found favour with this court that there is no proper basis on which to grant the extension of time for an

application to be made to vary or discharge the order of Morrison P as the application is wholly without merit. This is an application, which is bound to fail. As such, it would not be in keeping with the overriding objective to extend time only to dismiss the application. Accordingly, the application for extension of time for a variation or discharge of the order of Morrison P is refused.

The application for relief from sanction

[61] Rule 26.8 of the CPR governs applications for relief from any sanction imposed by the court. In this case, no sanction was actually imposed by Morrison P in granting the order for security for costs. However, JEO is applying for the most serious sanction of striking out to be imposed for non-compliance with the court's order. The considerations given to an application for relief from sanction could be applied by analogy, to such extent as is necessary, in order to determine whether relief from the sanction applied for should be given.

[62] This application, we must say, suffers the same fate as the application for extension of time. Although strictly speaking, no sanction was imposed by Morrison P from which relief could be sought, there is no evidence provided on which this court could exercise its discretion to grant relief from sanctions in all the circumstances, if any sanction in the proper sense of the term even existed. The rules provide that such an application must be made promptly (see rule 26.8(1) of the CPR). Given all the circumstances of the case, MSA Tire would have failed to satisfy this requirement because it cannot be said, given the type of order that was made and the period for compliance that has elapsed, that it

had acted with any promptitude. It would have, therefore, failed at the first hurdle.

[63] In any event, the fundamental reasons given in refusing to grant the extension of time, which are the lack of merit in the application and the prejudice to JEO, would, of necessity, strongly militate against granting relief from sanction.

[64] In the premises, the application of MSA Tire, filed on 19 June 2018 (no 124 of 2018) for relief from sanction and extension of time within which to apply to vary or discharge the order of Morrison P is refused. JEO would be entitled to the costs of this application.

JEO's application to strike out (no 112/2018)

[65] This application was partly made pursuant to rule 2.12(4) of the CAR, which provides:

> "(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."

[66] In this case, Morrison P did not make an order that the appeal be dismissed in the event of non-compliance, despite the mandatory terms of the rule that the court must make such an order. In paragraph [37], Morrison P stated that he would decline to make an order striking out the appeal because as he put it:

> "[37]... 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 [JEO] and its legal advisers to determine which of the options open to them to take at that stage."

[67] Morrison P cited rule 2.12(4) of the CAR as it was prior to the amendment in 2015. By virtue of that amendment a single judge is now empowered to make an order dismissing the appeal for failure to comply with an order to provide security for costs. The section now reads:

> "Security for costs of appeal
>
> "2.12 (1) The court or the single judge 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,
>
> to give security for the costs occasioned by an 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 or the single judge 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 or the single judge 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." (Emphasis added)

[68] Given the clear wording of the rule, it was within the powers of Morrison P to make the order striking out or dismissing the appeal and it was mandatory for him to do so. The use of the word "must" instead of "may" in this context has led to this conclusion. Mr Dunkley has conceded that much.

[69] The making of an order for the appeal to be dismissed or struck out for non- compliance with the order for security for costs is long overdue as it ought to have been made by Morrison P at the time he made the order for security for costs. Given that there is nothing to show, in all the circumstances, that MSA Tire is entitled to relief from sanction, it is now incumbent on this court, without more, to make the order in keeping with the dictates of rule 2.12(4) of the CAR.

[70] The court, therefore, agrees with Mr Gordon that that the appeal should be struck out due to the failure of MSA Tire to comply with the order of Morrison P to give security for costs of the appeal. But, there is more.

[71] Mr Gordon also drew support for his application to strike out the appeal from rule 26.3(1)(a) of the CPR, which applies to this court by virtue of rule 2.15(a) of the CAR. That rule confers an unqualified discretion on the court to strike out an appeal, or part of it, for failure to comply with a time limit fixed by a rule, practice direction or court order given in the proceeding. There is a clear order for security for costs made on 23 April 2018 by Morrison P, and to date, there is no evident effort to comply and no explanation forthcoming for failure to do so. MSA Tire has also disclosed no basis that would entitle it to relief from sanction for failure to comply with the order of Morrison P.

[72] Furthermore, it is observed that the hearing of the appeal is less than a month away and yet no step has been taken by MSA Tire to comply with the order for security for costs. There is also no indication of any intention on its part to comply. In fact, the affidavit of Tiffany Sinclair, filed in opposition to the order for security for costs, had indicated that "it would almost certainly" fail to comply if the order was made. Given the blatant flouting of the order of Morrison P by MSA Tire, without any proper excuse, explanation or justification, the court must move to ensure that its authority is not undermined, through disobedience of its orders and rules of court. This is necessary for the administration of justice.

[73] There is also nothing to show that MSA Tire could successfully argue that the grant of the order is more prejudicial to it than it would have been for JEO, if the order were not granted. There is no evidence to substantiate the arguments

of prejudice and hardship as a result of the order as contended by counsel for MSA Tire.

[74] Mr Gordon went a bit further to contend that another basis that would support a striking out order is that the appeal is frivolous and completely without merit and, so, the court by virtue of its inherent jurisdiction, could move to strike it out. He also contended that there was no reasonable ground for bringing the appeal. This argument of Mr Gordon is a very attractive one, when the grounds of appeal and the main thrust of the arguments put forward in support of them, before this court and Morrison P, are closely considered. The merit of the appeal is, indeed, dubious at best and, so, is not of such potency as to override the principles that operate in favour of an order striking out the appeal. Therefore, alternatively, the appeal could also be struck out, on other grounds other than rule 2.12(4), when all the circumstances are considered. I am content, however, to strike it out on the basis of rule 2.12(4) of the CAR since that was the order that ought to have been made from the outset.

Conclusion

[75] It is evident that there is more than ample basis, in fact and in law, on which this appeal should properly and justifiably be struck out and we should rule accordingly. The application of JEO that the appeal be struck out is granted on the basis of MSA Tire's failure to comply with the order for security for costs, made by Morrison P.

[76] The ruling applies to the appeal, in general, and so binds Miss Lavan as MSA Tire's co-appellant.

[77] Accordingly, the following orders are made:

On application no 124/2018

i. The application for relief from sanction, extension of time within which to apply to vary/discharge the order of the single judge; and to vary or discharge the order of the single judge filed on 19 June 2018 is refused.

ii. Costs of the application to JEO to be agreed or taxed.

On application no 112/2018

i. Upon the failure of MSA Tire to provide security for the costs of the appeal pursuant to the order of Morrison P made on 23 April 2018, the appeal is struck out.

ii. Costs of the application and costs incurred by JEO to date in defending the appeal to JEO to be agreed or taxed.

PUSEY JA (AG)

[78] I also agree with the reasoning, conclusion and the orders made by McDonald-Bishop JA.

PHILLIPS JA

ORDER

Application no 124/2018

i. The application for relief from sanction, extension of time within which to apply to vary/discharge the order of the single judge; and to vary or discharge the order of the single judge filed on 19 June 2018 is refused.

ii. Costs of the application to JEO to be agreed or taxed.

Application no 112/2018

i. Upon the failure of MSA Tire to provide security for the costs of the appeal pursuant to the order of Morrison P made on 23 April 2018, the appeal is struck out.

ii. Costs of the application and costs incurred by JEO to date in defending the appeal to JEO to be agreed or taxed.