[2016] JMCA App 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 50/2015

APPLICATION NO 165/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE WILLIAMS JA (AG)

BETWEEN	**STRATA APPEALS TRIBUNAL**	**APPLICANT**
AND	**DOUGLAS CAMPBELL**	**RESPONDENT**

Mrs Symone Mayhew and Miss Kimberly Morris for the applicant

Miss Carol Davis for the respondent

20, 21 October 2015 and 3 June 2016

PHILLIPS JA

[1] The Strata Appeals Tribunal (the Tribunal) made an application before this court for a variation of the order of Sinclair-Haynes JA (Ag) (as she was then) made on 10 July 2015, and for a stay of execution of the judgment of Laing J made on 18 March 2015, pending determination of the appeal filed on 4 May 2015. The order of Sinclair-Haynes JA, read as follows:

> "Application for stay refused. Applicant has not proven that without grant of stay it would suffer financial ruin or any risk of injustice."

Laing J overturned the decision of the Tribunal, wherein it refused to hear the respondent's appeal challenging contributions levied against his apartments by the

Proprietor's Strata Plan No 73 (the corporation) on the basis that it was out of time. He made the following orders:

> "1. The decision of the Tribunal dated 19th September 2014 dismissing the [respondent's] appeal is quashed.
>
> 2. Leave to Appeal granted to the [Proprietor's Strata Plan No 73].
>
> 3. Costs awarded to the [respondent] against the [Strata Appeals Tribunal] to be agreed or taxed
>
> 4. [Respondent's] Attorney-at-Law to prepare, file and serve orders herein."

[2] The grounds of the application were that, *inter alia*: (i) rule 2.11(2) of the Court of Appeal Rules, 2002 (CAR) empowered the court to vary or discharge an order made by a single judge; (ii) there were special circumstances which warranted the grant of a stay of execution and there was a significant risk of injustice to the applicant if a stay of execution was refused; and (iii) the applicant had a realistic prospect of success on appeal.

[3] On 20 October 2015, we heard the application and on 21 October 2015 we refused the same, with costs to the respondent to be taxed if not agreed. We promised to give reasons for that decision. These are my reasons.

[4] It is necessary for me to set out a summary of the background facts in order to readily grasp how this application came before the court. These facts will be gleaned from the pleadings filed on behalf of the parties; the affidavits filed in support of the fixed date claim form; and the affidavits in support of and in opposition to the

application for the stay of execution of the judgment of Laing J; and the judgment of Laing J.

Background facts

[5] The respondent claimed to be the legal owner of apartment 103 and the beneficial owner of apartments 104 and 218 (the apartments) located in the parish of Saint Ann. Apartment 104 is registered in the name of Traute Campbell, his deceased wife, and apartment 218 is registered in the name of Woodruff Hospital in the United States of America. These apartments were managed by the corporation, which is a strata corporation, established under the Registration (Strata Titles) Act (the Act) which was substantially amended in 2009.

[6] The respondent fell into arrears with regard to the maintenance fees payable in respect of the apartments which resulted in a delinquency notice being sent to him by letter dated 23 March 2011, from the corporation, pursuant to section 5A of the Act. The amounts allegedly outstanding were stated therein and the corporation informed the respondent of its powers of sale over the apartments unless the sums stated as owed were settled within 30 days of the date of the letter. The respondent stated that he had not become aware of the action that the corporation intended to take until December 2011. He then immediately contacted his attorneys and he indicated that eventually he had received the letters, being the delinquency notices with certificates attached thereto in February 2012, when they were sent to him in the United States. The respondent provided details demonstrating that the mail sent by registered post, had not been received by him, but had been collected by the corporation, and as he

had been barred from entry to the complex, being a delinquent owner, no mail left at the apartments would have been received by him.

[7] The certificates he had received which were attached to the delinquency notices were dated 13 July 2011 and bore the signatures of the Chairman and the Secretary of the Commission of the Strata Corporations (the Commission) and were stated to be issued pursuant to section 5C(4) of the Act. They stated further that the Commission, in accordance with the Act, was certifying that the proprietors of the corporation had satisfied the Commission that the corporation had exhausted its means of: (a) obtaining payment of amounts owing to the corporation and (b) notifying the proprietors of the proposed sale of the respective apartments, in full compliance with section 5 of the Act.

[8] The respondent was dissatisfied with the amounts stated to be due in respect of the apartments and averred that a "delinquency levy" had been charged which was 103%, 106% and 98% relative to apartments 103, 104 and 218 respectively, in excess of the sums claimed for maintenance in respect of the said apartments. It was also his contention that certain of the amounts claimed were allegedly due from 2006 which amounts would have been statute barred. He therefore instructed his attorney to file an appeal.

[9] The notice of appeal to the Tribunal was stated to be filed pursuant to section 15A(2)(b) of the Act and was accompanied by a statement setting out the grounds of appeal. The respondent claimed that the amounts being levied on him were in law a penalty, illegal and/or outside of the provisions of the Act, and that some of the sums

were time barred. He also claimed that certain paintings and photographs which were in apartment 218 had been damaged due to water which had leaked from the roof above. Also some clothes in apartment 104, had been damaged due to leakage from a gutter outside of the apartment. With regard to apartment 103, water had leaked from the apartment above resulting in flooding of the apartment for a period in excess of six months. He also claimed that an historic motor vehicle and a valuable statue entitled "naked pregnant woman" belonging to him had also been removed by the corporation and converted to its own use. It was the respondent's expectation that the value of these losses would be set off against any sums allegedly due to the corporation.

[10] The respondent also stated as a ground of his appeal that, as he resided abroad and had been barred from the complex, and even though he had provided an address of his attorney through whom he could be contacted, he had not received any information in writing with regard to any outstanding contributions and/or the period in respect of which they had been outstanding prior to the corporation proceeding to obtain the certificate from the Commission. As a consequence, he claimed that the certificates had been wrongfully and improperly obtained. He demonstrated by producing a receipt to that effect, that he had paid the sum of $5,042,452.00 to the corporation, as an agreed sum to facilitate the appeal to the Tribunal.

[11] When the matter went before the Tribunal on 19 September 2014, it ordered that the appeal was dismissed "as being out of time" and stayed the effect of the order for a period of 10 days from the date of the order with costs to the corporation to be taxed if not agreed. It was the respondent's contention that the notice of appeal could

not have been filed within 30 days of the date of issuance of the certificates, which was on 18 July 2011, as he had been unaware before December 2011 of any action being taken by the corporation and had not had sight of the documents until February 2012.

[12] The respondent being entirely dissatisfied with the approach taken and the order made by the Tribunal, filed an application in the Supreme Court for leave to apply for judicial review of the decision of the Tribunal, which was granted by Sykes J on 2 October 2014. The learned judge gave leave indicating that the sole ground to be argued was whether the decision of the Tribunal was ultra vires and/or unlawful or irrational. However, he refused the application for an injunction restraining the corporation from exercising its powers of sale in respect of the apartments until the hearing and determination of the matter or the determination of the respondent's appeal. He ordered costs to the corporation to be taxed if not agreed.

[13] The amended fixed date claim form was duly filed on 5 November 2014 and asked for the following reliefs:

> "1. A Declaration that the [Tribunal] acted ultra vires and/or illegally and/or unlawfully in dismissing the Appeal of the [respondent] dated 8th May, 2012 as being out of time
>
> 2. A Declaration that the [Tribunal] acted irrationally and without any reasonable cause in dismissing the Appeal of the [respondent] dated 8th May, 2012 as being out of time.
>
> 3. An Order of certiorari to quash the decision of the [Tribunal] dated 19th September 2014.
>
> 4. Further or other relief
>
> 5. Costs to the [respondent] to be agreed or taxed."

It was supported by an affidavit of the respondent which contained the facts referred to herein in paragraphs [5]-[12].

The judgment of Laing J

[14] As indicated Laing J delivered his reasons for judgment on 18 March 2015. He set out the background facts as set out previously, in paragraphs [5]-[12] herein, and the basic threshold for the grant of judicial review. He referred to the case of **Council of Civil Service Unions and Others v Minister for the Civil Service** [1985] AC 374 where he stated that Lord Diplock had "classified under three well established heads the grounds upon which administrative action is subject to control by judicial review, namely illegality, irrationality and procedural impropriety". The learned judge stated that the application for judicial review had at its core the interpretation of the Act and so he dealt with what he considered to be the relevant provisions of the same, namely sections 3, 5 and 15 *in extenso.*

[15] He pointed out that section 3A of the Act established the Commission; section 3B set out the functions of the Commission which included considering complaints from proprietors that the amount of the contribution levied under section 5(2)(b) was unreasonable or inequitable; that section 3B(5) provides that the corporation, a proprietor or any other person aggrieved by a decision of the Commission may appeal against the decision which shall be binding on those persons until the appeal is determined; and importantly that section 3B(6) states that an appeal made under section 3B shall be made no later than 30 days from the date of the decision of the Commission. It is of significance that section 3B(5) is subject to section 3B(7) which

states that the implementation of a decision that is subject to an appeal shall be suspended until the time for the appeal has expired or the appeal has been disposed of; section 3B(7) is subject to section 3B(8) which states that the decision shall be implemented forthwith where the continuation of the action complained of in respect of which the decision was made is likely to result in a nuisance or health hazard.

[16] The learned judge opined that section 3B(6) of the Act referred specifically to a decision of the Commission. Additionally, the appeal referred to therein must also, he stated, be to the Tribunal established by section 15A, as that was the only other body to which an appeal could reasonably be directed.

[17] The learned judge also addressed section 5A of the Act, which he said addressed appeals, but was limited to appeals to the Tribunal against decisions from a strata corporation and not appeals against the decisions of the Commission. Section 4 of the Act established the corporation and section 5(1) and (2) set out the duties and powers of the corporation respectively, with the latter including the establishment of a fund for administrative purposes and expenses sufficient in the opinion of the corporation for the control, management and administration of the common property, for the payment of any premiums of insurance, and for the discharge of any of its other obligations (section 5(2)(a)). These powers would also include the determination from time to time of the amounts to be raised for the fund and to raise amounts so determined by levying contributions on the proprietors in proportion to the unit entitlement of their respective lots (section 5 (2)(b)).

[18] The learned judge emphasized that section 5A of the Act made it clear that if a proprietor failed, neglected or refused to pay to the corporation, all or any part of the contribution levied pursuant to section 5(2)(b), the corporation could act in the manner set out in section 5A(2). This included the corporation informing the proprietor, his agent or mortgagee of the amount outstanding, the period for which it had been outstanding which would be outlined in a statement of accounts (section 5A(2)(a)); the interest accruing on the same also set out in a statement of accounts (section 5A(2)(b)); and that the sum with interest should be paid within 30 days from the date of service of the notice informing of the same (section 5A(2)(c)). If the sum was not paid or suitable arrangements made to settle the same then the corporation may sell the strata lot by public auction or by private treaty in accordance with section 5C(4). Of some significance to the application, section 5A(2)(e) states that the proprietor, if aggrieved by the amount of contribution stated in the notice may lodge an appeal if he has paid at least 50% of the amount owing or such other sum which may be agreed with the corporation.

[19] Once a proprietor appeals against the amount owing, then the corporation shall not exercise its power under section 5A(2)(d) of the Act to sell the strata lot until the appeal is determined (section 5A(4)). In any appeal under section 5A, if the Tribunal is satisfied that contributions have been owed to the corporation in excess of 60 days prior to the appeal having been lodged, the Tribunal may make an order for such payment to be made (section 5A(5)). If the Tribunal on appeal determines that the amount paid by the proprietor pursuant to section 5A(2)(c) ought not to have been

paid, the Tribunal may order that the corporation refund such amount, or set off that sum against any other sum outstanding with regard to that proprietor (section 5A(6)).

[20] The learned judge also found section 5C of the Act instructive, and relevant to his deliberations in the matter. The section stated that the corporation, prior to its exercise of the power of sale shall satisfy the Commission that it has taken all reasonable measures to recover the amounts owing by giving notice to the proprietor and his agents if any, and the mortgagee of the strata lot in accordance with the notice previously referred to section 5A(2). If the Commission is satisfied that the corporation has exhausted all means of notifying the proprietor in accordance with section 5A, it may direct the corporation to take any additional steps that it deems fit including publishing the sale of the proposed lot (section 5C(2)). The Act sets out that the notice referred to above shall be published in a daily newspaper within 30 days after the Commission has given the direction for it to be published, and outlines the detailed information that must be contained therein (section 5C3(b)). Once the Commission is satisfied that the corporation has taken all reasonable steps in accordance with section 5A(2) in order to obtain payment of the amounts owing to the corporation and notifying the proprietor of the proposed sale, the Commission shall issue a certificate in the prescribed form to that effect (sections 5C(4)(a) and (b)). The corporation may only exercise a power of sale if it has received from the Commission a certificate under the section 5C(4) as set out above.

[21] Section 15A of the Act also loomed large in the learned judge's deliberations. Section 15A(1) established the Tribunal for the purpose of hearing appeals. The fourth

schedule to the Act set out the constitution and operation of the Tribunal. Section 15A(2) reads as follows:

> "Any person aggrieved by a decision of--
>
> (a) the corporation, in the case of the aggrieved person being a proprietor of a strata lot; or
>
> (b) the Commission,
>
> may appeal to the Tribunal in the prescribed manner, upon payment of any prescribed fee."

It is clear, pursuant to section 15A(3) of the Act, that the Tribunal shall before determining the appeal, give the parties an opportunity to be heard by the Tribunal, and may on the appeal allow the appeal, set aside or vary the decision of the corporation, or the Commission, or dismiss the appeal and confirm the decision of the corporation, or the Commission, as the case may be.

[22] The learned judge canvassed the submissions of counsel for both parties. He noted that it was the respondent's contention that it was wrong for the Tribunal to have relied on section 3B(6) of the Act in dismissing his appeal since the appeal had not been filed pursuant to section 3 of the Act. The appeal, counsel submitted, related to the amounts in arrears computed as due by the corporation and the appeal therefore related to the decision of the corporation. The learned judge recognized that the respondent's position was that his appeal to the Tribunal was pursuant to section 5A of the Act, and there was no provision in section 5A that placed any limitation on or specifying a time within which to appeal. Additionally, counsel had submitted, the learned judge noted, that section 5A(2)(e) provided a separate and independent right

of appeal and having paid the sum required in order to lodge an appeal pursuant to that section, the appeal lodged would have been pursuant to that section namely an appeal from a decision of the corporation. The learned judge referred to counsel's further arguments that the Act should not be interpreted negatively so as to adversely affect the rights of citizens.

[23] The learned judge also specifically noted that counsel for the applicant had relied on the fact that the Act embraced a new regime. Neither the Commission nor the Tribunal had existed prior to the amendment of the Act in 2009. The new regime counsel had argued, was established to assist corporations in the "face of widespread delinquency of proprietors and section 5A(2) places importance on the certificate issued by the Commission as a precondition to any sale of the property of a delinquent owner." Thus, continued the submission, once the certificate was issued and was unchallenged, the delinquent owner lost the right to appeal the decision of the corporation. Any appeal therefore must be an appeal from the decision of the Commission, even if, as in the case of the appeal at bar, the appeal relates to the issue of the quantum of arrears assessed by the corporation. It was further suggested that in any event the Act would not have contemplated an indeterminate amount of time for the laying of an appeal.

[24] The learned judge asked the following relevant and important question:

> "Was there an appeal of the decision of the Corporation or of the Commission and under which section was the appeal brought?"

Having examined and assessed the provisions of section 5C of the Act as set out previously, he indicated that he had difficulty accepting that the respondent was appealing the decision of the corporation to the Tribunal simply on the basis that the appeal was subsequent to the issuing of the notices by the corporation particularly as there was no challenge to the Commission with regard to the assessment of arrears before it, prior to the issuance of the certificate, by the Commission, as the Commission was under no obligation to review and certify the correctness of the assessment. The learned judge therefore concluded at paragraph [18] of his judgment that in his opinion:

> "...one would be applying an artificial construction to say that the [respondent] (who in his appeal expressed it to be an appeal of the quantum of the assessed sum) was appealing the decision of the Commission to issue the Certificate, the Commission not having at all considered or made a decision as to quantum. Furthermore appeal [sic] in the absence of any express provision indicating this to be so, I do not find that the [respondent] has lost his right to appeal to the Tribunal on the issue of the quantum of the Corporation's assessment simply because he did not lodge an appeal to the Commission and permit the Commission to exercise those powers of review granted to it by section 3B."

The learned judge continued in paragraph [19] of the judgment:

> "I therefore agree with the [respondent's] Counsel's submission and find that his appeal to the Tribunal was an appeal against the decision of the Corporation in its assessment of the fees payable..."

[25] The learned judge also found that section 5A(2)(e) of the Act does confer a separate avenue for appeals and was not merely a provision establishing the prescribed fee for appeals.

[26] The learned judge reviewed section 15A of the Act and concluded that it was:

> "a comprehensive appeals section which provides for appeals from decisions of a strata corporation as well as the Commission and is noticeably devoid of any time limit or deadline for appeals to be brought."

[27] In his conclusion the learned judge stated that the appeal gateway provisions in the Act were sections 3B, 5A and 15A. There may be, he surmised, an overlap in these gateway sections to the extent that section 15A provides a right of appeal already conferred by sections 3B and 5A. He found that the 30 day limit in the filing of appeals exclusively applied to section 3B(6). In his view, had the draftsmen intended that the 30 day limit was applicable to all appeals that could easily have been stated in section 15A. The court, he stated, was not prepared to construe the Act in such a manner so as to impose the application of such a provision to all appeals made to the Tribunal.

[28] He found that the appeal to the Tribunal in the case at bar, had not been made pursuant to section 3B of the Act, not being an appeal from a decision of the Commission. He further found that although the 30 day limit did not apply, the appeal would have to have been filed within a reasonable time. He accepted the explanation of the respondent in respect of the delay, that he had not become aware of the corporation's assessment until February 2012. He found therefore that the Tribunal had erred in failing to hear the respondent's appeal and he set aside the order of the Tribunal dated 19 September 2014.

The appeal

[29] The applicant appealed. The notice and grounds of appeal were duly filed on 4 May 2015, asking that the order of Laing J made on 18 March 2015 be set aside. There were seven grounds of appeal. In summary the applicant stated that the learned judge had erred:

1. in finding that the appeal had been lodged in a reasonable time as it had been filed 10 months after the corporation's delinquency notices had been served (ground (i));
2. in failing to find that the appeal was not a decision from the Commission as the respondent had not appealed prior to the certificate having been issued (ground (ii));
3. in construing section 5A(5) as contemplating that section 5A(e) was a separate avenue of appeal, and also in finding that section 5A(e) was a separate avenue of appeal (grounds (iii) and (iv));
4. in his interpretation of sections 3B , 5A, and 15A of the Act (ground (v));
5. in his interpretation of section 3B of the Act, particularly in his finding that the 30 day limit imposed by 3B(6) applied exclusively to section 3B; in falling to have

regard to the entire scheme of the Act (ground (vi)); and

6. in failing to fully appreciate the consequences of the fact that the certificate had already been issued to the corporation by the Commission empowering the corporation to exercise its powers of sale over the respondent's three apartments (grounds (vii)).

The application for a stay of execution

[30] The application for stay was filed in this court and as indicated was refused by Sinclair Haynes JA, the variation or discharge of which is part of the relief claimed in the application for stay filed on 10 September 2015 before us, as set out in paragraphs [1]-[2] herein. The affidavit of Keva Hylton, attorney-at-law and member of the Tribunal, was filed in support of the application. Having set out the history of the matter and the grounds of appeal indicating that the learned judge had misinterpreted the provisions of the Act, she emphasized that the learned trial judge was wrong in finding that the respondent had lodged his appeal in a reasonable time. She reiterated that the Tribunal had a realistic prospect of success. She posited that if the stay of execution was not granted it would make the appeal nugatory and lead to injustice, since the Tribunal would be obliged to comply with the order of the learned trial judge to hear the respondent's appeal before the court would have had the opportunity to adjudicate on the merits of the appeal.

[31] The respondent's affidavit in response reiterated the information contained in his affidavit filed in support of the fixed date claim form as set out in paragraphs [5]-[12] herein. In specific response to Mrs Hylton's affidavit, he deponed that he had lodged an appeal with the Tribunal because he was of the view that the corporation were claiming amounts in respect of his three apartments in excess of what was legally and properly due to it. He stated that he had responded in reasonable time bearing in mind when he had received the delinquency notices. He maintained that his dispute was with the corporation, particularly with regard to the "delinquency levy" they had claimed from him in respect of which he had been severely prejudiced, as the corporation had refused to accept maintenance sums from him as any sums so received, the corporation had indicated, would be put to the account outstanding, which included the said levy which the respondent had disputed. He stated that he had already paid the corporation $13,427,486.00 towards settlement of the amount due to it, in respect of the apartments.

[32] The respondent indicated that the corporation was a party to the application before Laing J and it had not appealed his decision. He deponed that the corporation had no chance of success on appeal, based on Laing J's reasons for judgment. His concern was that the appeal had already been scheduled to be heard before the Tribunal subsequent to the ruling of Laing J, but had been adjourned due to the unavailability of counsel for the corporation. He maintained that he would be greatly prejudiced if the matter were further delayed, as he was 80 years of age and wished the matter to be resolved at the earliest possible opportunity.

[33] He denied that the appeal before this court would be nugatory if the appeal before the Tribunal was to be heard as soon as possible. He made it clear at paragraph 31 of his affidavit filed 22 June 2015 that:

> "...The [applicants] are mandated by statute to hear and determine appeals. They should do so in an independent manner, without taking sides. Their appeal can proceed for the purpose of the clarification of the law for future matters, but should be no impediment to my appeal proceeding before the tribunal in a timely manner."

The submissions

For the applicant

[34] Counsel for the applicant submitted that the court had jurisdiction to hear the application and referred to rule 2.11 of the CAR. She indicated that the power to grant or refuse a stay was discretionary and set out the test for doing so as approved by this court by referring to the oft cited cases on this area of the law namely: **Linotype Hell Finance Ltd v Baker** [1992] 4 All ER 887, **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another** [2011] JMCA App 1 and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065.

[35] Counsel submitted in detail on the prospects of success of the applicant's appeal and the risk of injustice to it if the application was refused. With regard to the prospects of success counsel referred to the reasons for judgment of Laing J and to the grounds of appeal outlined in paragraph [29] herein. Counsel addressed in detail, the provisions of the Act, and focused on the fact, she said, that prior to exercising its powers of sale to recover outstanding sums, the corporation must obtain from the Commissioner a

section 5C certificate. She pointed out that the corporation cannot exercise the power of sale if any appeal against an assessment by the corporation was pending. She submitted further that as the certificate was issued on 20 July 2011, and the appeal to the Tribunal was lodged in May 2012, the learned judge had erred as the appeal could no longer be against the decision of the corporation but had to be against the decision of the Commission and was therefore subject to the 30 day limit, and the appeal had not been filed within the time prescribed in the Act.

[36] Counsel seriously challenged the learned judge's treatment of "the several gateways to appeals in sections 3B 5A and 15A" of the Act. Counsel submitted that the certificate having been issued by the Commission, the certificate was then the subject of the appeal and not the assessment which had been effected by the corporation. What, queried counsel, would be the status of the certificates issued under section 5C, which empowered the corporation to sell the apartments, if the learned judge was correct? Counsel further challenged the delay by the respondent in the filing of his appeal to the Tribunal and the learned judge's treatment of it. She concluded by submitting that the Tribunal had an arguable case for appealing the decision of Laing J.

[37] Counsel argued further that there was a risk of injustice to the Tribunal if the stay was not granted, as if the appeal was successful, the Tribunal would have been put to significant cost and expense to hear and determine an appeal that it would not have been obliged to hear, which costs and expense would be irrecoverable. Counsel challenged the efficacy of the respondent relying on his age resulting in prejudice to him, when he had allowed the passage of time to elapse in circumstances when the

dispute had arisen due to his failure to pay contributions levied on him by the corporation, and his failure to address matters in a timely manner. Counsel therefore submitted that there was a greater injustice to the applicant, when viewing the matter in the balance, if the stay was refused as against if the stay was granted.

For the respondent

[38] Counsel submitted that she accepted the principles laid down in the cases referred to by counsel for the applicant with regard to the discretion of the court to grant or refuse a stay. She additionally set out, in summary, matters which the court ought to consider when determining whether to grant or refuse a stay of execution of a judgment. She submitted that the normal rule is that the successful litigant was entitled to the fruits of his judgment. Also, in determining whether to grant or refuse the stay, the court should always consider the merits of the appeal, and if there is no merit in the appeal, the stay ought to be refused. If there is merit in the appeal then the court should conduct a balancing exercise and consider the risk of injustice to either party. Another factor, counsel argued, to be taken into account is whether the refusal of the stay may have the effect of stifling the appeal

[39] Counsel submitted that the appeal had little chance of success. She specifically referred to section 15A of the Act, and posited that any person aggrieved by a decision of either the corporation or the Commission could appeal to the Tribunal and it was her contention that "it was undisputed" that there was no time limit to do so set out in section 15A. The only time constraints related to section 3B of the Act. Counsel commented further that the learned judge had explained why he had accepted the

respondent's explanation for the delay and that position expressed by the judge could not be faulted.

[40] Additionally, counsel submitted, the fact that certificates had been issued could not be a bar to the respondent appealing the amount of the contribution required of him, as even when the premises were sold that amount had to be determined in order for an assessment to be done with regard to what amount, if any, was to be paid to the proprietor. Counsel reiterated the position of the respondent that there was no prejudice to the Tribunal obtaining clarification of the law for future appeals. However, it was inaccurate to say that the expenses of the hearing before the Tribunal were irrecoverable as any expenses incurred in the conduct of the hearing of the appeal before the Tribunal could be recovered pursuant to section 15A(8) of the Act. Counsel further argued that it should be noted that the Tribunal was not directly affected by the appeal before it, the parties affected were the corporation and the respondent, and the parties had agreed that the appeal before the Tribunal was to be heard on 23 October 2015, which was a day later on in the week in which the matter was being argued before us.

[41] Counsel for the respondent reiterated the prejudice likely to be suffered by the respondent. She contended that the respondent was required to pay substantial sums in respect of the apartments, which included the delinquency levy and his obligation to do so would continue for an extended period, the longer the appeal took to be heard. This would be prejudicial to him even if the corporation was successful on its appeal in this court. Additionally, the respondent has had the orders for sale of the three

apartments hanging over him for some time, and he was desirous of paying the sums legally owed and "clearing up his affairs" in a timely manner, bearing in mind that he was over 80 years of age.

[42] In the light of all of the above, counsel submitted that on an analysis of the law and the facts, the learned judge had applied the right principles, had arrived at the correct findings, and his decision ought to be upheld. The application, she stated therefore, for the variation/discharge of the order of Sinclair-Haynes JA and the application for the stay of execution of the judgment of Laing J ought to be refused.

Discussion and analysis

[43] There is no doubt that this court has the jurisdiction to grant a stay of execution of a judgment of the court below. The CAR in rule 2.14 states that unless directed by the court below, or this court or a single judge of this court the appeal does not operate as a stay of execution or of proceedings of the court below.

[44] This court has given guidance and stated its approval in several cases on the threshold test for the grant of a stay of execution of a judgment in the court below. I accept the principles as enunciated by counsel for the applicant. The two-fold test was initially outlined by Staughton LJ in **Linotype-Hell Finance Limited v Baker** requiring the applicant to show that he has some prospect of success on his appeal and that without the grant of a stay he would be financially ruined. Subsequent to this dictum, the courts have taken a more liberalized approach and sought to impose the interests of justice as an essential factor in the consideration as stated by Harris JA in

Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another. This court has also approved the balancing exercise within the concept of the due administration of and the interests of justice. In **Hammond Suddard Solicitors v Agrichem International Holdings Ltd**, Clarke JA clarified the position which has been adopted by our courts generally since then. He stated at paragraph 22 of the judgment:

> "...Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

[45] In **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another**, we referred to with approval the dictum of Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited** FC 297/6273 [1997] EWCA 2164 delivered on 23 July 1997, where he stated the proper approach to be as follows:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered, but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course

> that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

[46] It is incumbent on the court to consider whether there is a real prospect of success on appeal. The true meaning of this phrase has been explained by Lord Woolf MR in **Swain and Hillman and Another** [2001] 1 All ER 91 which dictum has also been approved in several cases in this court. The oft cited clarification of Lord Woolf MR at page 92 of the judgment is as follows:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[47] It is also necessary that the court bear in mind the powerful speech of Lord Hodge in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 where the learned law lord, on behalf of the court, in detail, reminded us that when reviewing the decision of the single judge in the court below, an appellate court should not do so on the basis that it would have arrived at a different conclusion based on the facts, but this court must be satisfied that the judge, in exercise of his discretion was "plainly wrong". This is particularly essential when assessing the prospect of success on appeal, as once the judge in the court below has properly taken all that he should into consideration this court is hesitant to interfere. It is true that in the case at bar dealing with the interpretation of the statute imposing a new regime the principle

would be less restricted in its application but nonetheless it requires our focus and attention.

[48] I accept and agree with Laing J that the crux of the case before him was the interpretation of the Act. I also accept that the amendment of the Act in 2009 brought about a new regime in the management and administration of strata corporations. Prior to that amendment, the Commission and the Tribunal did not exist. As a consequence, when interpreting the Act and in order to effect the purpose and intent of the legislation, one must examine the regime as a whole and give consideration to the fact that it is an entirely new regime. It is clear that the Act was amended to address the delinquency among proprietors in the payment of the contributions levied on the strata units owned by them in order to defray expenses attendant with the management and administration of the strata corporations. I also accept that the Act is fairly complex, and that there has not yet been any case in this court where the court has given guidance with regard to the interpretation of any provisions of the statute. I also bear in mind the principle emanating from **Sewing Machines Rentals Ltd v Wilson Petitioner and Another** [1976] 1 WLR 533, that I ought not to make any pronouncements on the merit of the case at this stage of the proceedings, as the matter is on appeal and is yet to be heard.

[49] That having been said however, in order to assess the issue with regard to the whether the applicant had a real prospect of success on appeal, it is necessary to come to some view on the proper interpretation to be accorded certain relevant provisions. I do not intend to go through the Act in detail as Laing J was constrained to do in order

to arrive at a decision, but there is a cardinal rule of statutory construction which requires one to give the words their ordinary and literal meaning.

[50] In this case, in my opinion, for the purposes of the resolution of the competing issues in the application, it is only necessary to examine section 15A of the Act. It seems clear to me that this section established the Tribunal for the purpose of hearing appeals. It is also pellucid, as found by the learned judge and endorsed by counsel for the respondent in submissions in the application before us, that any person aggrieved by the decision of the corporation, being a proprietor of the strata lot, or by a decision of the Commission, may appeal to the Tribunal, in the prescribed manner, having paid the prescribed fee. So, on the basis of those clear words, in this case, the respondent, being a proprietor of a strata lot could appeal to the Tribunal, if aggrieved by a decision of the corporation or by a decision of the Commission. There is also no mention of any time limit in that provision, and so on the face of it, it would appear that the respondent would not be restricted to appealing within a 30 day limit but could appeal within a reasonable time.

[51] The question would therefore be whether in the circumstances of this case, it was reasonable to conclude without more, that the respondent's appeal was out of time. The judge found that it was not, and he also gave consideration to the delay and whether the appeal was filed within a reasonable time and he found that it was. It may therefore appear that the Tribunal erred in this regard in which case there would not be a real prospect of success on appeal on this point.

[52] However, there were other issues raised in respect of the interpretation to be accorded to other provisions in the statute, which would, it was argued, impact on the position taken above, with particular regard to whether the decision being appealed must relate to the certificate issued by the Commission and not to the assessment of the contribution being levied by the corporation, in which case the appeal ought to have been filed within 30 days from the issuance of the certificate which the respondent had not done. Whether any of those arguments can succeed will be based on how sections 3B and 5A of the Act are to be construed, and particularly whether section 15A can be overridden by those provisions or whether it can stand alone and be construed as such. That decision will be determinative of the appeal. In my view, there seems little chance of section 15A being interpreted in any way other than I have already indicated and that was therefore one of the bases upon which I thought that the application for stay should be refused.

[53] With regard to the risk of injustice, in my view, on any balance of the competing situations the respondent seems likely to suffer the greatest prejudice. I agree that the only inconvenience to the Tribunal is to proceed with the hearing of the appeal with all the attendant cost and expenses, in circumstances where if the appeal was successful in this court, and the court were to find that the respondent's appeal was out of time, and the Tribunal was therefore not obliged to have heard it, then any order made by the Tribunal would be ineffectual, null and void, and not binding on the parties.

[54] It is of significance that counsel for the respondent submitted that section 15A(8) of the Act stated that "costs of the appeal proceedings including court costs and any

attorney's costs may be recovered from an unsuccessful party", which suggests that the Tribunal could be reimbursed all expenses attendant with the hearings before it. It is also of some significance, that if the Tribunal proceeded with the hearing and the respondent was successful in showing that the sums being levied on the units by the corporation were unlawful, one might expect that a statutory body, even in the light of the successful appeal in this court, may wish to re-think collecting those sums from a proprietor if they were not lawfully due. Additionally, the Tribunal which has been established and has as its mandate to hear appeals would have had the law clarified under which it is governed, which would be of great benefit for the future operation of that statutory body. The appeal therefore would not in my opinion be nugatory.

[55] It is of some significance also that although the corporation is unable to sell the respondent's apartments as the appeal is extant, the sums agreed having been paid, and the judge having ruled accordingly, until the appeal is heard by this court, and/or the respondent is successful in its appeal before the Tribunal, in the interregnum, the certificates of the Commission also remain extant, with the possible sale of the apartments pursuant thereto being an option in the future, while the respondent remains obliged to pay the substantial sums being levied on the apartments inclusive of sums representing the delinquency levy, without any use of the apartments if he continues to be barred from entry to the premises, due to his delinquency as found by the corporation. This situation seems untenable to me coupled with the fact that he is an elderly proprietor, who is desirous of having the situation regularized at the earliest possible opportunity.

[56] In all the circumstances, it seemed to me that the balance weighed heavily in the stay being refused, with the Tribunal proceeding to hear the respondent's appeal pursuant to the ruling of the leaned trial judge, and with the Tribunal acting responsibly while awaiting the outcome of the appeal to this court.

[57] In the light of all of the above, these are the reasons why I joined with the other members of the court refused the application for variation/discharge of the order of Sinclair-Haynes JA and the stay of execution of the judgment of Laing J as stated previously in paragraph [3] above.

BROOKS JA

[58] The Strata Appeals Tribunal (the Tribunal) has filed an appeal from a decision made by Laing J in the Supreme Court. He ordered the Tribunal to hear an appeal, made to it by Mr Douglas Campbell from a decision of Proprietors Strata Plan No 73 (the Corporation). The Corporation operates a strata plan called Carib Ocho Rios. This is an application for a stay of execution of Laing J's order pending the result of the appeal to this court. The Tribunal has also applied for a variation of the order of Sinclair-Haynes JA (Ag), who, as a single judge of this court, refused the Tribunal's application when it was initially filed.

[59] We heard the application on 20 October 2015 and on 21 October 2015 we made the following orders:

> "1. The application for variation of the order of Sinclair Haynes JA (Ag) and for a stay of execution of the judgment of Laing J, both made herein, is refused.
>
> 2. Costs to the respondent to be taxed if not agreed."

We promised at that time to put our reasons in writing. These are my reasons for agreeing to that decision.

The factual background

[60] The appeal to this court turns on the interpretation of certain provisions in the Registration (Strata Titles) Act (the Act). Those provisions were introduced when the legislature radically amended the Act in 2009. The amendments were part of the legislature's response to a chronic problem of arrears affecting strata corporations. The amendments were designed, in part, to make it easier for strata corporations to collect maintenance fees from recalcitrant proprietors of strata units. The Tribunal was established as an important part of the mechanism for keeping strata corporations efficient.

[61] The Corporation accuses Mr Campbell of being one of its recalcitrant proprietors. He has control of three units in Carib Ocho Rios. The Corporation says that all three units are in arrears for maintenance fees.

[62] It initiated steps in 2011 to recover the outstanding maintenance fees for these units. In March of that year, it issued delinquency notices concerning the arrears for each of the strata units. The notices required payment of the outstanding sums, failing which the Corporation would initiate the process leading to the sale of the units.

[63] The Corporation received no response to its notices and it took the next step required by the Act to enforce collection. In July 2011, it secured certificates in respect of each of the units from the Commission of Strata Corporations (the Commission), as is prescribed by the Act. Those certificates indicated that the Commission was satisfied that the Corporation had taken all reasonable steps to obtain payment of the arrears, and to notify the proprietors that the Corporation intended to sell the strata units. The certificates allowed the Corporation, if it were so inclined, to proceed with the sale of the units.

[64] In May 2012, Mr Campbell lodged an appeal with the Tribunal, protesting the Corporation's notice. He asserted that the sums claimed by the Corporation were excessive. Among his complaints was an assertion that the Corporation had been improperly imposing a monthly delinquency levy, which is more than the monthly maintenance fee. The Tribunal ruled on 19 September 2014 that his appeal was out of time and dismissed it.

The litigation

[65] Mr Campbell did not accept the Tribunal's ruling. On 9 October 2014, he filed a claim for judicial review of its decision. He filed an amended claim on 5 November 2014. His claim was against both the Corporation and the Tribunal. Laing J heard the claim, and, on 18 March 2015, quashed the Tribunal's decision that the appeal was out of time. The learned judge ruled that the Tribunal should hear the appeal and decide it on its merits.

[66] The Tribunal has appealed from that decision. It filed several grounds of appeal. The grounds all require an interpretation of the 2009 amendments to the Act. That appeal is pending before this court. The Tribunal asserts that the learned judge's decision is wrong and ought to be set aside. The essence of the issue on the appeal to this court is whether there is a time limit for appeals to the Tribunal.

[67] The present application arises because the Tribunal does not wish to conduct the hearing of Mr Campbell's appeal, until its appeal to this court has been decided. It therefore filed the application for a stay of Laing J's order, pending the hearing of the appeal.

[68] Sinclair-Haynes JA (Ag) heard the application on 10 July 2015, and refused it. She ruled that the Tribunal had "not proven that without grant of stay it would suffer financial ruin or any risk of injustice".

[69] The Tribunal has now asked the court to vary her decision and grant the stay.

The basis of the application

[70] The application for stay is based on the assertions that:

> (a) the Tribunal's appeal has a good prospect of success, and
>
> (b) if the application is refused it would render the appeal nugatory as the Tribunal would be obliged to comply

with the order of Laing J and hear Mr Campbell's appeal before the Tribunal's appeal is heard by this court.

The analysis

The relevant law

[71] Ms Davis, on behalf of Mr Campbell, correctly pointed out the main principle governing a review of a decision of a single judge of this court. It is that the court is required to assess "whether the single judge was wrong in law or in principle or had misconceived the facts" (*per* Phillips JA in **John Ledgister and Another v Jamaica Redevelopment Foundation Inc** [2013] JMCA App 10, at paragraph [33]). It is only where the single judge has made such an error that the court will disturb his or her ruling.

[72] The essence of the application before the single judge, as before this court, is whether there is a greater risk of injustice in granting the stay as opposed to refusing it. There is no real dispute between the parties on the applicable principles of law to be applied. The case of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 has long been accepted by this court as having correctly set out the approach to be used in considering applications such as these. The relevant position is set out at paragraph 22 of the judgment:

> "...Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, **but the essential question is whether there is a risk of**

> **injustice to one or other or both parties if it grants or refuses a stay**. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?" (Emphasis supplied)

The approach in **Hammond Suddard** was approved by this court in **Hargitay v Gartmann** [2015] JMCA App 44.

[73] Other guidance may also be drawn from the judgment of Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited FC** [1997] EWCA 2164. The learned judge of appeal considered that the appropriate approach to assessing such applications was to:

> "...make that order which best accords with the interest of justice. **If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered.** Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. **This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered.** But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice...." (Emphasis supplied)

That method of assessment was approved by this court in **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another** [2011] JMCA App 1.

The question of merit

[74] The question at this stage of the process is, therefore, a simple one: "If the Tribunal has an arguable appeal, does the justice of the case require a stay of execution to be granted?"

[75] In utilising the approved approach, the court must first determine if there is merit in the appeal. Mrs Mayhew, on behalf of the Tribunal, submitted that the appeal did have merit. She argued that a purposive approach should be used in interpreting the relevant sections of the Act. Learned counsel submitted that on such an approach it would be held that there was a time limit for appeals from claims by strata corporations for maintenance fees. She argued that, looking at the Act as a whole, it would be an anomaly for there to be time limits in respect of appeals from decisions in certain instances and time limits for the payment of outstanding contributions, yet no time limit for appeals from claims for contributions as in the present case.

[76] Ms Davis argued that the Tribunal's appeal had no reasonable prospect of success. She stressed that the section dealing with appeals to the Tribunal concerning contributions did not stipulate a time limit.

[77] There have been very few judgments in this court concerning the Act since it was amended in 2009. None covering this point has been brought to our attention. As has been mentioned above, the specific issue involved in this appeal is whether the Act stipulates a time limit for appeals to be lodged with the Tribunal from claims by strata corporations for maintenance fees. Laing J carefully considered the relevant portions of the Act that resulted from those amendments and which affected this case. He found that there was no time limit for such appeals. The learned judge reached his decision, by way of a process of reasoning and comparison of the relevant sections. The Act speaks to time limits for other processes, but does not specifically set out a time limit for protests against notices from Corporations alleging arrears. It may have been a deliberate stance taken by Parliament. That is an issue to be decided when the Tribunal's appeal is heard.

[78] In light of the amendments being relatively new, and in the absence of a ruling on the point by this court, it may be said that the Tribunal has an arguable appeal. It therefore remains to examine the circumstances of this case, and in particular, the status of the Tribunal as opposed to that of Mr Campbell and the Corporation's status as opposed to Mr Campbell's.

Prejudice – the Tribunal versus Mr Campbell

[79] The first aspect to be noted is that if no stay is granted, the Tribunal will be obliged to hear Mr Campbell's appeal on its merits. If its appeal to this court is successful and this court rules that Mr Campbell's appeal to the Tribunal was out of

time, the only loss for the Tribunal would be the time and cost that it incurred in hearing his appeal. Its decision, one way or the other, has no financial impact on it. Mrs Mayhew submitted that the exercise would be a significant expense and would be irrecoverable. That, however, is an untenable argument. The Tribunal was established to hear appeals. That is its statutory task, and its reason for existence. In addition, there is provision in the Act, which speaks to the recovery of the costs of the appeal. Section 15A(8) of the Act states:

> "Costs of the appeal proceedings including court costs and any attorney's costs may be recovered from the unsuccessful party."

[80] The affidavit filed on behalf of the Tribunal suggested that its appeal to this court would be rendered nugatory if it were obliged to hear Mr Campbell's appeal in the interim. That position is also untenable. There will be no risk of the Tribunal's appeal in this court being stifled. It is entitled to pursue its appeal, whether or not it hears Mr Campbell's appeal. At the determination of the appeal in this court, the Tribunal, whether it is successful or not, would have had the benefit of a decision of this court to guide it going forward.

[81] Mrs Mayhew also submitted that the absence of a stay would place the Tribunal in an invidious position if it were to have heard Mr Campbell's appeal and later be successful in its appeal to this court. It would have found, on being successful in this court, that it was not obliged to have heard him at all, or put another way, that he had no right of audience before it. She queried the status of the decision that the Tribunal would have made.

[82] The Tribunal cannot be prejudiced by going through the exercise of hearing the appeal. As mentioned above, it would be doing what it is established to do. It would not be irreparably harmed by having heard and decided an appeal that this court later found it was not obliged to hear.

[83] The effect of a ruling in this court in favour of the Tribunal must, however, be assessed. One view is that a ruling of this court that the Tribunal was not obliged to hear Mr Campbell, or, in the formulation that Mrs Mayhew prefers, a ruling that Mr Campbell was not entitled to a hearing, would not nullify the ruling made by the Tribunal on hearing Mr Campbell's appeal on its merits. On that view, the Tribunal's ruling would bind both the Corporation and Mr Campbell, subject to any other process allowed by the Act, or to any recourse to a court.

[84] A contrary view is that such a ruling by this court would nullify the decision of the Tribunal on the merits of Mr Campbell's complaint. On that view, the Tribunal would have been wrong to have heard Mr Campbell. The entire proceedings would, therefore, have been of no effect and the parties would not be able to act on the ruling on the merits.

[85] The difficulty with the latter view, with respect, is that it equates a finding that Mr Campbell had no right to be heard with a finding that he could not properly be heard. Such an argument ignores the fact that the Act does not specifically preclude the tribunal from hearing an appeal out of time. It also ignores the fact that by regulation 6(4) of the fourth schedule to the Act, the Tribunal is empowered to regulate

its own proceedings. Presumably, that power would enable it to extend the time in which an appeal may be lodged by a proprietor.

[86] The better view is that a ruling by the Tribunal on the merits of the appeal, quite independent of whether or not Mr Campbell had a right of audience, would be more likely to render justice, and be more satisfactory to all parties. If a party were, perchance, dissatisfied with a ruling on the merits, it could challenge it with judicial proceedings. That, however, is an entirely different issue and need not be discussed here.

[87] If, on the merits, the Tribunal held that the Corporation was in error, it would be unsatisfactory all round for Mr Campbell to have been obliged, by virtue of having been denied a hearing, to pay monies that he did not properly owe. Conversely, the Corporation could not properly complain that it had failed to secure a payment to which it was never entitled.

[88] Similarly, if the Tribunal ruled in favour of the Corporation, Mr Campbell would have had the benefit of his complaint having been assessed according to law. The Corporation would also have had the benefit of its practice of applying a delinquency levy, being approved by the Tribunal. A ruling by the Tribunal in favour of the Corporation would give justification to the Corporation's position.

[89] In either result, the Tribunal would have had the benefit of building its expertise in handling disputes between corporations and proprietors.

Prejudice – the Corporation versus Mr Campbell

[90] It is true that the Corporation would be somewhat prejudiced by the refusal of the Tribunal's present application. The Corporation would be unable to enforce collection of the arrears until the Tribunal's appeal has been heard and determined by this court. This is because section 5A(4) of the Act prevents the Corporation from exercising its powers of sale while an appeal to the Tribunal is pending. The section states:

> "Where a proprietor appeals against the amounts of contribution, the corporation shall not exercise its powers under subsection (2) (d) until the appeal is determined."

Subsection 2(d) permits the Corporation to sell a strata unit "by public auction or by private treaty". The Corporation will, however, not be irreparably prejudiced, as it would still have its rights against the units. It is noted that one of the points being taken by Mr Campbell is that some of the funds claimed by the Corporation against the units are statute barred. In light of that stance, the Corporation will no doubt be concerned about any further delay in pursuing collection of the maintenance fees, but it is not without methods to minimise the effects of that challenge.

[91] On the other hand, if the Tribunal heard and decided Mr Campbell's appeal before this court heard and decided the Tribunal's appeal, the Corporation would be entitled to enforce collection if the Tribunal ruled in its favour in Mr Campbell's appeal. The absence of a stay would then suit the Corporation.

[92] The position would, however, be very different if the stay is granted. A grant of stay may be interpreted to mean that, technically, there is no appeal to the Tribunal in place. In the absence of a specific order that the Corporation would not be entitled to sell during the time that a stay was in place, the Corporation would be entitled to proceed with the sale of the strata units in which Mr Campbell is interested. The sum said to be now due is in excess of $5,000,000.00 (Mr Campbell has already paid a sum in excess of $5,000,000.00 in order to pursue his appeal). The Corporation has already secured a certificate from the Commission, permitting the sale of the units. Should the sale proceed, and this court later finds that there was no time limit and that Mr Campbell's appeal ought to have been considered by the Tribunal, the prejudice to Mr Campbell would be enormous and irreparable, especially if he were to be also successful in his appeal to the Tribunal.

[93] A less substantial point is that a grant of a stay would also be prejudicial to Mr Campbell from the point of view that his payment to secure the appeal is tied-up pending the hearing of the appeal. A later ruling in his favour by this court and then by the Tribunal would be to his disadvantage as there is no indication that he would be entitled to interest on that payment. This is, admittedly, not a strong basis to support prejudice to his interests.

Summary and conclusion

[94] An examination of the circumstances of this case supports a refusal of the application for a stay. A consideration of the balance of inconvenience to the respective parties shows that in the event that this court rules in Mr Campbell's favour on the Tribunal's appeal, the risk exists of greater irreparable loss to him if the stay were granted. This is because the Corporation could, in the interim, sell the properties. Conversely, the Tribunal, would not suffer irreparable loss in the case of a ruling in its favour, if the stay were not granted. It is the Tribunal's duty to hear appeals, and in any event, the costs of the appeal are recoverable from the unsuccessful party. It is better for the orders of Laing J to be obeyed, and later found to have been wrongly made, than for them to be stayed and found, on appeal, to have been correctly ordered.

[95] There is no basis for stating that Sinclair-Haynes JA (Ag) "was wrong in law or in principle or had misconceived the facts".

[96] It is on those bases that I agreed that the application be refused.

F WILLIAMS JA (AG)

[97] I have read in draft the judgment of Phillips JA and Brooks JA. Inasmuch as they agree in respect of all the material considerations necessary to determine this application, I too concur, as it could not correctly be said (as the applicant alleged) that Sinclair-Haynes JA (then acting) "was wrong in law or in principle or had misconceived the facts".